

## **BILL ANALYSIS**

C.S.H.B. 1390  
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Business & Industry  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Currently, a person who furnishes labor or material for the improvement of real property is authorized to place a mechanic's, contractor's, or materialman's lien on the property. The labor and material typically are furnished by subcontractors and suppliers but also can be provided by a general contractor. When a contractor presents a bill to the owner for work performed on a construction project, typically once a month but sometimes more often, the owner is required to pay only 90 percent of the work completed. The owner may retain the remaining 10 percent, which is referred to as retainage. The owner is required to hold this retainage for at least 30 days after the project is completed.

Provisions of law relating to such liens are designed to allow parties to become secure through a right to a lien on the property being improved. These provisions require a person furnishing labor or material to follow certain procedures in order to protect the person's right to secure a lien on the property, including the right to any retainage held by an owner. C.S.H.B. 1390 seeks to repair certain flaws in the procedures relating to a claim for retainage while maintaining the overall structure of lien procedures and taking into account the interests of various stakeholders.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 1390 amends the Property Code to include as a date on which a claim for retainage accrues the last day of the month in which all work called for by a contract between a property owner and an original contractor has been terminated. The bill includes as a condition under which a claimant is authorized to give notice for a retainage claim, instead of or in addition to a notice to the owner and original contractor of an unpaid balance, that the claimant has labored, furnished labor or materials, or specially fabricated materials under an agreement with an original contractor or a subcontractor providing for retainage, and limits that authorization to the portion of a retainage claim not in excess of the amount of the required retainage for the benefit of lien claimants. The bill 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 earliest of the 15th day of the second month following the date the claimant completed the work required under the claimant's contract with the original contractor or subcontractor; the 25th day after the date the work under the original contract is completed, provided that the owner, if required, gave notice of a filed affidavit of completion or a notice of completion to secure a retainage claim to the claimant; the 25th day after the date the original contract is terminated, provided that the owner, if required, gave notice relating to termination of work or abandonment of performance to the claimant; or the 25th day after the date the original contractor abandons performance under the original contract, provided that the owner, if required, gave notice relating to termination of work or abandonment of performance to the claimant.

C.S.H.B. 1390 removes a provision requiring 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. The bill removes a provision requiring the claimant to give notice within that time to the original contractor if the agreement is with a subcontractor. The bill removes a provision requiring the notice to contain the sum to be retained, the due date or dates, if known, and a general indication of the nature of the agreement. The bill establishes that a claimant is not required to give any other notice as to the retainage before the required date for the notice for a filed affidavit if a claimant gives notice for a retainage claim. The bill removes a provision establishing that the claimant is not required to give any notice as to the retainage if a claimant gives notice for a retainage claim and notice of a filed affidavit or if the claim relates to a residential construction project.

C.S.H.B. 1390 authorizes an owner, if a notice for a retainage claim is sent and immediately on receipt of the notice, to withhold funds from the original contractor under provisions of law relating to the required retainage for the benefit of lien claimants for the period required for filing the affidavit of mechanic's lien or, if a lien affidavit has been filed, until the lien claim has been satisfied or released. The bill removes the authorization to withhold such funds immediately on receipt of a copy of the claimant's affidavit prepared in accordance with the procedure for perfecting a lien.

C.S.H.B. 1390 includes as a requisite to a claimant having a lien on retained funds that the claimant file an affidavit claiming a lien not later than the earlier of two specified dates. The bill designates one of the specified dates as the 60th day after the earliest of the date the work under the original contract is completed, provided that the owner, if required, gave notice of a filed affidavit of completion or a notice of completion to secure a retainage claim to the claimant; the date the original contract is terminated, provided that the owner, if required, gave notice relating to termination of work or abandonment of performance; or the date the original contractor abandons performance under the original contract, provided that the owner, if required, gave notice relating to termination of work or abandonment of performance. The bill designates as the other specified date the last day of the period provided under provisions of law relating to a claimant filing an affidavit. The bill removes as a requisite to a claimant having such a lien that the claimant file 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.

C.S.H.B. 1390 establishes, in the requirement that an affidavit of completion filed by a property owner with the county clerk of the county in which the property is located contain a conspicuous statement that a claimant may not have a lien on retained funds except under certain conditions, that the claimant is exempt from that prohibition if the claimant files an affidavit claiming a lien not later than the 60th day after the date the work under the original contract is completed, rather than not later than the 30th day after the date of completion of the original contract, and adds as a condition for such exemption that the claimant comply with the notice requirement for a retainage claim not later than the earlier of the 15th day of the second month following the date the claimant completed the work required under the claimant's contract with the original contractor or subcontractor or the 25th day after the date the work under the original contract is completed.

C.S.H.B. 1390 changes from not later than the 10th day to not later than the fifth day after the date an owner receives notice of lien liability the deadline for sending a copy of the affidavit to the original contractor and each claimant who sends a notice of lien liability to the owner under provisions of law relating to notices from derivative claimants, if that date is later than the date the affidavit is filed. The bill changes the deadline for sending a copy of the affidavit to each person who furnishes labor or materials for the property and who furnishes the owner with a written request for a copy from not later than the 10th day to not later than the fifth day after the date the owner receives the request. The bill establishes that an affidavit of completion filed

under the bill's provisions on or before the fifth day, rather than 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 provisions of law relating to a notice for a retainage claim.

C.S.H.B. 1390 changes the date by which an owner is required to give notice relating to termination of work or abandonment of performance by the original contractor or owner to certain subcontractors from the 10th to the fifth day after the date the original contract is terminated or the original contractor abandons performance under that contract. The bill establishes, in the requirement that such notice contain a conspicuous statement that a claimant may not have a lien on the retained funds except under certain conditions, that the claimant is exempt from that prohibition if the claimant files an affidavit claiming a lien not later than the 60th day after the date of the termination or abandonment, rather than not later than the 30th day after that date, and adds as a condition for that exemption that the claimant comply with the notice requirement for a notice filed for a retainage claim not later than the earlier of the 15th day of the second month following the date the claimant completed the work required under the claimant's contract with the original contractor or subcontractor or the 25th day after the date the original contract is terminated or abandoned.

C.S.H.B. 1390 establishes that a notice sent in compliance with requirements for a notice relating to a termination of work or abandonment of performance by the original contractor or owner on or before the fifth day, rather than on or before the 10th day, after the date of termination or abandonment is prima facie evidence of the date the original contract was terminated or work was abandoned. The bill establishes that a subcontractor to whom an owner fails to send notice relating to termination or abandonment is not required to comply with provisions relating to notice for a retainage claim to claim retainage and authorizes such a subcontractor to claim a lien by filing a lien affidavit. The bill removes a provision establishing that a subcontractor who fails to file a lien affidavit within the prescribed period for a lien on retained funds has a lien to the extent authorized under provisions of law relating to notice of termination or abandonment if the subcontractor otherwise complies with those provisions and the owner did not provide the subcontractor notice of termination or abandonment.

C.S.H.B. 1390 requires a property owner, not later than the fifth day after the date of completion of certain work called for by a contract between an owner and an original contractor, to send by specified method of delivery a notice of completion to the original contractor, any person who provides a notice under provisions relating to a derivative claimant, and any person who furnished labor or provided materials for the improvement and requests a copy of the notice. The bill requires the notice to contain specific information and establishes that notice sent in compliance with the bill's provisions is prima facie evidence under provisions relating to the accrual of a claim for retainage and provisions relating to notice for a retainage claim of the date the work under the original contract was completed. The bill establishes that an owner who sends a copy of an affidavit of completion as prescribed by requirements for an affidavit of completion satisfies the requirements of the bill's provisions. The bill establishes that a person described by the bill's provisions to whom an owner fails to send such a notice is not required to comply with provisions relating to notice for a retainage claim to claim contractual retainage and authorizes such a subcontractor to claim a lien by filing a lien affidavit as prescribed by provisions setting forth requirements for the filing of an affidavit.

C.S.H.B. 1390 includes the date on which the original contract for a project was executed among the information an owner is required to provide to any person furnishing labor or materials for a project and an original contractor is required to provide to a person who furnished work under the original contract, on the person's request and within a reasonable time, but not later than the 10th day after the date the request is received. The bill establishes that a subcontractor who does not receive the information requested relating to the date on which the original contract for the project was executed within the prescribed period is not required to comply with statutory provisions governing a derivative claimant and authorizes the subcontractor to perfect a lien for

retainage by filing a lien affidavit.

C.S.H.B. 1390 includes among the grounds for objecting to the validity or enforceability of a claim or lien for purposes of a summary motion to remove an invalid or unenforceable lien that the deadlines for perfecting a lien claim for retainage have expired, in addition to other specified conditions. The bill provides, in the grounds for objecting to the validity or enforceability of a lien for such purposes that all funds subject to the perfection of a claim against the statutory retainage and certain other information have been deposited in the registry of the court, to specify that such information is a notice regarding the retainage, rather than the perfection of a claim against the statutory retainage.

C.S.H.B. 1390 makes its provisions applicable only to a lien claim for labor or materials furnished under a subcontract where the original contract was entered into on or after the bill's effective date. The bill makes conforming and nonsubstantive changes.

### **EFFECTIVE DATE**

September 1, 2011.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.H.B. 1390 contains a provision not included in the original limiting a claimant's authorization to give notice for a retainage claim to the portion of the claim not in excess of the amount of the required retainage for the benefit of lien claimants. The substitute contains a provision not included in the original requiring a claimant to give notice that the claimant may have a lien claim for retainage to the owner or reputed owner not later than the earliest of four specified periods of time, rather than not later than the 25th day after the date the work under the contract is completed, the original contract is terminated, or the original contractor abandons performance under the contract, as in the original. The substitute contains a provision not included in the original authorizing an owner to withhold funds immediately on receipt of a notice for a retainage claim.

C.S.H.B. 1390 differs from the original in the provision establishing that a claimant has a lien on retained funds if the claimant sends the required notice in the time and manner required and files an affidavit claiming a lien to specify that the claimant file the affidavit not later than the earlier of the 60th day after the earliest of three specified dates or the last day of the period provided under provisions of law relating to a claimant filing an affidavit, rather than specifying that the claimant file an affidavit claiming a lien in the period required under provisions of law relating to the filing of such an affidavit, as in the original.

C.S.H.B. 1390 differs from the original by establishing, in the requirement that an affidavit of completion filed by a property owner with the county clerk of the county in which the property is located contain a conspicuous statement that a claimant may not have a lien on retained funds except under certain conditions, that the claimant is exempt from that prohibition if the claimant files an affidavit claiming a lien not later than the 60th day after the date the work under the original contract is completed, whereas the original establishes that the claimant is exempt from that prohibition if the claimant files an affidavit not later than the 15th day after the fourth calendar month after the date of completion of the original contract. The substitute differs from the original by adding as a condition for that exemption that the claimant comply with the notice requirement for a retainage claim not later than the earlier of the 15th day of the second month following the date the claimant completed the work required under the claimant's contract with the original contractor or subcontractor or the 25th day after the date of completion of the original contract, whereas the original adds as a condition for the exemption that the claimant comply with the notice requirement not later than the 25th day after the date the work under the original contract is completed.

C.S.H.B. 1390 differs from the original by establishing, in the requirement that a notice for a retainage claim contain a conspicuous statement that a claimant may not have a lien on the retained funds except under certain conditions, that the claimant is exempt from that prohibition if the claimant files an affidavit claiming a lien not later than the 60th day after the date of the termination or abandonment, whereas the original establishes that the claimant is exempt from that prohibition if the claimant files an affidavit claiming a lien not later than the 15th day of the fourth month after the date of the termination or abandonment. The substitute differs from the original by adding as a condition for such exemption that the claimant comply with the notice requirement for a retainage claim not later than the earlier of the 15th day of the second month following the date the claimant completed the work required under the claimant's contract with the original contractor or subcontractor or the 25th day after the date the original contract is terminated or abandoned, whereas the original adds as a condition for such exemption that the claimant comply with the notice requirement not later than the 25th day after the date the original contract is terminated or abandoned.

C.S.H.B. 1390 differs from the original by extending to certain specified persons the exemption from the requirement to claim retainage if an owner fails to send to the person notice of completion to secure a retainage claim and authorizing the person to claim a lien by filing a lien affidavit, whereas the original extends that exemption to certain subcontractors.

C.S.H.B. 1390 contains provisions not included in the original including the date on which the original contract for a project was executed among the information an owner is required to provide to any person furnishing labor or materials for a project and an original contractor is required to provide to a person who furnished work under the original contract in a certain manner. The substitute contains a provision not included in the original establishing that a subcontractor who does not receive the information requested relating to the date on which the original contract for the project was executed within the prescribed period is not required to comply with statutory provisions governing a derivative claimant and authorizes the subcontractor to perfect a lien for retainage by filing a lien affidavit.

C.S.H.B. 1390 contains a provision not included in the original, in provisions including among the grounds for objecting to the validity or enforceability of a claim or lien for purposes of a summary motion to remove an invalid or unenforceable lien, adding as a condition to the grounds for such objection that the deadlines for perfecting a lien claim for retainage have expired, in addition to other specified conditions. The substitute contains a provision not included in the original, in the grounds for objecting to the validity or enforceability of a lien for such purposes that all funds subject to the perfection of a claim against the statutory retainage and certain other information have been deposited in the registry of the court, specifying that such information is a notice regarding the retainage.

C.S.H.B. 1390 differs from the original by removing a provision relating to the information that must be contained in a notice for a retainage claim, whereas the original repeals that provision.

C.S.H.B. 1390 differs from the original by making its provisions applicable only to a lien claim for labor or materials furnished under a subcontract where the original contract was entered into on or after the bill's effective date, whereas the original makes the bill's provisions applicable only to an original contract entered into on or after the bill's effective date and any lien arising under that contract.

C.S.H.B. 1390 differs from the original in nonsubstantive ways.