



TEXAS CONSTRUCTION ASSOCIATION

NEWSLETTER

Winter 2017

BUILDING SOMETHING GREAT!

LIEN LAW MODERNIZATION

Of all the states, Texas has the most burdensome and complex lien law scheme. Due to its complexity, many subcontractors and suppliers fail to comply with the statutory filing requirements. People who provide labor or materials should not be required to navigate through a statutory quagmire in order to establish a lien for unpaid labor or materials.

The Texas Constitution established the right to a lien on an owner's property for unpaid work on the owner's property. Since then, the Legislature has enacted laws dealing with the statutory lien rights and duties for people furnishing labor and material. These lien rights provide security to the construction team in exchange for the improvements being made to the owner's property.

The current lien laws are very difficult for attorneys to decipher and nearly impossible for the lay person to understand. The problems presented in perfecting lien rights are numerous: Often it is difficult to obtain the legal description of the property or the name of the owner. Time

deadlines for filing notices depend on the position of the person in the construction chain. Owners do not have knowledge of all the subcontractors and suppliers on a project who might be filing a lien. The excessive amount of required notices can serve as a trap for honest mistakes which prevent claimants from protecting their lien rights.

An attorney group established by TCA, Associated Builders and Contractors of Texas and AGC-Texas Building Branch has submitted a Lien Law Modernization bill to change the Texas lien law system.



Some aspects of the proposed changes 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 and title companies with more timely and accessible information regarding projects via an Internet portal. The proposed lien law has no required fund-trapping or retainage and should provide more reliable close-out procedures.

Due to the upfront knowledge of who are possible claimants and the owner's ability to associate payments and lien releases with possible claimants, it is expected that there will be fewer payment disputes that ultimately require a lien affidavit to be filed.

The mechanic's lien law in Texas needs a major overhaul. The bill proposed by the attorney group does it in a forward-thinking way.★

Some Major Issues of the 2017 Texas Legislature

It's likely that 6-7,000 bills will be filed during the 85th Texas Legislative session that began on January 10. Here are a few of the issues that will consume a lot of the legislators' time:

School Choice

Lt. Governor Dan Patrick has been a vocal advocate for expanding school choice. This session, he will push Educational Savings Accounts (ESA), in which the state

would pay certain educational expenses, such as homeschooling materials or private school tuition, in lieu of state funds that would go towards that child's public education. Although all the details have not been worked out, the amount of money available in an ESA would be less than the full amount paid by the state for that child, with the remain-

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Message from the President

Connections. Seems as though many people want to connect through various types of social media and be able to do it instantly through a cell phone. A close friend told me he's trying to figure out how to implant a smart phone in his body. Ugh.

Social media connections play a vital part in the lives of many people. But have you made THE connections that can play a vital role in your business? Put down the phone for a minute and think on it.

The first connection is a mental one. It is a realization of how state law affects your business. For many, state taxes & rules immediately come to mind. Think unemployment tax, filing forms, franchise tax, permits, sales tax, fuel tax, to name a few. Those are easy and a distasteful CONNECTION to some people. But have you considered the CONNECTION between state laws or rules that can be beneficial to your business?

When the Texas legislature believes certain business negotiations are unfair, it sometimes passes laws that it believes will provide a more equitable playing field. For instance, in 2015 the Texas legislature decided to prescribe a list of items that a consolidated insurance program sponsor must provide to the construction team prior to a person entering into a construction contract on a project that utilizes a consolidated insurance program. The intent was to provide disclosure so people could see before signing a contract what is the insurance coverage on a project. And previous legislatures have made requirements for state agencies to pay their construction invoices promptly and for fairer uses of indemnification clauses and additional insurance endorsements. See the CONNECTION? Laws affect your business, but are you affecting laws? If not, I contend that you should. It's usually better to participate in something that can have substantial and long lasting impact on your business rather than merely dealing with the consequences of others' actions.

If you see that CONNECTION, make another CONNECTION. That CONNECTION is with your legislators. Other than being a legislator, establishing a strong CONNECTION with your state Senator and Representative is the best way to participate in making laws which are supportive of your business. Becoming a close friend to your legislators and advisor on construction issues to them will pay great dividends when your legislators seek input from you on bills pending before the legislature. This connection is not hard to make; it just takes a little time. It's not much different than courting a prospective customer or meeting a new neighbor on your block. It's really that simple.

Step up. Make the effort. Make the connection happen. TCA staff is ready to help you make this connection. The issues discussed in this newsletter are worthy of your effort. ★

Raymond

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TEXAS GENERAL ELECTION RESULTS

Texas voters in the November 8, 2016, General Election were not considering any candidates for statewide office, but there were elections in the Texas Senate and Texas House of Representatives. Here's how the election has changed the composition of the Texas House and Senate:

Of the three incumbent Texas

senators who had major party opposition in the General Election, all won re-election. The Senate has three new members, two of whom moved from the Texas House to the Senate. The Senate ratio of Republicans to Democrats remains the same—20 Republicans to 11 Democrats.

All 150 members of the Texas House were up for election in 2016. Only 47 House candidates had General Election opposition, while 83 House candidates had no major party opposition. Prior to the General Election, the House

ratio of Republicans to Democrats remains the same—20 Republicans to 11 Democrats. All 150 members of the Texas House were up for election in 2016. Only 47 House candidates had General Election opposition, while 83 House candidates had no major party opposition. Prior to the General Election, the House

had 99 Republicans, 50 Democrats, and one Independent. The Democrats picked up five seats—one from the Independent and four from Republicans. In the 85th Legislature in 2017, the House has 95 Republicans and 55 Democrats.

The House has 22 new members along with four former State Representatives who will be returning to that chamber. Fourteen House incumbents did not seek re-election. Additionally, three members resigned during the legislative interim and their seats were filled in special elections. Four incumbents were defeated in the March 2016 Republican Primary and two incumbents were defeated in Republican Primary Run-offs. Five incumbents were defeated in the General Election. ★

Right to Repair

From time to time, construction defects occur on construction projects. In Texas, the property owner is not required

to notify the subcontractor about an alleged construction defect and may file a lawsuit or initiate an arbitration proceeding without any

prior notification to the subcontractor. If a lawsuit is filed or arbitration proceedings are initiated, the subcontractor must

then retain an attorney to represent them.

Legislation is needed to require an owner to notify a subcontractor of any alleged construction defects. The subcontractor should then be allowed to inspect the alleged defect and have a right to repair the alleged defect before the owner is allowed to file a lawsuit or initiate an arbitration proceeding. ★

Major Issues of the 2017 Texas Legislature Continued...

der continuing to go to the public school that child would attend. This will be the second time the Senate has attempted to expand school choice under Lt. Governor Patrick's leadership. Last session the Senate passed a bill that would have allowed up to \$100 million in tax credits for businesses that donated money for scholarships for school choice.

School Finance

While Lt. Governor Dan Patrick has stated that expanding school choice will be addressed by the Texas Senate, Speaker of the House Joe Straus has signaled that the Texas House will address school finance. The Legislature last made changes to the public school finance system in 2006. At that time, the Texas Supreme Court had found the state's school finance system violated the Texas Constitution. In ruling on the most recent lawsuit challenging how Texas finances its public schools, the Supreme Court found that, although the school finance system needed reform, it was not unconstitutional. Notably, in re-

cent history, the Texas Legislature has not made significant changes to the school finance system absent a directive from the Texas Supreme Court.

Bathroom Legislation

It might seem odd that a bill concerning restrooms will be a major issue until one considers how much deliberation time such a bill may take. Time is most precious during the 140 day legislative session. SB 6, which was recently filed by Senator Lois Kolkhorst with strong support from Lt. Governor Dan Patrick, would require transgender individuals to use the bathroom in public schools, government buildings and public universities that correspond with their biological sex. At the same time, the bill would preempt local non-discrimination ordinances that allow transgender individuals to use the bathroom that corresponds with their gender identity. Many business organizations are opposed to such legislation, citing the negative impact following the passage of similar legislation in North

Carolina. The Texas Association of Business has released a report stating that the legislation could cost the state anywhere from \$964 million to \$8.5 billion and more than 100,000 jobs.

Budget

The only bill the Legislature is required to pass is the biennial state budget. Anticipating fiscal challenges, this past summer Governor Greg Abbott, Lt. Governor Dan Patrick and Speaker of House Joe Straus directed state agencies to reduce their budget requests by four percent. Exceptions were made for public schools, border security, Child Protective Services and mental health resources. The Texas Constitution prohibits the Legislature from spending more money than the state has. (That is the reason the voters must approve a Constitutional amendment when issuing bonds.) Going into the session, not accounting for population growth and inflation, there is an estimated shortfall of \$4 billion. ★

Responsibility for Defective Plans & Specifications

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 they wanted 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 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 *Loneragan*, construction plans and specifications have become increasingly com-

plex. 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 warranty 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 net worth.

The construction team should not be liable for construction that is defective due to erroneous documents furnished by the owner. In Texas, architects and engineers are licensed to prepare construction drawings. A contractor is not licensed to do that. Because of the *Loneragan* case, a person who is not allowed by law to draft the documents is being required to warranty those documents. That needs to be changed to place responsibility where it belongs. ★

State Breach of Contract

State governmental entities are typically immune from suit under the doctrine of sovereign immunity. State law authorizes lawsuits against the state for a claim of a breach of contract. Several issues that relate to breach of contract matters are recovery of attorneys' fees without contractual provisions, oral directives vs. written change orders, and recovery of attorneys' fees in smaller cases (i.e., claims less than \$250,000) that must go through the State Office of Administrative Hearings (SOAH),

instead of state district court.

In 2015, Rep. Paul Workman (R-Austin), filed HB 1124 to address these and other issues. In addition to the above-listed issues, the legislation would have made the state statute consistent with the breach of contract statutes of counties and local governments. HB 1124 would have removed requirements that claims must be based on the breach of an "express provision" of a contract. In addition, a provision

of the legislation would have removed requirements that claims for delay or acceleration caused by an owner must be expressly authorized by the contract. HB 1124 failed to pass in 2015. We're looking forward to Rep. Workman pursuing the issue in 2017.

The current statute should be cleaned up to address the issues related to attorney fees, use of SOAH, and change orders. The requirement that a claim must be based on the breach of an "express provision" of a contract should also be removed. ★

Attorney Fees



Chapter 38 of the Civil Practice & Remedies Code provides for the possible award of attorney fees in a claim for services, labor, or materials. Without such a statute, attorney fees are not recoverable unless a contract provides for them. In 1985, a revision to this Chapter provided that attorney fee recovery could only be made against an individual or a corporation.

Prior to the 1985 revision, the statute allowed for recovery of attorney fees from “persons” and corporations. “Person” is a much broader term in statutory usage. It is typically all encompassing and includes individuals, entities such as corporations, partnerships, limited liability companies, cities, counties, and state agencies. The usage of partnerships and LLCs as a business

structure by construction companies and real property owners has expanded over the last couple of decades. Thus, the possibility of attorney fee recovery outside of a contract right to such fees is limited or non-existent against partnerships and LLCs.

Rep. Jessica Farrar has filed H.B. 744 for consideration by the Legislature in 2017. The bill seeks to revise Chapter 38 to add “other legal entity” to Sec 38.001(a) so attorney fees can be recovered from an individual, corporation or other legal entity.

A statutory right of recovery of attorney fees should not be contingent on the type of organization. The statute should be amended to allow for recovery against any individual or legal entity. ★

2017 TCA★PAC Roundup & Walk on the Capitol

TCA members from around the state will gather in Austin on the 31st of January for the TCA PAC Roundup and on the 1st of February for The TCA Walk on the Capitol. After an informative lobby briefing by the TCA lobby team, TCA members will make the scene at Cover3 for an evening Roundup, which provides everyone ample opportunity to network in a fun, relaxed atmosphere. Members will make new connections with colleagues from all over Texas and have a chance to introduce themselves to legislators and their staffers over libations, hors d'oeuvres, and Texas construction issues. The night will be full of excitement, with good food, music and even better company!

The following day TCA members will meet for breakfast and a briefing on TCA issues. Afterwards TCA members head to the Capitol for a day of meetings with legislators and their staff. The events of the day will give members a significant opportunity to continue discussions with their state senators and representatives concerning the TCA legislative agenda and other issues of significance to the Texas construction industry. These visits will make a favorable impact about issues important to TCA members' businesses!

Thank you to all of the participants who make the Walk and Roundup a great, memorable success! A special thank you to our member association executives for setting up meetings with legislators, helping organize for both events, and spreading the word about these important days for TCA members.

We are excited that 97% of participants who responded to the 2015 post-event survey believe the Walk and Roundup to be a good use of their time and will attend another TCA Walk in the future. We look forward to seeing you all at the Walk and Roundup, so **REGISTER NOW!** ★



Mail this form to:
Texas Construction Association
1011 San Jacinto, Suite 330
Austin, TX 78701-2494

Registration Form

Or FAX to:
Texas Construction Association
(512) 473-3777

2017 Walk on the Capitol & TCA★PAC Roundup

Tuesday & Wednesday, January 31- February 1, 2017

I will attend: The Lobby Briefing on the 31st
(All TCA Members Invited) The Roundup on the 31st
(TCA★PAC Membership Required) The Breakfast & Walk on the 1st
(All TCA Members Invited)
Complete the Form Below

Name _____

Company _____

Address w/City & Zip _____

Phone () _____ Fax() _____

Email _____

Please use a separate sheet for each attendee. Thank you!

Sponsorship

May use corporate funds

I'll be a Roundup Sponsor for: \$2,500 \$1,000 \$500

A check is enclosed Charge the card below Please invoice me

Credit Card: Visa Master Card Discover American Express

Name on Credit Card _____ Expiration Date: _____

Company Name _____

Card Billing Address _____

Card No. _____ Card ID No. (3-4 digits) _____

TCA★PAC Membership Contribution

May NOT use corporate funds. Select option A or B.

A. I want to attend the Roundup. I have donated to the TCA★PAC after February 1, 2015!

B. I want to attend the Roundup. Please accept my TCA★PAC Contribution:

Gold Badge Member \$1,000 Silver Badge Member \$500 Blue Badge Member \$250 Red Badge Member \$100

My personal check (payable to TCA★PAC) is enclosed Charge the non-corporate card below Please invoice me

Charge the non-corporate credit card below \$ _____ each month. (Contact TCA at 512-473-3773 when you want billing to cease.)

Visa Master Card

Discover American Express

Name on Credit Card _____

Card Billing Address _____

(street) _____

(city, zip) _____

Card No. _____

Card ID No. (3-4 digits) _____ Expiration Date: _____

Please check if you are a member of any of the following TCA Member Associations

- American Subcontractors Association - Texas Chapters
- Central Texas Subcontractors Association
- DFW Drywall & Acoustical Contractors Association
- Fire Sprinkler Contractors Association of Texas
- Heart of Texas Subcontractors Association
- Mechanical Contractors Association
- National Electrical Contractors Association
- Plumbing-Heating-Cooling Contractors Association of Texas
- Precast Concrete Manufacturers Association of Texas
- Southwest Terrazzo Association
- Subcontractors Association of the Metroplex
- Texas Council Painting & Decorating Contractors
- Texas Crane Owners Association
- Texas Glass Association
- Texas Iron Workers Employers' Association
- Texas Masonry Council
- Texas Structural Steel Institute



★ Please ★ ★ Join Us! ★



Mid-afternoon of Tuesday, January 31, 2017 ~ Lobbyist Briefing & Political Pundits for TCA Members

Doubletree Guest Suites Hotel
303 West 15th Street, Austin
2pm-4pm

Evening of Tuesday ~ TCA★PAC Roundup & Legislator Reception for TCA★PAC Contributors

Opportunity to visit with Legislators & their Staff over libations & hors d'oeuvres

Cover 3 Restaurant
1717 West 6th Street
5:30 - 8:30 pm

Morning of Wednesday, February 1, 2017 ~ Walk on the Capitol

Doubletree Guest Suites Hotel
303 West 15th Street, Austin

Breakfast & Briefing
7:30 - 9:00 am

Walk on the Capitol
9:00 am - ?

Please visit <http://tinyurl.com/2017WalkontheCapitol>
or contact Patrick Finnegan at (512)473-3773.





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