

# SEAMass Newsletter



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## MASSACHUSETTS PASSES NEW LIEN LAW TO PROTECT DESIGN PROFESSIONALS

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On January 5, 2011, Governor Deval Patrick signed into law several amendments to the Massachusetts mechanic's lien statute, G.L. c. 254. These amendments were widely supported by a number of design and construction industry groups, and have brought Massachusetts in line with the majority of other states which extend the security of a mechanic's lien to design professionals. This article will present a basic overview of the new law, address the procedural requirements and deadlines set forth in the amendments, and offer a few words of caution to structural engineers who may seek the protection of a lien in the near future.

### Overview of the New Lien Law

The new lien law, which will go into effect on July 1, 2011, protects "design professionals." The term, as used in the amendments, refers to: architects, landscape architects, professional engineers, licensed site professionals, and land surveyors licensed or registered in the Commonwealth of Massachusetts.

The law enables a licensed design professional, who has furnished "professional services" in the construction, repair, or removal of a building or other improvement to real property, to file a lien on that property. Professional services are defined as including "programming, planning, surveying, site investigation, analysis, assessment, design, preparation of drawings and specification, and construction administration services."

The lien process is especially useful when the owner or developer fails to pay for the agreed-upon services. The lien attaches to the property, so that any sale would be encumbered by the obligation to pay the fee owed to the design professional under the contract. This is an efficient and effective way to secure the payment of all amounts due or to become due.

The recent changes to the lien law will also benefit other project participants, such as electricians and plumbers. Liens placed by design professionals, who often perform the first work on a project, will act as an early warning to other contractors that the property owner or developer may be financially unsound or unwilling or unable to pay bills on time.

### Procedural Requirements and Deadlines

A structural engineer who seeks to place a lien on a project owner's real estate, pursuant to the new amendments, must comply with the procedural requirements set forth in G.L. c. 254. First, the engineer is required to file or record a so-called "notice of contract" with the Registry of Deeds for the county or district where such land lies. Second, the engineer must file a "statement of amount due." Finally, the engineer must file a civil action to ensure that the lien is enforced. Each step has strict timing requirements. These three steps are outlined below.

An engineer may file a notice of contract under either section 2C or section 2D of Chapter 254, as may be applicable. Section 2C allows a lien to be placed where the engineer enters into a written contract directly with the owner of the real property. Section 2D allows the engineer to place a lien where he or she furnishes professional services under a written subcontract with another design professional. Actual notice of a 2D filing must be given to the property owner. The notice creates a lien for "all amounts due or to become due" under the sub-consultant's agreement, regardless of the amount stated in the notice, but may "not exceed the amount due or to become due under the original contract" – i.e., the contract between the owner and the design professional – "as of the date actual no-



tice of filing was given to the owner." Sample 2C and 2D notice of contract forms will be provided in the February Issue of Structure Matters.

A structural engineer filing a notice of contract must comply strictly with the procedural deadlines of the new law. Failure to adhere to these deadlines will invalidate the lien. An engineer may file a notice of contract at any time after the written contract or subcontract is signed by both parties. He or she does not have to wait until the professional services have been commenced or completed to file the notice with the Registry of Deeds. However, the engineer may not file a notice later than the earlier of: (i) 60 days after the filing or recording of the notice of substantial completion under G.L. c. 254, § 2A; or (ii) 90 days after the engineer, or any person through or under the engineer, last performed professional services for the project.

The timely filing of a notice of contract is not enough to effectuate a proper lien. The structural engineer must also file a "statement of amount due" under G.L. c. 254, § 8. This statement should give a just and true account of the amount due or to become due, with all just credits, a brief description of the property, and the names of the owners set forth in the notice of contract. The validity of the lien will not be affected by an inaccuracy in the description of the property to which it attaches, so long as the description is sufficient to identify the property. Neither will an inaccuracy in the stated amount due for professional services affect the lien, unless it is shown that the person filing the statement has willfully and knowingly claimed more than is due. However, liens under sections 2C and 2D will be dissolved, if the statement is not filed or recorded at the appropriate Registry of Deeds, within 30 days after the last day that a notice of contract may be filed or recorded.

Finally, the structural engineer is obligated to file a lawsuit to secure the lien, pursuant to G.L. c. 254, § 11. According to section 11, the lien will be dissolved unless a civil action to enforce it is commenced within 90 days after the filing of the statement of amount due.

### **Words of Caution**

The new lien law will only allow the procurement of a lien where the design professional has obtained a *written* contract. Oral agreements between the parties will not suffice. This provides yet another reason why it is imperative that structural engineers memorialize their design contracts in writing.

While liens help guarantee that payment for one's services will be recovered, they are likely unnecessary where the project is well funded and the owner or developer is highly regarded. An owner or developer may be justifiably unhappy if the structural engineer files a notice of contract at the outset of the project. This could harm your professional relationship with the owner or developer, or worse, it could harm your reputation. Therefore, it may be good practice to proceed only when a substantial payment issue has arisen during the job, or when there is a real concern that one's invoices will not be paid.

Finally, as a general caution, the lien law is unforgiving and deadlines are strictly enforced. Accordingly, the prudent engineer will consult legal counsel to make sure the proper actions are taken and notices, statements, and suits are filed in a timely manner.

**Learn more next month.**



1. The new amendments only pertain to private properties and projects. No lien will attach to any public land, building, or structure.
2. The statute does not protect an engineer if he or she is working as a consultant to a subcontractor to the design professional.
3. The owner or contractor files this form in the appropriate Registry of Deeds after the work under the written contract has been substantially completed.

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