



C. Jaye Berger - A lawyer discusses subcontractors and contracts: What owners and general contractors need to know

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Most owners and developers spend a lot of time negotiating the terms of their contracts with general contractors; however, it is often subcontractors who do most of the work. Their contracts, if they even have one, are the least thorough and the terms of their work are often very unclear. However, the legal issues that can arise from subcontractors can be profound for owners and general contractors who have not been well-briefed by knowledgeable legal counsel.

When a client hires a general contractor to build or renovate property, that company is legally responsible to the owner for completing all of that work. The contractor may go out and hire different subcontractors to help execute that work, but the prime contractor still remains liable for the entire project and the subcontractors are in turn liable to the general contractor, not to the client. However, a subcontractor who has done work, with the knowledge and consent of the client, may file a mechanic's lien, the same way that a general contractor can. Owners should make it their business to be aware of the names and contact information of the subcontractors have been hired to perform some of the work.

The general contractor is obligated to pay the subcontractor, even though the owner has been slow or late in paying him. Many a general contractor has tried to claim that he is not liable for paying subcontractors until he has been paid by the client, but that is not a legally correct position. There are also situations in which the general contractor has been paid by the owner, but for some reason has not paid the subcontractor. The best insurance for an owner that subcontractors have been paid is insisting on partial waivers of lien throughout the project and final waivers at the end.

The subcontractor can foreclose on that mechanic's lien; however, he can only recover up to the amount that the general contractor is owed by the client at the time that the lien was filed. Thus, if a general contractor was paid in full for an application for payment and for some reason he did not pay the subcontractors, the subcontractors would not be able to file a valid mechanic's lien, but they still could sue the general contractor for breach of contract.

If a general contractor has been paid for a requisition that includes work provided by subcontractors, he is considered to be holding that money "in trust" for those subcontractors and must pay them. The portion that is for the subcontractors is not his money. If he uses that money to pay his own men, to pay his own rent or to buy a new car, those "trust funds" can be traced and the general contractor can be liable for violating the trust fund.

It is now easier to bond mechanic's liens than in the past. It is done by the court clerks, instead of by an application to a judge, with a hearing to determine the amount of the undertaking. The general contractor must show assets of at least 110 % of the amount of the lien to obtain a bond.

If a subcontractor agrees to obtain general liability insurance naming the client and the general

contractor as additional insureds, he must do so before any work has started. He cannot do demolition and purchase the policy a week later. If he does and an accident occurs, it may not be covered under the policy. The subcontractor may also be subject to a lawsuit for breach of contract for failing to obtain the coverage required under the contract.

I always advise general contractors to be equally concerned about having appropriate contracts with their subcontractors as they are with their own contracts and not to just rely on a telephone call or a purchase order. Subcontractors should spend the time to have properly drafted contracts and owners and developers should know who is working on their projects and how to contact them if they need to.

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