

MECHANICS' LIEN LAW AND STRATEGIES IN TEXAS

I. Overview of Mechanics' Liens

In olden days, when an artisan manufactured or repaired an item, the artisan had the legal right to hold the item to ensure payment. If the artisan relinquished possession of the item, the artisan effectively released all right to any lien on the item. The key to the artisan's legal position was possession of the item. In other words, possession was more than 90% of the law. However, contractors did not enjoy such rights. When a contractor constructed a building for an owner, the contractor invariably released possession of the building perhaps at nights or on weekends, and certainly at the completion of the project. When the contractor released possession of its work, the contractor legally forwent any lien against the property for the value of the work.

Mechanics' liens as we know them did not exist under the common law either in England or the United States. Although courts in equity had greater inherent ability to do justice, they too were powerless to enforce a mechanics' lien. If a contractor built a project for an owner, and then was not paid, the contractor had only a personal action against the owner, and no lien on the owner's property. Recognizing this inherent inequity, legislatures in the United States began passing remedial statutes to allow an enforceable lien to those who worked on real property.

The first mechanics' lien law in the United States was passed by the Maryland legislature in 1791 to promote development of the new city of Washington. Pennsylvania followed in 1803. Since then, every state in the country has passed some sort of mechanics' lien law. Mechanics' lien laws allowed contractors some security of payment and enticed them to invest capital in buildings and other projects. Mechanics' lien laws have been credited with the expansive growth of cities and

towns across the country in the nineteenth century.

The first mechanic's lien statute in Texas was passed in 1839. At first, mechanic's liens in Texas were remarkably easy to perfect -- there was no filing or notice requirement. Although today, Texas protects the right to a mechanic's lien under both the Texas Constitution and state law, perfecting a lien is no longer easy for subcontractors or suppliers.

A. What is a Mechanics' Lien?

A mechanic's lien is a legal attachment to real property which arises with the occurrence of specified conditions. A mechanic's lien is created only by the operation of law, not by grant or contract.

There are two schools of legal thought underlying mechanic's lien statutes -- New York versus Pennsylvania. The fundamental difference between the views is the way in which they treat subcontractors' rights. Texas follows the New York approach, which limits the value of the subcontractor's lien to that portion of the contract price that the owner owes to the original contractor at the time that the lien notice is given, plus any amount which may become due thereafter. To succeed on a lien claim, the subcontractor must show that the owner owed the amount of the claim or more to the original contractor. The owner usually owes no more than the contract price. Under the New York scheme, the owner is not liable to claimants for amounts which he has already paid to the original contractor prior to the filing of liens. The owner can freely pay the original contractor without concern for potential subcontractor claims, provided that (in some New York-scheme states) the owner does not deliberately try to defraud subcontractors.

The Pennsylvania approach is much more subcontractor friendly. With this approach,

subcontractors have a direct lien, not merely a derivative right, on the owner's property for the full value of the claim, regardless how much the owner has already paid to the original contractor. Under this view, the original contractor is considered the owner's agent for hiring and directing subcontractors. As a result, payments to the original contractor do not reduce the owner's liability to subcontractors. Owners in Pennsylvania-scheme states may face subcontractor claims far in excess of the original contract price.

B. Who is Entitled to a Lien?

The mechanic's lien statute which was first enacted in Texas was intended to benefit those contractors with whom the owner directly contracted. Contractors were enticed to provide labor and materials on credit in return for some security on the owner's property,. By 1844, Texas subcontractors were granted limited lien rights, but they have never gained the level of rights which original contractors enjoy.

Texas statutes and cases, as well as the constitution, have historically differentiated between the rights of original contractors or master mechanics, and materialmen, subcontractors, laborers, and others, but today there are only two principal classes of mechanic's lien claimants: original contractors and subcontractors, in addition to special provisions for architects, engineers, and surveyors who prepare plans and plats. The law controlling mechanic's liens is set out in Chapter 53 of the Texas Property Code.

1. Original Contractor

An original contractor is defined under Texas law as "a person contracting with an owner either directly or through the owner's agent." Texas Property Code §53.001(7). The owner under

Chapter 53 is a person who owns any legal or equitable interest in the property sought to be charged with the lien. *Diversified Mortgage Investors v. Blaylock*, 576 S.W.2d 794 (Tex. 1978). An original contractor is not required to do any actual work on a construction project, only be responsible for it to the owner. Any person who contractually agrees with the owner to furnish the labor and materials used in the construction of an improvement is an original contractor, regardless whether subcontractors or vendors actually do the heavy lifting. *Wilson v. Hinton*, 116 S.W.2d 365 (Tex. 1938).

Contracting with the owner's agent suffices to make one an original contractor. However, one who contracts to construct improvements as the owner's agent, and not as an independent contractor, cannot be an original contractor. *Dallas National Bank v. Peaslee-Gaulbert Co.*, 35 S.W.2d 221 (Tex.Civ.App. -- Dallas 1931, writ dismissed). A contractor with a cost plus contract with the owner may be an original contractor, as long as the contract evinces intent that the contractor be independent of the owner and not be the owner's agent. *Associated Sawmills, Inc. v. Peterson*, 366 S.W.2d 844 (Tex.Civ.App. -- Dallas 1963, no writ).

(a) Sham Contracts

Sometimes, the owner contracts with or arranges for a party to procure labor or materials for a construction project. That party need not perform any actual work, and ordinarily would be an original contractor based on the direct contract with the owner. However, a sham contract exists if the owner can effectively control the party or if the contract lacked any good faith intent that the other party have responsibility for performing the contract. When a sham contract exists between the owner and its agent, then any person who furnishes labor or materials under contract with the agent

is elevated in status to an original contractor, with all the rights of an original contractor.

For example, some owners will contract with a construction manager, who in turn contracts with trade contractors for labor and materials for the project. Under the owner-construction manager contract, the construction manager may not be responsible for any of the actual construction and is really the owner's agent for scheduling and coordination. In that case, the construction manager is not construed as the original contractor. Each trade contractor who contracts with the construction manager becomes an original contractor with concomitant rights of an original contractor.

2. Subcontractors

A subcontractor is a person who has furnished labor or materials to satisfy an obligation to an original contractor or to a subcontractor, where the obligation involves the performance of some or all of the work required by the original contract. Tex. Prop. Code §53.001(13). An original contract is defined as "an agreement to which an owner is a party directly or by implication of law." Tex. Prop. Code §53.001(6). The term "work" means "any part of construction or repair performed under an original contract." Tex. Prop. Code §53.001(14). Translating these definitions, the term "subcontractor" includes anyone who provides labor or material under a contract with an original contractor or another subcontractor, where the labor or material forms any part of the construction or repair required under an agreement to which the owner is directly or impliedly a party.

To define the term "subcontractor," the statute unfortunately uses the very term to be defined. This causes some confusion as to whether the term subcontractor is limited to only those who have contracted either directly with the original contractor or with one who has contracted with an original contractor. In other words, one could construe the statute to exclude liens for third-tier

subcontractors, that is, those who have contracted with a sub-subcontractor to a subcontractor to an original contractor. However, a third-tier subcontractor becomes a “subcontractor” under the Property Code because it is furnishing labor or materials to fulfill an obligation to a subcontractor, the second-tier subcontractor. A provider to the third-tier subcontractor would be in a similar position, as would the fourth-tier provider, and all lower tier providers. Under Tex. Prop. Code §53.021(a), anyone furnishing labor or material under a contract with any higher tiers is entitled to a lien if the work performed is required by the original contract for the project.

3. Others

It appears from the Property Code that anyone who furnishes labor or material for a specific project for some part of the work required by an original contract is entitled to a lien. It matters not whether the person to whom it is furnished is a supplier or a contractor. It matters not what particular tier the person occupies in the series of contracts pertaining to the project. Under Tex. Prop. Code §53.021, the class of persons entitled to a lien is defined broadly to include anyone who furnishes labor or material “under or by virtue of a contract with the owner or the owner’s ... contractor, or subcontractor.”

Architects who were engaged not only to design a structure, but also to supervise the construction of a building, have historically been entitled to a mechanic’s lien because they were expending labor for the erection of the improvements. Today, an architect, engineer or surveyor is entitled to a lien for the mere preparation of a plan or plat, without regard to supervision of construction, if he or she complies with the requirements of Tex. Prop. Code §53.021(c).

C. Types of Labor, Materials, and Services That are Lienable

A mechanic's lien does not exist independently from the debt owed for labor or materials for a construction project. The lien's creation is, in fact, an incident of the debt incurred to perform the type of work described in the constitution or in the mechanic's lien statutes. The lien may exist only so long as the debt exists. When the debt is discharged, the mechanic's lien is likewise discharged. *University Savings & Loan Ass'n v. Security Lumber Co.*, 423 S.W.2d 287 (Tex. 1967).

Under Tex. Prop. Code §53.023, a mechanic's lien secures payment for:

- (1) labor done or material furnished for construction or repair;
- (2) specially fabricated material, even if the material has not been delivered or incorporated into the construction or repair, less its fair salvage value;
- (3) the preparation of a plan or plat by an architect, engineer, or surveyor in accordance with Section 53.021(c).

Unless the debt is listed, it is not secured by a mechanic's lien.

Where the original contractor has a cost plus agreement with the owner, all the expense that the contractor incurred in building the project, including subcontractors' claims and a 10% prime contractor's fee, are lienable. *Lee v. Ardoin*, 677 S.W.2d 686 (Tex.App. -- Beaumont 1984, no writ).

Where sales tax is part of the price charged for the items purchased for a project, the tax is part of the lienable debt. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974)(sales tax paid for garbage disposals and dishwashers properly recoverable under mechanic's lien).

Profit on the contractor's work actually performed is lienable. Anticipated profits on work

not performed is not lienable. *Texas Bank & Trust Co. v. Campbell Bros., Inc.*, 569 S.W.2d 35 (Tex.Civ.App. -- Dallas 1978, writ dismissed)(no lien for profit on work not performed).

A recent case, *Advance'd Temporaries, Inc. v. Reliance Surety Co.*, 2004 WL 1632737 (Tex.App. – Corpus Christi July 22, 2004), has held that a temporary employment agency which supplied employees to a subcontractor had a legal right to a mechanic's and materialman's lien for the employees' labor.

While debt incurred for labor and material furnished for a project is lienable, debt incurred for the loan of money to pay for labor and material furnished is not. *Gaylord v. Loughridge*, 50 Tex. 573 (1879)(one who advances money as loan for labor or materials for building project not entitled to mechanic's lien). Where a loan is disguised as a construction contract, the court will examine the substance not the form of the transaction.

In *Bunton v. Palm*, 9 S.W. 182 (Tex. Comm'n App. 1888, judgment approved), the court faced a loan purporting to be a construction contract. There, an owner issued a note to another person in return for money to pay for labor and material for the owner's homestead property. The transaction, however, never envisioned that the lender would perform any work, and was in substance a loan. The lender assigned the note to another who attempted to assert a mechanic's lien as security for the note. The court held that, although the assignee paid value for the note, the assignee did not buy any mechanic's lien rights because the transaction was, in effect, merely a loan of money, secured by a contract lien on the property. A loan of money, even for labor and materials, does not give rise to a mechanic's lien. Here, the assignee had no right to a mechanic's lien.

The Texas Property Code allows the recovery of attorney's fees. However, any attorney's

fees awarded are not part of the lienable debt secured by the lien. *Dossman v. National Loan Investors, L.P.*, 845 S.W.2d 384 (Tex.App. -- Houston [1st Dist.] 1992, writ denied). In other words, the attorney fee claim is a personal action against the owner, and is not part of the debt covered by the lien. However, the owner may agree to a contractual lien to secure the payment of attorney's fees on non-homestead property, such as those common in mortgages and deeds of trust. *Hufstedler v. Glenn*, 82 S.W.2d 733 (Tex.Civ.App. -- Austin 1935, no writ).

Prejudgment interest is similarly not protected by the mechanic's lien, since Section 53.023 limits the scope of the lien to payment for labor, material, special fabrication, and professional plan or plat preparation, and does not encompass prejudgment interest. *Ambassador Development Corp. v. Valdez*, 791 S.W.2d 612 (Tex.App. -- Fort Worth 1990, no writ).

A contractor or supplier may be able to apply payments received to any portion of the debt that the contractor or supplier chooses. If the debtor provides no direction as to what particular items are to be paid by a payment, the contractor or supplier is entitled to allocate the payment as it chooses, provided that the contractor or supplier does not make an application that is inequitable and unjust to the debtor. *First National Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974); *Hodges v. Price*, 163 S.W.2d 868 (Tex.Civ.App. -- Galveston 1942, writ ref'd w.o.m.). A creditor's right to apply payments as it chooses is an exception to the general rule that the payment clears the oldest item then due. The defense that a payment paid for a particular item is an affirmative defense which must be specially pled. The debtor-purchaser has the burden of proof on such a defense. A general denial is insufficient. Texas Rules of Civil Procedure 94 and 95; *First National Bank in Dallas v. Whirlpool Corp.*, *supra*.

II. Construction Contracts and Mechanics' Liens

A. "No Lien" Contract

Parties under Texas law are generally free to form their own contracts granting or releasing such rights as they wish. Although there are a few exceptions, waiving a prospective mechanic's lien is not one of them. Texas law allows a contractor to expressly waive its right to a mechanic's lien either before or after the lien arises, but only if the intent to waive is clear. If the purported waiver is not clearly intentional, it will not be an effective waiver. *Barker & Bratton Steel Works, Inc. v. North River Insurance Co.*, 541 S.W.2d 294 (Tex.Civ.App. -- Dallas 1976, writ ref'd n.r.e.). The law presumes that no intentional waiver has occurred. *Shirley-Self Motor Co. v. Simpson*, 195 S.W.2d 951 (Tex.Civ.App. -- Fort Worth 1946, no writ).

A potential mechanic's lien claimant may validly sign a contract which contains a blanket waiver of lien. If a blanket lien waiver is signed, the claimant cannot assert a lien for labor or materials on a construction project. Once waived, a mechanic's lien cannot be revived. *Collinsville Manufacturing Co. v. Street*, 196 S.W. 284 (Tex.Civ.App. -- Amarillo 1917, no writ).

Sample operative language for a blanket waiver of an original contractor's mechanic's lien rights follows:

[Original Contractor] for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby waives and releases all liens and claims to liens that the undersigned may now have, or hereafter be entitled to have, from the furnishing of services, labor or materials, whether such liens or claims of lien arise

under the Texas Constitution, the Texas Property Code, or otherwise.

Blanket waivers are strictly construed. If a provision may be construed for a legitimate purpose other than a waiver, the provision will be construed to effectuate that purpose and not as a waiver. For example, a contractor may agree with an owner to satisfy every claim for material and labor and to hold the owner harmless from all liens in respect thereto. This provision should be construed merely as a provision which protects the owner from having to pay more than the contract price, and not as a waiver of lien rights. *Childress v. Smith*, 37 S.W. 1076 (Tex.Civ.App. 1896), *rev'd on other grounds*, 40 S.W. 389 (Tex. 1897).

If a contractor agrees not to file a mechanic's lien for a certain period of time, and the time extends beyond the deadline for perfecting the lien, the contractor has effectively waived its lien rights. *Dyer v. Mettalic Building Co.*, 410 S.W.2d 56 (Tex.Civ.App. -- Tyler 1966, no writ).

B. "Pay When Paid" Contracts

Under Texas law, the parties are free to contract as to when or even if they will receive payment for construction work. The original contractor typically agrees to pay its subcontractors a certain number of days after the original contractor receives payment from the owner. If the subcontract says nothing more, this provision will be interpreted as merely a timing mechanism for payment, not a shifting of risk of non-payment. The subcontractor will be entitled to payment within a reasonable time whether or not the original contractor is paid for the subcontractor's work. This shifting of the time for payment is known as a "pay when paid" clause.

If, on the other hand, the subcontract additionally states that the owner's prior payment to the original contractor for the subcontractor's work is a condition precedent to the original contractor

having to pay the subcontractor, and that the subcontractor assumes the risk of non-payment by the owner, then the original contractor need not pay the subcontractor without prior payment by the owner. The condition precedent of owner payment must occur first before the original contractor is obligated to pay the subcontractor. This shifting of risk of non-payment is known as a “pay if paid” clause.

When a subcontractor agrees to sign a “pay if paid” subcontract, the subcontractor usually anticipates that the subcontractor will not be paid if the subcontractor’s work is deficient, and the original contractor is not paid. However, there may be various reasons why the original contractor is not paid, reasons which have nothing to do with deficiencies in the subcontractor’s work, or even the subcontractor’s work. The owner may not pay the original contractor because the work in some other area is defective, or the work may be behind schedule, or the owner has sustained some costs or expenses totally unrelated to the subcontractor. If the subcontractor agrees to a “pay if paid” clause, the subcontractor should negotiate an exception for owner non-payment not associated with the subcontractor’s work.

C. Other Drafting Considerations

Negotiating a blanket lien waiver by the original contractor does not fully protect the owner from mechanic’s liens. Even with the original contractor’s blanket lien waiver, the owner could face liens from subcontractors and suppliers. If the original contractor abandons the project due to financial insolvency or declares bankruptcy, subcontractors and suppliers will submit notices of non-payment and file mechanic’s lien claims against the project. The owner would then have no recourse against the insolvent original contractor for indemnity from the liens. To avoid this problem, the

owner could insist on a provision in the original contractor's contract which requires the original contractor to extract blanket lien waivers from all subcontractors and suppliers on the project.

The owner must withhold ten percent of the original contract amount in retainage from the original contractor in order to protect itself from statutory retainage claims by subcontractors and suppliers. Texas Property Code §53.101. If the owner fails to withhold ten percent from the original contractor's payments, the owner or its property can be liable for retainage claims. Texas Property Code §53.105.

The owner should consider requesting payment and performance bonds from the original contractor. With a payment bond in place, any mechanic's liens attach to the payment bond, and not the owner's property.

III. The Payment Process

A. Applications for Payment

With projects which may last several months, the original contractor and subcontractors will ordinarily be entitled to progress payments to reflect the value of work performed in the month preceding the request for payment. The original contractor will usually prepare a schedule of values to reflect the major items of work, and the relative worth of such items. To request a periodic payment, the contractor then estimates the relative percentage of completion of each item of work and multiplies the percentage times the value assigned to the item. The contractor then subtracts the amount of prior payments, and deducts the amount of any retainage (usually ten percent). These calculations are generally listed on an application for payment form.

For example, say an original contractor contracts to construct an apartment building for an

owner. The contractor will prepare a schedule of values for the major project tasks. In this instance, the contractor may list as major items the site work, foundation, framing, plumbing, electrical, roof, drywall, flooring, and finish out interior items. The contractor will then assign dollar amounts to each of the items. The total of the amounts assigned obviously cannot exceed the total contract price. As each month passes, the contractor will estimate the progress made for each item. If the amount assigned to the foundation is \$30,000, and the contractor has completed 50% of that work in the first month, the contractor will apply for 50% of \$30,000 or \$15,000, less 10% retainage, in the first month's application for payment.

The owner and/or the architect will typically negotiate the percentage complete for each item. The owner should not pay for defective work, and may not approve any progress at all for an item during the month even if the contractor spent considerable sums working on it. Importantly, if the contractor furnishes labor or materials during a month, and the owner for whatever reason refuses to accept the work on the application for payment, or convinces the contractor to omit the item from the application, the time for notices of non-payment and lien filing continue just the same. These deadlines run from the date of the work, not the date of invoice or request for payment.

The contractor typically desires to maximize its stated progress to enhance cash flow. The owner typically desires to withhold as much cash from the contractor as is possible to maintain a pool of money to resolve any deficiencies in the contractor's work. Tension is routine between the owner and contractor as to the actual percentage of completion until the project is substantially complete. At that time, the project should be at least 90% complete and all but the 10% retainage is due to the contractor. The owner may, however, hold additional sums for the cost of correcting

particular defects in the work.

Another source of tension is the contractor's schedule of values. The contractor typically will enhance the value of items completed early in the project. This front end loading maximizes the contractor's cash flow, while leaving the owner with less money in hand to resolve contractor defaults or deficiencies. The owner and contractor need to resolve the tension between the contractor's need for working capital and the owner's need for protection from a contractor default.

B. Sworn Statements

Typically, the application for payment will contain a sworn, notarized statement by the contractor that the amount of work listed in the application has occurred and that labor and materials for this or prior applications have been paid. The payment verification may be just for prior applications or may also include the current application. If the current application is included, the applicant is required to pay first for its labor and materials, and await reimbursement by the owner or original contractor.

C. Lien Waivers

Typically, in the payment application process, the owner and original contractor will require waivers of lien for all previous work and a conditional lien waiver for the current payment application. This provides some assurance that there will be no liens for the work for which payment was previously made. The lien waiver for the current work is typically conditioned on anticipated payment, and is not fully effective without actual payment.

IV. Deadlines for Preserving Lien Rights

A. For General Contractors

Original contractors as they are termed under the Texas Property Code, or general contractors as they are known in general parlance, have the easiest method of perfecting a mechanic's lien against the owner's property.

1. Constitutional Lien

The Texas Constitution provides for a mechanic's lien for original contractors, that is, those contractors who have a contract with the owner. It protects prime or "original contractors," as they are referred to in the Property Code, but not subcontractors.

2. Perfection of Constitutional Lien

A contractor does not have to comply with the notice provisions of the Property Code to enforce the lien against the owner. For the contractor to defeat the rights of third parties, such as subsequent purchasers of the property, the contractor must ensure that the third party has at least constructive notice of the lien. This may be accomplished by filing a lien affidavit (See Private Form #6). There is no definitive deadline or statute of limitations for filing a constitutional lien. Arguably, there is a four year statute of limitations to match that for an action for debt.

3. Original Contractor's Property Code Lien

In order to perfect a lien under the Property Code, an original contractor must file a lien affidavit not later than the 15th day of the fourth month following the month in which the original contract has been: a) materially breached and thus terminated by the contractor or by the owner; b) completed; c) finally settled; or d) abandoned. Within 5 days after filing the lien affidavit, the original contractor must also send a copy of the affidavit claiming lien to the owner by certified or registered mail, addressed to the owner's last known business or residence address.

B. For Subcontractors and Suppliers

Generally, a subcontractor or supplier, is dealing with one of the following situations:

- ☞ There is no payment bond since bonds on private construction projects in Texas are optional. In this situation, the subcontractor or supplier has rights to a lien to secure payment of the "trapped funds" and/or the "10% statutory retainage fund";
- ☞ The original contractor may have given the owner a payment bond. In this situation, the subcontractor or supplier 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 would have lien rights against "trapped funds" or "statutory retainage" and a claim against the subcontractor's payment bond, and possibly a claim against the original contractor's bond.

The safest course of action is always to file notices and a lien in accordance with the requirements of the Property Code. Safer yet is to perfect and file a lien, and to furnish copies of the lien affidavit and notice letters to the payment bond surety, if there is one, by certified mail.

1. Trapping Funds (Unbonded Projects)

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 owner. A claimant must "trap funds" because unless funds are trapped in the hands of the owner, the claimant's recovery under its lien is limited to its share, if any, of the original contractor's 10% statutory retainage being withheld by the owner. 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 (Private Form #5) to the owner and the prime contractor.

2. Statutory Retainage Fund (Unbonded Projects)

During the progress of work under the original contract and for 30 days after that work is completed, the owner of an unbonded project is required to retain either 10% of the amount of each original contract 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, using the reasonable value of the completed work. Texas Property Code §53.101. This retainage fund is for the benefit of claimants who have filed lien affidavits within 30 days after completion of the original contract and who have sent required notices. The 10% retainage requirement does not apply if there is a payment bond.

3. Claimants contracting with an original contractor:

(a) Optional Retainage Notice

Each person contracting with the original contractor to furnish material, labor and/or specially fabricated material may send a notice to the owner detailing the particulars of the subcontract or agreement, including any provision for retainage, not later than the 15th day of the second month following first delivery of materials or the performance of labor after the agreement was made (see Private Form #1). Texas Property Code §53.057. Any claimant who fails to provide the optional retainage notice must provide notice to the owner of each month's retention billed but unpaid within the time requirements described in Paragraph 5, below.

4. Additional Notice for Specially Fabricated Material

To perfect a claim for specially fabricated items, the claimant must send a notice to the owner (and to the original contractor if dealing with a subcontractor or another supplier) not later than the 15th day of the second month following the month in which the order was received and accepted (see Private Form #2); and when material is delivered, give notice described in Paragraph 5, immediately below (Private Form #4). Texas Property Code §53.058.

5. Notice for Labor and Materials Delivered

The notice for labor and materials delivered, including specially fabricated materials and retainage if the optional retainage notice has not been given (Private Form #4) must be provided to the owner and original contractor not later than the 15th day of the third month following each month during which labor or materials were furnished. Texas Property Code §53.056. Please note that the date of delivery, not the date of invoice, controls.

WARNING: If original contract is nearly complete, the claimant should not wait the full number of days as there may be no funds to "trap" in the owner's hands to insure that the claim can be paid. To be safe, the claimant should provide notice to the owner no later than 30 days after completion of the original contract.

6. Filing Lien Affidavit (Private Form #6)

Depending on one's position in the food chain, there are differing dates by which a lien affidavit must be filed. The dates generally relate to the date that the indebtedness to the claimant accrued, the details of which are discussed in Section C Determining the Last Date of Work, below.

☞ As a general rule, all claimants seeking a lien (except on residential property) must file a mechanic's lien affidavit not later than the 15th day of the fourth month after the

day on which the indebtedness to the claimant accrued. Please note that the date that indebtedness accrues is different depending on the claimant's status in life. The lien affidavit must be filed with the county clerk of the county in which the property is located.

- ☞ If the claimant seeks a lien on residential property, the lien affidavit must be filed by the 15th day of the third calendar month after the day on which the indebtedness accrued.
- ☞ If the claim is for specially fabricated materials, the lien affidavit must be filed by the 15th day of the fourth month from the earliest of (i) the last month the material was delivered; or (ii) the last month material would normally have been required.
- ☞ For a portion of the statutory retainage held by the owner, the lien affidavit must be filed within 30 days after completion of the original contract.
- ☞ After the claimant has filed the lien affidavit with the county clerk of the county in which the project is located, the claimant must send copies of the affidavit by registered or certified mail to the owner and original contractor, at their last known business or residence address, within 5 days after filing.

WARNING: The safest practice is to be sure that the lien affidavit is filed no later than 30 days after completion of the original contract.

7. Lower Tiered Claimants (Sub-Subcontractors and Suppliers to Subcontractors, Etc.)

(a) Optional Retainage Notice

The optional retainage notice allows a sub-subcontractor or supplier to a subcontractor or any lower tiered claimant to provide notice to the owner and original contractor of the existence of an agreement which will deduct retainage from the claimant's payments. This notice dispenses with further notices of non-payment of retainage during the project. The notice may be sent to the owner and original contractor not later than the 15th day of the second month following the month of first delivery of materials or labor under the agreement providing for retainage. (See Private Form #1.) Any claimant who fails to provide the optional retainage notice must provide notice to the original contractor and owner of each month's retention billed but unpaid within the time requirements described in Paragraph 7(c), below.

(b) Undelivered Specially Fabricated Materials

If the claimant is supplying specially fabricated materials, there are additional notice requirements. Notice of an order for specially fabricated material must be sent to the owner and the original contractor not later than the 15th day of the second month following the month in which the order was received and accepted. Texas Property Code §53.058. (See Private Form #2.) When the specially fabricated material is delivered, the notice described in Paragraph 7(c), immediately below, must be provided.

(c) Notice For Labor and Materials Delivered By Lower Tiered Claimants

For labor and materials delivered, including specially fabricated materials and retainage (if the optional retainage notice has not been given), lower tiered claimants (i.e., sub-subcontractors or suppliers to subcontractors) must provide:

- ☞ Notice to the original contractor (Private Form #3) not later than the 15th day of the second month following each month during which labor or materials were furnished; and
- ☞ Notice (Private Form #4) to the owner and original contractor not later than the 15th day of the third month following each month during which labor and materials were furnished.

(d) Filing Lien Affidavit

The claimant must ordinarily file a lien affidavit not later than the 15th day of the fourth month following the last month during which labor was performed or material was furnished. If the claim is for specially fabricated materials, the lien affidavit must be filed by the 15th day of the fourth month after the earliest date of (i) the last month material was delivered; or (ii) the last month material would normally have been required. If the original contract has been breached or terminated by the owner or original contractor, or if the party with whom the claimant has contracted has breached or terminated the claimant's sub-contract, the lien affidavit must be filed by the 15th day of the fourth month after the date of the breach or termination.

If the claim is for a portion of the statutory retainage, the lien affidavit must be filed within 30 days after completion of the original contract. The completion date is determined by an affidavit of completion, which the owner is required to file in the county real estate records.

After the lien affidavit has been filed with the county clerk of the county in which the property is located (Texas Property Code §53.052(a)), the claimant must send copies of the affidavit by registered or certified mail to the owner's and original contractor's last known business or

residence address. This notice has to be sent within 5 days after filing the affidavit.

WARNING: The safest practice is to be sure that the lien affidavit is filed no later than 30 days after completion of the original contract.

8. How to Obtain Information

To properly notify the owner and original contractor, and in order to properly file a lien, the claimant is entitled to various information. The Property Code makes this process easier. The Property Code allows a claimant to obtain, among other things: (1) a legal description of the property from the owner; (2) a copy of any bond furnished to the owner or furnished to the original contractor or to any subcontractor; (3) information on whether there are prior liens filed on the property; and (4) the name and address of the owner (Private Forms 7 through 9). The claimant may be charged up to \$25 for asking for this information from a person with whom the claimant does not have a contract, but if the information is not provided, the claimant may recover reasonable and necessary costs incurred to obtain the information requested. (See Texas Property Code §53.159.)

9. Trust Fund Claim

Subchapter 162A. of the Property Code can provide a claimant with a means of recovery even where the claimant has failed to properly perfect a lien claim. The following are the significant aspects of the trust fund statute:

(a) Personal Liability

Where a contractor or subcontractor is paid, but fails to pay subcontractors or suppliers, the contractor or subcontractor, and its agents, officers, directors or the persons who directed or

controlled the use of the monies received which were diverted to another project or use, may be held personally liable for the debt.

(b) Criminal Penalties

The diversion or misapplication of "trust funds" by a contractor, subcontractor, owner or any other officer, etc. is punishable by fine and/or imprisonment.

(c) Lien Unnecessary

The benefits of the Trust Fund Statute exist regardless whether or not a lien has been perfected.

(d) Parties Exempted

The Trust Fund Statute is not applicable to any lender, title company, closing agent, or bonding company.

(e) Defense

It is a defense under the Trust Fund Statute that the trust funds were used to pay the trustee's "actual expenses directly related to the construction or repair of the improvement".

9. The Property Code Payment Bond

The payment bond or "Property Code Payment Bond" (also called "Statutory Bond") is a payment bond posted by an original contractor (i.e., a contractor with a direct contract with the owner) which meets the requirements listed 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.

(a) Requirements for a Property Code Payment Bond

The requirements for a valid Texas Property Code bond follow:

- ☞ The bond must be issued by a bonding company authorized and admitted to execute bonds in Texas.
- ☞ The "penal sum" of the payment bond must at least match the amount of the original contract price between the original contractor and the owner.
- ☞ The bond must be signed by both the original contractor and the bonding company.
- ☞ The bond must be conditioned on (i.e., guarantees) prompt payment for all labor and materials used on the project and payment for normal extras, not to exceed 15% of the contract price.
- ☞ The owner must endorse the bond with its written approval.
- ☞ The bond must be filed, together with a copy of the written original contract or memorandum of the contract, with the county clerk of the county in which the project is located.

(b) Claims Against Property Code Payment Bond

The best way to perfect a claim against a Property Code payment bond is to follow all the requirements for filing a lien against the project. An alternate method for perfecting a claim against a Property Code payment bond is to provide the bonding company with the notices otherwise required for the owner to perfect a lien against the owner's property. Note the distinction here is that

the notices which normally are to be given to the owner, must instead be given to the bonding company.

10. Claims on Non-Property Code Payment Bonds

Not all payment bonds qualify as Property Code bonds. For example, all payment bonds furnished by someone other than an original contractor (i.e., subcontractors) do not meet Property Code requirements. Because of the unlimited variety of terms which may be included in non-Property Code payment bonds, a claimant must take great care in dealing with these bonds. The claimant should obtain and read the original contractor's or subcontractor's payment bond, as payment bonds may have terms which are more lenient or more strict than the Property Code bond, and may or may not allow recovery where recovery would be available on a Property Code bond.

11. Liens on Residential and Homestead Property

Residential property is defined under the Property Code as a single family house, duplex, triplex, or quadruplex or a unit in a multiunit structure used for residential purposes. Residential property is given special protection against liens. Homestead property is given even more protection. A mechanic's lien can attach to residential property, but only if the following requirements are met:

- ☞ The claimant other than an original contractor must give notice to the owner and original contractor of the unpaid balance not later than the 15th day of the second month following each month in which all or part of the claimant's labor was performed or material or specially fabricated material was delivered. The notice must state that if the claim remains unpaid, the owner may be subjected to a lien unless the owner withholds payment from the contractor or the claim is otherwise

paid or settled. The notice must be sent by certified or registered mail.

- ☞ If specially fabricated materials have not been delivered to the project or incorporated into the work, the claimant for those materials must give notice to the owner by the 15th day of the second month after the month in which the claimant receives and accepts the order for the material. If the claimant did not contract with the original contractor, the claimant must also give the same notice to the original contractor. Once the specially fabricated materials have been delivered, the claimant must give notice of non-payment by the 15th day of the second month after the delivery of the materials.
- ☞ All claimants must then file a lien affidavit with the county clerk of the county clerk of the county in which the property is located not later than the 15th day of the third calendar month after the day on which the indebtedness accrued.
- ☞ Indebtedness accrues as follows: Indebtedness to an original contractor accrues on the last day of the month in which the original contract was terminated, or the original contract was completed, finally settled, or abandoned. Indebtedness to a subcontractor or any person other than an original contractor or supplier of specially fabricated material accrues on the last day of the last month in which labor was performed or material was furnished. Indebtedness for specially fabricated material accrues on the last day of the last month in which materials were delivered, or 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 on the last day of the month of any material

breach or termination of the original contract by the owner or contractor or of the subcontract under which specially fabricated material was furnished.

- ☞ A claim for retainage accrues on the last day of the month in which all work called for by the contract between the owner and the original contractor has been completed, finally settled, or abandoned.

Please note that the Property Code requires that the claimant provide certain specified disclosures to the owner about the owner's rights and liabilities. However, the claimant's failure to comply does not invalidate a lien.

(a) Homestead Property

There are additional requirements for perfecting a lien on homestead property. To fix a lien on homestead property, the claimant must accomplish the residential steps, and also do the following:

- ☞ Sign a written agreement, setting out terms of the contract, and containing the "Homestead Warning" with the owner of the homestead property, before work is performed. (See Texas Property Code §53.255 for the specific warning.)
- ☞ If the owner of the homestead is married, both spouses must sign the contract.
- ☞ The contract must be filed with the clerk of the county in which the homestead is located. The best practice is to have the contract recorded by the county clerk before any work or material is provided under the contract.
- ☞ Add to the notice of non-payment required for residential property the following specified notice:

“If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:

“(1) after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or

“(2) during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

“If you have complied with the law regarding the 10 percent retainage and you have withheld payment sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to you contractor before you received written notice of the claim.”

When this is done, the mechanic's lien on the homestead benefits all the persons who do work or furnish materials on the job. If the original contractor fails to comply with these requirements, none of the subcontractors or suppliers will have valid lien claims.

12. Liens on Leasehold Improvements

Any person who contracts for and provides labor or materials to a tenant may acquire a lien against the tenant's lease rights, known as the leasehold estate. However, by themselves, neither the lien against the leasehold estate, nor the contract to do improvements for a tenant entitle a contractor to lien rights against the owner of the property. Unless the lien claimant can show that a tenant was acting as the agent of the landlord, in contracting for improvements to the leased property, the claimant usually lacks any significant lien rights on leasehold improvements.

C. Determining the Last Date of Work

Determining the *precise* last date of work is especially important for claims under the Miller Act, 40 U.S.C. §270b, or little Miller Act statutes in states other than Texas. The Texas Property Code, however, does not rely on the precise last date of work. Instead, the Property Code usually starts the running of time at the end of the month in which labor or materials or a contract breach or completion occurs. Property Code §53.053 sets out the date the indebtedness accrues, as follows:

- ☞ Indebtedness to an original contractor accrues on the last day of the month in which the original contract was terminated, or the original contract was completed, finally settled, or abandoned.
- ☞ Indebtedness to a subcontractor or any person other than an original contractor or supplier of specially fabricated material accrues on the last day of the last month in which labor was performed or material was furnished.
- ☞ Indebtedness for specially fabricated material accrues on the last day of the last month in which materials were delivered, or 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 on the last day of the month of any material breach or termination of the original contract by the owner or contractor or of the subcontract under which specially fabricated material was furnished.

- ☞ A claim for retainage accrues on the last day of the month in which all work called for by the contract between the owner and the original contractor has been completed, finally settled, or abandoned.

The date that indebtedness accrues is important for establishing the dates for issuing notices of non-payment or for filing lien affidavits. See Figure 1 for Texas Property Code deadlines.

**FIGURE 1
PROPERTY CODE DEADLINES**

(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 OR 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.

Private Form #1 - NOTICE OF RETAINAGE AGREEMENT

 (1)

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

Our company is pleased to be involved in the construction of your (2) at (3) under an agreement with (4) your (5) . Our part of this project will be to furnish the (6) called for by the plans.

Our agreement provides that a portion of the contract price is to be retained until (7) .

The amount to be retained is (8) .

We are advising you that we have commenced supplying labor or material to your project and of the above terms of our agreement so that you will have the information and notice required by law. If you have any questions, do not hesitate to call us.

Sincerely,
 (9)
 (10)

cc: (11)

* * * * *

- (1) Letter addressed to the owner of the property being improved.
- (2) Indicate type of improvement.
- (3) Address of job.
- (4) Name of firm under whom you are working.
- (5) Status of that firm, such as "general contractor," "roofing subcontractor", etc.
- (6) Describe the labor and/or material that you will perform.
- (7) Insert time for paying retainage.
- (8) Amount or percentage of retainage.
- (9) Your firm name.
- (10) Name and capacity of person signing letter.
- (11) Carbon copy to the original contractor by certified mail unless you have a contract directly with the original contractor.

Private Form #2 - NOTICE OF SPECIALLY FABRICATED ITEM

 (1)

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

Our firm is pleased to be involved in the construction of your (2) at (3) under an agreement with (4) your (5) . Our part of this project will be to fabricate and furnish (6) for use as a component part of the construction as called for in the plans. This component will be reasonably unsuitable for use elsewhere. The order for this item has been received and accepted and the price to be billed to our customer is \$ (7) .

We are advising you of the foregoing so that you will have the information and notice specified by law.

If you have any questions, please call us.

Yours very truly,

 (8)
 (9)

cc: (10)

* * * * *

- (1) Letter addressed to the owner of the property being improved.
- (2) Indicate type of improvement.
- (3) The address of the job, with street and city.
- (4) Name of company for whom you work.
- (5) Status of the person under whom you are working, such as "general contractor" or "roofing subcontractor", etc.
- (6) General description of the item being fabricated.
- (7) Contract price for the item being fabricated.
- (8) Name of your company.
- (9) Person signing letter and capacity.
- (10) Carbon copy to original contractor by certified mail unless the order was direct from the original contractor.

Private Form #3 - PRELIMINARY NOTICE TO ORIGINAL CONTRACTOR

____ (1) _____

Re: Job: _____ (2) _____
Owner: _____ (3) _____
Location: _____ (4) _____

Dear Sir:

We have furnished _____ (5) _____ on the above job to your subcontractor, _____ (6) _____. Our books show an unpaid balance due us on this job of \$ _____ (7) _____ through the end of _____ (8) _____.

We are giving you this notice in order to protect our rights under the mechanic's lien laws of Texas.

We wish to cooperate with both you and our customer in any way that would be helpful. Should you desire any additional information, please advise us.

Sincerely,

____ (9) _____
____ (10) _____

cc: _____ (11) _____

* * * * *

- (1) Letter addressed to the original contractor under whom you are working sent certified mail.
- (2) Name of project.
- (3) Owner's name.
- (4) Address of job--street, city and state.
- (5) Indicate generally what has been furnished.
- (6) Your customer.
- (7) Amount due.
- (8) Date of last billing.
- (9) Your firm name.
- (10) Name and capacity of person signing letter.
- (11) Your customer.

Private Form #4 - NOTICE TO OWNER AND ORIGINAL CONTRACTOR

_____(1)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

We have furnished (2) to (3) , (4) on the construction in progress on your property at (5) . We have not been paid the amounts due us for the month of (6) in the amount of \$ (7) as shown by the attached statement which is made a part hereof. Under the mechanic's lien laws of Texas, a subcontractor or supplier of goods or labor is required to notify the owner of all claims which are not paid. Failure to give this notice may cause us to lose our rights under the mechanic's lien laws if the sums are not finally paid.

The law requires that we advise you that if our bill is not paid, you may be personally liable and your property subjected to a lien unless you withhold payments to the contractor for the payment of our statement or unless the bill is otherwise paid or settled.

Demand is hereby made for the payment of our claim from funds withheld by you as owner unless the contractor disputes this claim as required By law.

Should you have any question concerning our claim, please advise us. We will appreciate being advised if there is a dispute as to our claim from the contractor.

Sincerely,

_____(9)_____
_____(10)_____

cc: (11) Certified Mail Return Receipt Requested
 (12) Certified Mail Return Receipt Requested

* * * * *

- (1) Letter addressed to the owner of the property being improved and original contractor.
- (2) Indicate generally what has been furnished.
- (3) Name of the person to whom you furnished goods or labor.
- (4) Indicate status of person to whom you furnish, such as "contractor" or "subcontractor."
- (5) Address of the job--street number, and city.
- (6) Indicate the month or months during which work was done for which payment has not been received.

- (7) The amount due.
- (8) If you have already filed a lien affidavit or are doing so simultaneously insert: "We have elected to file an affidavit claiming a lien on your property and enclose a copy of the affidavit as filed."
- (9) Your company.
- (10) Person signing letter and capacity.
- (11) The general contractor, if not your customer.
- (12) Your customer.

Private Form #5 - DEMAND FOR PAYMENT

_____(1)_____

Certified Mail
Return Receipt Requested

Dear Sir:

We have furnished _____(2)_____ to _____(3)_____, _____(4)_____ on the construction in progress on your property at _____(5)_____. We have not been paid the amounts due us for the month of _____(6)_____ in the amount of \$ (7) .

Demand is hereby made for the payment of our claim from funds withheld by you as owner.

Should you have any question concerning our claim or this notice, please advise us. We will appreciate being advised if there is a dispute as to our claim from the contractor.

Sincerely,

_____(8)_____
_____(9)_____

cc: _____(10)_____
_____ (11) _____

* * * * *

- (1) Letter addressed to the owner of the property being improved sent by Certified Mail
- (2) Indicate generally what has been furnished.
- (3) Name of the person to whom you furnished goods or labor.
- (4) Indicate status of the person to whom you furnish, such as "contractor or "subcontractor"
- (5) The address of the job, street, number and city.
- (6) Indicate the month during which work was done for which payment has not been received.
- (7) The amount due.
- (8) Your company.
- (9) Person signing letter and capacity.
- (10) Send carbon copy to general contractor.
- (11) Send carbon copy to your customer, if other than the general contractor.

Private Form #6 - AFFIDAVIT CLAIMING LIEN

THE STATE OF TEXAS :
AFFIDAVIT CLAIMING LIEN
COUNTY OF (4) :

BEFORE ME, a notary public in and for the State of Texas, on this day personally appeared the undersigned, who being by me duly sworn, on oath states:

1. My name is (1). I am the (2) of (3) ("Claimant") and am authorized to make this affidavit on its behalf as the sworn statement of its claim.

2. Claimant furnished labor and/or materials for the improvement of the following described land in (4) County, Texas:
(5)

3. The labor and/or material was furnished for such improvement to (6).
(7).

4. (8) is the original contractor for such improvement.

5. (9) is the owner or reputed owner of the land and improvements thereon.

6. The kind of work done and/or material furnished by claimant is (10) and is made up of the items shown on the attached Exhibit "A" which reflects the dates of Performance and/or delivery.

7. The amount unpaid for such furnishing and due and owing to claimant is \$ (11), which is true, correct, and just, with all just and lawful offsets, payments, and credits known to affiant allowed.

8. Claimant's address is (12).

Claimant claims a lien against all the above described land and improvements thereon in the amount shown above pursuant to Chapter 53 of the Texas Property Code, and makes this sworn statement of claim in support thereof.

(3)

By: (1)

Subscribed and sworn to before me by the said (1) this day of , 19
, to certify which witness my hand and seal of office.

Notary Public - State of Texas

THE STATE OF TEXAS :

COUNTY OF :

BEFORE ME, the undersigned authority, on this day personally appeared (1) ,
 (2) of (3) , known to me to be the person and officer whose name is subscribed to the
foregoing instrument, who after being by me duly sworn acknowledged that the statements contained
above are true and correct and that he executed the same for the purposes and consideration therein
expressed, in the capacity therein stated, and as the act and deed of said (13) .

Given under my hand and seal of office this day of , 19 .

Notary Public - State of Texas

Typed or Printed Name of Notary Public

My Commission Expires:

* * * * *

- (1) Name of the person signing the affidavit.
- (2) Position of the affiant with the claimant, such as credit manager, controller, owner, partner, president, etc.
- (3) Name of claimant.
- (4) County in which the land is located.
- (5) Legal description of the land, e.g.:
 - (a) Lot 1, Block 2, Jones Subdivision of the City of Austin, per plat recorded in Volume , Page , Plat Records, Travis County, Texas; or

- (b) The 50 acres covered by the deed from Frederic N. Freeloader to Horace P. Homeowner, dated _____, recorded in Volume _____, Page _____, Deed Records, Travis County, Texas, which is referred to for a more complete description.
- (6) Name of the general contractor or subcontractor for whom work was done or material was furnished. If a subcontractor, add "a subcontractor."
- (7) If the work or material was furnished under a written contract, it is preferable to attach the contract and insert, "The labor and/or material was furnished under a written contract which is attached hereto and made a part hereof."
- (8) Name of original (general) contractor.
- (9) Name of property owner.
- (10) General description of work done or materials supplied.
- (11) Amount due, including retainage.
- (12) Your business address.
- (13) e.g., partnership, corporation, etc.

Private Form #7 - REQUEST FOR INFORMATION FROM OWNER

_____(1)_____, 19____

_____(2)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Re: _____(3)_____

We are furnishing labor and/or materials for the above-referenced project. Pursuant to Section 53.159(a) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) A legal description of the real property upon which the above-referenced project is being constructed.
- (2) Whether a payment bond has been provided to you on this project, and if so, the name and last known address of the surety and a copy of the bond.
- (3) Whether there are any prior recorded liens or security interests on the real property being improved and if so, the name and address of the holder of the lien or security interest.

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

Also, we request you furnish our company with a copy of the affidavit of completion, if used, filed with the county clerk for this project. Thank you for your attention to this request.

_____(4)_____

By: _____(5)_____

* * * * *

- (1) Date of request.
- (2) Name and address of owner.
- (3) Project.
- (4) Your Company.
- (5) Officer of your Company.

**PRIVATE FORM #8
REQUEST FOR INFORMATION FROM ORIGINAL CONTRACTOR**

_____(1)_____, 19____

_____(2)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

RE: _____(3)_____

We have furnished labor and/or materials for the above-referenced project. Pursuant to Section 53.159(b) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) The name and last known address of the person to whom you furnished labor or materials for the project.
- (2) Whether a payment bond has been provided by or to you on this project, and if so, the name and last known address of the surety(s) and a copy of the bond(s).

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

_____(4)_____

By: _____(5)_____

* * * * *

- (1) Date of request.
- (2) Name and address of original contractor.
- (3) Project.
- (4) Your company.
- (5) Officer of your company.

**PRIVATE FORM #9
REQUEST FOR INFORMATION FROM SUBCONTRACTOR**

_____(1)_____, 19____

_____(2)_____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

RE: _____(3)_____

The undersigned _____(4)_____ the above-referenced project. Pursuant to Section 53.159(c) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) The name and last known address of each person from whom you purchased labor or materials for the project, other than those materials which were furnished by you from your own inventory.
- (2) The name and last known address of each person to whom you furnished labor or materials for the construction project.
- (3) Whether a payment bond has been provided by or to you on this project, and if so, the name and last known address of the surety and a copy of the bond.

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

_____(5)_____

By: _____(6)_____

* * * * *

- (1) Date of request.
- (2) Name and address of subcontractor.
- (3) Project.
- (4) Fill in as applicable:
(a) is the owner of

(b) is the original contractor on
(c) is the surety which bonded the original contractor for
(d) has furnished work under your subcontract on.

- (5) Your company.
- (6) Officer of your company.