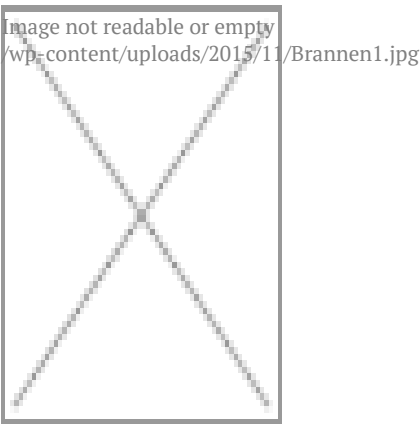


# Protecting Property Owners from Failed Contractors



By Rob Brannen, Bouhan Falligant LLP

## Special to Business in Savannah

When a general contractor shuts its doors, property owners who have already paid their contractor might end up having to pay twice for the same work. Property owners can reduce the risk of double payments by negotiating strong funding procedures in their contracts, by identifying all suppliers and subcontractors up front (the ["pay-if-paid" clause](#)) and by requiring regular confirmation of payment.

First, negotiate strong funding procedures in the contractor's and architect's agreements. The contractor's agreement should include a precise description of the work, a budget allocating the price to the major components of the work, retainage requirements, a complete list of intended subs, and a specific list of documents required with each draw, including interim and final lien waivers, discussed below.

The architect's agreement should require the architect to inspect the work prior to each draw and certify to the owner that the amount of the draw is consistent with the completed work. The architect should be familiar enough with the work that he or she can help the owner identify whether appropriate subs are being paid.

Second, identify the subs in order to confirm payment. The contractor's agreement should require the contractor to

provide a list of subs the contractor has engaged. The owner should also file or require the contractor to file a notice of commencement. The notice of commencement, recorded at the courthouse and posted on the construction site within 15 days after the project starts, requires subs not hired directly by the contractor (second tier subs) to notify the owner they are performing work.

If a second tier sub does not notify the owner and contractor that it is performing work, it forfeits its right to file a lien. Since these subs do not have a contract with the owner or contractor, the loss of these lien rights leaves them without a remedy against the owner.

Third, require confirmation of payment. Owners should not assume their contractor or lender is confirming proper application of payments to subs. The owner must aggressively assume this responsibility.

The contractor's agreement should require that each draw request include an affidavit or certification from the contractor listing all subs that have performed work, and the amount owed to each of them. The owner and his architect should be comparing this list to the budget, the initial list of subs received from the contractor, and the notifications from subs triggered by the notice of commencement.

Prior to paying the contractor, the owner should require interim lien waivers from major subs. Georgia's **interim lien waiver** form is not intuitive, because it must be signed BEFORE the sub gets paid. Subs are often uncomfortable signing a lien waiver before payment. However, the statutory lien waiver form provides that the sub agrees to waive its lien rights only if it actually gets paid the stated amount. If the sub does not get paid, the form warns the sub that it has 60 days to notify the owner of non-payment. If the sub does not notify the owner of non-payment, its lien rights terminate even if it did not get paid. This statutory framework rewards the prudent owner by shifting the burden to the sub to notify the owner it did not get paid.

Lastly, the owner needs to confirm that the contractor terminates all lien rights related to the project at the end of construction. The contractor should provide **final lien waivers** from all of the subs that the owner has identified, and execute a **final contractor's affidavit** confirming that everyone has been paid. The contractor's affidavit at final payment terminates any unfiled lien rights against the property.

The statutory framework can be burdensome, but it does provide protection for the careful property owner. Those unfamiliar with the specific requirements of the lien statutes should seek the assistance of an attorney to negotiate strong funding procedures in the contractor's and architect's agreements, file the notice of commencement, and secure lien waivers and a contractor's affidavit.

---

*Rob Brannen is a partner at Bouhan Falligant LLP. His practice focuses on real estate law, and a significant amount of his work involves the acquisition, financing, and development of property for commercial development. He can be reached at 912-644-5721 or [rbrannen@bouhan.com](mailto:rbrannen@bouhan.com).*

## Practice Areas

- Commercial Real Estate
- Real Estate Litigation

## Attorneys

- Rob Brannen