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Texas Mechanic's Lien Law Update: New Law Brings a Little Relief for Subcontractors and a Lot of Relief for Design Professionals

After several recent failed attempts to amend Chapter 53 of the Texas Property Code (the “Texas Mechanic’s Lien Statute”), it appears that long awaited relief may, at least in part, be on the horizon for subcontractors in Texas. Additionally, architects, engineers, and surveyors also appear to be significant benefactors of House Bill 2237 (“HB 2237”). Under existing law, many subcontractors often fail to perfect their mechanic’s liens under the Texas Mechanic’s Lien Statute because of complex notice requirements which must be sent for every month in which labor or material are furnished. And architects, engineers and surveyors currently have no lien rights unless they have a direct contractual relationship with the owner of the project. Effective January 1, 2022, HB 2237 amends the Texas Mechanic’s Lien Statute in several significant respects.

Subcontractor Impacts

HB 2237 impacts subcontractors in the following ways:

1. Establishes uniformity in the notice requirements by imposing the same notice obligation on all subcontractors regardless of with whom they have contracted. Rather than sending one notice to the owner and one to the general contractor, the single notice now required must be sent to both simultaneously. Additionally, HB 2237 prescribes the form of the notice to be given under both Section 53.056 (notice of derivative claimant) and 53.057 (notice of contractual retainage).
2. Adds alternative methods for delivery of the notices required to be sent under Sections 53.056 and 53.057 (as detailed below).
3. Eliminates the requirement that an architect, engineer or surveyor have a direct contractual relationship with the owner to be entitled to file a lien.
4. Eliminates an owner’s ability to cut-off the time period in which lien claims can be perfected through the filing of an affidavit of completion or notice of termination or abandonment.
5. Shortens the deadline to bring suit to foreclose a lien to the first anniversary of the last day on which a claimant may file a lien affidavit under Section. 53.052.
6. Removes the requirement that the statutory lien waivers under Section 53.284 be notarized.

In addition to the foregoing, HB 2237 amends some key definitions and terminology, such as “improvement” and “retainage” and updates others; however, these changes are non-substantive.

Under existing law, if the subcontractor contracted with the original contractor (defined by the Texas Mechanic’s Lien Statute as “a person contracting directly with the owner or the owner’s agent,”), then it only has to send one notice to the owner for every month it provides labor or material and the deadline to send the notice is the fifteenth day of the third month following the month in which the labor and/or materials were furnished. If the subcontractor contracted with another subcontractor of any tier, then it has a second

obligation to send notice to the general contractor for every month it provides labor or material and the deadline for this notice is the fifteenth day of the second month following the month in which the labor and/or materials were furnished. HB 2237 eliminates the second notice requirement for second-tier and lower subcontractors and prescribes the form of the notice that must be sent by subcontractors of every tier. For commercial construction, a subcontractor must send the statutorily prescribed notice to both the owner and the general contractor by the fifteenth day of the third month following each month in which labor or material is furnished. For residential construction, the timing of the notice is unchanged. A subcontractor still must send notice to both the owner and the general contractor by the fifteenth day of the second month following each month in which labor or material is furnished. Under the new law, they must now use the statutorily prescribed form. In addition to being delivered in person and being sent by certified mail, these notices may now also be given by using any other form of traceable, private delivery or mailing service that can confirm proof of receipt. Even though HB 2237 brings some uniformity to the law and expands the options for delivering the required notices, the burden of having to send monthly notices remains.

Architect, Engineer, and Surveyor Impacts

HB 2237 also has significant impacts for licensed architects, engineers and surveyors. Architects commonly subcontract work to design consultants, such as structural elements, mechanical design, and electrical engineering. Under existing law, these professionals hired by the Architect have no lien rights under the Texas Mechanic's Lien Statute, unless the architect is acting as the owner's agent. HB 2237 not only redefines the term "Improvement" to include "a design, drawing, plan, plat, survey, or specification provided by a licensed architect, engineer, or surveyor," it also removes the requirement that an architect, engineer or surveyor provide services "under or by virtue of a contract with the owner or the owner's agent, trustee, or receiver" to be entitled to a lien. Therefore, HB 2237 expands the group of architects, engineers and surveyors that can file a lien against a project in Texas. Even if they contracted with an original architect or engineer, or an original contractor or a subcontractor, a licensed architect, engineer or surveyor is entitled to a lien if they prepared a design, drawing, plan, plat, survey or specification in connection with the project.

Currently, under Section 53.106 of the Texas Mechanic's Lien Statute, the owner of a project can file an affidavit of completion, provide notice to the general contractor and subcontractors, and generally insist that those receiving the notice file their lien affidavits within forty days after the date of completion, regardless of when their work was completed. Similarly, under Section 53.107, the owner can give notice to subcontractors that the general contractor has been terminated or abandoned the project and insist the subcontractors file their lien affidavits within forty days after the date of the termination or abandonment. HB 2237 removes the ability of owners to shorten the deadline for a lien claimant to file a lien affidavit and makes the deadline imposed under Section 53.052 controlling. This change makes sense because the forty-day deadline cannot be imposed against those not receiving the notice, resulting in multiple lien filing deadlines.

Additional Changes

Another significant change made in HB 2237 is changing the deadline to foreclose a mechanic's lien from two years to one year in the commercial construction context. As amended, the deadline to foreclose a mechanic's lien under the Texas Mechanic's Lien Statute for a commercial construction project is one

year from the last day a lien claimant could timely file a lien affidavit under Section 53.052. Although the parties may agree to extend that deadline, it may not be extended past the second anniversary of the lien filing deadline, and any agreement to extend the deadline must be in writing, be entered into before the first anniversary of the lien filing deadline, and must be recorded with the County Clerk where the lien is recorded.

Finally, HB 2237 removes the requirement that the statutory conditional and unconditional lien waivers under Section 53.284 be notarized to be effective. Since these waivers are generally given prior to lien filing, this change appears to be aimed at making it easier for subcontractors to comply with their contractual waiver provisions. Be aware, however, that in the absence of notarization, such a waiver and release would not be suitable for recording with the County Clerk's office, which requires notarization. Nothing in the amendments prohibit requiring notarization; they just remove the statutory requirement that they be notarized to be effective.

Conclusion

While these amendments will undoubtedly be well received by the new group of lien claimants created by them, the Texas Mechanic's Lien Statute (as amended) still imposes an obligation on subcontractors to send lien notices for every month in which they perform labor or furnish materials in order to protect their lien rights, except for a notice of contractual retainage. Even though the elimination of the "second month" notice may be a welcome change, the reduction of time in which a lien claimant has to foreclose a mechanic's lien will not.

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