

How do Original Contractors Perfect a Mechanic's Lien?

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Post #2 in our Series on Private Non-Residential/Commercial Mechanic's Liens in Texas

This is the second post in our series addressing mechanic's liens in Texas on private commercial/non-residential projects. In the last [post](#), we discussed the difference between original contractors and subcontractors. As a reminder, an original contractor is a person/company contracting **directly** with the property owner.¹ In this post, we discuss the steps necessary for an original contractor to perfect a mechanic's lien.

Unlike subcontractors, original contractors are **not** required to send pre-lien notices informing the owner of the lack of payment for work or materials provided on a project. The policy rationale behind not requiring pre-lien notices focuses on the direct contractual relationship between the owner and the original contractor. Because the owner and original contractor are interacting directly, if there is a payment dispute, both parties should already be aware of the dispute without need of sending a notice letter. Nonetheless, even though a notice letter is not required, it is always advisable for an original contractor to put the owner on written notice of any payment dispute. This often will help resolve the dispute without need of filing a lien.

Because no pre-lien notice letter is required to perfect its lien claim, an original contractor can simply move forward with filing a lien affidavit claiming a mechanic's lien after a payment dispute arises. The deadline to file the lien affidavit is **no later than the 15th day of the fourth (4th) calendar month after the month in which the original contract was terminated, abandoned, completed or finally settled**. By way of example, if an original contractor completed its contract in February, the deadline for the original contractor to file a lien affidavit would be June 15th. Below are the requirements for the lien affidavit to satisfy Section 53.054 of the Texas Property Code. The affidavit claiming a lien must *substantially comply* with the following:

1. A sworn statement of the amount of the claim;
2. The name and last known address of the owner or reputed owner;
3. A general statement of the kind of work done and materials furnished by the claimant;²
4. The name and last known address of the person by whom the claimant was employed or to whom the claimant furnished the materials or labor;
5. A description, legally sufficient for identification, of the property sought to be charged with the lien;
6. The lien claimant's name, mailing address, and, if different, physical address; and
7. A representative of the original contractor must sign the affidavit before a notary with specific language in the signature verification.³

While it is not necessary to attach a copy of any notices or written demand letters to the property owner or invoices substantiating unpaid charges, it is advisable to make sure the owner has sufficient notice of any amounts in dispute.

The lien affidavit must be filed with the County Clerk where the project is located. There is a nominal filing fee associated with recording the lien affidavit. Further, the original contractor must send a copy of the lien affidavit by registered or certified mail to the owner **within five (5) days** after the affidavit is filed with the County Clerk. The last thing an original contractor wants to do is go through the steps of asserting and filing a lien affidavit only to have it be unenforceable because the original contractor failed to provide timely notice to the owner of the affidavit. Therefore, it is advisable to send the owner notice of the lien affidavit contemporaneous with filing the affidavit.

If an original contractor timely completes the above-referenced steps, it will have properly perfected a statutory mechanic's lien.

As discussed in our last [post](#), it is always preferable to perfect a statutory mechanic's lien rather than rely on a constitutional mechanic's lien. However, because original contractors, with certain limitations previously identified, have a right to both a statutory and constitutional mechanic's lien, they should assert both forms of liens as part of the lien affidavit. Further, if an original contractor fails to timely perfect a statutory mechanic's lien (*i.e.*, by the 15th day of the fourth month after the original contract was terminated, abandoned, completed or finally settled), all is not lost, as it can still assert a constitutional mechanic's lien.

Constitutional mechanic's liens are self-executing, meaning that no notices or even lien affidavits are required. Nevertheless, an original contractor should still file a lien affidavit asserting a constitutional lien, as it puts others on notice of the claimed lien. If no lien affidavit is on file and someone purchases the applicable property from the owner, the purchaser/new owner will not be subject to the lien, as it had no notice of the lien prior to the purchase. The purchaser/new owner is considered a bona fide purchaser. Consequently, even though a lien affidavit is not required to assert a constitutional mechanic's lien, an original contractor should still file an affidavit to preserve all of its rights.

It is advisable to seek legal counsel when filing a mechanic's lien. An attorney can prepare a lien affidavit in the proper form necessary to comply with the technical requirements to protect your lien rights. The relatively limited expense associate with preparing and filing a lien affidavit is well worth knowing you have preserved your rights to collect money due and owing for your work on a project.

In our next post in this series, we will discuss the notice requirements, deadlines and steps necessary for first-tier and second-tier subcontractors to perfect a mechanic's lien.

Click [here](#) to read Post #1 of this series.

¹Tex. Prop. Code § 53.001(7).

²While required for subcontractors and suppliers, an original contractor need not include a statement for each month in which the work was done and/or materials furnished for which payment is requested. Further, an original contractor is not required to provide a statement identifying the date of any pre-claim notices to the property owner, as no pre-claim notices are required for original contractors to perfect a lien.

³The verification on the lien affidavit must state the lien claim is "subscribed and sworn to." A verification simply "acknowledging" the claim is insufficient. See *Sugarland Bus. Ctr., Ltd. v. Norman*, 624 S.W.2d 639, 641 (Tex. App.—Houston [14th Dist.] 1981, no writ).

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