

◆ The Construction Report ◆

Volume 6 Issue 1

July 2006

Published periodically by Quilling, Selander, Cummiskey & Lownds, P.C., 2001 Bryan Street, Suite 1800, Dallas, Texas 75201
Brian W. Erikson, Editor, (214) 880-1844; Fax (214) 871-2111

Texas Mechanic's Liens - A Subcontractor's perspective

The Texas Property Code governs whether a contractor will be paid for work on private projects, that is, projects not involving any federal, state, or local governmental body. Chapter 53 of the Property Code contains the magic language you need to perfect claims on the owner's property or against the general contractor. It also defines how to perfect a claim on the general contractor's bond if the owner had the foresight to require one.

In evaluating your rights, you need to understand that the Property Code is not set up to make bond or lien claims easy. It requires strict adherence to time lines and often emphasizes the form of your notices over their substance.

Under the Property Code, the contractor who contracts with the owner is termed the "original contractor" not the "prime contractor" (for no apparent

mal notice under the Property Code and may be asserted at any time within four years of the completion of work. The constitutional lien must be reduced to



paper and recorded in the county mortgage records to place third parties on notice. Recordation may prevent a sale or refinance of the property. Blocking an owner's sale or refinance is one of the best ways to ensure payment.

Under the Property Code, the original contractor need only file a lien affidavit by the 15th day of the fourth month after the end of the last month in which any work was done under the original contractor's contract with the owner. The time may start earlier if the owner has breached its contract, or abandoned the project. No other notices of nonpayment are required.

If you did not have a contract with the owner, you have additional hurdles to jump to perfect your lien rights. The nature of these hurdles depends on whether the original contractor posted a

(Continued as "Property Code" on page 2)

Lawyer Quips and Quotes

A verbal contract isn't worth the paper it's written on.
—Samuel Goldwyn
* * *

"That's a nasty-looking bunch of customers you've got to dispose of this morning, Your Honor," remarked the new court reporter. The veteran judge barely glanced up from the various documents he was reading. "You're looking at the wrong bunch. Those are the lawyers."
* * *

To some lawyers, all facts are created equal.

—Felix Frankfurter
* * *

Two little girls were having a heated argument. Said Mindy, "My dad's better. He's an important carpenter. He makes buildings."

Replied Carol, "Oh, yeah? Well, my dad's a lawyer. He makes loopholes."
* * *

Scrooge, a notoriously shady businessman, visited Huey Louie Dewey, an attorney, for advice, but would only pay if the shyster felt sure that Scrooge had a lock cinch case. Scrooge then gave a lengthy account of the trouble.

After listening for more than two hours, the lawyer interrupted. "But Mr. Scrooge, your case is an absolute certainty. The other fellow has no leg to stand on. You owe \$200 for the advice."

"Nope—sorry," he said, and started to leave the office.

"What are you doing?" the lawyer protested. "You agreed to pay if I was certain your case was airtight, and it is—the other guy has no chance at all!"

Scrooge grinned. "I told you the other guy's side."

Time begins to run on Property Code lien rights at the end of the month in which you did the work, regardless whether or when you billed for it.

good reason). The original contractor need not do "general" work, and may even do real work like mechanical or electrical. If you find yourself contracting directly with the owner, you are an original contractor, with original contractor rights under the Property Code.

The original contractor has two bundles of rights against the owner. The most powerful is the constitutional lien, which actually arises from the Texas Constitution, not the Property Code. The constitutional lien requires no for-

(*"Property Code" continued from page 1*)
payment bond to pay lien claims.

If the original contractor did not post a Property Code payment bond, you have a right only to funds that you have "trapped" with notices of nonpayment to the owner or to the ten percent retainage that the owner is required to withhold from the original contractor's payments. Trapping of funds occurs when you submit a notice of nonpayment before the owner has paid the original contractor for its work. If he owner has already paid the original contractor for the work, you may be out of luck. You will then be relegated to a proportionate share of the ten percent retainage, if and only if you have provided either the optional retainage notice at the beginning of your work, or notices of retainage accrual along with your notices of nonpayment (more on these subjects later).

The Property Code lists drop dead dates for notices of nonpayment. For a subcontractor with a contract directly with the original contractor, the subcon-

The Property Code has drop dead dates for notices of nonpayment. You miss them and your claim drops dead.

tractor must provide notice of nonpayment by the 15th day of the third month following the end of the month in which you did the work for which you have not been paid. Translated into English, this means that you must provide notice that you have not been paid by about 75 days after the month in which you did the work. Note that there is no reference to when or even if you sent an invoice for the work. The time deadline simply runs from the end of the month in which you did the work for which you have not been paid.

This notice requirement is especially important when you are doing extra work or work which is arguably outside the scope of your subcontract. If you want to be paid for extra work, whether by lump sum or time and materials, you must submit notices of nonpayment by the 15th day of the third month after the month in which you did the extra or extra-contractual work.

To perfect your claim for retainage, you have two choices. You may submit a notice to the owner of your retainage agreement by the 15th day of the second month after you begin work. This is called the optional retainage notice. Although termed "optional", you should take advantage of this provision. If you choose not to send the "optional" retainage notice, you have to provide notice to the owner of each month's retainage billed but not paid.

Your lien affidavit must be filed by the 15th day of the fourth month following the earlier of the last month in which labor was performed or material was furnished, or the month in which the original contract was breached or abandoned or your contract was breached. The lien affidavit must be filed with the county clerk of the county where the project is located. You must provide copies of the lien affidavit to the owner and original contractor within five days of filing.

To capture the retainage, you should file your lien affidavit within thirty days of the completion of the project, since the owner need only hold the retainage for those thirty days. Your claim for retainage may be kaput if the owner has already released the retainage.

If your contract is with a subcontractor as opposed to the original contractor, then the Property Code adds an additional notice. You will have to provide notice of nonpayment to the original contractor by the 15th day of the second month following the month in which you furnished labor or materials. You also have to supply notice of nonpayment to the owner and original contractor by the 15th day of the third month following the month you performed labor or provided the materials.

If the original contractor posted a Property Code payment bond, you have two ways of perfecting a claim against the bond. You may follow the steps set out above for perfecting a claim against the project. Alternatively, you may give the bonding company the notices ordinarily destined for the owner.

A bond must state some magic language to qualify as a Property Code bond. These requirements are set out at length in the Property Code (and are too

(Continued as "Property Code" on page 4)

The Editor's Corner

The Construction Report is published periodically by Quilling, Selander, Cummiskey & Lownds, P.C., to highlight construction matters of interest to at least the Editor, Brian W. Erikson. The information we provide is a community service and is not intended to displace the legal judgment of real (expensive) attorneys. We invite your comments. Write us at 2001 Bryan Street, Suite 1800, Dallas, Texas 75201. Call us at (214) 880-1844.

TCR

Mediation: A Win-Win

Two sisters were having a heated argument over who would eat the last orange.

The sisters finally reached a Solomonic decision — they split the orange. As the sisters walked away, one peeled her half and saved the peel, trashing the pulp. She wanted the peel for a cake she was making. The other sister peeled her half and ate the pulp, discarding the peel.

If the sisters had only worked for a win-win solution, and discussed each other's needs, they could have had an entire orange for their purposes.

A win-win solution is the objective of mediation. Win-win solutions are only possible when the parties discuss their needs openly and candidly.



**PROPERTY CODE DEADLINES
(PRIVATE CONTRACTS IN STATE OF TEXAS)**

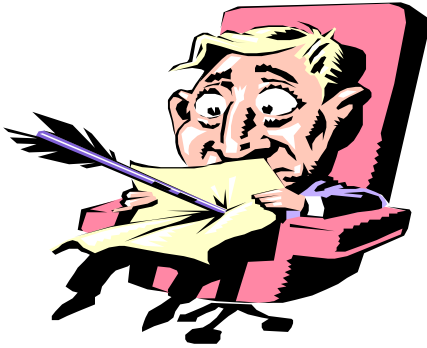
(1) Month Labor Performed or Materials Delivered	(2) Last Date for Early Notice to Original Prime Contractor by Claimant Who Dealt With Subcontractor	Last Date for Fund Trapping Notice to Owner and Original Contractor or Regular Notice to Surety on Property Code Bond	(3) Last Date for Filing Lien Affidavit (Assuming (1) Is Last Month of Performance of Delivery)
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) IF NOTICE PERTAINS TO SPECIALLY FABRICATED ITEMS THE DATE OF RECEIPT AND ACCEPTANCE OF THE ORDER CONTROLS NOTICE ON UNDELIVERED SPECIALLY FABRICATED ITEMS.
- (2) CONTRACTUAL RETAINAGE NOTICE TO OWNER AND/OR PRIME CONTRACTOR DUE.
- (3) SUBS AND SUPPLIERS SHOULD ALWAYS REMEMBER TO FILE AFFIDAVIT WITHIN 30 DAYS OF COMPLETION TO TRAP STATUTORY RETAINAGE.

(Property Code continued from page 2)

dull to list here). If you need the legal description or the bonding company's name, the owner and original contractor are required to provide the information. They can charge you up to \$25 to discourage you from protecting your lien rights.

You must file suit within two years from the date you filed your lien affidavit or one year after the completion of the project, whichever is later.



Notice that you filed a lien may prompt the owner or original contractor to pay.

Texas Trust Fund Liability: Not so subtle pressure with or without a lien filing

The Texas Construction Trust Fund Act, Chapter 162 of the Texas Property Code, can apply not so subtle pressure on an owner or an original contractor even when a subcontractor or supplier has missed the Property Code deadlines. The Trust Fund Act provides for criminal penalties and personal liability for the officers and employees of the general contractor who is paid for a subcontractor's or supplier's labor or materials, but fails to pass along payment to the subcontractor or supplier. This statute is especially useful where the general contractor has diverted money to another project.

The Act also applies to an owner who has received loan proceeds, but has diverted the money for other purposes.

The subcontractor or supplier does

not need to file any lien to perfect a Trust Fund Act claim. However, the general contractor has a defense if the contractor had to use subcontractor or supplier money to correct defects in the labor or materials. The general contractor also has a defense if it has paid out all of the original contract amount for the costs of the project, even though the project has not yet been completed. Construction trust funds may be used for overhead and other directly related expenses.

Perhaps the most significant feature of the Act allows the claimant to sue the officers or owner of the general contractor directly, and impose personal liability those persons who had authority to issue payment to the claimant, but for some reason chose not to.

Although the statute is not applicable to any lender, title company, closing agent, or bonding company, it can be very persuasive against an original contractor.

TCR

The Construction Report

Quilling, Selander, Cummiskey, Clutts & Lownds, P.C.

Attention: Brian W. Erikson

2001 Bryan Street, Suite 1800

Dallas, Texas 75201

(214) 880-1844; Fax (214) 871-2111

Inside This Issue:

—*Texas Mechanic's Liens:*

A Subcontractor's Perspective

—*Lawyer Quips and Quotes*

—*Mediation: A Win-Win*

—*Property Code Deadlines Chart*