

LAND MINES AND BLOOPERS

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Lien and Bond Rights are created by Arizona Statute. There was no similar protection for contractors under the common law. Because they are creatures of statute, they must be strictly followed. The following are problems frequently encountered by contractors in attempting to assert lien or bond rights

Lien Law Land Mines

1. Failure to provide preliminary notice. On all residential and commercial projects, *all* contractors (including the prime contractor) must give preliminary 20-day notice, and obtain proof of service. The preliminary 20-day notice *and the proof of service* must be attached to the lien when recorded. Even though claimants who are not in direct contract with an owner-occupant of a residential structure may not have lien rights, the provision of preliminary 20-day notice is a precondition to recovery against a license bond. The lesson: serve a preliminary 20-day notice on every project.

2. Failure to amend preliminary notice. If the amount of the contract increases by change order or otherwise to an amount more than 20% greater than the amount stated in the preliminary 20-day notice, an amended preliminary 20-day notice must be filed. Otherwise, the lien claim will be limited to the amount stated in the original notice, plus 20%.

3. Failure to obtain correct legal description. The notice and claim of lien must include the correct legal description. A street address, tax parcel number or other designation may not be sufficient, although a reference to a previously recorded instrument, incorporating by reference the legal description found therein, is sufficient. A.R.S. § 11-482. Waiting until the last day that the lien can be recorded before trying to determine a correct legal description is often fatal. This information should be requested from the contractor and the owner at the start of the project. Pursuant to A.R.S. §33-992.01(I), such a request must be answered within 10 days.

4. Failure to recognize “completion.” The last day by which the lien must be recorded is calculated from day the project was “complete.”¹ A project may be “complete” even though the painters have not finished painting, and even though the claimant is still on the job performing under the original requirements of its contract. In short, even though the project is not complete, it may be “complete” for purposes of the lien statutes. Depending upon which version of the law applies, partial completion or occupancy of a residential structure, or a final certificate of occupancy from the governmental agency that issued the building permit meets the definition of “complete” under the lien statutes even though work continues. Likewise, a project built in phases could have separate “completion” dates for each phase. There is no penalty for recording a lien early.

5. Failure to apportion. The Arizona courts require claimants to apportion their claim among the various buildings of a project. Failure to do so could result in an invalid lien. The requirement that a lien claimant apportion its claim arises most often on residential development projects, where the contract

between the project owner and the prime contractor calls for the construction of 20 (or 200) homes. A “blanket lien” against all of the property securing the entire amount owed may not be permitted. Even lien claimants who perform site improvements (streets, water and sewer) may not assert the full amount of their lien against any one parcel of property. The Arizona courts have indicated that such a claimant is required to apportion its claim by some form of percentage allocation (i.e., apportioning 1% of the value of the sewer installation to each house in a 100 house development).

6. Failure to recognize owner-occupied property. The provisions of A.R.S. § 33-1002 restrict lien rights on owner-occupied residential construction to only those contractors who have a signed, written contract with the owner. An “owner-occupant” is defined to be a *natural person* who is on the deed or contract for conveyance prior to the commencement of the construction and who resides or intends to reside (or have family members reside) in the dwelling at least 30 days during the next twelve months after construction in complete. In addition to the general penalties provided under A.R.S. § 33-420, a penalty of \$1,000 can be assessed against a contractor who liens owner-occupied residential property without a signed, written contract. A.R.S. § 33-1006(C).

7. Failure to recognize the difference between the landlord and tenant. Under Arizona lien statutes, construction performed at a tenant’s request only entitles the contractor or supplier to assert a lien against the tenant’s interest in the property. This interest is typically defined in the lease agreement. A lien cannot be asserted against the property itself unless the lien claimant has a direct contract with the landlord/owner or if the lease requires the tenant to perform the construction work. In such cases, the lien claimant could assert a lien against the tenant’s leasehold interest and/or against the landlord’s interest in the property.

8. Failure to record. If all other conditions have been satisfied, and a proper lien has been prepared, the lien must be recorded. The clerks at the recorder's office will not accept for recording any document that they do not believe meets the statutory requirements. These requirements include proper margins, proper type size and legibility. Although the lien, itself, will most often meet the requirements of the recorder's office, the attachments may not. Faxed copies of the contract, preliminary 20-day notice and proof of service could cause the entire lien to be rejected. Some clerks have rejected a lien because the type size used in the contract was not large enough. Although there is a dispute with regard to the statutory margin and type size requirements, and their application to exhibits to a lien, if you are at the recorder's office at 4:55 p.m. on the last day the lien can be recorded, the clerk's acceptance or rejection of the lien will be the last word on the issue. Again, there is no penalty for recording early. If the clerk will not accept the lien as originally prepared, it is always better to have another day or two in which to make any changes to the lien or exhibits that the Clerk may request.

9. Failure to serve. After recording, the lien must be served upon the property's owner. Failure to timely serve the lien can cause the lien to be invalid, or could give the property owner the defense of waiver or estoppel. This would be true if the owner released contract fund after the expiration of time in which all liens must have been recorded, and after not having been served with a lien.

10. Failure to timely sue. Once the lien is recorded, the lawsuit to foreclose the lien must be brought within six months. Unless the lawsuit to foreclose the lien is filed within six months, the lien becomes invalid and must be released. The lawsuit must be against the property owner, and must seek to foreclose the lien. A lawsuit filed against the contractor or owner for breach of contract is not good enough. When the lawsuit is filed, a lis pendens must be recorded, putting all on notice of the pending lien foreclosure lawsuit

11. Failure to record Notice of Pendency of Action. In 1996, A.R.S. § 12-1191 was amended to add new language as follows:

In any action to foreclose a mechanics' or materialmen's lien pursuant to Title 33, Chapter 7, Article 6, the lien claimant shall file a notice of pendency of action as prescribed by section 33-998 within five days of filing the action or raising the defense.

New language added to A.R.S. § 33-998 includes a similar requirement that a Notice of Pendency of Action be recorded within six months after the mechanics' lien is recorded.

12. Failure to timely add surety. If a lien discharge bond is recorded in compliance with the law, the lien is automatically discharged, and the claimant has 90 days in which to commence proceedings against the principal and surety. Failure to amend the lien foreclosure lawsuit to dismiss the owner and add the principal and surety can result in the loss of the lien claim *and* the loss of the bond claim.

Bond Bloopers

1. Failure to provide preliminary notice. Most statutory and contractual bonds require some form of notice, at least from those not in direct contract with the bond's principal. Failure to give proper and timely notice could be fatal to the bond claim.

2. Failure to amend preliminary notice. A preliminary 20-day notice that understates the amount of the contract can limit the amount of the bond claim. The statute permits the bond claim to exceed by 20% the amount specified in the preliminary notice. If the amount of the contract increases by change order or otherwise to an amount more than 20% greater than the amount stated in the original preliminary notice, an amended notice should be provided.

3. Failure to provide post-completion notice. Most statutory and contractual bonds require some form of post-completion notice, at least from those not in direct contract with the principal on the bond. The notice must identify the claimant, the work or materials provided, the contractual relationship the claimant has to the project and make a demand for payment of a sum certain. If the post-completion notice and demand for payment is not received within the period specified (often 90 days after the last of the work or material were provided by the claimant), the bond claim may be lost.

4. Failure to understand bond requirements. What the bond states, may not be what the bond covers. In Arizona, if the bond is a statutory bond, then the terms of the statute controls. Anything extra in the bond is "read out" and anything omitted from the bond is "read in." On the other hand, if the bond is not given to satisfy a statutory requirement, or if the bond fails to satisfy the statutory requirement, then the bond is a contractual bond, and the terms of the bond controls. Never assume what the bond covers. Always read the statute and the bond.

5. Failure to timely file suit. Most statutory bonds have very short statutes of limitations. Typically, suit against a statutory bond must be filed within one year after the claimant last performed work. Punch list work and warranty work may not extend the one year period. Even if the bond states that the claimant has two or more years in which to bring suit, if the bond is a statutory bond, the terms of the statute control. The one year limitation period for claims against statutory bonds is compared to the six year limitation period for most breach of contract claims. Most contractual bonds have a provision requiring the filing of suit within two years after the last of the labor or material were provided.