

Proposal to Change Texas Lien Laws Includes Changes to Highly Complex Notice System

A working group of contractors and construction associations' attorneys is proposing significant changes to Texas' patchwork of procedures for asserting and perfecting mechanic's lien claims from suppliers and subcontractors, including an overhaul to the notice system. These proposed changes have yet to appear in a bill in the Texas legislature, which resumes its legislative session in January 2017.

If eventually passed into law, the new system would require claimants to post notices with every new project, according to attorneys Randall Lindley and Kelsey Williams at Bell Nunnally of Dallas, TX. Simplified notice provisions would seem to favor subcontractors and suppliers, and the elimination of statutory retainage and fund-trapping notices could make an owner's liability unlimited. However, "It appears the revised statute would not prevent owners from continuing to use project funds to pay their general contractors in spite of unpaid subs, or simply waiting until the project is complete to make pro rata distributions to all perfected claimants," Lindley said.

Since 2013, a working group of Texas lawyers appointed by the Texas Building Branch of the Associated General Contractors and others has been working on a draft re-write of Ch. 53 of the Texas Property Code, he said. According to its latest proposed changes, the working group would eliminate all notice requirements in favor of a "Notice of Furnishing" that all claimants other than original contractor would be required to send to the owner and the original contractor. Instead of trapping funds, a single notice of furnishing would be provided at the outset of work, and merely preserves a contractor's right to make a claim, Lindley said. Currently, Texas law requires a series of past-due and fund-trapping notices that have to be sent via certified mail to specific parties on or before the 15th of a specific month before a valid lien affidavit can be recorded.

Another big change to the lien law would provide the option for owner's to appoint a lien agent who must create and maintain a common website for giving and receiving notices and for furnishing information about notices on the project, he said. Owners would also have to post a Notice of Commencement on such a website.

The proposal would also change the mechanic's lien affidavit, Lindley said. Changes would include identifying the date of sending the notice of furnishing, while the statement of each month in which work was performed would no longer be needed. The deadline to file the affidavit would become the 15th day of the fourth month, or the third month for residential projects, after the work under the original contract was completed or the original contract was terminated. "This is a significant revision that may function to extend a subcontractor's lien filing deadline, especially if materials or labor were supplied early in the project," he said.

- Nicholas Stern, editorial associate