

AN UPDATE FOR SUPPLY HOUSES ON 2011 LEGISLATIVE CHANGES

For Lumbermen's Association of Texas & Louisiana

**Lien Release and Waiver Forms (HB 1456) and
Retainage Amendments (HB 1390)**

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I. LIEN RELEASE AND WAIVER FORMS (HB 1456)

Chapter 53 of the Texas Property Code was changed to require universal statutory forms to waive or release lien and payment bond¹ claims, and to prohibit blanket waivers before any work is begun as a matter of Texas public policy. This change will go into effect January 1, 2012. However, the industry will probably start using the new waiver forms now.

A. HB 1456 will minimize unfair boilerplate.

The change protects against two pernicious, but common problems in the industry.

First, HB1456 voids release and waiver clauses often contained in master service agreements that waive and release any future lien even before work begins. Such clauses, often buried amidst pages of boilerplate, make subcontractors and suppliers vulnerable who furnish labor and materials on credit. Some large plant owners currently require boilerplate lien and bond claim waivers in their master contracts. If these owners file for bankruptcy, these waiver clauses destroy a subcontractor's and supplier's rights in the bankruptcy proceeding because the trade creditor will have lost secured creditor status and its defenses to preference claims.

Second, HB1456 voids a waiver on a project (subject to exceptions) to the extent the waiver deviates from the statutory form. This new law will help prevent upstream parties from slipping indemnity clauses into the release form that is requested in exchange for draw requests. In the past, upstream parties have put clauses into lien waivers that down shift risk on a project to a subcontractor.

Overall this new legislation is good for subcontractors and suppliers; however, there are uncertainties.

B. New Release Forms.

The new statute requires waiver forms to "substantially comply" with the new statutory forms. TEX. PROP. CODE § 53.281(b). Some tweaking will thus be tolerated, but the public policy forbidding blanket waiver of future claims must be observed. The new statutory release forms are attached.

1. The Exceptions: when use of the new statutory forms is not required and nonconforming forms may be used.

(a) Residential Construction

¹ Hardeman bond claims, but not Miller or McGregor bond claims.

The new statutory form is not required to release and/or waive liens in a contract for residential construction if the contract was made *before* labor or materials are provided. TEX. PROP. CODE § 53.282(a)(3). Therefore, residential or residential development contracts may still contain blanket waivers if done before the work starts. However, such waivers are not effective as to a sub supplying *only* materials. TEX. PROP. CODE § 53.282(c). Thus, subcontractors who only supply materials (and no labor) generally should not be required to sign lien releases and/or waivers that deviate from the statutory form, unless another exception applies.

(b) The Sub has already been paid in full.

The new statutory form is not required if the sub has actually received payment in full. TEX. PROP. CODE § 53.282(a)(2). A general contractor (or upstream subcontractor) may still demand a statutory waiver in exchange for *final* payment. However, the new statutory release form must be used in exchange for a progress payment. Further, Texas is a relation-back state where a lien arises when the materials or labor are furnished, not when the notices or invoices are sent. Thus, the lien should be released rather than waived because it is then in existence.

(c) Accord and Satisfaction, Settlement, and Recorded-lien affidavit.

The new statute also excludes the new forms where there is an accord and satisfaction agreement, settlement of pending court or arbitration proceeding, or agreement made *after* a lien affidavit claim has been filed or after the bond claim has been made. TEX. PROP. CODE § 53.287(1)-(3). In other words, upstream parties may still require downstream contractors to sign customized lien and bond releases if: (1) the release or waiver is made in accord and satisfaction of an identified dispute; (2) the release or waiver is part of an agreement concerning an action pending in any court or arbitration proceeding; or (3) a lien affidavit has already been recorded or the bond claim has already been sent. However, even in these circumstances, subs should refuse to sign overbroad releases such as those that require a release of *all* claims or general indemnity clauses.

2. Public Policy.

The new statute contains a strong declaration of Texas public policy against waivers and releases demanded before any work begins. "...[A]ny contract, agreement, or understanding purporting to waive the right to file or enforce any lien or claim created this chapter is *void* as against public policy." TEX. PROP. CODE 53.286 (emphasis added). Thus, if a subcontractor does sign a lien waiver or release that does not conform to the statutory forms and is not allowed by the statutory exceptions, the subcontractor may assert that the waiver or release is void.

C. Landscapers.

This new statute also contains an amendment completely unrelated to lien waivers and releases that is very important to landscapers. A person "who provides labor, plant material, or other supplies for the installation of landscaping for a house, building, or improvement" has a lien on the property if the claimant has a contract with the owner, owner's agent, *contractor or subcontractor*. TEX. PROP. CODE 53.285(d). This broadens the statute which formerly only

allowed landscapers a lien if they had a direct contract with the owner. Landscapers therefore now will have greater lien coverage.

II. HB 1390: CHANGES TO RETAINAGE DEADLINES

The deadlines and other requirements for perfecting lien claims against both contractual and statutory retainage were changed by new TEX. PROP. CODE § 53.057(b) (1)-(2). The new law is designed to benefit retainage claimants by slightly extending the notice deadline and allowing the notice after work has been done. These new rules apply if the original contract of the project was made after September 1, 2011.

A. Preliminary Contractual Retainage Notice.

This new statute extends the preliminary notice deadline to an owner for contractual retainage to the 30th day after the claimant's work is completed, terminated or abandoned, or the prime contract is terminated or abandoned (whichever occurs first) for those contracts made after September 1, 2011. TEX. PROP. CODE § 53.057(b). If the agreement for retainage is with a subcontractor, then the claimant must also give notice of the retainage to the GC within the same time period. TEX. PROP. CODE § 53.057(b-1). This is an improvement over the current requirement (to send this notice before the 15th day of the second month following the first delivery of materials when the claimant agreed to contractual retainage). However, suppliers and subcontractors with contractual retainage should not confuse this different deadline with the more well known monthly notices because this deadline comes much sooner. For instance, if a subcontractor furnishes the last of its labor or materials on August 1, under 53.056, its notice to the general contractor would be due on October 15. However, under the amended 53.057(f) and (b), its contractual retainage notice would be due on August 31, 2011. Rather than wait, it would be wise for a subcontractor who has contractual retainage to provide notice of this retainage before beginning work.

The required contents of the statutory notice were also changed. Now the notice must contain the name and address of the claimant and the name and address of the upstream subcontractor. TEX. PROP. CODE § 53.057(c). Suppliers should also include "fund trapping" language (if they have not been paid) in this preliminary notice; it is generally a good practice to include this language in every notice.

B. A limited alternative means of perfection for statutory retainage.

If a subcontractor sends notice of its contractual retainage under 53.057(b) then it may use the new more favorable lien affidavit deadline for statutory retainage. In particular, section 53.057(f) provides that "[a] claimant has a lien on, and the owner is personally liable to the claimant for, the retained funds under Subchapter E [statutory retainage] if the claimant: (1) gives *notice in accordance with this section* and..." (Emphasis added). There are no notice provisions in section 53.057 for perfecting a lien on statutory retainage except for the five day later notice of a lien filing. However, statutes are interpreted to avoid surplusage, thus presumably the notice referred to in 53.057(f) appears to mean sending the notice required by

53.057(a) and (b).² However, by its plain language, the 53.057(b) notice only applies to contractual retainage. Thus, these changes do not appear to benefit subcontractors or suppliers who have no contractual retainage.³ It is unfortunate the Legislature has comingled contractual and statutory retainage provisions. Commentators already are in disagreement as to what notice provisions are required. The courts or the Legislature will have to refine those requirements. This complexity imposes an unnecessary and additional burden on subs, who are often the least able to comply with these complicated provisions even though they were ostensibly designed to improve payment protections for subs.

Nevertheless, this statute does help those who have contractual retainage and who timely send the contractual retainage notice described in 53.057(b). In particular, the new statute alleviates the harsh deadline to file a lien affidavit to perfect a statutory retainage lien for those subcontractors and suppliers who send the contractual retainage notice discussed above. That is, if a claimant sends notice under section 57, then 53.057(f) provides that this claimant may file its lien affidavit by the deadline in 53.052 (the fifteenth of the fourth month) rather than the more harsh deadline found in section 53.103(2) (30 days from the date of completion of the claimant's work, original contract is terminated or original contractor abandons the project). However, the owner can accelerate this deadline. Thus, there are exceptions to this new alternative. As ably articulated by Bob Bass, these exceptions are as follows:

1. If an owner files an affidavit of completion and the owner sent a copy of the affidavit to the claimant within the time and in the manner required under Sec. 53.106, the claimant must file its lien affidavit within 40 days after the date of completion stated in the affidavit (Tex. Prop. Code 53.053(f)(1)(B)(ii));
2. If an owner sends a notice relating to termination or abandonment of the original contract to the claimant within the time and in the manner required under Sec. 53.107, the claimant must file its lien affidavit within 40 days after the date of termination or abandonment stated in the notice (Tex. Prop. Code 53.053(f)(1)(B)(iii)); or
3. If an owner sends a written notice of demand for the claimant to file its lien affidavit within the time and in the manner required under the new Sec. 53.057(g), the claimant must file its lien affidavit within 30 days after the owner sent the notice to the claimant (Tex. Prop. Code 53.053(f)(1)(B)(iv)).⁴

² 53.057(a) states that "a claimant may give notice under this section instead of or in addition to notice under Section 53.056 or 53.252..." This indicates that the notice is permissive and that that it may be used as an alternative to the notices provided in sections 56 and 252. However, the amended section 53.057(b) provides that "[t]he claimant *must* give the owner or reputed owner notice of contractual retainage not than the earlier of: (1) the 30th day after the date the claimant's agreement providing for retainage is completed, terminated, or abandoned or (2) the 30th day after the date the original contract is terminated or abandoned." (Emphasis added).

³ It appears that section 53.057(f) does not apply to them because such claimants would have no contractual retainage notices to send under section 57.

⁴ Robert C. Bass, Legislative Report, Construction Law Section, State Bar of Texas (June 23, 2011).

In sum, this new statute extends the default lien affidavit deadline to the fourth fifteenth for a claimant who timely sends the contractual retainage notice. However it also gives an owner the option to accelerate this deadline. The intent of this statute is to give claimants two ways to perfect their lien on statutory retainage: (1) send preliminary notice of contractual retainage (under 53.057(b)) and file the lien affidavit in the 4th month (or earlier if one of the 53.057(f)(1)(B) early filing requirements is triggered); or (2) send the monthly (53.056 and 53.256) notices of claim and file the lien affidavit within 30 days after final completion (pursuant to 53.103).

In any event, the wisest policy for a subcontractor is to file a lien affidavit immediately after completing its work.

C. 4th 15th lien affidavit deadline applies to lien claim on statutory retainage when owner fails to comply with statutory retainage requirements.

In *Page v. Structural Wood Components*, the Texas Supreme Court held that a claimant who failed to file its lien affidavit within 30 days after completion lost its claim on statutory retainage even though it was not clear that the owner fully complied with the statutory retainage requirements. 102 S.W.3d 720, 723 (Tex. 2003). HB 1390 fixes this problem by amending 53.105(a): If the owner fails or refuses to comply with this subchapter, the claimants complying with Subchapter C or this subchapter have a lien...” Subchapter C contains the more lenient 4th 15th lien affidavit deadline. Thus, if a claimant misses the 30 day completion deadline in section 103, but meets the deadline in Subchapter C’s section 52, and the owner does not comply with the retainage requirement, then the claimant will still have a lien in the amount of retainage that should have been withheld.

D. 4th 15th lien affidavit deadline applies to lien claim on statutory retainage when owner does not send termination notice to subcontractor.

Section 53.107 requires the owner to send notice of termination or abandonment by the general contractor to subcontractors or suppliers who have sent their lien notices or sent written requests for notice of termination or abandonment. HB 1390 amends this statute in section d: “If an owner is required to send notice to a subcontractor under this section and fails to send the notice, the subcontractor is not required to comply with Section 53.057 to claim retainage and my claim a lien by filing a lien affidavit as prescribed Section 53.052 [4th 15th].”

III. CONCLUSION

These new statutes help suppliers, but they also add another bewildering layer of complexity for suppliers attempting to determine their deadlines. This complexity reinforces the need for subs to act on lien and bond claims as soon as the debt is due, more so if the project is nearing completion.