

# Mechanic's & Materialman's Liens

## Recent Changes to the State Lien Statutes

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There's more to tradesmen's protection than hard hats and steel-toe boots. There's the matter of payment for services rendered. That's where Texas law comes in. It provides a mechanic's and materialman's lien that gives tradesmen a way to protect themselves and collect for their work.



A previous article, "Lien on Me: Payment Protection for Tradesman," (scan QR code) outlined the law governing mechanic's and materialman's liens, but the 87<sup>th</sup> Texas Legislature made changes to that law. This article reflects legislative changes through 2023 but is not exhaustive.

### Constitutional and Statutory Mechanic's Liens

Texas has two types of mechanic's liens—constitutional and statutory. All Texas mechanic's liens have their source in Article XVI, Section 37 of the state constitution, which provides for the lien and instructs the legislature to provide for its enforcement. The legislature did so by passing the mechanic's lien statutes found in Chapter 53 of the Texas Property Code.

### Takeaway

Texas law includes statutes to help ensure tradesmen get paid for their work, but perfecting liens can be complicated. The 87<sup>th</sup> Texas Legislature overhauled these statutes to simplify the process and expand those protections.

A constitutional lien is self-executing. In other words, it requires no filing or action on the part of the contractor. However, it applies only to contractors and suppliers who have a direct contractual relationship with the property owner. A subcontractor does not have a constitutional lien.

In addition to the constitutional lien, contractors, subcontractors, and suppliers have a statutory mechanic's lien that provides more protection and applies against subsequent purchasers.

Liens may be claimed by those who provide labor or materials, including specially fabricated materials, for construction or repairs to a house, building, or improvement, as well

as architectural or engineering design services, surveying, landscape, dirt work, or demolition. Chapter 53 sets out the rules governing statutory liens.

## Relationship Between Property Owners, Contractors, and Subcontractors

The laws governing these liens vary depending on the relationship between the property owner and the contract, so it is important to understand the terms involved.

The *original contract* is the contract made by a contractor with the owner or the owner's agent. This is often a contract whereby the owner and general contractor agree to the terms of the contract, and various parts of the work are performed by subcontractors.

The statutes give the contractor who contracts directly with the owner or owner's agent the title of *original contractor*. There can be more than one original contractor. An original contractor is any contractor who contracts with the owner or owner's agent. Often, the original contractor has separate contracts with other *subcontractors*. Subcontractors may also contract with additional subcontractors, forming levels of contractors commonly referred to as *tiers*. Thus, the original contractor has a contract with the owner. A *first-tier* subcontractor has a contract with the original contractor. A *second-tier* subcontractor has a contract with the first-tier subcontractor, and so on.

The new statutes eliminate many of the differences in how the rules apply to the various tiers of subcontractors, resulting in more uniform (but still complex) rules.

The new rules apply only if the original contract was entered into on or after Jan. 1, 2022. If the original contract is entered into in 2021 and a subcontract is entered into in 2022, the old law applies.

Note that a *residential construction contract* means a contract between an owner and a contractor for the construction or repair of the owner's residence. Construction of a home is not a residential construction project unless the property is owned by the resident. Tex. Prop. Code § 53.001(9)-(10).

## What is Perfection?

To get the full protection of the statutory lien, the person claiming the lien must perfect the lien in accordance with the statutes. This means the claimant must:

1. give the appropriate preliminary notices,
2. make the appropriate filing, and
3. give notice to the property owner.

The Texas Legislature has amended the statutes to simplify the process and eliminate traps for the unwary.

## Who Has a Mechanic's Lien

Under the new rules, a licensed architect, engineer, or surveyor who provides a design, drawing, plan, plat, survey, or specification has a mechanic's lien, even if the licensed person providing the service does not have a contract with the owner. Tex. Prop. Code § 53.001, 53.021.

## Delivery of Notices

Notices required under Chapter 53 must be delivered to the party entitled to the notice or that party's agent by personal delivery, certified mail, or any other form of traceable, private delivery, or mailing service that can confirm proof of receipt. Unless receipt is otherwise required, a notice sent by certified mail is considered sent when it is mailed.

If the person entitled to receive the written notice actually receives the notice, the method by which it is sent is immaterial.

Under the new notice rules, if the deadline falls on a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. Tex. Prop. Code §§ 53.003.

## Preliminary Notices

Original contractors are still not required to give preliminary notices. However, an original contractor on a residential construction contract must provide a special disclosure statement as set forth in Tex. Prop. Code § 53.255. Original contractors on residential construction projects are also required to furnish a list of all subcontractors and suppliers of materials (Tex. Prop. Code § 53.256). Claimants other than original contractors must give preliminary notices of claims for unpaid labor or materials to the owner or reputed owner and the original contractor.

## Residential

For residential construction projects, the notice must be sent no later than the 15<sup>th</sup> day of the second month after the month during which the labor or materials were provided. If the lien is for specially fabricated materials, the notice must be sent no later than the 15<sup>th</sup> day of the second month after the month during which the labor or materials were provided, or the 15<sup>th</sup> day of the second month after the month during which the undelivered materials would normally have been delivered [Tex. Prop. Code § 53.056(a)].

## Nonresidential

For nonresidential construction projects, the notice must be sent no later than the 15<sup>th</sup> day of the third month after the month during which the labor or materials were provided. If the lien is for specially fabricated materials, the notice must be sent no later than the 15<sup>th</sup> day of the third month

after the month during which the labor or materials were provided, or the 15<sup>th</sup> day of the third month after the month during which the undelivered materials would normally have been delivered [Tex. Prop. Code § 53.056(a)].

Section 53.056 sets forth a statutory form for the notice. The notice given must be in substantially the same form set out in the statute to be valid [Tex. Prop. Code § 53.056(a-2)]. The notice may include an invoice or billing statement [Tex. Prop. Code § 53.056(a-3)]. A claimant may give a written notice of unpaid past-due labor or materials to the original contractor, but this is not required for the lien to be valid [Tex. Prop. Code § 53.056(a-4)].

### **Payments Withheld**

Contractual retainage is part of a contract payment that is withheld from a progress payment and paid later, after the contract has been performed and subcontractors and materialmen are paid. A subcontractor whose contract provides for retainage must give notice under Section 53.057 for a lien for unpaid retainage to be valid. The notice must be sent to the owner or reputed owner and the original contractor no later than the 30<sup>th</sup> day after the claimant's contract is completed, terminated, or abandoned, or the 30<sup>th</sup> day after the original contract is terminated or abandoned [Tex. Prop. Code § 53.057(a)]. The notice must be substantially in the statutory form set forth in Tex. Prop. Code § 53.057(a-2) to be valid. The notice may be combined with and included in the notice set forth in Tex. Prop. Code § 53.056 [Tex. Prop. Code § 53.057(a)]. Under the new statute, "retainage" refers to contractual retainage. Statutory retainage is now called "reserved funds."

### **Lien Affidavits**

All lien affidavits are filed with the county clerk and must be filed in the county where the improvements are being made [Tex. Prop. Code § 53.052(e)].

An original contractor on a residential construction project must file the lien affidavit no later than the 15<sup>th</sup> day of the third month after the month in which the original contractor's work was completed, terminated, or abandoned. For nonresidential construction projects, the affidavit must be filed no later than the 15<sup>th</sup> day of the fourth month after the month in which the original contractor's work was completed, terminated, or abandoned [Tex. Prop. Code § 53.052(a)(2)].

A subcontractor on a residential construction project must file the affidavit no later than the 15<sup>th</sup> day of the third month after the month the claimant last provided labor or materials. For specially fabricated materials, the affidavit must be filed

no later than the 15<sup>th</sup> day of the third month after the month the claimant last provided labor or materials, *or* the 15<sup>th</sup> day of the fourth month after the month in which the claimant would normally have been required to deliver the last of the specially fabricated materials that have not been actually delivered, whichever is later [Tex. Prop. Code § 53.052(c)].

On a nonresidential construction project, a subcontractor must file the affidavit no later than the 15<sup>th</sup> day of the fourth month after the month the claimant last provided labor or materials. For specially fabricated materials, the affidavit must be filed no later than the 15<sup>th</sup> day of the fourth month after the month the claimant last provided labor or materials, *or* the 15<sup>th</sup> day of the fourth month after the month in which the claimant would normally have been required to deliver the last of the specially fabricated materials that have not been actually delivered, whichever is later [Tex. Prop. Code § 53.052(b)].

A subcontractor claiming a lien for retainage must file an affidavit no later than the 15<sup>th</sup> day of the third month after the month in which the original contract was completed, terminated, or abandoned [Tex. Prop. Code § 53.052(d)].

The contents of the affidavit have not changed.

### **Notice of Filing of Lien Affidavits**

The filer of an affidavit must send a copy of the affidavit to the owner or reputed owner at the owner's last known business or residence address by the fifth day after the affidavit is filed with the county clerk. If the claimant is not an original contractor, he must also send a copy to the original contractor's last known business or residence address within five days [Tex. Prop. Code § 53.055].

### **Special Rules for Homestead Property**

For a lien to be fixed on a homestead, the claimant and the owner must have a written contract signed by the owner and the owner's spouse if the owner is married. The contract must be executed before the material is furnished or the labor is performed, and it must be recorded in the county where the homestead is located. The contract inures to the benefit of the subcontractors. Special notices must be included in the preliminary notice and in a lien affidavit filed against homestead property [Tex. Prop. Code § 53.254].

Nothing in *TG* should be considered legal advice. For advice or representation on a specific situation, readers should consult an attorney. 📌

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