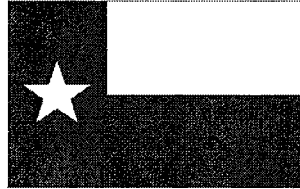


TEXAS LIEN LAW

Protecting Your Right to Contract Funds



Presented by:



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WHAT WE'LL COVER

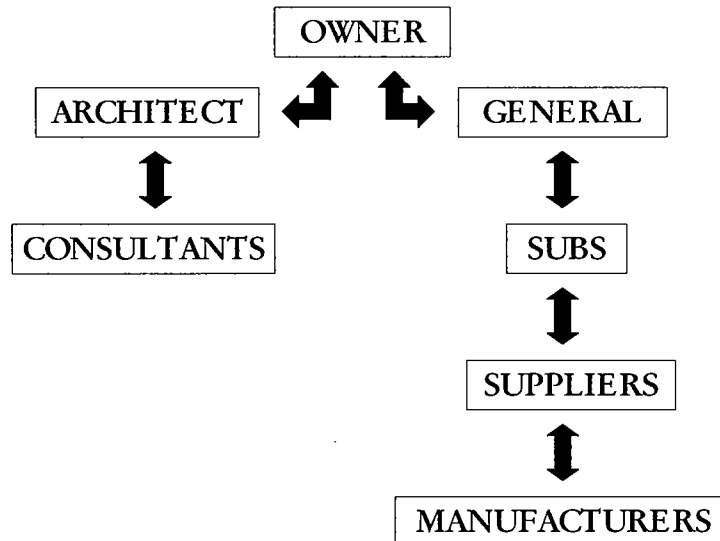
- ◆ Part 1: Why Liens Are Important
- ◆ Part 2: Overview of Lien Filing Procedures
- ◆ Part 3: The Case Study— A Closer Look

**Part 1:
WHY LIENS ARE
IMPORTANT**

**EXPECTATION OF
PARTIES**

- ◆ **Owner:**
 - On time
 - Within budget
 - Quality product
- ◆ **Contracting Parties:**
 - Show me the money!

THE PRIVITY PROBLEM



HOW DOES A LIEN HELP?

- ◆ Eliminates privity problem by providing direct recourse against:
 - Funds in the hands of the owner (retainage)
 - Owner's property and improvements

WHO CAN FILE A LIEN?

- ◆ Anyone providing labor, materials, or fabrication for the improvement of real property including:
 - Architects/engineers
 - Contractors
 - Suppliers
 - Manufacturers
- ◆ Improvements are not limited to buildings

WHAT DOES A LIEN SECURE?

- ◆ Payment for labor performed or material furnished including:
 - Contract price
 - Changes that can be tied back to the contract
 - Specially fabricated materials, even if never delivered
- ◆ Retainage

WHAT DOES A LIEN GET ME?

- ◆ **With a lien**
 - **The power of persuasion:**
 - Ties up owner financing
 - Discourages potential buyers
 - Foreclosure
- ◆ **Without a lien**
 - Original contractor: costly lawsuit
 - Subcontractor/supplier: good luck!

Part 2: OVERVIEW OF LIEN FILING PROCEDURES

HOW DO I FILE A LIEN?

- ◆ **Complicated procedures that vary depending on:**
 - Commercial/residential
 - Public/private
 - Bond status
 - Claimant's contracting position

HOW DO I FILE A LIEN?

- ◆ **Overview of process:**
 - Gathering information
 - Early notices
 - Notices of unpaid account
 - Filing the lien affidavit

GATHERING INFORMATION

- ◆ **You'll need to know a few things:**
 - Owner's name and address
 - Surety's name and address
 - Original contractor's name and address
 - Legal description of the property
- ◆ **Start early!**

EARLY NOTICES

- ◆ **Notice of retainage agreement**
 - Alerts owner and original contractor that they should be withholding funds
 - Owner's liability is otherwise limited
- ◆ **Notice of specially fabricated materials**
 - Alerts owner and original contractor that you will be fabricating items specifically for the project

NOTICES OF UNPAID ACCOUNT

- ◆ **Who is your contract with?**
 - Owner? No notice requirements.
 - Original Contractor or Sub? Statutory notices are required prior to filing lien.
- ◆ **Purpose: put those “up the food chain” on notice that you’re not getting paid.**
 - Owner’s liability is otherwise limited
- ◆ **Be careful! Notice deadlines are strictly enforced.**
 - Always send via CM/RRR and copy everyone above you.

FILING THE LIEN

- ◆ **Sworn statement of claim**
 - Filed in real property records where project is located
 - Secures right to payment from owner
 - Puts world on notice of your claim
 - Relates back to commencement of construction
 - Must give owner and general contractor notice of filing

FORECLOSURE

◆ Judicial remedy to enforce lien

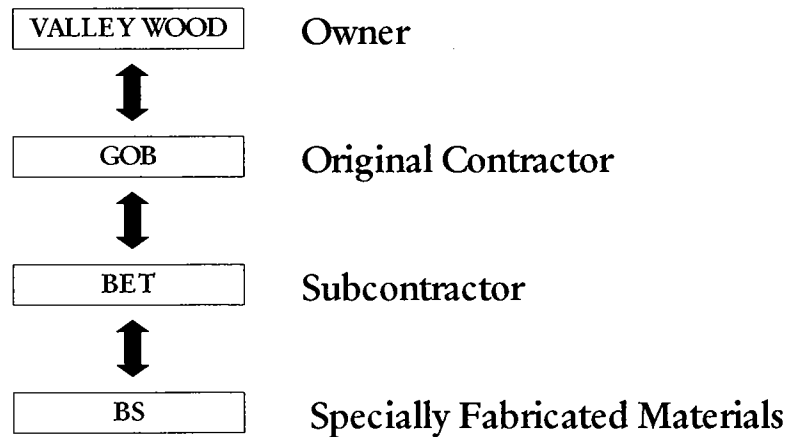
- Forced sale of owner's property
- Contractors share in the proceeds
- Priority over other creditors as to improvements

Part 3: A CLOSER LOOK

THE PROJECT

- ◆ Construction of the D'FEAT Tower
 - 50-story office building
 - Bamboo façade
- ◆ Note
 - Private project
 - Commercial construction
 - No payment bond

THE PLAYERS



THE SCENARIO

- ◆ **January 2004**
 - All contracts are entered
 - 10% retainage
 - Monthly draws due within 30 days
 - All work commences

STEP ONE: GATHERING INFORMATION

- ◆ **Requesting information (forms 1.1, 1.2)**
 - **If the money stops, every contractor will need to know:**
 - Owner's name and address
 - Surety's name and address
 - Original contractor's name and address
 - Legal description of the property

STEP ONE: GATHERING INFORMATION

- ◆ **Responding to RFI (form 1.3)**
 - Due within 10 days
 - Note alternate responses

STEP TWO: EARLY NOTICES

- ◆ **Notice of Contractual Retainage Agreement (form 2.1)**
 - Protects your right to funds retained by the owner
 - Everyone but original contractor should send (BET, BS)
 - Due by 15th day of 2nd month following commencement. When?
 - MARCH 15th

STEP TWO: EARLY NOTICES

- ◆ **Notice of Specially Fabricated Materials (form 2.2)**
 - Preserves lien rights if materials are not delivered or incorporated (BS)
 - Due by 15th day of 2nd month following placement and acceptance of order. When?
 - MARCH 15th

THE MONEY STOPS

- ◆ **Steps One and Two complete? No worries until the money stops**
- ◆ **June 2004**
 - All contractors submitted draws for work completed that month
 - Valleywood doesn't pay the June 2004 draws
 - GOB doesn't pay its subs and so on

STEP THREE: NOTICES OF UNPAID ACCOUNT

- ◆ Notice of Unpaid Account to Original Contractor (form 3.1)
 - Must be sent if you don't have a contract with owner or original contractor (BS)
 - Let's original contractor know you're not getting paid
 - Due by the 15th day of 2nd month following each month work performed but not paid. When?
 - AUGUST 15th

STEP THREE: NOTICES OF UNPAID ACCOUNT

- ◆ Notice of Unpaid Account to Owner (form 3.2)
 - Everyone but original contractor must file (BET, BS)
 - Let's owner know you're not getting paid
 - Due by 15th day of 3rd month following each month work performed but not paid. When?
 - SEPTEMBER 15th
 - Note "fund-trapping" language

STEP FOUR: FILING THE LIEN

- ◆ **Original Contractor Affidavit (form 4.1)**
 - Only step for original contractor (GOB)
 - Due by 15th day of 4th month following:
 - Termination
 - Abandonment
 - Completion
 - When? OCTOBER 15th
 - Filed in real property records of county of project

STEP FOUR: FILING THE LIEN

- ◆ **Subcontractor Affidavit (form 4.2)**
 - Subcontractor (BET): due by 15th day of 4th month following the last month work was performed.
When?
 - OCTOBER 15th
 - Specially fabricated materials (BS): due by 15th day of 4th month following:
 - Last month materials delivered;
 - Last month which delivery would normally been required; or
 - Last month of breach/termination of original contract or subcontract under which you are furnishing material.
 - When? OCTOBER 15th
 - Filed in real property records of county of project

STEP FOUR: FILING THE LIEN

- ◆ **Does your claim include retained funds?**
 - As a practical matter, if your claim includes retainage, affidavit should be filed within 30 days of completion.

I FILED MY LIEN, AM I FINISHED?

- ◆ **No! Must send Notice of Filing to the Owner and Original Contractor (form4.3)**
 - **Within 5 days of filing!**

FALLBACK: THE CONSTITUTIONAL LIEN

- ◆ Miss a deadline? You still may have a constitutional lien, BUT:
 - Only available to those with a direct contract with the owner
 - Does not apply to improvements other than building
- ◆ Moral: don't screw up!

WHAT IF THE JOB WAS BONDED?

- ◆ Same procedure, just copy the surety on everything
- ◆ You should know who it is!

WHAT IF THE JOB WAS PUBLIC?

- ◆ Similar procedures

QUESTIONS?



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