

Navigating the Lien Process

Webinar

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Today's Speakers

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Goals for Today's Session

➤ Open Discussion

- Questions welcome!

➤ Highlight the Process

➤ Key Takeaways and Strategies for each Stakeholder

- Owners
- General Contractors
- Subcontractors

➤ Common Issues, Scenarios and Solutions

➤ Q&A

What is a “lien”?

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- **Secured right to payment for work performed on a construction project**
- Liens are statutory rights (**RCW 60.04 et seq.**)
 - As a matter of public policy, the vast majority of state legislatures have determined that individuals that provide work to improve real property should have extra protection against non-payment in the form of a lien
 - **BUT** there are a bunch of procedural hoops to jump through to timely and properly assert and preserve lien rights
 - More on this later...in a nutshell there are lots of ways to challenge the validity of a lien
- Right to payment is secured by the underlying real property that the work was performed on
 - Sometimes the lien only attaches to the improvements to the real property (e.g. tenant improvement work unless explicitly directed by the property owner)
 - Also, a “release of lien bond” can be substituted in as security (more on that later)

Who has lien rights?

- Most parties performing work on construction projects have lien rights
- Statutory parameters for who has lien rights is broad:
 - “Except as provided in [RCW 60.04.031](#), any person furnishing labor, professional services, materials, or equipment **for the improvement of real property** shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.” [RCW 60.04.021](#)
- The touchstone is whether the work is “for the improvement of real property”



What constitutes “improvement” of real property?

› RCW 60.04.011(5):

- “Improvement” means: (a) Constructing, altering repairing, remodeling, demolishing, clearing, grading or filling in, of, to or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, lawns, or providing other landscaping materials on any real property; and (c) providing professional services upon real property or in preparation for or in conjunction with the intended activities in (a) or (b) of this subsection.
- › Again, the lien statute casts a pretty wide net in terms of who has lien rights
 - **BUT** the lien statute (and related case law) also sets up a series of procedural hoops that a lien claimant must strictly comply with in order to properly assert and preserve lien rights

Lien Prerequisites?

- Must be a “registered contractor” with L&I per **RCW 18.27**. No registration = no lien rights
- Notice to Customer form must be provided and signed before work begins on certain projects (**RCW 18.27.114**)
 - Must be provided by GC on projects with 4 or fewer residential units or accessory structures; or commercial projects between \$1,000 and \$60,000
 - Failure to provide results in loss of lien, citations and fines from L&I, violation of Contractor’s Registration Act, and CPA exposure.
- Must have “authority” to perform work from Owner, Owner’s common law agent or a “construction agent”

Lien Prerequisites?

- ▶ Must have “authority” to perform work from Owner, Owner’s common law agent or a “construction agent”
- ▶ **“Construction Agent”** is defined as follows:
 - “Any registered or licensed contractor, registered or licensed subcontractor, architect, engineer, or other person having charge of any improvement to real property, who shall be deemed the agent of the owner for the limited purpose of establishing the lien created by this chapter.” **RCW 60.04.011(1)**



Pre-Lien Notice Requirements?

- Pre-lien notice is required for certain contracting tiers performing work on certain types of projects. In other words, whether pre-lien notice is required to preserve lien rights will depend on the party's contracting tier and the type of project

Note: General Contractors are not required to provide pre-lien notice (just the Notice to Customer form in limited circumstances as discussed earlier)

- First Tier Subcontractors are generally not required to provide pre-lien notice
 - **BUT** of course, there are some exceptions!

Pre-Lien Notice Requirements?

- Pre-Lien Notice to Owner (from Subcontractors/ Suppliers)
 - Specific statutory form that must be sent via certified mail
- Commercial Projects
 - Within **60 Days** of starting work
 - Not required for 1st tier subcontractors
 - Not required for anyone contracting directly with the Owner or the Owner's common law agent
- Single-family Residence
 - Within **10 days** of commencement
 - Required for all subcontractors and suppliers on owner-occupied single-family residence or garage who do not contract directly with Owner or Owner's common law agent

Requirements for “Perfecting” a Lien

“Claim of Lien” must contain the following information:

- Name of claimant
- Name of person indebted to claimant
- Name of owner
- Legal description of property
- Tax parcel number
- Date of work commencement
- Last date labor or materials provided
- Amount of lien
- Contractor registration number

Failure to strictly comply could result in loss of lien rights



Procedural Requirements for “Perfecting” a Lien

- ▶ “Claim of Lien” must be recorded no later than **90 calendar days from lien claimant’s “last day of work”**
 - Must record in compliance with the County Auditor’s office rules.
 - Failure to comply will result in loss of lien rights
- ▶ Must provide copy to owner via certified mail within 14 days or lose claim for attorneys’ fees under the lien statute
- ▶ “Last day of work”??
 - Must be performing contract work or changed work.
 - Punchlist or warranty work extends filing deadline if:
 - Work is done in good faith in completion of original contract.
 - Work is not done for sole purpose of extending lien rights.
 - Touchstone: must still be “improving” the property.

Lien Enforcement?

- ▶ **When**: Lien foreclosure lawsuit must be filed within **8 months of the date of recording the lien**.
 - Failure to timely file results in loss of lien rights
- ▶ **Where**: The **superior court in the county in which the property is located**.
- ▶ **Fees**: The prevailing party in a lien foreclosure lawsuit **may** be awarded its fees and costs (including the cost of a lien bond). **RCW 60.040.181(3)**. If the claimant's written contract provides for fees, it would also be entitled to fees in claims for breach of contract

Frivolous Liens?

- Upstream party has the statutory right to contest and throw out a lien as “frivolous” in an expedited court hearing
- **What is a “frivolous” lien?**
 - High standard of proof for party contesting the lien
 - Must show *as a matter of law* that the lien claimant failed to comply with statutory lien prerequisites, pre-lien notice requirements and/or statutory perfection deadlines
 - OR can show *as a matter of law* that lien amount is grossly inflated and that a reduction in the lien amount is warranted
 - For example, the amount of the lien is the full contract price when the lien claimant only performed 40% of the work before being terminated for convenience
- Right to recover attorney fees if contesting party prevails

Release of Lien Bonds

RCW 60.04.161 (excerpts below)

- Any owner of real property subject to a recorded claim of lien under this chapter, or contractor, subcontractor, lender, or lien claimant who disputes the correctness or validity of the claim of lien may record, either before or after the commencement of an action to enforce the lien, in the office of the county recorder or auditor in the county where the claim of lien was recorded, a bond issued by a surety company authorized to issue surety bonds in the state...
- The bond shall contain a description of the claim of lien and real property involved, and be in an amount equal to the greater of five thousand dollars or two times the amount of the lien claimed if it is ten thousand dollars or less, and in an amount equal to or greater than one and one-half times the amount of the lien if it is in excess of ten thousand dollars...
- The condition of the bond shall be to guarantee payment of any judgment upon the lien in favor of the lien claimant entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien.
- The effect of recording a bond shall be to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed. Unless otherwise prohibited by law, if no action is commenced to recover on a lien within the time specified in [RCW 60.04.141](#), the surety shall be discharged from liability under the bond. If an action is timely commenced, then on payment of any judgment entered in the action or on payment of the full amount of the bond to the holder of the judgment, whichever is less, the surety shall be discharged from liability under the bond.

Release of Lien Bonds

› Surety Underwriting Requirements

- Copy of the Lien / other correspondence
- Narrative on the Situation
- Financial Underwriting
 - Corporate and personal financials
 - Cash verification
- General Agreement of Indemnity
- Collateral
 - Can be required in the form of cash, letter of credit or real property.
- Premium Cost
 - 1-3% of bond amount (150% of the lien amount)



Owners: Key Takeaways and Strategies

- Get progress payment and final payment lien releases from ALL downstream parties
- Upon receipt of a lien, carefully analyze the substantive and procedural validity of the lien
 - With so many hoops to jump through, often there will be a mistake that undermines the validity of the lien.
 - Solicit information, analyze it, negotiate.
- Use the release of lien bond option to free up the underlying real property and allow construction to move forward without adverse effects from the lien
- Set yourself up for success with strong, key contract clauses: “free and clear of liens”; indemnity; retainage; right to back-charge, and conditional and unconditional lien releases.
- Consider involving L&I.



General Contractors: Key Takeaways and Strategies

- Set up internal procedures for every job to ensure compliance with lien deadlines to protect your right to payment.
 - Notice to Customer? Contemporaneous documentation of last day of work?
 - Daily reports and other contemporaneous documentation critical to determining real versus phantom last days of work.
- Review your upstream contract and strike any waiver of lien rights language.
- **Make sure to include express reservations of claim rights on progress payment lien releases and final payment lien releases**
- Incorporate by reference into your subcontracts all prime contract provisions regarding liens, indemnity, back-charges, etc. Potentially strengthen these provisions as well.
- Also in your subcontracts: reconcile subcontractors' statutory lien rights with contract entitlement to pay and dispute resolution/pass-through provisions.
- Coordinate and strategize regarding liens with your subcontractors when in a dispute with the owner.
- Consider also sending a "stop notice."

Subcontractors: Key Takeaways and Strategies

- Know your tier.
- Set up internal procedures for every job to ensure compliance with lien deadlines to protect your right to payment
 - Pre-Lien Notice? Notice to Customer?
 - Contemporaneous documentation for last day of work.
- Review your subcontract and strike any waiver of lien rights language and/or any language that requires you to stay your lien foreclosure lawsuit pending resolution of an upstream dispute between Owner-GC
- **Make sure to include express reservations of claim rights on progress payment lien releases and final payment lien releases**
- Get progress payment and final payment lien releases from ALL downstream parties to avoid liability to GC for lien issues
- Include strong lien indemnity obligations and lien removal rights in your sub-subcontracts and supplier agreements.
- Consider also sending a “stop notice.”



Q&A

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