

Measures to Minimize Subcontractors from Filing a Lien

A Legal Primer

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Published On: Friday, January 13, 2017 8:47 AM



A lien is essentially a claim for repayment of a debt. In the construction context, a lien is of considerable importance because it offers considerable power to a subcontractor to seek payment from an owner through the property itself for a debt owed to the subcontractor by a general contractor or other third party.

Many state laws provide property owners and general contractors with several ways to reduce and even eliminate the risk of a subcontractor or materials provider filing a claim of lien. Perhaps the most common are lien waivers, which are private agreements in which a subcontractor surrenders the right to lien property in exchange for payment. State laws govern the use of lien waivers and other protections, but the following provides an overview of the basic process.

While there a variety of types of lien waivers, such as interim and final versions, any agreement where a subcontractor waives lien rights upfront prior to providing labor or materials is illegal and unenforceable. The prohibition of these “pre-work” lien waivers is

based upon the public policy concern that the leverage enjoyed by general contractors in selecting subcontractors would result in large-scale lien waivers and a deterioration in the general treatment of subcontractors.

Another popular lien protection mechanism is when a contractor executes an affidavit swearing that a subcontractor was paid a reasonable value or an agreed upon price for the work performed or materials furnished. This arrangement is often referred to as a “contractor’s affidavit.” In the event that a subcontractor files a lien, an owner can defeat any attempted enforcement by obtaining and filing a contractor’s affidavit, unless the subcontractor properly noticed his or her preliminary lien rights. Contractor’s affidavits are often executed upon a subcontractor’s acceptance of final payment.

A third measure that may provide contractors with considerable lien protection is a Notice of Commencement, which is essentially a public announcement of basic information regarding the general contractor, the property owner, the lender, the surety and the property where the project is located. A form containing this information is filed with the clerk of superior court where the project is located, posted at the project site and provided to any requesting subcontractor.

Once these steps are complete, some state laws, including those in Georgia, impose an additional time-sensitive requirement on any subcontractor who lacks contractual privity with the general contractor and seeks to file a claim of lien. This is known as a “Notice to Contractor.”

This provision of basic information from a subcontractor to a property owner and general contractor must include the contact information of the subcontractor and whoever the subcontractor is providing materials for, the name of the project and a description and estimated price of the work or materials provided. The Notice to Contractor must be sent certified mail to the property owner *and* the contractor at the addresses set forth in the Notice of Commencement within 30 days after the filing of the Notice of Commencement or the first delivery of labor or materials by the subcontractor, whichever is later.

Where a valid Notice of Commencement exists, a subcontractor lacking privity of contract with the general contractor is prohibited from filing a lien unless he or she complied with the Notice to Contractor requirements. Georgia courts, for example, regularly cancel lien claims by subcontractors who failed to comply with the Notice to Contractor requirements. Therefore, a Notice of Commencement is an offensive tool to combat potential liens, and general contractors can enjoy an additional layer of protection by simply taking a few minutes to create a sufficient Notice of Commencement form, drive to the courthouse and pay a reasonable filing fee.

Considering these minimal expenses against the potentially staggering costs of lien litigation, property owners and general contractors should implement a Notice of Commencement on every construction project regardless of size.

WHAT SUBCONTRACTORS NEED TO KNOW TO PROTECT THEIR LIEN RIGHTS

Most states, including Florida, Georgia and New York, demand that subcontractors strictly comply with all lien-related requirements. Adding to this harsh approach, the Georgia Supreme Court decided in a recent case that a subcontractor seeking to enforce a lien “has but one bite at the apple,” meaning that there are no “do-overs” – if any deadline is missed or other requirement unfulfilled, the right to claim a lien is lost forever.

In recognition of this grave consequence, the Georgia Legislature provides subcontractors with the ability to file a “preliminary notice of lien.” This must contain the contact information of:

- the subcontractor;
- the contractor at whose instance the subcontractor is providing labor or materials;
- the owner of the property; and
- a general description of the labor or materials provided.

Once drafted, the preliminary notice is filed with clerk of the superior court in the county where the project is located within 30 days of first providing labor or materials, and sent certified mail to the owner or general contractor within seven days of filing. Once these steps are complete, the property owner is presumed to have preliminary notice of the subcontractor’s lien rights.

The effect of this preliminary notice is to protect a subcontractor against contractor’s affidavits. While a contractor’s affidavit will usually dissolve any claim of lien at the time payment is made to a subcontractor, this is not the case if a preliminary notice was filed and mailed. Considering the minimal effort and cost involved, all subcontractors should consider filing a preliminary notice of lien rights in their normal course of business.

Subcontractors should also be aware of these rules for the states in which they operate. A subcontractor should always make a written request to the general contractor for any applicable Notice of Commencement, which must be provided in return. Where a Notice of Commencement exists, the subcontractor must provide the corresponding Notice to Contractor. A subcontractor who fails to provide a Notice to Contractor in the face of a Notice of Commencement within the requisite time period will forever lose their right to claim a lien.

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