

◆ The Construction Report ◆

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Perfecting Claims on Public Work

Texas Government Code Chapter 2253 details the steps for perfecting a claim for non-payment on Texas public work, like public schools, sewer systems, and buildings. Chapter 2253's recipe for claim perfection is confusingly difficult. Lack of compliance prevents a subcontractor or supplier from perfecting claims, and from collecting money otherwise rightfully due. Successful Chapter 2253 claimants usually have had to retain skilled attorneys at considerable cost.

Chapter 2253 requires a public owner of a project of at least \$25,000 to require its prime contractor to secure a payment bond to protect subcontractors and suppliers from a failure to make proper payment. The notice requirements are exacting and tedious, and require various specified steps. Chapter

The notice deadline for claims does not start from the date of an invoice.

2253 is unforgiving – it has no grace period for notices not filed by the statutory deadlines.

The claimant's relationship to the prime contractor determines the number and type of required notices. Chapter 2253 establishes two categories of claimant: those who contract directly with the prime contractor, and those who do not. A claimant who contracted directly with the

prime contractor has fewer notices than a claimant with no contractual relationship with the prime contractor. A direct claimant must provide notice of nonpayment by the 15th day of the third month following the month in which the claimant did the work for which it has not been paid. This is an awkward way of prescribing a notice period of about 75 days. Important note: The time deadline



for a notice does not start from an invoice date or the date that the invoice was submitted for the work at issue. This is particularly important for change order work. Time does not start to run when you submit a change order proposal to pay for work clearly outside the contract. Instead, time begins to run out on your Chapter 2253 rights at the end of the month in which you did the work, regardless whether you billed for it or even had a contract to do it. (For a painful demonstration, see the Case Study on Page 4.)

For example, suppose the prime contractor insisted that you do certain work outside the scope of your subcontract. Suppose that he or

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Lawyer Quips and Quotes

If a lawyer and an IRS agent were both drowning, and you could only save one of them, would you go to lunch or read the paper?
**

You're trapped in a room with a tiger, a rattlesnake and a lawyer. You have a gun with two bullets. What should you do?
Shoot the lawyer. Twice.
**

What happened to the lawyer who was thrown out of a saloon?
He was disbarred.
**

Two lawyers went into a diner and ordered two drinks. Then they produced sandwiches from their briefcases and started to eat.

The owner became quite concerned and marched over and told them, "You can't eat your own sandwiches in here!"

The attorneys looked at each other, shrugged their shoulders and then exchanged sandwiches.
**

"You are a cheat!" shouted the attorney to his opponent.

"And you're a liar!" bellowed the opposition.

Banging his gavel loudly, the judge interjected, "Now that both attorneys have been identified for the record, let's get on with the case."
**

Did you hear about the terrorists who took a whole courtroom full of lawyers hostage? They threatened to release one every hour until their demands were met.

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(Continued from "Claims" on page 1)

dered you to do the work over the Memorial Day weekend and during the beginning of June. Besides a ruined holiday, you would then have a notice deadline for nonpayment for the May work by August 15, and for the June work by September 15. The notice is required even if the cost has not been fully defined or the prime contractor has back charged you for totally unrelated work. The only significant fact is whether you have done work for which you have not been paid.

The timing of the notice is only part of the requirements. You must also provide the notice in the right form, and to the right persons by the correct manner of mailing. The notice must state how much is owed, based on what kind and type of work. The notice must include a sworn statement of account stating the magic words that "the amount claimed is just and correct and that all just and lawful offsets, payments, and credits known to the affiant have been allowed." You must sign a blood oath for these magic words before a notary public.

If retainage has been withheld,

A notice of non-payment must include a sworn statement of account and be mailed to the prime contractor and its surety.

the notice should so state to alert the prime contractor and its surety. If you do not advise the prime contractor and its surety of retainage, you will have to provide a retainage notice within 90 days of the completion of the prime contract.

If you do not have a written contract, you must list the name of the party with whom you contracted, the date of your work, a description of your work, the prices for your work, and an itemization of the

work. Include copies of invoices, delivery tickets, orders showing a reasonable identification of the project and destination of delivery.

If you have a written contract, you should attach a copy of the contract and state how much of the contract you have completed, along with your calculations or itemization of the unpaid charges.

If your contract provides for retainage, you must also provide a notice that retainage has not been paid. At the latest, the retainage notice is required within 90 days of the completion of the prime contract. A retainage claim is not valid for an amount that exceeds 10 percent of your contract.

The notices of nonpayment and sworn statement of account must be sent by certified or registered mail both to the prime contractor and its surety. Make sure to retain the white receipt for mailing and the green receipt proving delivery. If you are one day late or cannot prove



timely notice, you may lose some or all of your claim.

The governmental entity and the prime contractor are both required to provide you with the name of the prime contractor's bonding company and a copy of the payment bond. Should the public entity fail to obtain a payment bond, the entity would then be liable for unpaid subcontractor claims just as if it were the bonding company.

Once you have properly and timely filed a Chapter 2253 claim, the prime contractor and its surety

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 your attorneys. Write us c/o **Brian W. Erikson**, 2001 Bryan Street, Suite 1800, Dallas, Texas 75201. Call us at (214) 880-1844.*

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have 60 days to respond. If there is no response, you may sue them in a county where any part of the work was located.

You must file suit on your payment bond claim within one year of the date that you mailed your notice of nonpayment and sworn statement of account. You may sue the prime contractor with or without its bonding company. If you win, the court may award you attorney's fees and court costs for having to file suit. You can assign your payment bond claim to any third party, such as your bank, and allow the bank to pursue your claim.

If you willfully file a false and fraudulent payment bond claim, you may be liable for the criminal penalty of false swearing.

Sub-subcontractors or suppliers to subcontractors have an additional notice and other requirements. For example, they must provide notice to the prime contractor of their claim by the 15th day of the second month after the month in which they did their work. Suppliers of specially fabricated materials also have additional notice requirements. For more details, visit The Construction Report website: <http://www.theconstructionreport.org>.

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Texas Government Code Chapter 2253 Notice Deadlines
(PUBLIC CONTRACTS IN THE 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	(3) LAST DATE FOR NOTICE TO SURETY ON MCGREGOR ACT BOND WITH SWORN STATEMENT
JANUARY	MARCH 15	APRIL 15
FEBRUARY	APRIL 15	MAY 15
MARCH	MAY 15	JUNE 15
APRIL	JUNE 15	JULY 15
MAY	JULY 15	AUGUST 15
JUNE	AUGUST 15	SEPTEMBER 15
JULY	SEPTEMBER 15	OCTOBER 15
AUGUST	OCTOBER 15	NOVEMBER 15
SEPTEMBER	NOVEMBER 15	DECEMBER 15
OCTOBER	DECEMBER 15	JANUARY 15
NOVEMBER	JANUARY 15	FEBRUARY 15
DECEMBER	FEBRUARY 15	MARCH 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 prime contractor due.
- (3) If you forget to give notice in (2) above you must notify the prime contractor and its surety within 90 days of project completion that unpaid retainage is due.

Case Study: A lesson on timely filing

The Richardson Independent School District hired R.C. Small to renovate four schools. Small subcontracted with Glen Barrett Paint & Drywall for certain drywall work on the schools. Barrett purchased wall coverings and other materials from S.A. Maxwell Company for the school work. Maxwell shipped the wall coverings from its Chicago warehouse to its Dallas warehouse in late May 1990. On May 31, 1990, Barrett picked up some of the materials and took them to the school sites. Barrett continued picking up materials, storing the last of the materials at the school sites on June 4, 1990.

Maxwell invoiced Barrett for the materials in two separate invoices. On July 26, 1990, after Barrett had

failed to pay most of the amounts due, Maxwell mailed to R.C. Small a notice of nonpayment under the MacGregor Act. [The MacGregor



Act then controlled claims on public projects like schools, buildings and other public works.] Maxwell sent a second notice of nonpayment on August 15, 1990, to R.C. Small and its surety. When Maxwell still did not receive payment, Maxwell filed suit in State District Court.

Both sides filed motions for

summary judgment. The trial court granted the motion by R.C. Small and its surety, holding that Maxwell's notices were untimely. Maxwell appealed.

On appeal, the Dallas Court of Appeals held that the date that Barrett picked up the materials and took them to the job site started the notice clock running. Since Barrett picked up some of its materials in May 1990, Maxwell's time started running at the end of May for those materials. As a result, Maxwell's notice for May materials was required by July 15, 1990. Maxwell's notice was 11 days too late. Its August 15, 1990, notice was timely for the materials picked up in June 1990, entitling Maxwell to payment for the June materials.

See *S.A. Maxwell Co. v. R.C. Small & Associates*, 873 S.W.2d 447 (Tex. App. – Dallas 1994).

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