

Using a Mechanic's Lien to Get Your Money in Texas

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IMPORTANT DISCLOSURE

You no doubt know that a lawyer cannot type any thing without a disclaimer of some sort. So that you are not disappointed, here's mine: Please note that the information in this paper is designed as a brief recapitulation of the Texas lien laws for those already familiar with the law. This paper is not intended or suitable for those not familiar with either the lien laws or the strict requirements the laws impose. Not knowing or following the law may result in dire consequences -- you may lose substantial money by not protecting your lien rights. Please also note that this paper is not intended to be a comprehensive compilation of the lien laws. In the interest of brevity, not all sections of the lien laws are discussed. There may be some sections which could affect your rights which are not listed. Finally, the lien laws are amended or changed over time. This paper obviously does not capture future amendments. That said, you may find this paper extremely helpful when counting sheep does not work.

I. INTRODUCTION

The construction lien laws, especially in Texas, are not intended to be easy. Easy lien laws would entitle each contractor or supplier with a mechanic's and materialman's lien at the onset of the project until paid in full. Or, the Texas lien laws could be modeled on the Miller Act, which is the law protecting unpaid labor or material suppliers on federal projects. Many states have what are called little Miller Act statutes which are relatively straight forward schemes to protect unpaid providers of labor or materials. The lien laws that the Texas legislature has enacted are difficult to understand and follow, and often change and trap the unwary. The Texas Legislature has done much to keep construction lawyers like me busy, by creating such a confusing and tangled web of lien laws that clients have to call for help. The purpose of this paper is to simplify, as much as possible, the construction lien or bond claim process in Texas. Other states are obviously different. Perfection of lien rights can basically be broken into three steps.

The first step in any claim on a construction project is to determine the nature of the project. You must determine whether the project is: (1) private work; (2) state public work; or (3) federal public work. This determination is based on the identity of the owner of the project.

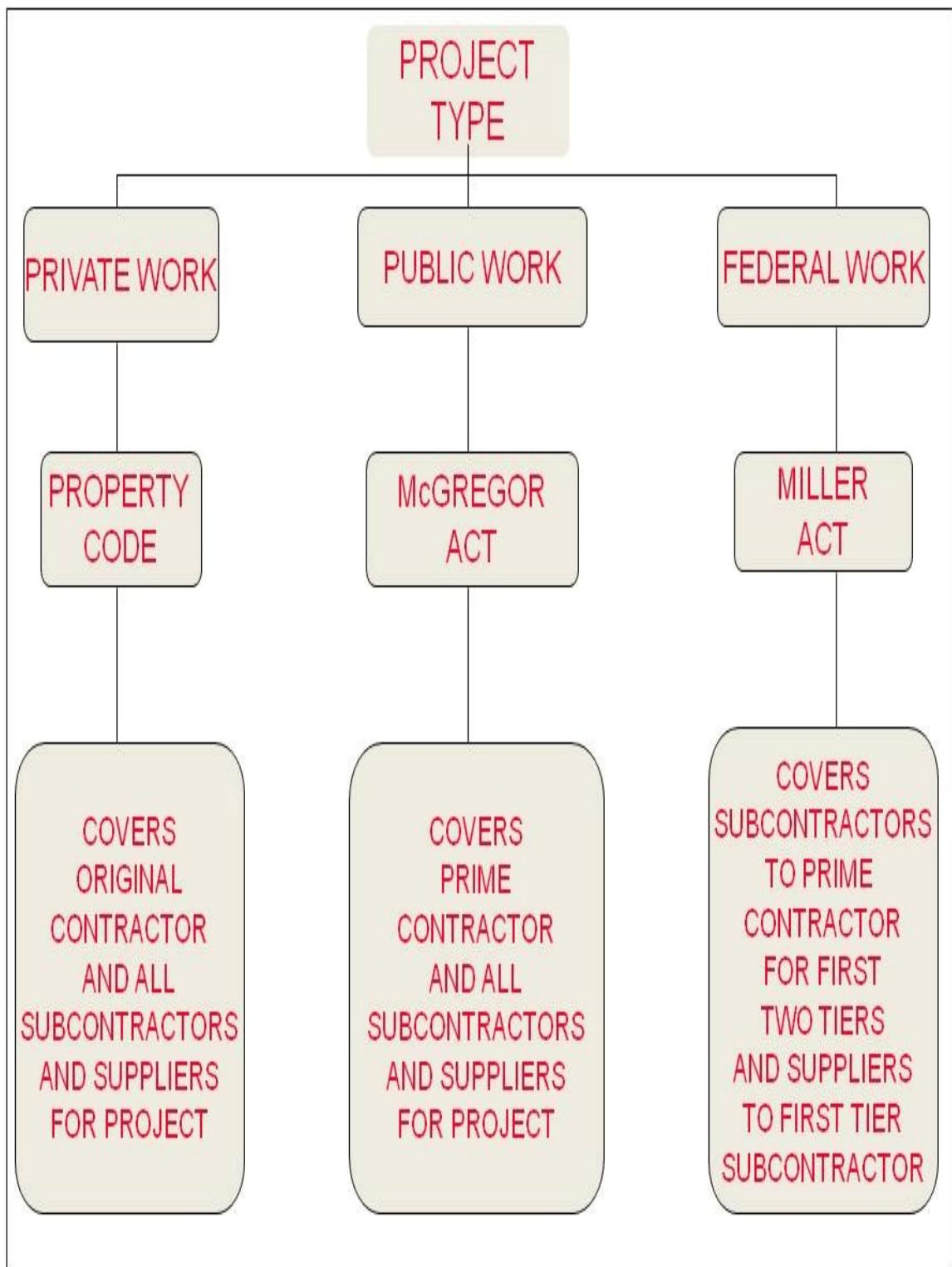
The Texas Property Code, Chapter 53, addresses claims arising out of private work on which no bond was issued or for which the owner obtained a "statutory bond" in accordance with the terms of the Property Code.

Claims on public work projects in Texas are governed by the Texas Government Code Chapter 2253, formerly known as the McGregor Act. The McGregor Act applies to contracts for the construction, alteration or repair of any "public building" or "public work" between prime contractors and the State of Texas, or with political subdivisions like a county, municipality, departments, boards, agencies, school districts, or any other governmental authority.

Claims on federal public work are governed by the Miller Act, 40 U.S.C. Section 270b. It requires prime contractors to post payment bonds in connection with all contracts in excess of \$100,000 for the construction, alteration or repair of any "public building" or "public work" of the United States of America. A project that is owned by a private entity, or by a non-federal public agency, such as a local housing authority, a municipal utility district or a school district, but which is financed, in whole or in part, with federal funds is not covered by the Miller Act. Those types of projects are governed by the McGregor Act or the Property Code (depending on ownership).

The second step is to take the action required by the applicable law to perfect the claim. This means send the notices at the right time to the right parties, and/or file your lien affidavit in a timely manner.

The third step assuming the claim has been properly perfected, but not paid, is to initiate suit to enforce the claim within the deadlines for the applicable laws or bonds. A note of caution - these deadlines are short. Pay close attention to the sections of this paper entitled "ENFORCEMENT". If you fail to file suit within the appropriate time, all your efforts in sending notices, filing claims and filing affidavits will be wasted.



II. THE PROPERTY CODE (TEXAS PRIVATE WORKS)

Chapter 53 of the Property Code is the Texas statute that governs improvements to privately owned real estate. The following discussion will cover the procedures for obtaining a lien, making a claim on a payment bond and making a claim under the "trust fund" statute.

A. ORIGINAL CONTRACTOR'S LIENS:

1. Constitutional Lien: The Texas Constitution provides for a lien. A constitutional lien is available only to those who have a contract with the owner. It protects prime or "original contractors", as they are referred to in the Property Code, but not subcontractors.

2. Perfection of Constitutional Lien: A contractor does not have to comply with the notice provisions of the Property Code to enforce the lien against the owner. For the contractor to be protected against the rights of third parties, such as subsequent purchasers of the property, the contractor must see that the third party has notice of the lien. This may be accomplished by filing a lien affidavit (See Private Form #6).

3. Original Contractor's Property Code Lien: In order to perfect a lien under the Property Code, an original contractor must file a lien affidavit not later than the 15th day of the fourth month following the month in which the original contract has been: a) materially breached and thus terminated by the contractor or by the owner; b) completed; c) finally settled; or d) abandoned. The original contractor must also within 10 days after filing the lien affidavit send to the owner by certified or registered mail, addressed to the owner's last known business or residence address, a copy of the affidavit claiming lien.

4. Definition of "Original Contractor": An original contractor is one who has a direct relationship with the owner, either directly or through the owner's agent. A subcontractor has no contract with the owner, but may have a contract with, and may furnish the labor or material to an original contractor or to another subcontractor. The difference between an original contractor and a subcontractor is significant. An original contractor has very simple notice procedures. A subcontractor, whether first or second tier, has additional notice requirements. In addition, a subcontractor's lien only secures payment of funds trapped in the hands of the owner or retainage funds which the owner is required to keep by law.

B. SUPPLIERS' AND SUBCONTRACTORS' PROPERTY CODE LIEN AND BOND CLAIMS:

Generally, a subcontractor or supplier, is dealing with one of the following situations:

1. There is no payment bond since bonds on private construction projects in Texas are optional. In this situation you only have your rights to a lien to secure payment of the "trapped funds" and/or the "10% statutory retainage fund".

2. The original contractor may have given the owner a payment bond. In this situation you can perfect a claim against the bond by giving the appropriate notices and/or by filing a perfected lien.

3. The subcontractor/supplier is dealing with another subcontractor who has provided a payment bond. In this situation you have lien rights against "trapped funds" or "statutory retainage" and a claim against the subcontractor's payment bond, and possibly a claim against the original contractor's bond.

The safe course of action is always to file notices and a lien in accordance with the requirements of the Property Code. Safer yet is to perfect and file a lien, and to furnish copies of the lien affidavit and notice letters to the payment bond surety, if there is one, by certified mail.

C. TRAPPING FUNDS DUE UNDER PRIME CONTRACT (UNBONDED PROJECTS):

The legal effect of a timely and proper notice of claim by a subcontractor or supplier to the owner is to "trap" funds due the original contractor in the hands of the owner. It is essential that a claimant "trap funds" because unless funds are trapped in the hands of the owner, the claimant's recovery under its lien is limited to his share, if any, of the original contractor's 10% statutory retainage being withheld by the owner. It is to a claimant's advantage to send notices to the owner as soon as a payment problem is evident. In addition, the claimant should send a written demand for payment (Private Form #5) to the owner and the prime contractor.

D. STATUTORY RETAINAGE FUND (UNBONDED PROJECTS):

During the progress of work under the original contract and for 30 days after that work is completed, the owner of an unbonded project is required to retain either 10% of the amount of each original contract or 10% of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, using the reasonable value of the completed work. This retainage fund is for the benefit of claimants who have filed lien affidavits within 30 days after completion of the original contract and who have sent required notices. The 10% retainage requirement does not apply if there is a payment bond.

E. REQUIREMENTS FOR SUBCONTRACTORS AND SUPPLIERS:

E.1 Claimants contracting with an original contractor:

- (a) OPTIONAL RETAINAGE ONLY NOTICE - for all persons contracting with the original contractor to furnish material, labor and/or specially fabricated material, a notice may be sent to the owner not later than the 15th day of the second month following first delivery of materials or the performance of labor after the agreement was made (see Private Form #1). Any claimant who fails to provide the optional retainage notice must provide notice to the owner of each month's retention billed but unpaid within the time requirements described in Paragraph E.1(c) below.

E.1 (b) ADDITIONAL NOTICE FOR SPECIALLY FABRICATED MATERIAL:

- (i) To perfect a claim for specially fabricated items, the claimant must send a notice to the owner (and to the original contractor if dealing with a subcontractor or another supplier) not later than the 15th day of the second month following the month in which the order was received and accepted (see Private Form #2); and
- (ii) When material is delivered, give notice described in Paragraph E.1(c) below (Private Form #4).

E.1 (c) NOTICE FOR LABOR AND MATERIALS DELIVERED - including specially fabricated materials and retainage if optional retainage notice not given. Notice to owner (Private Form #4) and original contractor not later than the 15th day of the third month following each month during which labor or materials were furnished (DATE OF DELIVERY CONTROLS - NOT DATE OF INVOICE).

WARNING: If original contract is nearing completion, do not wait the full number of days as there may be no funds to "trap" in the owner's hands to insure your claim can be paid. To be safe, notice to the owner should be given no later than 30 days after completion of the original contract.

E.1 (d) FILING LIEN AFFIDAVIT (Private Form #6):

- (i) You must file not later than the 15th day of the fourth month following the last month in which you provided labor or material; or
- (ii) If claim is for specially fabricated materials, the lien affidavit must be filed by the 15th day of the fourth month from the earliest of (i) the last month the material was delivered; or (ii) the last month material would normally have been required; or
- (iii) For a portion of the statutory retainage held by the owner, within 30 days after completion of the original contract.
- (iv) After you have filed the Affidavit with the county clerk of the county in which the project is located, you must send copies of the Affidavit by registered or certified mail to the owner and original contractor, at their last known business or residence address, within 5 days after filing.

WARNING: The safest practice is to be sure that the lien affidavit is filed no later than 30 days after completion of the original contract.

E.2. Claimant's contract is with a subcontractor or a supplier:

E.2 (a) OPTIONAL RETAINAGE ONLY NOTICE-applicable to all persons contracting

with a subcontractor or a supplier to furnish material, labor and/or specially fabricated material:

A notice may be sent to the owner and original contractor not later than the 15th day of the second month following the month of first delivery of materials or labor under the agreement providing for retainage. (see Private Form #1). Any claimant who fails to provide the optional retainage notice must provide notice to the original contractor and/or owner of each month's retention billed but unpaid within the time requirements described in Paragraph E.2(c) below.

E.2 (b) FOR UNDELIVERED SPECIALLY FABRICATED MATERIALS:

- (i) Notice to owner and original contractor not later than the 15th day of the second month following the month in which the order was received and accepted. (Private Form #2).
- (ii) When material is delivered, give notice described in Paragraph E.2(c) below.

E.2 (c) FOR LABOR AND MATERIALS DELIVERED - including specially fabricated materials and retainage if optional notice not given.

- (i) Notice to original contractor (Private Form #3) not later than the 15th day of the second month following each month during which labor or materials were furnished; AND
- (ii) Notice (Private Form #4) to owner and original contractor not later than the 15th day of the third month following each month during which labor and materials were furnished.

E.2 (d) FILING LIEN AFFIDAVIT (Private Form #6):

- (i) You must file not later than the 15th day of the fourth month following the last month during which labor was performed or material was furnished; or
- (ii) If claim is for specially fabricated materials, file by the earliest date of (i) last month material delivered; or (ii) last month material would normally have been required; or
- (iii) If the original contract has been breached or terminated by the owner or prime contractor, or if the party with whom you contract commits a breach or terminates your sub-contract, file based on the date of the breach or termination.
- (iv) If claim is for a portion of the statutory retainage, file within 30 days after completion of the original contract.

- (v) After you have filed the Affidavit with the county clerk of the county in which the property is located (53.052(a)), you must send copies of the Affidavit by registered or certified mail to the owner's and original contractor's last known business or residence address. This notice has to be sent within 5 days after filing the Affidavit.

WARNING: The safest practice is to be sure that the lien affidavit is filed no later than 30 days after completion of the original contract.

E.3 Enforcement:

To enforce your lien claim you must file suit within two years after the date of filing your affidavit claiming lien or within one year after completion of the prime/original contract, whichever is later. These time limits are strict and for a claim against a bond they are even shorter, see H.3 of this book.

F. HOW TO OBTAIN INFORMATION:

In order to properly notify the Owner and Original Contractor, and in order to properly file a lien, various items of information must be available to a claimant. The Property Code has a provision to make this process easier. The Property Code allows a claimant to obtain, among other things; (1) a legal description of the property from the owner; (2) a copy of any bond furnished to the Owner or furnished to the Original Contractor or to any Subcontractor; (3) information on whether there is prior liens filed on the property; and (4) the name and address of the Owner (Private Forms 7 through 9). You may be charged up to \$25 for asking for this information from a person with whom you do not have a contract, but if the information is not provided to you, you may recover your reasonable and necessary costs incurred in obtaining the information requested.

G. "TRUST FUND" CLAIM:

Subchapter 162A. of the Property Code can provide a claimant with a means of recovery even where the claimant has failed to properly perfect a lien claim. The following are the significant aspects of the trust fund statute:

1. Personal Liability:

Where a contractor or subcontractor is paid, but fails to pay his subcontractor or supplier, the contractor or subcontractor, and its agents, officers, directors or the persons who directed or controlled the use of the monies received which were diverted to another project or use, may be held personally liable for the debt.

2. Criminal Penalties:

The diversion or misapplication of "trust funds" by a contractor, subcontractor, owner or any other officer, etc. is punishable by fine and/or imprisonment.

3. Lien Unnecessary:

The benefits of the trust fund statute may be claimed regardless of whether or not a lien has been perfected.

4. Parties Exempted:

Trust fund statute is not applicable to any lender, title company, closing agent, or bonding company.

5. Defense:

It is a defense under the Trust Fund Statute that the trust funds were used to pay the trustee's "actual expenses directly related to the construction or repair of the improvement".

H. THE PROPERTY CODE PAYMENT BOND:

The payment bond or "Property Code Payment Bond" (also called "Statutory Bond") is a payment bond posted by an original contractor (i.e., a contractor who has a direct contract with the owner) which meets the requirements set out in the next paragraph. Bonds posted by subcontractors are not Property Code payment bonds. When a valid Property Code payment bond has been filed, subcontractors and suppliers cannot foreclose liens against the Project, or file suits against the owner, but must look to the bond as their security in case the contractor does not pay.

1. Requirements for a Property Code Payment Bond:

- (a) The bond must be issued by a bonding company authorized and admitted to execute bonds in Texas.
- (b) The payment bond must be in a "penal sum" i.e., at least in the amount of the original contract price between the original contractor and the owner.
- (c) The bond must be signed by both the original contractor and the bonding company.
- (d) The bond must be conditioned on (i.e. guarantees) prompt payment for all labor and materials used on the project and payment for normal extras, not to exceed 15% of the contract price.
- (e) The owner must endorse the bond with his written approval.
- (f) The bond must be filed, together with a copy of the written original contract or memorandum of the contract, with the county clerk of the county in which the project is located.

2. Claims Against Property Code Payment Bond:
 - (a) The best way to perfect a claim against a Property Code payment bond is to follow all requirements for filing a lien against the project.
 - (b) The alternate method for perfecting a claim against a Property Code payment bond is to perfect a valid claim by giving the notices which are required for a lien, with the crucial difference that the notices which normally are to be given to the owner, must instead be given to the bonding company in order to perfect a claim against a statutory payment bond.

3. Enforcement:

The time limits for filing a lawsuit based upon a Property Code payment bond are strict. Suit may not be filed under the Property Code payment bond until 60 days after the claim is perfected. A lawsuit on a bond claim must be brought within 12 months after the claim is perfected.

I. CLAIMS ON NON-PROPERTY CODE PAYMENT BONDS:

An example of payment bonds which do not meet the Property Code requirements are all payment bonds furnished by someone other than a prime contractor. Because of the unlimited variety of terms which may be included in non-Property Code payment bonds, great care must be exercised in dealing with these bonds. It is very important to obtain a copy of any payment bond posted by a prime contractor and/or a subcontractor, as payment bonds may have terms which are more lenient or more strict than the Property Code bond, and may or may not allow recovery where recovery would be available on a Property Code bond.

J. LIENS ON RESIDENTIAL AND HOMESTEAD PROPERTY:

Residential property is defined under the Property Code as a single family house, duplex, triplex, or quadruplex or a unit in a multiunit structure used for residential purposes. Residential property is given special protection against liens. Homestead property is given even more protection. A mechanic's lien can be attached to residential property, but only if the following requirements are met:

1. The claimant other than an original contractor must give notice to the owner and original contractor of the unpaid balance not later than the 15th day of the second month following each month in which all or part of the claimant's labor was performed or material or specially fabricated material was delivered. The notice must state that if the claim remains unpaid, the owner may be subjected to a lien unless the owner withholds payment from the contractor or the claim is otherwise paid or settled. The notice must be sent by certified or registered mail.

2. If specially fabricated materials have not been delivered to the project or incorporated into the work, the claimant for those materials must give notice to the owner by the 15th day of the second month after the month in which the claimant receives and accepts the order for the material. If the

claimant did not contract with the original contractor, the claimant must also give the same notice to the original contractor. Once the specially fabricated materials have been delivered, the claimant must give notice of non-payment by the 15th day of the second month after the delivery of the materials.

Please note that the Property Code requires that the claimant provide certain specified disclosures to the owner about the owner's rights and liabilities. However, the claimant's failure to comply does not invalidate a lien.

3. Homestead Property

In addition to the requirements for perfecting a lien on residential property, to fix a lien on homestead property, the claimant must do the following:

- (a) Sign a written agreement, setting out terms of the contract, and containing the "Homestead Warning" with the owner of the homestead property, before work is performed. (See Texas Property Code §53.255 for warning).
- (b) If the owner of the homestead is married, both spouses must sign the contract.
- (c) The contract must be filed with the clerk of the county in which the homestead is located. The best practice is to have the contract recorded by the county clerk before any work or material is provided under the contract.
- (d) Add to the notice of non-payment required for residential property the following specified notice:

"If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:

"(1) after receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or

"(2) during construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

"If you have complied with the law regarding the 10 percent retainage and you have withheld payment sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to you contractor before you received written notice of the claim."

When this is done, the mechanic's lien on the homestead benefits all the persons who do work or furnish materials on the job. If the Original Contractor fails to comply with these requirements,

none of the subcontractors or suppliers will have valid lien claims.

K. LIENS ON LEASEHOLD IMPROVEMENTS:

Anyone who contracts to provide improvements to a tenant may acquire a lien against the tenant's lease rights, known as the leasehold estate. However, neither the lien against the leasehold estate, nor the contract to do improvements for a tenant gives a contractor any lien rights against the owner of the property. Unless the lien claimant can show that a tenant was acting as the agent of the landlord, in contracting for improvements to the leased property, claimant is usually left without any significant lien rights on leasehold improvements.

L. PRIVATE FORMS:

The forms that follow the Property Code Deadlines Chart are examples containing the requisite warnings and notices. Please note that each instance of non-payment may be different and require a different legal approach. Please consult your legal advisor for an analysis of your particular fact situation. Suppliers and subcontractors who frequently file notices and liens should consult with their attorneys to have forms prepared for their specific needs.

PROPERTY CODE DEADLINES
(PRIVATE CONTRACTS IN STATE OF TEXAS)

(1) MONTH LABOR PERFORMED OR MATERIALS DELIVERED	(2) LAST DATE FOR EARLY NOTICE TO ORIGINAL/PRIME CONTRACTOR BY CLAIMANT WHO DEALT WITH SUBCONTRACTOR	LAST DATE FOR FUND TRAPPING NOTICE TO OWNER AND ORIGINAL CONTRACTOR OR REGULAR NOTICE TO SURETY ON PROPERTY CODE BOND	(3) LAST DATE FOR FILING LIEN AFFIDAVIT (ASSUMING (1) IS LAST MONTH OF PERFORMANCE OR DELIVERY)
JANUARY	MARCH 15	APRIL 15	MAY 15
FEBRUARY	APRIL 15	MAY 15	JUNE 15
MARCH	MAY 15	JUNE 15	JULY 15
APRIL	JUNE 15	JULY 15	AUGUST 15
MAY	JULY 15	AUGUST 15	SEPTEMBER 15
JUNE	AUGUST 15	SEPTEMBER 15	OCTOBER 15
JULY	SEPTEMBER 15	OCTOBER 15	NOVEMBER 15
AUGUST	OCTOBER 15	NOVEMBER 15	DECEMBER 15
SEPTEMBER	NOVEMBER 15	DECEMBER 15	JANUARY 15
OCTOBER	DECEMBER 15	JANUARY 15	FEBRUARY 15
NOVEMBER	JANUARY 15	FEBRUARY 15	MARCH 15
DECEMBER	FEBRUARY 15	MARCH 15	APRIL 15

- (1) IF NOTICE PERTAINS TO SPECIALLY FABRICATED ITEMS THE DATE OF RECEIPT AND ACCEPTANCE OF THE ORDER CONTROLS NOTICE ON UNDELIVERED SPECIALLY FABRICATED ITEMS.
- (2) CONTRACTUAL RETAINAGE NOTICE TO OWNER AND/OR PRIME CONTRACTOR DUE.
- (3) SUBS AND SUPPLIERS SHOULD ALWAYS REMEMBER TO FILE AFFIDAVIT WITHIN 30 DAYS OF COMPLETION TO TRAP STATUTORY RETAINAGE.

Private Form #1 - NOTICE OF RETAINAGE AGREEMENT

[Date]

(1)

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

Our company is pleased to be involved in the construction of your (2) at (3) under an agreement with (4) your (5). Our part of this project will be to furnish the (6) called for by the plans.

Our agreement provides that a portion of the contract price is to be retained until (7).

The amount to be retained is (8).

We are advising you that we have commenced supplying labor or material to your project and of the above terms of our agreement so that you will have the information and notice required by law. If you have any questions, do not hesitate to call us.

Sincerely,

(9)
(10)

cc: (11)

* * * * *

- (1) Letter addressed to the owner of the property being improved.
- (2) Indicate type of improvement.
- (3) Address of job.
- (4) Name of firm under whom you are working.
- (5) Status of that firm, such as "general contractor," "roofing subcontractor", etc.
- (6) Describe the labor and/or material that you will perform.
- (7) Insert time for paying retainage.
- (8) Amount or percentage of retainage.
- (9) Your firm name.
- (10) Name and capacity of person signing letter.
- (11) Copy the original contractor by certified mail unless you have a contract directly with the original contractor.

Private Form #2 - NOTICE OF SPECIALLY FABRICATED ITEM

[Date]

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

Our firm is pleased to be involved in the construction of your (2) at (3) under an agreement with (4) your (5). Our part of this project will be to fabricate and furnish (6) for use as a component part of the construction as called for in the plans. This component will be reasonably unsuitable for use elsewhere. The order for this item has been received and accepted and the price to be billed to our customer is \$(7).

We are advising you of the foregoing so that you will have the information and notice specified by law.

If you have any questions, please call us.

Yours very truly,

(8)
(9)

cc: (10)

* * * * *

- (1) Letter addressed to the owner of the property being improved.
- (2) Indicate type of improvement.
- (3) The address of the job, with street and city.
- (4) Name of company for whom you work.
- (5) Status of the person under whom you are working, such as "general contractor" or "roofing subcontractor", etc.
- (6) General description of the item being fabricated.
- (7) Contract price for the item being fabricated.
- (8) Name of your company.
- (9) Person signing letter and capacity.
- (10) Copy to original contractor by certified mail unless the order was direct from the original contractor.

Private Form #3 - PRELIMINARY NOTICE TO ORIGINAL CONTRACTOR

[Date]

(1)

Re: Job: (2)
Owner: (3)
Location: (4)

Dear Sir:

We have furnished _____ (5) _____ on the above job to your subcontractor, _____ (6) _____. Our books show an unpaid balance due us on this job of \$ _____ (7) _____ through the end of _____ (8) _____.

We are giving you this notice in order to protect our rights under the mechanic's lien laws of Texas.

We wish to cooperate with both you and our customer in any way that would be helpful. Should you desire any additional information, please advise us.

Sincerely,

$$\frac{(9)}{(10)}$$

cc: _____ (11)

* * * *

- (1) Letter addressed to the original contractor under whom you are working sent certified mail.
 - (2) Name of project.
 - (3) Owner's name.
 - (4) Address of job--street, city and state.
 - (5) Indicate generally what has been furnished.
 - (6) Your customer.
 - (7) Amount due.
 - (8) Date of last billing.
 - (9) Your firm name.
 - (10) Name and capacity of person signing letter.
 - (11) Your customer.

Private Form #4 - NOTICE TO OWNER AND ORIGINAL CONTRACTOR

[Date]

(1) _____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Dear Sir:

We have furnished (2) to (3). (4) on the construction in progress on your property at (5). We have not been paid the amounts due us for the month of (6) in the amount of \$ (7) as shown by the attached statement which is made a part hereof. Under the mechanic's lien laws of Texas, a subcontractor or supplier of goods or labor is required to notify the owner of all claims which are not paid. Failure to give this notice may cause us to lose our rights under the mechanic's lien laws if the sums are not finally paid.

The law requires that we advise you that if our bill is not paid, you may be personally liable and your property subjected to a lien unless you withhold payments to the contractor for the payment of our statement or unless the bill is otherwise paid or settled.

Demand is hereby made for the payment of our claim from funds withheld by you as owner unless the contractor disputes this claim as required By law.

Should you have any question concerning our claim, please advise us. We will appreciate being advised if there is a dispute as to our claim from the contractor.

Sincerely,

(9)
(10)

cc: (11) Certified Mail Return Receipt Requested
(12) Certified Mail Return Receipt Requested

* * * * *

- (1) Letter addressed to the owner of the property being improved and original contractor.
- (2) Indicate generally what has been furnished.
- (3) Name of the person to whom you furnished goods or labor.
- (4) Indicate status of person to whom you furnish, such as "contractor" or "subcontractor."
- (5) Address of the job--street number, and city.
- (6) Indicate the month or months during which work was done for which payment has not been received.
- (7) The amount due.
- (8) If you have already filed a lien affidavit or are doing so simultaneously insert: "We have elected to file an affidavit claiming a lien on your property and enclose a copy of the affidavit as filed."
- (9) Your company.
- (10) Person signing letter and capacity.
- (11) The general contractor, if not your customer.
- (12) Your customer.

Private Form #5 - DEMAND FOR PAYMENT

[Date]

(1)

Certified Mail
Return Receipt Requested

Dear Sir:

We have furnished (2) to (3), (4) on the construction in progress on your property at (5). We have not been paid the amounts due us for the month of (6) in the amount of \$ (7).

Demand is hereby made for the payment of our claim from funds withheld by you as owner.

Should you have any question concerning our claim or this notice, please advise us. We will appreciate being advised if there is a dispute as to our claim from the contractor.

Sincerely,

(8)
(9)

cc: (10)
(11)

* * * * *

- (1) Letter addressed to the owner of the property being improved sent by Certified Mail
- (2) Indicate generally what has been furnished.
- (3) Name of the person to whom you furnished goods or labor.
- (4) Indicate status of the person to whom you furnish, such as "contractor or "subcontractor"
- (5) The address of the job, street, number and city.
- (6) Indicate the month during which work was done for which payment has not been received.
- (7) The amount due.
- (8) Your company.
- (9) Person signing letter and capacity.
- (10) Send copy to general contractor.
- (11) Send copy to your customer, if other than the general contractor.

Private Form #6 - AFFIDAVIT CLAIMING LIEN

THE STATE OF TEXAS :

AFFIDAVIT CLAIMING LIEN

COUNTY OF (4) :

BEFORE ME, a notary public in and for the State of Texas, on this day personally appeared the undersigned, who being by me duly sworn, on oath states:

1. My name is (1). I am the (2) of (3) ("Claimant") and am authorized to make this affidavit on its behalf as the sworn statement of its claim.

2. Claimant furnished labor and/or materials for the improvement of the following described land in
(4) County, Texas:

(5)

3. The labor and/or material was furnished for such improvement to (6). (7).

4. (8) is the original contractor for such improvement.

5. (9) is the owner or reputed owner of the land and improvements thereon.

6. The kind of work done and/or material furnished by claimant is (10) and is made up of the items shown on the attached Exhibit "A" which reflects the dates of Performance and/or delivery.

7. The amount unpaid for such furnishing and due and owing to claimant is \$ (11), which is true, correct, and just, with all just and lawful offsets, payments, and credits known to affiant allowed.

8. Claimant's address is (12).

9. Claimant provided notices as required under Chapter 53 of the Texas Property Code on (13).

Claimant claims a lien against all the above described land and improvements thereon, including, without limitation, removables, in the amount shown above pursuant to Chapter 53 of the Texas Property Code, [and/or the Texas Constitution] and makes this sworn statement of claim in support thereof.

(3)

By: (1)

THE STATE OF TEXAS :

COUNTY OF _____ :

BEFORE ME, the undersigned authority, on this day personally appeared (1), (2) of
(3), known to me to be the person and officer whose name is subscribed to the foregoing instrument, who after being by me duly sworn acknowledged that the statements contained above are true and correct and that he executed the

same for the purposes and consideration therein expressed, in the capacity therein stated, and as the act and deed of said
(14).

Given under my hand and seal of office this _____ day of _____, 20____.

Notary Public - State of Texas

Typed or Printed Name of Notary Public

My Commission Expires:

* * * * *

- (1) Name of the person signing the affidavit.
- (2) Position of the affiant with the claimant, such as credit manager, controller, owner, partner, president, etc.
- (3) Name of claimant.
- (4) County in which the land is located.
- (5) Legal description of the land, e.g.:
 - (a) Lot 1, Block 2, Jones Subdivision of the City of Austin, per plat recorded in Volume ___, Page ___, Plat Records, Travis County, Texas; or
 - (b) The 50 acres covered by the deed from Frederic N. Freeloader to Horace P. Homeowner, dated _____, recorded in Volume ___, Page ___, Deed Records, Travis County, Texas, which is referred to for a more complete description.
- (6) Name of the general contractor or subcontractor for whom work was done or material was furnished. If a subcontractor, add "a subcontractor."
- (7) If the work or material was furnished under a written contract, it is preferable to attach the contract and insert, "The labor and/or material was furnished under a written contract which is attached hereto and made a part hereof."
- (8) Name of original (general) contractor.
- (9) Name of property owner.
- (10) General description of work done or materials supplied.
- (11) Amount due, including retainage.
- (12) Your business address.
- (13) Dates of prior notices.
- (14) e.g., partnership, corporation, etc.

Note: Original contractors (those contracting with the owner) also have a Texas Constitutional lien. If appropriate, you may wish to claim such a lien.

Private Form #7 - REQUEST FOR INFORMATION FROM OWNER

_____ (1) _____, 20 _____

_____ (2) _____

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

Re: _____ (3) _____

We are furnishing labor and/or materials for the above-referenced project. Pursuant to Section 53.159(a) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) A legal description of the real property upon which the above-referenced project is being constructed.
- (2) Whether a payment bond has been provided to you on this project, and if so, the name and last known address of the surety and a copy of the bond.
- (3) Whether there are any prior recorded liens or security interests on the real property being improved and if so, the name and address of the holder of the lien or security interest.

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

Also, we request you furnish our company with a copy of the affidavit of completion, if used, filed with the county clerk for this project. Thank you for your attention to this request.

_____ (4) _____

By: _____ (5) _____

* * * * *

- (1) Date of request.
- (2) Name and address of owner.
- (3) Project.
- (4) Your Company.
- (5) Officer of your Company.

PRIVATE FORM #8
REQUEST FOR INFORMATION FROM ORIGINAL CONTRACTOR

[(1) Date]

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

RE: _____ (3)

We have furnished labor and/or materials for the above-referenced project. Pursuant to Section 53.159(b) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) The name and last known address of the person to whom you furnished labor or materials for the project.
- (2) Whether a payment bond has been provided by or to you on this project, and if so, the name and last known address of the surety(s) and a copy of the bond(s).

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

(4)

By: _____ (5)

* * * * *

- (1) Date of request.
- (2) Name and address of original contractor.
- (3) Project.
- (4) Your company.
- (5) Officer of your company.

PRIVATE FORM #9
REQUEST FOR INFORMATION FROM SUBCONTRACTOR

[(1) Date]

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

RE: _____ (3)

The undersigned _____ (4) _____ the above-referenced project. Pursuant to Section 53.159(c) of the Texas Property Code, we request that you provide us with the following information within 10 days after receipt of this request:

- (1) The name and last known address of each person from whom you purchased labor or materials for the project, other than those materials which were furnished by you from your own inventory.
- (2) The name and last known address of each person to whom you furnished labor or materials for the construction project.
- (3) Whether a payment bond has been provided by or to you on this project, and if so, the name and last known address of the surety and a copy of the bond.

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

(5)

By: _____ (6)

* * * * *

- (1) Date of request.
- (2) Name and address of subcontractor.
- (3) Project.
- (4) Fill in as applicable:
(a) is the owner of
(b) is the original contractor on
(c) is the surety which bonded the original contractor for
(d) has furnished work under your subcontract on.
- (5) Your company.
- (6) Officer of your company.

III. THE GOVERNMENT CODE Chapter 2253 (Formerly the McGREGOR ACT) (TEXAS PUBLIC WORKS)

A. APPLICATION:

The Government Code Chapter 2253 (formerly the McGregor Act) applies to contracts for the construction, alteration or repair of any "public building" or "public work" between prime contractors and the State of Texas, any county, municipality, or any departments, boards, or agencies thereof, any school district, or any other governmental authority organized under the laws of the State of Texas.

YOU CANNOT ESTABLISH A MECHANIC'S LIEN ON A PUBLIC PROJECT IN THE STATE OF TEXAS.

Your remedies on a public project are limited to a statutory lien on funds payable under prime contracts of \$25,000 or less (see Section 53.231 of the Property Code) or a claim against a payment bond on prime contracts in excess of \$25,000. The McGregor Act requires prime contractors on public works in the state of Texas whose contract is in excess of \$25,000 to furnish a payment bond in the amount of the prime contract price for the protection of all persons supplying labor, equipment, or materials to the project.

B. WHO IS PROTECTED:

Any party who has furnished labor, materials, or equipment or performed a part of the work required by the prime contract is protected by the McGregor Act. A party's relationship to the prime contractor is very important, because additional notices with shorter time limits are required of a claimant who does not have a contract directly with the prime contractor.

C. HOW TO PERFECT A CLAIM - You must send the notices described below by certified or registered mail.

1. Notice requirements always applicable (first and second tier):

- (a) Not later than the 15th day of the third month following each month in which labor was done or material furnished for which payment has not been made, send written notice of claim and sworn statement of account to the prime contractor and the prime contractor's bonding company. A sample form is attached (see Public Form #1).
 - (i) The sworn statement of account must state that "the amount claimed is just and correct and that all just and lawful offsets, payments, and credits known to the affiant have been allowed" and should state the amount of retainage withheld (if any), but not yet due;

- (ii) If no written contract exists, the notice must identify the party who employed the claimant, the date of the performance of labor or delivery of materials, a description of the labor or materials and prices therefore, or similar itemization of the claim, and include if possible copies of invoices, delivery tickets, or orders showing a reasonable identification of the project and destination of delivery (see Public Form #1).
- (iii) If a written contract exists, you may attach, as your notice, a copy of the contract advising of the completion of same or the value of partial completion of same, with the sworn statement of account; if a written unit price agreement exists, attach to the sworn statement of account a list of units and unit prices and a statement of those units completed and partially completed (see Public Form #1).
- (iv) If the claim is for multiple items of labor or materials to be paid for on a lump sum basis, the notice must identify the party who employed the claimant or to whom the materials were delivered, the amount of the contract and whether written or oral, the amount claimed, the approximate date or dates of performance or delivery and a description of the labor or materials.
- (v) If the claimant's contract provides for "retainage" (defined as any amount not required to be paid to the claimant within the month next following the month in which the labor was done or materials furnished or both), within 90 days of completion of the prime contract, send to the prime contractor and its bonding company notice of any retainage called for, but not previously covered by any notice. The notice should show the amount of the contract, the amount paid, and the balance outstanding (see Public Form #2).

2. Additional notice requirements for claimants who contracted with a subcontractor (2nd Tier):

- (a) Give written notice of unpaid balance to prime contractor not later than the 15th day of the second month next following each month in which labor was done or materials delivered, in whole or in part, for which payment is due and has not been received. A copy of the statement sent to the subcontractor may suffice as this notice (see Public Form #3).
- (b) If a retainage agreement exists, the claimant must give notice to the prime contractor not later than the 15th day of the second month next following the commencement of the delivery of materials or the performance of labor under the agreement. This notice must indicate the nature of the retainage agreement (see Public Form #4).
- (c) If the claim is for undelivered specially fabricated materials, the claimant must give written notice to the prime contractor not later than the 15th day of the second month following receipt and acceptance of the order for such specially fabricated materials

(see Public Form #5).

3. Compliance with notice deadlines is mandatory:

The Texas courts require strict compliance with the notice deadlines described above. A notice given one day late will not suffice. All notices should be given by certified or registered mail. If notices are sent by certified or registered mail and are properly addressed and mailed, the date of mailing will be the date of notice. If a deadline for getting a notice out is very close, go to the Post Office and have the Post Office personnel stamp the registered or certified receipt with the date of mailing so you will have proof that the notice was timely given. The following notice schedule gives you an easy reference to the applicable notice deadlines.

D. ENFORCEMENT OF CLAIM:

After the claim has been "perfected" by the giving of the notices required, the prime contractor and its bonding company are given a 60 day period to investigate and settle the claim before becoming subject to the filing of suit. If you do not get paid, you have only one year from the date the claim has been filed to bring suit on the payment bond.

E. OBTAINING COPY OF BOND:

The name of the bonding company, the prime contractor's name, and the pertinent bond and contract numbers are generally available from the governmental agency with whom the prime contractor has contracted. The contracting authority is legally required to furnish you with a certified copy of the payment bond if you furnish them with the affidavit required by Section 2253.026. Most public owners will, however, furnish a copy of the payment bond without requiring an affidavit (see Public Form #6).

F. NOTIFYING THE "PUBLIC OWNER":

Except for claims arising under prime contracts of \$25,000 or less or where the state failed to obtain bonds, there is no requirement that you notify the "owner" of the public project of your claim. It may be advisable to do so as a precautionary measure. Many public owners will retain sufficient funds to pay your claim, although they are not obligated to do so, or otherwise put pressure on the prime contractor to see that the claim is resolved, particularly, as the governing authority may have liability to pay your claim.

G. LIEN AVAILABLE IF PRIME CONTRACT OF \$25,000 OR LESS:

On public improvement contracts of \$25,000 or less, a claimant can obtain a lien for material, equipment and/or labor furnished to a contractor (Section 53.231 of the Property Code). In this situation, however, the lien will attach only to monies, bonds, or warrants, if any, due the contractor from the public entity. There is no lien on the improvements.

1. How to Perfect the Lien:

The claimant must send the notices described below to the public official having the duty to pay the prime contractor and to the contractor at the contractor's last known business or residence address.

(a) Time and method of sending notice

Not later than the 15th day of the second month next following each month of performance, written notice must be sent to the public official and to the prime contractor by certified or registered mail.

(b) Form of notice

The notice must state: (i) the amount claimed; (ii) the name of the party to whom the materials or equipment were delivered or for whom work was performed; (iii) the dates and places of delivery or performance; (iv) a reasonable description of the work done; (v) a statement of the amount due; (vi) an identification of the project; (vii) the claimants business address; and (viii) must be accompanied by a sworn statement of account, stating that the amount claimed is just and correct, and that all payments, lawful offsets, and credits known to the affiant have been allowed.

(c) Public official's duty

The public official has a duty upon receipt of the notice described above to withhold, to the extent available, sufficient monies, bonds, or warrants to pay the claim, unless the claim is bonded around.

H. PUBLIC FORMS:

Warning, warning, warning - see your attorney for forms suited to your operation.

**Government Code (Chapter 2253) (f/k/a MCGREGOR ACT) NOTICE DEADLINES
(PUBLIC CONTRACTS IN THE STATE OF TEXAS)**

(1) MONTH LABOR PERFORMED OR MATERIALS DELIVERED	(2) LAST DATE FOR EARLY NOTICE TO ORIGINAL/PRIME CONTRACTOR BY CLAIMANT WHO DEALT WITH SUBCONTRACTOR	(3) LAST DATE FOR NOTICE TO SURETY ON MCGREGOR ACT BOND WITH SWORN STATEMENT
JANUARY	MARCH 15	APRIL 15
FEBRUARY	APRIL 15	MAY 15
MARCH	MAY 15	JUNE 15
APRIL	JUNE 15	JULY 15
MAY	JULY 15	AUGUST 15
JUNE	AUGUST 15	SEPTEMBER 15
JULY	SEPTEMBER 15	OCTOBER 15
AUGUST	OCTOBER 15	NOVEMBER 15
SEPTEMBER	NOVEMBER 15	DECEMBER 15
OCTOBER	DECEMBER 15	JANUARY 15
NOVEMBER	JANUARY 15	FEBRUARY 15
DECEMBER	FEBRUARY 15	MARCH 15

- (1) If notice pertains to specially fabricated items the date of receipt and acceptance of the order controls notice on undelivered specially fabricated items.
- (2) Contractual retainage notice to prime contractor due.
- (3) If you forget to give notice in (2) above you must notify prime contractor and surety within 90 days of project completion that unpaid retainage is due.

Texas Government Code Chapter 2253 (McGregor Act) - Public Form #1
3RD MONTH NOTICE OF UNPAID BILLS

TO: _____ (1) _____ CERTIFIED MAIL

_____ (2) _____ RETURN RECEIPT REQUESTED

AND

_____ (3) _____ CERTIFIED MAIL

_____ (4) _____ RETURN RECEIPT REQUESTED

RE: _____ (5) _____

We notify both of you that _____ (6) _____ has a claim in the sum of _____ dollars (\$_____) for labor performed and/or materials delivered during the month of _____, 20_____, on the referenced project. The labor performed and/or materials furnished by us are generally described as follows: _____ (7) _____. Such labor performed and/or materials were furnished to _____ (8) _____ pursuant to the terms of a written contract [or] written purchase order, a copy of which is attached hereto [or] per an oral agreement with _____ (9) _____. [If the agreement was oral, attach copies of invoices which identify the labor or materials and the location of the job where the labor or materials were performed or delivered.]

Attached hereto is our Sworn Statement of Account.

[If applicable, also add:] The above amount includes contractual retainage in the amount of \$_____ which is now due our firm [or] In addition to the above amount, the sum of \$_____ has been withheld from us, which amount is not yet due according to our contract with _____ (10) _____.

This notice is sent in compliance with the McGregor Act, Texas Government Code Chapter 2253.

Dated this _____ day of _____, 20_____.

_____ (11) _____

By: _____

STATE OF TEXAS : SWORN STATEMENT OF ACCOUNT
COUNTY OF _____ :

Before me the undersigned authority on this day personally appeared _____, who, after being by me duly sworn did depose and say:

1. My name is _____; I am the _____ (12) _____ and am authorized to make this affidavit;

2. _____ (13) _____ has a claim in the amount of _____ dollars (\$_____) for labor performed and/or materials delivered during the month of _____, 20_____, for _____ (14) _____.

3. The amount of this claim is just and correct, and all lawful offsets, payments and credits known to the undersigned claimant have been allowed.

4. The amount of any retainage applicable to the account on which the claim is made which have not yet become due by virtue of the terms of the contract on which the above claim is made is \$_____.

5. The invoices or statements attached hereto are true and correct copies of the originals of same which were sent to (15).

(16)

Subscribed and sworn to before me this ___ day of _____, 20___.

Notary Public in and for
The State of Texas

* * * * *

- (1) Bonding Company.
- (2) Bonding Company's Address.
- (3) Prime Contractor.
- (4) Prime Contractor's Address.
- (5) Name of Project.
- (6) Your Company.
- (7) General Description of Labor and Materials Provided.
- (8) Prime Contractor.
- (9) Prime Contractor.
- (10) Prime Contractor.
- (11) Your Company.
- (12) Title.
- (13) Your Company.
- (14) Prime Contractor
- (15) Prime Contractor.
- (16) Your Signature.

Texas Government Code Chapter 2253 (McGregor Act) - Public Form #2
RETAINAGE ONLY NOTICE

[Date]

AND

(3) CERTIFIED MAIL
(4) RETURN RECEIPT REQUESTED

Re: _____ (5)

Pursuant to The McGregor Act, Texas Government Code Chapter 2253, we advise you that this firm has a claim for unpaid retainage pursuant to a certain contract dated _____, 20____, with _____(6) for the referenced project. The amount of the contract is \$_____, and the amount paid is \$_____, leaving a balance outstanding of \$_____, which is due and owing. We make claim for such amount which has been retained from us and which is past due.

(7)

By: _____

* * * *

- | | |
|---------------------------------|-----------------------|
| (1) Bonding Company. | (5) Name of Project. |
| (2) Bonding Company's Address. | (6) Prime Contractor. |
| (3) Prime Contractor. | (7) Your Company. |
| (4) Prime Contractor's Address. | |

Texas Government Code Chapter 2253 (McGregor Act)
Public Form #3 - DERIVATIVE CLAIMANT NOTICE

[Date]

TO: _____ (1) _____ CERTIFIED MAIL

_____ (2) _____ RETURN RECEIPT REQUESTED

Re: Unpaid Bills of _____ (3) _____ due
to _____ (4) _____

Dear Sir:

We have furnished labor and/or materials to your subcontractor on the _____ (5) _____ project, which you are building as prime contractor for _____ (6) _____. The labor and/or materials were furnished during the month of _____ pursuant to a written agreement with your subcontractor.

The nature of the labor and/or materials are described on the attached invoice [or are generally described as follows: _____]. The amount of our claim is \$ _____, which is due and payable. If same is not promptly paid, we shall be forced to make claim against you and your surety.

This notice is sent to you in compliance with the McGregor Act, Texas Government Code Chapter 2253.

(7)

By: _____

cc: _____ (8) _____ Certified Mail, Return Receipt Requested

* * * * *

- (1) Prime Contractor.
- (2) Prime Contractor's Address.
- (3) Your Customer.
- (4) Your Company.
- (5) Name of Project.
- (6) Name of Public Body.
- (7) Your Company.
- (8) Copy to Your Customer by Certified Mail, Return Receipt Requested.

Texas Government Code Chapter 2253 (McGregor Act) - Public Form #4
DERIVATIVE CLAIMANT NOTICE - RETAINAGE AGREEMENT

[Date]

TO: (1) CERTIFIED MAIL
(2) RETURN RECEIPT REQUESTED

Re: (3)

Notice is hereby given pursuant to the McGregor Act, Texas Government Code Chapter 2253, that the undersigned entered into a contract with (4) on the above-referenced project. The contract provides for retainage of funds by the subcontractor on the following terms: (5).

(6)

By: _____

* * * * *

- (1) Prime Contractor.
- (2) Prime Contractor's Address.
- (3) Name of Project.
- (4) Your Customer.
- (5) Set Out Terms of Retainage Agreement.
- (6) Your Company.

Texas Government Code Chapter 2253 (McGregor Act) - Public Form #5
SPECIALLY FABRICATED MATERIALS

[Date]

TO: (1) CERTIFIED MAIL
(2) RETURN RECEIPT REQUESTED

RE: (3)

Notice is hereby given pursuant to the McGregor Act, Texas Government Code Chapter 2253, that the undersigned has received and accepted an order for specially fabricated items as that term is defined in said statute from (4), your Subcontractor on the above-referenced project.

The price of the items is \$. A copy of the order is attached hereto and made a part hereof. The notice is not intended to reflect on the credit of (4), but is sent to protect our rights for undelivered specially fabricated materials.

_____ (5) _____

BY: _____

cc: (6) Certified Mail, Return Receipt Requested

* * * * *

- (1) Prime Contractor.
- (2) Prime Contractor's Address.
- (3) Name of Project.
- (4) Your Customer.
- (5) Your Company.
- (6) Copy to Your Customer by Certified Mail, Return Receipt Requested.

Texas Government Code Chapter 2253 (McGregor Act) - Public Form #6
REQUEST FOR COPY OF BOND

[Date]

(1)

(2)

Re: _____ (3)

In accordance with the McGregor Act, Texas Government Code Chapter 2253, I request a certified copy of the payment bond and the contract between _____ (4) _____ and _____ (5) _____ for improvements on the referenced project.

_____ (6) _____ has furnished _____ (7) _____ to the prime contractor for the referenced project and payment in full has not been received for same. Costs of such certified copies will be paid upon receipt of a statement for same.

_____ (8) _____

BY: _____ (9) _____

THE STATE OF TEXAS

COUNTY OF _____

_____ (9) _____, Affiant, upon his oath and after being duly sworn, states that he has read the above application and the facts contained therein are true and correct.

SWORN AND SUBSCRIBED before me on this the _____ day of _____, 20____, to certify which witness my hand and seal of office.

Notary Public in and for
The State of Texas

* * * * *

- (1) Public Body.
- (2) Public Body's Address.
- (3) Project.
- (4) Public Body.
- (5) Prime Contractor.
- (6) Your Company.
- (7) Labor, Materials, Equipment, etc .
- (8) Your Company.
- (9) Officer of Your Company.

Texas Government Code Chapter 2253 (McGregor Act) - FORM #7
REQUEST FOR INFORMATION FROM PRIME CONTRACTOR

[(1) Date]

TO: (2)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: (3)

We have furnished labor and/or materials for the prosecution of the work on the above-referenced project. Pursuant to the McGregor Act, Texas Government Code Chapter 2253, we request that you provide us with the following information within ten (10) days after receipt of this request:

- (1) The name and last known address of the department, board, agency or other governmental authority with whom you contracted for the construction of the project; and
- (2) A copy of the payment and performance bonds which relate to the construction of the project, including the bonds furnished by or to you.

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

(4)

By: (5)

* * * * *

- (1) Date of request.
- (2) Name and address of prime contractor.
- (3) Project.
- (4) Your company.
- (5) Officer of your company.

Texas Government Code Chapter 2253 (McGregor Act) - FORM #8
REQUEST FOR INFORMATION FROM SUBCONTRACTOR

[(1) Date]

TO: (2) CERTIFIED MAIL
----- RETURN RECEIPT REQUESTED

Re: (3)

The undersigned (4) the above-referenced project. Pursuant to the McGregor Act, Texas Government Code Chapter 2253, we request that you provide us with the following information within ten (10) days after receipt of this request:

- (1) The name and last known address of each person from whom you purchased labor or materials for the project, other than materials that were furnished to the project from your inventory.
- (2) The name and last known address of each person to whom you furnished labor or materials on the project; and
- (3) Whether you have furnished a bond for the benefit of your subcontractors or materialmen and if so, the name and last known address of the surety and a copy of the bond.

In the event you fail to furnish the above-requested information, you may be liable for the undersigned's reasonable and necessary costs incurred in procuring the requested information.

(5)

By: (6)

* * * *

- (1) Date of request.
- (2) Name and address of subcontractor.
- (3) Project.
- (4) Fill in as applicable:
 - (a) is the owner of.
 - (b) is the prime contractor on.
 - (c) is the surety which bonded the prime contractor for.
 - (d) has furnished work under your subcontract on.
- (5) Your company.
- (6) Officer of your company.

IV. THE MILLER ACT (FEDERAL GOVERNMENT PROJECTS)

A. APPLICATION:

The Miller Act requires prime contractors to post payment bonds in connection with all contracts for the construction, alteration or repair of any "public building" or "public work" of the United States. The Miller Act will apply where the U.S. Government, including any of its hundreds of agencies or departments, is the owner of the project. The most common types of projects on which Miller Act bonds are required are federal buildings, post offices and military installations. A word of caution: A project that is owned by a private entity, or by a non-federal public agency, such as a Local Housing Authority, a Municipal Utility District, or a school district, but which is financed with federal funds does not come within the coverage of the Miller Act. Those are governed by the McGregor Act or the Property Code.

B. WHO IS PROTECTED:

If you have a contract or account (as a subcontractor or supplier) directly with the prime contractor, you are protected by the Miller Act. If you do not have a contract or account directly with the prime contractor, you are protected only if the party with whom you do have a contract or account is himself a "subcontractor" (not an ordinary supplier) of the prime contractor. Anyone more remote than a second-tier subcontractor or supplier to a first tier subcontractor has no protection under a Miller Act Payment Bond.

C. NOTICE REQUIREMENTS:

A subcontractor who has a contract directly with the prime contractor is not required to notify the bonding company of its claim, but a formal demand for payment should be made. However, a subcontractor with no contractual relationship with the general contractor must notify the general contractor within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the materials for which such claim is made." Second-tier claimants (those dealing with a sub of the prime) must strictly comply with the 90-day notice requirement to the prime, or they will lose all protection.

The second-tier claimant's notice must state "with substantial accuracy" the amount claimed and the identity of the party with whom the claimant dealt. The notice should be sent by registered mail. It has been held by the courts that certified mail may satisfy the notice requirements, but better practice is to use registered mail. When the 90 day notice requirement applies, it is wise to mail the notice sufficiently in advance of the deadline so that it is actually received by the prime within the 90 days.

Work done for the purpose of correcting defects does not usually extend the 90 day period. Also, if there are a series of deliveries with substantial delays in between, notices should be given so as to be timely for each delivery.

D. ENFORCEMENT:

If you are a protected subcontractor or supplier you can enforce your rights under the Miller Act Payment Bond directly against the bonding company who must pay you if the prime is unable or refuses to do so.

The Miller Act has an extremely short limitation period within which you must file a lawsuit. You must file suit in Federal Court and in the District in which the contract was to be performed, within one year from the last date on which you furnished labor or materials to the project, and no sooner than 90 days after the last of your work or material was furnished. As in the case of notices, warranty work does not, as a general rule, extend the time for filing suit. With only a nine month period to file suit on your claim, you should have any Miller Act claim that is not promptly paid in the hands of your attorney in time for the attorney to file suit within the one year deadline.

E. IDENTITY OF SURETY:

The bonding company's name, the prime contractor's name and prime contract number are available from the contracting officer on any federal project. By simply submitting an affidavit that you have supplied materials to the project and that you have not received payment, the contracting officer is directed to provide you with a certified copy of the bond and the contract with the general contractor. If there is any possibility that you are going to have to pursue the bonding company for payment, you should submit your affidavit to the contracting officer and obtain a certified copy of the bond at the earliest possible date.

Miller Act - Public Form - NOTICE TO PRIME CONTRACTOR

[Date]

_____(1)

REGISTERED MAIL*

RE: _____

_____(2)

Dear Sirs:

Notice is hereby given that the undersigned firm supplied labor and/or materials in the construction of the above-described project pursuant to a subcontract with _____(3)_____ (a copy of which subcontract is attached).

The undersigned _____(4)_____ in said project pursuant to the above-referenced contract and received therefor the sum of \$ _____(5)_____. The remaining balance in the amount of _____(6)_____ is due and owing. Demand is hereby made upon you and _____(3)_____ for payment of said sum.

Very truly yours,

_____(7)

By: _____
_____(8)

cc: _____(9)_____ Certified Mail Return Receipt Requested
_____(10)_____ Certified Mail Return Receipt Requested

* * * * *

* Notice should be sent by registered, not certified mail

- (1) Prime Contractor's Name and Address.
- (2) Name of Project.
- (3) Your Customer (First Tier Subcontractor).
- (4) General description of Work.
- (5) Amount Received for Work.
- (6) Amount Due and Owing.
- (7) Your Company.
- (8) Name of Person Signing for Your Company.
- (9) Copy to First Tier Subcontractor by Certified Mail, Return Receipt Requested.
- (10) Copy to Bonding Company by Certified Mail, Return Receipt Requested.