

## BEST PRACTICES

# Lien Rights

## remedies for potential issues on the project

By Aman Kahlon

Lien rights are one of the primary tools for the construction industry to secure payment claims. However, lien rights and remedies vary between states, and these distinctions are often difficult for owners, contractors, and subcontractors to navigate. Because many states apply lien laws strictly—meaning technical non-compliance can result in forfeiture of lien rights or defenses—it is important to be informed regarding lien requirements and comprehend potential issues that may arise if lien rights are asserted on your project. Let's walk through a few of those potential issues here.

### PRE-CONSTRUCTION LIEN NOTICES

Several states have enacted laws that require parties to file notices prior to the start of construction. For example, some states require or permit an owner to file a notice of commencement in the county records where the construction project is located. The notice of commencement typically highlights the name and contact information for parties like the owner, contractor, surety (if applicable), and lender, as well as providing information regarding the property and project address. In most states, an owner or contractor is required to disseminate the notice of commencement to subcontractors either via mailing to subcontractors or posting at the jobsite.

Once a notice of commencement is filed, it generally triggers an obligation for subcontractors and other entities on the project to file or send out a separate notice identifying information like the subcontractor's contact information, the services to be performed by the

subcontractor, the price of such services, etc. These notices typically must be sent out shortly after the notice of commencement is recorded or shortly after construction commences. A subcontractor who fails to send such a notice may forfeit its lien rights on the project. Conversely, an owner who fails to properly record a notice of commencement may forfeit the defenses afforded under the notice of commencement statute against any potential lienors.

Other states require a preliminary notice of the right to lien to be sent out by contractors, subcontractors, and suppliers irrespective of any corresponding notice of commencement filed by the owner. In these states, the preliminary notice must typically be sent prior to receiving any payment on a project or within a set time after the start of providing labor or materials on a project. Failure to satisfy an applicable preliminary notice can bar a subcontractor or supplier from later perfecting an otherwise valid lien on a project.

### STATUTORY REQUIREMENTS

Many states require precise compliance with lien filing requirements. Statutory provisions may outline specific forms to be used in lien notices and filings. Other statutes may require certain language to appear in lien notices or waiver forms in order for them to be effective. Because substantial compliance may not be sufficient to perfect your lien rights or enforce lien defenses, it is critical that you and your project team understand a particular state's lien notice and filing



requirements prior to beginning work on a project.

### TIMING REQUIREMENTS

Preliminary notices, notices of right to lien, and lien filings themselves often must be filed within a specific time period as defined by statute. It is important to keep track of those deadlines; otherwise, you may lose out on your right to file a lien. In the same vein, an upstream contractor or owner may benefit from being informed about the timing requirements for a lien filing and be able to defeat otherwise valid liens and enforcement actions by noting deficiencies in the timing of required filings.

In order to monitor these timing requirements, contractors and subcontractors need to be aware of when their lien rights accrue in a particular state. Typically, lien rights accrue upon the date work was last performed on a project. But, that date is not always certain. For example, does warranty work a subcontractor returned to site to perform extend the time that subcontractor has for filing a lien?

If you have a valid lien, you need to be conservative in calculating your time for filing, so you do not run afoul of a deadline that may extinguish your lien rights. This can be a difficult task when negotiating final payment requirements or a payment dispute with an owner or contractor, especially a party with which you have an existing relationship. These negotiations may drag on, and, because lien filings of any kind can be a pain for an upstream party to deal with, it may

make you hesitant to assert lien rights to avoid upsetting your commercial relationship. But, by hesitating, you may inadvertently waive your lien rights, so proceed cautiously.

**LIEN WAIVERS**

Lien waiver forms and requirements are usually fiercely negotiated in construction contracts and subcontracts. As a party signing a waiver, you need to be aware of the rights you are waiving upon execution of a partial or final waiver. Consider whether the form asks for waiver of all claims, including lien claims, or just lien claims. That distinction may materially affect your ability to sue for relief irrespective of whether you have valid lien rights.

Consider also whether you have appropriately reserved your rights on a disputed payment or extra work claim prior to signing any lien waiver or release. You may inadvertently waive your right to seek relief if you sign a

comprehensive waiver, even where the owner is aware of the extra work claim prior to execution of the waiver.

As an owner or contractor enforcing a waiver provision, consider whether you have included all required statutory language in the lien waiver form. Some states require specific language to be included in all lien waiver forms to help make downstream parties aware of the rights they are potentially waiving. An upstream party also needs to consider whether the lien form is enforceable as written. Some states will not enforce an unconditional waiver sent prior to receipt of payment.

**CLOSING THOUGHT**

The topics above outline some of the standard lien issues that arise in construction law. But, there are a host of other issues that may arise. It is important to spend time understanding the lien law in the state where you are performing work. You may consider

consulting with a local construction attorney to highlight for you any particular requirements of a state before you enter into a contract, and, similarly, if you anticipate encountering a lien issue once construction begins or as you approach substantial completion, reaching out to an attorney to discuss filing requirements may prove invaluable. ■

**about the author**

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