

CONSTRUCTION BLOG

“Oops... I HAVE BLOWN MY LIEN TIME! Now What Do I Do?”

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Mechanic's liens are without a doubt a subcontractor's best collection tool when there are payment problems. The sources of its power are (1) the risk that the property will be sold to satisfy the lien, (2) the threat that the owner, in order to prevent foreclosure, may have to pay the subcontractor even if the owner has already paid the general contractor, and (3) the lien may trump the lender's prior deed of trust.

In order to receive the benefits afforded by the lien laws, there are strict deadlines that must be met. For example, in Missouri, a subcontractor is required to file its lien with the court within 6 months after its last day of work. However, at least 10 days before filing its lien, it must give to the owner a notice of its intent to file its lien. In Illinois, the time requirements are different. There, the lien must be recorded with the recorder of deeds within 4 months of the last day of its work. Before a lien may validly be recorded in Illinois by a subcontractor, a notice of intent must be given to the owner within 90 days of the last day of work. Failure to meet these deadlines will result in the loss of lien rights. These deadlines may not be extended by agreement.

If you miss the deadline, what can be done to mitigate the loss of lien? The first thing is to sensitize yourself to deadlines so that the mistake does not happen again on an even larger job. It is easier to learn from mistakes than successes. Start the learning process by using a calendar to provide advance written notice of approaching deadlines. Give yourself more than a “2 minute warning.” Calendar the deadline for, say, 30 days. That is not to say a lien should necessarily be filed for each problematic job, but at least by putting the deadlines on the calendar, you will not lose lien rights by default, make it your informed business decision.

The next thing to consider is that there may be a payment bond posted by the general contractor for the benefit of subcontractors. While payment bonds are required on government projects in Missouri and Illinois (and elsewhere), they are not required as a matter of law for private work. However, what happens in some instances is there are private owners that require, at least on some projects, that payment bonds be posted by the general contractors to provide payment security for subcontractors. Bonds cost money, so why would an owner do that? Because it is easier for a subcontractor to make a claim against a bonding company than pursue a lien claim. If the lien is good, the owner is exposed to the risk of double payment and it will also have a cloud on its title to the real estate, creating problems to sell or refinance the property; whereas, if a bond claim is valid, it is the bonding company that is liable and the owner has avoided these risks. Walmart is an example of an owner that sometimes requires bonds for its construction projects.

When private owners obtain payment bonds from their general contractors, that fact is typically not advertised. Therefore, it is a good and prudent business practice to make inquiry in the early days of the project before there are payment problems to determine whether a bond has been posted. It will be much easier to obtain a copy of the bond early in the project while everyone is sharing the same hot tub than waiting until problems develop and the parties are standing 20 paces apart waiting to fire.

If there is a bond, it is advantageous to obtain a copy as early as possible so that you can determine if there are notice requirements or time limits for making claims. Not all bonds have the same terms and conditions when it comes to who is protected, what the notice requirements are, and what the time limits are.

Another option, though not as effective as a bond or lien claim, is to determine whether the owner has paid the general contractor for the entire contract balance. If the owner is holding money due to the general contractor it may be that you have a claim against the owner using an unjust enrichment theory even though you have no direct contractual relationship with the owner. While an owner cannot be made to pay twice in the absence of a mechanic's lien, it can in some instances be required to directly pay the subcontractor if the owner has not paid the complete contract price to the general contractor. The theory is that the owner would be unjustly enriched if it did not pay the value of the improvements made to its property. This remedy is available to subcontractors in Missouri and Illinois.

Finally, remember that if there are no lien rights, bond rights, or rights against the owner, you will still have all of your contractual and equitable rights against the general contractor. Unfortunately, all general contractors are not equally solvent and creditworthy. In the worst case scenario, let's hope the general contractor is solvent. Be careful who you do business with.