

## DECIDING WHETHER TO INCLUDE “CLAIMS” IN YOUR LIEN

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Mechanic's lien laws are meant to provide protection and security for those who supply labor, materials, and equipment to improve real property for private construction projects. One who has increased the value of property as a result of labor or materials put into the property should have security in the form of a lien against the property. But there sometimes is a disconnect between what a contractor is entitled to contractually and what it can include in a mechanic's lien claim. And when these two numbers are not the same, there can be competing motivations influencing the lien claimant.

### I. The risk of recording an excessive lien.

One should not file a mechanic's lien for a sum in excess of what is actually due, and many states penalize parties who do so. Such penalties can range from losing lien rights entirely to monetary penalties and worse.

In Colorado, for example, filing a mechanic's lien for an excessive amount can result in forfeiture of the entire lien claim, even that part of the claim that is genuine. Additionally, one who files an exaggerated mechanic's lien can be made to pay attorneys' fees and costs to the aggrieved party. The risks of having a lien completely invalidated and having to pay an opposing party's attorneys' fees make it important for lien claimants to carefully consider exactly what to include in their lien claims, and not simply pursue a lien for what they believe is owed them contractually. The problem comes when deciding whether or not to include claims for additional compensation above the original contract price in a mechanic's lien.

### II. If a claim is not proven, is the lien excessive?

Nowhere is the friction between trying to maximize the value of a mechanic's lien claim and trying to avoid the pitfalls of recording a potentially-overstated lien more prevalent than in the area of claims for alleged extra

work, delays, or impacts. Generally, if entitlement is proven, then the costs associated with performing extra work can be included in the recovery for a mechanic's lien claim. Mechanic's lien claimants do not have crystal balls, and cannot foresee whether they will be able to prove entitlement to their claims for performing additional work or for incurring additional costs. And some courts have held that a failure to prove entitlement to extra compensation for a claim means that the lien was excessive when originally recorded.

This should cause contractors some pause in deciding whether or not to include disputed amounts in a mechanic's lien claim. If you include claims for additional compensation in your mechanic's lien and cannot prove them, there are some courts that will deem the mechanic's lien as originally recorded excessive and impose penalties.

The more reasoned approach is that a good-faith disagreement should not be the basis of invalidating a mechanic's lien or imposing penalties. And even an overstated lien should not be the basis of invalidating the entire lien in the absence of some intent to defraud. But not all courts follow this approach, and trial courts unfamiliar with how construction claims work may be persuaded to find that a mechanic's lien was overstated or exaggerated simply because the parties have a disagreement regarding entitlement to additional compensation.

### III. Certain Components of Claims.

Although mechanic's lien statutes vary state to state, the amount of a lien is typically based on the "value" of the labor performed and equipment and materials supplied. And often times the claimant's contract amount is the best indication of what that "value" is. In fact, some states limit lien claims to the contract amount. But simply because a claim for additional

compensation might be allowable under a contract or subcontract does not mean that the costs or damages associated with that claim can be included in a mechanic's lien. As one court put it, "a mechanic's lien proceeding is not intended to settle the contractual obligations of the parties." And just because a claim is allowable under a breach-of-contract theory does not mean that the associated costs can be recovered as part of a mechanic's lien. The items that seem to be the subject of most of the disputes are costs for idle and standby time, delay and impact costs, overhead and profit, interest and late charges, and attorneys' fees.

### IV. Conclusion

State mechanic's lien statutes are the first place to start when determining whether and to what extent costs associated with a claim for additional compensation should be included in a mechanic's lien. Additionally, searching case law for additional answers is a must. But many states have never addressed issues such as whether delay damages can be included in a lien, and there is a split among the states

that have done so. This, coupled with the risk of being penalized for recording an excessive mechanic's lien, means that lien claimants must proceed cautiously in deciding whether and to what extent to include claims in a mechanic's lien claim. And you decide to include costs associated with a claim for additional compensation in a mechanic's lien claim you had better be prepared to explain why such costs are properly included, since those defending against the lien will be ready to argue that the inclusion of certain claims renders the lien excessive.

<sup>1</sup> C.R.S. §§ 38-22-123 and -128. Pope Heating & Air-Conditioning Co. v. Garrett-Bromfield Mortgage Co., 480 P.2d 602, 604 (Colo. App. 1971); Heating & Plumbing Eng'rs, Inc. v. H. J. Wilson Co., 698 P.2d 1364, 1367 (Colo. App. 1984).

<sup>2</sup> Pope Heating & Air-Conditioning Co., 480 P.2d at 602.

<sup>3</sup> See, e.g., A-C Const., Inc. v. Bakke Corp., 956 P.2d 219, 224 (Or. App. 1998).

<sup>4</sup> See, e.g., Cordeck Sales, Inc. v. Constr. Sys., Inc., 887 N.E.2d 474, 513 (Ill. App. 2008) (\$74,901.86 lien not invalid even though it was overstated by \$24,819.15, since no fraud shown).

<sup>5</sup> Artsmith Dev. Grp., Inc. v. Updegraff, 868 A.2d 495, 496 (Pa. Super. Ct. 2005).

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