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May the Fourth Be With You: Tips to Make Sure You Get Paid



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Payment Terms

Make sure they are clear, and you agree with them.

Fixed Price Contract

Use allowances for
unknown items-
mechanical openings,
stiffeners, doublers



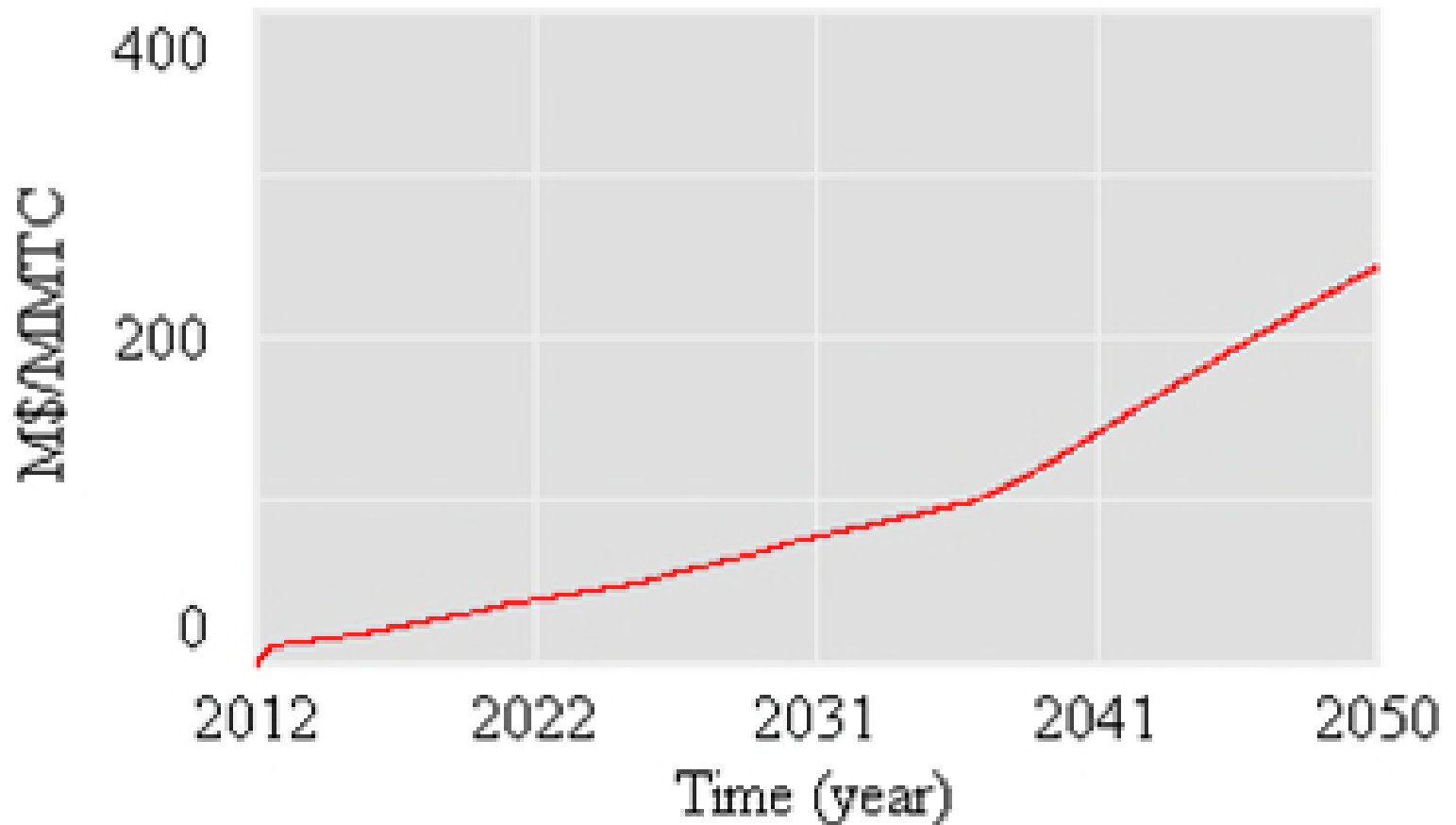
Unit Price Contract – Reduced Risk

1. What are unit prices based on?
2. Bolts?
3. Connection tonnage?
4. Don't hold the price for the duration of the job in case of Complexity Changes



Escalation

Market Price



Market Price : Smooth



ESCALATION

Look for the following language:

“Unit prices are based upon the current price of steel as of the date of this Proposal. **Any price increase** of steel exceeding 10% between the date of this Proposal and Substantial Completion shall cause the Contract Price to be **equitably adjusted to cover any increase.**”

Don't have this? **NO ESCALATION**

ACTUAL COST

Termination

- Base Compensation on % Complete
– NOT “actual costs”
- Have detailing line item in SOV

Change Orders

Change Orders – Notice

- To recover, make sure you understand notice!
- Time (5 days?)
 - How given - certified mail return receipt?
 - To whom?
 - What must be included?
- Who can authorize a CO?



How much will the change cost?

- Lump Sum Price
- Unit Price
- IF NO AGREEMENT? –
 - *T&M or TBD. . .*

Change Order Pricing

Pricing without an agreement (A201 Article 7.3.6)

- Contractor must keep and present itemized accounting of all costs.
- **Labor costs**
- **Material costs** (including transportation)
- **Rental costs** (exclusive of hand tools)
- Bond and insurance premiums
- Sales or use taxes
- Additional supervision and field costs directly attributable to the change

Make sure you understand the difference between:

- T&M pricing
vs.
- Actual cost
vs.
- Estimated costs



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TIME

When are you going to
get paid?



Progress Payments

Paid within x days of payment from Owner?

Based on delivery?
Or purchase of materials?



Remember to check the prime contract.

Pay-If-Paid

- » To the fullest extent allowable by law, receipt of payment by the Contractor from the Owner **shall be a condition precedent for payment** to the Steel Fabricator.
 - You bear the risk of nonpayment from Owner.
- Enforceable? Depends on the state / public policy.
- Pay-When-Paid
- KEY – Keep Your **LIEN AND BOND RIGHTS**

Payment Considerations – COVID-19

- The Coronavirus (COVID-19) has resulted in a declaration of a state of emergency and closures in various cities, particularly related to large gatherings of people. Construction projects are being impacted, or have been impacted, either by shutdowns, worker illnesses, or employees who are unable to report due to other impacts such as a sick family member or school closure.
- Submit Payment Applications immediately to help ensure cash flow in the event projects are shutdown.



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Lien Waivers

Don't sign away your rights!

“I will pay you if you sign this Lien Waiver”



2 Types of Waivers of Lien Rights

1. Advanced Waiver in Subcontract

1. Subcontractor shall not file any lien . .
2. Is it enforceable?
3. Modify it – waive to extent paid...
4. Ask for Bond – will not waive right to make claim against bond

2. Lien Waivers for Progress Payments

1. Waive ALL CLAIMS (including pending CO claims) through date
2. Use same waiver with your sub

Lien Release

“In consideration of \$____, which represents the full, complete, and final payment for the Work, Subcontractor releases the GC and Owner from...”

- All claims, demand and causes of action; and
- All liens

(Insert Name and Location of Job)

NOW, THEREFORE, in consideration of \$ _____ * which represents the full, complete and final payment for the Work, the Subcontractor/Supplier does hereby:

1. Release, remise, relinquish and forever discharge _____ and the Owner of the Premises of their successors or assigns, from any and all claims, demands and causes of action which the Subcontractor/Supplier has, might have or could have against _____ or Owner by reason of, or arising out of, the Work.
2. Waive and release any and all liens or right to lien against the Premises on account of labor and/or materials furnished by the Subcontractor/Supplier, which the Subcontractor/Supplier has under the law and statutes relating to Mechanic's Liens of the State in which the Premises are located.

_____ and the Owner of the Premises on account of any liens, demands, as

SUBCONTRACTOR/SUPPLIER
CONDITIONAL WAIVER OF LIEN AND CERTIFICATION OF PAYMENT
FOR LABOR, MATERIALS, EQUIPMENT AND SUBCONTRACTORS

NOW THEREFORE, conditioned upon actual receipt of One Hundred Eighteen Six Hundred Ninety Five Dollars and Fifty Cents (\$118,695.50) (“Payment”) the undersigned shall provide the FINAL RELEASE AND WAIVER OF LIEN (“Release”) for the amount of the Payment actually received. The Release shall be in the form of the attached **Exhibit 1** and shall be provided within five (5) business days from the day the Payment check clears.



conditioned upon actual receipt of 0



1. Unpaid contract amount
2. Retainage
3. Unpaid change orders

A401 – Lien Right Info

- § 3.2.5 The Contractor shall furnish to the Subcontractor . . . information necessary . . . to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.
- Make sure you have the right to get this information...
 - And make sure you exercise it when needed!

What does Acceptance of Payment Mean?

Waiver of \$\$\$



Retainage

- How Much? Will the law allow that much?
 - Dictated by State Law?
 - No more withholding after 50 % completion?
- How Long?
 - Your Work v. Project Completion?
 - Retainage shall be paid in full within thirty (30) days after final completion of Subcontractor's Work

RIGHT TO STOP WORK



Right to Stop Work

- Pending final resolution of a Claim, **Subcontractor shall proceed diligently with performance** of the Contract.

Right to Stop Work

- Expressly include the right to stop
- If payment not received as stated in contract, Fabricator shall stop work until such payment is received and bear no obligation to Contractor for the consequences of such work stoppage.
- If you don't have this – be careful!!



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**Do Not Proceed With Change Order
Work Until Paid**

Construction Change Directive

§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, **directing a change in the Work prior to agreement on adjustment**, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, **order changes in the Work within the general scope of the Contract consisting of additions, deletions, or other revisions**, the Contract Sum and Contract Time being adjusted accordingly.

Exceptions to Duty to Proceed

1. Contractor cannot proceed with work until owner responds to a requested clarification.
2. Specifications are so defective that the purpose of the contract will fail if the contractor proceeds.
3. Owner is in material breach of the contract.
4. The change is of such magnitude that it constitutes an entirely different undertaking: A “Cardinal Change.”

Solution

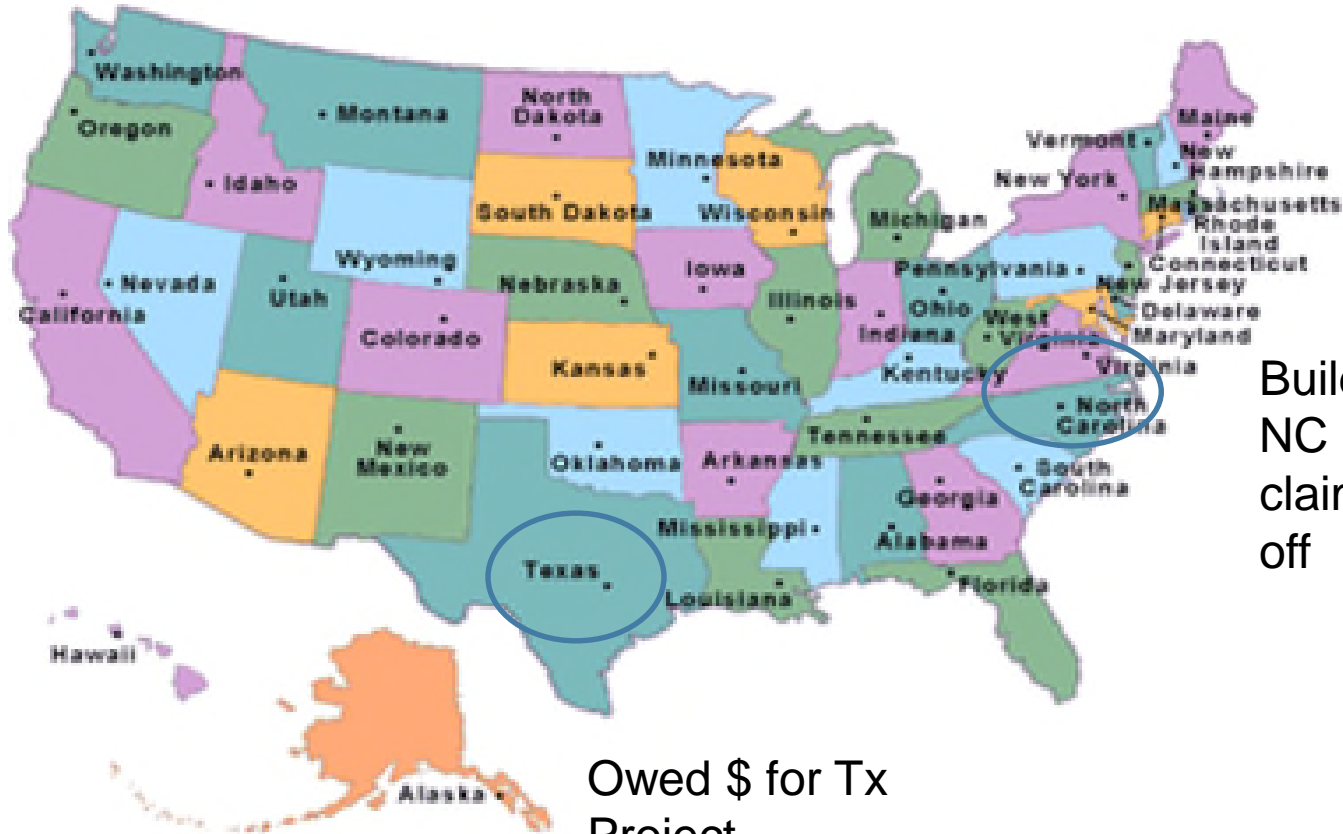
Provided Contractor has:

1. paid all amounts owed under the original scope of Work in accordance with the Contract,
2. paid for all Contractor-caused changes, and
3. for Owner-caused changes Contractor has diligently submitted and requested timely payment of all applicable Change Order Requests,

Subcontractor shall proceed diligently with performance of the original Work and changed work which has been directed prior to agreement, and Contractor shall continue to make payments in accordance with the Contract Documents.

Set-off

Right to set-off varies by state law...



Building Leaks on
NC Project – GC
claimed right to set-
off

Owed \$ for Tx
Project

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TERMINATION

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Termination for Convenience

Contractor Terminates –
what will you be paid?

Work completed?
Lost profits?
Lost shop time?



Termination for Cause Basis? What will you be paid?





**Read and Object to Terms
BEFORE YOU BID**

Before you start work

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Determine if Project is:

- Public - State or Federal?
- Private
- Quasi-Public

Do you have a Payment Bond?

- Get a copy before you start work!!!



Payment Bond Claims Private Projects

- Before you start work
- Get a copy
- Deadlines can be different
 - Typical Notice - **30-90 days**
 - Suit – 1 year of date provided notice or last day of work



Payment Bond Claims – Public Projects

- Bonds required for most state public projects over certain thresholds
- Check state statute for timing



Federal Miller Act Payment Bond Claims

- Application - contract > \$100,000
 - public building of the United States.
- Covered parties:
 - The general contractor
 - 1st tier
 - 2nd tier

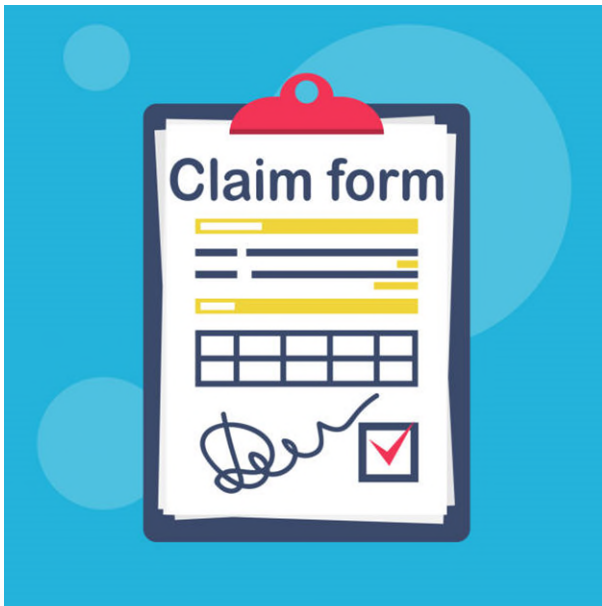


Federal Miller Act Payment Bond Claims

- **Notice of Claim on Bond**
 - **90-days LDOW**
- Notice must state:
 - \$\$\$
 - Name of party Claimant contracted with
- Send to general contractor by Registered Mail

Federal Miller Act Payment Bond Claims

- **Enforcement of Claim Against Bond**
 - File suit within **1 year** of the last date labor or materials were supplied.
 - 40 U.S.C. §3133(b)(4).



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PROMPT PAYMENT ACTS

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FEDERAL PROMPT PAYMENT ACT (31USC § 3902)

FINANCIAL MANAGEMENT SERVICE
A Bureau of the United States Department of the Treasury
fms.treas.gov

- Interest on unpaid amounts
- Rates change
- Use the calculator
 - <http://www.fms.treas.gov/prompt/ppinterest.html>

Always Check Your State's Prompt Payment Statutes

- What are the differences between public vs. private projects?
- What is the deadline for Owner to pay GC?
 - Deadline for GC to pay sub?
 - Sub to pay sub?
 - If silent, what would deadline be?



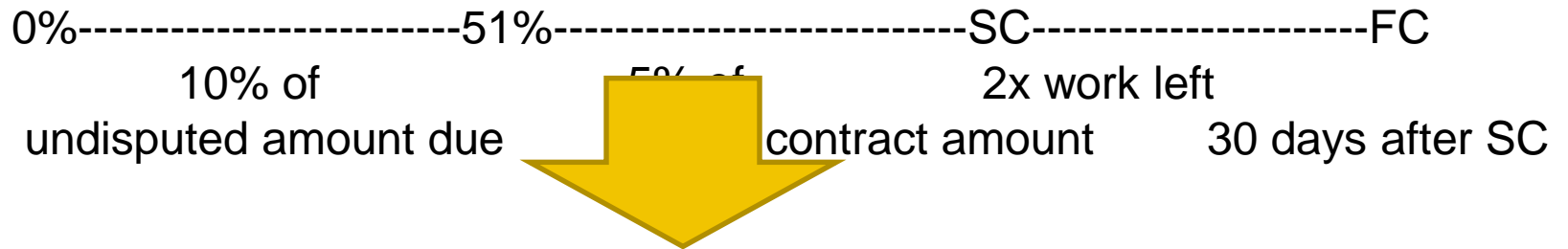
Always Check Your State's Prompt Payment Statutes

- What happens if you fail to comply?
 - Does statute speak to attorneys' fees?
 - Does statute speak to retainage?
 - Interest? Notice issues?
- Know and understand these statutes and deadlines
- Failure to understand can cost you money!



Owner's Release of Retainage

- What does your Prompt Payment Statute require re: retainage?



GC release to Sub w/in 15 business days

- *Not for materials provided by owner*

Failure to Release Retainage

~~INTEREST~~

- 12% per year
- Send Notice.



Mechanic's Liens “Walking the Tightrope”



- Public v. Private
- Commercial v. Residential
- Sub v. direct Contract

Private Projects

- Notice of Commencement (if filed by the Owner)
 - File a Notice of Furnishing w/in 21 days of starting work
 - » To Owner
 - » To GC (optional if direct contract, but its recommended)
- Lien
 - Residential - w/in 60 days LDOW
 - Commercial – w/in 75 days LDOW

Public Projects

- File Notice of Furnishing
- Public Improvement Lien
 - File w/in 120 days of LDOW
- Owner must serve affidavit on Prime w/in 5 days
 - Not disputed w/in 20 days = correct and amount retained by Owner paid on pro-rata basis

Statement of Lien

Know the rules of your State!

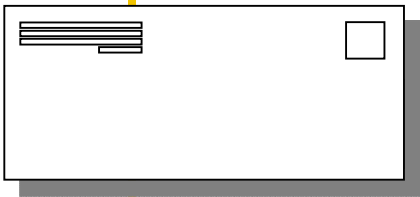
- File w/ County Clerk
- Later of
 - 60 days
 - or the date of S.C.
- Time not extended by trivial or warranty work
 - Consider possible time extensions for change order work?



Perfecting the Lien

Perfecting public liens

- Attested by County Clerk
- Send letter and Lien by certified mail
 - to owner
 - and person contracted with (if not the owner)



Understanding Lien Protests

- GC has 30 days to file protest
- Owner to hold funds
- If no protest –owner pays
- If protest – file suit & serve owner w/in 30 days



Suit to Enforce Lien



- What does statute say?
- Where is suit filed?
 - In Circuit Court in County where project is located
- Parties, typically:
 - Party with whom you contracted
 - Any party who has an interest in the property
- Causes of Action, typically
 - Breach of contract
 - Enforcement of lien – must be carefully drafted

IMPORTANT: Do Not Over State Your Claims

Lien laws are extremely particular:

- Know them...
- Understand them...
- Follow them...

Don't get caught...

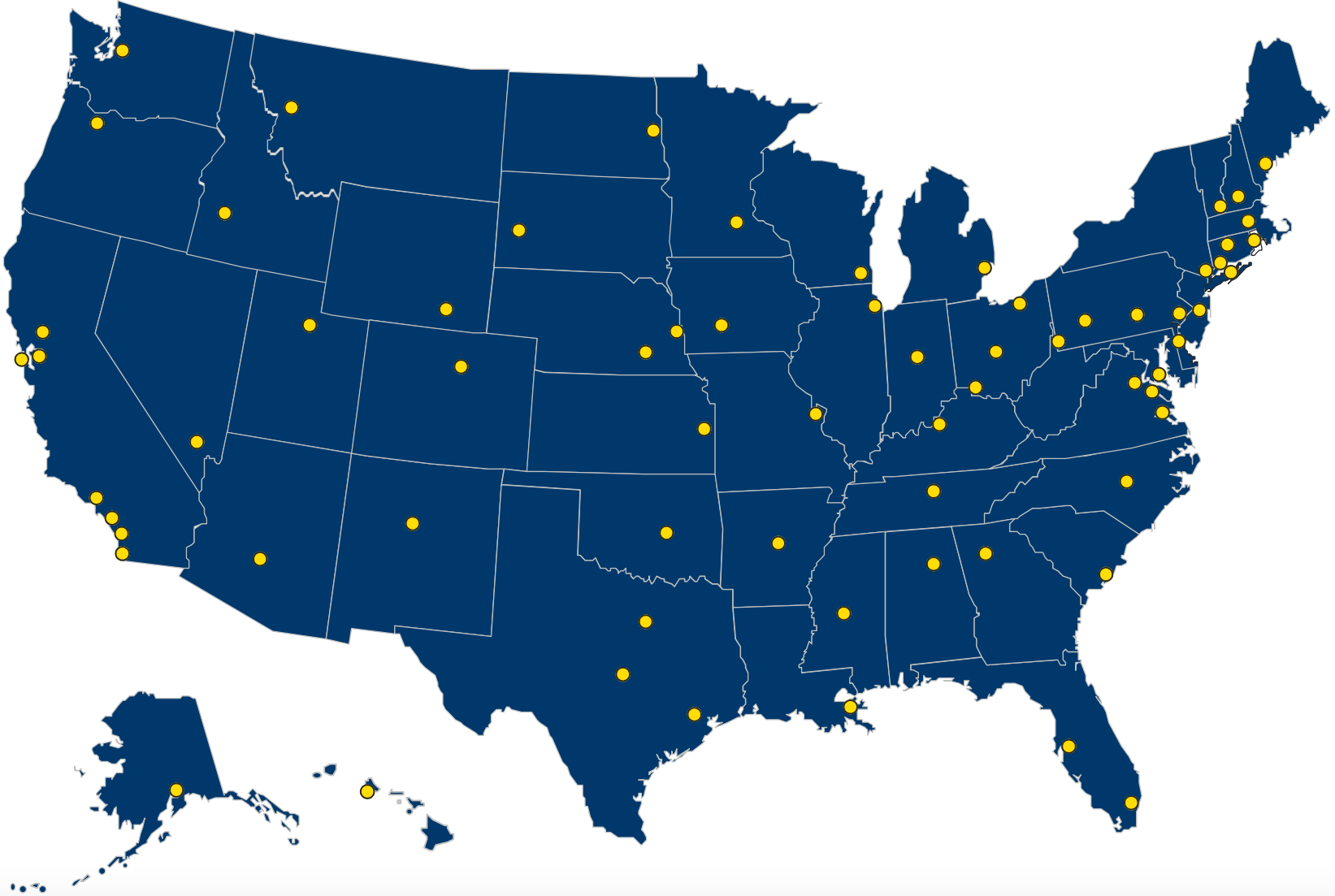




Questions?

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