

CONTRACTOR'S
GUIDE
to the
GALAXY:
PERFECTING
M&M LIENS

Contractor's Guide to the Galaxy: Perfecting M&M Liens

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I. **INTRODUCTION**

Texas law concerning the perfection and foreclosure of mechanic's and materialman's liens (M&M liens) is notoriously complex, has unforgiving deadlines, and contractors can unknowingly lose their lien rights if they are not careful. If you are a contractor and have any doubt about what lien rights you have, it is strongly recommended that you seek guidance from an attorney knowledgeable about Texas lien laws.

This issue of the "Contractor's Guide to the Galaxy" series does not provide a comprehensive explanation of M&M liens or all applicable laws, including laws specific to perfecting liens for residential construction projects (RCPs) or homestead property. Rather, this guide will provide you with a blueprint to help get you started on the process of perfecting a lien in accordance with Chapter 53 of the Texas Property Code (TPC). *This guide does not constitute legal advice and is not a substitute for obtaining legal advice from an attorney about your particular situation.* This publication is meant for general informational purposes only. Texas lien laws are subject to change so the information in this guide may not be current. Your receipt of this publication does not create an attorney-client relationship with the author or any law firm or business with which the author is affiliated.

A. What Lien Rights Do You Have?

Whether you are a general contractor, subcontractor, or supplier, the first question to ask is whether you have any lien rights against the property where the project is located. TPC 53.021 describes which contractors or professionals are entitled to a lien. Answer the following questions which are the most common:

1. Did you furnish labor and/or materials for the construction or repair of a house, building or improvement on the property? Yes No
2. Did you specially fabricate materials for a construction project, regardless of whether the materials were delivered to the project? Yes No
3. Were you a design professional on a construction project (engineer, architect, or surveyor)? Yes No

If you answered “Yes” to any of these questions, you should have the right to an M&M lien against the project assuming all other requirements are satisfied.

B. Are you a General Contractor?

You have been hired as the general contractor on a new construction or remodel project. You invest time and money ramping up and for the project, your crews and subcontractors work hard, and you live up to your reputation for getting the job done! You expect to have a satisfied customer who is ready to settle up, but unfortunately things do not work out as planned. Perhaps your customer is being unreasonable, posting unfair reviews online, and withholding their final payment. What can you do about it? What rights do you have? Go to Section II (Rights of General Contractors) to find out.

C. What About Subcontractors?

You have been hired as a subcontractor on a new construction or remodel project. You complete your part of the project on time and within budget. The general contractor (or the first-tier subcontractor) who hired you begins to “slow pay” progress payments and finally stops paying altogether. What rights do you have to obtain payment from the property owner or to lien the property? Read Section III (Rights of Subcontractors) to find out.



Avel Chuklanov

D. What is a Lien Affidavit?

Throughout the TPC, you will see many references to a lien affidavit. What is a lien affidavit and why is it important? A lien affidavit is the document by which contractors and suppliers provide a notice of lien to the owner of the property where the project is located and to the general contractor. TPC 53.054 has strict requirements for lien affidavits, including that the affidavit must be signed by the person claiming the lien or by another person on the claimant's behalf and must contain "substantially" the following information:

- (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 and, for a claimant other than an original contractor, a statement of each month in which the work was done and materials furnished for which payment is requested;



Kate Mangostar

- (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) the name and last known address of the original contractor;

(6) a description, legally sufficient for identification, of the property sought to be charged with the lien;

(7) the claimant's name, mailing address, and, if different, physical address; and

(8) for a claimant other than an original contractor, a statement identifying the date each notice of the claim was sent to the owner and the method by which the notice was sent.

The lien affidavit is not meant to be complicated, but it must be done correctly. If you are in doubt about how to prepare a lien affidavit, you are welcome to contact me or another construction law attorney for assistance.

II. **RIGHTS OF GENERAL CONTRACTORS**

A. who is a General Contractor aka Original Contractor?

The TPC uses the term "Original Contractor" in lieu of general contractor. The term "Original Contractor" is defined as "a person contracting with an owner either directly or through the owner's agent." TPC 53.001(7). General contractors should know who they are but, for purposes of this discussion, the terms "general contractor" and "original contractor" are used interchangeably. Keep in mind that there can be more than one original contractor on any given project. The key is whether you have a direct contractual relationship with the property owner. If so, you are considered an original contractor and must comply with the lien requirements applicable to original contractors.

B. General Contractor's Deadline to Provide Notice of Claim

If you are an original contractor, you must determine when the owner's indebtedness to you accrued which in turn triggers other deadlines. Indebtedness to an original contractor accrues: (1) on the last day of the month in which a written declaration by the original contractor or the owner is received by the other party to the original contract stating that the original contract has been terminated; or (2) on the last day of the month in which the original contract has been completed, finally settled, or abandoned. TPC 53.053(b).

1. File a Lien Affidavit

As the original contractor, you do not have to provide a preliminary notice of lien before filing a lien affidavit. However, an original contractor must file a lien affidavit in the real property records in the county in which the project is located no later than the *15th day of the fourth (4th) calendar month* after the month in which the original contract was terminated, completed, finally settled, or abandoned. TPC 53.052, 53.053. Note: there is an RCP or residential

construction project caveat that requires the lien affidavit to be filed by *the 15th day of the third (3rd) calendar month* after the day on which the indebtedness accrues. TPC 53.052(b).

2. Give Notice to the Property Owner Within 5 Days

After filing the lien affidavit, an original contractor must be sure to send a copy of the lien affidavit by registered or certified mail to the owner or reputed owner at the last known business or residence address “not later than the fifth day after the date the affidavit is filed with the county clerk.” TPC 53.055. Because deadlines are so important, the recommended practice is to go ahead and send a file-stamped copy of the affidavit to the owner on the same day you file it with the county clerk. There is no reason to wait and risk missing the deadline through an oversight.



Annie Gray

III. RIGHTS OF SUBCONTRACTORS

A. Who is a 1st-Tier, 2nd-Tier, or Lower-Tier Subcontractor?

A “subcontractor” is “a person who has 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

contract.” TPC 53.001(13). In other words, “subcontractor” includes first-tier and lower-tier subcontractors on a project.

What is the difference between a first- and second-tier contractor? First-tier subcontractors have an agreement with the original contractor while second-tier and all lower-tier subcontractors do not. Material suppliers can either be in the first or second tier depending on whether their contract is with the original contractor or a subcontractor.

Why is it important to know which tier or “pecking order” you are in? Because second-tier (and all lower tier) subcontractors must provide an additional preliminary notice of lien to the original contractor to perfect their lien rights on non-RCPs.

A. Subcontractor’s Deadline to Provide Notice of Claim

For subcontractors and suppliers, be aware that indebtedness to you “accrues on the last day of the last month in which the labor was performed or the material furnished.” TPC 53.053(c). Business tip: each month that material or labor is provided but no payment is received should be accounted for separately as a different debt for purposes of perfecting an M&M lien because each monthly debt triggers new notice and filing deadlines.

Important note: there is a more compressed schedule for perfecting a lien on RCPs, and the deadlines discussed in the following sections do not apply to RCPs. As for work performed or materials supplied on RCPs, first-tier and lower-tier contractors must provide a notice of the claim to both the owner and general contractor no later than *the 15th day of the second (2nd) month* following each month in which all or part of your labor was performed or material or specially fabricated material was delivered. TPC 53.252(b).

1. Notice by 1st-Tier Subcontractor or Supplier

On non-RCPs, first-tier subcontractors and suppliers must send a lien notice letter by certified mail, return receipt requested, or registered mail to both the owner and the original contractor to inform them about your unpaid claim not later than the *15th day of the third (3rd) calendar month* following *each month* in which labor was performed or materials were delivered. TPC 53.056(b). This is commonly referred to as the “third-month notice” for obvious reasons.

If work is performed or materials provided in successive months for the same project, do you have to mail out multiple notices? Technically no, since it is possible to combine the notice for two months, but providing separate notices is the recommended best practice. For example, if labor or materials were provided to a project in January and February and payment has not been received by April 15th, you could provide a combined notice to the owner and general contractor regarding both months. You might find it easier to keep track of notice letters when sent out monthly instead of trying to combine more than one month, but do what works best for you.

When providing these notices, TPC 53.056(f) says that a “copy of the statement or billing in the usual and customary form is sufficient as notice” for purposes of that section of the TPC. Is simply sending your invoice with a demand for payment your only or best option? If you are a first-tier subcontractor and supplier, can you require the owner to pay the debt owed to you by the general contractor? Possibly.

The TPC does provide for a “fund-trapping” obligation on the part of the owner if certain conditions are met. To take advantage of this, your notice to the owner (discussed above) must contain specific “fund-trapping” language. Specifically, you must inform the owner that, if your claim remains unpaid, the owner may be personally liable and the owner’s property may be subjected to a lien unless: (1) the owner withholds payments from the contractor for payment of the claim; or (2) the claim is otherwise paid or settled. TPC 53.056(d). (Note: this issue of the *Contractor’s Guide to the Galaxy* series does not provide a comprehensive discussion about fund-trapping or retainage rights, but you should become familiar with those requirements. If you have any questions, you can contact me or another construction law attorney to advise you about your specific situation.)

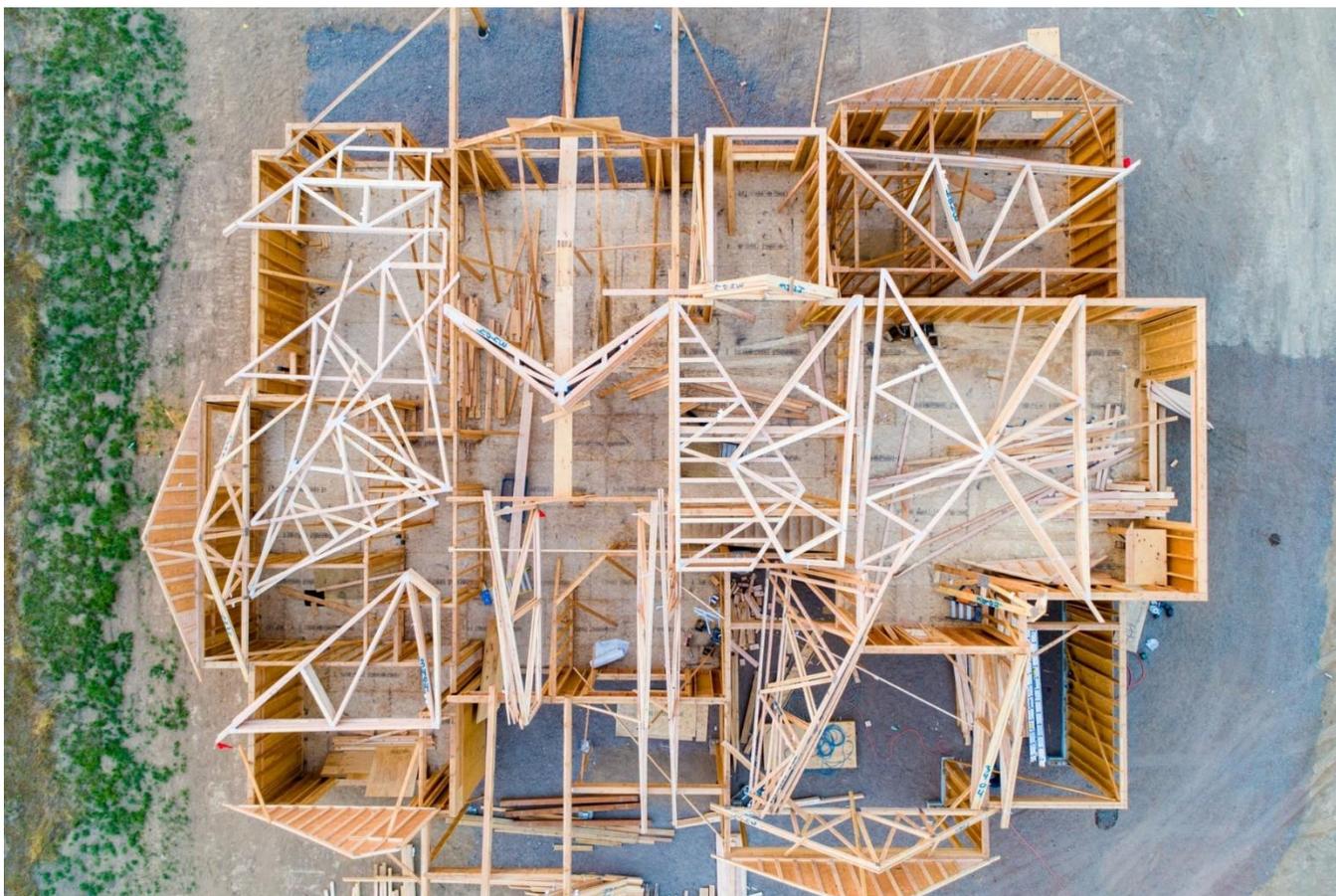
2. Notice by Lower-Tier Subcontractor or Supplier

TPC 53.065(b) begins by saying, “If the lien claim arises from a debt incurred by a subcontractor ...” That means that this requirement applies to second-tier and all lower-tier subcontractors. In other words, if you were hired by another subcontractor and you are owed money on the project, this applies to you. The statute requires you to give both a second-month notice and a third-month notice.

First, you must give the original contractor written notice of the unpaid balance *by the 15th day of the second (2nd) month* following each month in which all or part of your labor was performed or material delivered for the project. TPC 53.056(b). You must also give the same notice to the owner or reputed owner and the original contractor *by the 15th day of the third (3rd) month* following each month in which all or part of your labor was performed or your material or specially fabricated material was delivered to the project. TPC 53.056(b).

As a practical matter, you may streamline this process a little by combining the second- and third-month notices by sending a single notice to both the original contractor and to the owner simultaneously, but you must do so by the earlier, second-month notice deadline. It is also recommended that you include all upper-tier subcontractors (not just the original contractor) on your notice of claim.

Again, keep in mind that the above schedule *does not apply to RCPs*, which has shorter notice and filing deadlines. For RCPs, a *two-month notice* (i.e., by the 15th day of the second month) must be sent to the owner and GC. TPC 53.252(b). If you have any questions, you are welcome to contact me or another construction law attorney who can advise you about your particular situation.



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B. Subcontractor's Deadline to File Lien Affidavit

After you go through all the trouble of sending out the required notices, what comes next to preserve your lien rights? You must file a lien affidavit “with the county clerk of the county in which the property is located” by *the 15th day of the fourth (4th) calendar month* after the day on which the indebtedness accrues. TPC 53.052(a).

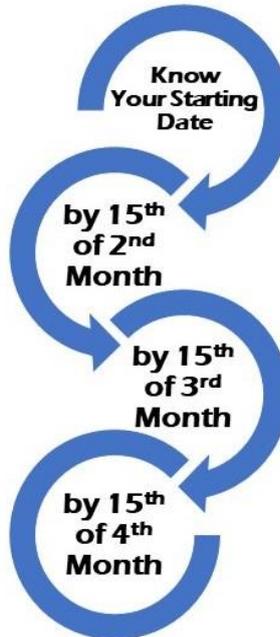
Note for RCPs: remember that for RCPs the lien affidavit to be filed by *the 15th day of the third (3rd) calendar month* after the day on which the indebtedness accrues. TPC 53.052(b).

F. Promptly Send the Lien Affidavit within 5 Days

Like original contractors, subcontractors and suppliers must provide prompt notice of the lien affidavit by registered or certified mail to the owner or reputed owner at the last known business or residence address “not later than the fifth day after the date the affidavit is filed with the county clerk.” TPC 53.055(a). However, be aware that subcontractors and suppliers “must also send a copy of the affidavit to the original contractor at the original contractor’s last known business or residence address within the same period.” For convenience, the same letter can be addressed to both the owner and original contractor to provide them both with a copy of the lien affidavit. To make your life easier and avoid missing a key deadline, consider sending a file-

stamped copy of the affidavit to the owner and general contractor on the same day you file it with the county clerk.

It can be challenging to keep all of your statutory deadlines straight. Remember that different deadlines apply to general contractors, first-tier subcontractors, and to second-tier and lower-tier subcontractors. The following table summarizes the deadlines discussed above.



General Contractor	1st-Tier Subcontractor	Lower-Tier Subcontractor
Month the contract is terminated, completed or abandoned	Each month labor or material is provided to the project	Each month labor or material is provided to the project
	RCPs: send notice to owner and GC	Send notice to GC (*RCPs: also send to owner)
RCPs: file Lien Affidavit & send to owner within 5 days	Send notice to owner and GC (*RCPs: file Lien Affidavit & send to owner and GC within 5 days)	Send notice to owner and GC (*RCPs: file Lien Affidavit & send to owner and GC within 5 days)
File Lien Affidavit & send to owner within 5 days	File Lien Affidavit & send to owner and GC within 5 days	File Lien Affidavit & send to owner and GC within 5 days

IV.

WHEN ALL ELSE FAILS: FILING SUIT TO FORECLOSE YOUR LIEN

Once a contractor provides all of the required notices and files a Lien Affidavit, in most cases the owner and/or original contractor will be highly motivated to negotiate a resolution. After all, it is typically in everyone’s best interest to resolve a lien claim rather than subject the property to the possibility of a judicial foreclosure. However, if all attempts to resolve the dispute fall short and court intervention becomes necessary, there is yet another deadline of which to be aware.

The TPC provides that a suit to foreclose the lien must be brought *within two (2) years* after the last day you may file the lien affidavit (Note: this period is shortened to one (1) year for RCPs) or within one (1) year after completion, termination, or abandonment of the work under the original contract under which the lien is claimed, whichever is later. TPC 53.158.

As with other deadlines discussed above, the deadline for filing suit to foreclose a lien is strictly enforced. Depending on the project location, your lawsuit may either be filed in a district court or a statutory county court for the county where the property is located. District courts have historically been vested with exclusive jurisdiction over suits involving title to or liens against

real property. However, the Texas Government Code has carved out a few exceptions for populous counties by granting concurrent (or shared) jurisdiction to statutory county courts (not constitutional county courts) over suits to enforce a lien against real property.

V. CONCLUSION

As a contractor or business owner, you have worked hard to establish a good reputation for quality work. In true Texas spirit, you take pride in getting the job done right! Unfortunately, problems sometimes arise and periodic payments are delayed or final payments are not forthcoming. If you ever find yourself in this situation, I hope you find this issue of *Contractor's Guide to the Galaxy: Perfecting M&M Liens* to be a helpful resource.

Wading through the detailed requirements and deadlines imposed by the Texas Property Code can be daunting and feel overwhelming. If you are ever in the position of needing to preserve or foreclose a lien against real property to recoup project payments owed to you, know that you are not alone. You are welcome to contact me or another construction law attorney for advice to help you navigate the legal process and to protect your rights.

For more information about this or other construction law topics that may be of interest to you, go to www.texasbuilderlaw.com. You may also contact the author at 214.304.8255 to arrange for a consultation about your construction law or business matters.



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