

# PROTECT Yourself

## How Glazing Contractors Can Recognize and Limit Lien Waivers

by Ellen Giard

**G**lazing contractors are not unfamiliar with construction documents and clauses that prey upon cost and payment issues—timely payment remains at the top of the list when it comes to glaziers' challenges. Mechanic's liens are one of many terms and conditions that can be beneficial to glaziers.

"A lien represents a stick in the owner's bundle and with lien rights you are entitled to one of those sticks," said Mike Madigan, an attorney with the law firm Kegler, Brown, Hill & Ritter. Madigan led an American Subcontractors Association (ASA) teleconference on "Limiting Lien Waivers." The presentation focused on educating subcontractors about mechanic's liens and lien waivers and offered tips and advice that they can use to protect themselves.

### What is a Lien?

A lien is a legal claim of one party upon the property of another to secure the payment of a debt; in construction terms, a mechanic's lien secures payment of debts owed to construction subcontractors (i.e. glaziers) for the value of work performed and materials furnished on a construction project. These exist in all 50 states and the District of Columbia.

"A lien transfers some of the pain subs feel when they are not getting paid," said Madigan. "It's a great tool to protect payment interest." Mechanic's lien rights reduce a glazier's cost to provide services and materials because they reduce their collection costs in the event of a default and also increase the glazier's odds of getting paid.

"With mechanic's liens, owners are aware so they put pressure on the general contractor to make sure they pay the subs, so there's a trickle down effect," added Madigan. "It helps to push whoever's not paying to make their payments."

### What's a Waiver?

As beneficial as a lien can be for glaziers, a waiver or release can restrict or limit those benefits. Glaziers may frequently be asked to sign written waivers of their mechanic's line and/or payment bond rights.

Madigan explained that there are two categories in which glaziers can lose their lien rights. First is not following pay-

ment bond procedures. "You need to tag as many upstream to let them know you're working on their project," he said. "Lots of states have this requirement, so you can preserve your lien rights. Also, be timely with your notices," he added. "The point is, each state has its own respective steps to follow and you need to realize this before you start."

The second way glaziers can lose their lien rights is through a waiver and there are four types of lien waivers that could be problematic for glaziers.

1. A **contractual lien waiver** is included as a term in one of the subcontract documents and provides that the glazier waive all lien rights on the project before any work is actually performed. "Look at the contract to identify the language that is waiving your lien rights," Madigan advised. He also warned glaziers to be aware of "flow-down" clauses. He explained that some states permit a contractual lien waiver in the prime contract document to be flowed-down to glaziers by incorporating the prime contract by reference into the subcontract. "This provision passes the general contractor's obligation onto the sub," he said.

2. **Unconditional lien waivers** waive lien rights toward project payment. An unconditional lien waiver provides that the glazier waive payment bond and/or mechanic's lien rights for work that is still the subject of a pending payment application, without being conditioned upon the glazier's actual receipt of the funds. These waivers could release lien rights for work that has yet to be done.

3. **Time-based lien waivers** forfeit a glazier's right to assert liens for work performed and materials supplied on or before a specified date. According to ASA, these waivers may not be objectionable if the glazier has actually been paid in full through the specified date. The problem comes in the fact that the date specified in the lien waiver is often the date on the check by which the glazier received his last payment or another date that has exceeded the date of the last work for which the glazier has been paid.

4. **Lien-plus waivers** are often found on payment applications and change-order forms. "They don't just waive your right to a lien, but they also waive your right to claim a debt," said Madigan. These waivers include language that releases a glazier's right to payment for work he has already done.

## Negotiating Tips and Advice

When faced with lien waivers, it is important for glaziers to understand what their rights are. In fact, according to ASA, the right to secure payment with a mechanic's lien or payment bond claims is often the most valuable right he has to ensure payment.

So, when negotiating contractual language Madigan advises glaziers to know where they stand. "Say, 'I don't expect the general contractor or owner to waive his rights and there's no justification for me to waive mine.'"

He also pointed out that glaziers should know that a mechanic's lien shouldn't be a problem so long as glaziers are being paid on time. "Your bond claim/lien is security from someone upstream and it represents value. If someone wants to change/alternate it then that's an alteration to your security and value."

Madigan added that if a glazier is being asked to waive lien rights it could be a sign that the project is "shaky with its financials."

Another tip for glaziers is to be sure that their specified terms are actually included on the lien waivers, payment applications and change-order forms they are required to sign.

## Tools for Glaziers

In order to protect and preserve lien rights, Madigan offered a number of tools and resources.

"Become informed of states' mechanic's lien and bond laws," he advised. "You're protecting your security interest in the project and the cost that it takes to become informed ... is money well spent."

Another tool that could be beneficial is a rubber stamp. "Buy stamps that you can use on your forms to say to what the release applies and to what it does not," said Madigan. "It's a quick and easy way to protect your lien rights." He noted, however, that using a rubber stamp to limit the effect of waivers could be objectionable by the customer, so glaziers should still be able to identify abusive waiver language and limit its use.

In addition, another tool that can be useful is the ASA Addendum to Subcontract, which provides language to limit lien waivers "whether or not the subcontractor specifically adds the language." Still, this language is not guaranteed to be enforced by the courts, especially if lien waivers are given in exchange for payment.

A glazier's best bet is to always insist that the actual language be included in the contract.

"These [liens] are a value to [to you] and if you're asked to waive them without payment, you're giving up value," said Madigan. "You're entitled to them and being asked to waive them is against public policy." ■

## the author



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