



# What Are the Contractor's Options in Response to Lower Tier Mechanic's Liens?

By Christopher S. Drewry

**F**or a contractor, knowing how to record a mechanic's lien to secure its own payment upstream is one thing. However, knowing what to do if a lien is recorded on the owner's project by a lower tier claimant is an entirely different story. When a lien is recorded and the owner looks to the contractor to resolve it, what are the defenses or remedies available short of paying? Not surprisingly, a state's mechanic's lien statute likely has key provisions addressing lien rights and remedies, and there are likewise several contractual protections that may afford a contractor remedies as well.

## LIEN PERFECTION AND STATUTORY DEFENSES

In most (if not all) states, the first line of defense is to attack the sufficiency of the lien itself. Have the statutory perfection requirements to acquire a valid lien been met? Is the correct owner identified? Have requisite consents to the work been obtained? Is the right property described? Is the legal description of the real estate adequate? Has the claimant been properly identified? Has the lien been properly executed? Has the amount been grossly overstated? Has it been timely recorded, or recorded in the wrong county? These are just a handful of questions that arise when first presented with

a lien. Therefore, it is important to understand the statutory framework to specifically identify the requirements and whether they have been met. Typically, failure to record a proper lien will subject it to attack and lessen its impact as a tool to secure prompt payment. It also could render the entire lien void.

## CONTRACTUAL DEFENSES

Contractually, a contractor may have a number of defenses as well. First, is there a valid no-lien contract? Depending on the state, there may be limitations on whether no-lien contracts are valid as a threshold matter, but to the extent they are allowable, this can provide another potential defense. In that same vein, have the statutory requirements for perfecting a valid no-lien contract been met?

Second, have the contractual payments been exchanged for lien waivers? A lien waiver typically will only be effective upon receipt of payment. Nevertheless, if payment has been given in exchange for a lien waiver, exactly what lien rights have been waived? Has the waiver been furnished solely for a specific amount or through a given date? If it is the latter, then lien rights for additional monies for changes or disputed

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claims, or even retainage, may be waived if those claims arose prior to the effective date of the waiver. While parties are cautioned to only furnish partial waivers for a particular dollar amount (or to specifically exclude from the waiver other pending claims for which payment is not being sought), the reality is that this does not always happen in practice.

Even if lien waivers have been obtained, or there are valid contractual reasons for nonpayment (e.g., a contingent payment clause), these may not prevent a lien from being filed. In such circumstances, an owner may demand from the contractor—or the contractor may demand from its subcontractor—that the lien be removed from the project. Typically, there is a contractual indemnity obligation owed upstream by the subcontractor to the contractor or by the contractor to the owner in order to protect the property and its title. There often is a corresponding duty to pay or otherwise discharge the lien of record.

### ALTERNATIVES TO EXPEDITE LIEN RELEASE

Assuming payment is not a viable option, what else can be done to satisfy the indemnity and lien removal demands being placed upon the contractor? Depending on the state, there may be other remedies or tools to address these upstream demands when a lien is recorded.

For example, an owner or other parties with an interest in the property may be able to shorten the statutory deadline and force the lien claimant to bring suit on its lien before the deadline to foreclose as provided by statute. If possible, this can be done by sending written notice demanding the claimant commence suit within a short, specific time period following receipt of the notice. If statutorily allowable, failure to file suit within the stated time period can render the lien null and void. By shifting the burden of commencing suit to the lien claimant, this remedy can be a simple way to clear title quicker. Then, if suit is timely filed, the lien can be “bonded off” (as discussed next).

Another possible statutory remedy involves the discharge of a lien from the real estate pending final judicial adjudication on the merits of the claim. In this instance, once a lien foreclosure action is initiated, the owner or any party with a property interest may be able to file a bond or other sufficient written undertaking, to the effect that the surety and interested party will pay any judgment obtained on the lien. Upon the filing of the bond, the court can issue an order releasing the lien and discharging the property from the lien. The lien then attaches to the bond. If the claimant is successful on its foreclosure, it is then paid out of the bond proceeds. This remedy allows the lien to be removed from the property and clear title while still affording the opportunity to dispute the lien on its merits.

### CONCLUSION

In the end, it is often every bit as important for a contractor to understand the various ways to address a mechanic's lien filed by a lower-tier claimant as it is for the contractor to understand how to file its own lien. The contract and the statutory mechanic's lien framework can prove critical in establishing the defenses and remedies available to a contractor. Direct contractual waivers in the subcontract, interim, and final lien waivers with draw applications, indemnification, bond-off remedies, and notices to foreclose, are just some of the primary tools available to a contractor to protect itself from subcontractor liens. ■

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