

Mechanics' liens — powerful, but not always efficient



Construction Law

By Pamela J. Scholefield

There is no denying that a mechanics lien is a powerful tool for getting paid, but, procedurally, it sometimes isn't very helpful to expedite progress payments during the course of construction.

Unless a property owner needs the title to its property clear of liens for refinancing or selling, the mechanics' lien procedure may not help you get paid promptly or inexpensively. Here's why:

1. As a general or "original" contractor (one who contracts directly with the property owner), you aren't supposed to record your lien until your work is completed or stopped. So, you can't use a mechanic's lien to enforce progress payments while you are still actively providing service under your contract.

2. You must file a lawsuit in Superior Court to perfect (or foreclose) your lien within 90 days of recording your lien, otherwise the lien is null and void. After 90 days, if you refuse to release your "stale" lien, it is relatively easy for the owner to file a petition for the court to release the lien. If that happens, you end up having a judgment against you to pay up to \$2,000 in attorneys' fees incurred by the owner for having to file the petition. If you don't pay the judgment within 90 days, your contractor's license is suspended.

3. A lawsuit to foreclose on your lien often results in a cross-complaint against you by the owner or general alleging all sorts of breaches, delays, negligence, etc.

4. Even if you are entitled to attorneys fees by the term of your contract, subcontract or — if you are a supplier — the credit application from whoever you sold the materials to, you are not entitled to reimbursement of attorney fees incurred in the lawsuit to foreclose on the mechanic's lien.

5. Even if you win the lawsuit, procedures for foreclosing on the property are complicated and expensive. And, your lien may be "junior" to the original mortgage holder or project construction lender. If either of them forecloses, then your lien may be worthless depending on the property equity and how many other liens are have been recorded.

So, taking advantage of your mechanics' lien rights may not get you paid promptly.

The easiest way to enforce your right to payments during the project is to insist on a clause in your contract or subcontract that requires payment in a timely manner based on clear procedures for payment applications. Some things the clause should include are:

- a guarantee that you will be paid the value of any work that isn't in dispute;
- immediate notice to you for reasons why any amount is withheld and;
- most importantly, the power to stop work if you are not getting paid.

For a subcontractor, don't let your payments depend on the general getting paid from the owner (known as "pay when paid" or "pay if paid" clauses). Even though the law usually finds these types of clauses unenforceable, that does not help you much during the course of construction.

If you don't have an express provision in the contract that allows you to stop work if a payment is late, then you are at risk of breaching the contract if you stop work. This is because a late payment may not be considered by the court to be such a significant breach of the contract to justify the extreme repercussion of stopping work.

It all depends on the value of the contract, how much is owed, and how late the payment is. There is no set rule for figuring this out. For example, if your contract is worth \$1.2 million, and about halfway through the project, the owner is 30 days late on a progress payments worth \$50,000, but you have been paid \$700,000 to date, what you are currently owed may or may not be a significant enough amount of money to justify you to stop the project.

But, if you have an express contract term that allows you to stop work if the owner is, for example, more than 30 days late on any progress payment, then you are allowed to stop work without having to analyze and take the risk of whether or not the late payment would be considered a significant (or "material") breach.

Even if you do not have such a clause in your contract, all is not lost if you are a general (or "original") contractor.

You have some ammunition under the law to demand timely payments and you need to familiarize yourself with your rights under various prompt payment statutes. For example, a little known code section that provides a big hammer for a general contractor is found under Civil Code section 3260.2.

This section allows you to stop work

if a progress payment is more than 35 days past due, as long as you follow the proper procedure.

The procedure includes serving a "10-day stop work order" on the owner and — five days before serving the owner — posting at a conspicuous place on the jobsite and at the job site main office, if one exists, a notice that you intend to serve the "10-day stop-work order" on the owner. The procedure has some other very specific requirements that you must fully understand before pursuing this remedy.

If the procedure is followed precisely, you and your subs and suppliers cannot be held responsible for delays to the project, even if you were in the wrong about being owed the money for some reason.

There are other weapons you can add to your "prompt payment" arsenal, but those will have to be covered in future articles.

In the meantime — learn your rights so you can stand strong and

demand that you be paid promptly and fairly for your work.

If you have a construction question, submit it to: info@construction-laws.com.

General disclaimer

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Drafting Table

Request for Proposals on Architectural and Engineering Services.
Please Check Building, Engineering, Specialties and Subcontracts for Construction Bids

(G) Indicates General Contractor Requesting Sub bids
(S) Indicates Subcontractor
(NA) Indicates Not Available

n/a #Electro Specialty System. 9474 Chesapeake Dr #903, San Diego858-571-7746/FAX 858-571-7049

D-25 Under Sidewalk Drain Inspect. & Clean. Svcs. Carlsbad

**Proposal Deadline
March 28, 2 pm**

Submit proposals to City of Carlsbad. 08-06. Public Works Dept., (760) 602-2460 Fax:(760) 602-8562. Estimate: N/A.

Plans Available at <http://plans.sddt.com>

Work Involves: D-25 Under Sidewalk Drain Inspection and Cleaning Services: The City of Carlsbad is issuing this Request for Proposal (RFP) for D-25 Under Sidewalk Drain Inspection and Cleaning. This program will be administered through the Carlsbad Municipal Utilities Department. Any questions relative to this program should be directed in writing to: Clayton Dobbs, cdobb@ci.carlsbad.ca.us or fax (760)431-2658. Mandatory Pre-Proposal Conf. to be held on Mar. 12, 10 a.m., 5950 El Camino Real, Carlsbad, CA 92008. RFP available for download from City of Carlsbad website: <http://www.carlsbad-ca.gov/publicworks/contracts.html>.

Planholders INCLUDE:

S #Ace Pipeline Corp. 1325 Simpson Way, Suite B, Escondido760-735-6105/FAX 760-735-6110
n/a #United Storm Water, Inc. 14000 E. Valley Blvd., City of Industry626-890-7078/FAX 619-421-7320

Const. Mgmt. Svcs. Const. Roof over Horse Arena Del Mar

**Proposal Deadline
April 3, 5 pm**

Submit proposals to Del Mar Fairgrounds-Admin Office (22nd DAA). Susie Trauner, (916) 263-6100 or strauner@calaonstruction.com. Estimate: N/A.

Documents Not On File

Work Involves: Request for Proposals for Construction Management Services for Construction of a Roof over the Horse Arena: CALIFORNIA CONSTRUCTION AUTHORITY (CCA) as agent for the 22nd District Agricultural Association (22nd DAA) is requesting proposals for Construction Management Services to manage the construction of a new roof over an existing Horse Arena at the Del Mar Fairgrounds. Project Description: Construction Management minimum qualifications and responsibilities are described under Scope of Services in the RFP. A pre-proposal conference and site walk-through has been scheduled for March 26, 2008, at 11:00 a.m. To obtain a Request for Proposals, please contact Susie Trauner at the California Construction Authority at (916) 263-6100 or strauner@calaonstruction.com.