

BILL ANALYSIS

Senate Research Center

H.B. 1390
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Current law requires the owner of a construction project to retain 10 percent of each payment to the general contractor for the benefit of the subcontractors working on the project. When the project is completed, the owner releases the retained funds to the general contractor, who passes them on to its subcontractors and suppliers. The retained funds (retainage) protect the subcontractors and suppliers from the possibility that a general contractor will go bankrupt without paying them.

In order to secure the right to be paid a portion of the retainage, a subcontractor must notify the owner that it is entitled to a portion of the retainage before the end of the fifteenth day of the second month after it begins work on the project and file a lien affidavit on the owner's property before the thirtieth day after the project's completion specifying the amount of retainage it is owed. The owner is prohibited from releasing the funds until 30 days after the completion.

In practice, the early date of the initial notice serves little purpose, since owners are statutorily required to retain the funds regardless of whether or not they have received notice. Subcontractors sometimes forget to send the initial notice to the owner and lose their rights, even though the funds were retained. The filing deadline for the lien affidavit also causes problems, because the statutory scheme requires subcontractors to encumber the property with a lien before the owner can release the funds to avoid the encumbrance. This is burdensome for owners who wish to sell the property quickly after the project's completion.

Finally, the date of completion, which triggers all of the statutory deadlines, is never clear, since no party has the duty or the ability under the statute to declare when completion has occurred. This creates problems for parties attempting to calculate the various statutory deadlines. This bill amends and clarifies statutes relating to completion dates and notice requirements.

H.B. 1390 amends current law relating to retainage under certain construction contracts.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 53.053(e), Property Code, to provide that a claim for retainage accrues on the earliest of the last day of the month in which all work called for by the contract between the owner and the original contractor has been completed, finally settled, terminated, or abandoned.

SECTION 2. Amends Section 53.057, Property Code, by amending Subsections (a), (b), (c), and (d) and adding Subsections (b-1), (f), and (g), as follows:

- (a) Authorizes a claimant to give notice under this section instead of or in addition to notice under Section 53.056 (Derivative Claimant: Notice to Owner or Original Contractor) or 53.252 (Derivative Claimant: Notice to Owner or Original Contractor) if the claimant is to labor, furnish labor or materials, or specially fabricate materials, or has

labored, furnished labor or materials, or specially fabricated materials, under an agreement with an original contractor or a subcontractor providing for retainage.

(b) Requires the claimant to give the owner or reputed owner notice of contractual retainage not later than the earlier of the 30th day day after the date the claimant's agreement providing for retainage is completed, terminated, or abandoned, or the 30th day after the date the original contract is terminated or abandoned, rather than requires the claimant to give the owner or reputed owner notice of the retainage agreement not later than the 15th day of the second month following the delivery of materials or the performance of labor by the claimant that first occurs after the claimant has agreed to the contractual retainage.

(b-1) Creates this subsection from existing text. Requires the claimant, if an agreement for contractual retainage is with a subcontractor, to also give the notice of contractual retainage to the original contractor within the period prescribed by Subsection (b), rather than also give notice within that time to the original contractor.

(c) Requires that the notice generally state the existence of a requirement for retainage and contain:

- (1) the name and address of the claimant; and
- (2) if the agreement is with a subcontractor, the name and address of the subcontractor.

Deletes existing text requiring that the notice contain the sum to be retained, the due date or dates, if known, and a general indication of the nature of the agreement.

(d) Requires that the notice be sent to the last known business or residence address of the owner or reputed owner or the original contractor, as applicable. Deletes existing text requiring that the notice be sent by registered or certified mail.

(f) Provides that a claimant has a lien on, and the owner is personally liable to the claimant for, the retained funds under Subchapter E (Required Retainage for Benefit of Lien Claimants) if the claimant:

- (1) gives notice in accordance with this section and:
 - (A) complies with Subchapter E; or
 - (B) files an affidavit claiming a lien not later than the earliest of:
 - (i) the date required for filing an affidavit under Section 53.052 (Filing of Affidavit);
 - (ii) the 40th day after the date stated in an affidavit of completion as the date of completion of the work under the original contract, if the owner sent the claimant notice of an affidavit of completion in the time and manner required;
 - (iii) the 40th day after the date of termination or abandonment of the original contract, if the owner sent the claimant a notice of such termination or abandonment in the time and manner required; or
 - (iv) the 30th day after the date the owner sent to the claimant to the claimant's address provided in the notice for contractual retainage, as required under Subsection (c), a written notice of demand for the claimant to file the affidavit claiming a lien; and

(2) gives the notice of the filed affidavit as required by Section 53.055 (Notice of Filed Affidavit).

(g) Provides that the written demand under Subsection (f)(1)(B)(iv):

(1) must contain the owner's name and address and a description, legally sufficient for identification, of the real property on which the improvement is located;

(2) must state that the claimant must file the lien affidavit not later than the 30th day after the date the demand is sent; and

(3) is effective only for the amount of contractual retainage earned by the claimant as of the day the demand was sent.

SECTION 3. Amends Section 53.103, Property Code, as follows:

Sec. 53.103. LIEN ON RETAINED FUNDS. Provides that a claimant has a lien on the retained funds if the claimant:

(1) sends the notices required by this chapter in the time and manner required; and

(2) except as allowed by Section 53.057(f), files an affidavit claiming a lien not later than the 30th day after the earliest, rather than the earlier, of the date the work is completed, the original contract is terminated, or the original contractor abandons performance under the original contract.

SECTION 4. Amends Section 53.105(a), Property Code, to provide that if the owner fails or refuses to comply with this subchapter, the claimants complying with Subchapter C (Procedure for Perfecting Lien) or this subchapter have a lien, at least to the extent of the amount that should have been retained from the original contract under which they are claiming, against the house, building, structure, fixture, or improvement and all of its properties and against the lot or lots of land necessarily connected. Makes a nonsubstantive change.

SECTION 5. Amends Sections 53.106(a) and (d), Property Code, as follows:

(a) Authorizes an owner to file with the county clerk of the county in which the property is located an affidavit of completion. Requires that the affidavit contain:

(1) the name and address of the owner;

(2) the name and address of the original contractor;

(3) a description, legally sufficient for identification, of the real property on which the improvements are located;

(4) a description of the improvements furnished under the original contract;

(5) a statement that the improvements under the original contract have been completed and the date of completion; and

(6) a conspicuous statement that a claimant may not have a lien on retained funds unless the claimant files an affidavit claiming a lien not later than the 40th day after the date the work under the original contract is completed, rather than the 30th day after the date of completion. Makes a nonsubstantive change.

(d) Provides that except as provided by this subsection, an affidavit filed under this section on or before the 10th day after the date of completion of the improvements is prima facie evidence of the date the work under the original contract is completed for

purposes of this subchapter and Section 53.057. Provides that if the affidavit is filed after the 10th day after the date of completion, the date of completion for purposes of this subchapter and Section 53.057 is the date the affidavit is filed. Provides that this subsection does not apply to a person to whom the affidavit was not sent as required by this section.

SECTION 6. Amends Sections 53.107(b) and (d), Property Code, as follows:

(b) Requires that a notice contain:

- (1) the name and address of the owner;
- (2) the name and address of the original contractor;
- (3) a description, legally sufficient for identification, of the real property on which the improvements are located;
- (4) a general description of the improvements agreed to be furnished under the original contract;
- (5) a statement that the original contract has been terminated or that performance under the contract has been abandoned;
- (6) the date of the termination or abandonment; and
- (7) a conspicuous statement that a claimant may not have a lien on the retained funds unless the claimant files an affidavit claiming a lien not later than the 40th, rather than the 30th, day after the date of the termination or abandonment.

(d) Provides that if an owner is required to send a notice to a subcontractor under this section and fails to send the notice, the subcontractor is not required to comply with Section 53.057 to claim retainage and is authorized to claim a lien by filing a lien affidavit as prescribed by Section 53.052. Deletes existing text providing that a subcontractor who fails to file a lien affidavit in the time prescribed by Section 53.103(2) has a lien to the extent authorized under this subchapter if the subcontractor otherwise complies with this chapter, and the owner did not provide the subcontractor notice as required by this section.

SECTION 7. Amends Section 53.159, Property Code, by amending Subsections (a) and (b) and adding Subsection (g), as follows:

(a) Requires an owner, on written request, to furnish the following information within a reasonable time, but not later than the 10th day after the date the request is received, to any person furnishing labor or materials for the project:

- (1) a description of the real property being improved legally sufficient to identify it;
- (2) whether there is a surety bond 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 person having the lien or security interest; and
- (4) the date on which the original contract for the project was executed.

(b) Requires an original contractor, on written request by a person who furnished work under the original contract, to furnish to the person the following information within a reasonable time, but not later than the 10th day after the date the request is received:

(1) the name and last known address of the person to whom the original contractor furnished labor or materials for the construction project;

(2) whether the original contractor has furnished or has been furnished a payment bond for any of the work on the construction project and if so, the name and last known address of the surety and a copy of the bond; and

(3) the date on which the original contract for the project was executed.

(g) Provides that a subcontractor who does not receive information requested under Subsection (a)(4) within the period prescribed by Subsection (a) is not required to comply with Section 53.057 and may perfect a lien for retainage by filing a lien affidavit under Section 53.052. Provides that this subsection expires September 1, 2013.

SECTION 8. Amends Section 53.160(b), Property Code, as follows:

(b) Provides that the grounds for objecting to the validity or enforceability of the claim or lien for purposes of the motion are limited to the following:

(1) notice of claim was not furnished to the owner or original contractor as required by Section 53.056, 53.057, 53.058 (Derivative Claimant: Notice for Specially Fabricated Items), 53.252, or 53.253 (Derivative Claimant: Notice for Specially Fabricated Items);

(2) an affidavit claiming a lien failed to comply with Section 53.054 (Contents of Affidavit) or was not filed as required by Section 53.052;

(3) notice of the filed affidavit was not furnished to the owner or original contractor as required by Section 53.055;

(4) the deadlines for perfecting a lien claim for retainage under this chapter have expired and the owner complied with the requirements of Section 53.101 (Required Retainage) and paid the retainage and all other funds owed to the original contractor before the claimant perfected the lien claim, and the owner received a notice of the claim as required by this chapter;

(5) all funds subject to the notice of a claim to the owner and a notice regarding the retainage, rather than notice of a claim to the owners and the perfection of a claim against the statutory retainage, have been deposited in the registry of the court and the owner has no additional liability to the claimant;

(6) when the lien affidavit was filed on homestead property no contract was executed or filed as required by Section 53.254 (Homestead), the affidavit claiming a lien failed to contain the notice as required by Section 53.254, or the notice of the claim failed to include the statement required by Section 53.254; and

(7) the claimant executed a valid and enforceable waiver or release of the claim or lien claimed in the affidavit.

SECTION 9. Makes application of Chapter 53, Property Code, as amended by this Act, prospective.

SECTION 10. Effective date: September 1, 2011.