

1-1 By: Deshotel, Bohac (Senate Sponsor - Estes) H.B. No. 1390
1-2 (In the Senate - Received from the House May 3, 2011;
1-3 May 4, 2011, read first time and referred to Committee on Business
1-4 and Commerce; May 10, 2011, reported favorably by the following
1-5 vote: Yeas 8, Nays 0; May 10, 2011, sent to printer.)

1-6 A BILL TO BE ENTITLED
1-7 AN ACT

1-8 relating to retainage under certain construction contracts.

1-9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-10 SECTION 1. Section 53.053(e), Property Code, is amended to
1-11 read as follows:

1-12 (e) A claim for retainage accrues on the earliest of the
1-13 last day of the month in which all work called for by the contract
1-14 between the owner and the original contractor has been completed,
1-15 finally settled, terminated, or abandoned.

1-16 SECTION 2. Section 53.057, Property Code, is amended by
1-17 amending Subsections (a), (b), (c), and (d) and adding Subsections
1-18 (b-1), (f), and (g) to read as follows:

1-19 (a) A claimant may give notice under this section instead of
1-20 or in addition to notice under Section 53.056 or 53.252 if the
1-21 claimant is to labor, furnish labor or materials, or specially
1-22 fabricate materials, or has labored, furnished labor or materials,
1-23 or specially fabricated materials, under an agreement with an
1-24 original contractor or a subcontractor providing for retainage.

1-25 (b) The claimant must give the owner or reputed owner notice
1-26 of contractual ~~[the]~~ retainage ~~[agreement]~~ not later than the
1-27 earlier of:

1-28 (1) the 30th [15th] day after the date the claimant's
1-29 agreement providing for retainage is completed, terminated, or
1-30 abandoned; or

1-31 (2) the 30th day after the date the original contract
1-32 is terminated or abandoned [of the second month following the
1-33 delivery of materials or the performance of labor by the claimant
1-34 that first occurs after the claimant has agreed to the contractual
1-35 retainage].

1-36 (b-1) If an ~~[the]~~ agreement for contractual retainage is
1-37 with a subcontractor, the claimant must also give the notice of
1-38 contractual retainage [within that time] to the original contractor
1-39 within the period prescribed by Subsection (b).

1-40 (c) The notice must generally state the existence of a
1-41 requirement for retainage and contain:

1-42 (1) the name and address of the claimant; and

1-43 (2) if the agreement is with a subcontractor, the name
1-44 and address of the subcontractor [the sum to be retained,

1-45 (2) the due date or dates, if known, and

1-46 (3) a general indication of the nature of the
1-47 agreement].

1-48 (d) The notice must be sent ~~[by registered or certified~~
1-49 ~~mail]~~ to the last known business or residence address of the owner
1-50 or reputed owner or the original contractor, as applicable.

1-51 (f) A claimant has a lien on, and the owner is personally
1-52 liable to the claimant for, the retained funds under Subchapter E if
1-53 the claimant:

1-54 (1) gives notice in accordance with this section and:

1-55 (A) complies with Subchapter E; or

1-56 (B) files an affidavit claiming a lien not later
1-57 than the earliest of:

1-58 (i) the date required for filing an
1-59 affidavit under Section 53.052;

1-60 (ii) the 40th day after the date stated in
1-61 an affidavit of completion as the date of completion of the work
1-62 under the original contract, if the owner sent the claimant notice
1-63 of an affidavit of completion in the time and manner required;

1-64 (iii) the 40th day after the date of

2-1 termination or abandonment of the original contract, if the owner
 2-2 sent the claimant a notice of such termination or abandonment in the
 2-3 time and manner required; or
 2-4 (iv) the 30th day after the date the owner
 2-5 sent to the claimant to the claimant's address provided in the
 2-6 notice for contractual retainage, as required under Subsection (c),
 2-7 a written notice of demand for the claimant to file the affidavit
 2-8 claiming a lien; and
 2-9 (2) gives the notice of the filed affidavit as
 2-10 required by Section 53.055.

2-11 (g) The written demand under Subsection (f)(1)(B)(iv):
 2-12 (1) must contain the owner's name and address and a
 2-13 description, legally sufficient for identification, of the real
 2-14 property on which the improvement is located;
 2-15 (2) must state that the claimant must file the lien
 2-16 affidavit not later than the 30th day after the date the demand is
 2-17 sent; and
 2-18 (3) is effective only for the amount of contractual
 2-19 retainage earned by the claimant as of the day the demand was sent.

2-20 SECTION 3. Section 53.103, Property Code, is amended to
 2-21 read as follows:

2-22 Sec. 53.103. LIEN ON RETAINED FUNDS. A claimant has a lien
 2-23 on the retained funds if the claimant:

2-24 (1) sends the notices required by this chapter in the
 2-25 time and manner required; and
 2-26 (2) except as allowed by Section 53.057(f), files an
 2-27 affidavit claiming a lien not later than the 30th day after the
 2-28 earliest [earlier] of the date:

2-29 (A) the work is completed;
 2-30 (B) the original contract is terminated; or
 2-31 (C) the original contractor abandons performance
 2-32 under the original contract.

2-33 SECTION 4. Section 53.105(a), Property Code, is amended to
 2-34 read as follows:

2-35 (a) If the owner fails or refuses to comply with this
 2-36 subchapter, the claimants complying with Subchapter C or this
 2-37 subchapter [chapter] have a lien, at least to the extent of the
 2-38 amount that should have been retained from the original contract
 2-39 under which they are claiming, against the house, building,
 2-40 structure, fixture, or improvement and all of its properties and
 2-41 against the lot or lots of land necessarily connected.

2-42 SECTION 5. Sections 53.106(a) and (d), Property Code, are
 2-43 amended to read as follows:

2-44 (a) An owner may file with the county clerk of the county in
 2-45 which the property is located an affidavit of completion. The
 2-46 affidavit must contain:

2-47 (1) the name and address of the owner;
 2-48 (2) the name and address of the original contractor;
 2-49 (3) a description, legally sufficient for
 2-50 identification, of the real property on which the improvements are
 2-51 located;
 2-52 (4) a description of the improvements furnished under
 2-53 the original contract;
 2-54 (5) a statement that the improvements under the
 2-55 original contract have been completed and the date of completion;
 2-56 and

2-57 (6) a conspicuous statement that a claimant may not
 2-58 have a lien on retained funds unless the claimant files an [the]
 2-59 affidavit claiming a lien not later than the 40th [30th] day after
 2-60 the date the work under the original contract is completed [of
 2-61 completion].

2-62 (d) Except as provided by this subsection, an affidavit
 2-63 filed under this section on or before the 10th day after the date of
 2-64 completion of the improvements is prima facie evidence of the date
 2-65 the work under the original contract is completed for purposes of
 2-66 this subchapter and Section 53.057. If the affidavit is filed after
 2-67 the 10th day after the date of completion, the date of completion
 2-68 for purposes of this subchapter and Section 53.057 is the date the
 2-69 affidavit is filed. This subsection does not apply to a person to

3-1 whom the affidavit was not sent as required by this section.

3-2 SECTION 6. Sections 53.107(b) and (d), Property Code, are
3-3 amended to read as follows:

3-4 (b) The notice must contain:

3-5 (1) the name and address of the owner;

3-6 (2) the name and address of the original contractor;

3-7 (3) a description, legally sufficient for
3-8 identification, of the real property on which the improvements are
3-9 located;

3-10 (4) a general description of the improvements agreed
3-11 to be furnished under the original contract;

3-12 (5) a statement that the original contract has been
3-13 terminated or that performance under the contract has been
3-14 abandoned;

3-15 (6) the date of the termination or abandonment; and

3-16 (7) a conspicuous statement that a claimant may not
3-17 have a lien on the retained funds unless the claimant files an
3-18 affidavit claiming a lien not later than the 40th [~~30th~~] day after
3-19 the date of the termination or abandonment.

3-20 (d) If an owner is required to send a notice to a [A]
3-21 subcontractor under this section and fails to send the notice, the
3-22 subcontractor is not required to comply with Section 53.057 to
3-23 claim retainage and may claim a lien by filing a lien affidavit as
3-24 prescribed by Section 53.052 [who fails to file a lien affidavit in
3-25 the time prescribed by Section 53.103(2) has a lien to the extent
3-26 authorized under this subchapter if:

3-27 [~~(1) the subcontractor otherwise complies with this~~
3-28 ~~chapter, and~~

3-29 [~~(2) the owner did not provide the subcontractor~~
3-30 ~~notice as required by this section].~~

3-31 SECTION 7. Section 53.159, Property Code, is amended by
3-32 amending Subsections (a) and (b) and adding Subsection (g) to read
3-33 as follows:

3-34 (a) An owner, on written request, shall furnish the
3-35 following information within a reasonable time, but not later than
3-36 the 10th day after the date the request is received, to any person
3-37 furnishing labor or materials for the project:

3-38 (1) a description of the real property being improved
3-39 legally sufficient to identify it;

3-40 (2) whether there is a surety bond and if so, the name
3-41 and last known address of the surety and a copy of the bond; [~~and~~]

3-42 (3) whether there are any prior recorded liens or
3-43 security interests on the real property being improved and if so,
3-44 the name and address of the person having the lien or security
3-45 interest; and

3-46 (4) the date on which the original contract for the
3-47 project was executed.

3-48 (b) An original contractor, on written request by a person
3-49 who furnished work under the original contract, shall furnish to
3-50 the person the following information within a reasonable time, but
3-51 not later than the 10th day after the date the request is received:

3-52 (1) the name and last known address of the person to
3-53 whom the original contractor furnished labor or materials for the
3-54 construction project; [~~and~~]

3-55 (2) whether the original contractor has furnished or
3-56 has been furnished a payment bond for any of the work on the
3-57 construction project and if so, the name and last known address of
3-58 the surety and a copy of the bond; and

3-59 (3) the date on which the original contract for the
3-60 project was executed.

3-61 (g) A subcontractor who does not receive information
3-62 requested under Subsection (a)(4) within the period prescribed by
3-63 Subsection (a) is not required to comply with Section 53.057 and may
3-64 perfect a lien for retainage by filing a lien affidavit under
3-65 Section 53.052. This subsection expires September 1, 2013.

3-66 SECTION 8. Section 53.160(b), Property Code, is amended to
3-67 read as follows:

3-68 (b) The grounds for objecting to the validity or
3-69 enforceability of the claim or lien for purposes of the motion are

4-1 limited to the following:

4-2 (1) notice of claim was not furnished to the owner or
4-3 original contractor as required by Section 53.056, 53.057, 53.058,
4-4 53.252, or 53.253;

4-5 (2) an affidavit claiming a lien failed to comply with
4-6 Section 53.054 or was not filed as required by Section 53.052;

4-7 (3) notice of the filed affidavit was not furnished to
4-8 the owner or original contractor as required by Section 53.055;

4-9 (4) the deadlines for perfecting a lien claim for
4-10 retainage under this chapter have expired and the owner complied
4-11 with the requirements of Section 53.101 and paid the retainage and
4-12 all other funds owed to the original contractor before:

4-13 (A) the claimant perfected the lien claim; and

4-14 (B) the owner received a notice of the claim as
4-15 required by this chapter;

4-16 (5) all funds subject to the notice of a claim to the
4-17 owner and a notice regarding the [~~perfection of a claim against the~~
4-18 ~~statutory~~] retainage have been deposited in the registry of the
4-19 court and the owner has no additional liability to the claimant;

4-20 (6) when the lien affidavit was filed on homestead
4-21 property:

4-22 (A) no contract was executed or filed as required
4-23 by Section 53.254;

4-24 (B) the affidavit claiming a lien failed to
4-25 contain the notice as required by Section 53.254; or

4-26 (C) the notice of the claim failed to include the
4-27 statement required by Section 53.254; and

4-28 (7) the claimant executed a valid and enforceable
4-29 waiver or release of the claim or lien claimed in the affidavit.

4-30 SECTION 9. Chapter 53, Property Code, as amended by this
4-31 Act, applies only to a lien claim for labor or materials furnished
4-32 under a subcontract where the original contract was entered into on
4-33 or after the effective date of this Act. A lien claim for labor or
4-34 materials furnished under a subcontract where the original contract
4-35 was entered into before the effective date of this Act is governed
4-36 by the law in effect immediately before the effective date of this
4-37 Act, and that law is continued in effect for that purpose.

4-38 SECTION 10. This Act takes effect September 1, 2011.

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