

SPAIN HASTINGS

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Client Update: Owner's Liability in Construction Contracts

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Construction projects usually start with an agreement between an owner of a property and a general contractor. The general contractor will make agreements with subcontractors to perform the labor and deliver materials, and those subcontractors may further subcontract with other companies to do the same. The result is that an owner, or even a general contractor, will not directly be a party to a contract with the companies or persons actually performing the contracted work.

Traditionally, one party to a contract is only liable to the other party to the contract. However, contrary to this traditional rule of contract law, Texas provides legal remedies to laborers and suppliers that can result in an owners' liability to workers they did not contract with directly. This is sometimes called pass-through liability. The classic remedy to enforce pass-through liability is a lien placed by a worker on an owner's property. Although this type of liability is most common in the field of construction, pass-through liability can arise in various other situations.

Minimizing Pass-Through Liability. From an owner's perspective, there are several steps one should take to minimize any potential pass-through liability:

Be Hands On. Some owners think that once they hire a general contractor, they have handed over all responsibilities. In fact, owners retain many responsibilities, including monitoring monthly payments, getting documentation from the general contractor, as well as many other tasks. Owners should not wait until they receive a notice of an unpaid balance from a subcontractor to get involved.

Stay on Top of Paperwork. Owners usually should not pay a general contractor's bill without getting something in return. A general contractor should provide documentation, such as all-bills-paid affidavits, lists of subcontractors, and even releases of lien claims from the subcontractors themselves, depending on the terms of the original agreement.

Retain the Right Amount. Many contracts provide for a percentage of the total contract amount that an owner must retain until some time after final completion of the project, usually ten percent for thirty days. This is called retainage. When owners pay the retainage amount before the thirty days are up, they may assume pass-through liability to an unpaid subcontractor for the full amount of retainage.

Check the Mail. When an owner receives a notice of an unpaid balance from a subcontractor, the owner should withhold payment to the general contractor until the claim is resolved. When an owner fails to withhold payment after receiving notice, the owner may be subjected to pass-through liability for the payments the owner should have withheld. These notices are also usually a precursor to liens filed on an owner's property, so it is critical to resolve the claim immediately. Upon receipt of a notice of an unpaid balance, an owner should seek the advice of an attorney.

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