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Construction Liens: What's New, What Can Hurt You

Steven E. Kennedy

Author contact information:
Steven E. Kennedy
McGuire, Craddock & Strother, P.C.
Dallas, TX

skennedy@mcsllaw.com
214-954-6821

2011 Texas Mechanic's Lien Update

The 2011 Legislature made substantial changes to Texas' already complex mechanic's lien law. The most significant of these changes are modifications to the notice requirements for retainage liens and the introduction of new mandatory lien release forms. The new provisions for retainage notices take effect for any contracts entered into after September 1, 2011. The new provisions for lien releases are effective January 1, 2012. The sections below provide a summary of these new changes.

Retainage Notices - Derivative Claimant: Notice for Contractual Retainage Claim (Texas Property Code § 53.057)

The 2011 Texas Legislature revised the requirements for a subcontractor or supplier to perfect a lien for contractual retainage. Under the prior law, claimants were required to send the initial notice of a retainage agreement to the owner no later than the fifteenth of the second month after the first materials were delivered or when the first work was done. As a result of the early notice requirement, many subcontractors and suppliers failed to send the required notice by the deadline. Further, even if a claimant sent the initial notice in time, they still had to file the lien affidavit no later than thirty days after final completion. If the claimant complied with the notice and filing deadlines, and the owner complied with the Subchapter E requirements to hold retainage until 30 days after final completion, there would always be retainage liens filed prior to the owner's release of retainage to the prime contractor.

In 2011, subcontractors lobbied for, and got, the Texas legislature to implement several significant changes to Tex. Prop. Code § 53.057 and its related provisions for retainage claims. Unfortunately, the revisions substantially complicated § 53.057. The full text of the revised section is attached. In summary, a claimant seeking to perfect a lien for retainage must now send its notice ***"not later than the earlier of"***:

- the 30th day after the claimant's agreement providing for retainage is completed, terminated, or abandoned; or
- the 30th day after the date the original contract is terminated or abandoned.

If the claimant's agreement for retainage is with a subcontractor, the claimant must also give notice of the retainage claim to the original contractor within the same deadline. The claimant is not required to provide the retainage notice if the notice of retainage is provided on a monthly basis under § 53.055 [probably § 55.056]¹, or, if the claim relates to a residential

¹ There is likely a typo in the statute at § 53.057(e). It says: "If a claimant gives notice under this section and Section § 53.055 or, if the claim relates to a residential construction project, under this section and Section 53.252, the claimant is not required to give any other notices as to retainage." BUT, the reference to § 53.055 almost certainly should be to § 55.056, which is the companion notice provision to the residential notice requirement at § 53.252.

construction project, the claimant has provided notices under § 53.252. Assuming both of these sections are intended to reference the derivative claimant monthly notice requirements, both of these notices must be sent for each month in which the claimant has provided labor or material for which it is not paid.

The new notice of retainage required under § 53.057 must generally state the existence of a requirement for retainage in an agreement and contain a name and address of the claimant and, if the agreement is with a subcontractor, the name and address of the subcontractor.

The 2011 Legislature deleted the requirement in the former § 53.057(d) that the notice must be sent by registered or certified mail. However, you should note Tex. Prop. Code § 53.003(c) provides that notices sent by registered or certified mail are effective upon deposit or mailing of the notice in the United States mail. Notwithstanding deletion of the § 53.057(d) requirement that a retainage notice must be sent by registered or certified mail, claimants and their attorneys will likely continue the practice of sending such notices by registered or certified mail so that notice is effective upon mailing.

Further, the deadline for filing the actual mechanic's lien to include a claim for retainage must now be filed "***not later than the earliest of***":

- The date required for filing an affidavit under § 53.052 (the 15th of the fourth month after completion of the claimant's work or, in the case of residential construction, the 15th of the third month after completion of the claimant's work);
- The 40th day after the date stated in the affidavit of completion under the original contract, ***if*** the owner sends the claimant notice of an affidavit of completion in the time and manner required;
- The 40th day after the date of termination or abandonment of the original contract, ***if*** the owner sent the claimant a notice of such termination or abandonment in the time and manner required; or
- The 30th day after the date the owner sent to the claimant, to the claimant's address provided in the notice for contractual retainage, a written notice of demand for the claimant to file the affidavit claiming the lien.

And, finally, the claimant must provide the owner with notice of the filed affidavit as required under § 53.055 (within five days of actual filing of the lien).

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