



TEXAS CONSTRUCTION ASSOCIATION

NEWSLETTER

Winter 2018

BUILDING SOMETHING GREAT

PREPARING FOR THE 2019 LEGISLATIVE SESSION

In less than a year the Texas Legislature will convene. TCA Board of Directors and staff have been working on development of issues for the 2019 session. Here is an early look at issues expected to be submitted.

Right to Repair

The Problem

At any time prior to end of the 10-year Statute of Repose on a construction project, a contractor could be responsible for the cost of repairs for damages due to an alleged construction defect on the project. Current law does require the owner of the project to give any notice to the contractor of the alleged construction defect, nor does it require that the contractor be given the opportunity to inspect the alleged defect and make any necessary repairs if there is proof of a defect.

The Solution to the Problem

Legislation should be filed that would require that, before a suit is filed or arbitration is initiated, a person making a claim for damages caused by an alleged construction defect must 1) provide a notice to the contractor, 2) obtain an inspection of the alleged defect by a professional engineer and allow the contractor to attend the inspection, 3) obtain a written report from the engineer concerning the alleged defect and 4) allow a reasonable time for the contractor to correct any construction

defect reflected in the written report. A court or arbitrator should be required to dismiss a claim if the above items were not followed by the claimant.

construction team's security for its unpaid retainage is gone.

The Solution to the Problem

Retainage should be recognized for what it is: a loan to the construction owner by the construction team. It should be protected in a similar fashion as the lender protects its construction loan. This can be accomplished by providing a priority to a lien for retainage that is equal to the priority of a lender's deed of trust for the construction loan. If the lender forecloses on a construction project, the properly perfected liens for retainage would not be wiped out, but rather would be on the same footing as the lender's deed of trust for the construction loan. The lender would continue to have protection under its deed of trust for the 90% of the construction cost it has provided. Legislation to address this issue could also provide that the lien for retained funds would not attach to the owner's property if,

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Chairman Ken Boen (L) receives the Chairman Service Award from incoming Chairman Victor Longo.

Priority Retainage

The Problem

The construction team's retainage lien on a construction project is subordinate to the lender's deed of trust securing the construction loan. If an owner defaults on the construction loan and the lender forecloses its lien against the property, all retainage liens are wiped out in the lender's foreclosure process. Thus, the

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Message from the President

Our resident historian, TCA lobbyist Clint Hackney, told me that his analysis revealed that the current primary election has the most candidates running for state office (legislature + statewide offices) in the history of the state, except for one election in 1972. What caused the 1972 activity was that it was the first election after the Sharpstown Scandal, which involved bribes and alleged bribes of legislators, combined with the implementation of the US Supreme Court's holding of "one man one vote" which meant that big counties like say Harris County that previously had 17 people elected for Harris County Place 1, Place 2, etc., but now they had to draw 17 Districts within the County.

The increase in number of candidates in this year's election is due to a combination of a couple of things. Some candidates are just not happy with their legislator's performance or believe they can do a better job representing the district, or at least their position on matters that are meaningful to them. This happens every election; however, it seems this year there are more people than usual who believe they can do a better job. What ratchets up the tally this year is the number of retirements. Obviously, retirements create races with no incumbent. Political aspirants tend to jump in when there is no incumbent.

What does a large number of candidates in a race mean? There are many races this year with more than two people running so there will likely be more races that will move into runoffs. Runoffs typically are dangerous for the incumbent. I recall seeing an analysis recently that showed only 20% of incumbents win a runoff. If this holds true, there will be a big freshman class in the 2019 legislative session. Compound that with a new Speaker of the House and the deck really gets shuffled.

As a construction industry, we need to help re-elect legislators who have supported our causes and work to elect new ones who have pledged to do so. The primary + primary runoff will be the decisive elections for most legislators in Texas. Supporting pro-construction candidates is what is needed for the primary and runoff. The TCA-PAC has endorsed candidates and contributed money to campaigns in contested races. Please consider those endorsements as you make your voting decisions.

Building Something Great



2018 Primary Election Endorsements for the Texas Legislature

Texas Construction Association - Political Action Committee

2018 PRIMARY ELECTION ENDORSEMENTS TEXAS LEGISLATURE - CANDIDATES WITH OPPOSITION IN PRIMARY

Early Voting Began Tuesday, February 20 ★ Primary Election Day is Tuesday, March 6

OFFICE	CANDIDATE	CITY	PARTY
<u>Texas Senate:</u>			
SD 2	Cindy Burkett	Sunnyvale	R
SD 5	Charles Schwertner	Georgetown	R
SD 15	John Whitmire	Houston	D
SD 17	Joan Huffman	Houston	R
SD 30	Craig Estes	Wichita Falls	R
SD 31	Kel Seliger	Amarillo	R
<u>Texas House:</u>			
HD 2	Dan Flynn	Van	R
HD 9	Chris Paddie	Marshall	R
HD 11	Travis Clardy	Nacogdoches	R
HD 14	John Raney	Bryan	R
HD 16	Will Metcalf	Conroe	R
HD 18	Ernest Bailes	Shepard	R
HD 23	Wayne Faircloth	Galveston	R
HD 36	Sergio Muñoz	Palmview	D
HD 37	Rene Oliveira	Brownsville	D
HD 41	Bobby Guerra	McAllen	D
HD 47	Paul Workman	Austin	R
HD 54	Scott Cospers	Killeen	R
HD 55	Hugh Shine	Temple	R
HD 59	J.D. Sheffield	Gatesville	R
HD 60	Mike Lang	Granbury	R
HD 64	Lynn Stucky	Sanger	R
HD 65	Ron Simmons	Carrollton	R
HD 87	Four Price	Amarillo	R
HD 88	Ken King	Canadian	R
HD 89	Candace Noble	Allen	R
HD 98	Giovanni Capriglione	Southlake	R
HD 99	Charlie Geren	Fort Worth	R
HD 100	Eric Johnson	Dallas	D
HD 102	Linda Koop	Dallas	R
HD 104	Roberto Alonzo	Dallas	D
HD 105	Rodney Anderson	Grand Prairie	R
HD 114	Jason Villalba	Dallas	R
HD 122	Lyle Larson	San Antonio	R
HD 127	Dan Huberty	Houston	R
HD 134	Sarah Davis	West University	R
HD 140	Armando Walle	Houston	D
HD 142	Harold Dutton	Houston	D
HD 147	Garnet Coleman	Houston	D

2018 Primary Elections in the Great State of Texas

The 2018 primary elections are upon us, which you probably know, unless you don't watch tv, check the mail or answer the phone.

In Texas, primaries, not the General Election, for the most part, decide our elected representation in more than 80 percent of races in the Capitol, with redistricting reducing the number of competitive districts over the years.

The headliner in this year's primary elections is Republican angst. The far right has targeted more moderate, mainstream legislators. That is nothing new, but this year they are getting some help from the elected leadership of the state who occupy statewide offices.

Governor Abbott has weighed in against three incumbent House members by endorsing their primary opponents. Those Republican incumbents are Rep. Sarah Davis (R-West University), Rep. Lyle Larson (R-San Antonio) and Rep. Wayne Faircloth (R-Galveston). This dynamic, plus the race for House Speaker, creates a lot of uncertainty as to what the mood will be when legislators convene in Austin again in 2019.

On the Senate side of the dome, Lt. Gov. Patrick has been working hard during the primary season to protect two Republican Senators Bob Hall (R-Edgewood) and Joan Huffman (R-Houston) and to defeat Senators Craig Estes (R-Wichita Falls) and Kel Seliger (R-Amarillo).

five to ten members to 55 they presently have in the House.

The Texas Construction Association Political Action Committee (TCA PAC), has been very active in recruiting TCA members to block walk for our legislative allies. The TCA PAC has targeted about a dozen races, helping our friends in competitive races. The PAC has also made sizable donations to a number of friends in the legislature who understand and support our issues.

The Texas Construction Association PAC has endorsed a number of candidates for Texas House and Senate seats for the 2018 primary elections. A list of those endorsements is contained in this newsletter. The TCA PAC encourages you to consider the endorsements when voting.

Be sure to vote. Early voting began Tuesday, February 20, and runs through Friday, March 2. The primary is March 6. There is some sentiment this will be a low turnout race, which means every vote truly matters. So, vote and make sure your voice and the voice of our industry is heard!

Note that many of the primary legislative contests will not be decided on March 6, but will require a runoff election to determine the party's candidates for the November ballot. Those primary elections will take place on May 22. ★

Thanks to Ross Ramsey at the Texas Tribune for source material for the article. (www.texastribune.org)



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Save Loads on Workers' Comp.

The Texas Construction Association Safety Group combines your business with other subcontractor businesses to provide workers' comp premium discounts and job-specific safety resources. As a member of the TCA Safety Group, eligible businesses may also qualify for both group and individual dividends and receive a discount for choosing the health care network option.

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Dividends are based on performance and are not guaranteed.

The Democrats are also waging a fairly low-profile campaign for governor. It will be interesting to see which candidate emerges, and whether they will have an anti-Trump tailwind in the fall. It is not atypical for the party in power to lose seats during mid-term elections, and this typically affects the down ballot races. With regard to the Texas House of Representatives, Democrats are hoping in the fall to increase their numbers in that body. There is hope in that party that they may add

Upcoming PAC Events

- ASA Houston - NO Pants PAC Party, Feb 12-March 16
- Houston Area Subcontractors - Clay Shoot, Summer 2018
- ASA San Antonio - To Be Determined
- Central Texas Subcontractors Association - To Be Determined

TCA ★ PAC

North Texas Fundraiser



Thank you to our legislators and members for helping make the TCA PAC North Texas Fundraiser a success! Special thanks to American Subcontractors Association - North Texas Chapter for organizing the event.





Member Benefits



TCA Purchasing Power through Texas Mutual Insurance Company

This program provides for lower workers' compensation insurance premiums to its members through its group purchasing power and premium discounts. The program was developed to benefit companies in all construction trades. In addition to participants being eligible for Texas Mutual Insurance Company's regular dividend, they are also eligible for the Special TCA group dividend. Coverage is purchased through the members' insurance agent. More details are available at www.txconstructionwc.com.



TCA-WEX Fuel Card Program

Take advantage of TCA's WEX Fuel Card Program for discounted pricing on fuel management. Get all of the tools you need to reduce costly waste and save up to 15% on fuel management costs. WEX's fuel card program gives you security by helping to protect against unauthorized spending and gives your drivers the convenience of being able to fill up just about anytime and anywhere they want. Contact Patrick Finnegan, pfinnegan@texcon.org for more information.



TCA-rapid! PayCard Program

Provide your company with one of the most comprehensive PayCard benefits and ePayroll program designed for employers choosing to convert to electronic delivery of payroll at zero cost. The PayCard is FREE to TCA members. It will help your business save time, costs, and minimize risk! Stop the expensive paper check routine! Contact Patrick Finnegan, pfinnegan@texcon.org for more information.



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before withholding retained funds from the original contractor, the owner furnished and filed a bond.

Responsibility for Defective Plans and Specifications

The Problem

In the 1907 Texas Supreme Court case, *Loneragan v. San Antonio Loan & Trust*, the court held that all the owner of a construction project did was to submit the plans and specifications for the project to bidders and it was the responsibility of the bidders to decide whether or not to construct the building following the plans and specifications provided by the owner. The court went on to say that the bidding contractors were responsible for making their own determination regarding the sufficiency of the plans and specifications. The court finally stated that by contracting to construct the building following the plans and specifications supplied by the owner, the contractor was implying that it understood the plans.

Over the century since the *Loneragan* case, construction plans and specifications have become increasingly complex. In 1907 there were not complex construction projects as exist today. At that time, it may have been reasonable to expect a contractor to be able to review a set of plans and specifications and be able to discover defects and deficiencies. Today, on major construction projects the plans may be hundreds of pages long along with possibly thousands of pages of specifications.

In the 2012 Texas Supreme Court case, *El Paso Field Services v. Mastec*, the court reaffirmed its decision in *Loneragan*.

Thus, in Texas, while it seems reasonable for a contractor to rely on plans and specifications prepared by design professionals hired by the project owner to build a project, if the work turns out to be defective due to an error in the plans and specifications prepared by someone else, the contractor bears the risk of liability for the defective work. Absent

fraud or specific contract terms that the owner guarantees the sufficiency of the plans and specifications, the contractor is held responsible. This implied warrant of constructability by the original contractor to the owner gets passed via contract to the subcontractors. Typical insurance does not cover this obligation and the possible loss may well exceed a company's worth.



The Solution to the Problem

The construction team should not be responsible for the consequences due to defective plans and specifications. In Texas, architects and engineers are licensed to prepare construction drawings. Contractors are not licensed to do that. Legislation is needed to establish in law that the construction team should not be liable for construction that is defective due to erroneous documents furnished by the owner.

Lien Law Modernization

The Problem

The current Texas lien law is the most complex and confusing lien law in the country. The original intent of

the lien law as contained in the Texas Constitution was to provide a remedy for mechanics, materialmen and artisans to secure payment for labor, materials or machinery furnished in the improvement of property. As a result of amendments to the lien law over many decades, the law's intent has been lost because of different notice requirements placed on subcontractors and suppliers. Today, the numerous notice and filing requirements in the lien law trip up subcontractors and suppliers, resulting in the loss of certain lien rights available to them. Many times the reason for subcontractors and suppliers not timely giving the required notice or perfecting their liens is that the current complexity of the lien law makes it confusing and makes the requirements in the law hard to understand.

The Solution to the Problem

The Texas lien law should be modernized and brought into the 21st century so that the processes and procedures for providers of construction labor or materials to perfect and maintain their lien rights are easier to understand and are straight forward. The result would be that compliance under the law would no longer be a stumbling block to trip up a laborer or materialman resulting in the loss of lien rights. Some of the changes to the lien law could include an early notice system that is consistent with many other states, eliminating several confusing concepts unique to Texas and providing owners, contractors, claimants, lenders, suppliers and title companies with more timely and accessible information regarding projects via an Internet portal. Such a law would no longer require fund-trapping notices or retainage. This modernization of the lien law would provide a more reliable close-out procedure which would result in fewer perfected lien claims on projects. ★



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