

How To Get Paid

On a construction
Project . . .



Mechanics Lien Manual #101

Increasing Your Chances of Getting Paid—Before a Mechanics Lien

There is nothing worse than performing construction services in good faith, incurring the cost of labor and materials, working well within industry standards, and then being battered with a litany of excuses in withholding payment. Although there is no magic bullet, there are realistic steps you can take to increase your chances before filing a mechanics lien form. In this short manual, we will discuss such issues as:

- Correct ways to invoice
- Using change orders to your benefit
- Tips and pointers
- Demand letters
- How to best collect
- Optimal contract clauses
- No freebies
- Interest and finance charges
- Attorneys fees
- Confirming Memos
- How to handle partial payments
- Punch lists
- Notice of intent to file a lien

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Delivering practical legal information to the construction industry since 1976.

Clear demand when payment is due. You want to remove any doubt as to precisely when payment, whether partial or final, is due. State this precisely in your contract or purchase order. It also sets up a precise time to file mechanic lien. Consider inserting a clause as follows:

Clause: "All payments (with extras) are due on presentation of an invoice, which includes materials stored on site, with a default occurring if there is non-payment after ten calendar days. Final payment (including unpaid extras and retention) is due within ten calendar days after completion, regardless of any outstanding punch list. Any allowances are estimates only, subject to change orders if exceed."

If it's not clear, you don't get paid. Never give the other side an excuse for non-payment or forcing your hand as to mechanic liens. Make sure your invoices are crystal clear.

For lump-sum contracts, it will never do to simply indicate: "Payment due for installment 1." Copy the exact language in the contract or schedule of values which sets out with the particularity what you have done, including percentage complete:

"Installment # 1 for \$32,500.00. Project is 15% complete. Work through today's date consists of grubbing, staking, layout and grading of pad for structure and northwest uphill slope, trenching for utilities, demolition, and trenching for foundation, and retaining wall above mother-in-law quarters."

For cost-plus contracts, you can't simply indicate: "June billing due of \$15,432.50 at the hourly rate of \$55.00, with materials, and profit and loss of 15%."

Unlike a lump sum contract, there must be a reasonable breakdown of labor rates, hours, materials, and equipment:

1. **Labor Cost--Employees** (See attached description of job description, such as "laborer, carpenter, and no. of men):

()	_ hrs.	@ \$	_ /hr.	=	\$ _____	
()	_ hrs.	@ \$	_ /hr.	=	\$ _____	
()	_ hrs.	@ \$	_ /hr.	=	\$ _____	
()	_ hrs.	@ \$	_ /hr.	=	\$ _____	\$ _____ (1)

2. **Material, Equipment and Special Tools On Site** (see attached description and invoices):
\$ _____ (2)

3. **Subcontractors & non-employee workmen** (names/company listed below--see attached invoices):
\$ _____
\$ _____
\$ _____
\$ _____ (3)

4. **Design Professionals** (see attached invoices): \$ _____ (4)

5. **Other Costs** (see attached description and invoices): \$ _____ (5)

6. **Subtotal** (1 through 5. If retention, deduct 10 %): \$ _____ (6)

Our friend the change order. Well, in theory it is your friend, but if misused, it can be your enemy. Be honest. How many times have you perform extra work at the direction of the owner or general contractor, but either don't get paid or are paid less than agreed? And end up taking the last step: mechanics liens?

Here's how you guard against this. The secret: **Make it look like you're doing them a favor as to your policies on change orders.** How?

Example. Tim is a general contractor performing substantial renovation work for Mr. and Mrs. Smith. Nice people but they are very picky and Mrs. Smith changes her mind all the time. They negotiate and sign a comprehensive home improvement contract with a definitive schedule of values and detailed plans and specs. On the day of signing, Tim tells them both:

"I can't tell you how excited I am to work on your project. But before we begin, let me share with you my philosophy as to making changes. The whole idea is for us to have a smooth project with no disagreement. And knowing you as I do, I think we will have no problem doing so."

"You have probably heard about projects to go over budget or contractors trying to overcharge the homeowner. But I am different. I actually want to complete the contract no more or less than specified. In fact, from a selfish standpoint, I make more money when I can complete a contract expeditiously and move on to the next one."

"So let me ask you. Have you had enough time to include all matters that you want in the contract? (Assume they say "Yes"). Good."

"On the other hand, if you want to make changes, I am happy to comply. But, it will necessarily make the contract more expensive. So if you want to make changes, bring them to my attention right away and I will give you an exact quote of how much more. You can then decide whether you want to proceed or not. Of course, to prevent any possible dispute, we will have a change order signed in writing by both of us before I begin. Because I will be incurring costs right away, I will also ask that you make the payment for change orders up front. Here is a copy of my standard form change orders so you know how it works. Sound fair? Any questions? (They will almost always say "Yes")."

One week into the project Mrs. Smith wants to substantially upgrade the bathroom fixtures. So Tim says:

"Sure, I would be happy to do this. Remember when we first started the project I told you about change orders? I'm happy to do this, but it will increase the cost. You still want me to do it? (They say "Yes"). OK, give me a day and I'll do some pricing and give you a written change order."

Now this is what Mr. Mrs. Smith are thinking: "This guy is true to his word and he is doing exactly what he told us in the beginning. I remember he said that changes would

be more expensive and told us the procedure in signing a change order. I really like this guy.”

Tim does the pricing and submits a written change order, but it is never signed. He does not start the work. When Mrs. Jones asks about the upgrades and why he has not completed them, he very politely says: “Have you had a chance to review and sign the change order? I have a copy in my truck so let me get it out and we can go over the terms again.” Long story short, Mrs. Smith knows nothing can be done unless she signs and agrees to the extra.

It goes one step further. Assume she signs the change order but never makes the upfront payment as required. Simply remind her you need that payment because you’ll be paying for the upgrade out-of-pocket from your supply house and incurring labor immediately.

Always require the money up front before you do the work. Hundreds of times a day a homeowner tells the contractor to go ahead and even signs a written change order, but after it’s done never gets payment.

Note also how bad you look if you never had the original conversation. You tell them you will only do the work if a change order is signed and they pay up front. They are thinking: “This guy doesn’t trust us” and you come across as an unreasonable mercenary.

The bottom line: If all goes well, it actually appears you are doing them a favor! Being honest and conscientious in saving them from an over budget project.

Best change order format. Putting the change order in writing is one thing; making sure it covers the bases is another. To many people simply specifying the work to be done and that it is an extra--without the other necessary elements to enforceability. All this information will also be helpful in enforcing a mechanic’s lien. Please include all of the following:

- Specific description of the work to be done.
- It constitutes extra work for additional compensation above the base contract.
- Pricing: either lump-sum, cost-plus, or T & M (as to the latter, make sure you specify the hourly rate of yourself and crew, laid out separately).
- Extended time to complete the overall project.

If a change order is not signed. There are few projects without extras and even fewer with signed change orders. Or as our attorney reminds is, he would be pretty much out of business without disputed change orders and mechanic’s lien lawsuits.

You must guard against this eventuality of not having the order signed. For this reason, insert in your contract a statement to the effect:

Clause: “In the event a change order is not reduced to writing, it shall nevertheless be considered an extra allowing for additional compensation under a cost-plus basis as follows: the cost of labor (hourly rates under this contract), material, equipment, and subcontractors, plus 25% profit and over head.”

Unforeseen conditions. You must also guard against circumstances beyond your control. Especially if they increase the cost of performance and you need to receive extra compensation. You should consider having the following clause in your contract:

Clause: “Contractor is entitled to extra compensation for a) conditions later discovered or which have changed and are either different from those indicated in this contract or not ordinarily encountered and not generally recognized as inherent in work of the character provided in this contract, b) alterations and deviations from the drawings, c) changes directed either by the owner, plan checkers, building inspectors, the architect (who will not be considered the final arbiter of disputes), engineers, or any other persons, and d) other changes to the initial scope.”

Keep your cool. You always want to be in emphatic about collecting your bill. But always remain professional. If you yell, threatened, “potshot”, get personal, or lose control, people aren’t going to pay you anything. And, if the other side claims you have breached the contract, being professional will keep you out of court.

Example: Our attorney had a major malpractice suit against a hospital, nurse, and doctor. The wrong medication was given and when administered intravenously, it was so caustic it destroyed the entire right wrist of the patient. It was so extreme, that when she moved her hand you could see her tendons. It was an open and shut case. But she never sued the doctor who administered that wrong medication. When asked why, she explained that even though the hospital was indifferent, the doctor was always there by her side, holding her other hand, making sure the dressings were changed three times a day, and always genuinely caring about their condition. One other reasons the plaintiff included the nurse was because she was obnoxious, haughty, and on one occasion raised your voice and walked out of the room.

No freebies. Good customer relations does not mean doing something for nothing. If you do, you have cheapened yourself. People will suspect your work is not worth the price if you continue to discounted or hand-out free change orders.

Follow through. There is nothing worse than demanding payment and then never following up. People take you seriously if they know you will follow through with your statements. For example, if you serve a Notice of Intent to Lien indicating it will be filed if payment is not made within ten days, file a mechanic’s lien on the eleventh day. You want them to say: “Boy, she really means business, we better pay her.”

Attorney demand letters. These are just about the cheapest thing you can get from an attorney, other than a last will and testament. When someone receives a demand letter from an attorney indicating a mechanic’s lien will be filed unless payment is made

by a set date, they really taken seriously. That attorney becomes your back-up ammunition.

Remember also the other party could very well be saying to themselves: "That's just great. She has hired an attorney so now I have to spend a fortune hiring my own-- maybe we should just pay her off."

Increasingly tough letters. Little is accomplished sending out an invoice marked past due and never doing any thing further. After payment is not made within 30 days, your office should have three distinct letters ready (we can prepare them for you):

- **1st Letter.** Remind them it is past due and finance/interest charges are now being assessed.
- **2nd letter.** Give the precise amount of interest and finance charges that have now accumulated. Remind them that you had to go out-of-pocket to pay your workers and supply house.
- **3rd letter.** Indicate you have now turned this over to your attorney and will be filing a mechanic's lien within a set time, without further notice. You'll be asking for court costs and attorneys' fees (assuming you have such a clause).

Early payment discount . Give them an incentive to pay early. For example, if paid within ten days of receipt, discount the bill by 2-3%.

Give the collection to someone who knows what they're talking about. You will eventually reach the point, after your bill has been ignored, for someone to call to collect payment. Make sure you give it to one who knows about the case, both as to what happened generally on the project and the details of the accounting. It comes across as much more persuasive. There is nothing worse than having an inexperienced staff person, indifferent to the whole situation, asking for payment with no idea as to what happened. They may not be the person in charge of recording a mechanic's lien, but they have to be available to answer questions or concerns.

Interest and/or finance charges. Construction work is a "service" and therefore not subject to usury laws--defined as a loan or forbearance of money. You can therefore charged any finance charge you wish. But to be binding, it must be in some writing signed by each party, whether a formal contract, purchase order, change order, etc. It is not valid if it simply inserted in an invoice later and was never part of the initial contract.

But how much of this can be included in a mechanics lien? Few states allow the lien to include a finance charge. As to interest, roughly half of the states allow this in the mechanic lien itself.

Notice of intent to file a mechanics lien. This simple little form is unusually productive in getting paid. It tells the owner and/or general contractor that if the payment is not made within a certain grace period, a lien will be filed. It is a serious and formal document that engenders settlement negotiations and/or payment. Obviously, it

is not to be used if you have already received the runaround, have no communication, or have already made repeated demands.

Handshakes are a prescription for fraud. Contractors are inherently honest, as compared to other professions. Many of them have spent decades with verbal contracts—mere handshakes. But it is just a matter of time. Not putting something in

writing is a haven for the dishonest and you will eventually get nailed. This relates directly to your getting paid because the scope of work and pricing is what is typically disputed.

Stop chatting on the phone. When you serve a formal written notice, such as a demand letter or notice of intent to file a mechanics lien form, it is powerful and emphatic. Invariably what happens, there are follow-up phone conversations or in-person meetings. Human nature being what it is, most people are polite and conciliatory. The entire “punch” goes out at that point. They no longer think you are serious--back to being the nice guy who agrees to wait to be paid. Do not talk to them at all. Better yet, don't return their phone calls. The idea is to make them sweat. Remember, we're not trying to make friends here: we are trying to get you paid. If they are serious, they will contact you by letter or e-mail.

Speed memos--confirming a verbal conversation or meeting. You know the drill. You have a conversation with someone who commits themselves but later in court they develop a selective memory and deny it occurred or claim something else altogether was discussed. It is the classic “He said--She said.”

It only takes a few minutes to confirm these conversations. We have the forms that everyone in your office can use. Here is an actual example from the trial attorney we use:

Example: Carrie is a general contractor specializing in commercial projects, including hotels. He is in the finish stages of completing a new hotel for a large chain. The plans called for a backup commercial generator under model 5232 priced at \$37,500. Unfortunately, that generator was not available and instead of waiting 60 days, it was agreed that upgraded model 6540 would be used for a price of \$ 45,500. Since the hotel was scheduled to have a grand opening in one week, over lunch the owner's representative indicated it would pay for the upgraded model and the overtime to install since it would be over a weekend. Further, the room housing the new generator had to be expanded at additional cost.

All work was performed as directed but the owner reneged about the new price and it ended in arbitration. Carrie was able to receive every dime as represented because of this simple speed memo he delivered the same day when he went back to his office:

“Thanks John for the conference verifying the new generator matter. It was agreed we would install model 6540 for \$45,500. The generator room will be extended 5ft. on the north wall at an extra for \$16, 500. Overtime for this weekend will be “Cos-Plus” at \$112.50/hr labor, materials, and P and O at 25%.”

Temporary demobilization. You are working on a job with a new owner who specializes in small strip malls. There are five installments on the job. Invoices are to be paid net 30. The first two were slow pays. But the third one was a real problem.

After 60 days you're still getting the runaround. Worse, you have moved ahead with the project and are now billing for the fourth installment. You've had it. You want to walk, but are afraid of being accused of breaching the contract because of abandonment. All you can think about is rushing to the courthouse to record a mechanics lien. Here is a solution, which also helps greatly in being paid.

Terminating the contract is always a big risk. But instead, you simply inform the owner you are temporarily holding off performance until you are paid at least the third installment. That way you protect your rights and are also seen in a more favorable light if it gets to arbitration. You e-mail the owner as follows:

Example: "As you know, we have a five draw system on this job with payments due within 30 days of receipt of invoice. Draw one was 45 days late. Draw two was 50 days late. Draw three is now 60 days late for \$46, 225.00. Nevertheless, I have elected to continue performing services in good faith. I enclose my billing on the fourth draw for \$37,500. The total amount to this date is \$83, 725.00."

"Demand is made that payment be made no later than July 25, 2012. Please be advised that after speaking with legal counsel, you are put on formal notice that my company will cease performing further services and temporarily demobilize if payment is not made. When payment is received, we will re-commence services within 48 hours."

Check 'em out. Whether you are a general or sub, it's always good to know who you are dealing with and their payment history. It is unlikely you will get references and you certainly cannot ask for their financials. But here are a couple of tricks:

- Casually ask what contractors or subcontractors they have used in the past. Call them up. They will definitely tell you about payment.
- Go to the courthouse and for free look up the index of defendants who have been sued in the county. If their name is on the list, it invariably means there was a payment issue. A perfect sample would be someone's law suit to foreclose a mechanic's lien.

Payment within ten days of receipt of funds from the owner. Some states such as California, have a rule that when an owner pays the general, that person must remit funds to the subs within ten days. It can either be grounds for discipline of one's license or the incurring of a late fee. Call them on it.

If you have no intention of continuing to work with a particular developer, you can "shame" them into payment by sending your invoice with an explanation directly to the owner. But watch out. This is the last time you will do business with that developer.

Part payment of a disputed claim. You are a prime contractor owed \$10,000. You get a check from the owner for \$6,000 indicating in the memo section "Paid in full". What can you do? The general legal rule is if there is a partial payment of a disputed claim

indicating full payment is being made, you cannot ask for the balance. That simply means the parties have a disagreement and it has been settled. But in the case above, you never agreed to such a settlement. For this reason, you need to write back: “Thank you for the payment of \$6,000 as a partial payment on my bill. This means the amount now in dispute is \$4,000. Thank you in advance for making that payment so we can clear up this account.”

Office manual. I know what you’re thinking. This is your mother again with a nag. She remarks: “Son, it is so simple to have a lien procedures manual in the office so everybody knows what forms to serve and the time limitations.” So why don’t you have one? All that is needed is to print out the free lien law summary and time deadline table for each state on our site. But, you get busy and forget. The number one cause of non-payment is not following your state’s lien procedures, not filing on time, and not using the right forms.

Stipulated judgment. It is never advisable to put off payment on the mere promise to pay. But if your mechanic’s lien has expired or if you agree to hold off filing it on the representation of being paid a certain sum, make sure you reduce it to a stipulation. The idea is that if a breach occurs, you can file a small claims or superior court action and use the stipulation to prevent any defense and seek an immediate judgment. We can prepare this for you for a fee. Some of the provisions would include:

Clause: “Joe owner agrees to pay John contractor, in lieu of a mechanic lien, the sum of \$22,000 as the reasonable value of labor, materials, and equipment furnished to the above-described property under the written/verbal contract in effect between the parties.”

“Owner shall pay this sum in equal installments of \$1,000 per month, commencing on July 25, 2012 and on the first of each month thereafter. Etc.”

“If owner fails to perform under this Agreement, contractor may, without further notice, requested any court of competent jurisdiction, ex parte, upon the furnishing of a declaration under penalty of perjury, for a judgment against the owner for the unpaid principal due, as well as court costs and finance charges of 2% per month.”

Definition of completion. Another major source of contention on a construction project is the date of completion. Obviously, when that is determined, it triggers the right to receive final payment and the final date for mechanics liens. It is in your interest not to extend his any longer than necessary. Consider this clause:

Clause: “Substantial completion shall be defined as the date the project passes final inspection by the building inspection department, whether or not occupied by owner. Owner’s occupancy shall constitute acceptance of contractors work and waiver of any claims against the contractor”.

Industry tolerances. Contractors must continually remind owners there is no such thing as a perfect construction project—we are making toasters for goodness sake.

Under the law of substantial performance, a contractor is allowed to receive all compensation upon completion, less the reasonable and actual cost to repair, if any.

Consider inserting this in your contract:

Clause: “Contractor shall use its best efforts to perform reasonably and within industry tolerances and standards.”

Punch list. It is almost impossible to construct anything without at least a minimal corrective list. It is only a question of how reasonable the other side treats it. But to keep people honest, we would suggest considering the following clause:

Clause: “Within 5 calendar days after completion, owner may submit a written punch list which contractor shall commence working upon within 7 calendar days thereafter. Even with such punch list, owner shall be required to make final payment, but may hold back 150% of the actual cost of all punch list work, to be paid to contractor immediately as that work is completed.”

Attorneys’ fees. Every contract should have an attorney’s fees clause (“In any action or proceeding to enforce the terms of this agreement or any breach thereof, the prevailing party shall be entitled to reasonable attorney’s fees and costs”). Although that does not provide any immediate measure of payment, it does provide an incentive to the other party. If they know non-payment may lead to a court proceeding which may lead to them paying for your attorneys fees, it may jar them loose.

What do we call the beast? We are asked from time to time exactly how to spell or look up the phrase “mechanic’s lien”. We may need to know the exact spelling to search the Internet, research title, title the form itself, or recording it in the clerk’s or recorder’s office. As silly as it sounds, there are many permutations, including:

- **Mechanic’s lien (the phrase used in such states as Arizona, California, Colorado, Illinois, Indiana, Pennsylvania, and Wisconsin)**
- **Mechanics lien**
- **Mechanics lien form**
- **Mechanic lien**
- **Mechanic liens**
- **Mechanics liens**
- **Affidavit for mechanic’s lien (Texas mechanics lien)**
- **Claim of lien (Florida mechanic’s lien, Georgia mechanic’s lien, Idaho mechanic’s lien, and North Carolina mechanic’s lien)**
- **Notice of lien (Nevada mechanic’s lien)**
- **Notice of mechanic’s lien (New York mechanic’s lien, Utah mechanic’s lien)**
- **Certificate of mechanic’s lien (Connecticut mechanic’s lien)**
- **Lien statement (Kansas mechanic’s lien)**
- **Mechanic’s lien statement (Minnesota mechanic’s lien)**
- **Construction lien claim (New Jersey mechanic’s lien)**
- **Statement of lien (Kentucky mechanic’s lien)**

- **Claim of construction lien (Oregon mechanics lien)**
- **Construction lien (Montana mechanic's lien, Nebraska mechanic's lien)**
- **Verified statement of account and claim of lien (Arkansas mechanic's lien)**

Well Martha, the good news is there is not a fundamental difference as to whether you call it a Mechanic's Lien or Mechanic Lien, etc. But wait, there is always California. The lawyers out there in their Law Revision Commission spent months debating this issue of great import, coming out with new law as of July 1, 2012. Know what those busy lawyers finally came up with? Everyone in the state now has to rename their forms. You can no longer call them "California Mechanic's Liens". Instead it must say "California Mechanics Lien". It is now illegal to use an apostrophe!