

CHAPTER 578

H.B. No. 1160

AN ACT

relating to the protection of subcontractors and other beneficiaries of funds paid or held under construction contracts; providing a penalty.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subchapter D, Chapter 53, Property Code, is amended by adding Section 53.085 to read as follows:

Sec. 53.085. AFFIDAVIT REQUIRED. (a) Any person who furnishes labor or materials for the construction of improvements on real property shall, upon request and as a condition of final payment for such labor or materials, provide to the requesting party, or its agent, an affidavit stating that such person has paid each of his subcontractors, laborers, or materialmen in full for all labor and materials provided to him for the construction. In the event that the person has not paid each of his subcontractors, laborers, or materialmen in full, the person shall state in the affidavit the amount owed and the name of each subcontractor, laborer, or materialman to whom such payment is owed.

(b) The seller of any real property shall, upon request by the purchaser or its agent prior to closing of the purchase of such real property, provide to such purchaser or its agent, a written affidavit stating that the seller has paid each of his contractors, laborers, or materialmen in full for all labor and materials provided to the seller for any construction of improvements on the real property and that the seller is not indebted to any person, firm, or corporation by reason of any such construction. In the event that the seller has not paid each of his contractors, laborers, or materialmen in full, the seller shall state in the affidavit the amount owed and the name of each contractor, laborer, or materialman to whom such payment is owed.

(c) A person, including a seller, commits an offense if the person intentionally, knowingly, or recklessly makes a false or misleading statement in an affidavit under this section. An offense under this section is a Class A misdemeanor.

SECTION 2. Section 162.004(a), Property Code, is amended to read as follows:

(a) This chapter does not apply to:

- (1) a bank, savings and loan, or other lender;
- (2) a title company or other closing agent; or
- (3) *a corporate surety who issues a payment bond covering the contract for the construction or repair of the improvement [receipts under a construction contract if the full contract amount is covered by a corporate surety payment bond].*

SECTION 3. Chapter 162, Property Code, is amended by adding Section 162.005 to read as follows:

Sec. 162.005. DEFINITIONS. In this chapter:

(1) A trustee acts with "intent to defraud" when he retains, uses, disburses, or diverts trust funds with the intent to deprive the beneficiaries of the trust funds.

(2) "Current or past due obligations" are those obligations incurred or owed by the trustee for labor or materials furnished in the direct prosecution of the work under the construction contract prior to the receipt of the trust funds and which are due and payable by the trustee no later than 30 days following receipt of the trust funds.

SECTION 4. Section 162.031, Property Code, is amended to read as follows:

Sec. 162.031. MISAPPLICATION OF TRUST FUNDS. (a) A [Except as provided by Subsection (b), a] trustee who, intentionally or knowingly or with intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds, has misapplied the trust funds.

(b) *It is an affirmative defense to prosecution or other action brought under Subsection (a) that the trust funds not paid to the beneficiaries of the trust were used by the trustee to pay the trustee's actual expenses directly related to the construction or repair of the improvement or have been retained by the trustee, after notice to the beneficiary who has made a request for payment, as a result of the trustee's reasonable belief that the beneficiary is not entitled to such funds or have been retained as authorized or required by Chapter 53 [A trustee may use trust funds to pay the trustee's reasonable overhead expenses that are directly related to the construction or repair of the improvement].*

(c) *It is also an affirmative defense to prosecution or other action brought under Subsection (a) that the trustee paid the beneficiaries all trust funds which they are entitled to receive no later than 30 days following written notice to the trustee of the filing of a criminal complaint or other notice of a pending criminal investigation.*

SECTION 5. Section 162.032, Property Code, is amended to read as follows:

Sec. 162.032. PENALTIES. (a) A trustee who misapplies trust funds amounting to \$500 or more in violation of this chapter commits a Class A misdemeanor [~~less than \$250 commits an offense punishable by confinement in jail for not more than two years and by a fine of not more than \$500 or by the confinement without the fine~~].

(b) A trustee who misapplies trust funds amounting to \$500 [~~\$250~~] or more in violation of this chapter, with intent to defraud, commits a felony of the third degree [~~an offense punishable by imprisonment in the Texas Department of Corrections for not more than 10 years~~].

SECTION 6. (a) The change in law made by this Act applies only to the punishment for an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose.

SECTION 7. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on May 7, 1987, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 1160 on May 30, 1987, by a non-record vote. Passed by the Senate, with amendments, on May 25, 1987, by a viva-voce vote.

Approved June 18, 1987.

Effective Aug. 31, 1987, 90 days after date of adjournment.