

- SUBJECT:** Required notice for a mechanic's lien
- COMMITTEE:** Business and Industry — favorable, without amendment
- VOTE:** 8 ayes — Giddings, Elkins, Bohac, Martinez, Solomons, Taylor, Vo, Zedler
- 0 nays
- 1 absent — Bailey
- WITNESSES:** For — Raymond Risk, Texas Construction Association
- Against — None
- BACKGROUND:** Contractors, subcontractors, and suppliers secure credit through the issuance of mechanics' and materialmen's liens, which use property being improved 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.
- Sec. 53.101 provides that during the work under an original contract for which a mechanic's lien may be claimed and for 30 days after the work is completed the owner shall retain:
- 10 percent of the contract price of the work to the owner; or
 - 10 percent 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 not contract price, using the reasonable value of the completed work.
- Sec. 53.103 says a claimant has a lien on the retained funds if the claimant sends proper notices or files an affidavit claiming a lien not later than the 30th day after the work is completed.

Sec. 53.101 defines "retainage" as an amount representing part of a contract payment that is not required to be paid to the claimant within the month following the month in which labor is performed, material is furnished, or specially fabricated material is delivered.

A recent Texas Supreme Court case, *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720 (Tex. 2003) held that work must be defined in relation to a particular contract. The opinion said the work is completed when the original contract is complete or terminated, whichever comes first.

DIGEST:

HB 629 would amend Property Code, sec. 53.103 to specify the deadline for filing a claimant's (mechanic's) lien affidavit in order to perfect a lien claim on statutorily retained funds (statutory retainage).

A claimant would have to file an affidavit for a mechanic's lien not later than the 30th day after work was completed or for a non-residential construction project, the earlier of:

- the date the work was completed; or
- the date the original contractor terminated work or abandoned performance under the original contract.

The bill would add sec. 53.107, requiring an owner, not later than the 10th day after an original contractor terminated or abandoned an original contract, to give written notice to each subcontractor who previously had given notice to the owner as provided by current law or who had sent the owner by certified or registered mail a written request for notice of termination or abandonment.

The notice to the subcontractor would have to contain:

- the name and address of the owner;
- the name and address of the original contractor;
- a description of the real property on which the improvements were located;
- a general description of the improvements agreed to under the original contract;
- a statement that the original contract had been terminated or abandoned;

- the date of termination or abandonment; and
- a conspicuous statement that a claimant could not have a lien on the retained funds unless the claimant filed an affidavit claiming a lien not later than the 30th day after the date of the termination or abandonment.

Notice sent on or before the tenth day after the date of termination or abandonment would be prima facie evidence of the date the original contract was terminated or abandoned.

A subcontractor who failed to file a lien affidavit in the time prescribed above would have a lien if the subcontractor otherwise complied with statutory provisions and the owner did not provide required notice to the subcontractor.

Sec. 53.107, relating to notice resulting from termination or abandonment by an original contractor, would not apply to a residential construction project.

The bill would take effect September 1, 2005, and would apply only to a subcontractor who claimed a lien if the lien arose under an original contract entered into on or after that date.

**SUPPORTERS
SAY:**

HB 629 would clarify that construction work on non-residential property was considered complete on the date that a project was finished or the date the original contractor terminated or abandoned the work, whichever came first. Under current law, a subcontractor or supplier (derivative claimant) who does not have a contract directly with the property owner may perfect a mechanic's lien on the owner's property to secure payment for work performed. To have this extraordinary right, a claimant must send certain notices to the owner and the contractor and must file a mechanic's lien affidavit within strict deadlines. When a derivative claimant has complied with the statutory requirement, the claimant may have a right to payment directly from the owner and may have a lien on the owner's property. In order to perfect a lien on an owner's retained funds (statutory retainage), a subcontractor must file a mechanic's lien affidavit within 30 days after the "work is completed."

This bill would amend the law regarding notice for a mechanic's lien on an owner's 10 percent retained funds (sec. 53.103) to conform with a recent Texas Supreme Court case.

The bill also would require an owner of commercial property to give notice within 10 days to subcontractors that the original contract on a construction project had been terminated or abandoned by the contractor. The owner would have to provide notice only to those contractors who had previously given a notice of claim as provided by statute or who had requested, in writing, to be notified of termination or abandonment by the original contractor. The owner simply would have to notify those subcontractors who already had been identified by written notice to the owner. Giving the owner 10 days to notify subcontractors would be reasonable because it would fall within the 30-day period during which the subcontractors would be required to file a notice of lien.

HB 629 would not create any burdensome notice requirements but simply would help those with an interest in pertinent dates related to claimant's liens. Claimants still would have to perfect their mechanic's liens in accordance with all other statutory requirements. Subcontractors, suppliers, and real estate lawyers who deal with such issues on behalf of commercial property owners would welcome such an approach.

OPPONENTS
SAY:

HB 629 would grant more protection to owners of commercial property and subcontractors involved with building or improving such property than it would to homeowners, subcontractors, or suppliers working on residential property.

As written, HB 629 would clarify the time deadline for filing a mechanic's lien affidavit only on non-residential property. The clarifying language specifically would not include residential property and likely would result in confusion, similar to what the Texas Supreme Court addressed in the *Page* case, for a subcontractor building or improving a single-family residence, duplex, or triplex. Homeowners building a new home or improving an existing one would be even more susceptible to problems because they would be less likely to be aware of the legal requirements regarding notice to subcontractors than owners of commercial property.

NOTES:

The author intends to offer a floor amendment with technical, clean-up language. One aspect of the amendment would be to broaden the clarifying language so that sec. 53.103 would apply to residential, as well as commercial, construction projects.