

Five questions to ask about liens

With the number of payment disputes perhaps going up, owners should be prepared

Amid all the fallout from the current financial crisis, an increase in payment disputes during construction projects is to be expected. An uptick in lien claims will likely result from these disputes. Owners must of course be careful to avoid lien claims, which may cause a breach in a lease or loan agreement, or require the owner to pay twice for the same work. For self-protection, here are five questions an owner should ask.



**CONSTRUCTIVE
ADVICE**

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Have the contractor and its subs signed lien waivers?

The best way to protect against a lien is to prevent one from starting. An owner may pay the contractor's invoices, but what's to prevent the contractor or its subs from claiming more in the future, and how does the owner know that the contractor and its subs are not in the middle of a fee dispute? Owners should require contractors to submit, with each payment, forms from the contractor and each of its subs that: 1, certify the contractor and its subs have been paid; and 2, waive all lien claims against the property. It's a pain in the neck to collect and track these forms, but doing so will head off looming payment disputes.

Can the owner post a notice of nonresponsibility?

Owners commonly lease their commercial properties to other businesses. But an owner's interest in the property isn't necessarily subject to lien claims that arise from its tenant's construction projects. As a general rule, improvements that the owner knows are being constructed are deemed to be made on the owner's behalf, and so the owner's interest in the property will be subject to liens. But an owner can avoid this general rule. Within three days of knowing of construction, an owner can post a notice in a conspicuous place on the property stating that it won't be responsible for the construction. Posting the notice in many places – and taking date-stamped photos of these postings – will help prevent the argument that the notice wasn't conspicuous.

Has the owner filed a notice of completion?

Lien claimants must follow strict deadlines. For example, a claim of lien filed for nonpayment for labor must be recorded within 75 days after the last day of performance or within 75 days after the construction is complete, whichever is earlier. Frequently, though, it isn't clear when the work is complete. To avoid this, the owner should post and record a notice of completion, following

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the requirements of the Oregon lien statute. This will start the clock on a claim filing deadline.

What about notices of right to a lien?

During construction, an owner may receive in the mail a "notice of right to a lien" from an unfamiliar company claiming to have lien rights on the owner's project. To have lien rights on commercial projects, material suppliers (and arguably some design professionals) must provide this notice. Owners should require in their construction contracts that the contractor indemnify them against lien claims. But if an owner fails to forward a notice of right to a lien to its contractor within 10 days of receipt, and the notice was sent by a company that doesn't have a contract with the contractor, the Oregon lien statute lets the contractor off the hook from its lien indemnity duty. To prevent this, an owner should make sure the construction contract states that the owner isn't obliged to forward these notices to the contractor. That way, forgetting to send one won't hurt the owner's rights.

Has the claim been filed properly?

Lien statutes are stuffed with technical requirements, and an unwary lien claimant may make a mistake that reduces or kills its lien rights. The 75-day deadline noted earlier is one example. In another, a claimant must notify the owner and the lender within 20 days of filing a lien claim, and failure to send this notice prevents the claimant from recovering attorneys' fees in a lien foreclosure suit. There are many other requirements that, if not met, put a claimant's lien in jeopardy. To protect itself, then, an owner should review a lien claim carefully to make sure everything is square.

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