CONSTRUCTION LIENS AND BOND CLAIMS IN TEXAS

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PERFECTING LIEN CLAIMS ON NON-RESIDENTIAL / PRIVATE PROJECTS

INTRODUCTION

This portion of the paper will focus on the filing of mechanic's liens on commercial construction projects (non-residential) located on private property. The Texas mechanic's lien laws are more complex than those of most states. Notices must be given within specific time limits in order to properly perfect a lien. Furthermore, an affidavit of lien that meets the statutory requirements must be filed with the county clerk of the county where the work was performed within the statutory time limitations. Lastly, if the claim is not paid, the claimant must file suit timely. One must comply with all of the technical requirements of the statute to perfect a mechanic's lien and to have legal rights against the owner of the property, and, most importantly, negotiating leverage.

Even though Texas courts have consistently held that Chapter 53 of the Texas Property Code is to be "liberally construed for purposes of protecting laborers and materialmen,"[1] lien claimants are strongly urged to strictly comply with the statutory requirements. The so-called liberal construction policy has historically been applied to the wording and content of notices and affidavits—but not to the statutory deadlines.[2]

[1] *See* Republic Bank Dallas, N.A. v. Interkal, Inc., 691 S.W.2d 605, 607 (Tex. 1985).

[2] *See* Suretec Ins. Co. v. Myrex Indus., 232 S.W.3d 811 (Tex. App.—Beaumont 2007, pet. denied); Bunch Elect.Co. v. Tex-Craft Builders, Inc., 480 S.W. 2d 42 (Tex. App.—Tyler 1972); Hunt Developers, Inc. v. Western Steel Co., 409 S.W. 2d 443 (Tex. Civ. App.—Corpus Christi 1966, no writ); Day v. Van Horn Trading Co., 183 S.W. 85 (Tex. Civ. App.—Austin 1916, no writ).

I.

HOW TO SEND THE PROPER NOTICE AND FILE THE PROPER AFFIDAVIT

CATEGORIES OF CLAIMANTS

The procedures for perfecting a lien claim depend on the claimant's position on the construction "food chain." The notice requirements in the Property Code are mandatory for first-tier subcontractors/suppliers, second-tier subcontractors/suppliers, and lower tiers, but notice is not required of an original contractor prior to filing a mechanic's lien. Therefore, it is essential for every claimant to know its "place in the food chain" on each Project.

(a) Original Contractor (a/k/a Prime Contractor or General Contractor)

An original contractor is defined as "a person contracting with an owner either directly or through the owner's agent."[3] On large projects, it is not uncommon to have more than one original contractor. For example, if the mechanical and electrical contractors on a project contract directly with the owner, both contractors will be considered original contractors under the lien statute.

(b) Subcontractors

A subcontractor is defined as "a person who has furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor to perform all or part of the work required by an original contract."[4] Subcontractors must comply with very detailed notice requirements pursuant to the Texas Property Code.

[3] TEX. PROP. CODE. § 53.001(7).

[4] TEX. PROP. CODE § 53.001(13).

(c) **First-Tier and Second-Tier Subcontractors: Notice Requirements Differ**

Subcontractors are divided into two tiers of contractors. First-tier subcontractors are those subcontractors and suppliers having an agreement with the original contractor. Conversely, second-tier subcontractors and suppliers (and all lower tiers) do not have an agreement with the original contractor. Material suppliers can either be in the first or second tier, depending on whether they have a contract with the original contractor or with a subcontractor. The major difference between the first-tier and second-tier subcontractors (and all lower tiers) is an additional preliminary notice that only second-tier subcontractors/suppliers must give to the original contractor to perfect their lien rights. Texas has no limit on the number of tiers down the food chain a claimant can be and still be eligible to perfect a claim. First-tier subcontractors/suppliers and second-tier subcontractors/suppliers are also referred to by the statute as derivative claimants.

LIEN PERFECTION STEPS

Sending proper and timely notice letters performs two functions.

- First, notices are necessary for any lien claimant (other than a general contractor) to satisfy the requirements of the Property Code in order to perfect a statutory lien.
- Second, notices that include the proper language serve to trap funds in the owner's possession.

ORIGINAL CONTRACTORS

1. The Notice: An original contractor is not required to send a notice before filing a mechanic's lien affidavit. The only notice required of an original contractor is the notice that must be sent after filing the lien affidavit. (*See* § (a)(3), below).

2. The Lien Affidavit: For an original contractor to properly perfect a statutory lien, the contractor must file a lien affidavit in the real property records in the

county in which the property is located **not later than the 15th day of the fourth calendar month after**:

> The month in which the original contract was terminated, completed, finally settled, or abandoned.[5]

3. The Notice To Owner After the Lien Affidavit is Filed. The original contractor must send a copy of the lien affidavit by registered or certified mail to the owner or reputed owner at the last known business or residence address not later than five (5) calendar days after the date the affidavit is filed with the county clerk.[6]

4. Practice Tip. As a practical matter, it is best to send notice to the Owner on the same day the lien affidavit is filed in order to avoid failing to comply with this requirement.

FIRST-TIER SUBCONTRACTORS AND SUPPLIERS

1. Fund Trapping: Generally, a subcontractor or supplier on a private project will encounter one of the following situations:

- There is no payment bond since bonds on private construction projects in Texas are optional. In this situation the claimant has a right to a lien to secure payment of the "trapped funds" and/or the "10% statutory retainage fund", or
- The original contractor may have given the owner a payment bond. In this situation the claimant can perfect a claim against the bond by giving the appropriate notices and/or by filing a perfected lien, or
- The subcontractor/supplier is dealing with another subcontractor who has provided a payment bond. In this situation the claimant has lien rights against "trapped funds" or "statutory retainage" and a claim against the original contractor's payment bond, and possibly a claim against the subcontractor's bond.

The legal effect of a timely and proper notice of claim by a subcontractor or supplier to the owner is to "trap" funds due the original contractor in the hands of the

[5] TEX. PROP. CODE §§ 53.052, 53.053.

[6] TEX. PROP. CODE § 53.055.

owner.[7] It is essential that a claimant "trap funds" because unless funds are trapped in the hands of the owner, the claimant's recovery under its lien is limited to his share, if any, of the original contractor's ten percent (10%) statutory retainage being withheld by the owner.[8] It is to a claimant's advantage to send notices to the owner as soon as a payment problem is evident. In addition, the claimant should send a written demand for payment to the owner and the prime contractor.[9]

2. The Notice: For a first-tier subcontractor or supplier to properly perfect a statutory lien, the first-tier subcontractor must send a letter by certified mail, return receipt requested, to the owner and the original contractor informing them of the unpaid claim not later than the **15th day of the third calendar month** following ***each month*** in which labor was performed or material delivered.[10] This notice is referred to as the "third month notice." It can also be called a "fund trapping" notice if the proper fund trapping language is used. While the Property Code states that a copy of the first-tier subcontractor's statement or billing "in the usual or customary form" will be sufficient to satisfy the requirements of notice in this section, the claimant is strongly urged to use the statutory language set out in § 53.056 in order to properly "trap" funds in the owner's possession. To trap funds, the notice to the owner must state that:

> "If this claim remains unpaid, you may be personally liable and your property may be subjected to a lien unless:
>
> (1) you withhold payments from the contractor for payment of the claim; or

[7] TEX. PROP. CODE § 53.081.

[8] *See* TEX. PROP. CODE § 53.105(b); *see also* First Nat'l Bank in Graham v. Sledge, 653 S.W.2d 283 (Tex. 1983).

[9] *See* TEX. PROP. CODE § 53.083.

[10] TEX. PROP. CODE § 53.056(b) ; s*ee* Moore v. Brenham Ready Mix, Inc., 463 S.W.3d 109, 117 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (holding that actual notice of a claim obtained through oral communications did not substantially comply with the statutory notice requirement to provide written notice).

(2) the claim is otherwise paid or settled."[11]

When an owner receives the required "fund trapping" notice, any unpaid contract funds (up to the amount of the claim as stated in the notice) are "trapped" in the hands of the owner. Potentially, the claimant has a lien on the real property ***and*** a claim against the owner for the funds that were "trapped" by the notice letter.

3. Fund Trapping Practice Tip: There can be a significant problem with the "fund trapping" notice. If the owner has already paid out all of the contract funds by the time it receives the "fund trapping" notice letter, there will be no contract funds trapped. Even if some contract funds are trapped, they may represent only a small portion of the amount claimed by the claimant. Because a claimant must "trap" contract funds in the hands of the owner before they are paid to the contractor, it is to a claimant's advantage to send the fund trapping notice letter to the owner as soon as a payment problem becomes evident.

4. The Lien Affidavit: The next step is to file an affidavit in the real property records in the county where the project is located **not later than the 15th day of the fourth calendar month after the last day of the last month in which the first-tier subcontractor performed labor or supplied material**.[12]

5. Notice to Owner and General Contractor After the Lien Affidavit is Filed: The Claimant must send a copy of the affidavit by registered or certified mail to: (1) the owner or reputed owner at the owner's last known business or residence address, and (2) to the original contractor at the original contractor's last known business or residence address not later than five calendar days after the date the affidavit is filed.

6. Practice Tip. As a practical matter, it is best to send notice to the Owner

[11] TEX. PROP. CODE § 53.056(d).

[12] TEX. PROP. CODE §§ 53.053(c), 53.052.

on the same day the lien is filed in order to avoid failing to comply with this requirement.

SECOND-TIER (AND LOWER) SUBCONTRACTORS AND SUPPLIERS

1. The Notices. For second-tier (and lower) subcontractors or suppliers to properly perfect a statutory lien, the second-tier subcontractor must send two notices. First, they must send a letter by certified mail, return receipt requested, to the original contractor informing it of the unpaid claim **not later than the 15th day of the second month** following ***each month*** in which the second-tier subcontractor has supplied labor or materials.[13] This notice is sometimes referred to as the "second month notice." Second, the second-tier subcontractor must also send a letter by certified mail, return receipt requested, to the owner or reputed owner informing it of the unpaid claim **not later than the 15th day of the third month** following ***each month*** in which the second-tier subcontractor's labor was performed or material delivered. This notice is sometimes referred to as the "third month notice."

Again, while the Property Code states that a copy of the claimant's statement or billing "in the usual or customary form" will be sufficient to satisfy the requirements of notice in this section, claimants are urged to use the "fund trapping" language set forth in § 53.056. The notice to the owner must state that:

> "If this claim remains unpaid, you may be personally liable and your property may be subjected to a lien unless:
>
> (1) you withhold payments from the contractor for payment of the claim; or
>
> (2) the claim is otherwise paid or settled."[14]

2. Combined Notice Practice Tip. (1) As a practical matter, the second and

[13] S*ee Moore*, 463 S.W.3d at 117 (holding that actual notice of a claim obtained through oral communications did not substantially comply with the statutory notice requirement to provide written notice).

[14] TEX. PROP. CODE § 53.056(d).

third month notices can be combined into one letter sent to the Owner, the general contractor and the first tier subcontractor. **However, the notice must go out by the 15th day of the second month in order to perfect a claim.** (2) If you are ever in doubt about who should receive a notice, the best rule of thumb is for the claimant to always send notice to everyone up the food chain from the claimant.

3. The Lien Affidavit: After all notices have been sent, the second-tier subcontractor must file an affidavit in the real property records of the county where the project is located **not later than the 15th day of the fourth calendar month after the last day of the last month in which the second-tier subcontractor performed labor or supplied material**.[15]

4. The Notice to Owner and General Contractor After the Lien Affidavit is Filed: The Claimant must send a copy of the affidavit by registered or certified mail to: (1) the owner or reputed owner at the owner's last known business or residence address, and (2) to the original contractor at the original contractor's last known business or residence address, not later than five calendar days after the date the affidavit is filed.

5. Practice Tip. As a practical matter, it is best to send notice to the Owner and General Contractor on the same day the lien is filed in order to avoid failing to comply with this requirement.

[15] TEX. PROP. CODE § 53.053(c), 53.052.

TEXAS LIEN CLAIMS ON *PRIVATE* PROJECTS (Non-Residential)

Notice & Filing Deadlines For General Contractors and Subcontractors

Month When Labor and/or Material Furnished	2nd Tier (and lower) Subcontractors	1st Tier Subcontractors Deadline to Send Notice to Owner and General Contractor	Deadline to File Lien Affidavit After Completion of Your Work
	Deadline to Send Notice to General Contractor	2nd Tier (and lower) Subcontractors Deadline to Send Notice to Owner and General Contractor (See Note 1 below)	(See Notes 2, 3 & 4 below)
	(15th day of 2nd Month)	(15th day of 3rd Month)	(15th day of 4th Month)
January	March 15	April 15	May 15
February	April 15	May 15	June 15
March	May 15	June 15	July 15
April	June 15	July 15	August 15
May	July 15	August 15	September 15
June	August 15	September 15	October 15
July	September 15	October 15	November 15
August	October 15	November 15	December 15
September	November 15	December 15	January 15
October	December 15	January 15	February 15
November	January 15	February 15	March 15
December	February 15	March 15	April 15

1. 2nd Tier (and lower) Subcontractors can combine the 2nd month notice to General Contractor and the 3rd month notice to Owner and General Contractor in one notice letter which must be sent by the 2nd month deadline.
2. General Contractor has to file a lien affidavit by the 15th day of the 4th month after the month in which the General Contractor completes or abandons the job.
3. Subcontractor has to file a lien affidavit by the 15th day of the 4th month after the last month in which the Subcontractor provides labor or materials.
4. Everyone who files a lien affidavit must send notice to the Owner of the filed lien affidavit no later than the 5th calendar day after the date of filing.
5. Architects, engineers, landscape contractors and demolition contractors who have a written contract with the Owner can perfect a lien. They are considered to be general contractors for lien perfection purposes.
6. All notices **must** be sent by certified or registered mail. We also recommend sending by regular mail and fax.

Different Deadlines for Retainage Claims

A. Notice must be sent to the Owner and to the General Contractor not later than the **earlier of:**
   a. the 30th day after the Claimant's agreement providing for retainage is completed, terminated, or abandoned; or
   b. the 30th day after the original contract is terminated or abandoned.

B. If you are a subcontractor, the lien affidavit must be filed by not later than the **earliest of:**
   a. the 15th day of the fourth calendar month after the last day of the month in which labor was performed or material furnished; or
   b. if you receive an affidavit of completion, the 40th day after the date stated in the affidavit of completion as the date of completion of the work under the original contract; or
   c. if you receive a notice that the general contractor was terminated or abandoned the job, the 40th day after the date of termination or abandonment of the original contract); or
   d. the 30th day after the date the owner sent to the claimant a written notice of demand for the claimant to file a lien affidavit.

C. If you are a general contractor, the lien affidavit must be filed by:
   a. the 15th day of the fourth calendar month after the last day of the month in which the original contract was terminated, completed or abandoned.

Specially Fabricated Items

A. Notice must be sent to Owner and/or General Contractor by the 15th day of the 2nd month after an order for material is received and accepted to perfect a claim for undelivered materials.

B. Notice by the date(s) set forth in the chart above is sufficent to perfect a claim for delivered materials.

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II.

STATUTORY RETAINAGE CLAIMS FOR UNBONDED PROJECTS

1. Section 53.101 of the Property Code requires the *owner* of a project to withhold 10% of the contract price of the work or 10% of the value of the work (measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, the reasonable value of the completed work) as **retainage** during the project and for thirty (30) days after completion of the work.

2. These retainage funds are intended to secure payment for subcontractors and suppliers that supply labor and material to the project. If the owner fails to retain the 10%, a Claimant who complies with the statute has a lien against the property, at least to the extent of the amount that should have been retained.[16] While, generally, an owner's liability to subcontractors and suppliers will not exceed the required retainage, the owner can have additional liability depending upon whether funds were "trapped" by proper fund trapping notices.

3. In order to properly perfect a claim on the statutory retainage held by the owner (or the amount which should have been retained), a claimant, with the exception of the procedure set forth in Section 53.057 discussed in Section IV *infra*, must:

(1) send all notices required by Chapter 53 (discussed in Section I, *supra*, and Section IV, *infra*[17]); and

[16] TEX. PROP. CODE § 53.105.

[17] PRACTICAL TIP: Theoretically, this language means you can send *either* the notices for perfecting a lien on the underlying property contained in § 53.056, OR the notices for contractual retainage contained in § 53.057. However, practically, since retainage is likely not yet earned when the claimant would be sending § 53.056 notice letters, it makes more sense that the claimant would send a § 53.057 notice, 30 days after the claimant's work is complete.

(2) file an affidavit claiming a lien not later than the 30th day after the original contract work is completed, the original contract is terminated or the original contractor abandons performance under the original contract.[18]

4. If the claimant fails to give proper notice and perfect the lien, the owner's property will not be liable.

5. The ten percent (10%) retainage requirement does not apply if there is a payment bond.[19]

III.

"COMPLETION" UNDER SECTION 53.103 (STATUTORY RETAINAGE)

In *Page v. Wood Structural Components, Inc.*, 102 S.W.3d 720 (Tex. 2003), the Texas Supreme Court held that a subcontractor's deadline for filing a lien affidavit to perfect a claim for statutory retainage runs from the date the original contract is completed, terminated or abandoned, even if the subcontractor did not know when (or even if) the original contract was completed, terminated or abandoned.

In 2005, the Texas Legislature added a section to the Property Code which helps subcontractors by requiring an owner to provide written notice to a subcontractor who has sent a lien notice or who has requested written notice from an owner whenever an original contract is either terminated or abandoned.[20]

Under Section 53.107, if the Owner does not provide notice within ten days of termination or abandonment and the lien claimant otherwise properly perfects its lien claim, the owner will not be allowed to object on the grounds that an early termination or abandonment of

[18] TEX. PROP. CODE § 53.103.

[19] TEX. PROP. CODE § 53.201(b); Indus. Indem. v. Zack Burnett, 677 S.W.2d 493 (Tex. 1984).

[20] TEX. PROP. CODE § 53.107.

the original contract shortened the subcontractor's time to perfect its lien claim. This statute does not apply to residential contracts.[21]

The statute:

a. Requires owners to provide notice to claimants that the original contractor has been terminated or has abandoned the project.

b. Requires the Owner's notice to provide the following:

1. the name and address of the owner;

2. the name and address of the original contractor;

3. a description, legally sufficient or identification, of the real property on which the improvements are located;

4. a general description of the improvements agreed to be furnished under the original contract;

5. a statement that the original contract has been terminated or that performance under the contract has been abandoned;

6. the date of the termination or abandonment; and

7. a conspicuous statement that a claimant may not have a lien on the retained funds unless the claimant files an affidavit claiming a lien not later than the 40th day after the date of the termination or abandonment.

c. Provides that a subcontractor who fails to file on time as authorized by § 53.103(2) has a lien to the extent authorized by § 53.107 if the subcontractor has otherwise complied with this Chapter and the owner did not provide the notice required.

While § 53.107 helps those claimants who have sent their lien notices and those who send a request for notice to the Owner, the *Page* holding is still the law. Therefore, those claimants who do not send a § 53.107 request but who perform their work on a project and then leave while the work of others continues must still keep up with when the original contractor completes, abandons or is terminated. Only by keeping a close watch, can such a claimant timely file a lien within the 30 day period.

[21] *Id.* at § 53.107(e).

YOU SHOULD SEND A FUND TRAPPING NOTICE IMMEDIATELY AFTER YOU PERFORM WORK AT THE END OF A PROJECT

Absent a fund trapping notice, the requirement that the owner hold statutory retainage for thirty days past completion under § 53.084 and § 53.101, serves to effectively shorten the time for giving a fund trapping notice for work completed at the end of the project. Since the owner, in the absence of a fund trapping notice, may release funds without liability after the expiration of thirty days after completion of the work, the effective deadline for sending a fund trapping notice is the **shorte**r of: 1) thirty days after the project is completed; or 2) the fifteenth of the third month (for a first tier subcontractor) following each month in which all or part of the Claimant's labor was performed or material delivered. However, this is the latest date to send a fund trapping letter and prudence dictates sending one much earlier.

IV.

PERFECTION OF A CONTRACTUAL RETAINAGE CLAIM

1. The Notice Requirements.

When a *subcontractor or supplier* provides material or labor under an agreement which provides for retainage, and wishes to perfect a lien for such contractual retainage held by the general contractor or other downstream party, the claimant may send **notice** to the owner or reputed owner (and the general contractor as applicable) of the contractual retainage claim to the last known business or residence address not later than the earlier of: 1) the 30th day after the date the *claimant's* agreement providing for retainage is completed, terminated, or abandoned; or 2) the 30th day after the date the *original contract* is terminated or abandoned.[22] If the claimant is a second-tier subcontractor, the same notice must also be given to the original contractor within the same time period.[23]

[22] TEX. PROP. CODE § 53.057(b)(1) and (2).

[23] TEX. PROP. CODE §53.057(b-1).

The notice must generally state the existence of a requirement for retainage and contain:

(1) the name and address of the claimant; and

(2) if the agreement is with a subcontractor, the name and address of the subcontractor.

No further notice is required to perfect a lien on contractual retainage if the claimant provides the above described notice and timely provides notice of its filed lien affidavit as set forth in Section 53.055.[24]

2. **Filing the Lien Affidavit.**

Several years ago, the deadlines for filing the lien affidavit to perfect a lien claim for contractual retainage changed. For contracts entered into *after September 1, 2011*, the lien claimant must:

(1) **file an affidavit claiming a lien** not later than the 30th day after the earlier of the date:

a) the work is completed;

b) the original contract is terminated; or

c) the original contractor abandons the project[25]

OR

(2) **file an affidavit claiming a lien** not later than the **earliest** of:

(i) the date required for filing an affidavit under Section 53.052;

(ii) the 40th day after the date stated in an affidavit of completion as the date of completion of the work under the original contract, *if the owner sent the claimant notice of an affidavit of completion* in the time and manner required;

(iii) the 40th day after the date of termination or abandonment of the

[24] TEX. PROP. CODE § 53.057(e).

[25] TEX. PROP. CODE § 53.103.

original contract, *if the owner sent the claimant a notice of such termination or abandonment* in the time and manner required; or

(iv) the 30th day after the date the owner sent to the claimant to the claimant's address provided in the notice for contractual retainage, as required under Section (c), *a written notice of demand for the claimant to file the affidavit claiming a lien*.[26]

The "written notice of demand for claimant to file the affidavit claiming a lien" as discussed in subsection (iv) above, must contain the following:

(1) the owner's name and address and a description, legally sufficient for identification, of the real property on which the improvement is located;

(2) a statement that the claimant must file the lien affidavit not later than the 30th day after the date the demand is sent; and

(3) is effective only for the amount of contractual retainage earned by the claimant as of the day the demand was sent.

The claimant must send a copy of the filed affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address not later than the fifth day after the date the affidavit is filed with the county clerk. If the claimant is not an original contractor, the person must also send a copy of the affidavit to the original contractor at the original contractor's last known business or residence address within the same five day period.[27]

[26] TEX. PROP. CODE § 53.057.

[27] TEX. PROP. CODE § 53.055.

V.

DOES COMPLETION INCLUDE PUNCHLIST WORK?

The punchlist work required to complete the contract scope of work extends the date of completion and therefore, the deadline for filing mechanic's liens. However, performing warranty work will generally not extend the completion date. In 1999, the definition of "completion" was modified to make it clear that replacement or repair of work performed under the contract will not extend the date. "Completion" is defined as "the actual completion of the work, including any extras or change orders reasonably required or contemplated under the original contract, other than warranty work or replacement or repair of the work performed under the contract."

In *Texas Wood Mill Cabinets, Inc. v. Butter*, 117 S.W.3d 98 (Tex. App.—Tyler 2003, no. pet.), the court dealt with the task of defining whether a project was completed. The Butters' house was constructed by D&D, as a "spec house." Texas Wood Mill ("TWM"), the cabinet contractor, was not paid and sought to foreclose its lien against the Butters. Texas Wood Mill argued that the evidence at trial established as a matter of law that the contract was completed in July 1999. The Butters argued that the evidence established that all work done after May 25, 1999 related to specific requests made by D&D to make adjustments to the work. The Court interpreted the term "completed," to mean "ended" or "concluded." Since the objective of the contract between D&D and TWM was the construction and installation of the cabinets for the house, the Court found the contract could not be "completed,"[28] until the cabinets were constructed, installed, and functional. In other words, until the "Punch List" was completed.

[28] Texas Wood Mill Cabinets, Inc. v. Butter, 117 S.W.3d 98, 104 (Tex. App.—Tyler 2003, no. pet.).

VI.

DEMAND FOR PAYMENT TO OWNER

Section 53.083 of the Property Code states that a derivative claimant may make demand upon the owner for payment. Such a claim must be made within the time in which the claimant would have to secure a lien for the claim. The demand must give notice to the owner that all or part of the claim has accrued under § 53.053 or is past due. A copy of the demand must also be sent to the original contractor, who then has thirty (30) days to notify the owner if the original contractor disputes the claim. If the original contractor fails to notify the owner that the claim is disputed, the original contractor is deemed to have assented to the claim and the owner "shall" make payment to the claimant.

As a matter of practice, all derivative claimants should include demand language to the owner in all second month and third-month notices. In other words, while the derivative claimant is properly fulfilling the notice requirements of the Property Code, he is also able to make demand upon the owner for the claim. If the original contractor fails to notify the owner that the claim is disputed, the owner is, at least by the terms of the statute, authorized to release the money to the claimant.

VII.

SPECIAL FABRICATORS SHOULD TAKE ADVANTAGE OF THE EARLY NOTICE PROVISIONS

1. Early Notice (Before Delivery)

A subcontractor or material supplier who supplies specially fabricated material is given extra protection under the Texas lien laws.[29] In order to perfect a lien for materials which are specially fabricated, but not incorporated into the project, the claimant of specially fabricated

[29] TEX. PROP. CODE § 53.058.

materials must take additional steps to perfect a claim.

A fabricator of specially fabricated material must send notice by registered or certified mail to the last known business or residence address of the owner or reputed owner (for first-tier fabricators) and to the original contractor (for second-tier fabricators) not later than the 15th day of the second month after the month in which the claimant receives and accepts the order for the material. The notice must contain: (1) a statement that the order has been received and accepted; and (2) the price of the order.

Essentially, the Property Code requires a fabricator of specially fabricated material to give the owner and, if necessary, the original contractor, additional time in which to halt production or become liable for a properly perfected lien. This early notice (together with a lien affidavit) will perfect a lien for specially fabricated material which has not yet been delivered to the project.

2. **§53.056 Notice (After Delivery)**

In addition to the early notice under § 53.058 described above, the claimant must give notice under § 53.056 if delivery has been made or if the normal delivery time for the job has passed. On the other hand, if the fabricator only gives the notices required by § 53.056, but has failed to provide the preliminary notice required by §53.058, then a lien will only be valid and perfected as to the materials actually delivered to the job.

3. **File Lien Affidavit**

After the proper notice has been sent, the claimant for specially fabricated materials must file an affidavit in the real property records of the county where the project is located not later than the 15th day of the fourth calendar month after:

1. The last day of the last month in which materials were delivered;

2. The last day of the last month in which delivery of the last of the material would normally have been required at the job site; or

3. On the last day of the month of any material breach or termination of the original contract by the owner, original contractor or of the subcontract under which the special fabricated material was furnished. (Tex. Prop. Code § 53.053.)

The claimant must send a copy of the filed affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address not later than the fifth day after the date the affidavit is filed with the county clerk. If the claimant is not an original contractor, the person must also send a copy of the affidavit to the original contractor at the original contractor's last known business or residence address within the same five day period.[30]

VIII.

THE GENERAL CONTRACTOR'S CONSTITUTIONAL LIEN

In addition to the specific statutory procedure outlined above, the Texas Constitution provides a self-executing lien for improvements to property made by an original contractor who is in direct privity of contract with the owner. The original contractor need not comply with the requirements of Chapter 53 of the Property Code to enforce such a constitutional lien. This right, however, is very limited. Art. XVI § 37 of the Texas Constitution provides:

> Mechanics, artisans, and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or materials furnished therefore; and the legislature shall provide by law for the speedy and efficient enforcement of said liens.

On the other hand, subcontractors and suppliers not contracting directly with the owner do not have a constitutional lien, and are relegated to statutory liens. The constitutional lien is only

[30] TEX. PROP. CODE § 53.055.

available to one in privity with the owner of the property in question.[31]

Although a constitutional lien exists without the necessity of filing a lien affidavit, certain circumstances which would bar collection of the debt can prevent enforcement of the lien. For example, a constitutional lien cannot be enforced against a good faith purchaser for value of the property who had no knowledge of the lien claim.[32] Therefore, in order to preserve such a claim against a subsequent good faith purchaser, claimants are encouraged to file a lien affidavit in the county records for the property in question. The filing of the lien affidavit will put prospective purchasers of the property on notice of the lien.[33]

While a valid constitutional lien requires direct contractual privity with the owner, certain provisions of the Texas Property Code concerning "sham contractors" may allow a subcontractor or supplier to prevail on such a claim. The claimant must show that the original contractor was a corporation effectively controlled through the ownership of voting stock, directorships or otherwise by the owner of the property, or vice versa, or the owner's contract with the general contractor was made with no good faith intention that the general contractor was to perform the contract.[34] Texas Property Code § 53.026 is most frequently litigated or arbitrated if the subcontractor failed to provide proper notices of its lien or failed to perfect its lien timely, or both, because the rules that allow a general contractor to create and enforce its liens against an owner's property are much easier to follow than those concerning subcontractors.

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[31] First Nat'l Bank of Paris v. Lyon-Gray Lumber Co., 194 S.W. 1146 (Tex. Civ. App.—Texarkana 1917), *aff'd*, 110 Tex. 162, 217 S.W. 133 (1919); Ralph M. Parsons Co. v. South Coast Supply Co. (In re A&M Operating Co.), 182 B.R. 997 (E.D. Tex. 1995).

[32] *See* Cavazos v. Munoz, 305 B.R. 661, 681 (S.D. Tex. 2004); *see also* Contract Sales Co. v. Skaggs, 612 S.W.2d 652, 653 (Tex. Civ. App.—Dallas 1981, no writ.).

[33] *See* FDIC v. Bodin Concrete Co., 869 S.W.2d 372 (Tex.App.—Dallas 1993, writ denied); Justice Mortgage Investors v. C.D. Thompson Constr. Co., 533 S.W. 2d 939 (Tex.Civ.App.—Amarillo 1976, writ ref'd n.r.e.).

[34] TEX. PROP. CODE § 53.026. *See* Trinity Drywall Sys. v. TOKA Gen Constrs., Ltd., 416 S.W. 3d 201 (Tex.App.—El Paso 2013, pet. denied); *but see* Southwest Props., L.P. v. Lite-Dec, Inc., 989 S.W. 2d 69 (Tex.App—San Antonio 1998, writ denied).

Certain types of construction work which may be covered by the statutory lien are not covered by a constitutional lien. The constitutional lien is only valid for articles or buildings. Suppliers of materials such as refrigerators which are not "incorporated" into the project may not acquire a constitutional lien, even if they are ordered directly by the owner. Likewise, claims for landscaping or water lines which are not considered 'buildings' can only be perfected through a statutory claim. However, unlike the mechanic's lien provided under the Texas Property Code, the constitutional lien will attach to the articles, i.e. chattels, made or repaired by the mechanic, artisan or materialman.

Due to the limitations of the constitutional lien, claimants should not rely on it to protect their rights. A statutory lien should always be perfected in order to preserve claims. The constitutional lien is a remedy of last resort for the original contractor who fails to timely perfect the statutory lien.

IX.

RESIDENTIAL CONSTRUCTION PROJECTS

Subchapter K of the Texas Property Code addresses the additional requirements that exist to perfect a lien on a residential construction project. This section does not describe all of the requirements and you are encouraged to review Subchapter K in its entirety and consult with counsel before setting out to perfect a lien on a residential project.

"Residential construction project" is defined in the Texas Property Code as a "project for the construction or repair of a new or existing residence, including improvements appurtenant to the residence, as provided by a residential construction contract."[35] "Residence" means a "single-family house, duplex, triplex, or quadruplex or a unit in a multiunit structure used for residential purposes that is: (A) owned by one or more adult persons; and (B) **used or intended**

[35] TEX. PROP. CODE § 53.001(10).

to be used as a dwelling by one of the owners."[36] For instance, in *Texas Wood Mill Cabinets, Inc. v. Butter*, the court held that a "spec" house was not a residential construction project because the builder and the owner were the same, and there was no residential construction contract or intent by the owner to use the residence as a dwelling. 117 S.W.3d 98, 105 (Tex.App.—Tyler 2003, no pet.). For these reasons, houses built by commercial developers typically do not fit the definition of "residential construction" under the Texas Property Code, because the owner of the property at the time of commencement of construction is not a person who intends to occupy the property as a residence when it is completed.

- Shorter Deadlines to Send Notices and File Lien Affidavits.

  A. Original Contractors – Do not have to provide notice to the owner before filing a lien affidavit. They have until the 15th day of the **third** month after the original contract was terminated, completed, settled or abandoned for filing a lien affidavit.[37]

  B. Subcontractors and Supplies – have until the 15th day of the **second** month after each month in which they provided labor or materials to send a notice and they have until the 15th day of the third calendar month after the last month in which they provided labor or materials to file a lien affidavit.[38]

- Disclosure. When dealing with a residential project, the original contractor must deliver the "disclosure statement" required by Texas Property Code 53.255.

- List of Subcontractors and Suppliers. The original contractor must provide the owner with a list of the name, address and telephone number of each supplier the

[36] TEX. PROP. CODE § 53.001(8).

[37] TEX. PROP. CODE § 53.052(b).

[38] TEX. PROP. CODE § 53.252(b).

contractor intends to use in performance of the work.[39] The owner can waive this requirement as long as such waiver is in writing.

- Final Bills-Paid Affidavit. The original contractor shall provide the owner with an affidavit stating that the original contractor has paid for all labor and materials used in construction of the residence as a condition of final payment.[40]
- Homestead. Additionally, if the residence is a homestead, additional requirements are necessary. The original contractor must execute a written contract setting forth the terms of the agreement before the materials are provided or the labor is performed. The contract must be signed by both spouses if the owner is married and must be filed with the county clerk of the county in which the homestead is located. Furthermore, all lien notices and the lien affidavit must contain the specific notice language mandated by statute in order to be effective.[41] A lien on a homestead is valid only if the lien strictly complies with the Texas Constitution and the Texas Property Code.

X.

ARCHITECTS, LANDSCAPERS, AND DEMOLITION CLAIMANTS

ARCHITECT / ENGINEER LIENS

Section 53.021 states that an architect, engineer or surveyor who prepares a plan or plat under or by virtue of a written contract with the owner or the owner's agent, trustee, or receiver in connection with the actual or proposed design, construction, or repair of improvements on real property or the location of the boundaries of real property has a lien on the property. As long as

[39] TEX. PROP. CODE § 53.256.

[40] TEX. PROP. CODE § 53.259.

[41] TEX. PROP. CODE § 53.254; CVN Group, Inc. v. Delgado, 47 S.W. 3d 157 (Tex.App.—Austin 2001), *rev'd on other grounds*, 95 S.W. 3d 234 (Tex. 2002); Stewart v. Clark, 677 S.W.2d 246 (Tex. App.—Corpus Christi 1984, no writ).

the engineer/architect/surveyor has a written contract with the owner and has actually prepared the plan or plat, the engineer/architect/surveyor has the right to a lien regardless of whether construction on the property actually occurred. The notice requirements for an original contractor apply to an engineer, architect, and surveyor. Since they are considered to be original contractors for lien perfection purposes, they do not have to send a notice, but they do have to file a lien affidavit timely.

LANDSCAPER LIENS

Section 53.021 of the Property Code provides the following:

> (d) A person who provides labor, plant material, or other supplies for the installation of landscaping for a house, building, or improvement, including the construction of a retention pond, retaining wall, berm, irrigation system, fountain, or other similar installation, under or by virtue of a written contract with the owner or the owner's agent, contractor, subcontractor, trustee, or receiver has a lien on the property.

Prior to January 1, 2012, a person who provides the landscaping work and/or materials described above had lien rights as long as he had a written contract with the owner or the owner's agent, trustee, or receiver. However, after January 1, 2012, that requirement was deleted from the statute.

DEMOLITION WORK

Section 53.021 (e) states:

> "(e) A person who performs labor as part of, or who furnishes labor or materials for, the demolition of a structure on real property under or by virtue of a written contract with the owner of the property or the owner's agent, trustee, receiver, contractor, or subcontractor has a lien on the property."

In 2003, demolition contractors were added to the list of those given lien rights under the Property Code. Initially, this provision required that the demolition company have a contract directly with the owner. However, the current language allows demolition companies of all tiers to maintain lien rights.

XI.

HOW DO I GET THE INFORMATION I NEED TO FILE A STATUTORY LIEN AFFIDAVIT WITH THE PROPER CONTENT?

THE "REQUEST FOR INFORMATION"

Claimants should ask for the information they may eventually need when the project begins. Pursuant to § 53.159, a claimant should make a written request of the owner, original contractor and/or subcontractor, as applicable, for needed information.

A. Claimants can get the following information from an **owner** within 10 days after receipt of the request:

(a) A legal description of the property;

(b) Whether there is a surety bond and if so, the name and address of the surety and a copy of the bond;

(c) whether there are any prior recorded liens or security interests on the real property, and if so, the name and address of the person having the lien or security interests; and

(d) the date on which the original contract for the project was executed.

A subcontractor who does not receive "the date on which the original contract for the project was executed" from the owner within the time required, is not required to comply with Section 53.057 in perfecting its claim for retainage and may perfect a claim for retainage by filing a lien affidavit under Section 53.052.[42]

B. Claimants can get the following information from a **general contractor** within 10

[42] TEX. PROP. CODE § 53.158(g).

days after the receipt of the request:

(a) the name and last known address of the person to whom the original contractor furnished labor or materials for the construction project;

(b) whether the original contractor has furnished or has been furnished a payment bond for any of the work on the construction project and if so, the name and last known address of the surety and a copy of the bond; and

(c) the date on which the original contract for the project was executed.

C. Claimants can get the following information from a **subcontractor** within 10 days after the receipt of the request:

(a) the name and last known address of each person from whom the subcontractor purchased labor or materials for the construction project, other than those materials that were furnished to the project from the subcontractor's inventory;

(b) the name and last known address of each person to whom the subcontractor furnished labor or materials for the construction project; and

(c) whether the subcontractor has furnished or has been furnished a payment bond for any of the work on the construction project and if so, the name and last known address of the surety and a copy of the bond.

D. In addition, the owner, surety or general contractor can ask a **claimant** for:

(a) his contract or purchase order;

(b) any billing, statement or payment request that is unpaid; and

(c) the estimated amount due for each calendar month the claimant has provided labor or material.[43]

[43] TEX. PROP. CODE § 53.159(d).

If the person from whom the information is sought does not have a direct contractual relationship with the person requesting the information, the person supplying the information can require payment of actual costs up to $25.00.

XII.

CONTENTS OF THE LIEN AFFIDAVIT

Section 53.054 states that a lien affidavit must be signed by the person claiming the lien or by another person on the claimant's behalf and must contain substantially the following:

(i) A sworn statement of the amount of the claim;

(ii) The name and last known address of the owner or reputed owner;

(iii) A general statement of the kind of work done and materials furnished by the claimant and, for a claimant other than an original contractor, a statement of each month in which the work was done and materials furnished for which payment is requested;

(iv) The name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the materials or labor;

(v) The name and last known address of the original contractor;

(vi) A description, legally sufficient for identification, of the property sought to be charged with the lien;

(vii) The claimant's name, mailing address, and if different, physical address; and

(viii) For a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.

It is crucial that the affidavit meet the requirement of a sworn statement. The affidavit must state that it was "subscribed and sworn to", not just acknowledged,[44] and the affidavit must be sworn to before a notary.

The Property Code states that a claimant may attach to the affidavit a copy of any applicable written agreement or contract, as well as a copy of each notice sent to the owner.[45] However, this attachment is not required and many practitioners do not attach these documents to mechanic's lien affidavits due to the filing costs and for other reasons.

DESCRIPTION OF THE MATERIAL OR LABOR AND APPLICABLE MONTHS

Section 53.054(c) states that the affidavit is not required to set forth individual items of work done or material furnished or specially fabricated.[46] An affidavit may use any abbreviations or symbols customary in the trade. However, Texas courts have held that the statute contemplates a description which is meaningful and intelligible, and meets the substantial compliance test.[47] In the labor context, the court in *In re: Orah Wall Fin. Corp.*, 84 B.R. 448, 444 (Bankr. W.D. Tex. 1986) found "[i]t is difficult to see what elaboration of 'General Contractor Responsibilities' is necessary in order to meet the statutory requirement of a 'general statement.' A general contractor is a general contractor is a general contractor." Conversely, in one specific case, the description of labor and materials furnished by the claimant as "5-12'2" x 14'1" O.H. St.d M.G. $3,328.00" was held to be insufficient and "gibberish" and the lien was

[44] TEX. PROP. CODE § 53.054 ; *see also* Sugarland Bus. Ctr., Ltd. v. Norman, 624 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist] 1981, no writ) ("It is well established under the Texas law that a subcontractor must file an affidavit containing a "sworn statement" of his claim as an essential part of perfecting a Mechanic's Lien against the landowner."); *accord* Perkins Construction Co. v. Ten-Fifteen Corp., 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ); Crockett v. Sampson, 439 S.W.2d 355 (Tex. Civ. App.—Austin 1969, no writ).

[45] TEX. PROP. CODE § 53.054(b).

[46] TEX. PROP. CODE § 53.054(c).

[47] James Mechanical Contractors, Inc. v. Tate, 647 S.W.2d 347, 349 (Tex. App.—Corpus Christi 1982, no writ); Haden Co., Inc. v. Mixers, Inc., 667 S.W.2d 316, 318 (Tex. App.—Dallas 1984, no writ).

held invalid.[48] In other words, the more specific and "understandable" the description, the less risk a claimant takes in a court finding that the lien is insufficient. One way for the claimant to meet these requirements is to attach dated, descriptive invoices to the lien affidavit setting forth the individual items of work done or material furnished. Invoices are strongly encouraged because they assist in clarifying the claimant's lien. Although abbreviations or symbols customary in the trade may be used, the best practice is to indicate plainly and clearly (with complete words) the services or materials provided.[49]

The failure to include a statement of each month in which the work was done and the materials was furnished, as required by § 53.054(a)(3), has been held to be grounds for finding that the lien is not perfected.[50] The failure of a derivative claimant to provide the months for their work will not meet the substantial compliance standard.[51]

DESCRIPTION OF THE PROPERTY

While the courts have reiterated that there is no clear and fast rule as to what constitutes a legally sufficient description of property for purposes of the Mechanic's Lien Statute, the Texas Supreme Court has held that there must "appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others."[52] In fact, Texas courts have continually cited the holding that:

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[48] *Haden Co.*, 667 S.W.2d at 317-18.

[49] TEX. PROP. CODE § 53.054(c); In re Orah Wall Financial Corp., 84 B.R. 442 (Bankr. W.D. Tex. 1986).

[50] Milner v. Balcke-Durr, Inc., 03-05-00547-CV, 2006 WL 2190516, at *1 (Tex. App.—Austin Aug. 4, 2006, no pet.).

[51] *Id.* (citing First Nat'l Bank v. Sledge, 653 S.W.2d 283, 285 (Tex. 1983); *see* LTF Real Estate Co., Inc. v. D & D Util. Supply, LLC, 01-11-00244-CV, 2013 WL 1183300, at *10 (Tex. App.—Houston [1st Dist.] Mar. 21, 2013, no pet.) (citing *Milner*, 2006 WL 2190516, at *3); *see also* Addison Urban Dev. Partners, LLC v. Alan Ritchey Materials Co., LC, 437 S.W.3d 597, 606 (Tex.App.—Dallas 2014, no pet.) (citing TEX. PROP. CODE § 53.054).

[52] Scholes & Goodall v. Hughes & Boswell, 14 S.W. 148, 149 (Tex. Ct. App. 1890).

> The descriptive words in an instrument should be given a liberal construction, in order that the writing may be upheld, and parol evidence is admitted to explain the descriptive words and to identify the land; but the instrument itself must contain a nucleus of description. The parol testimony must directly be connected with the descriptive data, and when more than this is required, the description is insufficient.[53]

Applying the general rule, however, can be problematic. For example, describing property only by quantity and as part of a larger tract is generally void for uncertainty.[54] Yet, adding additional information to the description through the introduction of evidence which makes the property identifiable by someone familiar with the area may be sufficient. In describing the particular property charged with the lien, a claimant should use a legal description and not merely a street address; however, in *AMS Constr. Co. v. Warm Springs Rehab. Found. Inc.*, 94 S.W.3d 152 (Tex. App.—Corpus Christi 2002, no writ), a street address listing the name of the owner but the wrong county, was held to be sufficient under the "substantial compliance" standard. The affidavit was, however, filed in the right county. The best practice is to use either a lot, block, and subdivision description, or a meter-and-bounds description from a surveyor's field notes if the lot-and-block description is not available. Failing to provide the identifiable legal description and omitting the name or reputed name of the owner resulted in a void lien in *Perkins Constr. Co. v. Ten-Fifteen Corp.*, 545 S.W.2d 494 (Tex.App.—San Antonio 1976, no writ).

In *Blanco, Inc. v. Porras*, 897 F.2d 788 (5th Cir. 1990), the court found that a mechanic's lien affidavit need not contain a metes-and-bounds survey of the property in order to be valid. Instead, a land description was deemed legally sufficient within the meaning of Texas Property Code § 53.054(a)(6) if it contains a "nucleus of information" that would enable a party familiar with the locality to identify with reasonable certainty the premises intended to be described. The

[53] Smith v. Sorrelle, 87 S.W.2d 703, 705 (Tex. 1935).

[54] Perkins Constr. Co. v. Ten-Fifteen Corp., 545 S.W. 2d 494, 501 (Tex. Civ. App.—San Antonio, 1976, no writ).

court held that a lien affidavit was sufficient that described 1500 acres as those on which the corporation asserting the lien performed "clearing, leveling and dirt work." The court further observed "that witnesses familiar with the property testified that it was possible to identify those acres given the fact that the unimproved land was densely forested and covered with deep ravines and gullies prior to the "dirt work."

Descriptions of rural routes and box numbers in the absence of appropriate evidence can be insufficient. Claimants should always endeavor to use metes and bounds or lot, block and subdivision descriptions whenever possible. The description should always include the city, county and state as well.

Claimants should obtain a legal description and determine the identity of the true owner. For a quick look before you send your notice, visit the website for the County Appraisal District, then conduct a street address "search" to see who owns the property, and obtain the legal description. Generally the "Owner" information is correct at the County Appraisal District web-site but their legal descriptions can be questionable. Since the appraisal districts are not the final word, you must search the Real Property Deed Records maintained by the County Clerk before you send the notice, or file an affidavit, you should "run title" to get the correct owner and legal description. If you fail to send the lien notices to the true owner, you will not have an enforceable lien.[55]

AMOUNT OF THE LIEN

When money is owed to a contractor, subcontractor, or material supplier, Chapter 53 authorizes the claimant to file a lien. When the claimant has fully performed its contractual obligations without compensation, the claimant is entitled to file a lien up to the full amount of

[55] Texas courts have held that giving the § 53.056 notice to the owner "is a condition precedent to the validity of a lien claimed by a subcontractor." *See, e.g.*, Yeager Elec. & Plumbing, Inc. v. Ingleside Cove Lumber & Builders, Inc., 526 S.W.2d 738, 741-42 (Tex. App.—Corpus Christi 1975, no writ) (involving predecessor statute).

the money owed under the contract, plus any charges for extra work performed.[56] Sales tax on items which have been incurred in the process of completing the project may also be included in the lien amount.[57] However, attorneys' fees and prejudgment interest may not be included as part of the lien.[58] However, attorney's fees that are "fair and just" may be awarded to the prevailing party in an action to foreclose a lien.[59] Furthermore, any items which are returned or repossessed by the claimant may not be included in the lien.[60]

LIMITATION ON SUBCONTRACTOR'S LIEN

The amount of a subcontractor's lien may not exceed:

(a) An amount equal to the proportion of the total subcontract price that the sum of the labor performed, materials furnished, materials specially fabricated, reasonable overhead costs incurred, and proportionate profit margin bears to the total subcontract price; minus

(b) The sum of previous payments received by the claimant on the subcontract.[61]

[56] Graves v. Hallmark, 232 S.W.2d 130, 133 (Tex.Civ.App.—Amarillo 1950, writ ref'd n.r.e.).

[57] First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262, 27d (Tex. 1974).

[58] Dossman v. Nat'l Loan Investors, L.P., 845 S.W.2d 386-87 (Tex. App.—Houston [1st. Dist] 1992, writ denied); Ambassador Dev. Corp. v. Valdez, 791 S.W.2d 612, 622-24 (Tex.App.—Fort Worth 1990, no writ).

[59] TEX. PROP. CODE §53.156.

[60] Murphy v. Fleetford, 70 S.W. 989, 990 (Tex. Civ. App. 1902, no writ).

[61] TEX. PROP. CODE § 53.024.

XIII.

COMMONLY ENCOUNTERED LIEN ISSUES

Penalty for Filing a Fraudulent Lien

Chapter 12 of the Texas Civil Practice and Remedies Code, known as the Fraudulent Lien Statute, gives an owner a cause of action and imposes liability on one who records a fraudulent lien. However, the statute limits the circumstances when one can be liable for filing a fraudulent lien to those cases when the person filing the lien does so with "the intent to defraud."[62] The Houston [1st Dist.] Court of Appeals held that unless a claimant provides evidence of every compenent of the statutory formula provided in Texas Property Code § 53.024, the evidence is legally insufficient to support a finding of a fraudulent lien.[63] The liability imposed for filing a fraudulent lien with the intent to defraud is the greater of $10,000.00 or the actual damages caused by the violation plus court costs, reasonable attorneys' fees and exemplary damages as awarded by the court.[64]

Liens for Temporary Labor

Reliance Nat'l Indemnity Co. v. Advanc'd Temporaries, Inc.[65] – The Texas Supreme Court held that temporary employment agencies can lien a project for the labor they furnish to the project.

Deadlines Are Strictly Enforced

Suretec Ins. Co. v. Myrex Industries[66] – The Beaumont Court of Appeals held that the requirement set forth in the Texas Property Code Section 53.154, requiring a lien to be filed not

[62] TEX. CIV. PRAC. & REM. CODE § 12.002(c).

[63] Lyon v. Bldg. Galveston, Inc., 01-15-00664-CV, 2017 WL 4545831, at *6 (Tex. App.—Houston [1st Dist.] Oct. 12, 2017, no pet.).

[64] TEX. CIV. PRAC. & REM. CODE § 12.001 *et al.*

[65] 227 S.W.3d 46 (Tex. 2007).

[66] 232 S.W.3d 811 (Tex.App.—Beaumont 2007, pet. denied).

later than the 15th day of the fourth calendar month after the indebtedness accrues, meant that the lien must be filed on or before the 15th, regardless of whether the 15th was a Saturday, Sunday or legal holiday.

Checks Are Not Payment

In *Honeycutt*, a nonpayment issue arose on a project involving the owner, general contractor, and a subcontractor. The subcontractor sent the appropriate fund-trapping notice to the owner regarding the amounts owed to it by the general contractor. The general contractor issued a post-dated check to the subcontractor in exchange for a mutual release. At the same meeting, the owner issued a check (presumably not post-dated) to the general contractor. The check from the general contractor to the subcontractor was subsequently returned NSF, so the subcontractor then filed a lien and sued the owner to recover the amount owed.

The subcontractor argued the mutual release failed for lack of consideration, and therefore the subcontractor should be able to pursue the owner for, among other things, paying over a trap notice. The court cited the applicable statutory language when it stated "…the ability to 'trap' funds is extinguished if the 'claim is otherwise paid or settled.'"[67] The court held that the acceptance of a post-dated check in exchange for a mutual release operates as payment and settlement, and therefore the subcontractor had no claim regarding trapped funds.[68]

Claimants should take care to not execute a release in exchange for a check, as a check is a negotiable instrument. Since 2012, some of this issue has been solved by the statutorily prescribed forms, where conditional releases are exchanged for checks and unconditional releases are subsequently executed after the checks clear and collected funds are confirmed. However, in practice, many upstream parties attempt to have potential claimants sign the *unconditional* form of release in exchange for a check. Claimants should insist on using the

[67] TEX. PROP. CODE §§ 53.056(d), 53.082.

[68] *See* Stolz v. Honeycutt, 42 S.W.3d 305, 313 (Tex.App.—Houston [14th Dist.] 2001, no pet.).

conditional release forms until the actual funds are in their possession.

Substantial Compliance with the Substance of Notices

Mustang Tractor & Equipment Co. v. Hartford Accident & Indemnity Co. – The Austin Court of Appeals held that a subcontractor's failure to include a statement identifying the date each notice of claim was sent to the owner and the method by which the notice was sent in a lien affidavit, as required by Texas Property Code Section 53.054, was not fatal to the subcontractor's claim in light of the fact that the subcontractor "substantially complied" with the statutory requirements.[69]

XIV.

JUDICIAL FORECLOSURE

In order to enforce a perfected mechanic's and materialman's lien against a private construction project in Texas, a lawsuit must be filed seeking the foreclosure of the lien. A mechanic's lien can only be foreclosed on the judgment of a court of competent jurisdiction.[70] Upon showing that a lienholder has a valid debt and perfected mechanic's lien, the court is required to enter a judgment of foreclosure and order the sale of the property subject to that lien.[71]

Jurisdiction

Basically, Texas has three types of Courts that hear and determine lawsuits filed by individuals other than small claims. These three types of Courts are district courts, statutory county courts at law, and constitutional county courts. The jurisdiction of the various courts in the State of Texas is determined by the amount in controversy and the subject matter involved.

[69] 263 S.W.3d 437 (Tex.App.—Austin 2008, pet. denied).

[70] TEX. PROP. CODE § 53.154.

[71] Crawford Servs., Inc. v. Skillman Intern. Firm, LLC, 444 S.W.3d 265 (Tex. App.—Dallas 2014, pet. dism'd).

Article 5, Section 8 of the Constitution of the State of Texas grants to the district courts of this state exclusive, original, and appellate jurisdiction of all actions except those where the original, exclusive or appellate jurisdiction has been conferred by the legislature on another court. The legislature of the State of Texas, pursuant to Texas Government Code Section 25, Subchapter C, grants to certain statutory county civil courts at law (specifically, Harris, Dallas, El Paso, and Tarrant Counties) concurrent jurisdiction with the district courts on suits for the enforcement of liens on real property.[72] On the other hand, the legislature, pursuant to Texas Government Code § 26.043, prohibits constitutional county civil court from having jurisdiction in suits involving, among other things, suits for the enforcement of a lien on land. In summary, a suit to foreclose a lien on real property may be filed in district court in all counties. In addition, suits to foreclose liens on real property in Harris,[73] Tarrant, El Paso, and Dallas counties may be filed in that county's statutory county courts at law. Lastly, suits to foreclose a lien on real property may not be filed in constitutional county courts.

Venue

Every county in the State of Texas has a statutory county court and a district court. Some of the smaller counties share district courts. Once a determination is made as to which court has jurisdiction of the suit to foreclose a mechanic's and materialman's lien, a determination must then be made regarding in which county the suit must be brought. There is no mandatory venue provision governing where a suit to foreclose on a lien must be brought. Section 53.154 of the Texas Property Code only requires that the suit be heard by a "court of competent jurisdiction." However, Section 53.157 of the Texas Property Code provides that a mechanic's lien may be

[72] The county courts at law which have this concurrent jurisdiction include: Harris County (25.1032 (c)(3)- specifically enumerated lien claim jurisdiction), Tarrant County (25.2222 (b)(7)- specifically enumerated lien claim jurisdiction), Dallas County (25.0592 (a) concurrent jurisdiction with the district court regardless of amount in controversy), and El Paso County (25.0732 (a) jurisdiction provided by the constitution and by general law for district courts).

[73] The amount in controversy must exceed $500 and be less than $100,000 for the suit to be filed in Harris County.

extinguished by "failing to institute suit to foreclose the lien **in the county in which the property is** located . . . ." Therefore, Chapter 53 appears to require a claimant to file suit to foreclose a lien in the county where the project is located. While there is no case that decides the issue definitively, the best practice is to file suit in the county where the project is located.

Limitations To File Suit

Under the Texas Property Code there are two different time limitations by which a Claimant must file suit to foreclose a mechanic's and materialman's lien. On non-residential construction projects, a claimant must file suit to foreclose the lien **within two years after the last day the claimant could have filed the lien affidavit** under Texas Property Code §53.052 or **within one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed, whichever is later**.

A suit to foreclose a lien against residential property must be brought **within one year after the last day the claimant could have filed a lien affidavit** under Texas Property Code §53.052 or **within one year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed, whichever is later**. Any suit to foreclose a lien not brought within the applicable time period(s) discussed above will be barred. The limitation periods will not affect the applicable limitation periods for other causes of action that a claimant may possess.

Parties

Pursuant to Rule 39 of the Texas Rules of Civil Procedure, a person or entity must be made a party to a lawsuit if:

(a) in his absence complete relief cannot be granted; or

(b) he claims an interest related to the subject matter of the suit and is so situated that the disposition of the suit in his absence would impair or impede his ability to protect that interest or leave any of the parties to the suit in substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the claimed

interest.

The Constitution of the United States prohibits the taking of property without due process of law. Since the entry of a judgment foreclosing a mechanic's and materialman's lien and ordering the sale of the property can result in the owner of the property being divested of his property, the owner of the property at the time the suit is filed is a necessary party to any lawsuit to foreclose a mechanic's and materialman's lien. If the property that is the subject of the mechanic's and materialman's lien has been sold subject to the accrual of the indebtedness giving rise to the lien, the former owner of the property is not a necessary party to the suit to foreclose the lien.[74] The holder of a lien, encumbrance, or mortgage that has priority over the mechanic's and materialman's lien is not a necessary party to a suit to foreclose the lien (Texas Property Code Sec. 53.123).

XV.

PROPERTY SUBJECT TO THE LIEN

A statutory lien extends to the house, building, fixture, or improvements, the land reclaimed from overflow, or improvements, or the railroad and all of its properties, and to each lot of land necessarily connected or reclaimed.[75] The Texas Property Code defines the term "improvement" as "includ[ing]: abutting sidewalks and streets and utilities in or on those sidewalks and streets; clearing, grubbing, draining, or fencing of land; wells, cisterns, tanks, reservoirs, or artificial lakes or pools made for supplying or storing water; pumps, siphons, and windmills or other machinery or apparatuses used for raising water for stock, domestic use, or irrigation; and planting orchard trees, grubbing out orchards and replacing trees, and pruning of

[74] *See* Matthews v. First State Bank, 312 S.W.2d 571 (Tex. Civ. App.—Texarkana 1961, writ ref'd n.r.e.).

[75] *See* TEX. PROP. CODE § 53.022(a); *see also* Moore v. Brenham Ready Mix, Inc., 463 S.W.3d 109, 118 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

orchard trees."[76] A perfected mechanic's and materialman's lien extends to all improvements without regard to who placed them there.[77] The lien does not extend to abutting sidewalks, streets, and utilities that are public property.[78]

Pursuant to the Texas Property Code, fixtures are also specifically made subject to a materialman and mechanic's lien.[79] Texas courts have adopted the following test for determining whether materials have become fixtures for mechanic's lien purposes: if the materials or items are annexed to, and essential for the use of the property, and removal would damage the underlying property and its value, then the materials are fixtures and subject to the statutory mechanic's lien.[80] In deciding the answer, the intent of the parties is examined.[81]

A lien against land in a city, town or village extends to each lot on which the house, building, or improvement is situated or on which the labor was performned.[82] A lien against land not in a city, town or village extends to not more than 50 acres on which the house, building, or improvement is situated or on which the labor was performed.[83] The Property Code does not define the term "lot," but the Texas Supreme Court has stated that the term "lot" "usually refers to a parcel of land as marked on a plat or survey."[84]

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[76] *See* TEX. PROP. CODE § 53.001(2).

[77] Richard H. Sikes, Inc. v. L & N Consultants, Inc., 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

[78] TEX. PROP. CODE § 53.022(b).

[79] TEX. PROP. CODE § 53.022(a).

[80] *See* First Nat'l Bank in Dallas v. Whirlpool Corp., 517 S.W.2d 262, 266 (Tex. 1974) (holding that refrigerators and ranges, which were not built into or in any other manner affixed or incorporated in the construction of the apartment building, fall in the same category as floor lamps, irons, television sets and other chattels which are connected by cords and plugs into an electrical outlet).

[81] *See* Campbell v. Teeple, 273 S.W. 304, 307 (Tex. Civ. App.—San Antonio 1925, no writ).

[82] *See* TEX. PROP. CODE § 53.022(c).

[83] TEX. PROP. CODE § 53.022(d).

[84] Valdez v. Diamond Shamrock Ref & Mktg. Co., 842 S.W.2d 273, 275 (Tex. 1992).

But what happens when a lien attaches to undivided property and is subsequently sold to individual lot owners? When (1) improvements are made to an undivided parcel of land, (2) the mechanic or materialman has properly perfected its lien against the whole, and (3) the land is parceled off to individual lot owners, then the lien can only be enforced against each lot owner based on the portion of the property purchased by that individual lot owner.[85] In other words, each individual lot owner is only liable for its pro rata share of the total value of the lien.

XVI.

PRIORITIES

The perfection of a mechanic's and materialman's lien does not guarantee a claimant payment. Instead, it improves the claimant's chances of payment and gives him a right to a share of any funds available or that should be available to pay mechanic's and materialman's lien claimants. The priority of the various types of claims determines what funds, if any, should be, or are available to pay claims and also the amount of any judgment the claimant is entitled to receive in a suit brought to foreclose his mechanic's and materialman's lien.

Inception of Lien

Pursuant to Texas Property Code Sec. 53.124, the time of inception of a mechanic's and materialman's lien for a claimant other than an architect, engineer, surveyor, or landscaper is the earlier of: 1) the commencement of visible construction of the improvements on the land on which the improvements are to be located, or 2) the first delivery of materials to be used in the construction of the improvements to the land on which the improvements are to be located, or 3) the recording of an affidavit of commencement pursuant to Texas Property Code Sec. 53.124(c). In order for the commencement of construction to be sufficient to constitute the inception of the lien, it must be conducted on the land to be improved itself, be visible on that land, and constitute

[85] Moore v. Brenham Ready Mix, Inc., 463 S.W.3d 109, 118 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

either an activity defined as an "improvement" under Texas Property Code Sec. 53.001 or excavation for or laying of the foundation or structure of the building.[86] The clearing of the construction site is not sufficient to constitute commencement of construction for inception purposes.[87] In order to constitute inception of the lien, the materials delivered to the improvement site must be materials that will be used during the construction or incorporated into the permanent structure.[88] The recording of an affidavit of completion that is in compliance with Texas Property Code Sec. 53.124(c) is prima facia evidence of the date of commencement.

The time of inception of a mechanic's and materialman's lien claimed by an architect, engineer, surveyor, or landscaper, as those persons are defined in Texas Property Code § 53.021(c) and (d), is the date of the recording of the affidavit of lien under Texas Property Code § 53.052.[89]

Relation Back Doctrine

This doctrine comes into play in situations where a receiver, mortgagee or other lien claimant attempts to hold his lien or claim superior to that of the mechanic's and materialman's lien claimant. It determines the priority of liens that may be filed. Pursuant to this doctrine, all mechanic's and materialman's liens relate back to their time of inception regardless of when the affidavit claiming the lien was actually recorded or when the work resulting in the lien claim was performed, except for, as described above, architect's, engineer's, surveyor's, and landscaper's liens, where the time of inception for their liens is decided by the date the lien affidavit is

[86] *See* Diversified Mortg. Inv'rs v. Lloyd D. Blalock General Contractor, Inc., 576 S.W.2d 794 (Tex. 1978).

[87] *See* Perkins Const. Co. v. Ten-Fifteen Corp., 545 S.W. 2d 494 (Tex. Civ. App.—San Antonio 1976, no writ).

[88] *See Diversified Mortg. Investors*, 576 S.W.2d at 794.

[89] *See* TEX. PROP. CODE § 53.124(e). Section 53.021(d) of the Texas Property Code, creates lien rights for:

> A person who provides labor, plant material, or other supplies for the installation of landscaping for a house, building, or improvement, including the construction of a retention pond, retaining wall, berm, irrigation system, fountain, or other similar installation, under or by virtue of a written contract with the owner or the owner's agent, contractor, subcontractor, trustee, or receiver has a lien on the property.

actually recorded. The relation back doctrine, along with Texas Property Code §§ 53.122 and 53.124, place all mechanic's and materialman's liens, with the exception of architect's, engineer's, surveyor's, and landscaper's liens, on an equal footing, regardless of when the affidavit claiming the lien was actually recorded or when the work resulting in the lien claim was performed. The priority of a lien claimed by an architect, engineer, surveyor, or landscaper is determined by the date of recording.[90] Texas Property Code § 53.123 provides that all mechanic's and materialman's lien claims have priority over any lien, mortgage or encumbrance recorded or arising after the date of inception of the mechanic's and materialman's lien.

Priorities

Except for liens claimed by architects, engineers, surveyors, and landscapers, all perfected mechanic's and materialman's liens are on equal footing regardless of the date of the filing of the affidavit claiming the lien. Texas Property Code Sec. 53.122 does not create a "race to the courthouse" situation. As such, a properly recorded affidavit claiming a mechanic's and materialman's lien that is recorded in April is treated equally to one properly recorded in June. If the proceeds of a foreclosure sale of property are insufficient to discharge all properly perfected mechanic's and materialman's liens in full, the various liens share pro rata in the proceeds.[91]

Preferences

Individual artisans and mechanics are entitled to a preference to statutory retainage.[92] A mechanic is generally defined as those that perform manual labor, while an artisan is generally defined as an individual skilled in a trade requiring manual dexterity (Black's Law Dictionary). After payment of the individual artisans and mechanics, other perfected lien claimants share proportionally in the balance of the retained funds. These individual artisans and mechanics,

[90] TEX. PROP. CODE §§ 53.021(d), 53.124(e).

[91] TEX. PROP. CODE § 53.122(b).

[92] TEX. PROP. CODE § 53.104.

however, share equally with other lien claimants in available trapped funds.

XVII.

REMOVABLES

Perfected mechanic's and materialman's liens are granted a preference over all other liens on improvements that can be removed without material injury to the land, pre-existing improvements, or improvements to be removed from the structure. This preference even extends to deeds of trust filed prior to the inception of the mechanic's lien.[93] The courts, however, have held that a claimant cannot remove a removable unless it can be proven that the claimant furnished the removable that it seeks to remove, (i.e., unless it can identify its materials).[94] Thus, a lumber supplier cannot remove the air handling unit because the lumber supplier did not provide them. The original contractor, however, is entitled to remove all removables provided by it and its subcontractors and suppliers since the entirety of the construction was provided pursuant to his contract with the owner.[95] A lien as to such removables can only be foreclosed by the order of a court with competent jurisdiction. The claimant is not entitled to self-help repossession in regard to these items.

Whether or not a particular item constitutes a "removable" is a question of fact for a jury to decide and will be decided on a case by case basis. The following questions must be asked to determine removablity. Will the removal cause: (1) material damage to the land; (2) material damage to an improvement that was already in existence at the time the improvement in question was installed or affixed; (3) material detriment or material injury to the building or lot; or (4) material injury to the improvement itself? The following is a list of some of the items that the

[93] TEX. PROP. CODE § 53.122; First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262 (Tex. 1974).

[94] *See* Kaspar v. Cockrell-Riggens Lighting Co., 511 S.W.2d 109 (Tex. Civ. App.—Eastland 1974, no writ); Suburban Homes Lumber Co. v. Lomas & Nettleton Fin. Corp., 609 F.2d 1387 (5th Cir. 1980).

[95] *See* L & N Consultants, Inc. v. Sikes, Inc., 648 S.W.2d 368 (Tex. Civ. App.—Dallas 1983, writ ref'd n. r. e.).

courts have, in the past, held to be removables:

1. Garbage disposals and dishwashers. *See* ***First Nat. Bank in Dallas v. Whirlpool***, 517 S.W.2d 262 (Tex. 1974);

2. Air conditioning and heating system equipment such as furnaces, air conditioning coil, compressor, thermostat, and condensing unit. *See* ***Houck Air Conditioning, Inc. v. Mortgage & Trust, Inc.***, 517 S.W.2d 593, (Tex. Civ. App.—Waco 1974, reh'g denied);

3. Windows and doors that can be removed by temporarily taking out surrounding brick without causing ultimate damage to a residence. *See* ***First Continental Real Estate Investment Trust v. Continental Steel Co.***, 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ);

4. Lighting fixtures, cabinets, chimes, buttons, mail boxes and lamps. *See* ***Kaspar v. Cockrell-Riggens Lighting Company***, 511 S.W.2d 109 (Tex. Civ. App.—Eastland 1974, no writ);

5. Picture screen, ticket booth, neon sign, and speaker pools at drive-in movie. *See* ***Freed v. Rozman***, 304 S.W.2d 235 (Tex. Civ. App.—Texarkana 1951, writ ref'd n.r.e.);

6. Pumps fastened to beds of concrete. *See* ***Mogul Prod. & Refining Co. v. Southern Engine & Pump Co.***, 244 S.W. 212 (Tex. Civ. App.—Beaumont 1922, no writ);

7. Carpets, appliances, air conditioning and heating components, smoke detectors, burglar alarms, light fixtures, and door locks. *See* ***Richard H. Sikes Inc. v. L & N Consultants Inc.,*** 586 S.W.2d 950 (Tex.Civ.App.—Waco 1979, writ ref'd n.r.e.);

8. Mirrors. *See* ***Occidental Nebraska FSB v. East End Glass Co.***, 773 S.W.2d 687 (Tex.App.—San Antonio 1989, no writ);

9. Pumps, compressors, fans for air conditioning and heat systems, toilets, basins, doors, windows, light fixtures, wall switches, electrical control panels, building hardware, and cabinets. *See* ***In re Orah Wall Finan. Corp.***, 84 B.R. 442 (Bankr. W.D. Tex. 1986);

10. Highway billboard signs. *See* ***Hoarel Sign Co. v. Dominiom Equity Corp.***, 910 S.W.2d 140 (Tex.App.—Amarillo 1995, writ denied);

11. Light fixtures, gears, electrical panels, lamps, wire, electrical wire. *See* ***In re Demay Inter., LLC,*** 431 B.R. 164 (Bankr. S.D. Tex. 2010);

12. Chiller to provide air conditioning. *See* ***RDI Mechanical, Inc. v. WPVA, L.P.,*** 2008 WL 920315 (Tex.App.—Houston [1st Dist.] 2008);

13. Air conditioning compressors, acoustic tiles and ceiling grid, air handling units, distribution air grills, doors, elevator equipment and cab, electric circuit breaker panels. *See* ***Cornerstone Bank. N.a. v. J. N. Kent Constr. Co.,*** 1992 WL 86591 (Tex.App.—Dallas 1992); and

14. Mirrors. *See* ***Occidental Nebraska Fed.Sav. Bank v. East End Glass co.,*** 773 S.W. 2d 687 (Tex.App.—San Antonio 1989).

The following is a list of some of the items that the courts have, in the past, held to be non-removable:

1. Concrete roof tiles. See Exchange Sav. & Loan Assn. v. Mononcret Party Ltd., 629 S.W.2d 34 (Tex. 1982);

2. Window frames. *See* ***McCallen v. Mogul Prod. & Refining Co.***, 257 S.W. 918 (Tex. Civ. App.—Galveston 1923, no writ);

3. Certain types of cabinets. *See* ***Houck Air Conditioning, Inc. v. Mortgage & Trust Inc.***, 517 S.W.2d 593 (Tex. Civ. App.—Waco 1974, rehearing denied);

4. Plastering and painting. *See* ***R.B. Spencer & Co. v. Brown***, 198 S.W. 1179 (Tex. Civ. App.—El Paso 1917, writ ref'd);

5. Lumber used in construction of a house. *See* ***Cameron County Lumber Co. v. Al & Lloyd Parker Inc.***, 122 Tex. 487, 62 S.W.2d 63 (1933);

6. Bricks utilized in the construction of a fireplace and chimney. *See* ***Chamberlain v. Dollar Sav. Bank***, 451 S.W.2d 518 (Tex. Civ. App.—Amarillo 1970, no writ);

7. Roofing tiles. *See* ***Exchange Sav. & Loan Ass'n v. Monocrete Property Ltd.***, 629 S.W.2d 34 (Tex. 1982);

8. A shell home. *See* ***Irving Lumber Co. v. Alltex Mortgage Co.***, 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971);

9. Duct work for air conditioning and heating systems, copper plumbing, piping, sheet rock, electrical wiring and conduit, electromagnetic insulation, glass brick interior wall, and suspended ceiling. *See* ***In re Orah Finan. Corp.***, 84 B.R. 442 (Bankr. W.D. Tex. 1986);

10. Lumber, nails, roofing, hardware, reinforcing mesh, rebar steel. *See* ***In re Jamail,*** 609 F. 2d 1387 (5th Cir. 1980); and

11. Exterior glass, including gasket material and aluminum framing. *See* ***Cornerstone Bank. N.a. v. J. N. Kent Constr. Co.,*** 1992 WL 86591 (Tex.App.—Dallas 1992).

In determining whether an item is removable, the court will look to the manner of its attachment to the land or existing improvements, the extent to which the removal of the item would require repairs, modifications, or protection of the land or existing improvements, the status of the construction at the time the removal is sought, and the function of the improvements sought to be removed.[96]

XVIII.

[96] *See* Exchange Sav. & Loan Assn., 629 S.W.2d 34 (Tex. 1982).

LEASED PROPERTY – LIENS AGAINST A LEASEHOLD

The extent of a leasehold interest and thus, the leasehold improvements, is determined by the terms of the lease agreement itself. A ground lease is an agreement pursuant to which a land owner leases his land to a tenant who, in turn, constructs a building upon the property. In that situation, the leasehold improvements would consist of the construction performed by the tenant such as the building constructed, underground utilities constructed by the tenant, parking lots, landscaping, etc. The leasehold interest of a tenant in an existing structure such as a shopping center is far less inclusive. The improvements would still consist of the construction performed by the tenant, but would not include the structure since it most likely was already in place. Leasehold improvements in an existing structure could, depending upon the terms of the lease, include HVAC equipment, interior walls, lighting, doors, floor and wall coverings, cabinets, and built-ins. A claimant can perfect a mechanic's and materialman's lien against leasehold improvements. The rights of a contractor or materialman can be no greater than those of the person with whom he has contracted. As such, contracts with a lessee of real property cannot give any rights against the lessor or his title to the realty.[97] A contractor, subcontractor or supplier that supplies labor and/or materials for the construction of leasehold improvements can perfect a mechanic's and materialman's lien against the leasehold interest, but the lien affidavit must specify that the lien is limited to that interest.[98] The mechanic's and materialman's lien attaches to any interest in the real estate and fixtures held by or that later come into the hands of the person that contracted for the improvements.[99] The mechanic's and materialman's lien

[97] *See* Schneider v. Delwood Ctr., 394 S.W.2d 671 (Tex. Civ. App.—Austin 1965, reh'g denied); Grube v. Nick's No. *2*, 278 S.W.2d 252 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.).

[98] Denco CS Corp. v. Body Bar, LLC, 445 S.W.3d 863 (Tex. App.—Texarkana 2014, no pet.); *see* Ogburn Gravel Co. v. Watson Co., 190 S.W. 205 (Tex. Civ. App.—Dallas 1916), *aff'd*, 110 Tex. 161, 217 S.W. 373 (Tex. 1919).

[99] *See* Diversified Mortgage Inv'rs v. Blalock, 576 S.W.2d 794 (Tex. 1978).

attaches to fixtures which the tenant is entitled to remove as well as those affixed to the property.[100] Many leases contain a reversionary interest provision. This is a provision that provides that the tenant, upon termination of the lease, shall surrender the premises and all improvements thereon to the landlord. Lease agreements also frequently provide that all improvements constructed become the property of the landlord when constructed or become the landlord's property upon the termination of the lease. The inclusion of a reversionary interest provision in a lease agreement can defeat a mechanic's and materialman's lien. A tenant's contractors and materialmen have no lien against the leasehold improvements, even if the improvements are removable, if the lease contains a reversionary claim and if the lease is terminated prior to the foreclosure of the mechanic's and materialman's lien.[101]

XIX.

SUMMARY MOTION TO REMOVE A LIEN

In 1997, the Texas Legislature created a procedure to remove invalid liens.

§ 53.160. Summary Motion to Remove Invalid or Unenforceable Lien

(a) In a suit brought to foreclose a lien or to declare a claim or lien invalid or unenforceable, a party objecting to the validity or enforceability of the claim or lien may file a motion to remove the claim or lien. The motion must be verified and state the legal and factual basis for objecting to the validity or enforceability of the claim or lien. The motion may be accompanied by supporting affidavits.

(b) The grounds for objecting to the validity or enforceability of the claim or lien for the purposes of the motion are limited to the following:

[100] *See* Summerfield v. King, 98 Tex. 332, 83 S.W. 680 (Tex. 1904), *modified on reh'g*, 84 S.W. 643 (Tex. 1905).

[101] *See* Schneider v. Delwood Ctr., 394 S.W.2d 671 (Tex. Civ. App.—Austin 1965, no writ).

(1) notice of claim was not furnished to the owner or original contractor as required by § 53.056, 53.057, 53.058, 53.252, or 53.253;

(2) an affidavit claiming a lien failed to comply with Section 53.054 or was not filed as required by § 53.052;

(3) notice of the filed affidavit was not furnished to the owner or original contractor as required by § 53.055;

(4) the owner complied with the requirements of § 53.101 and paid the retainage and all other funds owed to the original contractor before:

(A) the claimant perfected the lien claim; and

(B) the owner received a notice of the claim as required by this chapter;

(5) all funds subject to the notice of a claim to the owner and the perfection of a claim against the statutory retainage have been deposited in the registry of the court and the owner has no additional liability to the claimant;

(6) when the lien affidavit was filed on homestead property:

(A) no contract was executed or filed as required by § 53.254;

(B) the affidavit claiming a lien failed to contain the notice as required by § 53.254; or

(C) the notice of the claim failed to include the statement required by § 53.254; and

(7) the claimant executed a valid and enforceable waiver or release of the claim or lien claimed in the affidavit.

(c) The claimant is not required to file a response. The claimant and any other party that

has appeared in the proceeding must be notified by at least 21 days before the date of the hearing on the motion. A motion may not be heard before the 21st day after the date the claimant answers or appears in the proceeding.

(d) At the hearing on the motion, the burden is on:

(1) the claimant to prove that the notice of claim and affidavit of lien were furnished to the owner and original contractor as required by this chapter; and

(2) the movant to establish that the lien should be removed for any other ground authorized by this section.

(e) The court shall promptly determine a motion to remove a claim or lien under this section. If the court determines that the movant is not entitled to remove the lien, the court shall enter an order denying the motion. If the court determines that the movant is entitled to remove the lien, the court shall enter an order removing the lien claimed in the lien affidavit. A party to the proceeding may not file an interlocutory appeal from the court's order.

(f) Any admissible evidence offered at the hearing may be admitted in the trial of the case. The court's order under Subsection (e) is not admissible as evidence in determining the validity and enforceability of the claim or lien.

A motion to remove an invalid lien under Section 53.160 of the Texas Property Code operates, in effect, as a motion for partial summary judgment and an order granting such a motion may constitute a final and appealable judgment.[102]

§ 53.161 Bond Requirements After Order To Remove

(a) In the order removing a lien, the court shall set the amount of security that the claimant may provide in order to stay the removal of the claim or lien. The sum must be an

[102] In re M & O Homebuilders, Inc., 516 S.W.3d 101, 107 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

amount that the court determines is a reasonable estimate of the costs and attorney's fees the movant is likely to incur in the proceeding to determine the validity or enforceability of the lien. The sum may not exceed the amount of the lien claim.

(b) The court shall stay the order removing the lien if the claimant files a bond or a deposit in lieu of a bond in the amount set in the order with the clerk of the court not later than the 30th day after the date the order is entered by the court unless, for good cause, the court orders a later date for filing the bond or the deposit in lieu of a bond. If the court fails to set the amount of the security required, the amount required is the amount of the lien claim.

(c) The bond must be:

(1) executed by a corporate surety authorized to do business in this state and licensed by this state to execute bonds as surety; and

(2) conditioned on the claimant's payment of any final judgment rendered against the claimant in the proceeding for attorney's fees and costs to the movant under Section 53.156.

(d) In lieu of filing a bond, the claimant may deposit in the amount set by the court for the surety bond:

(1) cash;

(2) a negotiable obligation of the federal government or a federal agency; or

(3) a negotiable obligation of a financial institution chartered by the federal or state government that is insured by the federal government or a federal agency.

(e) A deposit made under Subsection (d) must be conditioned in the same manner as a surety bond. Any interest accrued on the deposit amount is a part of the deposit.

(f) If the claimant fails to file the bond or the deposit in lieu of the bond in compliance

with this section, the owner may file:

(1) a certified copy of the order; and

(2) a certificate from the clerk of the court stating that:

(A) no bond or deposit in lieu of the bond was filed within 30 days after the date the order was entered by the court; and

(B) no order staying the order to remove the lien was entered by the court.

(g) The claim or lien is removed and extinguished as to a creditor or subsequent purchaser for valuable consideration who obtains an interest in the property after the certified copy of the order and certificate of the clerk of the court are filed with the county clerk. The removal of the lien does not constitute a release of the liability of the owner, if any, to the claimant.

§ 53.162 Revival of Removed Lien

(a) If an order removing the lien is not stayed as provided by § 53.161 and the claimant later obtains a final judgment in the suit establishing the validity and ordering the foreclosure of the lien, the claimant may file a certified copy of the final judgment with the county clerk.

(b) The filed judgment revives the lien, and the claimant may foreclose the lien.

(c) A lien revived under this section is void as to a creditor or subsequent purchaser for valuable consideration who obtained an interest in the property;

(1) after the order removing the lien and the certificate from the clerk of the court was filed with the county clerk; and

(2) before the final judgment reviving the lien was filed with the county clerk.

XX.

BOND TO INDEMNIFY AGAINST LIEN

If a lien is filed by a subcontractor and the general contractor disputes the claim, the general contractor may choose (or may be required by contract) to file a Bond to Indemnify. This will "rid" the owner's property of the lien while the claim is disputed. This process is also referred to as bonding around a lien.

1. The Bond must be filed with the county clerk in the county in which the property subject to the lien is located. TEX.PROP.CODE § 53.171(b).

2. Requirements under TEX.PROP.CODE § 53.172:

a. Describe the property on which the liens are claimed;

b. Refer to each lien claimed in a manner sufficient to identify it;

c. Be in an amount that is double the amount of the lien referred to in the bond unless the total amount of the lien exceeds $40,000, in which case the bond must be in an amount that is the greater of 1-1/2 times the amount of the lien or the sum of $40,000 and the amount of the lien;

d. Be payable to the party claiming the lien:

e. Be executed by:

(i) The party filing the bond as principal; and

(ii) By a corporate surety authorized and admitted to do business under the law in this state and licensed by this state to execute the bond as surety; and

(iii) Be conditioned substantially that the principal and surety will pay to the named obligees or to their assignees the amount that the name obligees would have been entitled to recover if their claim had been proved to be a valid and enforceable lien on the

property.

3. After the bond is filed, the county clerk shall issue notice of the bond to all named obligees. TEX. PROP. CODE § 53.173(a).

a. A copy of the bond must be attached to the notice. TEX. PROP. CODE § 53.173(b).

b. The notice may be served on each obligee by having a copy delivered to the obligee by certified mail return receipt requested to the address of the claimant as listed in the lien affidavit. TEX. PROP. CODE § 53.173(c).

4. A party making or holding a lien claim may not sue on the bond later than one (1) year after the date on which the notice is served or after the date on which the underlying lien claim becomes unenforceable under § 53.158 (statute of limitations for lien claims). TEX. PROP. CODE § 53.175(a).

PAYMENT BOND CLAIMS ON PRIVATE PROJECTS

Under Subchapter I of the Texas Property Code, an original contractor who has a written contract with the owner may furnish a bond for the benefit of claimants. If a valid bond is recorded with the county clerk, the claimant may not file suit against the owner or the owner's property and the owner is relieved of its obligation to withhold retainage.[103]

The payment bond or "property code payment bond" (also called "statutory bond") is a payment bond posted by an original contractor which meets the requirements set out in the next paragraph. Bonds posted by subcontractors are not Property Code payment bonds. When a valid Property Code payment bond has been filed, subcontractors and suppliers cannot foreclose liens against the Project, or file suits against the owner, but must look to the bond as their security in case the contractor does not pay.[104] In other words, the property is cleared of the liens filed by subcontractors and suppliers.[105]

The bond must be in a penal sum at least equal to the total of the original contract amount, be written in favor of the owner, and have the written approval of the owner endorsed on the bond. The bond must also be executed by the original contractor as principal and a corporate surety authorized and admitted to do business in the State of Texas and licensed by the State to execute bonds as a surety.

The bond and the contract between the original contractor and the owner (or a memorandum of contract) must be filed in the county where the owner's property is on which the construction is being performed. The bond must be approved by the owner and that approval must be endorsed across the face of the bond. Once filed in the real property records as required

[103] TEX. PROP. CODE § 53.201.

[104] *Id.*

[105] Sentry Ins. Co. v. Radcliff Materials of Texas, Inc., 687 S.W.2d 437 (Tex.Civ.App.—Houston 1985, no writ).

under § 53.203, a purchaser, lender, or other person acquiring an interest in the property, is entitled to rely on the record of the bond and the contract as constituting payment of all claims as if each claimant had filed a complete release and relinquishment of lien rights.[106]

Advantage of Bond Claim. One significant advantage of a bond claim is that the claimant does not have to worry about "fund trapping" and statutory retainage. As long as the statutory requirements are met for perfecting the bond claim, a claimant's valid claim should be paid by the surety. This advantage is particularly significant to those subcontractors who provide work (or deliver material) toward the end of the project. On an unbonded job, those claimants may not have many contract funds to "trap" by their notice letters and the statutory retainage may not be sufficient to cover all of the claims. With a payment bond, the claimants do not have to worry about the amount of contract funds remaining or the amount of the other claims (as long as the total amount of claims do not exceed the penal limits of the bond.)

Requirements for Perfecting A Bond Claim. The best way to perfect a bond claim is to satisfy the requirements for a lien claim. The lien, if properly perfected, is also a perfected claim against the bond. Claimants should elect to perfect the claim as if a lien were being sought because, if the bond claim is defective in some way, the claimant will be able to fall back on its lien claim.

The **alternate** method for perfecting the claim against a payment bond is to furnish the surety with the same notices that were required to be sent to the owner for a lien claim.[107] In other words, the claimant must send a written notice to the surety giving it fair notice of the amount and nature of the claim asserted no later than the 15th day of the third month following

[106] TEX. PROP. CODE § 53.204.

[107] Again, it is highly recommended that a claimant meet the requirements for perfecting a lien claim even if the claimant knows that a payment bond has been provided to the owner. However, if a claimant is unable or unwilling for some reason to comply with the lien perfection procedures, the notice to owner can be modified so that it is addressed and sent to the surety. Of course, a copy should be sent to the original contractor and the owner.

the month in which the work was performed or material delivered. The claimant must also send the required notices to the original contractor (including the "second month notice").[108] If the owner receives any notices for a lien affixed under Subchapter C, the owner must mail the surety a copy of all notices received. However, failure of the owner to send copies of the notices to the surety does not relieve the surety of any liability under the bond if the claimant has complied with the requirements for perfecting a claim.[109]

Practice Tip. Use a belt and suspenders—perfect the claim both ways! When there is a bond on a private project, a claimant may perfect the claim as a lien claim by sending the owner and original contractor the proper notice letters and by filing the mechanic's lien affidavit. To perfect the claim as a bond claim as well, the claimant need only send the surety a copy of everything the claimant sends to the owner. By sending the surety all of the notices, the claim is perfected against the bond in the event that there is some technical defect in the mechanic's lien affidavit. On the other hand, if the claim is properly perfected as a lien claim, the claimant has the lien on the property if there is a problem with the validity of the bond.

I.

SUIT ON A PAYMENT BOND ON A PRIVATE PROJECT

A claimant must wait at least sixty (60) days after perfection of the claim on a payment bond to file suit. Once the sixty (60) days has passed, *if the bond was recorded at the time the lien was filed***, the claimant must sue on the bond within one year following the perfection of the claim**. *If the bond was not recorded at the time the lien was filed***, the claimant must sue on the bond within two years following the perfection of the claim.**[110] Suit must be brought in

[108] *See* TEX. PROP. CODE § 53.206.

[109] TEX. PROP. CODE §53.207.

[110] TEX. PROP. CODE § 53.208.

the county in which the property to be improved is located. A bond claimant may sue for the amount of the claim and costs of court. If for some reason the valid claims exceed the amount of the bond, each claimant who perfects a claim is entitled to a pro rata share of the bond amount.

II.

BOND CLAIMS ON TEXAS PUBLIC WORKS PROJECTS

The legal framework for public construction works in Texas is different than that for private work. Liens are not allowed on public lands, so a different scheme involving claims against bonds has developed. Whether and how a contractor working on a public job in Texas may bring a claim against a payment bond may depend on where the contractor falls in the "food chain."

A prime contractor is one who has a contract directly with the governmental body. On a public works job, the prime contractor will furnish a payment bond and a performance bond. A prime contractor must furnish a payment bond for the benefit of subcontractors and suppliers. The performance bond protects the governmental owner from a defaulting prime contractor.

III.

PAYMENT BONDS: CLAIMS BY SUBCONTRACTORS AND SUPPLIERS

(a) Limited Subcontractor and Supplier Protection

The protections and procedures applicable to Texas public works projects vary depending upon the dollar amount of the prime contract and the status of the party who desires to protect itself from the risk of not getting paid. Payment bonds are governed by Chapter 2253 of the Texas Government Code.

Since liens cannot be filed against a public project, the best source of protection for subcontractors and suppliers of public work prime contractors is perfecting a claim against the payment bond. The prime contractor for any Texas governmental job over $25,000.00, excluding

those for municipalities or a joint board created under Chapter 22 of the Transportation Code, is required by law to post a payment bond. The prime contractor for any Texas governmental job over $50,000.00 for municipalities or a joint board created under Chapter 22 of the Transportation Code, is required by law to post a payment bond.[111] For jobs costing $25,000 and less, bonds are not required, and the Texas Property Code provides for liens on the *funds* held by the public entity.[112] For purposes of the Government Code provisions that regulate payment bonds, the term "governmental entity" includes the state, a county, a municipality, an agency or department of one of the three, and a school district or subdivision thereof.[113]

A payment bond does not create an independent entitlement; rather, it is a mechanism to ensure payment.[114] Since the purpose of Chapter 2253 of the Texas Government Code is to protect subcontractors, suppliers, and laborers, it is to be construed liberally to accomplish that purpose.[115]

(b) **Coverage and Bond Amounts**

For public jobs under $25,000.00, as previously mentioned, the Texas Property Code provides for a limited sort of lien on the funds of the project, but since most public works jobs are for more than $25,000.00, this provision is rarely used. Payment bonds are required for all Texas governmental jobs, (excluding those for municipalities or a joint board created under Chapter 22 of the Transportation Code), over $25,000.00 that are for constructing, altering, or repairing a public building or carrying out or completing any such work.[116] For municipalities or

[111] TEX. GOV'T CODE § 2253.021(a)(2)(B).

[112] TEX. GOV'T CODE § 2253.021; TEX. PROP. CODE § 53.231.

[113] TEX. GOV'T CODE § 2253.001.

[114] Chilton Ins. Co. v. Pate & Pate Enters., *Inc.*, 930 S.W.2d 877, 886 (Tex.App—San Antonio 1996, writ denied).

[115] *Id*.

[116] TEX. GOV'T CODE § 2253.001(4) (defining "public work contract").

a joint board created under Chapter 22 of the Transportation Code, all projects over $50,000.00 require a payment bond.[117]

The payment bond framework, however, does not apply to all public contracts. Specifically, it does not apply to public work contracts entered into by a state agency relating to an action taken under Subchapter F or I, Chapter 361, Health and Safety Code (Solid Waste Act), or Subchapter I, Chapter 26, Water Code (Underground or Above Ground Storage Tanks).[118]

There are no payment bonds available for the protection of prime contractors (i.e. those with a direct contractual relationship with the public entity). If a public entity fails to pay, the prime contractor is left to contractual remedies and statutory claims procedures.[119] Indeed, sovereign immunity may insulate the public entity from suit, a topic beyond the scope of this paper.

The amount of the bond the prime contractor is required to provide is the amount of the prime contract.[120] The amount of the bond limits the amount available to claimants who properly perfect their bond claims. If the total claims exceed the limit of the bond, the claimants who perfect their claims share pro rata. If a public entity fails to ensure that a payment bond is secured by the prime contractor, the entity may be liable to the same degree that a surety would have been had the surety issued the bond.[121] That circumstance is rare. The most common problem is the failure of an otherwise deserving claimant to perfect the claim.

It is critical that the claimant timely file its claims, in proper form. The claim must be

[117] TEX. GOV'T CODE § 2253.021(a)(2)(B).

[118] TEX. GOV'T CODE § 2253.002.

[119] See TEX. GOV'T CODE Chapter 2260.

[120] TEX. GOV'T CODE § 2253.021(c)(2).

[121] TEX. GOV'T CODE § 2253.027.

sent to the correct parties by the proper method; otherwise, a valid claim can be lost and left unpaid.

(c) **Obtaining Information Early**

To properly file a bond claim, the claimant must send notices to the prime contractor and the surety who provided the bond.[122] The addresses of the prime contractor and the surety may be obtained from the governmental entity for whom the work is being performed.[123] The surety's information is also available from the Texas Insurance Commission. The governmental entity may charge a reasonable fee for a copy of the bond. Do not expect your request to be processed timely if you wait until the last minute to make the request. It is good practice to routinely request this information at the start of each job.

(d) **The Payment Bond Notice**

For a subcontractor with a direct relationship to the prime contractor, the notice must be mailed on or before the 15th day of the third month after each month in which the labor was performed or the materials were supplied.[124] These must be sent to the prime contractor and to the surety. It is good practice, but not required, to send a copy to the public owner at the same time.

A second-tier subcontractor or supplier (one whose contract is with a subcontractor of the prime contractor) must send an earlier notice *in addition to* the third month notice above. These second tier and lower subcontractors must send a notice to the prime contractor on or before the 15th day of the second month after each month in which the labor was performed or the material

[122] TEX. GOV'T CODE § 2253.041.

[123] TEX. GOV'T CODE § 2253.026.

[124] TEX. GOV'T CODE § 2253.041.

was delivered.[125] A copy of the invoice or statement sent to a subcontractor satisfies the 15th day of the second month notice as long as the amount and nature of the claim is clear.[126]

A second-tier or lower subcontractor who has a potential retainage claim must also send a notice on the 15th day of the second month to the prime contractor after entering into the subcontract, indicating that its contract provides for retainage, and generally stating the nature of that retainage.[127] This is an "early" notice requirement, and may need to be sent even before any money is due.

Contractors who provide specially fabricated material must also send a notice by the 15th day of the second month after entering into the subcontract.[128] This is another "early" notice to the prime contractor. This notice may be required before anything is delivered to the project. A claim for specially fabricated materials may be perfected, even if the materials are never actually delivered to the job site, as long as proper notice has been sent. If the materials are actually delivered for use in a public work, the claim may be perfected in the ordinary manner.[129]

All notices must be sent by registered or certified mail, return receipt requested.[130]

(e) **Contents of the Notice**

The third month notice must be accompanied by a sworn statement of account which states that "the amount claimed is just and correct" and that all just and lawful offsets, payments

[125] TEX. GOV'T CODE § 2253.047.

[126] But see the following discussion regarding additional notice requirements for parties who do not have written contracts.

[127] TEX. GOV'T CODE § 2253.047(b).

[128] TEX. GOV'T CODE § 2253.047(d).

[129] *See* TEX. GOV'T CODE §§ 2253.041(a), 2253.001(6). The materials, however, need not be actually used in the project. TEX. GOV'T CODE § 2253.001(6); Bond Restoration, Inc. v. Ready Cable, Inc., 562 S.W.3d 597 (Tex. App.—Amarillo 2015, pet. denied).

[130] TEX. GOV'T CODE § 2253.048.

and credits have been allowed."[131] Any retainage applicable to the account that has not become due under the terms of the public work contract between the claimant and the prime contractor or subcontractor must also be included.[132]

Whether you include or exclude the retainage, make it clear what you are claiming. To comply with the notice requirements, the labor and material that are the subject of the claim must be described in such a manner so as to be reasonably identified by the prime contractor and the surety; it is not necessary that they are objectively identifiable to a stranger to the contract.[133] However, just listing parts numbers is not sufficient. A copy of the contract showing what parts have been completed or the value of partial completion also will suffice.

Additional notice requirements apply to parties who do not have a written contract with the prime contractor or subcontractor. This class of claimants include all second and lower tier subcontractors and suppliers. In these cases, notices of claims for unpaid bills must include: (1) the name of the party for whom the labor was performed or to whom the material was delivered; (2) the month and year of performance or delivery (not the date of the invoice, but the actual month in which the work was done or the materials were delivered); (3) a description of the labor or material for reasonable identification; and (4) the amount due. The party submitting the claim notice must itemize the claim and include with it copies of pay applications, invoices, or purchase orders that reasonably identify the work performed or material delivered, the job, and the destination of delivery.[134] If more than one month is involved, list the amount claimed by month. These requirements are *in addition to* those found in §2253.047. As previously described, §2253.047 permits a claimant who does not have a direct contractual relationship to

[131] TEX. GOV'T CODE § 2253.041(c).

[132] TEX. GOV'T CODE § 2253.041(d).

[133] S.A. Maxwell Co. v. R.C. Small & Assoc., Inc., 873 S.W.2d 447 (Tex. App.—Dallas 1994, writ denied).

[134] TEX. GOV'T CODE § 2253.043.

the prime contractor to send a copy of the statement sent to the subcontractor as notice of the claim. However, if that statement does not contain the information set out above, a claimant should not rely on the invoice alone, to comply with the notice requirements.

Additional notice requirements apply to claimants who provide multiple items of labor or material that are ordered and intended to be paid for in a lump-sum. The notice must reasonably identify the labor or material, include the name of the party for whom the labor was performed or to whom the material was delivered, the approximate date of performance or delivery, the amount of the contract, and the amount claimed. It also must state whether the contract is written or oral.[135]

Claimants who have contracts with the prime contractor or a subcontractor which contain a written unit price agreement must meet the notice requirements of §2253.045. Such notices must contain a list of units and unit prices set by the contract, and a statement of those completed and partially completed units.

(f) **Obtaining Contract Retainage**

If the subcontractor's claim is for retainage, special rules apply. First, the lower tier subcontractor must provide the prime contractor written notice that the subcontract calls for retainage, and must describe generally the nature of the retainage. This notice must be sent on or before the 15th day of the second month after the date of the beginning of the delivery of material or the performance of labor.

Before filing suit on a claim for retainage, written notice of the claim must be provided to the prime contractor and the surety on or before the 90th day after the date of final completion of the public work contract. The notice must state the amount of the contract; the amount paid; and the outstanding balance.

[135] TEX. GOV'T CODE § 2253.044.

A retainage claim is never valid for more than ten percent of the amount of the contract.

(g) Substantial Compliance

The notice requirements contained in Chapter 2253 of the Texas Government Code are burdensome, and they are mandatory. However, some Texas courts have given effect to notices that complied *substantially*, but not perfectly, with the notice provisions.[136] The *S.A. Maxwell* court pointed out that the purpose of the bond claim statute is to ensure that subcontractors and suppliers receive payment for their work, and that the statute should be liberally construed and applied in order to accomplish that purpose. The *Star Operations* court agreed, saying the statute's purpose is not to create technical tricks, traps, and stumbling blocks to the filing of legitimate claims.[137] It is critical to point out, however, that cases where courts have found the notices to comply *substantially* with the statute are generally cases in which the form or content of the notice is in question.[138] The time limits should be treated as strict requirements which, if not met, "will bar a claim on the payment bond."[139]

(h) The Request for Information

What if you don't have all of the information necessary with which to file a bond claim? Chapter 2253 also provides for mandatory responses to written requests for information by claimants from contractors, subcontractors, and payment bond beneficiaries.[140] The governmental entity for whom the work is being performed will furnish, among other

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[136] S.A. Maxwell Co. v. R.C. Small & Assoc., Inc., 873 S.W.2d 447 (Tex. App.—Dallas 1994, writ denied); *see also* Featherlite Bldg. Products Corp. v. Constructors Unlimited, Inc., 714 S.W.2d 68, 69 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

[137] Star Operations, Inc. v. Dig Tech, Inc., No. 03-15-00423-CV, 2017 WL 3263352 (Tex. App.—Austin July 27, 2017, pet. filed) (mem. op.) (citing Argee Corp. v. Solis, 932 S.W.2d 39 (Tex. App.—Beaumont 1995), rev'd on other grounds, 951 S.W.2d 384 (Tex. 1997)).

[138] *See id.* (holding that actual notice of true and accurate information about the amount of the claim provided to the contractor and its surety substantially complied with the stautory notice requirements).

[139] *S.A. Maxwell Co.*, 873 S.W.2d at 451.

[140] TEX. GOV'T CODE §§ 2253.024, 2253.025.

information, a certified copy of the payment bond and the public work contract for which the bond was given.[141] The governmental entity may charge a reasonable fee for a copy of the bond. However, if you wait until the last minute to make your request, do not expect your request to be processed timely. It is good practice to routinely request this information at the start of each job. Claimants whose requests for information are denied by contractors or subcontractors are entitled to reasonable attorneys' fees and costs associated with acquiring the information.[142] It is important to note that it can take days or weeks to get a response to your request. It is doubtful that a claimant's failure to provide requested information timely will serve as an excuse for failure to perfect a claim.

(i) **Deadline to Sue on Payment Bond Claims**

If the surety refuses to pay the bond claim, a lawsuit against the surety and the prime contractor must be initiated before the expiration of one year after the date of mailing the claim.[143] A subcontractor is not allowed to bring suit on a bond claim until 61 days after the claim has been made.[144] Note that this time frame, combined with the one year statute of limitations, means that a subcontractor has only a ten month window to sue on a bond claim. Reasonable attorney's fees may be recovered, but are not mandatory.[145]

(j) **Damages Recoverable**

Bond claimants may recover for those items of work for which notice has been given

[141] TEX. GOV'T CODE §2253.026.

[142] Texas Government Code § 2253.024 does not create a private case of action for consequential damages against a party who fails to provide the payment bond information requested. *See* Bond Restoration, Inc. v. Ready Cable, Inc., 562 S.W.3d 597 (Tex. App.—Amarillo 2015, pet. denied).

[143] TEX. GOV'T CODE §2253.078.

[144] TEX. GOV'T CODE §2253.073.

[145] TEX. GOV'T CODE §2253.074.

properly, but never for more than the amount of the bond.[146] The claim may not exceed the proportion of the subcontract price that the work done bears to the total of the work covered by the subcontract.[147] The Texas Supreme Court affirmed that recovery on a Texas Government Code payment bond is limited to the subcontract price. When a jury awarded more than the remaining contract balance in that case, the court reduced the award.[148]

Any bond provisions that expand or limit the rights of claimants beyond that which the Government Code provides are void.[149] An example of such a provision is a bond term which purports to extend the time available to give notice of a claim. Despite the existence of such a provision, the *statutory* notice deadlines must be met.

If a claim is for specially fabricated material that has not been delivered or incorporated into the project, the claim is limited to the material that conforms to the plans and specifications concerning the material.[150] The amount of the claim is also limited to the reasonable cost of the material less fair salvage value.

Pre-judgment interest and attorney's fees may be recovered in a suit on the bond.[151] The State, though, is not liable for costs or expenses of a suit brought by any party on a payment bond.[152]

Under the Texas Government Code, if a prime contractor walks the job or gets fired, it cannot recover any contract funds it is owed until all costs of completion are paid from the

[146] TEX. GOV'T CODE §2253.076(a).

[147] *Id*.

[148] Green Intern., Inc. v. Solis, 951 S.W.2d 384 (Tex. 1997).

[149] TEX. GOV'T CODE §2253.023(b).

[150] TEX. GOV'T CODE §2253.076(b).

[151] TEX. GOV'T CODE §2253.074.

[152] TEX. GOV'T CODE §2253.072.

contract balance and the surety has been reimbursed.[153] If any money is left over, it is available to be paid to the prime contractor. If not, the owner may have a claim against the prime contractor. If the contractor's surety has paid out dollars to finish the project which exceed the contract balance paid by the owner to the surety, the surety can sue the contractor and other indemnitors to recover its losses. The prime contractor and its surety are also liable to the owner for the difference between its bid and the next low bidder, if it is awarded, but does not accept, the contract.

(k) **Defenses to Bond Claims**

Typically, the surety will raise every possible defense to a bond claim. These defenses may often include lack of timely notice and lack of proper notice. The content of the notices is crucial. The surety also has all of the defenses that the bonded contractor has. Failure to comply with the required procedures may leave the subcontractor with a lawsuit only against the prime contractor, who may be insolvent.

[153] TEX. GOV'T CODE § 2253.071.

TEXAS BOND CLAIMS ON *PUBLIC* PROJECTS
Notice Deadlines for Subcontractors

Month When Labor and/or Material Furnished	First Tier Subcontractor 3rd Month Notice	Second Tier (and Lower) Subcontractors 2nd Month Notice	
	[1] Claim Sent to Surety and General Contractor (See Notes 2 & 3)	[1] Notice to General Contractor (See Note 2)	[1] Claim Sent to General Contractor and Surety (See Note 2 & 3)
January	April 15	March 15	April 15
February	May 15	April 15	May 15
March	June 15	May 15	June 15
April	July 15	June 15	July 15
May	August 15	July 15	August 15
June	September 15	August 15	September 15
July	October 15	September 15	October 15
August	November 15	October 15	November 15
September	December 15	November 15	December 15
October	January 15	December 15	January 15
November	February 15	January 15	February 15
December	March 15	February 15	March 15

1. All notices must be sent by certified or registered mail.
2. Notice must be sent as to each month in which unpaid labor or material is furnished.
3. The "claim" is a notice letter accompanied by a sworn statement of account.
   - Any claim for retainage only must be sent on or before the 90th day after the date of final completion of the General Contractor's contract.
   - Any claim for retainage and labor/material should break out the amount of retainage from the amount of labor/material.
4. The information on this reference sheet is not applicable to Federal Projects.

PLEASE NOTE: The Texas lien and bond claim laws are complex.
This information is a guide and is not intended as legal advice. Please call us if you need help.

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