

Mechanics, artisans, and materialmen enjoy certain rights and protections under Texas law. Specifically, Article XVI, Section 37 of the Texas Constitution grants to mechanics, artisans, and materialmen a claim or interest upon the buildings and articles made or repaired by them for the value of labor done thereon or material furnished therefor. Chapter 53 of the Texas Property Code further governs mechanic's lien rights, as it provides a detailed procedure for assertion and enforcement of a mechanic's lien claim. In this respect, the Constitution and Property Code yield similar protections, although the two procedures function separately and distinctly.

If you provide labor and/or materials, or if you are the recipient of labor or materials, then you should familiarize yourself with the mechanic's lien assertion and enforcement procedures prescribed by the Texas Constitution and Texas Property Code. However, Texas lien law, especially the scheme set forth in Chapter 53 of the Texas Property Code, is very complicated, and many contractors lose their lien rights without even knowing. It is strongly advised that contractors seek guidance from an attorney experienced and comfortable with the specific requirements of Chapter 53.

Nonetheless, this Pamphlet is presented as an educational tool to help explain the most important and basic aspects of Texas lien law. Please understand that Chapter 53 utilizes uncommon terminology and specially-defined terms, such as "original contractor" and several others which don't necessarily carry a common usage. Further, the deadlines and notice requirements of Chapter 53 are mandatory and strictly enforced by the courts, and the failure to comply could result in waiver of your mechanic's lien claim.

All notices discussed herein should be sent via certified mail, return receipt requested. This method of transmission is often required by the Property Code, and it is the most reliable method for later proving that the forwarding party sent, and the proper party received the required notice. Additionally, a mechanic's lien claimant should also send notices via first class mail. While this dual transmission is not required, it is recommended to protect against the recipient's refusal of certified mail. As a matter of course, it is also recommended to send notice to everyone above

you in the contracting chain, all the way back to the property owner, regardless of the party with whom you've directly contracted.

### *Texas Property Code, Chapter 53*

#### **1. Gathering Information**

At the time you execute your contract (or very soon thereafter), you should request in writing from the property owner and all parties above you in the contracting chain the following: (a) a legal description of the real property being improved; (b) a copy of any contracts executed for the project; (c) a copy of the surety bond, if any, including the name and last known address of the surety; and (d) whether the real property is encumbered by any prior recorded liens or security interests, and if so, the name and last known address of any persons having such lien or security interest. Your correspondence should state the Property Code requirement of a response within ten (10) days of receipt of the request, and you may also wish to include a self-addressed, stamped envelope and check for reimbursement of reasonable expenses.

It is important to remember that protecting your right to payment begins as soon as you execute your contract. While there is no deadline for requesting this information, every contractor will need this information to perfect his statutory lien claim. Delay may cause you to miss a mandatory deadline and result in forfeiture of your statutory lien rights.

#### **2. Early Notices**

There are two types of notices that should be sent shortly after you commence work on the project: (a) Notice of Contractual Retainage Agreement, and (b) Notice of Specially Fabricated Materials.

The Notice of Contractual Retainage Agreement should be sent to all parties above you in the contracting chain, including the property owner, to provide notice of your retainage agreement so that they may withhold a corresponding amount of retainage. All contractors (mechanics, artisans, and materialmen) who do not have a contract with the property owner must send this notice. This notice must be sent

#### **NO LATER THAN THE 15TH DAY OF THE 2ND MONTH FOLLOWING THE DATE THE CLAIMANT FIRST PROVIDES LABOR AND/OR MATERIALS FOR THE PROJECT.**

This notice is not required to protect your lien. However, if you send this notice within the required time frame, you are not required to send the notices detailed in Section 3 (unless your claim involves more than one contractual retainage, i.e. unpaid monthly draws, then the notices in Section 3 must still be sent in order to protect your lien claim).

The second early notice, the Notice of Specially Fabricated Materials, only applies to those contractors that will be furnishing specially fabricated materials for the project. Materials are "specially fabricated" if they cannot be easily reused on other projects. This notice protects a contractor's right to perfect a lien on these materials, even when they have not been delivered or incorporated into the project. This form must be sent to the owner and, if the contractor providing these materials does not have a direct contract with the original contractor, also to the original contractor. This notice must be sent **NO LATER THAN THE 15TH DAY OF THE 2ND MONTH FOLLOWING RECEIPT AND ACCEPTANCE OF THE ORDER FOR SPECIALLY FABRICATED MATERIALS.**

#### **3. Notices of Unpaid Account**

To properly perfect a lien, all contractors other than original contractors are required to provide certain notices to the owner and the original contractor. Original contractors may proceed to Section 4.

If your contract is with someone other than the original contractor, you must send Notice to Original Contractor of Unpaid Account. This notice must be sent to the original contractor **NO LATER THAN THE 15TH DAY OF THE 2ND MONTH FOLLOWING EACH MONTH IN WHICH YOU PROVIDED LABOR AND/OR MATERIALS BUT WERE NOT PAID FOR THEM.** You must send this notice for each month that you were not paid. Unlike the notices in Section 2, this notice may be required on a recurring basis. A copy of this notice should also be sent to the person or entity with whom the claimant has a direct contract.

All contractors other than the original contractor must send Notice to Owner of Unpaid Account. This notice must be sent to the owner **NO LATER THAN THE 15TH DAY OF THE 3rd MONTH IN WHICH YOU PROVIDED LABOR AND/OR MATERIALS BUT WERE NOT PAID FOR THEM.** You must send this notice for each month that you were not paid. Unlike the notices in Section 2, this notice may be required on a recurring basis.

The Notice to Owner of Unpaid Account must also include specific "fund trapping" language as expressly required by Chapter 53. This language must be included to alert the owner to retain funds from the original contractor to cover your claim.

IMPORTANT NOTE: Those claimants required to send notice to the original contractor must also send notice to the owner. This may be accomplished through one notice letter sent to both the owner and original contractor, or through separate letters, so long as each letter meets the deadline for mailing.

#### **4. Filing Lien Affidavit**

After you have provided the required notices as described in Sections 2 & 3, above, protecting your right to file a lien claim, you must now file an Affidavit of Mechanic's Lien in order to collect money from the owner. The lien affidavit is the actual document claiming a lien on the owner's property. It must be recorded (filed) in the real property records of the County Clerk's office in the county in which the owner's property is located by personally delivering or mailing the lien affidavit to the County Clerk with the required recording fee. You need only file one lien affidavit.

Original contractors must record the lien affidavit **NO LATER THAN THE 15TH DAY OF THE 4TH MONTH FOLLOWING WRITTEN TERMINATION, ABANDONMENT, SETTLEMENT, OR COMPLETION OF YOUR CONTRACT.** For residential construction projects, original contractors must record the lien affidavit **NO LATER THAN THE 15TH DAY OF THE 3rd MONTH FOLLOWING WRITTEN TERMINATION, ABANDONMENT, SETTLEMENT, OR COMPLETION OF YOUR CONTRACT.**

Subcontractors that want their lien to attach to the retained fund so that they are paid from the retained funds in preference to the general contractor must record the lien affidavit **WITHIN 30 DAYS OF COMPLETION OF THE WORK**. If the claim does not include retained funds, it must be recorded **NO LATER THAN THE 15TH DAY OF THE 4TH MONTH FOLLOWING THE LAST MONTH IN WHICH LABOR WAS PERFORMED OR MATERIALS FURNISHED**. For residential construction projects, a subcontractor must record the lien affidavit **NO LATER THAN THE 15TH DAY OF THE 3rd MONTH FOLLOWING THE LAST MONTH IN WHICH LABOR WAS PERFORMED OR MATERIALS FURNISHED**.

For those providing specially fabricated materials, the lien affidavit must be recorded **NO LATER THAN THE 15TH DAY OF THE 4TH MONTH FOLLOWING: (1) THE LAST MONTH IN WHICH MATERIALS WERE DELIVERED, (2) THE LAST MONTH IN WHICH DELIVERY OF THE LAST OF THE MATERIAL WOULD NORMALLY HAVE BEEN REQUIRED AT THE JOB SITE, OR (3) THE LAST MONTH OF ANY MATERIAL BREACH OR TERMINATION OF THE ORIGINAL CONTRACT BY THE OWNER OR ORIGINAL CONTRACTOR OR OF THE SUBCONTRACT UNDER WHICH THE SPECIALLY FABRICATED MATERIAL WAS FURNISHED**.

**IMPORTANT NOTE:** Chapter 53 sets forth numerous substantive requirements for the lien affidavit. Failure to strictly comply with these requirements may result in waiver of your lien claim and potential civil liability for damages, statutory penalties, and attorney's fees.

Also, recording the lien affidavit is not the last step. You must send a copy of the recorded lien affidavit to the owner and, if you do not have a contract with the original contractor, to the original contractor **WITHIN 5 DAYS FOLLOWING THE DATE THE LIEN AFFIDAVIT IS RECORDED WITH THE COUNTY CLERK**. As a practical matter, a copy should be sent to both parties immediately upon recording.

## 5. Enforcement

A mechanic's lien, whether statutory or constitutional, may be foreclosed only upon judgment of a court of competent jurisdiction foreclosing the lien and ordering the sale of the property subject to the lien. A suit to foreclose upon a mechanic's lien, whether statutory or constitutional, must be filed within 4 years of the accrual of the claim.

## 6. Additional Considerations and Resources

There are additional implications when asserting a lien claim against homestead property. To fix a lien on homestead property, the person who is to furnish labor and the property owner must execute a written contract setting forth the terms of the agreement, and the contract must meet certain specific requirements. Further, Chapter 53 imposes additional substantive requirements for the lien affidavit for liens asserted against homestead property.

For additional information, go to <http://www.tenminutementor.com/> and search for "Texas Lien Law".

### *Texas Constitution, Article XVI, Section 37*

If you fail to meet the intricate deadlines and notice requirements of Chapter 53, all is not lost. As previously stated, the Texas Constitution grants to mechanics, artisans, and materialmen a claim or interest upon the buildings and articles made or repaired by them for the value of labor done thereon or material furnished therefor. A constitutional mechanic's lien claim is "self-executing," or has no notice requirement; thus, contractors who fail to meet the deadlines and/or notice requirements of Chapter 53 oftentimes must fall-back on their constitutional mechanic's lien rights. However, a constitutional lien is only available if the claimant has directly contracted with the owner of the property. A constitutional mechanic's lien claimant may file an affidavit of lien claim in the property records of the county in which the labor was performed or the material provided and may file a lawsuit seeking foreclosure of his claim within 4 years of the date on which the claim arose.

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# AN INTRODUCTION TO MECHANIC'S LIENS