

IF YOU HAVE QUESTIONS REGARDING
THIS MATTER, PLEASE CONTACT:



Catherine L. Schnaubelt
Partner, Houston
1401 McKinney Street, Suite 2200
Houston, Texas 77010.4035
713.951.5697
Cathy.Schnaubelt@strasburger.com

Mechanics and Materialmen's Lien in Commercial Construction Projects

The project is designed, the plans are finalized and the ground broken. A critical part of any facility construction project is paying the original contractor who in turn is responsible for paying his subcontractors. However, during the course of many construction projects, original contractors often do not pay their subcontractors. In such instances, the owner is frequently surprised to learn that a subcontractor has filed liens against the property or, even worse, filed a lawsuit. This article examines the types of mechanic's liens and materialmen's liens available under Texas law and the means by which property owners may protect themselves against them.

Types of Mechanic's Liens

Mechanic's liens and materialmen's liens (hereinafter "mechanic's liens") are liens created by law that attach to real estate and project improvements when an original contractor or subcontractor, who provided material, machinery, fixtures, or tools to erect or repair the improvements to the project, has not been paid. This lien empowers the original contractor or subcontractor to, under certain circumstances, force the property to be sold to pay off what is owed on the project.

In Texas, a mechanic's lien may arise one of three ways -- from a contract, the Texas Constitution, or by statute:

- ***Contractual Lien***

A contractual lien results from a contract in which the original contractor secures his right to payment from the owner by a right of foreclosure and sale. Contractual liens are governed by general rules of contract law and subject the property to foreclosure.

- ***Statutory Liens***

The Texas Property Code provides that an original contractor or subcontractor has the right to a statutory mechanic's lien if two conditions are met. First, the original contractor or subcontractor must furnish specially fabricated material, or furnish labor or materials for construction or repair of a building or improvement. Second, the original contractor or subcontractor must perform those functions under a contract with the owner or the owner's agent.

- ***Constitutional Lien***

The Texas Constitution provides for a mechanic's lien between the owner and original contractor and does not apply to

subcontractors. Constitutional liens are self-executing; that is, they do not require the same notice or public recording procedures required by statutory liens to enforce against the owner. Furthermore, constitutional liens can be asserted long after the statutory lien deadlines have expired.

Procedures and Filing Deadlines for Statutory Mechanics Liens

In order for an original contractor or subcontractor to file a statutory mechanic's lien, he or she must follow very specific deadlines, or the lien will be invalid. The original contractor must file an affidavit with the county clerk in the county where the property is located no later than the 15th day of the fourth calendar month *after* the last day of the month in which the original contract is completed, finally settled, abandoned or terminated. This means the original contractor has exactly four months and fifteen days after the month the project is complete to file its affidavit. If the original contractor misses this deadline, its statutory lien will be invalid and the original contractor cannot force a sale of the property to secure payment.

Subcontractors often finish their project work before the entire project is completed. Consequently, subcontractors' lien deadlines begin to run from the last day of the month in which the subcontractor supplied labor or materials to the project. Additionally, subcontractors are required to give the owner notice before filing their lien affidavits. The subcontractor has exactly three months and fifteen days after the month it finished its work to give the owner notice that he has not been paid. If the owner fails to pay the subcontractor by the deadline, then the subcontractor must file its affidavit within four months and fifteen days after the month it finished its work in order to secure a valid lien on the property.

Once the lien affidavits are properly filed, to foreclose the lien the original contractor or subcontractor must bring a lawsuit within two years after the last day the claimant may file the lien affidavit or within one year after the completion of the project, whichever is later. It is important to note that even if the original contractor or subcontractor misses the notice and affidavit deadlines and is preempted from filing a lien on the property, they can always file a lawsuit to collect unpaid fees or costs.

How to Prevent Liens: Retainage & Releases of Lien

Most construction contracts include a retainage provision allowing the owner to temporarily retain up to ten percent (10%) of the project cost. The retainage amount is not paid to the original contractor until both the original contractor and all subcontractors provide final releases of liens. It is critical to retain this percentage of funds until the end of the project to ensure that the subcontractors are timely paid. Additionally, during the course of the project, when progress payments are made to the original contractor, the owner should require the original contractor to submit partial releases of liens from the subcontractors. These partial releases

of liens will assure the owner that the original contractor is properly paying the subcontractors, thereby reducing the likelihood of a subcontractor filing mechanics liens on the property.

Conclusion

Owners should be aware that mechanic's liens can encumber their property if original contractors and subcontractors are not paid for their work. Project management demands that an owner require submission of partial releases of liens to avoid disputes with subcontractors, who claim they have not been paid by the original contractor. Additionally, retaining a percentage of the contract price until final releases are obtained will help ensure the owner has sufficient funds to settle with the original contractor and subcontractors when the project is complete. Careful attention to these issues during the project will significantly reduce the risk of mechanics liens and related disputes with original contractors and subcontractors.

Collin County Office
2801 Network Boulevard
Suite 600
Frisco, Texas 75034
469-287-3900 Phone
469-287-3999 Fax