

LEGISLATIVE UPDATE

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AREAS OF CHANGE

1. Lien Law for Non-residential Construction
2. Codification of *Spearin*
3. Sec. 38 Tex. Civ. Prac. And Rem. Code
4. Pandemic Protections
5. Commercial Auto Accidents
6. Public Projects

Updates to Texas Lien Law

- Texas Legislature made changes to Chapter 53 of the Texas Property Code for non-residential, private Texas construction projects.
- Applies to contracts entered into on or after January 1, 2022.
- Impacts
 - Owners
 - Contactors (general and sub)
 - Design Professionals

Change in key statutory definitions in Texas Property Code § 53.001

- **“Reserved Funds”** is now used to refer to the 10% of the contract price or value of the work the owner must withhold. § 53.101(a). Formerly, this was known as “statutory retainage.”
- **“Retainage”** is now the amounts withheld pursuant to the construction contract.

Change in key statutory definitions in Texas Property Code § 53.001

- **“Purported Original Contractor”** means an original contractor who can effectively control the owner or is effectively controlled by the owner through common ownership of voting stock or ownership interests, interlocking directorships, common management, or otherwise, or who was engaged by the owner for the construction or repair of improvements without a good faith intention of the parties that the purported original contractor was to perform under the contract. For purposes of this subdivision, the term "owner" does not include a person who has or claims a security interest only.

Statutory Notice for Non-Residential, Private Construction Projects

- Does not apply to public projects
- § 53.056: statutory notice to perfect a claim for unpaid labor or materials
- § 53.057: statutory notice to perfect a claim for unpaid contractual retainage
- Eliminated the requirement for a second tier or lower subcontractor to provide notice to the original contractor by the 15th day of the second month

Texas Property Code § 53.056

Sec. 53.056. DERIVATIVE CLAIMANT: NOTICE TO OWNER AND ORIGINAL CONTRACTOR. (a) Except as provided by Section [53.057](#), a claimant other than an original contractor must give the notice prescribed by Subsections (a-1) and (a-2) for the lien to be valid.

(a-1) For all unpaid labor or materials provided, the claimant must send a notice of claim for unpaid labor or materials to the owner or reputed owner and the original contractor. The notice must be sent:

(1) for projects other than residential construction projects, **not later than the 15th day of the third month after the month** during which:

- (A) the labor or materials were provided; or
- (B) the undelivered specially fabricated materials would normally have been delivered; or

Texas Property Code § 53.056 (cont'd)

(2) for residential construction projects, not later than the 15th day of the second month after the month during which:

(A) the labor or materials were provided; or

(B) the undelivered specially fabricated materials would normally have been delivered.

(a-2) The notice must be in substantially the following form:

Texas Property Code § 53.056 (cont'd)

NOTICE OF CLAIM FOR UNPAID LABOR OR MATERIALS

WARNING: This notice is provided to preserve lien rights.

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.

Date: _____

Project description and/or address: _____

Claimant's name: _____

Type of labor or materials provided: _____

Original contractor's name: _____

Party with whom claimant contracted if different from original contractor: _____

Claim amount: _____

_____ (Claimant's contact person)

_____ (Claimant's address)"

- (a-3) The notice may include an invoice or billing statement.
- (a-4) A claimant may give to the original contractor a written notice of an unpaid labor or materials invoice that is past due. A notice under this subsection is not required for a lien to be valid.

Texas Property Code § 53.057

- For contractual retainage: there were four different deadlines previously. Now must send the required notice under § 53.057.
- The new deadlines under § 53.057 only apply to unpaid contractual retainage. If the claim also includes unpaid materials or labor, then different deadlines apply.

Texas Property Code § 53.057

- Sec. 53.057. DERIVATIVE CLAIMANT: NOTICE OF CLAIM FOR UNPAID RETAINAGE. (a) To the extent that a claim for **unpaid retainage** is not included wholly or partly in a notice provided under Section [53.056](#), a claimant other than an original contractor whose contract provides for retainage must give notice under this section for a lien for unpaid retainage to be valid.
- (a-1) The claimant must send the notice of claim for unpaid retainage to the **owner or reputed owner and the original contractor** 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.**
- (a-2) The notice must be in substantially the following form:

Texas Property Code § 53.057 (cont'd)

NOTICE OF CLAIM FOR UNPAID RETAINAGE

WARNING: This notice is provided to preserve lien rights.

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.

Date: _____

Project description and/or address: _____

Claimant's name: _____

Type of labor or materials provided: _____

Original contractor's name: _____

Party with whom claimant contracted if different from original contractor:

Total retainage unpaid: _____

_____ (Claimant's contact person)

_____ (Claimant's address)

Texas Lien Law: Deadlines

If the deadline falls on a Saturday, Sunday, or legal holiday, the deadline is now extended to the next business day. § 53.003(e).

More Mailing Options for Lien Notices

Now: can use “any other form of traceable, private delivery or mailing service that can confirm proof or receipt.” § 53.003(b).

Ex: UPS and FedEx.

- Can still deliver in person or by certified mail through USPS. § 53.003(b).
- Delivery via registered mail is no longer permitted.

Who Can File Liens

Sec. 53.021. PERSONS ENTITLED TO LIEN. A person has a lien if the person, **under a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor:**

(3) is a licensed architect, engineer, or surveyor providing services to prepare a design, drawing, plan, plat, survey, or specification;

Before they had to have a written contract with the owner.

Statute of Limitations

Must file suit to foreclose on a lien within one year from the last date the claimant was permitted to file its lien affidavit under § 53.052.

This one year limitations period can be extended up to two years if the claimant enters into a written agreement with the then-current property owner for the extension and the agreement is recorded in the real property records in the county where the property is located.

Statutory Lien Waivers

Do not have to be notarized to comply with statutory requirements.

TEXAS LEGISLATURE ADOPTS *SPEARIN*

Spearin and Lonergan

Previously, *Lonergan v. San Antonio Loan & Trust*, 101 Tex. 63, 104 S.W. 1061 (1907): the Texas Supreme Court held that it was the contractor's responsibility to reconstruct a building that had collapsed even though the collapse occurred due to a defect in the architectural plans and specifications. The architect had been contracted by the owner, and the owner provided the plans and specifications to the contractor by the owner. In 2012, the Texas Supreme Court reaffirmed its decision in *Lonergan* in *El Paso Field Services v. Mastec*, 389 S.W.3d 802 (Tex. 2012)

U.S. Supreme Court ruled in *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918): presented with a similar question as arose in *Lonergan*. The U.S. Supreme Court held it is NOT the contractor's responsibility to determine the sufficiency of the plans and specifications provided to the contractor by the project owner.

Chapter 59 Added to the Texas Business & Commerce Code

- Texas Legislature adopted the *Spearin* Doctrine
- Effective September 1, 2021.
- Applies to contracts for construction or repair of an improvement to real property. § 59.002(a).
- Cannot be waived by contract. § 59.003.

- Chapter 59 does not apply to:
 - Design-build contract
 - Design documents for which the contractor is responsible and the defective design document is part of the design documents for which the contractor is responsible
 - Design documents where the contractor's input and guidance are provided as the signed and sealed work product of a design professional
 - Critical infrastructure facility (ex.: petroleum refineries, electrical power generating facilities, ports, rail yards, oil/gas pipelines, etc).

Chapter 59 Added to the Texas Business & Commerce Code

A contractor is not responsible for the consequences of design defects in the plans and specifications where the contractor or its agents did not provide the design documents.

- The contractor may not warranty the accuracy, adequacy, sufficiency, or suitability of the plans, specifications, or other design documents.
-
- The contractor must disclose in writing and within a reasonable time to the person with whom the contractor entered into a contract any defects, inaccuracies, inadequacies, or insufficiencies in the plans, specifications, or design documents that the contract learns about or reasonably should have discovered using ordinary diligence, before or during construction.
- “ordinary diligence” is the observations of the plans, specifications, or design documents a contractor would make in reasonable preparation of a bid or fulfillment of its work under normal circumstances .
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- The contractor is not required to hire a design professional. This level of disclosure is based on the contractor’s level of knowledge.
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- If the contractor fails to disclose a defect under § 59.052(b), the contractor can be liable for the consequences of defects that result from the failure to disclose. § 59.052(c).
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Chapter 59 Added to the Texas Business & Commerce Code

§ 59.052 Standard of Care for Certain Designs

Design services provided under a contract described by Section [59.002](#)(c) or (d) are subject to the same standard of care requirements provided in Section [130.0021](#), Civil Practice and Remedies Code.

Texas Legislature revised Chapter 130 of the CPRC to require that construction contracts for architectural and engineer services or a contract related to the construction or repair of an improvement to real property that contains architectural or engineering services must require that the services be performed **“with the professional skill and care ordinarily provided by competent architects or engineers practicing under the same or similar circumstances and professional license.”**

If one of these contracts contains a different standard of care than this one, the contractual provision will be void and unenforceable and the statute’s standard of care applies.

SEC. 38 CPRC

- Effective September 1, 2021
- Sec. 38.0015. RECOVERY OF ATTORNEY'S FEES AS COMPENSATORY DAMAGES.
(a) A person may recover reasonable attorney's fees from an individual, corporation, or other entity from which recovery is permitted under Section 38.001 as compensatory damages for breach of a construction contract as defined by Section 130.001.

Passed in response to *In re Nalle*

Allows recovery of attorney's fees as compensatory damages for breach of a construction contract.

Insurance company is required to pay the prevailing party's attorney's fees under a CGL policy instead of the contractor being responsible.

Pandemic Protections for Contractors

SB 968: Protection from Pandemic Related Project Shutdown

- Effective June 16, 2021
- Prohibits local government officials from limiting or prohibiting residential or commercial construction activities during a state of disaster or pandemic.
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SB 6: Pandemic Protections for Contractors

- Effective June 14, 2021
- Protects essential businesses that continued to work during COVID-19 from liability for personal injury, death or property damage related to exposure to COVID-19.
- Business will be exempt from liability unless plaintiff establishes one of the exemptions, i.e. shows the business knowingly failed to warn the employee of a condition the business knew was likely to result in exposure of the employee to COVID-19.

Vehicular Accidents

HB 19: Requirements for bringing a lawsuit resulting from commercial vehicular accident

- Effective September 1, 2021
- Aimed at protecting the commercial trucking industry from frivolous lawsuits.
- Applies to all commercial vehicles, so it will apply to lawsuits involving an accident involving any commercial vehicle.
- Sets forth requirements that must be met to bring a lawsuit.
- Allows bifurcation of a trial:
 - First company driver must be found negligent.
 - Then plaintiff can present evidence against the company of a policy or environment that contributed to the negligence.
 - Plaintiff can seek exemplary damages in the second phase.
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Public Projects

SB 338: Uniform general conditions for K-12 building construction.

- Effective June 7, 2021.
- Allows school districts to adopt uniform general conditions to be incorporated into all district building construction contracts after reviewing the uniform general conditions adopted by the Texas Facilities Commission.

HB 1476: Prompt Pay Act

- Effective September 1, 2021
- A governmental entity is now required to provide written detailed notice of the disputed amount and may only withhold 110% of the disputed amount.

SB 3069: Shorten Statute of Repose for Public Work Projects

- Effective June 14, 2021
- Shortens the time public building owners can sue for defects from 10 years to 8 years.
- Will have additional year if proper written notice is sent for defects discovered in year 8.

THANK YOU

Please call or email with any questions.

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Enjoy Your Break!!!!