

Written Testimony on Senate Bill 590

Texas Building Owners & Managers Association (Texas BOMA)

Texas BOMA submits this written testimony on Senator Estes's SB 590. Texas BOMA opposes changing the law to require notice from a subcontractor of a potential retainage lien to come after completion, as opposed to coming at the start of work on a project. In addition, Texas BOMA believes the bill would prove difficult to comply with in a practical sense because of some of the timelines placed in the bill.

While Texas BOMA retains its opposition, we believe a few changes in the bill would make it "workable" for owners and contractors alike.

Require retainage notice from a subcontract to be sent via certified mail, return receipt requested. This would provide documentation that the notice was both sent by the subcontractor and received by the owner. Because the notices would be coming to the owner *after* the job is completed (as opposed to at the start of a project), and the retainage payment is due 30 days after completion, we think it would be good policy to require some kind of documentation that the notices were actually sent and received. Absent some requirement of this kind, notice could come in forms such as e-mail, or could be lost in the mail. This would defeat the policy purpose behind this change, which is to allow subcontractors and owners to know of potential retainage liens so they can assist one another in ensuring payment is made.

Change the 25 day post-completion timeline to 15 days. Under current law, a subcontractor notifies the owner of a potential claim at the start of the subcontractor's work; under SB 590, the notice would come after completion. The bill would require the owner send the subcontractor notice of completion within 5 days after completion occurs; the subcontractor would send the owner notice of a potential retainage claim 25 day after completion occurs; and the owner is still required to pay retainage to the contractor 30 days after completion occurs. There is a relatively long wait between the notice from the completion notice from the owner and the potential lien notice from the subcontractor. In addition, because of the so-called "mailbox rule", notice is considered delivered when the notice is mailed, not when it is received. It is possible for an owner to receive a subcontractor's notice just a day or two before the owner is required to pay the contractor. This does not leave much time for an owner to help ensure the subcontractor is paid. For this reason, we recommend the two references to 25 days be changed to 15 days. This change would create a more equitable situation. The subcontractor would still have at least a week (probably more, depending on when the subcontractor receives the notice) to notify the owner of a potential claim, and the owner would have enough time to help ensure the subcontractor will be paid by the contractor.

Eliminate the last sentence in 53.159(e). Section 53.159 currently requires an owner, on request from a subcontractor, to furnish certain information to the subcontractor. This information includes a legal description of the real property; whether there is a surety bond; and whether there are any prior recorded liens or security interests on the property. The bill adds a new sentence at the end of 53.159(e) which would allow the subcontractor to forego sending the owner notice of a potential lien if the owner fails to provide the subcontractor, at the subcontractor's request, of the date the contract was entered into. We think this provision is

over-reach, as a mistake in providing such information to the subcontractor should not waive the subcontractor's requirement to notify the owner of a potential lien.

Texas BOMA has been in contact with the Texas Contractors Association and will continue to work with that group on this bill. If we can be of assistance to the Committee, you may contact any member of the Texas BOMA lobby team at the numbers below.

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