

- SUBJECT:** Statutory forms for waiver and release of lien or payment bond claim
- COMMITTEE:** Business and Industry — committee substitute recommended
- VOTE:** 8 ayes — Deshotel, Orr, Bohac, Garza, Giddings, S. Miller, Quintanilla, Solomons
- 0 nays
- 1 absent — Workman
- WITNESSES:** For — Todd Hewitt, Texas Fifth Wall Roofing Systems, Inc.; Luanne Woodruff, Foxworth-Galbraith Lumber; Thomas Shiels; (*Registered, but did not testify*: Mike Barnett, Texas Association of Realtors; Michael Chatron, Associated General Contractors of America Texas Building Branch; Barbara Douglas, Lumbermen’s Association of Texas; Jon Fisher, Associated Builders and Contractors of Texas; Karen Neeley, Independent Bankers Association of Texas; Kathleen Quill, National Association of Credit Management; Michael White, Texas Construction Association; Gale Albertson; C. D. Henderson; John Herberger; Meagan McCoy Jones)
- Against — (*Registered, but did not testify*: David Mintz, Texas Apartment Association)
- On — Ned Munoz, Texas Association of Builders
- BACKGROUND:** Contractors, subcontractors, and suppliers secure credit through mechanics’ and materialmen’s liens, which use property as collateral for payment on construction contracts. Property Code, ch. 53 establishes who is entitled to a lien, procedures for perfecting such a lien, and what actions may be taken after such a lien is perfected. If a contractor, subcontractor, or supplier of labor or materials used in the construction, repair, or improvement of real property is not paid, a lien may be executed. If notice requirements for such liens are met and the debt is not paid, the property subject to the lien may be foreclosed.

A person who furnishes labor or materials for the construction of improvements on real property is required as a condition of payment to provide an affidavit stating that the person has paid each of the person's subcontractors in full, if the affidavit is requested. The affidavit may include a waiver or release of lien rights that is conditioned on payment.

DIGEST:

CSHB 1456 would create four forms to be used for the waiver and release of a mechanic's or materialman's lien or payment bond claim. A waiver and release of a lien or payment bond claim would be unenforceable unless it was executed and delivered in accordance with the bill.

A waiver and release would be effective to release the owner, the owner's property, the contractor, and the surety on a payment bond from claims and liens only if:

- the waiver and release substantially complied with one of the forms prescribed by the bill
- the waiver and release was signed by the claimant or the claimant's agent and notarized; and
- in the case of a conditional release, evidence of payment to the claimant existed.

A statement purporting to waive, release, or adversely affect a lien or payment bond claim would not be enforceable and would not create an estoppel or impairment of a lien or payment bond claim unless:

- the statement was in writing and complied with the bill;
- the claimant had actually received full payment; or
- the statement was:
  - in a written original contract or subcontract for the construction, remodel, or repair of a single-family house or duplex; and
  - made before labor or materials were provided under the original contract or subcontract and a good faith dispute existed regarding the quality of the labor or material provided by the original contractor or subcontractor that resulted in that person's nonpayment.

A person could not require a claimant or potential claimant to execute an unconditional waiver and release for a progress payment or for final payment amount unless payment in that amount was received.

An accord and satisfaction in a bona fide dispute or a legal settlement would not be affected if specific reference was made to the lien or payment bond claim. The bill would not apply to a written agreement to subordinate, release, or satisfy all or part of a lien claimed after a notice of lien was filed.

**Form for conditional waiver and release on progress payment.** If a claimant or potential claimant was required to execute a waiver and release in exchange for or to induce the payment of a progress payment and was not fully paid or was given a payee check, the bill would require a specified form for conditional waiver and release on progress payment. The form would state that on receipt and payment of a check, the form would become effective as a release. The release would cover a progress payment for all labor, services, equipment, or materials, except for unpaid retention, pending modifications and changes, or other items furnished. The form's signer would warrant that he or she had already paid laborers and subcontractors or would use the funds from the progress payment to promptly pay.

**Form for unconditional waiver and release on progress payment.** If a claimant or potential claimant was required to execute an unconditional waiver and release to prove the receipt of a progress payment and asserted that payment had been made, the bill would require a specified form for unconditional waiver and release on progress payment. The top of the form would contain a notice in bold type at least as large as the largest type in the document stating that the document waived rights unconditionally and purported that the form's signer had been paid for giving up those rights. Below the notice, the form would state that the signer had been paid and waived rights and claims. The release would cover a progress payment for all labor, services, equipment, or materials, except for unpaid retention, pending modifications and changes, or other items furnished. The form's signer would warrant that he or she had already paid laborers and subcontractors or would use the funds from the progress payment to promptly pay.

**Form for conditional waiver and release on final payment.** If a claimant or potential claimant was required to execute a waiver and release in exchange for or to induce final payment and was not fully paid or was given a payee check, the bill would require a specified form for conditional waiver and release on final payment. The form would state that on receipt and payment of a check, the form would become effective

as a release. The release would cover the final payment for all labor, services, equipment, or materials. The form's signer would warrant that he or she had already paid laborers and subcontractors or would use the funds from the final payment to promptly pay.

**Form for unconditional waiver and release on final payment.** If a claimant or potential claimant was required to execute an unconditional waiver and release to prove the receipt of a final payment and asserted that payment had been made, the bill would require a specified form for unconditional waiver and release on final payment. The top of the form would contain a notice in bold type at least as large as the largest type in the document stating that the document waived rights unconditionally and purported that the form's signer had been paid for giving up those rights. Below the notice, the form would state that the signer had been paid and waived rights and claims. The form's signer would warrant that he or she had already paid laborers and subcontractors or would use the funds from the final payment to promptly pay.

**Attempted compliance.** A waiver or release would be construed to comply with the bill and would be enforceable if the waiver or release:

- was furnished in attempted compliance with the bill; or
- evidenced by its terms intent to comply with the bill.

Any provision in a waiver or release that expanded or restricted the rights or liabilities under the bill would be disregarded and the provisions of the bill would be read into the waiver or release. The attempted compliance provisions would expire on August 31, 2012.

**Effective date.** The bill would take effect on September 1, 2011, and would apply only to a contract executed on or after the effective date.

SUPPORTERS  
SAY:

CSHB 1456 would create one standardized, uniform set of statutory lien waiver forms. Currently every contractor has a unique form. Some of these forms have become long and complex and have gone beyond waiving a lien, such as by waiving personal injury claims. Having lawyers review these forms drives up the cost of construction, and confusion related to the forms delays payment. Introducing a common set of forms would avoid disputes and litigation and make the process simpler.

The bill contains attempted compliance provisions that would protect contractors using imperfect forms.

OPPONENTS  
SAY:

It is not realistic to anticipate that every contractor in the state would update their forms by the effective date of the bill. Not everyone would know about the statutory forms, and the attempted compliance provisions of the bill would offer protection only until August 31, 2002.

NOTES:

The substitute differs from the original by making the attempted compliance provisions temporary.

The companion bill, SB 1332 by Deuell, was reported favorably, as substituted, by the Senate Business and Commerce Committee on April 13.