

## **BILL ANALYSIS**

H.B. 2668  
By: Wray  
Business & Industry  
Committee Report (Unamended)

### **BACKGROUND AND PURPOSE**

Interested parties note a problem in which parties entitled to a retainage for certain construction projects are not paid that retainage due to a foreclosure of the loan financing the construction. H.B. 2668 seeks to address this problem by protecting the retainage in a similar fashion as the lender protects its construction loan.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **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**

H.B. 2668 amends the Property Code to establish that a lien for retained funds withheld from the original contractor, other than funds retained under a contract for construction or repair of a single-family house or a duplex used for residential purposes, that is perfected under statutory provisions relating to a mechanic's, contractor's, or materialman's lien has equal priority with a lien of a person with whom the owner has entered into a loan or financing agreement to fund the construction of an improvement of real property that is secured by a lien on the property or improvement, unless a preference for the retained funds is provided by other law. The bill excepts from this prioritization retained funds that have been paid to the original contractor. The bill makes a waiver or release of this priority unenforceable unless the waiver or release is contained in an accord and satisfaction of an identified dispute, an agreement concerning an action pending in a court or arbitration proceeding, or an agreement that is executed after an affidavit claiming a lien for retained funds has been filed.

H.B. 2668 establishes that the lien for retained funds under statutory provisions relating to a mechanic's, contractor's, or materialman's lien does not attach to the owner's property if, before withholding retained funds from the original contractor, the owner furnishes and files a bond as provided by the bill. The bill requires such a bond to meet the following conditions: be in a penal sum at least equal to the total of 10 percent of the original contract amount and the lesser of 10 percent of the normal and usual extras or 1.5 percent of the original contract amount; be executed by the owner as principal and a corporate surety authorized to execute surety bonds in Texas under applicable provisions of the Insurance Code; be conditioned on prompt payment of retained funds owed for all labor, subcontracts, materials, and specially fabricated materials furnished by any person to accomplish work required under an original contract; be in favor of each claimant who is due such prompt payment; and clearly and prominently display on the bond or on an attachment to the bond the name, mailing address, physical address, and telephone

number, including the area code, of the surety company to which any notice of claim should be sent or the toll-free telephone number maintained by the Texas Department of Insurance (TDI) for information and complaints and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from TDI by calling the toll-free telephone number.

H.B. 2668 makes the statutory requirements for recording a bond and contract between an original contractor and an owner applicable to a bond issued under the bill and to the related contract. The bill entitles a purchaser, lender, or other person acquiring an interest in the owner's property or an insurer of title to rely on the record of the bond and contract as constituting payment of all claims and liens for retained funds owed for labor, subcontracts, materials, or specially fabricated materials incurred by the owner as if each person furnishing labor or materials for the work performed under the original contract had filed a complete release and relinquishment of a lien for retained funds of record.

H.B. 2668 establishes that the bond protects all persons with a claim for retained funds and expressly does not require a claimant to give any notice to the surety to bring a claim under the bill's provisions. The bill requires the claimant to sue on the bond within two years following the date on which the claim on retained funds becomes due and requires the suit to be brought in the county in which the property being improved is located in whole or in part.

H.B. 2668 entitles each person who has perfected a mechanic's, contractor's, or materialman's lien claim if 10 percent of the total of the original contract amount and any modifications is an amount that exceeds the penal sum of the owner's bond in lieu of the lien of retained funds to the priority of the lien for the difference between the total original contract amount, as modified, and the penal sum. The bill requires any provision in any payment bond furnished or filed in attempted compliance with the bill's provisions relating to an owner's bond in lieu of a lien for retained funds that expands or restricts the rights or liabilities provided under statutory provisions relating to a mechanic's, contractor's, or materialman's lien to be disregarded and the bill provisions to be read into that bond.

H.B. 2668 makes any waiver or release of a payment bond claim under the bill's provisions relating to an owner's bond in lieu of a lien for retained funds unenforceable unless the waiver or release is executed under applicable law or is contained in an accord and satisfaction of an identified dispute, an agreement concerning an action pending in any court or arbitration proceeding, or an agreement that is executed after a bond claim has been made. The bill requires the court in any proceeding to foreclose a lien or to enforce a claim against a bond issued under the bill to award costs and reasonable attorney's fees as are equitable and just.

**EFFECTIVE DATE**

September 1, 2017.