

Contractor's Guide to the Galaxy

Perfecting M&M Liens
[Including 2022 Updates to
Ch. 53, Texas Property Code]

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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 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 experienced Texas construction law attorney.

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 you get started on the process of perfecting a lien in accordance with Chapter 53 of the Texas Property Code (TPC), as updated in 2022.

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 rights to assert a lien against the property where the project is located. According to TPC 53.021, a person has a lien if the person, under a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor:

- (1) labors or furnishes labor or materials for construction or repair of an improvement;
- (2) specially fabricates material, even if the material is not delivered;
- (3) is a licensed architect, engineer, or surveyor providing services to prepare a design, drawing, plan, plat, survey, or specification;
- (4) provides labor, plant material, or other supplies for the installation of landscaping for an improvement, including the construction of a retention pond, retaining wall, berm, irrigation system, fountain, or other similar installation; or
- (5) performs labor as part of, or furnishes labor or materials for, the demolition of an improvement on real property.

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.



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D. what is a Lien Affidavit?

Throughout Chapter 53 of the TPC, you will see references to a lien affidavit. 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 complicated, but it must be done correctly. If you are in doubt about how to prepare a lien affidavit, contact Little & McCool, P.C. at (830) 321-0120 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). 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. Original Contractor’s Deadlines

One of the biggest differences in the requirements imposed on an original contractor and a subcontractor to perfect a mechanic’s lien is whether a notice of claim is required to be sent to the owner or reputed owner of the property. For original contractors, the answer is “no.”

1. Notice of Claim Not Necessary for Original Contractors

Due to their direct contractual relationship with the property owner, an original contractor is not required to send a notice of claim for unpaid labor or materials to the owner. That is true whether the project is residential or non-residential in nature.

Tip: even though the original contractor is not required to send the owner a notice of claim to preserve a lien, it is still a good idea to do so. The notice might prompt the owner to resolve the claim sooner, but giving notice also serves the dual purpose of formally “presenting” the claim before filing suit in accordance with Chapter 38, Texas Civil Practice & Remedies Code.

2. Original Contractor’s Deadline to File Lien Affidavit

As the original contractor, you are required to file a lien affidavit in the real property records in the county where the improvements are located no later than the *15th day of the fourth (4th)*

calendar month after the month in which the original contractor’s work was completed, terminated, or abandoned. TPC 53.052(a)(1). Note: there is a residential construction project (RCP) caveat that requires the original contractor to file a lien affidavit by *the 15th day of the third (3rd) calendar month* after the month in which the original contractor’s work on the RCP was completed, terminated, or abandoned. TPC 53.052(a)(2).

3. Original Contractor’s 5-Day Deadline to Give Notice to the Property Owner

After filing a lien affidavit, an original contractor must send a copy of the lien affidavit to the owner or reputed owner at their 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). Tip: Because deadlines are so important, the recommended practice is to send a copy of the recorded affidavit to the owner on the same day the original contractor files it with the county clerk. Why wait and risk missing the deadline through an oversight?

4. Original Contractor’s Deadline to File Suit to Foreclose on the Lien

Assuming all previous steps were done properly to preserve lien rights, the original contractor will need to take the additional step of filing a lawsuit to foreclose on the lien against the property if the claim remains unpaid and due.

Based on the 2022 amendments to Chapter 53, “suit must be brought to foreclose the lien not later than the first anniversary of the last day a claimant may file the lien affidavit under Section 53.052.” TPC 53.158(a). This deadline applies to both residential and commercial construction projects. This limitations period may be extended for up to one year by written agreement between the claimant and property owner, but any such “agreement must be recorded with the clerk of the same county where the lien was recorded and is considered to be notice of the extension to any subsequent purchaser.” TPC 53.158(a-2).

As with other deadlines discussed in this guide, 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 in 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.



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III. **RIGHTS OF SUBCONTRACTORS**

A. who is a subcontractor?

A “subcontractor” is “a person who labors or has furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor of any tier 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.

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 with a subcontractor.

In the past, second-tier (and all lower tier) subcontractors had to provide two rounds of claim notices to the owner and original contractor to perfect lien rights. For all prime contracts effective as of January 2022 or later, all subcontractors (whether a first-tier or lower-tier subcontractor) must only provide a single notice of claim for unpaid labor and materials, in addition to filing an affidavit claiming a lien.

B. Subcontractor's Deadlines

1. Subcontractor's Deadline to Provide Notice of Claim

For subcontractors and suppliers, be aware that each month that material or labor is provided should be accounted for separately as a different debt for purposes of perfecting a lien because each monthly debt triggers new notice and filing deadlines.

Another important distinction is whether the project in question is residential or commercial (i.e., non-residential). These distinctions are discussed below.

a. Subcontractor's Notice Deadline for Commercial Construction Projects

If you are a subcontractor on a commercial project, to protect your lien rights you must provide a notice of the claim to both the owner and general contractor no later than *the 15th day of the third (3rd) month* following each month in which your labor or materials were provided, or your undelivered specially fabricated materials would normally have been delivered. TPC 53.056(a-1)(1). 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, although providing separate notices is generally recognized as the best practice. For example, if labor or materials were provided on a project in January and February and payment has not been received, a subcontractor could serve a combined notice of claim to the owner and general contractor by April 15th regarding both months. It might be easier to keep track of notice letters sent out on a monthly basis, but do what works best for you.

When providing a 3rd-month notice, TPC 53.056(a-3) says that a “notice may include an invoice or billing statement.” Tip: the best practice is to include a copy of your invoice or billing statement when giving notice to the general contractor and the owner. Among other things, this will help satisfy another legal requirement of giving “presentment” of your claim before filing suit. [See Chapter 38, Texas Civil Practice & Remedies Code]

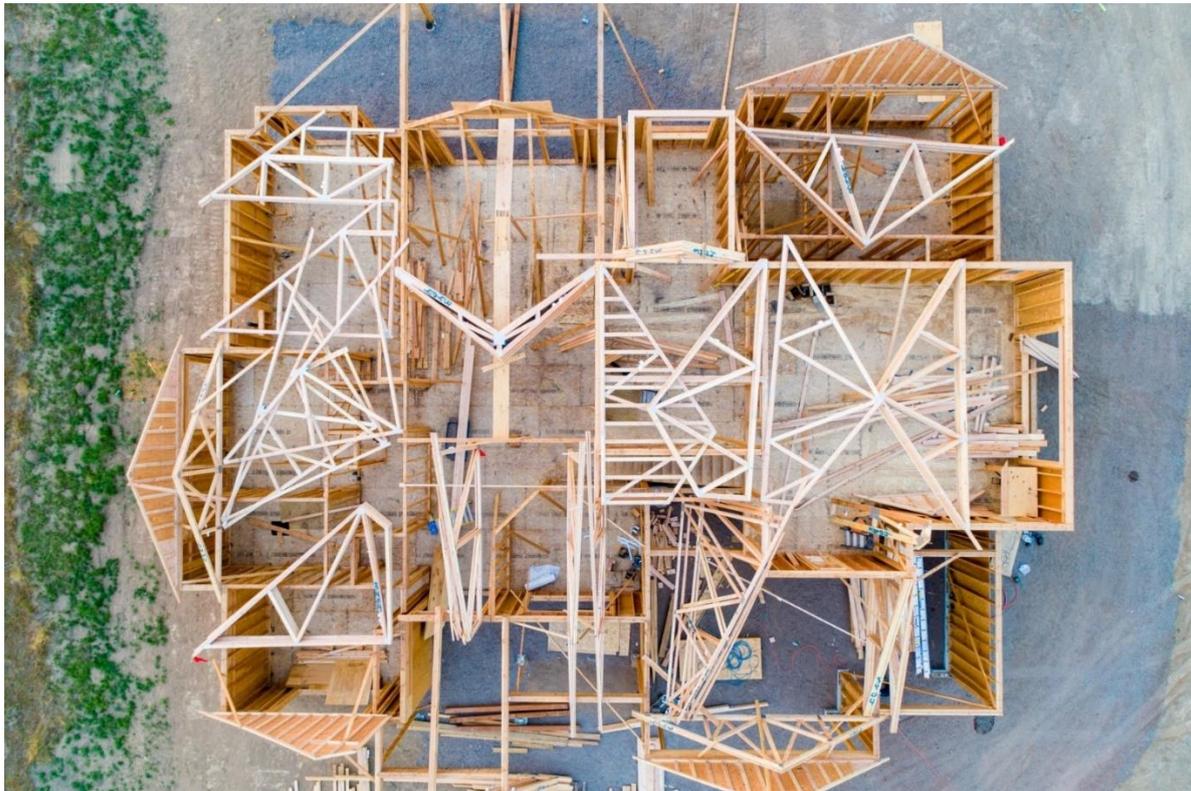
Is it possible to require the property owner to pay a claim made by a subcontractor? The answer is “possibly.” When giving a 3rd-month notice, the form of the notice must substantially conform to the language provided in TPC 53.056(a-2). Among other things, the notice should contain this statement: “Owner’s property may be subject to a lien if sufficient funds are not withheld from future payments to the original contractor to cover this debt.” Upon receipt of this notice, the owner is authorized to withhold from payments to the original contractor an amount necessary to pay the claim, which is in addition to any reserved funds. TPC 53.081(a). (Note: this issue of the *Contractor's Guide to the Galaxy* series does not provide a detailed discussion about reserved funds or contractual retainage rights. If you have any questions about those

requirements, you can contact Little & McCool, P.C. at (830) 321-0120 or another construction law attorney to advise you about your specific situation.)

b. Subcontractor’s Notice Deadline for Residential Construction Projects

For claims involving RCPs, the notice and lien deadlines are compressed by one month when compared to commercial construction projects. If you are a subcontractor on an RCP, to protect your lien rights you 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 your labor or materials were provided, or your undelivered specially fabricated materials would normally have been delivered. TPC 53.056(a-1)(2).

Because of the shortened deadline, it is important to know whether your project is considered “residential” or “commercial.” A “residential construction project” means “a project for the construction or repair of a new or existing residence, including improvements appurtenant to the residence, as provided by a residential construction contract.” TPC 53.001(10). A “residential construction contract” means “a contract between an owner and a contractor in which the contractor agrees to construct or repair the owner’s residence, including improvements appurtenant to the residence.” TPC 53.001(9). (Note: Because the statute defines an RCP in terms of work done to the “owner’s residence,” the construction of improvements to property owned by a business entity likely does not qualify as an RCP but will instead be considered a commercial construction project.)



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2. 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) month after the later of* (1) the month the claimant last provided labor or materials or (2) the month the claimant would normally have been required to deliver the last of specially fabricated materials that have not been actually delivered. TPC 53.052(b).

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 later of* (1) the month the claimant last provided labor or materials or (2) the month the claimant would normally have been required to deliver the last of specially fabricated materials that have not been actually delivered. TPC 53.052(c).

3. Subcontractor's 5-Day Deadline to Send Lien Affidavit to the Property Owner and Original Contractor

As with original contractors, a subcontractor must promptly send a copy of the lien affidavit to the owner or reputed owner at their 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). As an extra step, the subcontractor must also send a copy of the lien affidavit to the original contractor’s last known business or residence address by that same 5-day deadline. TPC 53.055(b).

Tip: 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 avoid missing a critical deadline, the recommended practice is for a subcontractor to send a copy of the recorded lien affidavit to the owner and general contractor on the same day it is filed with the county clerk. There is no reason to wait and risk missing the deadline through an oversight.

4. Subcontractor's Deadline to File Suit to Foreclose on the Lien

Assuming all previous steps were done properly to preserve lien rights, a subcontractor will need to take the additional step of filing a lawsuit to foreclose on the lien against the property if the claim remains due and owing.

Based on the 2022 amendments to Chapter 53, the same deadline discussed previously concerning original contractors applies to subcontractors. Unless extended by agreement, “suit must be brought to foreclose the lien not later than the first anniversary of the last day a claimant may file the lien affidavit under Section 53.052.” TPC 53.158(a). This deadline applies to both residential and commercial construction projects. This limitations period may be extended for up to one year by written agreement between the claimant and property owner, but any such

“agreement must be recorded with the clerk of the same county where the lien was recorded and is considered to be notice of the extension to any subsequent purchaser.” TPC 53.158(a-2).

5. Subcontractor’s Deadlines for Lien Claims Arising from Unpaid Retainage

Although this issue does not provide an in-depth discussion about retainage claims, subcontractors pursuing such claims need to be aware of some crucial deadlines. If a subcontractor’s contract provides for retainage, the subcontractor must give the owner or reputed owner and the original contractor a notice of claim for unpaid retainage not later than the earlier of: (1) the 30th day after the date the claimant’s contract is completed, terminated, or abandoned; or (2) the 30th day after the date the original contract is terminated or abandoned. TPC 53.057(a-1). The form of the notice is provided in TPC 53.057(a-2).

Also, a subcontractor claiming a lien for retainage “must file an affidavit with the county clerk not later than the 15th day of the third month after the month in which the original contract under which the claimant performed was completed, terminated, or abandoned.” TPC 53.052(d).

IV. 2022 Changes to Notice Procedures

Another important change brought about by 2022 updates to Chapter 53 affects notices required to be given to owners or original contractors. The first change concerns the method of communicating. Any notice of other written communication required by Chapter 53 must be delivered in one of the following methods: (1) in person to the party entitled to the notice or to that party’s agent; (2) by certified mail; or (3) by any other form of traceable, private delivery or mailing service that can confirm proof of receipt. TPC 53.003(b).

Tip: Providing notice using certified mail still has its advantages over other methods. For example, when giving notice by certified mail, “deposit or mailing of the notice in the United States mail in the form required constitutes compliance with the notice requirement.” TPC 53.003(c). This is referred to as the “mailbox rule” and only applies to service by certified mail. The other methods of delivery must be received by the applicable deadline to be effective.

Prior to the January 2022 updates, the notice deadlines were strictly enforced such that weekends and holidays were counted for purposes of computing the notice deadlines. Now, Chapter 53 says, “In computing the period of days in which to provide a notice or to take any action required under this chapter, if the last day of the period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.” TPC 53.003(e).

Another important change to Chapter 53 was to relax a strict-enforcement approach concerning the manner of giving notice. Chapter 53 now provides: “If a written notice is received by the

person entitled to receive it, the method by which the notice was delivered is immaterial.” TPC 53.003(d).

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, sometimes problems arise and payments are not made in a timely manner. If you ever find yourself in this situation, I hope you find this issue of the *Contractor’s Guide to the Galaxy* to be a helpful resource. For more information about this or other construction law topics that may be of interest to you, go to www.texasbuilderlaw.com.

It can be challenging to comply with all of the requirements imposed by the Texas Property Code to protect your lien rights. If you are interested in scheduling a consultation with a Texas construction law attorney, contact Little & McCool, P.C. at (830) 321-0120.

| Date | Original Contractor | Subcontractor |
|---|---|---|
| Starting Date for Computing Deadlines | Month the work is completed, terminated, or abandoned | Each month labor or material is provided |
| By 15 th Day of the Second Month | | <u>Residential Construction Project:</u> send pre-lien notice to owner and original contractor |
| By 15 th Day of the Third Month | <u>Residential Construction Project:</u> file Lien Affidavit (must send copy to owner within 5 days) | <u>Commercial Construction Project:</u> send pre-lien notice to owner and original contractor <u>Residential Construction Project:</u> file Lien Affidavit (must send copy to owner and original contractor within 5 days) |
| By 15 th Day of the Fourth Month | <u>Commercial Construction Project:</u> file Lien Affidavit (must send copy to owner within 5 days) | <u>Commercial Construction Project:</u> file Lien Affidavit (must send copy to owner and original contractor within 5 days) |

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