

Collections and Liens: Having a Plan and Understanding the Law

*“If you fail to plan ...
then you can plan to fail.”*

By Matthew DeVries

There is no better fit for this quote than in the construction arena. Whether you are talking about a project schedule, coordination of trades, processing of change orders, or disputes at the end of the project, planning is the key to success. It is even more important when you are talking about collection of your final contract balance and retainage.

HAVE A PLAN

A collections strategy developed *before* you have a collections dispute can help ensure a better recovery. Here are a few key tips to remember:

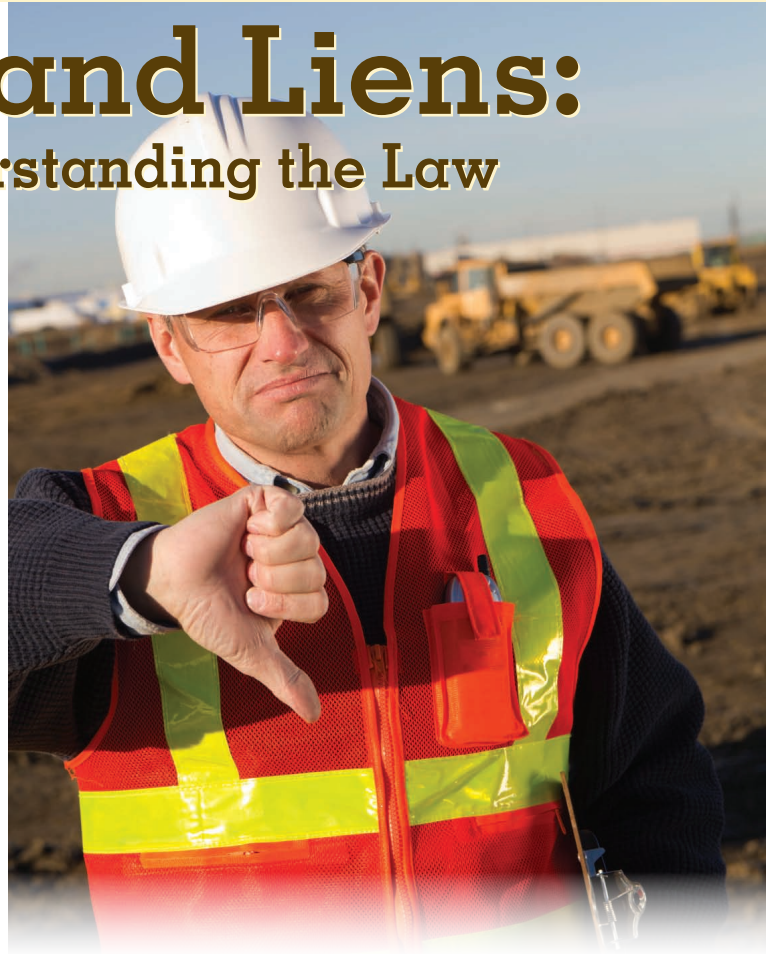
- Review your contract provisions to outline the deadlines for final payment, whether off-sets can be claimed, and what to do in the event of a dispute;
- Make sure you calendar payment deadlines, since your state may have a prompt payment act that requires the owner to pay contractors (or contractors to pay subcontractors) within a certain time period; and
- Organize copies of all relevant correspondence, payment applications, and invoices in case you have to seek legal counsel.

UNDERSTAND YOUR LIEN LAWS

The purpose of the mechanic's lien is to provide to a contractor or subcontractor who have furnished labor or materials adding to the value of real property a remedy for the collection of its debts. The security for the debt owed to the contractor is the property to which the mechanic's lien attaches. Each state has different requirements for what it takes to “perfect” or enforce your lien, so it is important to understand the law in your particular jurisdiction.

“LIBERAL” OR “STRICT” CONSTRUCTION

One of the key distinctions among the various states is how the courts will interpret the mechanic's lien laws. Some states, like Virginia, require the courts to “strictly construe” the lien statutes and any mistake or error in your lien filings can prove fatal to your lien claim. For example, if you include certain periods of work in your lien filing that are out of the time limits, then the entire lien may be invalid (as opposed to just the untimely portions of your claim). In other states like California, the courts liberally construe the law in favor of the lien



claimant, and the lien may be valid so long as the claimant has “substantially complied” with the requirements. In Tennessee, the legislature recently changed the standard from a “strict compliance” requirement to a “substantial compliance” one. A recent court decision applied the new Tennessee standard to allow a contractor to amend its complaint to fix some errors in its lien filings.

FOLLOW NOTICE DEADLINES

Whether you work in a liberal or strict construction state, make sure you follow your deadlines. The notice requirements can help establish priority, and in some instances a lien may be enforced even against subsequent purchasers. If a sworn statement is not recorded within the applicable statutory time period, the lien's priority as to subsequent purchasers or encumbrancers is determined as of the date of the recording. In other words, you may lose priority over a subsequent purchaser even if the work was performed prior to the sale.

In the end, collections is often about enforcing your rights—whether those rights are expressly written in the contract between the parties or granted to you by the statutes and case law, such as the mechanic's lien and prompt payment laws. If you have a plan in place and understand the laws in your state, you are one step closer to recovery. ■

ABOUT THE AUTHOR

Matthew DeVries, construction attorney and LEEP AP, is a member of the Construction Service Group of Stites & Harbison, PLLC, as well as the founder of www.bestpracticesconstructionlaw.com. He can be reached at matthew.devries@stites.com.