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## Texas Mechanic's Liens and Bonds

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This practice note explains Texas laws governing mechanic's liens and bonds. Texas is home to relatively complex statutory frameworks for liens and bonds used to secure payment for services rendered, and you must be familiar with the statutes to provide effective counsel.

The practice note discusses:

- The complex framework for liens on private construction projects in Texas. (If you represent contractors or subcontractors who supply labor and/or materials to such projects, statutory and constitutional liens provide powerful remedies for nonpayment—but only if the proper statutory guidelines are strictly observed.)
- The requirements and benefits of bonding on public and private construction projects. (Performance and payment bonds are frequently required on construction projects in Texas, and they provide protection for both owners and contractors (and subcontractors) in the event that payment or performance issues arise.)

### Mechanic's Liens

For private projects in Texas, mechanic's liens allow contractors to enforce their right to payment against the underlying property. Texas law recognizes two types of mechanic's liens: the constitutional lien and the statutory lien. *Cavazos v. Munoz*, 305 B.R. 661, 668 (S.D. Tex. 2004) (citing *Apex Financial Corp. v. Brown*, 7 S.W.3d 820, 830 (Tex. App.—Texarkana 1999, no writ), and including a detailed history of mechanic's lien law in Texas). The system of laws developed for application and enforcement of these liens, found in the Texas Property Code and Texas Government Code, is one of the most complex frameworks in the United States. You must therefore be cognizant of the various statutory requirements, many of which may change depending on various factors. The following sections outline the requirements and application of each type of lien, and include links to a number of useful forms.

### Chapter 53 Statutory Lien

A mechanic's lien under Chapter 53 of the Texas Property Code (Chapter 53 Lien or "Statutory Lien") is available to any contractor, subcontractor, materialman, or fabricator of specialty materials, provided he or she furnishes materials or labor in direct prosecution of work on a private construction project. It is also available to architects, engineers, or surveyors who prepare a plan or plat for the project, as well as to certain landscaping and demolition contractors. The material or labor provided must be furnished under (or by virtue of) a contract with the owner, owner's agent, trustee, receiver, contractor, or subcontractor, with the exception of architects, engineers, or surveyors, who must contract directly with the owner or the owner's agent. Tex. Prop. Code § 53.021.

The term "material" is defined by Tex. Prop. Code § 53.001 and includes all or any part of "the material, machinery, fixtures, or tools incorporated into the work, consumed in the direct prosecution of the work, or ordered and delivered for incorporation or consumption." It also includes charges and costs related to the material, such as reasonable rents, actual running repairs, and power, water or fuel used or consumed in the direct prosecution of the work. "Labor," unsurprisingly, means "labor used in the direct prosecution of the work."

When considering a potential lien claim for the first time, you should review Section 53.021 and the statutory definitions in Section 53.001 closely to determine if the claimant (whether your client or your opponent) is entitled to a lien. Keep in mind that while Chapter 53 requires privity of contract to establish entitlement to a lien, it does not necessarily need to be privity with the owner. Subcontractors, suppliers, and materialmen are also entitled to liens against the owner's property (subject to the heightened notice and filing requirements discussed below). Also, keep in mind the statute does not require the enabling contract to be in writing—oral, and even implied, contracts are sufficient to establish a valid lien. See *Big Three Welding Equip. Co. v. Crutcher, Rolfs, Cummings, Inc.*, 229 S.W.2d 600, 603 (Tex. 1950) (citing *Lippencott v. York*, 24 S.W. 275, 276 (Tex. 1893)).

### ***Statutory Notice – Original Contractor***

Validity of Chapter 53 liens depends on compliance with statutory notice requirements set out in the Texas Property Code. In the case of an original contractor (i.e., one who has directly contracted with the property owner), however, the statute imposes no such notice requirement. The purpose of predicating lien validity upon prior notice by the lien claimant is to ensure the original contractor and owner are aware of all potential claims before they mature into bona fide disputes. This allows for an opportunity to retain funds for payment of the claim, as discussed below.

Because the original contractor has a direct contractual relationship with the owner, prior notice would be superfluous and is thus not required by the statute. The owner is aware that the original contractor is not being paid, so the contractor should not be burdened with additional notice requirements. However, the lack of an upstream notice requirement should not be confused with the procedures and requirements for actually filing the lien. Although the original contractor is not required to provide any pre-lien notice to the owner, timely filing of the lien is nonetheless required for the lien to be enforceable. The distinct requirements for recording a valid lien are described below.

### ***Statutory Notices – Derivative Contractors***

Those parties who do not have a contract directly with the owner, such as subcontractors or material suppliers, are commonly referred to as “derivative claimants.” Due to the possibility that the owner, or even the original contractor, may not be aware of payment claims arising further down the contract chain, derivative claimants are required to provide advance notice of their lien claims for any lien against the owner's property to be valid. The notice required to validate such liens is prescribed by Tex. Prop. Code § 53.056 and will depend on the exact nature of the claimant. There are separate requirements for “first-tier” subcontractors (i.e., those having a direct contract with the original contractor) versus “second-tier” subcontractors (i.e., those who have contracted with a party further down the chain).

A first-tier subcontractor must give notice of unpaid amounts due no later than the 15th day of the third month following each month in which all or part of the claimant's labor or material was performed or delivered. This notice must be delivered to the owner or reputed owner by registered or certified mail, with a copy to the original contractor. When calculating appropriate notice deadlines for such claimants, remember that the statutory deadline is based on when labor or material was actually performed or delivered. The date of invoice is irrelevant, as are any agreements between the parties regarding when payments will become due (with the exception of contractual retainage, which is discussed below). The statute only cares about actual delivery and/or performance dates, and this runs counter to what many industry professionals may expect. Because the statute requires notice to be provided for each month in which labor is performed or materials are supplied, subcontractors and suppliers may be required to send notice to the owner and original contractor on a continuous, monthly basis until payments resume, notifying the owner of each month in which payment is not made.

For a form see [Notice of Unpaid Balance \[and Demand for Payment\] for Labor Performed and/or Materials Delivered \(TX\)](#).

A second-tier (or below) subcontractor must conform to the same “third month” notice requirement, but is additionally required to submit notice to the original contractor at an earlier date. Such subcontractors must deliver notice of nonpayment to the original contractor, by registered or certified mail, no 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 materials provided. Tex. Prop. Code § 53.056(b). Because lower-tier claims result from payment failures the original contractor may not be privy to, this affords the original contractor an opportunity to become aware of the issue and arrange for payment to be made. This can be beneficial for relationships on the project, as such claims may be potentially resolved without the need to resort to notifying the project owner. However, in the event you are representing a lower-tier lien claimant, the safest course of action is to combine second- and third-month notices and send both to the owner and the original contractor. Not only will this help ensure notice is timely, but notice to the owner is often required to “grease the wheels” and prompt payment.

A claimant who has supplied, or contracted to supply, specially fabricated materials to the project is potentially subject to additional notice requirements—at least, if that claimant desires to perfect a lien for undelivered materials. For materials delivered to the project, deadlines are the same as those set forth above for other claimants. However, for specially fabricated materials not yet

delivered, no lien rights will exist unless the fabricator provides notice to the owner no later than the 15th day of the *second* month after the month in which the claimant receives or accepts the order for the materials. If a party other than the original contractor incurred the obligation to pay for the materials, notice must be given to the original contractor by the same deadline. The notice is intended to put the owner on notice that specially fabricated materials have been ordered for the project, and it must include the price of the materials. Note that this additional notice to the owner is not a substitute to the notice requirements for derivative claimants outlined above—suppliers of specially fabricated material are still required to supply second and third month notices following delivery of materials, if applicable. Tex. Prop. Code § 53.058.

Residential construction projects, as that term is defined in the Code, are subject to the same notice requirements as commercial projects, but they are also subject to additional requirements under Subchapter K of Chapter 53. Most notably, Subchapter K makes no distinction between first- and second-tier subcontractors, requiring all subcontractors and suppliers to provide notice of lien claims to the property owner and original contractor no later than the 15th day of the second month after each month in which the labor was performed or material delivered. Notice for specially fabricated materials are the same as nonresidential projects, with notice of an agreement to provide such materials due to the owner no later than the 15th day of the second month after acceptance of the order. Residential construction contracts must also include detailed disclosure statements, and the original contractor is subject to additional burdens, such as the obligation to provide a detailed list of subcontractors and suppliers. Tex. Prop. Code §§ 53.252–53.256.

For a form see [Notice of Unpaid Balance \[and Demand for Payment\] for Labor Performed and/or Materials Delivered \(Residential\) \(TX\)](#).

### ***Notice of Contractual Retainage***

While billing for progress payments during performance of work on a project, contractors and subcontractors may be subject to contractual retainage requirements set forth in their contract or subcontract. When work is performed on a private project under an original contract, the project owner is required to withhold 10% of the contract price and retain these funds during the progress of the work and for 30 days after the work is completed. The purpose of this 10% retainage is to provide for payment of artisans and mechanics who provide labor or materials on the project during the performance of the work. Tex. Prop. Code §§ 53.101, 53.102. Original contractors frequently pass through this retainage scheme to their subcontractors, providing in their subcontracts that the original contractor will also withhold 10% from each progress payment due the subcontractor.

Because retainage is not typically due until the end of a construction project, the Texas lien statute provides an alternative method for notifying owners of the existence of retainage claims. Notice requirements for retainage are set forth in Tex. Prop. Code § 53.057 and are applicable to all derivative claimants from whom payments are withheld as retainage pursuant to a contractual agreement. To perfect their lien on such retainage, derivative claimants must comply with the requirements and notify the owner of the existence of their agreement providing for contractual retainage. By doing so, they make the owner aware that contractual retainage is being withheld by contractors or subcontractors further down the chain and that such retainage will become due at completion of the project.

Under Section 53.057, claimants must give notice to the owner (and the original contractor if the retainage agreement is with a subcontractor) of an agreement to withhold retainage no later than the 30th day after the subcontract agreement is completed, terminated, or abandoned, or by the 30th day after the original contract is terminated or abandoned, whichever comes first. Unlike a traditional lien for progress payments, a derivative claimant is not required to give any further pre-filing notice for its lien on the retainage to be valid. In other words, the retainage lien claimant is required only to notify the owner within 30 days of completing its contract that retainage was withheld under the contract and still needs to be paid. If no other payments are past due, the claimant has no other notice obligations. (If payments above and beyond the retainage were not paid, they should have been noticed pursuant to Tex. Prop. Code § 53.056 (i.e., second- and/or third-month notice requirements, discussed above).)

Given the various dates and requirements at play, the safest course of action for all potential lien claimants is to send notice of the agreement for contractual retainage at the beginning of the project. Additionally, retainage should be calculated and reported together with unpaid progress payments during performance of the work with notices sent to the original contractor and the owner for each month in which work is performed and remains unpaid (by the deadlines set forth above). Early delivery of notice of contractual retainage relieves potential lien claimants of the obligation to notify the owner within the short 30-day period at the end of the job. It also avoids any issues arising from early termination of the original contract, which can catch lien claimants unaware.

### ***Effect of Proper and Timely Notice***

After proper and timely notice is received, Chapter 53 authorizes the owner to withhold funds beyond the statutory 10% retainage for satisfaction of the noticed claim. Tex. Prop. Code § 53.081. You will often hear Subchapter D of Chapter 53 referred to as the “fund-trapping” statute, but the statute never actually uses that term. Still, it is an effective description of how the statute operates in practice. Essentially, once the owner receives a timely notice in the proper form, the owner is authorized to withhold further

payments from the original contractor in order to satisfy the claim. The authorization is stated as a permissive option (i.e., “the owner may withhold.. .”), but it is effectively a mandatory provision because the owner will be liable for any amounts paid to the original contractor that should have been withheld. Tex. Prop. Code § 53.084(b).

The owner is required to withhold the funds until either the deadline for the claimant to file a lien affidavit has passed (see below), or, if a lien affidavit was filed, until the lien is satisfied or released. Tex. Prop. Code § 53.082. Additionally, if the claimant makes a demand for payment upon the owner, and the original contractor does not object to the notice of lien claim within 30 days after receiving it, the owner is required to release the payment directly to the claimant. Tex. Prop. Code § 53.083. This is a very practical and expedient way to secure payment if your client has met the preliminary notice requirements, and it is often overlooked by practitioners unfamiliar with the statute.

In addition to being timely, notice to the owner must also be in the proper form to trigger the owner’s ability to trap funds. Specifically, the lien claimant must include language in the notice informing the owner of the possibility of personal liability and a lien against his or her property unless the owner withholds payments or the claim is otherwise paid or settled. Tex. Prop. Code § 53.056(d). Following such notice, the owner is authorized to withhold funds from the project. See Tex. Prop. Code § 53.081. Ultimately, the amount withheld by the owner may exceed the 10% statutory retainage requirement, depending on the number and size of claims received. However, the owner is never liable to any claimant for any amounts beyond (1) the 10% statutory retainage, and (2) funds paid to the original contractor that should have been trapped following notice from the claimant.

If the owner paid all amounts due to the original contractor prior to receiving notice, the lien claimant will have no further recourse against the owner or his or her property. For this reason, it is vital that you ensure your clients send timely notice and comply with all deadlines under the statute. Unless notice is received, the owner is not required to trap funds and is not required to hold statutory retainage beyond 30 days after project completion.

### ***Lien Affidavit***

Perfection of a mechanic’s lien requires compliance with Chapter 53 of the Texas Property Code, Subchapter C. That subchapter encompasses the claim notice requirements detailed above, but it also includes additional requirements intended to put third parties on notice of the lien claim. After delivering proper notice of the claim itself to the appropriate parties, if applicable, lien claimants are required to file an affidavit claiming the lien and give notice of the filing. These requirements are set out in Tex. Prop. Code §§ 53.052–53.055.

### ***Deadline for Filing Affidavit***

The deadlines to file an affidavit claiming a lien are prescribed by Section 53.052 and are dependent on the type of project at issue. For the majority of lien claims, the person claiming the lien must file an affidavit no later than the 15th day of the fourth calendar month after the day on which the “indebtedness accrues” (see below for a discussion of this phrase). For liens arising from residential construction projects, however, the affidavit must be filed no later than the 15th day of the third calendar month after accrual of the indebtedness.

As a side note, residential construction projects are one area where your close attention to the definitions set forth in Tex. Prop. Code § 53.001 will pay dividends. Chapter 53 features many special restrictions and deadlines based on whether property is residential or commercial, and even further restrictions if property is a homestead. Knowing how these terms are defined is important to properly comply with the statute. Importantly, a “residence” is defined as a single-family structure “used or intended to be used as a dwelling” by one of the owners. Thus, ownership of the property is a key factor, and many projects that appear residential (and thus would be subject to stricter deadlines under the statute) are, in fact, commercial.

Affidavits are filed with the county clerk of the county in which the subject property is located, and the county clerk is charged with the duty to index and record the affidavit. As the deadline for filing an affidavit is determined by reference to the date on which the “indebtedness accrues,” you must be aware of the manner in which this date is determined:

- If the indebtedness is to an original contractor, it accrues either on (1) the last day of the month in which a written declaration of contract termination is received; or (2) the last day of the month in which the original contract has been completed, finally settled, or abandoned. Tex. Prop. Code § 53.053(b)
- By contrast, if the debt runs to a subcontractor, it accrues on the last day of the month in which the labor was performed or the material was furnished. Tex. Prop. Code § 53.053(c)
- Indebtedness for specially fabricated material accrues (1) on the last day of the month in which delivery occurred, (2) on the last day of the month in which delivery would normally have been required, or (3) on the last day of the month of any material breach or termination of the original contract. Tex. Prop. Code § 53.053(d)

- Lastly, a claim for retainage accrues on the earliest of the last day of the month in which all work has been completed, or the original contract has been completed, finally settled, terminated, or abandoned. Tex. Prop. Code § 53.053(e)

Put more simply, an original contractor will generally need to file its affidavit claiming a lien no later than the 15th day of the fourth month after the original contract is completed. A subcontractor will generally need to file its affidavit no later than the 15th day of the fourth month after the last month in which the subcontractor performed work. In almost all cases, subcontractors providing specially fabricated materials will follow the same deadline as other subcontractors.

These deadlines are relatively straightforward, but they are complicated somewhat by the additional filing requirements pertaining to statutory retainage. The deadline for filing a claim against the 10% statutory retainage withheld by the owner is shorter than the standard deadlines. To have a claim against the retainage, the claimant must file its affidavit no later than 30 days after (1) the work is completed, (2) the original contract is terminated, or (3) the original contractor abandons performance. Tex. Prop. Code § 53.103(2). For claimants who perform work near the end of the project, this deadline may expire before the standard 15th day of the fourth month deadline discussed above. If that happens, the claimant will still have a valid lien against any additional funds trapped by the owner, but it will not have a lien on the retained funds. In many cases, this will have no practical effect—since any surplus retainage will also technically be “trapped funds”—but it could impact the claimant’s ability to recover in situations where the retained funds are insufficient to satisfy all claims.

Further complicating matters, Chapter 53 provides a method to extend the 30-day retainage filing deadline for those claimants who have properly noticed their claim for contractual retainage under Tex. Prop. Code § 53.057. Provided timely notice of the retainage claim was delivered to the owner as discussed above, Tex. Prop. Code § 53.057(f)(1)(B) allows the affidavit to be filed before the earliest date on which one of four specified events occurs:

- The date required for filing under Section 53.052 (i.e., 15th day of the fourth month after accrual of indebtedness)
- The 40th day after completion of the work under the original contract (as evidenced by an affidavit of completion)
- The 40th day after the date of termination or abandonment of the original contract
- The 30th day after the owner delivers a written notice to the claimant demanding that the affidavit be file

Provided the claimant complied with all notice requirements and affidavit deadlines under the statute, he or she will have a lien on statutory retainage held by the owner. If the owner has not retained the funds as required, the claimant will alternatively have a valid lien upon the property or structure itself.

Obviously, the process for perfection of liens is a complicated framework, the retainage provisions especially so, and it can be confusing for even the most dedicated reader. However, all of the uncertainty can be circumvented by one simple piece of advice: Claimants should always file their liens by the 30th day after their work is completed, and they will never be late. This is the most valuable piece of advice you can give to clients who are worried about lien deadlines or the complexity of the statute.

#### *Form of Affidavit*

The affidavit need not strictly conform to the content requirements of the statute, but it must substantially contain all of the indicated information. This includes, but is not limited to (1) a sworn statement of the amount of the claim; (2) a general statement describing the kind of work done and materials furnished; (3) a legally sufficient description of the property; and (4) for non-original contractors, details regarding delivery of statutory notice. Tex. Prop. Code § 53.054(a).

For forms, see:

- [Affidavit for Mechanic’s and Materialman’s Lien \(Contractor\) \(TX\)](#)
- [Affidavit for Mechanic’s and Materialman’s Lien \(TX\)](#)
- [Affidavit for Mechanic’s and Materialman’s Lien \(Subcontractor\) \(Residential\) \(TX\)](#)
- [Affidavit for Mechanics and Materialman’s Lien \(Contractor\) \(Residential\) \(TX\)](#)

#### *Notice of Affidavit*

After filing the lien affidavit, you must also send a copy of the affidavit to the owner or reputed owner of the property at his or her last known address, via registered or certified mail. This delivery must be effected no later than the fifth day after the affidavit was filed with the county clerk. Tex. Prop. Code § 53.055(a). If the lien claimant is not an original contractor, this notice of affidavit

must also be sent to the original contractor within the same time period. This notice of filing is separate and distinct from the other notice requirements imposed by Subchapter C of Chapter 53. While an original contractor has no obligation to comply with claim notice requirements under that subchapter, notice of the filed affidavit is an obligation for all lien claimants—including the original contractor.

For a form see [Notice of Filed Affidavit \(TX\)](#).

### **Texas Constitutional Liens**

Under Texas law, general contractors working on private construction projects within the state are afforded an additional remedy for nonpayment in the form of a constitutional lien. The Texas Constitution expressly provides a constitutional mechanic's lien for improvements on real property. *Cavazos v. Munoz*, 305 B.R. 661, 670 (S.D. Tex. 2004). While this constitutional lien right is not generally available to subcontractors or material suppliers, it is an important tool for the general contractor because it is self-executing and thus free of many of the hurdles imposed on Chapter 53 statutory liens. It is not without limitations, however, and parties relying on it should be aware of its contours.

The exact language regarding the constitutional lien is found at Art. XVI, § 37, of the Texas Constitution:

Mechanics, artisans and materialmen, 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 materials furnished therefore; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens

This type of lien is typically limited to original contractors because courts have historically interpreted the above language as requiring privity of contract with the owner. *Horan v. Frank*, 51 Tex. 401 (1879). Those who supply labor or material but do not contract directly with the owner of the property are consigned to statutory lien and bond claims, instead. The advantage of this privity requirement is that no particular notice or affidavit filing deadlines are imposed on a valid claimant to protect his or her right to a constitutional lien. Instead, the constitutional lien is self-executing. *Strang v. Pray*, 89 Tex. 525, 529 (1896). As recognized by the Texas Supreme Court in *Keating Implement and Mach. Co. v. Marshall Elec. Light & Power Co.*, the lien is imposed at the moment of the transaction and is independent of lien statute requirements. 74 Tex. 605, 607–08 (1889).

There is one important caveat to the self-executing nature of a constitutional lien in Texas: a self-executed lien will be ineffective against subsequent good faith purchasers who take without actual or constructive notice of the lien. To preserve the lien right against such a purchaser, a lien affidavit must be filed in the county records for the property at issue. Such filing provides constructive notice to any future purchasers, even if they fail to search the property records and are unaware of the lien. Note that the debtor and trustee of real property in bankruptcy are both, by statute, considered bona fide purchasers of the property. *In re Boots Builders, Inc.*, 11 B.R. 635, 639 (Bankr. N.D. Tex. 1981).

The contractual privity requirements read into the constitutional lien statute may not be a complete bar to subcontractors or other suppliers who have contracted with someone other than the property owner. In limited cases, a subcontractor may be deemed to have an implied contract with the property owner, which affords the necessary privity to establish a constitutional lien. See *Tenison v. Hagendorn*, 155 S.W. 690, 693–94 (Tex. Civ. App.—Dallas 1913, no writ) (finding an implied contract enabling a Texas constitutional lien where the owner knew the work of a subcontractor was for his benefit, suggested modifications, and supervised the work).

The constitutional lien is also limited by the types of projects that it applies to. The terminology of the statute is narrow in scope, creating a lien only upon buildings. As a result, claims for work other than that related to the building itself—such as water or sewer lines, landscaping, etc.—will not be afforded the protection of a constitutional lien. These types of work are not considered a “building,” and must therefore seek protection under a Chapter 53 statutory lien.

### **Challenges to Asserted Liens**

#### ***Lien Removal***

Tex. Prop. Code § 53.157 details the various ways in which a lien filed under Section 53.052 may be discharged. The first method of discharge is through the recording of a lien release signed by the lien claimant pursuant to Section 53.152. This generally occurs once the debt for labor or materials has been fully paid and satisfied, after which the lien claimant is required to furnish a release within 10 days of a request to do so. For a form, see [Release of Mechanics' and Materialmen's Liens \(TX\)](#).

The remaining options for discharge are (1) failure by the lien claimant to institute foreclosure of the lien within the allotted time period, and (2) the entering of a judgment discharging the lien. The limitations period for bringing suit to foreclose a lien ends two years after the last date to file the lien affidavit under Section 53.052, or one year after work on the project is completed, terminated,

or abandoned (whichever is later). Tex. Prop. Code § 53.158. The process for obtaining a judgment discharging the lien is set out in Section 53.160.

Procedurally, an owner who objects to the validity or enforceability of a lien placed on his or her property may file a summary motion in court seeking discharge of the lien. The motion must be verified and contain a detailed statement regarding the legal and factual basis for such a discharge. Tex. Prop. Code § 53.160(b) provides a complete list of acceptable grounds for objecting to the validity or enforceability of a lien claim. Predictably, the lien claimant's failure to comply with the statutory notice, perfection, or affidavit filing requirements are among the enumerated grounds. Additionally, a proper objection may be predicated on deposit of the disputed funds into the court registry, failure of the lien claimant to comply with the additional requirements for liens on homestead property (under Section 53.254), or the execution of a valid waiver or release of the claim.

In issuing its order removing a lien, the court is required to specify an amount of security that the lien claimant may elect to provide in order to stay the removal of the claim or lien. Tex. Prop. Code § 53.161. This provides the lien claimant with an opportunity to provide the requested security to the court, in the form of a bond or deposit, within 30 days of the court's order. If the lien claimant does so, and the bond or deposit conforms to the statutory requirements, the removal of the lien will be stayed. If not, the property owner may file a certified copy of the original order, and the lien will be removed and extinguished. In the event that the removal of the lien is not stayed pursuant to Section 53.161, and the lien claimant later obtains a judgment establishing the validity of the lien, a filing of that judgment will revive the lien in favor of the claimant. Tex. Prop. Code § 53.162.

### ***Fraudulent Liens***

Liens that have been falsely claimed, or lien affidavits filed despite a knowing violation of Texas Property Code requirements, qualify as fraudulent liens. Possible examples of fraudulent liens include affidavits filed after the requisite deadline for filing has passed, filing a lien when statutory notice has not been given, including amounts in a lien that are not lienable, or other actions taken with knowledge that the resulting lien is invalid. Aside from the procedures for removing an invalid lien outlined above, owners faced with a fraudulent lien have the following options:

- **Action through county clerk.** Tex. Gov't Code § 51.901 provides a procedure for a county or court clerk to take action against a filed lien, provided the clerk has a reasonable basis for believing that the document was filed fraudulently. This reasonable belief can be gained by information from the aggrieved property owner, accompanied by an appropriate affidavit. Given that information, the clerk must "(1) request the assistance of the county or district attorney to determine whether the document is fraudulent before filing or recording the document; (2) request that the prospective filer provide to the county clerk additional documentation supporting the existence of the lien, such as a contract or other document that contains the alleged debtor or obligor's signature; and (3) forward any additional documentation received to the county or district attorney."
- **Action initiated through aggrieved owner.** The aggrieved owner can also personally initiate action pursuant to Tex. Gov't Code § 51.903. If he or she "has reason to believe that the document purporting to create a lien or a claim ... is fraudulent," a motion entitled "Motion for Judicial Review of Documentation or Instrument Purporting to Create a Lien or Claim," verified by an affidavit, may be filed with the district clerk. Such a motion requests a judicial determination regarding the status of the documentation filed in support of the lien, or of the lien instrument itself.

Provided that a filed lien or claim is determined to be fraudulent, the claimant will be subject to harsh penalties imposed by the Texas Civil Practice & Remedies Code. This portion of the Code was not originally enacted with construction disputes in mind, but it applies to any fraudulently filed instrument asserted against real or personal property in Texas. Tex. Civ. Prac. & Rem. Code § 12.002(a) (1). As such, it applies to mechanic's lien disputes in the construction industry and has been used by courts in that context. See *Centurion Planning Corp. v. Seabrook Venture II*, 176 S.W.3d 498, 505 (Tex. App. Houston 1st Dist. 2004); *Taylor Electrical Services, Inc. v. Armstrong Electrical Supply*, 167 S.W.3d 522 (Tex. App.—Fort Worth 2005, no pet.). Indeed, Section 12.002 explicitly mentions liens filed under Chapter 53 of the Texas Property Code, and cautions that a Chapter 53 lien claimant is not liable under Section 12.001 unless the claimant acts with an intent to defraud.

The decisions in these cases indicate that penalties under Section 12.001 may be assessed even when there is some merit to the underlying claim—the statute only requires knowledge that the lien is in some way invalid, coupled with an intent that the lien be given the same effect as a valid lien. Violations under the statute subject the fraudulent lien claimant to the following penalties:

- \$10,000 or the actual damages caused by the violation (whichever is greater)
- Court costs and attorney's fees of the aggrieved owner
- Exemplary damages in an amount determined by the court

Thus, at a minimum, the penalty for filing a fraudulent lien is \$10,000, and costs assessed to the claimant may be substantially higher. For this reason, you should be aware of all statutory requirements for the filing of mechanic's liens under Chapter 53 of the Texas Property Code, and vigilant compliance with those requirements is strongly urged.

### **Lien Priority**

Because multiple liens and encumbrances may ultimately be placed upon the same property, the priority of a mechanic's lien over claims held by other creditors is an important concern. A general contractor or subcontractor may give notice of nonpayment and file a valid and appropriate lien affidavit, but this does not always guarantee that another party will not have superior rights to the property. In the worst cases, a battle over the priority of lien claimants may even leave the losing party with no further recourse for obtaining payment from the owner.

As a starting point, a mechanic's lien properly perfected pursuant to Chapter 53 of the Texas Property Code is afforded a qualified preference over any other lien, encumbrance, or mortgage that attached to the same property prior to the date of inception of the mechanic's lien. Tex. Prop. Code § 53.123(a). Importantly, however, this preference applies only "where the improvements made can be removed without material injury to the land and preexisting improvements, or to the improvements removed." *First Nat'l Bank v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974). In practice, this means that a contractor who has been hired to erect improvements on a piece of real property will have a superior lien right to those improvements, despite the fact that there may be a preexisting deed of trust or other encumbrance on the underlying property. As the court pointed out in *First Nat'l Bank v. Whirlpool*, however, this right is conditioned on the ability to safely remove the improvements without damaging anything else (and without damaging the improvements themselves).

Aside from this initial preference, the priorities of competing liens or encumbrances are, for the most part, determined by a "first in time, first in right" methodology. That is to say, whichever lien or encumbrance legally occurs first will generally have the superior right to proceeds from the property. For mechanic's liens, the "legal occurrence" is determined by the inception date of the lien. The inception date is "the commencement of construction of improvements or delivery of materials to the land on which the improvements are to be located and on which the materials are to be used." The only other statutory requirement is that the construction or materials be visible from inspection of the land. Tex. Prop. Code § 53.124. Case law has interpreted the definition of material under Tex. Prop. Code § 53.001 to impose an additional requirement that the material be such that it will be "incorporated into the permanent structure or consumed or used up during the construction of the permanent structure." *Diversified Mortg. Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 803 (Tex. 1978).

Because all mechanic's liens will thus "relate back" to the original commencement of construction, all contractors, subcontractors, and material suppliers with valid lien claims will be on equal footing in priority disputes. The Property Code anticipates this and indicates that each claimant is to be paid a pro rata share of the proceeds from the property in the event that the proceeds are insufficient to satisfy all claims. Tex. Prop. Code § 53.122(b). There are also provisions allowing the owner and original contractor to jointly file an affidavit of commencement for the project, should they desire to avoid the potential for disputes regarding the actual commencement date. Tex. Prop. Code § 53.24(c), (d).

As to other unsecured creditors, Tex. Prop. Code § 53.121 clearly states "all subcontractors, laborers, and materialmen who have a mechanic's lien have preference over other creditors of the original contractor." This language does not apply to other secured creditors; however, per the holding in *In re Huber Contracting Ltd.*, 347 B.R. 205, 221 (Bankr. W.D. Tex. 2006).

### **Lien Waiver and Release**

In 2001, the Texas Legislature enacted statutes governing the waiver and release of mechanic's and materialmen's liens. The main purpose of the statutes is to protect laborers and suppliers from waiving their statutory lien rights prior to being compensated. The statutes are found at Tex. Prop. Code §§ 53.281–53.287, and they function in three parts:

1. The statutes prohibit the unconditional waiver and release of progress or final payments unless the laborer or supplier has actually received payment.
2. The statutes allow for execution of conditional waivers and releases of progress and final payments, but such waivers are only enforceable up to the amount that the lien claimant was actually paid.
3. Forms used for waiver and release of lien or payment bond claims must substantially comply with the format and language or the forms explicitly set out in the statute.



For forms, see:

- [Conditional Waiver and Release on Final Payment \(TX\)](#)
- [Unconditional Waiver and Release on Final Payment \(TX\)](#)
- [Conditional Waiver and Release on Progress Payment \(TX\)](#)
- [Unconditional Waiver and Release on Progress Payment \(TX\)](#)

### Special Lien Issues

Two types of property interests deserve specific mention here: leasehold interests and homestead interests. In the case of the former, many clients do not understand how far their lien rights extend, and in the case of the latter, additional statutory requirements increase the burden of claimants seeking to assert liens.

#### *Liens against Leasehold Interests*

Unlike the property owner, tenants do not have a fee interest in the real property upon which they may contract for improvements. Common law property principles hold that the maximum interest they have in the property—and thus, the maximum interest they could possibly convey—is the leasehold interest granted by their agreement with the property owner (i.e., the landlord). Consequently, those who contract with tenants to construct or furnish leasehold improvements have no lien claim against the landlord’s underlying fee interest. Rather, the lien claimant has recourse only against the leasehold estate. *Grube v. Nick’s No. 2*, 278 S.W.2d 252, 253 (Tex. Civ. App. 1955).

This means that a lien claimant—such as the original contractor—has no rights to the property beyond those held by the hiring tenant. In practice, the original contractor may have the right to occupy the leased premises or otherwise use the property according to the terms of the original lease, but this right and the underlying lien claim will be extinguished at the expiration of the original lease term. *GE Capital Corp. v. BCI Mech., Inc.*, 2002 Tex. App. LEXIS 362, \*6–7 (Tex. App. Dallas Jan. 17, 2002). Such a limited right is of questionable value to a contractor seeking payment for work performed, but it is also likely to be a breach of the tenant’s lease with its landlord. Putting the tenant in breach may be helpful in securing payment for the work, but it is otherwise little protection for contractors and other suppliers furnishing labor or materials on a job at the risk of nonpayment. Additional controls should be considered before execution of agreements with tenants occupying leased property.

#### *Lien Requirements for Homesteads*

Due to the special protections afforded to homesteads in Texas, there are additional requirements placed upon claimants seeking to assert a lien against them. These requirements are set forth in Texas Property Code, Chapter 53, Subchapter K. First, Tex. Prop. Code § 53.254 requires that, for a valid mechanic’s lien to exist on a homestead, there must be a written contract between the owner and the original contractor, and the contract must have been executed prior to commencement of construction. Further, if the property is owned by a married couple, both spouses must have signed the contract.

To avoid violation of the Texas Deceptive Trade Practices Act (DTPA), the contract for home improvement must also contain the following warning, conspicuously typed in at least 10-point bold type:

**IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.**

Failure to include this notice next to the owner’s signature line in the contract automatically constitutes a false, misleading, or deceptive act or practice under the DTPA. Tex. Prop. Code § 41.007. Such a violation could entitle the owner to substantial damages, attorney’s fees and other remedies, provided the owner can ascribe some causal link between the missing disclaimer and his or her injuries.

For a lien claimed against homestead property to be valid, lien notices to the owner must also contain the statutory language contained in Tex. Prop. Code § 53.254(g):

- If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:
  - After receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved –or–

- During construction and for 30 days after completion of construction, you fail to retain 10% of the contract price or 10% of the value of the work performed by your contractor
- If you have complied with the law regarding the 10% retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10% retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim

As noted above, the affidavit filing deadline for a lien against residential property (not just homestead property) arising from a construction agreement is also shortened by one month. Thus, such an affidavit must be filed by the 15th day of the third month after the day on which the indebtedness accrues (rather than the fourth month). Tex. Prop. Code § 53.052(b). Similar to the additional warning language required for notices, Tex. Prop. Code § 53.254(f) requires the following notice to be included at the top of the first page of any affidavit claiming a lien against homestead property (in conspicuous typeface of sufficient size (i.e., 10-point type or higher):

NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN

Failure to include any of the additional notice requirements described above will render the underlying lien claim invalid. Additionally, in the case of notices called for by Tex. Prop. Code § 41.007, failure to comply with the statute may subject otherwise legitimate claimants to substantial penalties under the DTPA.

### **Payment and Performance Bonds**

While mechanic's liens are often a viable avenue for securing payment for contractors, subcontractors, and suppliers in Texas, they are not always available. For the reasons discussed below, some projects substitute a surety bond for the protection of laborers and artisans performing the work, and in these cases, you must be familiar with Texas laws governing payment and performance bonds in order to properly advise your clients.

#### ***Texas Public Works Construction Bonds***

While bonds on federal projects in the United States are governed by the Miller Act (40 U.S.C. § 3131 et seq.), most states have enacted similar statutes for the protection of subcontractors and suppliers on state projects. Texas is no exception. As is the case with federal projects, public property in Texas cannot be liened by construction claimants trying to recover for nonpayment on a construction project. Tex. Prop. Code § 43.002. For this reason, the Texas Legislature codified payment bond requirements for such projects in the Texas Government Code, Chapter 2253. Due to the similarities between state and federal law on this issue, statutory frameworks such as Chapter 2253 are commonly referred to as "little Miller Acts." Like the actual Miller Act, the bonding requirements under Chapter 2253 apply only to public projects over a certain contract amount, and subcontractors and suppliers seeking to perfect a claim against a payment bond are required to give specific notices.

#### ***Basic Requirements***

The basic bond requirements are set out in Tex. Gov. Code § 2253.021. If the construction contract exceeds \$25,000, the prime contractor for the project must obtain a payment bond for the benefit of those who supply labor or materials to the project. This monetary threshold is increased to \$50,000 for municipalities and joint airport boards. The payment bond will generally be issued by a surety agreed upon by the government entity and the prime contractor, and will be conditioned upon payment of all subcontractors and suppliers for the project. By issuing the bond, the surety guarantees payment by the prime contractor (the principal on the bond) to its subcontractors and suppliers. In the event payment is not made, claimants who properly perfect their bond rights under Chapter 2253 will be able to assert a claim against the bond itself.

If the government entity fails to obtain a payment bond from the prime contractor as required, it will be subject to the same liability that a surety would be if it were to have issued the bond. Tex. Gov't Code § 2253.027(a)(1). For public projects under \$25,000, on which no payment bond is required, claimants are afforded limited recourse through Subchapter J of the Texas Property Code, which allows claimants on such projects to establish liens against the funds held for payment of the primary contractor (but not liens against the underlying public property). Tex. Prop. Code § 53.231.

#### ***Bond Recovery***

To actually recover on the payment bond, a claimant must satisfy statutory guidelines that are very similar in nature to the mechanic's lien requirements set forth in Chapter 53 of the Texas Property Code. Most importantly, the claimant must mail notice of its claim to the prime contractor and the surety before the 15th day of the third month after each month in which the claimed material or labor

was delivered or performed. Tex. Gov't Code § 2253.041. The notice must include a sworn statement of account that includes:

- The amount claimed as owed
- A statement that all known offsets, payments, and credits have been allowed
- The amount of any retainage that has been withheld but is not yet due for payment

As with notice for mechanic's liens, if payment is repeatedly past due on a project, these notice requirements require claimants to send notices on a monthly basis for as long as work is performed without payment. You should caution clients in this situation that notice is required for each month that material and labor is delivered or performed. The only exception is a notice for contractual retainage, which is not due until the end of the project. For such retainage claims, the claimant need only send written notice of the claim to the prime contractor and surety within 90 days after the date of final completion of the public work contract. The retainage notice must include a statement as to the amount of the contract, the amounts paid under the contract, and any outstanding balance remaining. Tex. Gov't Code § 2253.046.

If your client does not have a direct contractual relationship with the primary contractor, Tex. Gov't Code § 2253.047 requires that an additional notice be sent to the prime contractor before the 15th day of the *second* month after the material was delivered or labor performed. This additional notice provides the prime contractor with knowledge of the nonpayment and affords an opportunity to withhold funds from the subcontractor failing to make payment. Similar preemptive notices to the prime contractor are also required for retainage claims and subcontracts involving specially fabricated materials. Texas courts require strict compliance with these statutory notice deadlines, but the beneficiary's duty to promptly deliver the notice appears to end at the mailbox. See *Johnson Service Co. v. Climate Control Contractors, Inc.*, 478 S.W.2d 643, 645 (Tex. Civ. App. Austin 1972); *General Elec. Supply Co. v. Utley-James of Texas, Inc.*, 857 F.2d 1010, 1012–13 (5th Cir. 1988). As long as the notice is actually sent within the prescribed time period, the date of receipt by the prime contractor or surety will not render the notice untimely—even if it is after the deadline.

Provided that the requisite notices have been sent via certified or registered mail by the appropriate deadlines, and if the claim is not paid within 60 days of the notice, payment bond beneficiaries may bring suit against the payment bond principal and surety, jointly or severally. Such a suit must be brought within one year, and the proper venue is the county in which the project is located. The claim amount should reflect the unpaid balance owed to the beneficiary at the time of suit, but it may not exceed the proportion of the contract price that the work done bears to the total of the work covered by the subcontract. The Texas Supreme Court affirmed in *Green International, Inc. v. Solis* that the bond claim must be limited to the subcontract price, reducing a jury award of an amount larger than the remaining contract balance. 951 S.W.2d 384 (Tex. 1997). Delay damages and other items not directly addressed or provided for by the subcontract are not recoverable. However, reasonable attorney's fees are available for recovery, and are explicitly provided for by the statute. Tex. Gov't Code §§ 2253.073–2253.078.

### **Texas Private Works Construction Bonds**

There are no mandatory bonding requirements on private construction projects in Texas. Unlike public projects, where laborers and materialmen are unable to secure a lien against the underlying property in the event of nonpayment, private projects are susceptible to such liens as an avenue for recovery. For this reason, there is no need to require bonding on private jobs for the protection of unpaid claimants. However, because voluntary bonding of private projects is common, Subchapters H and I of the Texas Property Code still feature bonding guidelines and requirements for private construction bonds.

Subchapter H, Tex. Prop. Code §§ 53.171–53.175, provides a statutory framework for securing bonds to indemnify against liens that have been asserted against private property. In the event an unpaid claimant fixes or attempts to fix a Chapter 53 lien against property on a private construction project, Tex. Prop. Code § 53.171 allows any person to file a bond to indemnify against that lien. The filing of a proper bond and compliance with related notice requirements will extinguish a mechanic's lien claim against the owner's property.

To be valid, the bond must:

- Describe the property encumbered by the lien
- Sufficiently identify the lien
- Be in an amount that is double the amount of the lien (or 1 ½ times the amount if the lien exceeds \$40,000)
- Be payable to the parties claiming the lien
- Be properly executed with assurances that the principal and surety will pay the claims of those claiming the lien

Additionally, after the bond is filed, it must be recorded by the county clerk and notice must be served on each obligee by mailing a copy of the notice and attached bond by certified U.S. mail, return receipt requested. Any party making or holding a lien claim covered by the bond is subsequently limited to filing suit on the bond within one year to recoup any unpaid earnings.

Subchapter I operates in a similar fashion, providing a basis for securing bonds for the payment of liens, but it is intended as a prophylactic measure to be used in advance of any claims or liens being made against the property. If the contractor for a private construction project has a written contract with the owner, the contractor can furnish a bond in accordance with Subchapter I. The bond is intended for the benefit of any potential lien claimants on the project and, if valid, prevents those claimants from filing a suit for unpaid labor or materials against the owner or the owner's property. Tex. Prop. Code § 53.201.

The specific requirements of a Subchapter I payment bond are detailed in Tex. Prop. Code § 53.202. The bond and the contract between the original contractor and owner must be filed with the county clerk. Once properly filed, the bond protects all laborers and material suppliers with a perfected claim. Such perfection may either be accomplished in the ordinary manner for fixing liens against property, as described below, or through appropriate notices given to the original contractor and surety. Tex. Prop. Code §§ 53.203–53.206. If, after proper notice has been given, the claim is not paid, the claimant may sue the original contractor and surety on the bond, either jointly or severally. Such an action must be brought within one year of perfection of the claim, unless the bond has not been recorded (in which case the period of limitation is extended to two years). Tex. Prop. Code § 53.208.

### ***Bid Bonds***

If you frequently represent parties to construction contracts in Texas, you will likely also encounter bonds secured for the protection of owners when soliciting bids for construction projects. “Bid bonds” are a tool used by project owners to ensure that contractors bidding for work on a construction project will follow through and honor their bids. The owner is the beneficiary of the bond, and the bidding contractor is the principal. Should the principal fail to honor its bid, the project owner can file suit on the bond against the principal and the surety, recovering any damages suffered. These damages often equal the difference between the principal's bid and the next lowest bid, but this is not always the case.

In *Guido & Guido, Inc. v. Culberson County*, the Eighth District Court of Civil Appeals ruled that bid bonds may be considered to be in the form of liquidated damages by Texas courts. 459 S.W.2d 674, 678 (Tex. Civ. App. El Paso 1970). The bid submitted by Guido & Guido, Inc. included a provision that the bidder's failure to subsequently execute a contract pursuant to the bid would entitle the project owner to the satisfaction via the bid bond. *Id.* at 676. The court allowed the project owner to claim the full amount of the posted bid bond, despite the fact that it exceeded the difference between the original bid and the alternate bid eventually secured by the owner, because the bid bond was properly viewed as liquidated damages. *Id.* at 678. As the court observed, the extent of damages that may be incurred as a result of the failure to honor a bid are difficult to ascertain, and can include additional costs and fees beyond the actual contract values of the bids. *Id.* at 678.

In all cases, however, the surety's liability is limited to the penal sum of the bond. This sum is typically a percentage of the bid submitted. In *Guido & Guido*, for example, the penal sum of the bid bond was 5% of the submitted bid.

### ***Fraudulent Bonds***

Unfortunately, some contractors may resort to unscrupulous methods in tough economic times. When unable to properly secure a required bond, particularly for public works, it is not unheard of for an unqualified contractor to provide a fraudulent bond. It may not be the contractor's intent to fail to perform once on the job, and supplying a fraudulent bond along with its bid may be viewed as a minor hiccup in the paperwork, but the ramifications can be significant for the project owner if the project goes south and there is no valid payment or performance bond for protection.

Fraudulent bonds take a few different forms. In some cases, contractors have provided bonds from nonexistent sureties. Typically, the name of the fictional surety sounds familiar, or is close to familiar, and it may even reference an address or phone number similar to an actual registered insurance company. In reality, however, the company does not actually exist. Alternatively, a fraudulent bond may be issued by a company that exists and sounds like a surety, but is not registered as an insurance company with the Texas Department of Insurance. When it comes time to cover a loss, the companies are often not around to help. There are also cases involving fraudulent bonds that actually bore the name of a valid, registered surety, but the bond was never authorized by that surety. These bonds are commonly referred to as forged, or “photoshopped” bonds. They are similarly worthless.

While it's impossible to prevent unscrupulous people from issuing faulty bonds, you should advise your clients of steps that can be taken to provide some protection. First, public and private owners requiring bonds should make sure that all bonds received are authentic. The Surety & Fidelity Association of America publishes a guide to help owners check bond authenticity. See <http://www.surety.org>. Owners should also ensure that their bond requirements explicitly limit valid bonds to those executed by a corporate surety in accordance with the Texas Insurance Code, as required by Tex. Gov't Code § 2253.021(d). Once received, owners should check the amount of the bond itself. Texas sureties may write bonds in amounts up to 10% of their capital and surplus. A reputable

surety will readily tell owners how they compute this number, and an owner's insurance agent can help double-check the surety's capacity.

#### Related Content

- [Notice of Unpaid Balance \[and Demand for Payment\] for Labor Performed and/or Materials Delivered \(TX\)](#)
- [Notice of Unpaid Balance \[and Demand for Payment\] for Labor Performed and/or Materials Delivered \(Residential\) \(TX\)](#)
- [Affidavit for Mechanic's and Materialman's Lien \(Contractor\) \(TX\)](#)
- [Affidavit for Mechanic's and Materialman's Lien \(TX\)](#)
- [Affidavit for Mechanic's and Materialman's Lien \(Subcontractor\) \(Residential\) \(TX\)](#)
- [Affidavit for Mechanics and Materialman's Lien \(Contractor\) \(Residential\) \(TX\)](#)
- [Notice of Filed Affidavit \(TX\)](#)
- [Release of Mechanics' and Materialmen's Liens \(TX\)](#)
- [Conditional Waiver and Release on Final Payment \(TX\)](#)
- [Unconditional Waiver and Release on Final Payment \(TX\)](#)
- [Conditional Waiver and Release on Progress Payment \(TX\)](#)
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