

TEXAS MECHANIC'S LIENS REQUIREMENTS FOR MATERIAL SUPPLIERS

Suppliers of materials to construction projects in Texas face some of the most complicated mechanic's lien laws found anywhere in the United States. Suppliers must strictly comply with technical, and sometimes complicated, statutory requirements in order to preserve their rights against privately owned construction projects, or in the case of bonded public or private projects, against the payment bond sureties.

In this presentation we will present an overview of the statutory requirements necessary for a material supplier to assert a mechanic's lien on a privately owned commercial construction project in Texas. Note that liens against residential construction projects and claims against payment bonds on public or private projects have additional statutory requirements.

In most cases, material suppliers are entitled to file liens for unpaid monies for materials used in the construction of the project. The lien arises as of the date of delivery, but must be perfected in accordance with the mechanic's lien laws. To properly preserve its lien rights, a material supplier must first give one or more written notices. The number, type, and time for providing the notices depends on whether the supplier has a contract with the owner, the general contractor, or a subcontractor.

When the supplier has a contract with the owner, the supplier must give notice only to the owner, which may be in the form of an invoice.

If the supplier's contract is with the general contractor, the supplier must give a notice of non-payment to both the owner and the general contractor not later than the 15th day of the third calendar month following each month in which the materials were delivered to the project.

This notice is sometimes referred to as the third month notice. The third month notice is not only required to perfect the lien of the supplier, but also requires the owner to withhold funds from the general contractor in excess of the 10% retainage required by Texas law. The third month notice must be sent by certified mail, return receipt requested to both the owner and general contractor, and must contain the following language: *If the claim remains unpaid, you may be personally liable and your property subjected to a lien unless you withhold payments from the contractor for payment of the claim or the claim is otherwise paid or settled.* This language is commonly referred to as the fund trapping notice.

Where the supplier has a contract with a subcontractor, the supplier must give written notice of non-payment to the general contractor (not the owner) by the 15th day of the 2nd calendar month following each month in which material was delivered to the project.

This notice is sometimes referred to as the second month notice.

The second month notice is intended to trap funds in the hands of the general contractor for the benefit of the supplier which has not been paid by the subcontractor. In addition to the second month notice, a supplier must also provide the third month notice to the general contractor and owner, as discussed previously. As a practical matter, the second and third month notices can be combined into one notice if the required fund trapping language is included in the second month notice.

Assuming the proper notices have been sent in a timely manner, the supplier has the right to perfect its lien by filing a lien affidavit containing all of the required information with the county clerk of the county in which the real property is located. The affidavit must be filed no later than the 15th day of the 4th month after the indebtedness accrues.

The indebtedness accrues on the last day of the last month in which materials were furnished, provided that all of the materials were supplied under one contract. Otherwise, each month's deliveries may be treated as being under separate contracts, with the indebtedness accruing on the last day of each month.

One important thing to remember—if the materials are supplied at the end of the project, the deadline to trap funds or file a lien is 30 days after completion of the project.

Let's turn to an example:

CASE BREAK:

A lumber and building material supplier is selling building materials under a contract with a framing subcontractor who has a turn-key material and labor subcontract with a general contractor for a project being built in Harris County, Texas. Building materials are delivered in January and February. Payment terms are Net 30. Payment is not timely made for either the January or February delivery.

Since the supplier is selling to a subcontractor and not the general contractor, the supplier must timely send both a second month notice and third month notice before the lien affidavit is actually filed. Both notices need to be sent for EACH month in which materials were delivered for which payment has not been made. Therefore, for the delivery made in January, the second month notice must be sent by March 15th, and for the delivery made in February, the second month notice must be sent by April 15th. For the delivery made in January, the third month notice must be sent by April 15th. For the delivery made in February, the third month notice must be sent by May 15th. The Lien Affidavit must be recorded with the Harris County Clerk's office by June 15th, as the accrual of indebtedness accrued on the last day of February, being the last month in which the materials were delivered to the project under one contract.

Previously we stated that the lien affidavit must be filed in the correct form. There is very little room for error here. If the lien affidavit does not contain all of the required information, it will be considered defective and unenforceable, and could lead to a claim by the owner against the supplier. For a material supplier, the lien affidavit must

- Be signed either by the supplier claiming the lien or the supplier's agent, and must contain
- A sworn statement of claim, including the amount due to the supplier
- The name and address of the owner
- A general description of the materials furnished and the months in which the materials were delivered
- The outstanding amount due to the supplier
- The name of the person to whom the supplier furnished materials
- The name and address of the general contractor
- A description, legally sufficient for identification, of the real property subject of the lien
- The supplier's mailing and physical addresses
- The date and method by which notices of non-payment were sent to the owner and general contractor.

A copy of the lien affidavit must be sent to the owner by certified mail no later than the 5th day after the lien affidavit is filed with the county clerk.

Complying with the statutory notice and filing requirements will help to ensure payment of the amounts due to a supplier. However, if the supplier is still not paid, there will be other issues to consider, including the deadline for filing a lawsuit, the parties responsible for payment of the monies due, and the effect of a lender's foreclosure of the property, among others.

There are additional statutory requirements if the supplier is providing specially manufactured items perfecting a lien on retained funds or perfecting a lien on a residential project

Pagel, Davis & Hill represents numerous companies throughout the state of Texas which supply materials to residential, commercial and industrial construction projects. We thoroughly understand the prerequisites which must be followed in order to properly perfect mechanic's liens. We also routinely handle litigation relating to mechanic's liens and other construction collection matters.

How does PDH charge for its lien and collection services? PDH utilizes two means for charging clients for this type of work—fixed fees for specific tasks undertaken or contingency fees. The list of fixed fees for Apartment Suppliers, Construction Suppliers, and Commercial Suppliers can be obtained by simply contacting us.