

BILL ANALYSIS

S.B. 1425
By: Wentworth
Business & Industry
Committee Report (Unamended)

BACKGROUND AND PURPOSE

S.B. 1425 addresses a narrow, but significant, part of the Property Code concerning a mechanic's and materialman's liens on real property relating to a concept called retainage.

Chapter 53 (Mechanic's, Contractor's, or Materialman's Lien), Property Code, grants a lien right to people who furnish labor or material to improve real property. The labor or materials are typically furnished by subcontractors and suppliers; however, a general contractor can also provide the labor or materials. In addition to the lien rights under Chapter 53, a general contractor (a person who contracts directly with the property owner) has a lien granted by the Texas Constitution.

Monthly, or sometimes more often, a contractor bills the owner for work performed on a construction project. Chapter 53 requires that an owner pay only 90 percent of the work put in place and retain the other 10 percent. This 10 percent is called retainage.

S.B. 1425 addresses the issue of retainage when an owner or borrower defaults on his or her obligations to the lender of construction funds. A number of cases have arisen where the retainage is not to be found upon the owner's or borrower's default, or where the borrower claims that the bank is holding the retainage. In any event, the contractor and subcontractors, who have provided services or supplies to the project and have a claim to the retainage, do not get paid.

S.B. 1425 amends Chapter 162 (Construction Payments, Loan Receipts, and Misapplication of Trust Funds), Property Code, to require an owner of a construction project to put aside retainage in a bank account as trust funds for the benefit of the contractors and subcontractors who are owed the retainage.

S.B. 1425 amends current law relating to an account for construction retainage and provides a civil penalty.

RULEMAKING AUTHORITY

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

ANALYSIS

SECTION 1. Amends Section 162.005, Property Code, by adding Subdivision (7) to define "construction trust fund account."

SECTION 2. Amends Subchapter A, Chapter 162, Property Code, by adding Sections 162.0061 and 162.008, as follows:

Sec. 162.0061. CONSTRUCTION TRUST FUND ACCOUNT REQUIRED IN CERTAIN CIRCUMSTANCES. (a) Requires a property owner who enters into a construction loan or financing agreement to pay toward the improvement of real property that is secured wholly or partly by a lien on the property or improvement, except as provided by this section, to deposit in a construction trust fund account in a financial institution not later than contemporaneously with payment to a contractor the amount retained under Subchapter E (Required Retainage for Benefit of Lien Claimants), Chapter 53 (Mechanic's, Contractor's, or Materialman's Lien), and other retainage, as defined by Section 53.001 (Definitions), retained by the owner from the contractor

to be held in trust for the benefit of a person described by Section 162.003(a) (relating to an artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or who furnishes labor or material for the construction or repair of an improvement on specific real property in this state being a beneficiary of any trust funds paid or received in connection with the improvement). Requires that trust funds deposited in a construction trust fund account under this section be used first toward the satisfaction of the owner's obligations and a claimant's rights under Subchapter E, Chapter 53. Authorizes that trust funds remaining in the construction trust fund account after the satisfaction of those obligations and rights be used by the owner for other construction payments under this chapter or other purposes of the owner. Provides that trust funds under this section are not subject to seizure, offset, or taking by the financial institution or a creditor of the owner. Provides that this subsection does not reduce the owner's obligation or liability under Subchapter E, Chapter 53.

(b) Provides that this section does not apply to a property owner who enters into a construction loan or financing agreement to pay toward the construction, remodeling, or repair of a single-family house or duplex used for residential purposes.

(c) Provides that this section does not apply to a property owner improving real property if the value of the improvement to be made is \$250,000 or less.

Sec. 162.008. MANAGEMENT OF CONSTRUCTION TRUST FUND ACCOUNTS. (a) Requires that the periodic statement received from the financial institution, if a property owner required to maintain a construction trust fund account under Section 162.0061 opens and maintains a separate construction trust fund account with the financial institution for each project subject to this subchapter:

(1) refer to the account as a "construction trust fund" account; and

(2) identify the project for which the construction trust fund account is maintained.

(b) Provides that, if a property owner required to maintain a construction trust fund account opens and maintains a construction trust fund account with the financial institution into which funds for two or more projects subject to this subchapter are deposited:

(1) the periodic statement received from the financial institution must refer to the account as a "construction trust fund" account; and

(2) the owner shall maintain an account record for the construction trust fund account that provides information relating to the source and amount of the funds in the account and the date the funds were deposited, the date and amount of each disbursement from the account and the person to whom the funds were disbursed, and the current balance of the account.

(c) Requires the owner, for each construction trust fund account maintained by the property owner under Subsection (b), to maintain the account record for each construction project for which trust funds have been deposited.

(d) Requires a property owner, not later than the 14th day after receipt of a written request, to provide a person who is a beneficiary of trust funds with a copy of:

(1) the periodic statement received from the financial institution regarding the construction trust fund account into which the trust funds of which the person is a beneficiary have been deposited; and

(2) the account record required to be maintained by the owner with respect to the construction project for which the trust funds have been deposited.

SECTION 3. Amends Section 162.032, Property Code, by adding Subsection (d), as follows:

(d) Authorizes a beneficiary, if the beneficiary of the trust funds required to be maintained in a construction trust fund account incurs actual damages as a result of the property owner's failure to

establish or maintain a construction trust fund account in violation of Section 162.0061 or failure to establish or maintain an account record for the construction trust fund account in violation of Section 162.008, to recover the beneficiary's actual damages, reasonable attorney's fees, and a civil penalty of \$500, in addition to any other remedy provided by law, from the property owner and each trustee who is an owner, officer, director, or agent of the property owner and who receives trust funds or controls or directs trust funds.

SECTION 4. Makes application of this Act prospective.

SECTION 5. Effective date: September 1, 2011.

EFFECTIVE DATE

September 1, 2011.