

By: Keffer

H.B. No. 3316

A BILL TO BE ENTITLED

1 AN ACT
2 relating to an account for construction retainage; providing a
3 civil penalty.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 162.001, Property Code, is amended to
6 read as follows:

7 Sec. 162.001. CONSTRUCTION PAYMENTS AND LOAN RECEIPTS AS
8 TRUST FUNDS. (a) Construction payments are trust funds under this
9 chapter if the payments are made to a contractor or subcontractor or
10 to an officer, director, or agent of a contractor or subcontractor,
11 under a construction contract for the improvement of specific real
12 property in this state.

13 (b) Loan receipts are trust funds under this chapter if the
14 funds are borrowed by a contractor, subcontractor, or owner or by an
15 officer, director, or agent of a contractor, subcontractor, or
16 owner for the purpose of improving specific real property in this
17 state, and the loan is secured in whole or in part by a lien on the
18 property.

19 (c) Funds required under this chapter to be deposited into a
20 construction trust fund account are trust funds.

21 (~~d~~) A fee payable to a contractor is not considered trust
22 funds if:

23 (1) the contractor and property owner have entered
24 into a written construction contract for the improvement of

1 specific real property in this state before the commencement of
2 construction of the improvement and the contract provides for the
3 payment by the owner of the costs of construction and a reasonable
4 fee specified in the contract payable to the contractor; and

5 (2) the fee is earned as provided by the contract and
6 paid to the contractor or disbursed from a construction account
7 described by Section 162.006, if applicable.

8 (~~e~~) Trust funds paid to a creditor under this chapter are
9 not property or an interest in property of a debtor who is trustee
10 described by Section 162.002.

11 SECTION 2. Section 162.003(a), Property Code, is amended to
12 read as follows:

13 (a) An artisan, laborer, mechanic, contractor,
14 subcontractor, or materialman who labors or who furnishes labor or
15 material for the construction or repair of an improvement on
16 specific real property in this state is a beneficiary of any trust
17 funds paid, ~~or~~ received, withheld as retainage, or required to be
18 deposited into a construction trust fund account under this chapter
19 in connection with the improvement.

20 SECTION 3. Section 162.005, Property Code, is amended by
21 adding Subdivisions (7) and (8) to read as follows:

22 (7) "Construction trust fund account" means an
23 account in a federally insured financial institution into which are
24 deposited only funds required by Section 162.0061(a) to be
25 deposited in a construction trust fund account and other funds
26 deposited by the property owner that are necessary to pay charges
27 imposed on the account by the financial institution.

1 (8) "Retainage" is an amount or agreed percentage of
2 money in a construction contract between an owner and a contractor
3 that is withheld from a payment and not due to be paid until
4 completion of the contract or on an agreed date.

5 SECTION 4. Chapter 162, Property Code, is amended by adding
6 Sections 162.0061-162.0064 to read as follows:

7 Sec. 162.0061. CONSTRUCTION TRUST FUND ACCOUNT REQUIRED IN
8 CERTAIN CIRCUMSTANCES. (a) Except as provided by this section, a
9 property owner who enters into a construction loan or financing
10 agreement to pay toward the improvement of real property that is
11 secured wholly or partly by a lien on the property or improvement
12 shall deposit in a construction trust fund account not later than
13 contemporaneously with payment to a contractor any money withheld
14 from the payment as retainage and the deposited funds shall be held
15 in trust for the benefit of a person described by Section
16 162.003(a). Trust funds deposited in a construction trust fund
17 account under this section shall be used first to satisfy the
18 owner's obligations and liabilities for retainage and a claimant's
19 rights under Chapter 53, Property Code. Trust funds remaining in
20 the construction trust fund account after the satisfaction of those
21 obligations, liabilities, and rights may be used by the owner for
22 other construction payments under this chapter or direct costs of
23 the owner. Trust funds under this section are not subject to
24 seizure, offset, or taking by the financial institution or a
25 creditor of the owner. This subsection does not alter the owner's
26 obligation or liability under any other law.

27 (b) This section does not apply to a property owner who

1 enters into a construction loan or financing agreement to pay
2 toward the construction, remodeling, or repair of a single-family
3 house or duplex used for residential purposes, or for land
4 development related thereto.

5 (c) This section does not apply to a property owner
6 improving real property if the value of the improvement to be made
7 is \$500,000 or less.

8 Sec. 162.0062. BOND IN LIEU OF TRUST FUND ACCOUNT. (a) In
9 lieu of complying with Section 162.0061(a), a property owner may
10 obtain a bond described in Subsections (b), (c) or (d).

11 (b) A bond furnished by the contractor that meets the
12 requirements of Section 162.0063 and the following requirements:

13 (1) be in a penal sum at least equal to the total of the
14 original contract amount between the owner and the contractor;

15 (2) be conditioned on prompt payment for all labor,
16 subcontracts, materials, specially fabricated materials, and
17 normal and usual extras not exceeding 15 percent of the contract
18 price; and

19 (3) be for the protection and use of all persons that
20 are due prompt payment under Subsection 162.0062(b)(2).

21 (c) A bond furnished by the owner that meets the
22 requirements of Section 162.0063 and the following requirements:

23 (1) be in a penal sum at least equal to 10 percent of
24 the value of the total of the original contract amount between the
25 owner and the contractor including 10 percent of normal and usual
26 extras not exceeding 15 percent of the original contract amount;

27 (2) be conditioned on prompt payment for retainage

1 owed to a contractor by an owner; and

2 (3) be for the protection and use of all persons that
3 are due prompt payment under Subsection 162.0062(c)(2).

4 (d) a bond furnished by the contractor that meets the
5 requirements of Section 162.0063 and the following requirements:

6 (1) be in a penal sum at least equal to 10 percent of
7 the value of the total of the contract amount between the owner and
8 the contractor including 10 percent of normal and usual extras not
9 exceeding 15 percent of the original contract amount;

10 (2) be conditioned on prompt payment for contractual
11 retainage owed for all labor, subcontracts, materials, specially
12 fabricated materials, furnished by any person to a contractor or to
13 accomplish work owed by a contractor under a contract between a
14 contractor and an owner; and

15 (3) be for the protection and use of all persons that
16 are due prompt payment under Subsection 162.0062(d)(2).

17 Sec. 162.0063. REQUIREMENTS FOR BOND. A bond under Section
18 162.0062 must meet the following requirements:

19 (a) be executed by:

20 (1) the contractor as principal if furnished under
21 Section 162.0062(b) or (d) or by the owner as principal if furnished
22 under Section 162.0062(c); and

23 (2) a corporate surety authorized and admitted to do
24 business in this state and licensed by this state to execute bonds
25 as surety subject to Sections 3503.001-3503.005, Insurance Code;
26 and

27 (b) not be subject to any notice or perfection obligation

1 other than as may be required by Chapter 53, Property Code.

2 Sec. 162.0064. NONPAYMENT NOT A DEFENSE. Nonpayment by the
3 owner is not a defense for the surety under a bond furnished under
4 Section 162.0062(d).

5 SECTION 5. Chapter 162, Property Code, is amended by adding
6 Section 162.008 to read as follows:

7 Sec. 162.008. MANAGEMENT OF CONSTRUCTION TRUST FUND
8 ACCOUNTS. (a) If a property owner required to maintain a
9 construction trust fund account under Section 162.0061 opens and
10 maintains a separate construction trust fund account with the
11 financial institution for each project subject to this subchapter,
12 the periodic statement received from the financial institution
13 must:

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

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

18 (b) If a property owner required to maintain a construction
19 trust fund account opens and maintains a construction trust fund
20 account with the financial institution into which funds for two or
21 more projects subject to this subchapter are deposited:

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

25 (2) the owner shall maintain an account record for the
26 construction trust fund account that provides information relating
27 to:

1 (A) the amount of the funds in the account for
2 each project and the date the funds were deposited;

3 (B) the date and amount of each disbursement from
4 the account and the person to whom the funds were disbursed; and

5 (C) the current balance of the account.

6 (c) For each construction trust fund account maintained by
7 the property owner under Subsection (b), the owner shall maintain
8 the account record for each construction project for which trust
9 funds have been deposited.

10 (d) Not later than the 14th day after a property owner
11 receives a written request from a person who is a beneficiary of
12 trust funds the property owner shall provide the beneficiary with:

13 (1) a copy of the periodic statement received from the
14 financial institution regarding the construction trust fund
15 account into which the trust funds of which the person is a
16 beneficiary have been deposited or the original of an executed
17 authorization sufficient to allow the requesting person to obtain
18 the periodic statement; and

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

22 (e) If a property owner does not provide the notice in the
23 time required by Subsection (d), or if the statement or record
24 furnished does not demonstrate that the owner has complied with the
25 obligations of Section 162.0061 or 162.0062, a beneficiary may
26 suspend contractually required performance the 10th day after the
27 date the beneficiary gives the owner written notice that states the

1 intent of the beneficiary to suspend performance and the reason for
2 suspending performance.

3 (f) An owner may cure any grounds for suspension as provided
4 by Subsection (e) by complying with the requirements of Sections
5 162.0061 or 162.0062-162.0063 and furnishing proof of such
6 compliance to a beneficiary who has given notice under Subsection
7 (d) or (e).

8 (g) A beneficiary that has suspended performance as
9 provided by Subsection (e) is not:

10 (1) required to supply further labor, services, or
11 materials until the owner has cured as provided by Subsection (f)
12 and paid the beneficiary its costs for demobilization and
13 remobilization; or

14 (2) responsible for damages resulting from suspending
15 work unless the beneficiary continues to suspend performance after
16 the 10th day after the owner has cured under Subsections (f) and
17 (g)(1).

18 SECTION 6. Section 162.031 (b), (c) and (d), Property Code,
19 is amended to read as follows:

20 (b) It is an affirmative defense to prosecution or other
21 action brought under Subsection (a) that the trust funds described
22 in Section 162.001(a) and (b) not paid to the beneficiaries of the
23 of the trust were used by the trustee to pay the trustee's actual
24 expenses directly related to the construction or repair of the
25 improvement. ~~[or]~~

26 (c) It is an affirmative defense to prosecution or other
27 action brought under Subsection (a) that the trust funds described

1 in Section 162.001(c) have been retained by the trustee, after
2 notice to the beneficiary who has made a request for payment, as a
3 result of the trustee's reasonable belief that the beneficiary is
4 not entitled to such funds or have been retained as authorized or
5 required by Chapter 53.

6 (d[~~e~~]) It is also an affirmative defense to prosecution or
7 other action brought under Subsection (a) that the trustee paid the
8 beneficiaries all trust funds which they are entitled to receive no
9 later than 30 days following written notice to the trustee of the
10 filing of a criminal complaint or other notice of a pending criminal
11 investigation.

12 (e[~~d~~]) A trustee who commingles trust funds with other funds
13 in the trustee's possession does not defeat a trust created by this
14 chapter.

15 SECTION 7. The change in law made by this Act applies only
16 to an amount retained under a contract between an owner and
17 contractor entered into on or after the effective date of this Act.
18 An amount retained under a contract between an owner and contractor
19 entered into before the effective date of this Act is governed by
20 the law as it existed immediately before that date, and that law is
21 continued in effect for that purpose.

22 SECTION 8. This Act takes effect September 1, 2013.