

## CONSTITUTIONAL MECHANIC'S LIEN OFTEN OVERLOOKED

By Anthony D. Whitley (as seen in *Texas Construction* July 2008)

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Most Texas commercial contractors have extensive experience with the mechanic's lien statutes found in Chapter 53 of the Property Code. Fewer contractors, however, understand the other mechanic's lien: the constitutional mechanic's lien. The constitutional mechanic's lien is a powerful yet often forgotten tool that provides protection similar to the statutory mechanic's lien found in Chapter 53 of the Property Code. Failure to understand the constitutional mechanic's lien can result in the potential loss of valuable leverage against an owner's refusal to pay overdue contract sums.

The Congress of the Republic of Texas first incorporated the constitutional mechanic's lien in the Texas Constitution of 1869. Today, the constitutional lien provision is found in Section 37 of Article 16 of the constitution. Section 37 states: "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 . . . ."

While both constitutional and statutory mechanic's liens protect against an owner's non-payment by potentially attaching to the owner's property allowing for the lien's foreclosure, the constitutional lien is different from the statutory lien found in the Property Code in several ways. First, and most significantly, the constitutional lien is only available to a prime contractor working directly for an owner; subcontractors or suppliers of a prime contractor cannot file a constitutional lien.

Secondly, unlike a statutory mechanic's lien, a constitutional mechanic's lien is "self-executing." The constitutional lien automatically arises and becomes enforceable against the owner by virtue of the contractual relationship between the owner and the prime contractor. Although it is not recommended, as explained in more detail below, a constitutional lien does not have to be filed by the fifteenth day of the fourth month following the date work was last performed as is required to enforce a statutory lien under Chapter 53 of the Property Code. In fact, a contractor does not even have to file a constitutional lien for it to be enforceable against the owner's property so long as the owner has not sold the property.

### When Should You File a Constitutional Lien

Even though the constitutional mechanic's lien does not necessarily need to be filed to be effective, a contractor should always file the lien as soon as possible after it last performs its work. Filing the lien as soon as possible will help avoid the risk that a subsequent lien holder or purchaser of the property may not have proper notice of the constitutional lien, which could prevent the lien's enforceability. To provide infallible notice, contractors are advised to record constitutional liens within the time-frame for filing statutory liens under

Chapter 53 of the Property Code. If filed within the Property Code's statutory deadlines, a constitutional lien will "relate back" and be considered effective as of the date construction started, just like statutory liens. The constitutional lien will thereafter share priority (with statutory mechanic's liens) over non-mechanic's liens or encumbrances recorded after the start of construction.

If the constitutional mechanic's lien is not filed within the statutory deadlines in Chapter 53 of the Property Code, and the owner still owns the property, the lien will still be effective against the owner, and the contractor will still be able to file a suit to foreclose the lien. However, some argue that the constitutional lien will no longer "relate back" to the start of construction and will lose priority over previously filed liens and encumbrances. If eventually filed, the constitutional lien will thereafter have priority over subsequently filed liens or purchasers of the property.

### **When and How to File and Foreclose the Constitutional Lien**

The constitutional mechanic's lien must be in the form of a sworn affidavit and filed in the real property records of the county in which the owner's property is located. Texas law is unclear as to whether a contractor must file its suit to foreclose a constitutional lien according to the same statutory deadlines in Chapter 53 of the Property Code. Prior to 1999, Texas courts allowed a contractor to bring a suit to foreclose its constitutional lien so long as the statute of limitations had not yet run on the underlying debt (such as the four-year limitation on bringing a suit for breach of contract). The Property Code was amended in 1999 in an attempt to require contractors to file suit on both statutory mechanic's liens and constitutional mechanic's liens within the same limitations period (within two years from the fifteenth day of the fourth month following the last day work was performed). However, the 1999 revisions do not directly mention the constitutional lien, and to date no Texas court has applied the deadlines related to filing a suit to the constitutional lien. Until a court decides the issue, contractors are advised to file their suits to foreclose constitutional liens according to the same deadline required for filing suits to foreclose statutory mechanic's liens under the Property Code.

The constitutional mechanic's lien is a powerful tool available to contractors faced with an owner's refusal to pay overdue contract sums. Contractors should consider using the constitutional lien alongside their statutory mechanic's lien for added leverage and security.