

85R5274 BEE-F

By: Wray

H.B. No. 2668

A BILL TO BE ENTITLED

AN ACT

relating to a mechanic's or materialman's lien for retained funds under certain construction contracts.

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

SECTION 1. Subchapter F, Chapter 53, Property Code, is amended by adding Section 53.125 to read as follows:

Sec. 53.125. PRIORITY OF LIEN FOR CERTAIN RETAINED FUNDS.

(a) This section does not apply to funds retained under a contract for construction or repair of a single-family house or a duplex used for residential purposes.

(b) A lien for retained funds withheld from the original contractor that is perfected under this chapter 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.

(c) The priority provided under Subsection (b) does not apply to retained funds that have been paid to the original contractor.

(d) A waiver or release of the priority provided by this section is unenforceable unless the waiver or release is contained

in:

- (1) an accord and satisfaction of an identified dispute;
- (2) an agreement concerning an action pending in a court

or arbitration proceeding; or

(3) an agreement that is executed after an affidavit claiming a lien for retained funds has been filed.

SECTION 2. The heading to Subchapter I, Chapter 53, Property Code, is amended to read as follows:

SUBCHAPTER I. CONTRACTOR'S BOND TO PAY LIENS OR CLAIMS

SECTION 3. Chapter 53, Property Code, is amended by adding Subchapter I-1 to read as follows:

SUBCHAPTER I-1. OWNER'S BOND IN LIEU OF LIEN FOR RETAINED FUNDS

Sec. 53.221. BOND IN LIEU OF LIEN FOR RETAINED FUNDS. The lien for retained funds under this chapter does not attach to the owner's property if, before withholding retained funds from the original contractor, the owner furnishes and files a bond under this subchapter.

Sec. 53.222. BOND REQUIREMENTS. A bond under this subchapter must:

- (1) be in a penal sum at least equal to the total of:
 - (A) 10 percent of the original contract amount; and
 - (B) the lesser of:
 - (i) 10 percent of the normal and usual extras;

or

- (ii) 1.5 percent of the original contract

amount;

(2) be in favor of each claimant who is due prompt payment under Subdivision (4);

(3) be executed by:

(A) the owner as principal; and

(B) a corporate surety authorized to execute surety bonds in this state under Subchapter A, Chapter 3503, Insurance Code;

(4) 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; and

(5) clearly and prominently display on the bond or on an attachment to the bond:

(A) 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

(B) the toll-free telephone number maintained by the Texas Department of Insurance under Subchapter B, Chapter 521, Insurance Code, and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from the Texas Department of Insurance by calling the toll-free telephone number.

Sec. 53.223. RECORDING OF BOND AND CONTRACT. The requirements for recording a bond and contract under Section 53.203

apply to a bond issued under this subchapter and to the related contract.

Sec. 53.224. RELIANCE ON RECORD. A purchaser, lender, or other person acquiring an interest in the owner's property or an insurer of title is entitled 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.

Sec. 53.225. ENFORCEABLE CLAIMS. The bond protects all persons with a claim for retained funds. A claimant is not required to give any notice to the surety to bring a claim under this subchapter.

Sec. 53.226. ACTION ON BOND. (a) The claimant must sue on the bond within two years following the date on which the claim on retained funds becomes due.

(b) The suit must be brought in the county in which the property being improved is located in whole or in part.

Sec. 53.227. CLAIMS IN EXCESS OF BOND AMOUNT. If 10 percent of the total of the original contract amount and any modifications is an amount that exceeds the penal sum of the bond under Section 53.222, each person who has perfected a lien claim under this chapter is entitled to the priority of the lien under Section

53.125 for the difference between the total original contract amount, as modified, and the penal sum.

Sec. 53.228. ATTEMPTED COMPLIANCE. Any provision in any payment bond furnished or filed in attempted compliance with this subchapter that expands or restricts the rights or liabilities provided under this chapter shall be disregarded and the provisions of this subchapter shall be read into that bond.

Sec. 53.229. WAIVER AND RELEASE OF PAYMENT BOND CLAIM. Any waiver or release of a payment bond claim under this subchapter is unenforceable unless the waiver or release is executed under Subchapter L or is contained in:

- (1) an accord and satisfaction of an identified dispute;
- (2) an agreement concerning an action pending in any court or arbitration proceeding; or
- (3) an agreement that is executed after a bond claim has been made.

SECTION 4. Section 53.156, Property Code, is amended to read as follows:

Sec. 53.156. COSTS AND ATTORNEY'S FEES. In any proceeding to foreclose a lien or to enforce a claim against a bond issued under Subchapter H, I, I-1, or J or in any proceeding to declare that any lien or claim is invalid or unenforceable in whole or in part, the court shall award costs and reasonable attorney's fees as are equitable and just. With respect to a lien or claim arising out of a residential construction contract, the court is not required to

order the property owner to pay costs and attorney's fees under this section.

SECTION 5. The changes in law made by this Act apply only to a lien relating to a contract entered into on or after the effective date of this Act. A lien relating to a contract entered into before the effective date of this Act is governed by the law applicable to the lien immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 6. This Act takes effect September 1, 2017.