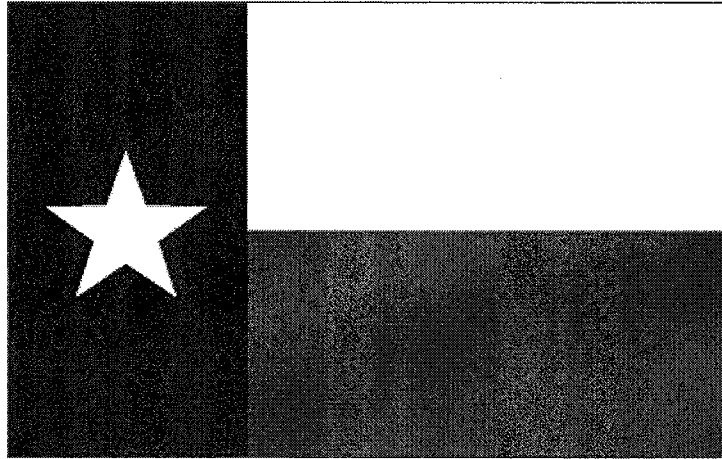


TEXAS LIEN LAW

Protecting Your Right to Contract Funds



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PREFACE

Ford White & Nassen P.C. has prepared this packet of information as an educational tool to help construction industry participants understand the otherwise complex nature of Texas lien law as it relates to non-residential, private-owned projects. Please be advised that the procedures necessary to perfect a lien on residential and public-owned projects vary from what is presented herein.

This information is current as of the date of this presentation. However, the Texas legislature meets once every two years to review and revise the statutes that provide contractors with lien rights. Therefore, before proceeding, an attorney should be consulted to make sure that the procedures outlined herein have not changed.

This information is for educational purposes only. It is not a substitute for legal advice and an attorney licensed in this state should be consulted to ensure that appropriate steps are taken to protect your right to payment.

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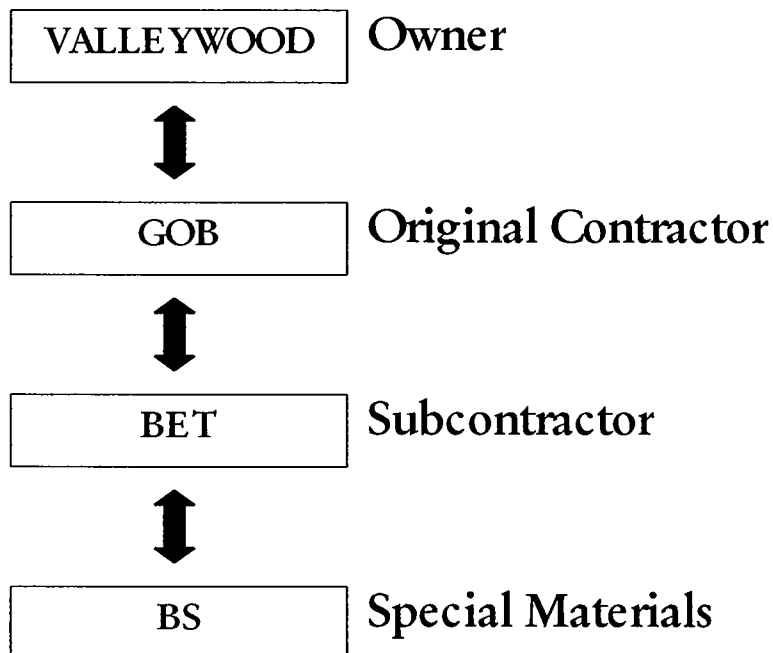
THE HYPOTHETICAL

To enhance this presentation and make the information herein easier to understand, we will walk you through each step of the lien perfection process via the hypothetical set forth below. Please note that lien perfection procedures may vary depending on the circumstances of each particular project. However, we have selected a common scenario to highlight the features of the lien filing process. This scenario will provide the basis for our presentation.

D'FEAT is a much anticipated mixed-use development in the heart of Downtown Dallas. The developer, Valleywood Development, plans to build commercial office buildings, a hotel, residential condominiums, retail shops, and entertainment venues. The first project to be built is the D'FEAT Tower, a 50-story office building in the shape of the letter "D". An architectural and engineering marvel, the structure will be made out of steel and bailing wire with a bamboo façade.

Valleywood has hired Good ol' Boy (GOB) to provide general construction services. GOB has, in turn, contracted Bamboo Erection Technologies (BET) to furnish and install the façade. As a value engineering option, BET suggested that the façade be constructed with manufactured bamboo rather than the natural version that would have to be imported from China. BET entered into a purchase order with Bamboo Supply (BS), to supply all of the bamboo required for the Project.

All contracts are entered and construction commences in January 2004. Each contract calls for 10% retainage and monthly draws to be paid within 30 days. Work proceeds until such time as the Valleywood refuses to pay GOB for its June draw. That's when the trouble begins...



INTRODUCTION TO TEXAS LIEN LAW

Texas lien law with respect to private, non-residential projects is governed by Chapter 53 of the Texas Property Code. Lawyers and contractors alike agree that Texas lien law is among the most complicated in the nation. It can be mastered, but any uncertainty should be met with expert advice. That said, we have attempted to break down the procedure into manageable form. In doing so, we have divided the process into four primary steps: (1) Gathering Information, (2) Early Notices, (3) Notices of Unpaid Account, and (4) Filing the Lien.

Before getting into the nuts and bolts of the process, there are few things to note. First, and most importantly, the deadlines noted herein are mandatory and strictly enforced by courts when deciding whether to enforce a lien. If you miss a deadline, your lien will not be valid and your right to payment will be unnecessarily limited.

Second, the Texas Property Code uses some uncommon terminology. Where possible, we have avoided the use of these terms to simplify the material. However, one recurring term you will see is “original contractor.” In most cases, this term is synonymous with a general contractor. All it means is a contractor with a direct contract with the owner. If you have one, you are an original contractor. If you do not, you are a subcontractor under the Texas Property Code. This distinction becomes important when determining which people to send the forms herein. As with deadlines, if you do not send the each form to the appropriate party, your lien will not be valid. Although these people are identified in the explanatory notes to each form, one simple rule can alleviate any uncertainty. When in doubt, send each form to everyone above you in the contracting chain.

Last, all of the forms herein should be sent via certified mail, return receipt requested. The purpose of this is two-fold. First, in most instances it is required by the Texas Property Code. Second, in all cases it the most fail-safe mechanism for later proving that the intended recipient received what was sent. Each form also notes delivery via first class mail. Although not required, we recommend doing so to protect against the recipient’s refusing to accept a certified mailing.

SECTION ONE: GATHERING INFORMATION

Protecting your right to payment should begin as soon as you get your contract. Under the Texas Property Code, there are a few steps every contractor needs to take to make sure it will be entitled to a lien in the event it is not paid for its work. Section One includes those steps that should be taken up front. The following forms should be used to assist with gathering information that will be used later on to perfect a lien in the event of nonpayment.

FORM 1.1: Request for Information to Owner

This form should be used by contractors of all tiers. While there is no deadline for requesting this information, the best practice is to send this request as soon as you get your contract. In the event of nonpayment, every contractor will need this information to perfect a lien. If you have to scramble for this information later on, you may miss one of the mandatory deadlines addressed below. If you miss one of these, your lien will not be valid.

FORM 1.2: Request for Information to Original Contractor

Obviously, if you are an original contractor, you'll already have this information. Subcontractors of any tier, however, will need this information to perfect a lien. Again, there is no deadline to request this information. However, as with the information from the owner, this information will be necessary to perfect your lien in the event of nonpayment. Waiting may cause you to miss a deadline and result in forfeiture of your lien rights.

FORM 1.3: Response to Request for Information

This form is included so that a contractor receiving form 1.2 will know how to reply. Thus, it should be used in the event you are an original contractor and you receive a request for information from a contractor below you in the contracting chain. Use Alternate 1 or 2 depending on whether there is a payment bond for the project. Alternate 3 should only be used if the request comes from someone other than a contractor with a direct contractual relationship with you. Note that the you are required to respond to the request within 10 days of receipt.

FORM 1.1: REQUEST FOR INFORMATION TO OWNER

[Date]

Via Certified Mail No. [Number]

Return Receipt Requested

and First Class Mail

[Owner's Name]

[Owner's Address]

Re: Request for Information to Owner regarding:
[Project Description]

Our company is providing labor and/or materials to improve the above-referenced project. It is our understanding that you are the owner of the real property and improvements at the project. If this is incorrect, please advise us immediately.

In accordance with the Texas Property Code, please furnish us with the following information:

- (1) a description of the real property being improved legally sufficient to identify it;
- (2) whether there is a surety bond and, if so, the name and last known address of the surety and a copy of the bond; and
- (3) whether there are any prior recorded liens or security interests on the real property being improved and, if so, the name and address of any person having a lien or security interest.

Pursuant to the Texas Property Code, you are requested to provide this information not later than 10 days following receipt of this request. Enclosed is a check for \$25.00 as reimbursement of costs in connection with providing this information.

Sincerely,

[Claimant]

FORM 1.2: REQUEST FOR INFORMATION TO ORIGINAL CONTRACTOR

[Date]

Via Certified Mail No. [Number]

Return Receipt Requested

and First Class Mail

[Original Contractor's Name]

[Original Contractor's Address]

Re: Request for Information to Original Contractor regarding:
[Project Description]

Our company is providing labor and/or materials to improve the above-referenced project. It is our understanding that you are the original contractor for the construction of these improvements at the project. If this is incorrect, please advise us immediately.

In accordance with the Texas Property Code, please furnish us with the following information:

- (1) the name and last known address of the person to whom you have furnished labor and/or materials for the project; and
- (2) whether you have furnished or have been furnished a payment bond for any of the work on the project and, if so, the name and last known address of the surety(s) and a copy of the bond(s).

Pursuant to the Texas Property Code, you are requested to provide this information not later than 10 days following receipt of this request. Enclosed is a check for \$25.00 as reimbursement of costs in connection with providing this information.

Sincerely,

[Claimant]

FORM 1.3: RESPONSE TO REQUEST FOR INFORMATION

[Date]

Via Certified Mail No. [Number]

Return Receipt Requested

and First Class Mail

[Claimant's Name]

[Claimant's Address]

Re: [Claimant's] Request for Information regarding:
[Project Description]

Receipt of your letter dated [Date] requesting information regarding the above-referenced project is acknowledged. The name and address of the person to whom the undersigned has furnished labor and/or materials for the project is:

[Owner's Name]

[Owner's Address]

[Alternate 1] The undersigned has not furnished and no other party has furnished to us a payment bond for any of the work on the above-referenced project.

[Alternate 2] We have furnished or otherwise been furnished with a payment bond(s) for the above-referenced project. A copy of the bond(s) is enclosed. The name and last known address of the surety(s) is:

[Surety's Name]

[Surety's Address]

[Alternate 3] Pursuant to the Texas Property Code, because you do not have a direct contractual relationship with the undersigned, we are entitled to actual costs, not to exceed \$25.00, incurred in complying with your request. Our actual costs exceed this amount; therefore, please remit \$25.00 as reimbursement for our costs of compliance.

Sincerely,

[Original Contractor]

SECTION TWO: EARLY NOTICES

Two types of notices should be sent shortly after commencing work on the project. These notices are an integral part of protecting your right to a lien. Section Two contains the two notices that must be sent up front.

FORM 2.1: Notice of Contractual Retainage Agreement

This form is used to put others on notice that the party that hired you is withholding retainage from you under your contract. Thus, all parties above you in the contracting chain need to know of your retainage agreement so that they may withhold a corresponding amount of retainage.

An original contractor need not send this notice because the owner is already aware of whether it has a retainage agreement with the original contractor. However, all contractors without a direct contract with the owner must send this form and make the owner aware of the retainage agreement. Likewise, if you do not have a direct contract with the original contractor, you must also send this form to it as well to make the original contractor aware of the retainage agreement.

This form must be sent no later than the fifteenth day of the second month following when the claimant first provides labor and/or materials to the project.

This notice is not required to protect your lien. However, if you send this notice within the required time frame, you are not required to send the notices detailed in Section Three in order to protect your lien rights on the retainage. This has two benefits. First, you will know that you have already taken the first step toward protecting your right to a lien on the retainage before payment becomes a problem. Second, the notices required under Section Three which must be sent for every month you are not paid, will not need to be sent for non-payment of retainage. Form 2.1 need only be sent once. Please note, however, that if your claim involves more than contractual retainage (i.e. unpaid monthly draws) the notices in Section Three will still have to be sent to protect your right to a lien on this amount.

FORM 2.2: Notice of Specially Fabricated Materials

This form only applies to those contractors that will be specially fabricating materials for the particular project in question. Specially fabricated materials are those that cannot be easily reused on other projects. This notice protects a contractor's right to perfect a lien on these materials, even when they have not been delivered or incorporated into the project.

This form must be sent to the owner. It must also be sent to the original contractor if the fabricator of these materials does not have a direct contract with the original contractor.

This form must be sent no later than the fifteenth day of the second month following receipt and acceptance of the order for specially fabricated materials.

FORM 2.1: NOTICE OF CONTRACTUAL RETAINAGE AGREEMENT

[Date]

*Via Certified Mail No. [Number]
Return Receipt Requested
and First Class Mail*

[Owner's Name]

[Owner's Address]

*Via Certified Mail No. [Number]
Return Receipt Requested
and First Class Mail*

[Original Contractor's Name]

[Original Contractor's Address]

Re: Notice of Contractual Retainage Agreement
Project: [Project Description]

Our company has entered into a contract with [Name of Party Contracted With] on the above-referenced construction project. It is our understanding that you are the owner of the project and/or original contractor of improvements thereon. If this is incorrect, please advise us immediately.

The agreement between our company and [Name of Party Contracted With] calls for us to furnish the following labor and/or materials to the project: [General Description of Work]. In accordance with the Texas Property Code, please be advised that this contract includes a "Contractual Retainage Agreement" as defined therein. The contract requires retainage to be withheld as follows: [Retainage as stated in your contract, e.g. 10% from each draw]. The retainage is due [Retainage due date as stated in your contract, e.g. 30 days from completion]. Copies of the applicable portions of our contract are enclosed for your review.

Sincerely,

[Claimant]

Enclosure

FORM 2.2: NOTICE OF SPECIALLY FABRICATED MATERIALS

[Date]

*Via Certified Mail No. [Number]
Return Receipt Requested
and First Class Mail*
[Owner's Name]
[Owner's Address]

*Via Certified Mail No. [Number]
Return Receipt Requested
and First Class Mail*
[Original Contractor's Name]
[Original Contractor's Address]

Re: Notice of Specially Fabricated Materials
Project: [Project Description]

Our company is providing labor and/or materials to the above-referenced project. It is our understanding that you are the owner of the project and/or the original contractor of improvements thereon. If this is incorrect, please advise us immediately.

In accordance with the Texas Property Code, please be advised that we have received and accepted an order from [Name of Party Placing Order] for specially fabricated items to be incorporation in the project. The price agreed upon for said items is [Dollar Amount]. A copy of the order is enclosed for your reference.

Sincerely,

[Claimant]

Enclosure

