

# Construction Liens in Practice (WA)

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**A Practice Note addressing statutory construction liens arising from the improvement of privately owned residential and commercial real property in Washington. This Note provides practical guidance on the procedures in Washington for perfecting, enforcing, and releasing construction liens.**

A construction lien (also known as a mechanics' or materialmen's lien) is a powerful tool for a contractor, subcontractor, laborer, supplier, designer, or other construction professional to secure payment for the work or services it performs or the materials or equipment it furnishes to improve real property.

Chapter 60.04 of the Revised Code of Washington governs construction liens on privately owned residential and commercial real property in Washington (RCW 60.04.011 to 60.04.904). Public property in Washington is not subject to construction liens (*Hall & Olswang v. Aetna Cas. & Sur. Co.*, 296 P. 162, 166 (Wash. 1931)).

This Practice Note discusses the processes and procedures when:

- Preparing a construction lien claim.
- Perfecting and enforcing lien rights.
- Determining the priority of lien rights.
- Releasing, waiving, or discharging a lien.

## PRE-LIEN MATTERS

Washington law imposes several preconditions on any person seeking to create and enforce a construction lien (claimant).

Washington courts interpret the construction lien statutes:

- Strictly to determine whether the claimant has the right to a lien.
- Liberally when applying protections for all intended claimants.

(RCW 60.04.900; *Williams v. Athletic Field, Inc.*, 261 P.3d 109, 116-17 (Wash. 2011); *Westinghouse Elec. Supply Co. v. Hawthorne*, 150 P.2d 55, 57 (Wash. 1944)).

## PERSONS ENTITLED TO A CONSTRUCTION LIEN

A claimant acquires the right to a construction lien by furnishing one of the following to improve real property:

- Labor.
- Professional services.
- Materials.
- Equipment (including renting or leasing).

(RCW 60.04.011(4) and 60.04.021.)

To qualify as lienable work, the claimant must provide the labor, professional services, materials, or equipment both:

- At the request of the property owner or its agent.
- Under a contract.

(RCW 60.04.021; *Colo. Structures, Inc. v. Blue Mountain Plaza, LLC*, 246 P.3d 835, 839-40 (Wash. App. 2011).)

A contribution owed to an employee benefit plan on account of labor performed by the claimant also qualifies as lienable work (RCW 60.04.011(4)).

Potential claimants include:

- Contractors.
- Subcontractors (any tier). A subcontractor may not contract directly with an owner or its common law agent (RCW 60.04.011(16)).
- Laborers.
- Primary (first-tier) suppliers of materials or equipment.
- Licensed professionals, such as architects, engineers, and surveyors.

The following parties typically do not have construction lien rights:

- A professional that is either unlicensed or not identified in the construction lien statutes, such as a construction manager

(*Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 266 P.3d 881, 884 (Wash. App. 2011)).

- A second-tier supplier (for example, a manufacturer, distributor, or other supplier providing materials to a primary supplier) (*Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 741 P.2d 58, 63-64 (Wash. App. 1987)).
- An unregistered contractor (RCW 18.27.080, 60.04.011(1), and 60.04.041).

### Owner's Construction Agent

Both a common law agent and a construction agent may request lienable work on behalf of the owner (RCW 60.04.021).

A construction agent:

- Is deemed an agent of the owner solely for establishing a construction lien.
- Must be:
  - a registered or licensed contractor or subcontractor (RCW 60.04.041). Verify a contractor's registration status with the Department of Labor and Industries (L&I);
  - an architect or engineer; or
  - any other person in charge of an improvement to real property.
- Cannot be a materials or equipment supplier. (RCW 60.04.011(1).)

### WORK COVERED BY A CONSTRUCTION LIEN

Generally, lienable work must both:

- Be performed or delivered at the project site.
- Contribute directly to the physical improvement being constructed.

There are exceptions for certain activities, including:

- Demolishing, clearing, and grading.
- Planting trees and plants and providing other landscaping materials.
- Performing professional services:
  - on the real property; or
  - offsite in preparation for or in conjunction with the intended improvement.

(RCW 60.04.011(5).)

### PROPERTY INTERESTS SUBJECT TO A CONSTRUCTION LIEN

A construction lien attaches to both:

- The improvement for which the claimant furnishes lienable work.
- The underlying real property to the extent of the interest of the person requesting the lienable work.

(RCW 60.04.051.)

Although a construction lien typically encumbers the entire improved parcel, a court has discretion to determine the amount of land subject to the lien (*Caine-Grimshaw Co. v. White*, 238 P. 980 (Wash. 1925)). In extreme cases, the court may order the removal and sale of the improvement (RCW 60.04.051).

A construction lien may attach to a limited interest in the property. For example:

- A tenant-in-common may order work that creates a lien on its own undivided interest (*In re Foreclosure of Liens (Clallam Cty. v. Folk*, 922 P.2d 73, 77-78 (Wash. 1996)).
- Lienable work performed for a purchaser during the redemption period after a foreclosure sale creates a lien only against the purchaser's limited post-sale property rights (*W. T. Watts, Inc. v. Sherrer*, 571 P.2d 203, 206 (Wash. 1977); see Practice Notes, Residential Foreclosures (WA): Right of Redemption ([W-011-5725](#)) and Commercial Foreclosures (WA): Right of Redemption ([W-013-1946](#))).

Accordingly, a construction lien cannot arise if the person ordering the work does not have an interest in the property (*Olson Eng'g, Inc. v. KeyBank Nat'l Ass'n*, 286 P.3d 390, 399-400 (Wash. App. 2012)).

### Tenants and Purchasers

If a lease or a purchase and sale agreement requires a tenant or purchaser to improve the property:

- The tenant or purchaser is deemed an agent of the owner for the purpose of making the improvement.
- Any lienable work supports a construction lien on the interest of the landlord or seller.

(*Hewson Constr., Inc. v. Reintree Corp.*, 685 P.2d 1062, 1064 (Wash. 1984).)

No lien attaches if the tenant or purchaser only has a privilege to make improvements rather than an obligation (*Hewson Constr.*, 685 P.2d at 1064).

### Condominiums

If a construction lien attaches to the property before a condominium declaration is recorded, the lien automatically becomes a set of proportional liens on the various units after conversion (*Rainier Pac. Supply, Inc. v. Gray*, 633 P.2d 1355 (Wash. App. 1981)). If the claimant performs lienable work after the declaration is recorded, any liens arise against each unit individually (RCW 64.32.070).

### PRELIMINARY NOTICE REQUIREMENTS FOR CONTRACTORS

Contractors in most cases must satisfy preliminary notice and disclosure requirements to preserve their construction lien rights.

#### Provide a Disclosure Statement

Washington's Contractor Registration Act requires contractors to provide customers with a model disclosure statement notice (disclosure statement) before beginning a project involving either:

- Four or fewer residential units or accessory structures with a contract price of at least \$1,000.
- A commercial building with a contract price of at least \$1,000 but less than \$60,000.

(RCW 18.27.114(1).)

The disclosure statement must follow the statutory form (available from L&I), adhere strictly to all formatting requirements, and describe:

- The contractor's registration and bond information.
- The customer's rights and responsibilities regarding retainage and construction lien claims.

(RCW 18.27.114(1).)

The customer must sign the disclosure statement to acknowledge receipt (RCW 18.27.114(1)).

The contractor must also:

- Give the customer L&I's informational notice on construction liens (RCW 60.04.250 and 60.04.255(2)).
- Retain a signed copy of the disclosure statement for at least three years and produce it to L&I on request.
- Notify the customer if the contractor's registration expires or is revoked or suspended.
- Review L&I's resources periodically for updates to the disclosure statement form.
- Prove that it provided a copy of the disclosure statement when enforcing a construction lien claim on any contract subject to the disclosure requirements (see Plead the Required Facts). (RCW 18.27.114(2), (3), (4), and (7).)

### Post a Notice at the Project Site

If a construction project costs more than \$5,000, the prime contractor must post a notice on the project site for the duration of construction (RCW 60.04.230(1)). A prime contractor includes:

- Any contractor that agrees with the owner or its common law agent to assume primary responsibility for the project.
- Any owner or its common law agent that:
  - qualifies as a contractor; and
  - offers to sell the property without occupying or using it for more than one year.

(RCW 60.04.011(12).)

The notice must be posted in plain view and state:

- The owner's name, address, and telephone number.
- The prime contractor's name, address, telephone number, and registration information.
- The property's:
  - legal description or tax parcel number; and
  - street address, if available.
- Either of the following:
  - the name, address, and telephone number of the lender providing the interim or construction financing (construction lender), if any (RCW 60.04.011(6)); or
  - the name and address of the surety issuing a payment bond to the owner on behalf of the prime contractor, but only if the bond covers at least 50% of the total project amount (RCW 60.04.011(10)).

(RCW 60.04.230(1).)

The prime contractor may satisfy this requirement by posting a building permit containing the same information (RCW 19.27.095(2) and 60.04.230(2)).

Failing to comply with the posting requirement may:

- Result in civil penalties (RCW 60.04.230(3)).
- Relieve a subcontractor of its obligation to provide the prime contractor with a pre-claim notice (RCW 60.04.031(1); see Serve a Pre-Claim Notice).

The prime contractor must immediately provide the contents of the posted notice to any subcontractor, supplier, or professional services provider as soon as the prime contractor becomes aware of that party's involvement in the project (RCW 60.04.261). L&I may take adverse action if the prime contractor neglects to share this information.

### RECORD A NOTICE OF FURNISHING PROFESSIONAL SERVICES

Third parties are often unaware that a claimant has provided professional services for a project (RCW 60.04.011(13)). If the professional services are not visible from an inspection of the property, the claimant should record a notice of furnishing professional services (notice of furnishing) in the county containing the property before construction begins (RCW 60.04.031(5)).

The notice of furnishing must follow the statutory form and include:

- The claimant's name, address, and telephone number.
- The owner's or reputed owner's name.
- The property's legal description.
- The general nature of the professional services.

(RCW 60.04.031(5).)

Failing to record the notice of furnishing:

- Invalidates the claimant's lien against the interest of a bona fide purchaser of the property.
- Subordinates the claimant's lien to the interest of a bona fide mortgagee or beneficiary of a deed of trust (RCW 60.04.011(8)). (RCW 60.04.031(5); see Priority of Construction Liens.)

### SERVE A PRE-CLAIM NOTICE

To obtain a valid construction lien, certain claimants must serve a notice of right to file lien claim (pre-claim notice) on both:

- The owner or reputed owner.
- The prime contractor, unless:
  - the claimant contracts directly with the prime contractor; or
  - the prime contractor fails to comply with the permitting and notice requirements for construction projects worth at least \$5,000 (RCW 19.27.095, 60.04.230, and 60.04.261; see Post a Notice at the Project Site).

(RCW 60.04.031(1), (6).)

A pre-claim notice is not required in any of the following circumstances:

- The claimant contracts directly with:
  - the owner or its common law agent; or
  - the owner-occupant or its common law agent, in the case of an owner-occupied single-family residence (RCW 60.04.011(9)).
- The lien claim is based solely on labor.
- The claimant is a subcontractor that contracts directly with the prime contractor, unless the lienable work is performed on an owner-occupied single-family residence.

(RCW 60.04.031(2), (3)(a).)

### Form and Service of the Pre-Claim Notice

The pre-claim notice must follow the statutory form, adhere strictly to all formatting requirements, and state:

- The date of the notice.
- The claimant's name, address, and telephone number.
- The street address or general location of the property.
- The name of the party requesting the lienable work.
- A brief description of the lienable work.
- Suggestions for avoiding construction liens.

(RCW 60.04.031(4).)

The claimant must serve the pre-claim notice by either:

- Certified or registered mail.
- Personal delivery with proof of service in the form of:
  - a signed receipt; or
  - an affidavit of service.

(RCW 60.04.031(1).)

Notice is effective on mailing or personal delivery. Actual notice is generally insufficient if the claimant fails to meet the statutory service requirements (*Johnson v. Heirgood*, 129 P. 909, 911 (Wash. 1913)). However, an owner's oral assurances of payment to a subcontractor may estop the owner from claiming a lack of pre-claim notice as a defense against the subcontractor's lien claim (*Robinson Tile & Marble Co. v. Samuels*, 266 P. 701, 702 (Wash. 1928)).

### Time Requirements for the Pre-Claim Notice

To protect the claimant's right to a construction lien on all lienable work, the claimant must serve the pre-claim notice:

- Within ten days after starting lienable work on the construction of a single-family residence.
- Within 60 days after starting lienable work on any other project.

(RCW 60.04.031(1).)

If the claimant performs lienable work on an existing owner-occupied single-family residence, the pre-claim notice protects the claimant's rights only as to any amount the owner-occupant still owes to the prime contractor either:

- When the owner-occupant receives the pre-claim notice.
- Three days after the pre-claim notice is mailed, excluding weekends and legal holidays.

(RCW 60.04.031(3)(b).)

### SEND A STOP NOTICE TO THE LENDER

Washington is one of the few states that permit a claimant to send a stop notice to a construction lender. The stop notice requires the lender to address a potential lien claim or risk subordinating its interest in the property.

The claimant may send a stop notice (notice to real property lender) if both:

- The project is not secured by a payment bond of at least 50% of the construction financing amount.

- The claimant has not received a payment within five days after the deadline in the claimant's contract.

(RCW 60.04.221(1).)

A stop notice does not create a lien and is not recorded. Although the claimant may send a stop notice without perfecting a lien claim, it is often advisable to pursue both options particularly if there is little equity in the property.

### Form and Service of the Stop Notice

The claimant must serve the stop notice within 35 days after the contractual payment deadline:

- On the lender at the office providing the construction financing, with a copy to:
  - the owner; and
  - the prime contractor.
- By either:
  - certified or registered mail; or
  - personal delivery with proof of service in the form of a signed receipt or an affidavit of service.

(RCW 60.04.221(1), (3).)

The stop notice must follow the statutory form and contain:

- The claimant's name, address, and telephone number.
- The property's street address or legal description.
- A description of the claimant's lienable work.
- The name of the person that requested the lienable work.
- The amount due for the unpaid lienable work.

(RCW 60.04.221(4).)

The claimant or another person authorized to act on the claimant's behalf must sign the stop notice (RCW 60.04.221(2)).

### Lender's Obligations

After receiving the stop notice, the lender must either:

- Withhold the delinquent amount from any future draws on the construction financing for the project if sufficient funds remain.
- Obtain a payment bond from the prime contractor or loan borrower for the claimant's benefit in the delinquent amount.

(RCW 60.04.221(5).)

The lender may disburse any withheld funds only by either:

- Written agreement of the claimant, owner, and prime contractor in a form prescribed by the lender.
- Court order.

(RCW 60.04.221(6).)

If the lender fails to abide by the stop notice, the lender's mortgage or deed of trust is subordinated to the claimant's construction lien both:

- To the extent of any financing wrongfully disbursed by the lender.
- In an amount no greater than the amount stated in the stop notice, plus costs and attorneys' fees awarded by the court.

(RCW 60.04.221(7).)

### Challenging the Stop Notice

The claimant is liable for any losses and costs, including attorneys' fees, resulting from an unjust, excessive, or premature stop notice (RCW 60.04.221(8)). The lender, owner, or another interested party may also file a motion challenging the stop notice on the basis that it is either:

- Frivolous and made without reasonable cause.
- Clearly excessive.

(RCW 60.04.221(9)(a).)

The motion procedure is similar to the procedure for challenging a frivolous or excessive lien claim (see Challenge a Frivolous or Excessive Lien Claim). The court must hold a hearing and, if it grants the motion, either:

- Void the stop notice.
- Reduce the stated delinquency amount.

(RCW 60.04.221(9).)

The court must also award costs and attorneys' fees to the prevailing party (RCW 60.04.221(9)(d)).

### CREATING AND PERFECTING A CONSTRUCTION LIEN

The claimant must follow specific recording and service procedures to perfect its construction lien.

#### RECORD AND SERVE A LIEN CLAIM

Every claimant asserting its right to a construction lien must file a notice of claim of lien (lien claim) for recording in the county containing the property within 90 days after the lienable work ends. The lien claim must follow the statutory form and include:

- The claimant's name, address, and telephone number.
- The dates that the claimant furnished the lienable work.
- The name of the person indebted to the claimant (typically the person requesting the lienable work).
- The street address, legal description, or another description of the property reasonably calculated to identify its location for a person familiar with the area.
- The name of the owner or reputed owner or a statement that the owner's identity is unknown.
- The principal amount of the claim.
- The terms of any agreed extension of the payment deadline, if applicable (see Enforcing a Construction Lien).
- The name of any assignee of the lien (RCW 60.04.121).

(RCW 60.04.091.)

If the last day of the 90-day filing period falls on a weekend or legal holiday, the deadline is extended to the next business day (RCW 1.12.040).

The claimant's performance of minor remedial or punch list work shortly after completing most of the lienable work under the contract may delay the deadline for filing the lien claim (*Kirk v. Rohan*, 187 P.2d 607, 609 (Wash. 1947)). However, warranty

work performed after completion of the contract typically does not extend the filing period (*Wells v. Scott*, 454 P.2d 378, 380-81 (Wash. 1969)).

#### Amount of the Lien Claim

The measure of the amount due under the lien claim is the contract price for the lienable work (RCW 60.04.021 and 60.04.151). The contract price is either:

- The amount agreed by the parties.
- If there is no agreed amount, the customary and reasonable charge for the lienable work.

(RCW 60.04.011(2).)

If the contract permits an equitable adjustment to the contract price (for example, when changes result from circumstances beyond the claimant's control), the court determines the adjustment based on the customary and reasonable charge for the lienable work (*Top Line Builders, Inc. v. Bovenkamp*, 320 P.3d 130, 141 (Wash. App. 2014)).

When stating the amount of the lien claim:

- Provide the total amount due on the date the lien claim is submitted for recording. An itemized statement is not required. The claimant may amend the stated amount as necessary (see Amend the Lien Claim).
- Do not include anticipated fees and interest.

A contractor with a lien claim affecting more than one property owned by the same person must allocate the amount due for the lienable work on each property or risk subordination of its lien (RCW 60.04.131; see Priority of Construction Liens).

#### Signature, Verification, and Acknowledgment

The claimant or another person authorized to act on the claimant's behalf must sign and verify the lien claim (RCW 60.04.091(2)).

The lien claim must be acknowledged in the same manner as other real property instruments (RCW 64.08.010 to 64.08.100). Washington's Revised Uniform Law on Notarial Acts provided new forms of acknowledgment effective July 1, 2018 (RCW 42.45.140 and 64.08.060).

#### Recording Practices

The county auditor must record the lien claim similarly to a deed or any other instrument affecting title to real property. The auditor may charge an appropriate recording fee. (RCW 60.04.111). If the property lies in two or more counties, the claimant should consider recording the lien claim in each county.

Claimants traditionally file a lien claim for recording by sending a messenger to the auditor's office with the original document and a copy for the auditor to stamp for proof of filing. Many counties in Washington now offer electronic recording through commercial platforms (for example, Spokane County).

Because local practices vary, counsel should contact the appropriate auditor's office to determine the most efficient way to file the lien claim, pay the recording fee, and obtain written proof of filing.

### Serving the Lien Claim

The claimant must provide a copy of the lien claim to the owner or reputed owner by one of the following methods within 14 days after the claimant files the lien claim for recording:

- Certified or registered mail.
- Personal delivery.

(RCW 60.04.091(2).)

Failing to serve a copy of the lien claim in the required manner forfeits the claimant's right to attorneys' fees and costs from the owner (RCW 60.04.091(2) and 60.04.181(3); see Judgment and Sale).

### AMEND THE LIEN CLAIM

The claimant may amend the lien claim within the 90-day filing period following the completion of lienable work (*Geo Exch. Sys., LLC v. Cam*, 65 P.3d 11, 15-16 (Wash. App. 2003); see Record and Serve a Lien Claim).

The claimant should:

- File a new lien claim for recording with the amended information.
- Serve the amended lien claim in the same manner as the original lien claim (see Serving the Lien Claim).
- Release or withdraw the original lien claim in whole or in part depending on whether the claimant has been paid for any lienable work (see Release on Payment).

A court may still permit an amendment after the 90-day filing period unless the sole purpose is to cure an invalidity from failing to substantially comply with the filing statute (*Lumberman's of Wash., Inc. v. Barnhardt*, 949 P.2d 382, 384-86 (Wash. App. 1997); but see *Williams*, 261 P.3d at 116-17 (overruling *Lumberman's* on issue of substantial compliance)). A material error in the lien claim (for example, omitting the property description or the claimant's name, signature, or verification) likely cannot be amended after the filing period ends.

After the claimant files a timely action to enforce the lien, the claimant may amend the lien claim in the same manner as a pleading (RCW 60.04.091(2); see Plead the Required Facts).

### ENFORCING A CONSTRUCTION LIEN

The claimant must enforce its construction lien claim through a foreclosure action. To begin the action, the claimant must:

- File a complaint in the superior court for the county containing the property within eight calendar months after the lien claim is recorded.
- Serve the complaint on the owner within 90 days after the date of filing.

(RCW 4.28.080 and 60.04.141; see State Q&A, Commencing an Action: Washington: Questions 5, 14, and 15 ([W-000-5748](#))).

The lien claim automatically expires if the claimant fails to file a foreclosure action within the eight-month limitations period (RCW 60.04.141). However, the limitations period may be extended if:

- The owner files for bankruptcy protection.
- The parties agree to delay the deadline for payment of the lienable work and the claimant states those terms in the lien claim. (RCW 60.04.141; see Record and Serve a Lien Claim.)
- The claimant timely amends the lien claim. The eight-month limitations period begins on the date the amended claim is recorded. (*Geo Exch. Sys.*, 65 P.3d at 15-16; see Amend the Lien Claim.)
- The claimant files an application for joinder in another pending lien foreclosure action (RCW 60.04.171; see Multiple Actions Against the Same Property).

### CONDUCT A FORECLOSURE ACTION

The claimant conducts the foreclosure action in the same manner as the judicial foreclosure of a mortgage or deed of trust (RCW 60.04.171; see Practice Notes, Residential Foreclosures (WA): Judicial Foreclosure ([W-011-5725](#)) and Commercial Foreclosures (WA): Judicial Foreclosure ([W-013-1946](#))). Unlike a mortgage foreclosure, however, the claimant is not required to record a notice of *lis pendens* after filing the action (RCW 4.28.320; *John Morgan Constr. Co., Inc. v. McDowell*, 813 P.2d 138, 140-41 (Wash. App. 1991)).

### Name the Necessary Parties

The claimant must name the following parties as defendants:

- The owner.
- The owner's spouse, if there is a possibility that the subject property is community property (RCW 60.04.211). Identify the spouse as "John Doe" or "Jane Doe" if the spouse's name is unknown.
- The surety of a recorded lien release bond, if applicable (see Record a Lien Release Bond).
- All junior or inferior lien or interest holders, including subsequent or subordinated mortgagees and judgment lien holders.
- Any person other than the owner or surety contractually obligated to pay the claimant for the lienable work (for example, a prime contractor).

(RCW 60.04.171.)

### Plead the Required Facts

The complaint must contain:

- A description of the lien claim, including:
  - a statement that the claimant performed lienable work that improved the subject property;
  - the amount due; and
  - the parties liable for payment.
- A statement that the claimant has satisfied all filing and service requirements for:
  - the pre-lien notice, if applicable;
  - the lien claim; and
  - the foreclosure action.
- If the claimant is a contractor, confirmation that the contractor has:
  - substantially complied with the statutory registration requirements (RCW 18.27.080); and

- provided a disclosure statement to the customer, if applicable (RCW 18.27.114; see Provide a Disclosure Statement). Attach a copy of the disclosure statement signed by the customer.
- A request for:
  - foreclosure of the lien;
  - attorneys' fees and costs; and
  - if desired, a judgment against any party personally liable for payment of the lien claim.

After filing the complaint, the claimant may amend the lien claim by motion in the same manner as an ordinary pleading (RCW 60.04.091(2); Wash. Super. Ct. Civ. R. 15(a)). Although amendments are granted liberally, the court must consider whether the amendment adversely impacts any third-party interests (RCW 60.04.091(2); *Bremerton Concrete Prods. Co., Inc. v. Miller*, 745 P.2d 1338, 1342 (Wash. App. 1987); see State Q&A, Commencing an Action: Washington: Question 22 ([W-000-5748](#))).

### Judgment and Sale

The claimant must pursue its case diligently. If the claimant does not obtain judgment in the foreclosure action within two years of filing, the court may dismiss the action and cancel the lien (RCW 60.04.141).

When entering judgment, the court may award the prevailing party:

- Attorneys' fees.
- Costs for:
  - recording the lien claim;
  - conducting a title search; and
  - obtaining a bond.

(RCW 60.04.181(3).)

Unless the judgment is satisfied by a lien release bond, the claimant enforces the judgment through a foreclosure (sheriff's) sale of the property (RCW 60.04.181(2), (4); see Record a Lien Release Bond). The claimant may recover the amount stated in its lien claim after deducting the costs of any other lien claims for which it is liable (RCW 60.04.151).

The sale proceeds are usually deposited with the court clerk pending payment of the sale costs and further distribution by the court (RCW 60.04.181(4)). The proceeds must be credited against any personal judgment in the action. The claimant may collect any resulting deficiency on a personal judgment through execution against the obligated party. (RCW 60.04.181(2); see Plead the Required Facts.)

### MULTIPLE ACTIONS AGAINST THE SAME PROPERTY

The claimant may not file a foreclosure action while another action is pending to foreclose a lien on the same property. The claimant may file an application to join the pending action if it is not already a party. The limitations period for the claimant's own foreclosure action is extended while the court considers the joinder application (see Enforcing a Construction Lien). The court must grant the application unless it would cause either:

- An undue delay.
- A hardship that cannot be cured by imposing costs or other conditions.

(RCW 60.04.171.)

If the claimant has already filed its own foreclosure action, the court may consolidate the two actions. The court may not dismiss the later action if the claimant filed it because of:

- Mistake.
- Inadvertence.
- Surprise.
- Excusable neglect.
- Irregularity.

(RCW 60.04.171.)

The court also may not dismiss a foreclosure action at the claimant's request if it would prejudice another party claiming a lien on the same property (RCW 60.04.171).

### PRIORITY OF CONSTRUCTION LIENS

A construction lien attaches to the property automatically, without recording, when the claimant first provides the lienable work. A construction lien has priority over any competing lien or encumbrance that does not attach to the property and is not recorded before the construction lien arises. (RCW 60.04.061 and 60.04.226.)

If the claimant provides professional services that are not visible at the property, the claimant's lien has priority over the interests of a later purchaser or lender from the time the claimant records a notice of furnishing (RCW 60.04.031(5); see Record a Notice of Furnishing Professional Services). If the claimant fails to record a notice of furnishing, the claimant's lien may still retain its priority if the purchaser or lender has actual notice of the professional services (*Zervas Grp. Architects, P.S. v. Bay View Tower LLC*, 254 P.3d 895, 898 (Wash. App. 2011)).

### Subordinating a Lien

The claimant may subordinate its lien:

- Voluntarily through a subordination agreement (*Mut. Reserve Ass'n v. Zeran*, 277 P. 984 (Wash. 1929); *A.A.R. Testing Lab., Inc. v. New Hope Baptist Church*, 50 P.3d 650, 653 (Wash. App. 2002)).
- Inadvertently if the claimant:
  - is a contractor and fails to allocate the claim amount when it performs lienable work at multiple properties for the same owner (RCW 60.04.131; see Amount of the Lien Claim); or
  - acts primarily as the promoter of a project (*Dalk v. Varick Inv. Co.*, 10 P.2d 231, 233 (Wash. 1932)).

### Multiple Construction Liens

If there are multiple construction liens on the property, the court must apply the proceeds from the sheriff's sale (and any costs and attorneys' fees awarded by the court):

- To each class of lien in order of priority.
- *Pro rata* among the claimants in each class.

(RCW 60.04.181(2), (3).)

The lien classes have the following order of priority according to the type of lienable work:

- Labor.
- Contributions owed to employee benefit plans.

- Furnishing material, supplies, or equipment.
  - Subcontractors' liens, including for labor and materials.
  - Liens for prime contractors or professional service providers.
- (RCW 60.04.181(1).)

## OWNER'S RIGHTS AND REMEDIES

The owner and other parties may take certain steps to protect against a construction lien claim.

### CHALLENGE A FRIVOLOUS OR EXCESSIVE LIEN CLAIM

The owner or another interested party may accelerate the lien claim process by filing a motion challenging the claim as either:

- Frivolous and made without reasonable cause. A frivolous lien claim must be defective beyond legitimate dispute (*Gray v. Bourgette Constr., LLC*, 249 P.3d 644, 648-49 (Wash. App. 2011)).
  - Clearly excessive.
- (RCW 60.04.081(1).)

The motion may be filed before or after the claimant brings a foreclosure action (RCW 60.04.081(3)). The motion must:

- Request an order directing the claimant to:
  - appear before the court between 6 and 15 days after service of the motion; and
  - show cause why the motion should not be granted.
- Identify the basis for relief.
- Include an affidavit from the moving party or its attorney stating all supporting facts.

(RCW 60.04.081(1).)

The show cause order must warn the claimant that failure to appear at the hearing results in:

- Release of the lien with prejudice.
- Liability for the moving party's costs and attorneys' fees.

(RCW 60.04.081(2).)

If the court grants the motion, it must either:

- Release the lien if the court finds the lien claim to be frivolous and without reasonable cause.
- Reduce the amount of the lien claim if the court finds it excessive.

(RCW 60.04.081(4).)

The court must also award costs and attorneys' fees to the prevailing party (RCW 60.04.081(4)).

### RECORD A LIEN RELEASE BOND

The owner or another interested party disputing the validity of the lien claim may record a lien release bond in the county containing the property before or after the claimant files a foreclosure action.

Recording the bond:

- Releases the property from:
  - the claimant's lien; and
  - any action to recover the lien amount.
- Shifts security for the lien from the property to the bond.

(RCW 60.04.161; *DBM Consulting Eng'rs, Inc. v. U.S. Fid. & Guar. Co.*, 170 P.3d 592, 596 (Wash. App. 2007).)

The bond must:

- Be given by a company authorized to issue:
  - surety bonds in Washington; and
  - federal bonds with an underwriting limitation at least equal to the amount of the requested bond.
- Contain a description of:
  - the lien claim; and
  - the subject property (attach a copy of the lien claim if necessary).
- Guarantee payment of any judgment on the lien claim in favor of the claimant.
- Secure an amount:
  - equal to the greater of \$5,000 or twice the amount of the lien claim, if the claim amount is \$10,000 or less; or
  - at least one and one-half times the amount of the lien claim, if the claim amount exceeds \$10,000.

(RCW 60.04.161.)

One bond may be used for multiple lien claims by a single claimant if the bond meets the statutory coverage requirements for the sum of the claims (RCW 60.04.161).

The surety is discharged from liability under the bond when either:

- The claimant fails to timely file a foreclosure action.
- The surety pays the lesser of:
  - the foreclosure judgment amount; or
  - the full amount of the bond.

(RCW 60.04.161.)

### WITHHOLD FUNDS FROM THE PRIME CONTRACTOR

During an action to foreclose on a lien claim filed by a subcontractor, supplier, or laborer, the owner may withhold the claim amount from the prime contractor. If the court enters judgment against the owner or the property, the owner may:

- Deduct the principal amount of the judgment, plus interest, attorneys' fees, and costs, from any present or future payments to the prime contractor.
- Recover from the prime contractor any portion of the judgment amount exceeding the owner's remaining payments to the prime contractor.

(RCW 60.04.151.)

### RELEASING, WAIVING, OR DISCHARGING THE LIEN

The claimant may release its lien rights, in whole or in part, any time after the rights arise.

### RELEASE ON PAYMENT

The claimant must promptly sign and deliver a release after both:

- Accepting payment of the lien claim.
- Receiving demand from the owner or other party making payment.

(RCW 60.04.071.)

The party making payment may recover damages and attorneys' fees if the claimant delays providing a release without justification (RCW 60.04.071).

There is no statutory form of release. The release should state at least the recording number and recording date of the lien claim to assist any title search.

If the claimant releases its lien rights for certain lienable work and then asserts a claim for later unpaid lienable work on the same project, the claim relates back for priority purposes to the date the initial lienable work began (*A.A.R. Testing Lab.*, 50 P.3d at 653-54; see *Priority of Construction Liens*).

#### ADDITIONAL GROUNDS FOR RELEASE, WAIVER, OR DISCHARGE

A construction lien also may be released, waived, or discharged if:

- The claimant affirmatively agrees to release its lien rights in exchange for payment under the subject contract or another agreement. This is common in construction contracts requiring periodic payments (see Practice Note, *Payment Provisions in Construction Contracts: Drafting Strategies: Waiver and Release of Claims* ([1-568-1506](#))).
- The claimant fails to timely:
  - provide a disclosure statement, if applicable (RCW 18.27.114(4); see *Provide a Disclosure Statement*);
  - serve a pre-claim notice, if applicable (RCW 60.04.031(6); see *Serve a Pre-Claim Notice*);
  - record a lien claim (RCW 60.04.091(2); see *Record and Serve a Lien Claim*);
  - file and serve a foreclosure action (RCW 60.04.141; see *Enforcing a Construction Lien*); or
  - obtain judgment in the foreclosure action (RCW 60.04.141; see *Judgment and Sale*).
- The owner or another interested party files a motion challenging the lien claim and:
  - the claimant fails to appear at the show cause hearing; or
  - the court determines that the lien claim is frivolous and made without reasonable cause.

(RCW 60.04.081(2), (4); see *Challenge a Frivolous or Excessive Lien Claim*).

- The owner or another interested party records a lien release bond (RCW 60.04.161; see *Record a Lien Release Bond*).
- The claimant forecloses on the lien and sells the subject property (RCW 60.04.171 and 60.04.181(2); see *Judgment and Sale*).

#### PROSPECTIVE RELEASES OR WAIVERS

The construction lien statutes do not address the validity of prospective lien releases or waivers. Washington courts have not provided clear authority on this issue.

However, the statutes explicitly prohibit coercive acts by a contractor or developer (including threatening to withhold future contracts) that discourage a contractor, subcontractor, or supplier from either:

- Serving a pre-claim notice.
- Filing a lien claim for recording.

(RCW 60.04.035.)

These coercive acts are considered unfair or deceptive practices in violation of the Washington Consumer Protection Act (WCPA) (RCW 19.86.010 to 19.86.920). Private suits under the WCPA may result in treble damages and attorneys' fees awards (RCW 19.86.020 and 19.86.090).

For more information on waivers and releases in construction contracts, including those affecting construction lien rights, see:

- Practice Note, *Waivers and Releases in Construction Contracts: Drafting Strategies* ([W-001-0219](#)).
- Standard Document, *Partial Lien Waiver and Release (Construction)* ([W-008-8952](#)).
- Standard Document, *Final Waiver and Release of Liens and Claims (Construction)* ([W-009-8445](#)).

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