

## Be proactive to avoid lien claims

Owners can protect their property by including these steps in project development

In these difficult and uncertain economic times, it is more important than ever for real estate developers and property owners to take steps to protect against construction lien claims on their property. The following are tried-and-true actions that developers and owners can take to guard against such lien claims under Oregon law.



### CONSTRUCTIVE ADVICE

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**To diminish the likelihood of lien claims filed by subcontractors and suppliers of the prime contractor, a project owner should consider requiring the prime contractor to furnish a payment bond.**

- **Select competent, well-run and financially stable design and construction firms**

Since construction liens are merely statutorily authorized encumbrances of real property to secure payment for claims, the best way to avoid liens is to avoid claims to begin with. One way to do so is to contract with experienced design and construction firms that are well-managed and are in good financial condition, because such firms are less likely to generate claims on their projects.

- **Properly handle pre-lien notices**

Some lien claimants on commercial projects do not have lien rights unless they send a Notice of Right to a Lien to the project owner. As such, project owners should date-stamp and retain these notices they receive throughout the course of their projects. Also, unless the obligation is waived by contract, an owner on a commercial project by law must send to the project prime contractor a copy of each Notice of Right to a Lien that the owner receives. Failure of an owner to send such copies results in the contractor being relieved of its obligation to indemnify the owner against subcontractor and supplier lien claims.

- **Pay subcontractors, suppliers and consultants with joint checks**

If the prime designer and prime contractor agree, or if the right is included in the owner's contracts with its prime designer and prime contractor, the owner should consider paying for costs incurred by subcontractors, suppliers and consultants with joint or multiple-payee checks.

- **Require submission of waivers and releases of liens with applications for payment**

A developer or project owner should be sure to include in its contracts the obligation of the prime designer and prime contractor to include forms of lien waivers and releases with each application for payment, signed by all subcontractors, suppliers and consultants that will receive payments from the monies being sought.

- **Require lien claims to be removed from the property, and reserve the right to do so at the other party's expense if necessary**

Owners should include in their contracts with their prime designers and prime contractors the obligation, upon demand of the owner, to remove from the property a claim of lien filed by that

party's subcontractor, supplier or consultant – whether through payment or settlement of the claim or by filing and perfecting a lien release bond or deposit pursuant to state statutes. Such contracts should also include the contractual right of the owner to take these steps itself, at the expense of the prime designer or prime contractor, if that party fails to remove a lien upon the owner's demand.

- **Consider a payment bond as another form of security for payment**

To diminish the likelihood of lien claims filed by subcontractors and suppliers of the prime contractor, a project owner should consider requiring the prime contractor to furnish a payment bond. Such bonds provide another means of securing payment to unpaid subcontractors and suppliers of the prime contractor, thus obviating the need for those parties to seek payment by means of the construction lien remedy. Payment bonds are obtained in conjunction with performance bonds. The cost of such bonds depends on the prime contractor's bond rating, but typically is from 0.5 percent to 3.0 percent of the prime contract price.

- **Post a Notice of Nonresponsibility for any landlord dealing with tenants constructing tenant improvements**

Under Oregon's construction lien statutes, a landlord in certain circumstances can shield itself from lien claims filed by parties performing work for a tenant. To do so, the landlord, within three days after learning of the construction, must post on the property a Notice of Nonresponsibility stating that the landlord will not be responsible for payment of claims by unpaid parties performing the work for the tenant. The posting of the Notice of Nonresponsibility will not be legally successful, however, when the lease requires the tenant to construct the tenant improvements, when the improvements will have economic value at the end of the term of the lease and when the improvements will become the property of the landlord at the end of the tenancy.

With payment claims on construction projects increasing dramatically, savvy project developers and property owners should take these steps to avoid or at least minimize exposure to construction lien claims on their projects.