

By: Keffer

H.B. No. 3316

Substitute the following for H.B. No. 3316:

By: Oliveira

C.S.H.B. No. 3316

A BILL TO BE ENTITLED

1 AN ACT

2 relating to an account or bond for construction retainage under  
3 certain contracts.

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

5 SECTION 1. Section 162.001, Property Code, is amended by  
6 adding Subsection (b-1) to read as follows:

7 (b-1) Funds required under this chapter to be deposited into  
8 a construction trust fund account are trust funds.

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

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

18 SECTION 3. Section 162.004(a), Property Code, is amended to  
19 read as follows:

20 (a) This chapter does not apply to:

21 (1) a bank, savings and loan, or other lender;

22 (2) a title company or other closing agent; or

23 (3) a corporate surety who issues a payment bond  
24 covering the contract for the construction or repair of the

1 improvement, except as provided by Section 162.0064.

2 SECTION 4. Section 162.005, Property Code, is amended by  
3 adding Subdivisions (7) and (8) to read as follows:

4 (7) "Construction trust fund account" means an account  
5 in a federally insured financial institution into which are  
6 deposited only funds required by Section 162.0061(a) to be  
7 deposited in a construction trust fund account and other funds  
8 deposited by the property owner that are necessary to pay charges  
9 imposed on the account by the financial institution.

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

14 SECTION 5. Subchapter A, Chapter 162, Property Code, is  
15 amended by adding Sections 162.0061, 162.0062, 162.0063, 162.0064,  
16 162.008, and 162.009 to read as follows:

17 Sec. 162.0061. CONSTRUCTION TRUST FUND ACCOUNT REQUIRED IN  
18 CERTAIN CIRCUMSTANCES. (a) Except as provided by this section or  
19 Section 162.0062, a property owner who enters into a construction  
20 loan or financing agreement to pay toward the improvement of real  
21 property that is secured wholly or partly by a lien on the property  
22 or improvement shall deposit in a construction trust fund account  
23 not later than contemporaneously with payment to a contractor any  
24 money withheld from the payment as retainage. The deposited funds  
25 are held in trust for the benefit of a person described by Section  
26 162.003(a). Trust funds deposited in a construction trust fund  
27 account under this section shall be used first to satisfy the

1 owner's obligations and liabilities for retainage and a claimant's  
2 rights under Chapter 53. Trust funds remaining in the construction  
3 trust fund account after the satisfaction of those obligations,  
4 liabilities, and rights may be used by the owner for other  
5 construction payments under this chapter or direct costs of the  
6 owner. Trust funds under this section are not subject to seizure,  
7 offset, or taking by the financial institution or a creditor of the  
8 owner. This subsection does not alter the owner's obligation or  
9 liability under any other law.

10 (b) This section does not apply to a property owner who  
11 enters into a construction loan or financing agreement to pay  
12 toward the construction, remodeling, or repair of a single-family  
13 house or duplex used for residential purposes or for related land  
14 development.

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

18 Sec. 162.0062. BOND IN LIEU OF TRUST FUND ACCOUNT. (a)  
19 Instead of establishing a construction trust fund account under  
20 Section 162.0061(a), a property owner may obtain or furnish a bond  
21 as described by Subsection (b) or (c).

22 (b) A property owner may obtain a bond furnished by the  
23 contractor that meets the requirements of Subchapter I, Chapter 53.

24 (c) A property owner may furnish a bond that:

25 (1) meets the requirements of Section 162.0063;

26 (2) is in a penal sum at least equal to 10 percent of:

27 (A) the value of the total of the original

1 contract amount; and

2 (B) normal and usual extras not exceeding 15  
3 percent of the original contract amount;

4 (3) is conditioned on prompt payment for retainage  
5 owed for all labor, subcontracts, materials, and specially  
6 fabricated materials furnished by any person to accomplish work  
7 required under a contract between a contractor and an owner; and

8 (4) is for the protection and use of each claimant who  
9 is due prompt payment under Subdivision (3).

10 Sec. 162.0063. ADDITIONAL BOND REQUIREMENTS. A bond  
11 furnished under Section 162.0062:

12 (1) must be executed by:

13 (A) the contractor as principal if furnished  
14 under Section 162.0062(b) or by the owner as principal if furnished  
15 under Section 162.0062(c); and

16 (B) a corporate surety authorized to execute  
17 surety bonds in this state, as provided by Subchapter A, Chapter  
18 3503, Insurance Code; and

19 (2) may not be subject to any notice or perfection  
20 obligation other than as required by Chapter 53.

21 Sec. 162.0064. LIMITATION ON ACTION ON BOND. A suit may not  
22 be filed on a bond furnished under Section 162.0062(c) after the  
23 first anniversary of the later of:

24 (1) the date of completion of the contract between the  
25 owner and contractor; or

26 (2) the date on which retainage is due to the  
27 contractor.

1 Sec. 162.008. MANAGEMENT OF CONSTRUCTION TRUST FUND

2 ACCOUNTS. (a) If a property owner required to maintain a  
3 construction trust fund account under Section 162.0061 opens and  
4 maintains a separate construction trust fund account with the  
5 financial institution for each project subject to this subchapter,  
6 the periodic statement received from the financial institution  
7 must:

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

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

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

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

19 (2) the owner shall maintain an account record for the  
20 construction trust fund account that provides information relating  
21 to:

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

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

26 (C) the current balance of the account.

27 (c) For each construction trust fund account maintained by

1 the property owner under Subsection (b), the owner shall maintain  
2 the account record for each construction project for which trust  
3 funds have been deposited.

4 Sec. 162.009. DISCLOSURES TO BENEFICIARIES; SUSPENSION OF  
5 PERFORMANCE. (a) Not later than the 14th day after a property  
6 owner receives a written request from a person who is a beneficiary  
7 of trust funds, the property owner shall provide the beneficiary  
8 with:

9 (1) if the owner is maintaining a construction trust  
10 fund account under Section 162.0061:

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

17 (B) the account record required to be maintained  
18 by the owner with respect to the construction project for which the  
19 trust funds have been deposited; or

20 (2) if a bond has been obtained or furnished under  
21 Section 162.0062, proof of a bond complying with that section.

22 (b) If a property owner does not comply with Subsection (a)  
23 or the information provided under that subsection does not  
24 demonstrate that the owner has complied with Section 162.0061 or  
25 162.0062, a beneficiary may suspend contractually required  
26 performance the 10th day after the date the beneficiary gives the  
27 owner written notice that states the intent of the beneficiary to

1 suspend performance and the reason for suspending performance if  
2 the owner does not cure the grounds for suspension under Subsection  
3 (c) before the beneficiary suspends performance.

4 (c) An owner may cure any grounds for a suspension under  
5 Subsection (b) by complying with Section 162.0061 or 162.0062 and  
6 providing proof of that compliance to the beneficiary.

7 (d) A beneficiary that has suspended performance under  
8 Subsection (b) is not:

9 (1) required to supply further labor, services, or  
10 materials before the date the owner cures the grounds for  
11 suspension as provided by Subsection (c) and pays the beneficiary's  
12 costs for suspending performance and for resuming performance; or

13 (2) responsible for damages resulting from suspending  
14 performance, unless the beneficiary continues to suspend  
15 performance after the 10th day after the date the owner cured the  
16 grounds for suspension as provided by Subsection (c) and paid the  
17 beneficiary for the costs described by Subdivision (1).

18 SECTION 6. Section 162.031, Property Code, is amended by  
19 amending Subsection (b) and adding Subsection (b-1) to read as  
20 follows:

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

27 (b-1) It is an affirmative defense to prosecution or other

1 action brought under Subsection (a) with respect to trust funds  
2 described by Section 162.001(b-1) that the trust funds:

3           (1) [~~or~~] have been retained by the trustee, after  
4 notice to the beneficiary who has made a request for payment, as a  
5 result of the trustee's reasonable belief that the beneficiary is  
6 not entitled to such funds; or

7           (2) have been retained as authorized or required by  
8 Chapter 53.

9           SECTION 7. The change in law made by this Act applies only  
10 to an original construction contract entered into on or after the  
11 effective date of this Act. An original construction contract  
12 entered into before the effective date of this Act is governed by  
13 the law as it existed immediately before that date, and that law is  
14 continued in effect for that purpose.

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