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**GETTING PAID : Time is of the Essence**

By

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Many experienced subcontractors know that when payment for labor or material is not received, it is imperative to take all of the well established steps to protect their ability to obtain payment.

First, the subcontractor should file a mechanic's lien, whether the job is private or public. In that respect, statutory deadlines for the timely filing of a lien must be observed. In the case of a private project, a lien must be filed within 8 months from the date the subcontractor last did work on the project; with respect to a public lien, the lien must be filed with the public owner within 30 days after completion and acceptance of the project.

However, the filing of the lien is just the first step in protecting payment rights. Unfortunately, too many subcontractors believe that by meeting the filing deadlines their claim will be automatically protected. This is far from accurate. Many times, despite timely filing, the lien turns out to be worthless. In order for the lien to have any value, in addition to it being timely filed, there must be a "fund" due and owed from the owner to the contractor for the work covered in the lien at the time the lien is filed. It is certainly not beyond the realm of possibility, especially if the lienor is one of the finishing trades, that when the lienor files his lien, there will be no monies remaining that are due and owing by the owner to the contractor. As a result, the lien filed by the subcontractor, although timely, would not "catch" any funds and would be of no value.

Therefore, in order to maximize the probability that at the time you file your lien there will still be a fund against which the lien can attach, you should file as early as possible, and not wait until you near the statutory time limitation.

Another possible scenario, and one which subcontractors face frequently, is that by the time a lien is filed, there are “insufficient funds” to cover all filed liens of record. There may be more liens filed against the contractor than there are funds still due and owing from the owner to the contractor. Here again, there seems to be a belief, albeit erroneous, that mechanic’s liens are given a priority based upon the time they are filed. A so-called “first-in-time, first-in-right” rule does not apply to mechanic’s liens (as opposed to judgment liens). All mechanic’s liens which have been timely filed and are otherwise enforceable, are treated on an equal basis. If there are insufficient funds to satisfy all valid liens, the liens share in that fund in *pari passu*, that is, on a proportionate basis, and without preference. Later liens share equally with early liens.

Therefore, it is in the subcontractor’s best interest to file a lien as soon as damages become ascertainable, so as to: (1) catch funds still due to the contractor by the owner for the work in question and, (2) catch funds before later filed liens create competition for limited funds.

### **G&C Commentary**

As the title implies, time is “of the essence” when it comes to the filing of mechanic’s liens. In this regard, we are sensitive to the fact that the filing of a lien may be considered an aggressive act and may affect the sub’s relationships with its contractor and/or the owner. But waiting can mean the difference between getting paid and being left out in the cold. We recognize that this is a balancing act, but we believe it’s one in

which the balance should tilt towards earlier filing for the numerous reasons cited above. (Note, that on public works projects, payment bond availability may temper these considerations because, if a payment bond claim is timely filed, full protection will be available regardless of other payment bond claims having been filed and regardless of whether an owner has already paid the contractor for the sub's work in question.)

Brian P. Craig, an associate with the firm, assisted with preparation of this article.