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Construction Pre-Litigation and Litigation Deadlines

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I. INTRODUCTION¹

Large or small, residential or commercial, practically any construction project presents two overarching liability threats. First, there is a threat that a party will not (or allegedly not) perform its contractual duty to pay money, or provide materials or services. Second, a threat exists that persons or property will suffer (or allegedly suffer) injury or damage in connection with the project. When such threats materialize, claims often follow. Any party involved in a construction-related claim in Texas should be aware of the numerous deadlines that may apply -- and they should know that the clock is ticking. Whether the claimant is a material supplier seeking to file or foreclose on a lien, an owner suing for defective construction, or a contractor seeking to recover under a payment bond, deadlines exist which can bar even meritorious claims.

This paper addresses four general categories of deadlines. First, liens: providing notice, filing the lien affidavit, discharging, foreclosing, and maintaining retainage. Second, bonds: payment bonds and performance bonds, the Miller Act, and the Texas “little” Miller Act. Third, lawsuits and alternative dispute resolution: statutes of limitations and repose, accrual of claims, and statutory demand requirements. Fourth, insurance and indemnity claims: statutes of limitations, providing notice, and other contractual requirements.

This paper provides only a brief overview of the deadlines that may apply to a construction-related claim. Use this content to identify potential issues, but consult an attorney to address a specific set of facts and craft the proper solution.

II. LIENS

A mechanic’s lien allows labor and material suppliers to claim an interest against certain real property to secure payment for their work. *See* BLACK’S LAW DICTIONARY 943 (8th ed. 2004). Under Texas law, a statutory lien² is available to those satisfying the following criteria:

¹ I thank John M. Bunting, an associate in the Insurance Litigation group of Haynes and Boone, LLP, for his assistance with this paper.

² The Texas Constitution provides for certain automatic liens, although their usefulness is limited. “A constitutional lien arises by virtue of the Constitution without the aid of statutes.” *Apex Fin’l Corp. v. Brown*, 7 S.W.3d 820, 830 (Tex. App.—Texarkana 1999, no pet.). These liens arise from Tex. Const. Ann. art. XVI § 37:

LIENS OF MECHANICS, ARTISANS, AND MATERIAL MEN. Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefore; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

No notices or lien filings are required to secure a constitutional lien, but the lien is limited to those who have dealt directly with the owner. Furthermore, a written contract must be executed prior to the construction of the improvements. *Hruska v. First State Bank*, 747 S.W.2d 783 (Tex. 1988). Moreover, the constitutional lien is ineffective against a bona fide purchaser (or lender) for value without knowledge (actual or constructive) of the lien claim. *See, e.g., Contract Sales Co. v. Skaggs*, 612 S.W.2d 652 (Tex. Civ. App.—Dallas 1981, no writ). Consequently, the constitutional lien is generally inferior to a statutory lien and usually is used only when the general contractor has failed to perfect its statutory lien. *See generally* Michael H. Hood and Katie Dolan-Galaviz, *Perfecting a Private Lien or Bond Claim* at 1-2, Construction Lien Law in Texas, April 21, 2010, available at http://www.haynesboone.com/files/Publication/bc2c1d28-1063-46f7-8aaac12fb1dec2/Presentation/PublicationAttachment/edad13c6-8675-40a6-80c1-cb0c43e0623b/Perfecting_Private_Lien-Bond_Claim.pdf.

- (a) A person has a lien if:
 - (1) the person labors, specially fabricates material, or furnishes labor or materials for construction or repair in this state of:
 - (A) a house, building, or improvement;
 - (B) a levee or embankment to be erected for the reclamation of overflow land along a river or creek; or
 - (C) a railroad; and
 - (2) the person labors, specially fabricates the material, or furnishes the labor or materials under or by virtue of a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor.
- (b) A person who specially fabricates material has a lien even if the material is not delivered.
- (c) An architect, engineer, or surveyor who prepares a plan or plat under or by virtue of a written contract with the owner or the owner's agent, trustee, or receiver in connection with the actual or proposed design, construction, or repair of improvements on real property or the location of the boundaries of real property has a lien on the property.
- (d) A person who provides labor, plant material, or other supplies for the installation of landscaping for a house, building, or improvement, including the construction of a retention pond, retaining wall, berm, irrigation system, fountain, or other similar installation, under or by virtue of a written contract with the owner or the owner's agent, trustee, or receiver has a lien on the property.
- (e) A person who performs labor as part of, or who furnishes labor or materials for, the demolition of a structure on real property under or by virtue of a written contract with the owner of the property or the owner's agent, trustee, receiver, contractor, or subcontractor has a lien on the property.

A statutory lien is available to those claimants who properly perfect it by providing the requisite notices and filing the required lien affidavit. A strict set of statutorily-defined deadlines governs these liens in Texas.

A. Creating a Lien: Providing Notice

The Texas Property Code provides definite notice requirements to perfect mechanic's liens, which courts strictly enforce. *See, e.g., Wesco Distrib., Inc. v. Westport Grp., Inc.*, 150 S.W.3d 553, 558-59 (Tex. App.—Austin 2004, no pet.). The statutory lien notice requirements apply to all contractors and materialmen other than the "original contractor" (*i.e.*, a party "contracting with an owner either directly or through the owner's agent." Tex. Prop. Code Ann. § 53.001(7)).

A claimant must generally provide notice to the owner and original contractor³ 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 was delivered. *Id.* at § 53.056(b). An additional notice must be sent to

³ A "first tier" subcontractor -- one who deals directly with the original contractor -- must provide notice to both the owner and original contractor. Tex. Prop. Code Ann. § 53.056(c). A subcontractor who does not deal directly with the original contractor must only provide this first notice to the original contractor. *Id.* at § 53.056(b).

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