

LIEN REVISION UPDATE

Robert C. Bass, Jr.

Winstead PC

401 Congress Avenue, Suite 2100

Austin, Texas 78701

rbass@winstead.com

AGC -- TEXAS BUILDING BRANCH

39th Annual AGC-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

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 (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

Notice does not “trap funds” / not a “stop notice”

Notice merely “preserves” the right to make a claim

Overview of Working Group Proposed Draft (cont'd)

B. KEY FEATURE: NOTICE OF FURNISHING (cont'd)

(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 within 45 days prior to notice and thereafter -- except when "Notice of Commencement" filed

Overview of Working Group Proposed Draft (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

Overview of Working Group Proposed Draft (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)

Overview of Working Group Proposed Draft (cont'd)

(8) 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 (cont'd)

(9) Owner may limit scope of Work subject to Notice of Commencement (may carve out scopes)

Work not covered by Notice would be subject to current inception rules (relates back to visible commencement of the Work)

(10) Owner may file **Notice of Completion** / cut off future Work (re-start process)

Overview of Working Group Proposed Draft (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)

Retains 15th day of 4th month (Residential is 3rd month)

- (3) After Completion of Original Contract, Owner may send written demand for claimant to file Lien Affidavit within 30 days

Overview of Working Group Proposed Draft (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

Overview of Working Group Proposed Draft (cont'd)

E. OTHER FEATURES (cont'd)

(5) Notice of Furnishing procedures will apply to Residential as well

(6) Tweaks to Statutory Lien Waivers

Remove broad exception for “other items furnished”

Party may tender unconditional waiver in trust to attorney, title company/agent, or licensed lender

Conditional Lien Waiver may be required as a condition to final payment

Overview of Working Group Proposed Draft (cont'd)

F. ANTICIPATED ADVANTAGES TO NEW SYSTEM

- (1) Pre-Notice System is consistent with many other States
- (2) Eliminates several confusing concepts unique to Texas
- (3) More timely and accessible information for Owners, Contractors and Claimants
- (4) For Claimants – no limitations on fund-trapping and retainage
- (5) For Owners / Contractors -- fewer anticipated perfected liens
- (6) For Owners / Contractors -- more reliable close-out procedures

Overview of Working Group Proposed Draft (cont'd)

G. FUNDAMENTAL SHIFTS

- (1) Fundamental Shift for Claimants: Up-front Notice for all Projects (as opposed to Past Due Notice on selected Projects)
- (2) Fundamental Shift for Owners/Contractors: Burden to “police” payments shifts to Owner/ Contractor
 - (a) Identification of all payment exceptions in Conditional Waivers
 - (b) Reliance on Unconditional Waivers (without verification of payment)

Overview of Working Group Proposed Draft (cont'd)

G. FUNDAMENTAL SHIFTS (cont'd)

- (3) Fundamental Shift for Owners: Derivative lien claims not limited to Retainage /Fund-Trapping
 - (a) No limitation on Owner's personal liability
 - except for purchasers at foreclosure
 - (b) Increases exposure for Removables

What Happens Now?