

BILL ANALYSIS

Senate Research Center

S.B. 590
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Business & Commerce
3/14/2011
As Filed

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, known as "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 works 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 would alter existing law to provide that subcontractors are not required to give notice of their right to retainage until 25 days after the project's completion, that lien affidavits for retainage do have to be filed until the fifteenth day after the fourth calendar month after the date of completion, and that the owner is responsible for notifying the general contractor and anyone who has already sent it a notice of a right to retained funds that the project has been completed.

As proposed, S.B. 590 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 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 53.056(d), Property Code, as follows:

(d) Requires that, except as provided by Section 53.057 (Derivative Claimant: Notice for Contractual Retainage Claim), to authorize the owner to withhold funds under Subchapter D (Funds Withheld by Owner Following Notice), the notice to the owner must state that if the claim remains unpaid, the owner may be personally liable and the owner's property may be subjected to a lien unless:

(1) the owner withholds payments from the contractor for payment of the claim;
or

(2) the claim is otherwise paid or settled.

SECTION 3. Amends Sections 53.057(a), (b), and (e), Property Code, 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 notice that the claimant may have a lien claim for retainage to the owner or reputed owner not later than the 25th day after the date the work under the original contract is completed, the original contract is terminated, or the original contractor abandons performance under the contract. Deletes existing text requiring the claimant to give notice of the retainage agreement to the owner or reputed owner by 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, and requiring the claimant, if the agreement is with a subcontractor, to also give notice within that time to the original contractor.

(e) Provides that if a claimant gives notice under this section, rather than under this section and Section 53.055 or, if the claim relates to a residential construction project, under this section and Section 53.252, the claimant is not required to give any other notice as to the retainage before the date the notice under Section 53.055 (Notice of Filed Affidavit) is required.

SECTION 4. Amends Section 53.081(c), Property Code, to authorize the owner, if notice is sent under Section 53.057 (Derivative Claimant: Notice for Contractual Retainage Claim), to withhold funds by retaining funds under Subchapter E (Required Retainage for Benefit of Lien Claimants) for the period required under Section 53.082 (Time for which Funds are Withheld), rather than to withhold funds immediately on receipt of a copy of the claimant's affidavit prepared in accordance with Sections 53.052 through 53.055.

SECTION 5. 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 sends the notices required by this chapter in the time and manner required and files an affidavit claiming a lien in the period required under Section 53.052 (Filing of Affidavit), rather than files an affidavit claiming a lien not later than the 30th day after 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 6. Amends Section 53.106, Property Code, as follows:

Sec. 53.106. AFFIDAVIT OF COMPLETION. (a) Authorizes an owner to file with the county clerk of the county in which the property is located an affidavit of completion. Requires the affidavit to contain certain information, including a conspicuous statement that a claimant may not have a lien on retained funds unless the claimant complies with the notice requirement under Section 53.057 (Derivative Claimant: Notice for Contractual Retainage Claim) not later than the 25th day after the date of completion of

the original contract; and files a lien affidavit not later than the 15th day after the fourth calendar month after the date of completion of the original contract, rather than files the affidavit claiming a lien not later than the 30th day after the date of completion.

(b) Requires a copy of the affidavit to be sent by certified or registered mail to the original contractor not later than the date the affidavit is filed and to each claimant who sends a notice of lien liability to the owner under Section 53.056, 53.057, 53.058, 53.252, or 53.253, not later than the date the affidavit is filed or the fifth day, rather than 10th day, after the date the owner receives the notice of lien liability, whichever is later.

(c) Makes a conforming change.

(d) Provides that, except as provided by this subsection, an affidavit filed under this section on or before the fifth 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 (Derivative Claimant: Notice for Contractual Retainage Claim). Provides that if the affidavit is filed after the fifth day, rather than 10th, 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 7. Amends Sections 53.107(a), (b), (c), and (d), Property Code, as follows:

(a) Requires the owner to give notice to each subcontractor who has given notice to the owner provided by Section 53.056, 53.057, or 53.058, or sent to the owner by certified or registered mail a written request for notice of termination or abandonment, not later than the fifth day, rather than 10th day, after the date an original contract is terminated or the original contractor abandons performance under the original contract.

(b) Sets forth the required content of the notice, including that it contain a conspicuous notice that a claimant may not have a lien on the retained funds unless the claimant complies with the notice requirement in Section 53.057 (Derivative Claimant: Notice for Contractual Retainage Claim) not later than the 25th day after the date the original contract is terminated or abandoned; and files an affidavit claiming a lien not later than the 15th day, rather than 30th day, of the fourth month after the date of the termination or abandonment.

(c) Makes a conforming change.

(d) Provides that a subcontractor to whom an owner fails to send notice under this section is not required to comply with Section 53.057 (Derivative Claimant: Notice for Contractual Retainage Claim) to claim contractual retainage and may 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 8. Amends Subchapter E, Chapter 53, Property Code, by adding Section 53.108, as follows:

Sec. 53.108. NOTICE OF COMPLETION TO SECURE RETAINAGE CLAIM. (a) Requires an owner, not later than the fifth day after the date of completion, to send by certified mail, return receipt requested, or registered mail a notice of completion to:

(1) the original contractor;

(2) any person who provides a notice under Section 53.056, 53.057, 53.058, 53.252, or 53.253; and

(3) any person who furnished labor or provided materials for the improvement and requests a copy of the notice of completion.

(b) Requires the notice to 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

(6) the date of completion.

(c) Provides that a notice sent in compliance with this section is prima facie evidence under Sections 53.053(e) and 53.057 of the date the work under the original contract was completed.

(d) Provides that an owner who sends a copy of an affidavit of completion as prescribed by Section (Affidavit of Completion) satisfies the requirements of this section.

(e) Provides that a subcontractor to whom an owner fails to send notice under this section is not required to comply with Section 53.057 (Derivative Claimant: Notice for Contractual Retainage Claim) to claim contractual retainage and may claim a lien by filing a lien affidavit as prescribed by Section 53.052 (Filing of Affidavit).

SECTION 9. Repealer: Section 53.057(c) (relating to notice requirements), Property Code.

SECTION 10. Makes application of Chapter 53, Property Code, as amended by this Act, prospective.

SECTION 11. Effective date: September 1, 2011.