

SUBJECT: Revising statutes on mechanic's, contractor's, or materialman's liens

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 6 ayes — C. Turner, Cain, Crockett, Lambert, Ordaz Perez, Shine

0 nays

3 absent — Hefner, Patterson, S. Thompson

WITNESSES: For — Greg Harwell, Dallas Builders Association; Sean Rooney, NACM SW; Fred Wilshusen, Texas Construction Association; (*Registered, but did not testify*: Corbin Van Arsdale, AGC Texas Building Branch; Melodie Durst, Credit Union Coalition of Texas; Jim Short, Houston Real Estate Council; Stephen Scurlock, Independent Bankers Association of Texas; Shawn Kirkpatrick, KB Home; Chris Lambert, L&O Electric, Inc. and Central Texas Subcontractors Association; David Mintz, Texas Apartment Association; Ned Muñoz, Texas Association of Builders; John Heasley, Texas Bankers Association; Crystal Brown, Texas Building Owners and Managers Association; Aaron Day, Texas Land Title Association; John Fleming, Texas Mortgage Bankers Association)

Against — Shelley Sampson, Airtron Inc., NRG / Direct Energy Company; Tami Behner, Barnsco and NACM; Anne Scarcella, Crawford Electric Supply and NACM SW; Teresa Waldron, Hajoca Corp; Jim Davis, Lehigh Hanson; Jason Burghart, NACM; Stephen Wilson, NACM and Foxworth Galbraith Lumber Co; Perrin Fourmy and Randall Lindley, NACM Southwest; Wendy Mode, NACM Southwest and ROMCO Equipment Co.; Kimberly Hanlin, NACM Southwest and Kloeckner Metals Corporation; Kim Larison Lancaster, NACM, Standard Supply, Bartos Industries, and Bradford Supply of Oklahoma; Heather Kimmel, WESCO Distribution Anixter Inc, Hill Country Electric Supply, Accutech Distributing, and Communications Supply Corporation; Stephanie Gharakhanian, Workers Defense Action Fund; (*Registered, but did not testify*: Caitlin Boehne, Equal Justice Center; Leonard Aguilar, Texas AFL-CIO; Denise Cawthon; Stephanie Hoffman)

On — (*Registered, but did not testify*: CJ Tredway, Independent Electrical Contractors of Texas)

DIGEST:

CSHB 2237 would revise several statutes relating to a mechanic's, contractor's, or materialman's lien, including statutes regarding the deadlines to file affidavits to claim a lien, the limitation period for bringing suit to foreclose a lien, and deadlines for notices of certain claims.

Definitions. CSHB 2237 would revise various definitions related to mechanic's, contractor's, or materialman's liens.

The bill would establish a definition for "purported original contractor," which would mean an original contractor who could effectively control the owner or was effectively controlled by the owner or who was engaged by the owner for the construction or repair of improvements without a good faith intention of the parties that the purported original contractor was to perform under the contract. For purposes of this definition, "owner" would not include a person who had or claimed a security interest only.

The bill would expand the definition of "improvement" to include additional fixtures or modifications to real property, machinery or apparatuses, work, or designs provided by a licensed architect, engineer, or surveyor. "Labor" would include a professional service used in the direct preparation for the work of a design, drawing, plan, plat, survey, or specification.

The bill would make revisions to certain other definitions as well, including definitions of "material," "residence," "retainage," "subcontractor," and "work."

Persons entitled to liens. The bill would specify the persons entitled to a lien for certain work performed under a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor. The bill also would specify that a lien would not extend to a house or building.

Sham contract. The bill would amend provisions governing a sham contract. A person who furnished labor or materials under a direct contractual relationship with a purported original contractor would be considered an original contractor for purposes of perfecting a mechanic's lien. The bill would repeal a provision providing that a person would not be considered an owner in a sham contract if they had or claimed a security interest only.

Deadlines to file affidavits. CSHB 2237 would revise deadlines to file affidavits to claim a lien and make certain conforming changes to statutes.

The bill would require an original contractor claiming a lien to file an affidavit with the county clerk for:

- projects other than residential construction projects, no later than the 15th day of the fourth month after the original contractor's work was completed, terminated, or abandoned; or
- for residential construction projects, no later than the 15th day of the third month after the original contractor's work was completed, terminated, or abandoned.

A subcontractor claiming a lien would have to file an affidavit no later than the 15th day of the fourth month after the subcontractor last provided labor or materials or after the subcontractor would normally have been required to deliver materials that had not been actually delivered, whichever date was later.

A subcontractor claiming a lien arising from a residential construction project would have to file an affidavit no later than the 15th day of the third month after the subcontractor last provided labor or materials or after the subcontractor would normally have been required to deliver materials that had not been actually delivered, whichever date was later.

The bill would require a subcontractor claiming a lien for retainage to file an affidavit no later than the 15th day of the third month after the original

contract under which the subcontractor performed was completed, terminated, or abandoned.

The bill would provide an additional three days after an affidavit of completion was filed for a copy of the affidavit to be sent to the original contractor and each claimant who sent a notice.

Limitation on bringing suit. CSHB 2237 would require a suit to be brought to foreclose a lien no later than the first anniversary of the last day a claimant could file a lien affidavit. The limitations period could be extended up to the second anniversary of that date if, before the period expired, the claimant entered into a written agreement with the then-current record owner of the property to extend the limitations period.

Notwithstanding other law, if suit was pursued solely to discharge a lien because the limitations had expired, the lien claimant's rights to pursue a suit would not be revived.

Notices. CSHB 2237 would revise certain requirements and deadlines for notices of certain claims regarding a mechanic's, contractor's, or materialman's lien.

Notice of claim for unpaid labor, materials. The bill would require a subcontractor claimant to send a notice of claim for unpaid labor or materials to the owner or reputed owner and original contractor. The notice would have to be sent by:

- the 15th day of the third month after the labor or materials were provided or the undelivered specially fabricated materials normally would have been delivered; or
- for residential construction projects, the 15th day of the second month after the labor or materials were provided or the undelivered specially fabricated materials normally would have been delivered.

The bill would specify the contents of the notification.

Notice of claim for contractual retainage. The bill would require a subcontractor claimant whose contract provided for retainage to give notice for a lien for unpaid retainage, to the extent that the claim was not included in another notice, for the lien to be valid.

The subcontractor claimant would have to send the notice to the owner or reputed owner and the original contractor by 30 days after either the date the subcontractor claimant's contract was completed, terminated, or abandoned or the date the original contract was terminated or abandoned, whichever was earlier.

The bill would specify the contents of the notification.

Repealed notice requirements. CSHB 2237 would repeal provisions requiring a subcontractor claimant to give notice to the original contractor by the 15th day of the second month after each month in which all or part of the claimant's labor was performed or material delivered, and the same notice to the owner and original contractor by the 15th day of the third month after each month in which labor was performed or material delivered.

Other provisions. The bill would allow any required notice or written communication to be delivered by certified mail and would provide a method to compute the period of days in which to provide a notice if the last day of the period was on a weekend or holiday.

Withheld funds. The bill would specify that upon receiving a notice of a claim, an owner could immediately withhold from payments to the original contractor an amount necessary to pay the claim, and the withheld funds could be in addition to any reserve funds.

The bill would repeal a statute authorizing a claimant to make a written demand for payment of the claim to an owner authorized to withhold funds.

Summary motion to remove lien. The bill would provide that, after a suit was brought to foreclose a lien or declare a claim or lien invalid or unenforceable, the claimant and any other party that appeared in the proceeding would have to be notified at least 30 days, instead of 21 days, before the date of the hearing on the motion. A motion could not be heard before the 30th day after the claimant answered or appeared in the proceeding.

Other provisions. The bill would replace "retainage" with "reservation" as it appeared in statute and make other conforming changes.

The bill would take effect September 1, 2021, and apply only to an original contract entered into on or after that date.

**SUPPORTERS
SAY:**

CSHB 2237 would clean up Texas lien laws to allow general contractors and subcontractors to more easily comply with the law. The bill would not make substantial alterations to the current process but would simplify statutes to create less confusing deadlines for affidavits and notices related to mechanic's, contractor's, or materialman's liens. The bill also would provide for a one-year statute of limitations for bringing a suit to foreclose a lien, provide specific forms for notices of claims, update definitions, and make several other conforming changes to the law. Regarding concerns about subcontractors being unable to give a second month notice, nothing in the bill would preclude them from sending an earlier notice.

**CRITICS
SAY:**

CSHB 2237 should expressly authorize subcontractors and suppliers to give notice of a lien claim on an unpaid balance in the second month after the labor was performed or material delivered. This notice is often an important tool to collect needed funds.