ARE CLAIMS "LIENABLE" UNDER NEW YORK LIEN LAW?

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In the performance of work on construction projects, contractors are often constrained to assert claims as a result of unforeseen circumstances and conditions, including additional work that is not recognized as such by the owner, changed conditions, delays occasioned by the owner, interruption/disruption, and acceleration claims etc.

Contractors often ask us whether such claims can be secured by means of a mechanics' lien. A useful conceptual guide in this area is a basic understanding of the purpose of the New York Lien Law.

The basic purpose of a mechanic's lien is to secure payment to those that improve real property by furnishing materials and/or labor which are incorporated into the improvement. This is true whether the real property is privately or publicly owned.

With regard to construction claims, as a basic matter, if you can fit your claim into either of the two categories, that is, "labor" or "material," then, most probably, the claim <u>is</u> lienable. On the other hand, a claim for lost "profits" is not the basis of a valid lien. Lost profits are neither "labor" nor "material furnished for the improvement of real property."

Courts treat contract claims, including delay damage claims, in a similar fashion. One court found as "lienable" a subcontractor's delay damages occasioned by the breach of a general contractor on a public contract. The subcontractor had been forced to keep full crews on the job for long periods during which there was insufficient work for them to do, because of the general contractor's breach. Consequently, the subcontractor's labor costs were grossly in excess of what it would have been had the general contractor not been in breach. The court construed the New York Lien Law liberally and reasoned that if an improvement includes "reasonable rental value for the period of actual use of machinery, tools and equipment" and "the value of materials actually manufactured for but not delivered to the real property," then the reasonable value of laborers "kept in hand," together with materials and equipment, would also be an improvement and therefore lienable.

Although breach of contract claims are generally not lienable, as will be seen below, some breach of contract claims can be asserted in such a way that they are viewed as extra work claims and, therefore, lienable.

There are certain fundamental differences between public and private liens that affect how certain construction claims are treated, for example, extra work claims. The most basic of these differences is that the consent or request of the owner for the labor or material is a essential to the existence of the lien in the case of a private lien. In the case of a public lien, the existence of a contract with the State or public corporation for the supply of labor or material utilized in the construction or demolition of a public

improvement corresponds to the consent or request of the owner. Another difference is that a lien on a public improvement can be based on a judgment of the New York State Court of Claims awarded to a contractor for damages arising from such contract by the State, or awarded for furnishing labor or materials not contemplated by the contract.

In the case of private improvements, during the course of construction, it will often occur that the owner will require the contractor to perform additional work. If the contractor performs the extra work and is not paid for such work he can secure his claim for the extra work by means of a mechanics' lien. Problems arise when the owner fails to recognize the work as extra work.

Many private contracts will have a provision that the contractor may not perform extra work unless he first obtains a signed written authorization of the owner, construction manager, architect or engineer in charge. If this is requirement is in a contract, no valid claim for extra work may be made without the contractor first obtaining the required written authorization or pleading and proving that the requirement was waived. Clearly, when the owner's agent orally requests that extra work be performed for the benefit of the owner it cannot be seriously argued that the labor and materials were not furnished at the request or consent of the owner. If the owner himself requests the extra work and knowingly accepts and receives the benefit of the work, he will be deemed to have waived the requirement of a written authorization for the extras, and a lien based on such a claim will be found to be valid.

Contracts for public works commonly contain a provision regulating extra work. Such provisions usually require advance approval by some authorized official before claims for extras are allowed. If the provision is properly followed, then there is a valid claim under the contract and liens will attach to the amount of the extra work.

Thus, the driving issues as to the "lienability" of a Construction Claim: (1) whether the items is cognizable under the lien law and all "labor" and "material" put into the property's improvement is so recognized and (2) whether the Contractor is correct as to the validity of his claim or its entitlement to the "extra" compensation.

Many times the over-riding issue is good faith. The Lien Law only prohibits "willfull" exaggeration of liens. If the liened dollars represent labor and material put into the incorporated improvement of real estate and the lien law has good faith belief in its claim, that is a colorable right to the extra compensation (which will eventually be indicated in any event in subsequent court proceedings), it may be advisable to secure the funds via a lien to avoid a subsequent favorable court ruling form being a Pyric victory. After all, it is to provide timely security, and not an adjudication of the rights of the parties, that was the original intended purpose of the Lien Law. Conversely, speculative, unfounded or exaggerated construction claims will expose the Lien Law to accountability for "exaggeration of lien" which is typically dollar for dollar to the extent to the amount of the exaggeration. We believe that if good faith is employed and the Contractor believes his claim as bonafide that it is appropriate and prudent to secure the funds by means of a mechanics' lien.