



Protecting Lien Rights on Retainage

by Scott Wolfe, Jr.

It appears that the laws on retainage and the laws on mechanic's lien rights were written in two different universes and two different eras. These laws could barely be more contradictory, and comparing the two policies and statutory frameworks is likely to end in head-scratching.

Subcontractors must nevertheless navigate the troubled waters. This article examines the friction between the two issues and discusses what subcontractors must keep in mind while, on the one hand protecting their lien rights, and on the other, making sensible relationship decisions that keep the project moving forward.

The Friction Between Retainage & Lien Rights

The friction between retainage requirements and lien rights needs little introduction. Retainage contract provisions and laws empower owners to withhold a certain sum of money — sometimes as much as 10 percent — until the very end of a project. This withheld amount is actually not contractually due until the project ends. Subcontractors, however, typically have only a small window of time to file their mechanic's lien claim, and this window may expire long before the retainage is actually due.

So, can the subcontractor file a lien against the project before the retainage payment is ever due? And if they can, should they?

Part 1: Can the Subcontractor Lien for Retainage Before Retainage Is Actually Due?

In most states, the mechanic's lien laws require a subcontractor to file a lien claim within a certain period of time from when they finish their work. Accordingly, the lien filing window may expire long before the whole project is completed, and thus the retainage is due.

In these situations, what does the lien law say about filing? Surprisingly, very little.

There are few exceptions to the legislative silence on this perplexing question. In 2011, the New York legislature amended its lien law to accommodate for the problem, amending

Lien Law Section 10 to allow liens against retainage to be filed at any time within ninety (90) days after the retainage payment is actually due. (See: Crossing the Bridge When You Get There: Why New York Builders Should No Longer Worry about Losing Retainage Lien Rights; September 2011: <http://www.zlien.com/articles/crossing-the-bridge-when-you-get-there-why-new-york-builders-should-no-longer-worry-about-losing-retainage-lien-rights/>)

In most states, however, subcontractors are left with very little to help with the legal friction. Most states are extremely strict with the timeframe to file a mechanic's lien, with most lien statutes written like the law in Washington state, which requires a lien to be filed within "ninety days after the person has ceased to furnish labor, professional services, materials, or equipment." (RCW § 60.04.091).

There is little ambiguity in such type of laws. If a lien claim is not filed within the 90 days, it is a forfeited right. Full stop.

A few states do introduce a bit more ambiguity. States such as a California, Louisiana, Illinois, Massachusetts, and Utah calculate the lien filing deadline from the completion of the project as a whole instead of an individual subcontractor's last furnishing date. While this does not address the retainage problem head-on, it does minimize the problem significantly since the completion of the project will also trigger the retainage payment.

One legal unknown the subcontractor must struggle with is whether they are even capable of filing a mechanic's lien claim on retainage before the payment is due.

IN THIS ARTICLE . . .

- **Can the subcontractor lien for retainage before retainage is actually due?**
- **Should the subcontractor file a lien for retainage?**
- **Other retainage protections can offer ease of mind.**

In many states, even though the lien claim is due within a strict window of time, the claimant is often restricted to filing a lien for the “amount due” on the project. If the retainage is not yet due, the right to file a lien on it may never exist.

Part 2: Should the Subcontractor File a Lien For Retainage

The previous section addressed whether a subcontractor *could* file a mechanic’s lien for retainage, and the answer is unfortunately unclear. The next question is whether the subcontractor *should* file a lien for retainage. Answering this question should involve two different thoughts for the subcontractor.

First, the subcontractor must decide whether protecting lien rights on the project’s retainage is worth the disruption the lien may cause to their relationship with project participants and to the project itself. Many general contractors, owners, and lenders would consider filing a lien for retainage when the retainage is not technically due pretty adverse. While there is room to debate whether this should be the case, the subcontractor must nevertheless determine if the juice is worth the squeeze.

Second, the subcontractor may actually be taking a legal risk by filing a lien claim for retainage. Depending on the state’s specific lien statute, there may or may not be ambiguity about whether such a claim could be filed. If there is ambiguity, the subcontractor is likely in a fine position to assert the claim. If there is no ambiguity, however, the subcontractor could be later held liable for attorney fees, damages and other penalties if the owner, lender, or general contractor proceeds legally to remove the lien. Note, however, as discussed in the next part, most lien statutes enable subcontractors to lien for the value of their work, labor, and materials, and accordingly, retainage

is a legal fiction that affects the distribution of contract funds only.

Part 3: Caveat — You Can Almost Always Include Retainage Within Your Lien

It is worth making one caveat in this discussion. Thus far, the article has addressed the situation of whether a mechanic’s lien can or should be filed on retainage. It is important to distinguish this debate from the question of whether retainage amounts can be included in a mechanic’s lien filing overall. In other words, if situations lead a subcontractor to file a mechanic’s lien, can retainage amounts be included in that lien — even if the retainage is not technically due? The answer to this question, in most cases, is yes.

If a mechanic’s lien claim is being filed, most states empower the subcontractor to file the claim for the full amount of their claim against the project. The lien claim, in other words, is equal to the value of the work, labor, and materials that the subcontractor furnished to the job. The component of that amount related to retainage is usually irrelevant to the calculation.

Other Retainage Protections Offers Ease of Mind

While the intersection between retainage and lien laws is an absolute mess, subcontractors can find some peace of mind by other protections available to them.

Notably, a healthy number of states require retainage proceeds to be placed into escrow accounts, and subject contractors and owners to strict fines in the event of non-compliance. Escrowing requirements are common, but states have a number of other bespoke provisions that protect retainage payments for subcontractors, and in most cases these will prove sufficient to protect the retainage payment. Typically, if these protections are not enough,

the lien will be timely and warranted because there are other larger problems with the project or project participant.

Conclusion

Subcontractors have capital challenges all over a construction project, and one of those capital challenges is floating the retainage payment across multiple jobs until those jobs are completed and the retainage is released. When it comes to capital, protecting the subcontractor’s right to get paid can often boil down to protecting the right to file a lien. In the case of retainage, however, the right to lien is often hazy and always practically challenging.

It sometimes seems like retainage laws and mechanic’s lien laws are so different that they must come from two different legal systems. They are contradictory principles, and in tricky situations, they often lead subcontractors or lawyers scratching their heads.

When confronted with a retainage mechanic’s lien problem, subcontractors would be best served to analyze their existing situation and the actual language of the state’s lien laws to determine the best course of action.

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