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# Helping Homeowners Enforce Contracts in a Post-Storm Era



**AFTER  
THE  
STORM**

In the aftermath of Hurricane Harvey, many emergency restoration and construction businesses will face the dilemma of how best to balance their desire to serve the community with the necessity of securing payment for their work. Fortunately, Texas law gives businesses the means to protect their fiduciary interests while still allowing them a level of flexibility.

The damage inflicted on the greater Houston area is staggering. Over 100,000 homes were destroyed, while hundreds of thousands were rendered temporarily uninhabitable. Infrastructure collapsed. Tens of thousands of businesses were similarly damaged and face serious obstacles as they work to re-open.

Houstonians long for a day when we can say “Houston has recovered.” We know homes will be rebuilt and busi-

nesses will re-open. However, that recovery will consist of tens of thousands of individual projects—whether a home, a strip mall, or a church—and each project will require skilled businesses and individuals investing time, using equipment, and supplying materials. And for each project, those businesses and individuals must be paid. Only liquid currency can grease this epic reconstruction.

Unfortunately, one cannot always count on insurance carriers or the National Flood Insurance Program to be timely, trustworthy, or competent paymasters. When payment comes late or not at all, the ripple-effects can be severe. After all, the businesses that are rebuilding and restoring face costs of their own: crews expect their paychecks; vehicles and equipment must be bought and maintained; and vendors must be paid for materials.

## Game Plan for All Jobs Always

Businesses and individuals should always ensure their investment of time, materials, and equipment is well documented. Especially in the frantic wake of natural disasters, when projects abound and time is limited, businesses and individuals often neglect to document their work contemporaneously. This is unwise.

Follow these four steps for each and every project:

1. Put initial quotes and estimates in writing and do so well in advance. Make sure your clients are aware—and have plainly accepted in writing—the initial estimate before the first nail is hammered or the first shingle is delivered.
  - a. To the extent possible, include the project name and address with the quote or estimate. This will be essential, even for material suppliers, to collect.
  - b. If it is impossible to state the total price (e.g., it is unknown how many days the dehumidifier needs to run to dry a building),

- then state the costs per unit.
2. Dispatch invoices in a timely manner and at regular intervals, and keep copies of all invoices.
  3. Keep receipts for supplies and materials as well.
  4. Take pictures of the work being performed at various stages of completeness. This is an easy step and can be important in proving what was done and when.

### What About Non-Payment?

What can be done when a client or customer does not pay those invoices for work performed or for materials provided? How can businesses or craftsmen protect their economic interests without hounding clients who are in the midst of their own difficult recovery process? The legal options available now are no different than the legal options available before the storm.

### Protecting Your Business by Securing the Debt, or Just Being a Jerk?

Especially in the aftermath of a disaster, some unpaid businesses, subcontractors, and contractors are hesitant to file a statutory lien against a non-paying client or customer. After all, no one wishes to kick customers while they are down. And as members of the community themselves, these contractors and subcontractors appreciate and have sympathy for the non-paying client. These are important considerations, and certainly valid.

### You May Already Have a Lien

These unpaid businesses, subcontractors, and contractors are likely unaware that *they may already have a lien* under the Constitution of the State of Texas. In Texas, if work is done or if material is furnished for a home or business (limited to the buildings associated with that home or business), “[m]echanics, artisans and materialmen of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or

material furnished.”<sup>1</sup> These “Constitutional liens” are automatic and require no notice or documentation. However, such a lien is not enforceable to subsequent purchasers of the property subject to the lien, so long as those subsequent purchases had no notice of it.<sup>2</sup>

### To File a Lien or Not to File, That is the Question

Therefore, the question for an unpaid contractor or subcontractor is not whether to seek a lien—but rather, whether to secure the rights provided in the Constitutional lien by filing a statutory lien. Failing to file a statutory lien gives no benefit to the property owner who did not pay his or her debt. Instead, it merely deprives the contractor or subcontractor of further security. Given that a lien already exists against the property where the work was performed, those who performed that work should feel no hesitation about further securing their rights through a statutory lien.

Under the Texas Property Code, contractors and sub-contractors, suppliers of materials to specific projects, and anyone who “labors, specially fabricates material, or furnishes labor or materials for construction or repair in this state of (A) a house, building, or improvement; (B) a levee or embankment to be erected for the reclamation of overflow land along a river or creek; or (C) a railroad... by virtue of a contract with the owner or the owner’s agent, trustee, receiver, contractor, or subcontractor,” are able to file statutory liens on properties.<sup>3</sup> This applies to large businesses and individual craftsmen alike. A statutory lien offers a lienholder the additional protection of knowing the lien runs with the property; the nonpaying customer may sell the property, but the lien will remain in place.

A statutory lien is a powerful tool. As a result, businesses should ensure they follow the requirements precisely. An experienced attorney can help ensure all the requirements are met.

### How to File Lien Properly (Without a Trusty Attorney by Your Side)

Whenever a contractor, sub-contractor, or supplier of materials encounters a nonpaying customer, it should take the following steps. The first step is notice:

1. If the unpaid party is a subcontractor, the subcontractor first must provide notice to both the owner and the original contractor before filing a lien. The subcontractor must provide this notice on or before the 15th day of the second month following first delivery of materials or the performance of labor.<sup>4</sup>

The process of actually filing a lien is subject to strict deadlines as well:

2. For a residential project, liens must be filed with the County Clerk’s office no later than the 15th day of the *third* calendar month after the day on which the indebtedness accrues.
3. For all other projects, liens must be filed with the County Clerk’s office no later than the 15th day of the *fourth* calendar month after the day on which the indebtedness accrues.<sup>5</sup>

A lien takes the form of an affidavit, by which the lienholder swears to certain facts; to ensure a lien is enforceable, the lienholder must:

4. Sign the lien, and ensure the lien contains:
  - a. A sworn statement of the amount of the claim;
  - b. The name and last known address of the owner or reputed owner;
  - c. 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;
  - d. 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;

- e. The name and last known address of the original contractor;
- f. A description, legally sufficient for identification, of the property sought to be charged with the lien;
- g. The claimant's name, mailing address, and, if different, physical address; and
- h. 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.<sup>6</sup>

Once the lien is filed, the lienholder must take certain steps to ensure proper notice is provided:

- 5. A copy of the lien must be sent by registered or certified mail to the property's owner or reputed owner at the owner's last known address, not later than the fifth day after the date the affidavit is filed with the county clerk.
- 6. Additionally, if the lien was filed by a subcontractor, a copy of the affidavit must also be sent to the original contractor at the original contractor's last known address.<sup>7</sup>

The process is different for projects on public lands, and it is advisable to engage the help of an experienced attorney to secure the debt in those cases, which will usually require chasing after a bond.

### With the Debt Secured, the Lienholder Can Choose to Be Patient, or Not

By filing a lien, the contractor, subcontractor, or provider of materials has now protected its ability to collect a debt. *This does not mean, however, that the debt must be pursued immediately.* As Houstonians work to repair their lives and businesses, many professionals may choose to give their clients and customers additional time to satisfy their obligations. This is commendable, and certainly en-

couraged. However, in many instances, there will come a time when this is no longer an option.

If a lienholder wishes to file and (especially) foreclose on a lien, he or she should consider hiring an attorney. Foreclosing on a lien requires a lawsuit, and business owners may find it is more practical, more efficient, and ultimately more economical to leave that task to experienced attorneys. However, if a lienholder chooses not to retain an attorney and instead chooses to pursue the matter himself or herself, there are important deadlines with which the lienholder must comply.

Unless the property is a residential property, a lienholder must file a lawsuit to foreclose on the lien by the latter of either:


- a. two years after the last day he or she could have filed the lien affidavit (see Nos. 3 and 4 above); or
- b. one year after completion, termination, or abandonment of the work under the original contract.<sup>8</sup>

If the lien is against a residential property, the contractor must sue to foreclose by the latter of either:

- a. one year after the last day the lien could have been filed; or
- b. within one year after completion, termination, or abandonment of the work under the original contract.

If a lienholder fails to abide by these deadlines, the lienholder may find himself or herself unable to foreclose on the lien. However, foreclosing on a lien is not the only remedy for an unpaid party. A lawsuit for breach of contract is an available option until the expiration of four years from the breach of the contract.<sup>9</sup> The same is true for a suit on sworn account.<sup>10</sup>

Our region was changed by this devastating storm. But our laws and solid business practices have not changed. The reconstruction efforts could represent some of the most profitable years

for many local companies, or it may be a period of over-extending credit, cash-heavy projects, delayed billings, and ultimate loss. To avoid the latter, proprietors and firms must stay organized and disciplined, and they should utilize the remedies available, such as the lien. It will then be for them to choose whether to be aggressive about the enforcement and collection, or be patient. 

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### Endnotes

1. Tex. Const. art. XVI, § 37.
2. *Cont'l Radio Co. v. Cont'l Bank & Tr. Co.*, 369 S.W.2d 359, 362 (Tex.Civ.App.—Houston 1963, writ ref'd n.r.e.).
3. Tex. Prop. Code § 53.021(a).
4. Tex. Prop. Code § 53.252.
5. Tex. Prop. Code § 53.052.
6. Tex. Prop. Code § 53.054.
7. Tex. Prop. Code § 53.055.
8. Tex. Prop. Code § 53.158.
9. Tex. Civ. Prac. & Rem. Code § 16.004 (a)(3).
10. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002).



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