

LIEN REVISION UPDATE

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AGC TEXAS BUILDING BRANCH

38th Annual TBB Convention

Working Group – History

How Did the Group Originate?

Who Was in the Working Group?

What Were the Working Group's Goals?

What Did the Working Group Do?

Overview of Working Group Proposed Draft with Open Issues

A. PRELIMINARY NOTICE SYSTEM in lieu of current Past Due Notice System -- will no longer have to understand / deal with:

- (1) Statutory Retainage
- (2) Fund-Trapping
- (3) Accrual of Indebtedness
- (4) Special Notices of Contractual Retainage / Special Fabrication
- (5) Computing the 15th day of the 3rd month after each month in which.....

Overview of Working Group Proposed Draft with Open Issues (cont'd)

B. KEY FEATURE: NOTICE OF FURNISHING

- (1) All Claimants (other than Original Contractors) must send a Notice of Furnishing to Owner and Original Contractor
- (2) Notice must include basic information about Claimant, general description of labor/materials, identify the Project, and must include “No Lien / Just Notice to Preserve” statutory language
- (3) No need to amend / update (only one notice) but must identify each Original Contractor through which labor/materials furnished
- (4) Notice covers labor/materials furnished 45 days prior to notice and thereafter -- except when “Notice of Commencement” filed

Overview of Working Group Proposed Draft with Open Issues (cont'd)

C. KEY FEATURE: NOTICE OF COMMENCEMENT / APPOINTMENT OF LIEN AGENT

- (1) Optional for Owner
- (2) Must appoint and identify Lien Agent
 - (a) Lien Agents must hold Certificate of Registration from Texas Department of Insurance (TDI)
 - (b) Lien Agent Fees shall initially be set by statute with subsequent review and regulation by TDI
 - (c) Lien Agents shall create and maintain a common Internet Website
- (3) Notice of Commencement must be posted on Lien Agent Website

C. NOTICE OF COMMENCEMENT / APPOINTMENT OF LIEN AGENT (cont'd)

- (4) Notice of Commencement must identify Owner, Project, Original Contractor(s), Lender(s), and scope of Work covered
- (5) All notices (including Notice of Furnishing) may be delivered by posting to Website
- (6) Lien Affidavits must still be recorded with County Clerk
- (7) If Notice of Commencement has been recorded and Lien Agent appointed at time of Claimant's first Work – "look back" is only 15 days (not 45 days)
- (8) Owner can limit scope of Work subject to Notice of Commencement (may carve out scopes)
- (9) Owner may file Notice of Completion / cut off future Work (re-start process)

C. NOTICE OF COMMENCEMENT / APPOINTMENT OF LIEN AGENT (cont'd)

(10) Inception of Lien for Work covered by Notice of Commencement:

(a) For Work performed *prior* to Notice of Commencement, inception relates back to visible commencement of Work (no substantive change from current law)

(b) For Work performed which is not covered by Notice of Commencement, inception relates back to visible commencement of Work (no substantive change from current law)

(c) For Work performed *after* Notice of Commencement (and which is covered by the Notice of Commencement), inception relates back to date of Notice of Commencement

Overview of Working Group Proposed Draft with Open Issues (cont'd)

D. LIEN CLAIM AFFIDAVIT

- (1) Must still record with County Clerk
- (2) Deadlines based upon completion of Project / entire Work or termination of Original Contract (not completion of Claimant's Work)

Note: Open Issue whether 15th of 4th month should apply only to Original Contractor (*i.e.*, reduce to 15th of 3rd month for Derivative Claimants).

Overview of Working Group Proposed Draft with Open Issues (cont'd)

E. MISCELLANEOUS BELLS AND WHISTLES / OTHER FEATURES

- (1) Deadlines falling on holidays and weekends will extend to next Business Day
- (2) Liens for Work on “Common Elements” for Condominiums attach pro-rata to Units (based upon Unit Owners’ interests in Common Elements)
- (3) One year limitation on bringing suit to enforce statutory mechanic’s lien
- (4) Minimal changes to procedures relating to payment bonds –but Claimants must provide Notice of Furnishing and “Fair Notice” to surety by lien filing deadline
- (5) Notice of Furnishing procedures will apply to Residential as well

Overview of Working Group Proposed Draft with Open Issues (cont'd)

F. MAJOR OPEN ISSUES

- (1) Fundamental Shift: Derivative lien claims not limited to Retainage /Fund-Trapping.
 - (a) Limitations on Owner's personal liability
 - (b) Limitations on Lien on Removables
- (2) Fundamental Shift: Burden to "police" payments shifts to Owner/Original Contractor.
 - (a) More flexible Statutory Lien Waivers / identify payment exceptions
 - (b) Reliance on Unconditional Waivers (without verification of payment)
- (3) Various "Bells and Whistles" to improve relative status of specific segments of Industry

What Happens Now?