

Mechanics' liens

3 steps to manage the financial risks in your construction project

INTERVIEWED BY SUE OSTROWSKI

If you are building new commercial construction, or making improvements to your existing facility, it is critical before starting to take steps to protect yourself from potential mechanics' liens. Failing to do so could result in making double payments, or potentially forfeiting your property to foreclosure, says Marc Felezzola, a shareholder in Babst Calland's Construction, Environmental and Litigation groups.

For example, if a prime contractor — someone who contracts directly with the owner — fails to pay a subcontractor — anyone who supplies labor or materials to the prime contractor or its direct subcontractor — the subcontractor can file a mechanics' lien against the property on which the project was built. And if the subcontractor is not paid the lien amount, it can foreclose on the lien, force a sheriff sale of the property and take its payment from the proceeds of that sale.

This is true even if the owner has paid the contractor for the subcontractor's work, meaning the owner could be subject to the double jeopardy of having to pay for subcontractor labor and materials twice.

"When you improve real property with construction, contractors and subcontractors confer a benefit that increases the property's value," Felezzola says. "The law allows for a lien against the property to secure payment for the benefit someone has contributed to increasing that value. As an owner, protecting yourself requires forethought before construction starts, to set the project up for transparency about potential lienholders and limit the scope of that potential to those with whom the owner directly contracts."

Smart Business spoke with Felezzola about three ways to protect yourself before beginning a construction project.

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WEBSITE: For more information about how to limit the risk of mechanics' liens on your construction project, contact Marc or visit www.babstcalland.com.



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HOW CAN A NO LIEN AGREEMENT BETWEEN THE OWNER AND THE PRIME CONTRACTOR OFFER PROTECTION?

A prime contractor may, but does not have to, purchase performance and payment bonds that provide a guaranty the contractor will perform and pay for the work required under the contract. If the contractor posts those bonds, Pennsylvania law allows the contractor to waive the right to mechanics' file liens on behalf of subcontractors because they have the payment bond as alternative security for their right to payment.

And while the bond premium gets passed on to the owner, the owner gets the security of knowing there is no risk of having to double pay for work because its property won't be subject to subcontractor liens.

HOW CAN A FILING A NOTICE OF COMMENCEMENT REDUCE RISK?

An owner can file a notice of commencement in the State Construction Notices Directory stating the project is commencing. If the owner does so, subcontractors must file a notice in the directory within 45 days informing the owner they are contributing to the project. Failure to do so forfeits any right to file a lien.

This ensures transparency and allows the owner to actively ensure against

liens by contacting potential lienholders during the project and confirming they being paid as they perform their work.

HOW ELSE CAN OWNERS PROTECT THEMSELVES?

An owner may also file a copy of the contract with the prime contractor with the court in the county where the project is located. Doing so limits the owner's total liability for liens for work performed under that prime contract to the contract's unpaid balance.

Thus, although filing the contract does not eliminate any subcontractor lien rights, it does eliminate the owner's risk of the double jeopardy of having to pay subcontractors amounts the owner has already paid the contractor.

Before beginning any construction project — and before signing a contract — meet with an experienced attorney to ensure the terms of the contract are appropriate and create a game plan to both understand potential lienholders and take measures to manage the risk of mechanics' liens.

None of these steps is expensive or time-consuming, and they will set your project up for success. However, once the project begins, these options are off the table, so reach out early to limit your risk of mechanics' liens and the possibility of losing your property to foreclosure. ●