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Changes to the Texas Mechanic's Lien Statute

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Changes in the Law

- A long way from Thomas Jefferson
- HB 2237
- Changes to Cover Today
 - Notice Requirements
 - Lien Affidavit Filing
 - Enforcement of Claims
- Effective January 1, 2022

Definitions

- Improvement definition much simpler and includes plan preparation.
- Subcontractor means Subs and Suppliers of all tiers.
- Purported original contractor defined to clean up Sham Contractor question.

Pre-Lien Notices

- HB 2237 makes changes to the notice procedures for subcontractors.
- No longer subcontractor “tiers”.
- No more Derivative Claimant 2nd month notice to Contractor.
- Changes establish uniformity in the notice requirements by requiring the same notice obligations on all subcontractors regardless of their contracting tier.
- Section 53.056 (notice of derivative claimant) and 53.057 (notice of contractual retainage) is statutorily prescribed for both commercial and residential construction.

Section 53.056

"NOTICE OF CLAIM FOR UNPAID LABOR OR MATERIALS

"WARNING: This notice is provided to preserve lien rights.

"Owner's property may be subject to a lien if sufficient funds are not withheld from future payments to the original contractor to cover this debt.

"Date: _____

"Project description and/or address: _____

"Claimant's name: _____

"Type of labor or materials provided: _____

"Original contractor's name: _____

"Party with whom claimant contracted if different from original contractor: _____

"Claim amount: _____

"_____ (Claimant's contact person)

"_____ (Claimant's address)"

Section 53.057

"NOTICE OF CLAIM FOR UNPAID RETAINAGE

"WARNING: This notice is provided to preserve lien rights.

"Owner's property may be subject to a lien if sufficient funds are not withheld from future payments to the original contractor to cover this debt.

"Date: _____

"Project description and/or address: _____

"Claimant's name: _____

"Type of labor or materials provided: _____

"Original contractor's name: _____

"Party with whom claimant contracted if different from original contractor: _____

"Total retainage unpaid: _____

"_____ (Claimant's contact person)

"_____ (Claimant's address)"

Notices

- Notices must be delivered in person, by certified mail, or by any other form of traceable, private delivery or mailing service that can confirm proof of receipt?
- E-mail with Read Receipt?
- “If a written notice is received by the person entitled to receive it, the method by which the notice was delivered is immaterial”.

Timing of Notices

- For labor or material furnished under an original contract entered into on or after January 1, 2022, subcontractors providing labor or material on a commercial project must now send the statutorily prescribed notice to both the owner and the general contractor by the **fifteenth day** of the **third month** following each month in which labor or material is provided.
- For residential construction, the timing of the notice is unchanged. A subcontractor must still send notice to both the owner and the general contractor by the **fifteenth day** of the **second month** following each month in which labor or material is furnished.

Timing of Notices

- The timing of the notice for contractual retainage is unchanged.
- Both commercial and residential subcontractors must use the statutorily prescribed notice and it must be sent to both the owner and original contractor by the earlier of (1) the 30th day after the date the claimant's contract is completed, terminated or abandoned; or (2) the 30th day after the date the original contract is terminated or abandoned. Notice for contractual retainage under Section 53.057 is only necessary if retainage is not included in the monthly notice.
- “Safe Harbor” provision. If the 15th day of the month falls on a Saturday, Sunday or legal holiday, then the deadline automatically extends to the next day that is not a Saturday, Sunday, or legal holiday.

Fund Trapping Notices

- Prior to January 1, 2022, fund trapping notices needed the “magic language” of: *“if this claim remains unpaid, the owner may be personally liable and the owner’s property subjected to a lien unless the owner withholds payment from the contractor for payment of this claim is otherwise paid or settled.”*
- For contracts entered into on or after January 1, 2022, the “fund trapping” language is incorporated into the statutory notice form.

Fund Trapping Notices cont.

- If an owner receives notice under Section 53.056 or 53.057, the owner may withhold from payments to the original contractor an amount necessary to pay the claim for which he receives notice. **The withholding may be in addition to any reserved funds.**
- If the notice is sent under Section 53.056, the owner may withhold the funds immediately on receipt of the notice.
- If the notice is sent under Section 53.057, the owner may withhold funds immediately on receipt of a copy of the claimant's affidavit.

Notice of Specially Fabricated Materials

- “Specially fabricated material” means material fabricated for use as a component of the construction or repair so as to be reasonably unsuitable for use elsewhere.
- A lien secures payment for the specially fabricated material, even if the material has not been delivered or incorporated into the construction or repair, less its fair salvage price.

Notice of Specially Fabricated Materials cont.

- For contracts entered into before 1/1/22, a claimant must give notice not later than the 15th day of the second month after the month in which the claimant receives and accepts an order for the material.
- HB 2237 eliminates the early notice for specially fabricated materials.
- Specially fabricated materials are treated the same as other materials for purposes of pre-lien notice.
- Notice given in accordance with Section 53.056 and, if applicable, Section 53.057.
- Still entitled to lien even if not delivered to the project.

Original Contractor's Lien

- Statutory Lien (after HB 2237):
 - For commercial construction, Lien Affidavit must be filed not later than the 15th day of the Fourth Month following the month in which the original contract has been: (a) completed; (b) terminated; or (c) abandoned.
 - For residential construction, Lien Affidavit must be filed not later than the 15th day of the Third Month following the month in which the original contract has been: (a) completed; (b) terminated; or (c) abandoned.

Subcontractor/Supplier Lien (After HB 2237)

- After HB 2237:
 - General Rule: For commercial construction, the claimant must file lien affidavit not later than the 15th day of the Fourth Month after the later of:
 - The month the claimant last provided labor or materials; or
 - The month the claimant would normally have been required to deliver the last of specially fabricated materials that have not been actually delivered.
 - Exception #1 – Lien on Reserved Funds (No Notice)
 - Exception #2 – Lien on Reserved Funds (Notice)

Lien on “Reserved Funds”

- HB 2237 changes the terminology in Subchapter E from “retainage” to “reserved funds”.
- Owner shall “reserve” 10% (or 10% of Progress Pay Application) of contract value for 30 days after Project Completion.
- Notice must be sent to Owner and Original Contractor by the earlier of: (1) the 30th day after the date the claimant’s contract is completed, terminated, or abandoned; or (2) the 30th day after the date the original contract is terminated or abandoned.
- The lien affidavit must be filed by the 15th day of the third month after the month in which the original contract under which the claimant performed was completed, terminated, or abandoned.

Enforcement of Lien Claim

- Prior to HB 2237, claimant could file to enforce lien claim: i) within two years after the last day claimant could have filed a timely Lien Affidavit; or ii) within one year after completion, termination or abandonment of the prime/original contract, whichever is later.
- HB 2237 shortens the deadline to foreclose a mechanic's lien to one year from the deadline to file the lien.
 - Can be extended by agreement of parties for one year, with agreement placed on file with county clerk.

Other Important Changes

- 53.083 “Owner shall pay” provision eliminated.
- Notary requirement for lien releases and waivers eliminated.
- Demolition Contractors, design professionals, landscapers, and surveyors have new rights.
- Lien claimants get expedited discovery in summary removal actions.
- Notice to Lien Claimant of summary removal action increased from 21 to 30 days.

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