

## Series on Texas Mechanic's Liens on Commercial/Non-Residential Projects – Post One – Introduction

Mechanic's Lien / January 19, 2021 / Brian M. Stork

This is the first in a series of posts addressing mechanic's liens in Texas on private commercial/non-residential projects.<sup>1</sup> Texas has a unique mechanic's lien scheme that is far more complex than most states. Parties are required to comply with burdensome notice requirements that vary depending on the respective party's role on the construction project. This series is designed to be a primer on basic issues; however, when confronted with the need to file or respond to a mechanic's lien, it is strongly recommended to consult with legal counsel. Each situation is unique and this particular area of the law is ripe with easily made mistakes that can have significant unintended consequences.

Mechanic's liens on private projects permit a general contractor, subcontractor or supplier to enforce its payment rights against the owner of the property. These liens are powerful tools that enable contractors to collect payment both in connection with enforcing the liens via litigation, and as leverage to encourage the property owner to address the non-payment claim without need of filing a lawsuit. There are two different types of mechanic's liens recognized under Texas law: (i) statutory liens; and (ii) constitutional liens. In order to understand the application of which of these two lien types applies to a given fact pattern, it is important to first discuss the classification of the various parties making up a mechanic's lien claim.

A typical construction project consists of a property owner, general contractor, subcontractors and suppliers. The party commonly referred to as the general contractor is defined as an "original contractor" under Chapter 53 of the Texas Property Code. More specifically, an original contractor is defined as, "a person contracting with an owner **directly** or through the owner's agent."<sup>2</sup> In other words, an original contractor has a contract with the owner rather than with some other contractor or supplier working on the job. However, an original contractor extends beyond general contractors, as large projects frequently involve several different professionals/trades that contract directly with the owner, e.g., an architect, geotechnical engineer, MEP contractor, landscaper, etc. Nonetheless, the term is frequently used interchangeably with a general contractor when referring to the application of mechanic's liens in Texas.

All parties working on a construction project that do not have a direct contract with the property owner are considered "derivative contractors," more commonly referred to as subcontractors. A subcontractor is defined as, "a person who furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor to perform all or part of the work required by an original contractor."<sup>3</sup> Subcontractors and suppliers are divided into different tiers. A "first-tier subcontractor" is a subcontractor or supplier that has an agreement with an original contractor. A "second-tier subcontractor" is any subcontractor or supplier that does not have an agreement with an original contractor. Therefore, any party that does not have a contract with an original contractor, including those multiple tiers removed from a direct contract with an original contractor, that provides labor or materials on a construction project is considered to be a second-tier subcontractor. In Texas, there is no limit to the number of tiers a subcontractor can be removed from an original

contractor and still qualify as a second-tier contractor to be eligible to perfect a statutory mechanic's lien claim. Therefore, mechanic's lien rights extend to the lowest level of subcontractors and suppliers providing labor or materials on a project.

Assuming all notice requirements are satisfied, statutory liens are available to original contractors, subcontractors and suppliers that provide materials, machinery, tools, and/or labor as part of a private construction project. On the other hand, constitutional liens are **only** available to original contractors. Texas courts have held subcontractors do not have separate mechanic's lien rights under the Texas Constitution. Instead, subcontractors are limited to statutory mechanic's liens. Further, the scope of what type of original contractors qualify for a constitutional lien is narrower than those that qualify for a statutory lien. Consequently, it is always preferable for an original contractor to attempt to assert a statutory lien rather than a constitutional lien, if available.

In our next post, we will discuss the steps necessary for original contractors to perfect their statutory and constitutional lien rights, including notice requirements, applicable deadlines and how to file an affidavit claiming a mechanic's lien. Please stay tuned for future posts discussing the necessary additional steps for first-tier subcontractors and second-tier subcontractors to perfect their mechanic's lien rights. Further, we will explore options to enforce and defend against mechanic's lien claims, as well as the necessary step to perfect a lien on retainage.

<sup>1</sup>This series does not address mechanic's liens on residential construction projects, or other payment protection mechanisms available on public projects. We will address mechanic's liens on residential projects, as well general contractor and subcontractor payment security rights on public projects in future blog posts.

<sup>2</sup>Tex. Prop. Code § 53.001(7).

<sup>3</sup>Tex. Prop. Code § 53.001(13).

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