

## To Lien or Not to Lien – Late Is Not Better Than Never

by Evelyn Yaeger

To lien or not to lien – that should never be the question. It is *always* a good idea for an elevator contractor to lien property and/or make payment bond claims on construction projects. Expensive, time-consuming litigation may be avoided down the road if simple steps are taken early to protect your interests. Lien filings are quite easy, and any elevator contractor, large or small, can take advantage of this procedure to help ensure payment.

While lien laws vary from state to state, most have stringent requirements for notices of possible lien filings to be sent to general contractors and/or owners, as well as for notices to be sent to insurance companies for claims against payment bonds. There are also timeliness requirements for the filing of actual lien affidavits. If these notices are not sent in a timely manner, there is no recourse or remedy. The liens simply cannot be filed, and the insurance company will rightfully (and gleefully) deny any claim on a payment bond. Another potential problem is that if a contractor files a lien late, there are sometimes statutory fines and the very real possibility that an owner may hire counsel to file a lawsuit against a contractor for filing a late lien. The contractor then incurs attorney's fees in defending the lawsuit, the possibility of having to pay the owner's attorney's fees and costs, as well as any damages that the owner may have incurred as a result of the lien being filed.

In many states, the time period for the notices and lien filings begins to

run from the time when work is substantially completed, not from when the invoice goes unpaid. In the elevator industry, it usually takes several months to complete either a new installation or modernization, depending on the scope of the project. Problems develop if the elevator contractor waits until the invoice for the last portion of the work goes unpaid, then decides to worry if he or she is going to be paid for any of the earlier work. If the elevator contractor waits until the last invoice goes unpaid to try to send notices or make lien filings, it may be found that the deadline has passed for some of the work done early on in the project. There is always a question as to whether one phase of the work constitutes a "substantial completion" for that work, or whether the work is not completed until all elevators are in operation. This gets further complicated on larger projects, as elevators may be totally completed in one area of the building but not in another. There is an assumption that when the entire building project is completed, somehow the elevator contractor will be paid. If all else fails, there is always that age-old remedy – don't turn over the keys to the elevators. However, that may inspire some animosity and will not work if the contractor receives a check, turns over the elevators and the check doesn't clear.

The solution to a potential problem is simple – send individual notices out for the work in each invoice as soon as payment is late. Know the time deadlines in your state, schedule



**Evelyn Yaeger**, an attorney in Dallas, represents several elevator manufacturers and maintenance companies throughout Texas in products liability and commercial litigation matters.

those to be done automatically on a monthly basis to make sure the deadlines are met and do the same thing for the actual lien filing deadlines. This can be a simple and short task as long as a system is in place. Communication between personnel with knowledge that payments are overdue and whomever is doing the notices and lien filings is critical. All that is needed is a form notice letter for liens and bonds in your computer, as well as a form lien affidavit. Simply change the names and amounts for each project. These can be filed earlier than the deadlines; they just cannot be filed late. Waiting until the absolute last day to file can cause undue stress and also increases the potential that a deadline will be missed.

Protecting the interests of the elevator contractor in construction projects can and should be a simple task that requires little time or effort. A repetitive program that followed consistently will help ensure full payment for work completed, and avoid contentious litigation that may affect long-term business relationships. A lien filing may cause a temporary problem for an owner but should be resolved more quickly and with less acrimony than a trip to the courthouse. 