

Texas Construction Association

NEWSLETTER

Fall 2011

REPRESENTING TEXAS SUBCONTRACTORS AND SUPPLIERS

SESSIONS OF THE 82nd TEXAS LEGISLATURE

In the midst of all of the political, budgetary and redistricting turmoil, the Texas Construction Association moved forward with an ambitious legislative agenda, seeking passage of six high priority bills. The issues addressed included banning broad form indemnification in construction contracts, establishing standards for Consolidated Insurance Programs (CIPs), amending the Texas lien laws related to lien waivers and the procedure for perfecting retainage liens, requiring retainage be placed in trust for the benefit of contractors and subcontractors, and requiring lenders to notify contractors and subcontractors when there is a default on a construction loan. Each of the bills filed this year, if passed, would have had a significant effect on the Texas construction industry.

At the conclusion of a long and difficult session, four of TCA's high priority issues contained in three bills were passed by the House and Senate and were signed into law by Governor Rick Perry.

The following is a discussion of those successful high priority bills

as well as the two high priority legislative measures that did not pass in the Regular Session.

TCA High Priority Legislation Signed Into Law

INDEMNIFICATION AND CIP

HB 2093 - by Representative Senfronia Thompson, Senator Leticia Van de Putte, Senator Robert Duncan and Representative John Smithee

Current Scene

Most construction contracts today contain clauses that require the subcontractor to indemnify the general contractor and owner for any negligent act they may commit even though the subcontractor may have done nothing improper. In addition, the indemnity clause typically requires the subcontractor pay the entire cost of defending any claim against the general contractor or owner regardless of the fact that the subcontractor has done nothing wrong. The concept of the people not being responsible for their wrongful acts flies in the face of the liability system in Texas—that everyone should be responsible for his or her own acts and not shift the responsibility for paying any claims resulting from his or her

bad actions to another party. The shifting of responsibility from the general contractors and owners to the subcontractors reduces the incentive to the general contractor and owner to maintain a safe workplace. Studies have concluded that the shifting of risks results in an increase in the total risk cost on a project. *This contractual indemnity can shift the entire financial burden for negligent acts to the subcontractor, the party who is usually less able to absorb such risk.*

How the Bill Passed

In 2009, the indemnification legislation would have been passed and sent to the governor, but for the fact that in the final

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Letter from the President

Hello TCA Members!

What an exciting year the Texas Construction Association has had so far! Starting with the phenomenal Walk on the Capitol at the beginning of February, the progress TCA made for the construction industry in the Texas Legislature was historic. The Texas Legislature passed 5 major construction related bills as well as several other bills affecting construction. Articles on all the construction bills are in this newsletter.

The tremendous participation of TCA members made the difference in the passage of legislation. Special thanks go to the members who helped with the passage of legislation. These are the members who contributed funds for the political action committee, who testified at the legislative hearings, who rallied our members, who made calls, and who wrote letters. These efforts made the difference. We had an outstanding lobby team to be sure, and TCA also had an advantage in its members' devotion to the cause.

The TCA website, www.texasconstruction.org, has been retooled. Take a look. I think you'll find its fresh look is easier to navigate. It has new information, but we've kept the valuable content from the past.

Thanks for being a member and supporting TCA!

*Raymond Risk, Jr.
President/CEO
Texas Construction Association*



Official Ballot Language and Order for the November 8, 2011 Constitutional Amendment Election

The Texas Constitution provides that the Legislature, by a two-thirds vote of all members of each house, may propose amendments revising the constitution and that proposed amendments must then be submitted for approval to the qualified voters of the state.

A proposed amendment becomes a part of the constitution if a majority of the votes cast in an election on the proposition are cast in its favor.

The following is a list of the constitutional amendments being proposed by the Texas Legislature for the November 8 election. The complete amendment can be viewed at www.capitol.state.tx.us. At the home page, insert the bill number (HJR or SJR____) in the Search Legislation box.

Proposition 1 **SJR 14**

Aims to ease the financial burden on spouses of totally disabled veterans. It would allow the Legislature to exempt the surviving spouses of 100-percent disabled veterans from property taxes on all or part of the market value of their home.

Proposition 2 **SJR 4**

Would allow the Texas Water Development Board to issue bonds for projects that will eventually become self-sustaining. The board, which has a zero default rate, issues bonds for water infrastructure projects. The amendment would allow the board to issue a maximum of \$6 billion at any time.

Proposition 3 **SJR 50**

Would allow the state to issue general obligation bonds to finance student loans.

Proposition 4 **HJR 63**

Would allow counties to issue bonds to finance the development

of transportation reinvestment zones. Such zones allow cities to use certain property tax revenues to build roads and other transportation projects in that area. Currently, cities are able to issue transportation reinvestment zone bonds, but it has been unclear whether counties have the authority to do so.

Proposition 5 **SJR 26**

Would make it easier and cheaper for cities or counties to enter into multi-year interlocal contracts — agreements between government agencies to share budgets. Right now, if a city or county wants to partner with another on a project, it has to create a special tax and a special debt fund for that project.

Proposition 6 **HJR 109**

Proposes clarifying references to the Permanent School Fund, a pot of money generated from the sale of state property that goes to Texas public schools. It would allow the General Land Office to distribute revenue from the fund, and it would increase the market value of the permanent school fund, allowing schools to get more money.

Proposition 7 **SJR 28**

Would allow El Paso to be included in the list of counties authorized to create conservation and reclamation districts. With the amendment, El Paso County could use tax revenue to develop parks and recreational facilities.

Proposition 8 **SJR 16**

Would create an open-space tax exemption for water stewardship. Open-space is land zoned for preservation of natural

resources, and historically, open space in Texas has been used for farming or timber. The amendment would add water stewardship, or conservation, to the list, providing extra incentive for individuals to conserve the 90 percent of state water that flows through privately owned land.

Proposition 9 **SJR 9**

Deals with the governor's authority to pardon individuals who receive deferred adjudication. People sentenced to deferred adjudication are given probation-like conditions, and if they complete the program successfully, a judge can dismiss the charges. Currently, the governor can only pardon convicted individuals, but the authority does not extend to those who have deferred adjudication. The governor would only be able to issue a pardon with the recommendation of the Board of Pardons and Paroles and in criminal cases excluding treason and impeachment.

Proposition 10 **SJR 37**

Would align the state's resign-to-run laws with the new primary election filing dates. Currently, elected officials can only keep their jobs if they file for other offices with less than one year left in their current terms. But during the legislative session, lawmakers moved the primary election filing deadline from Jan. 2 to mid-December to accommodate military and overseas voters. That would force some elected officials to resign from their current posts to file for candidacies for other offices. The amendment would change the length of unexpired term from one year to one year and 30 days.★

Sessions of the 82nd Texas Legislature Continued...

days of the session it was a victim of political maneuvering centered around the voter identification bill. As a Result, the indemnification legislation was never brought up for a vote on the House floor. The voter identification bill was back this year, but it was not a factor in deliberations on this or any other TCA legislation.

The language in the indemnification bill in 2011, SB 361 by Senator Robert Duncan and HB 2010 by Representative John Smithee, was identical to the language in the 2009 legislation. That language was the end result of negotiations between TCA, Associated General Contractors-Texas Building Branch and the Texas Civil Justice League (TCJL). In 2011, TCJL had changed its position on the legislation and actively opposed SB 361/HB 2010.

Early in the 2011 Session, SB 361 was passed by the Senate by a final vote of 24-7 and sent to the House, where it remained in the House Insurance Committee along with its House companion bill, HB 2010. The House committee held a public hearing on HB 2010, but did not vote on the bill. Under House rules governing time deadlines, both indemnification bills died in the Insurance Committee.

A decision was made late in the Session to use a pared down version of HB 2093, the CIP bill by Representative Senfronia Thompson, as a vehicle for the indemnification language contained in SB 361. HB 2093 was passed by the House Insurance Committee and the full House of Representatives. The House vote for final passage was

103-41. The Senate State Affairs committee then passed the bill. Not to be denied, when the bill reached the Senate floor, Senator Duncan proposed an amendment to the legislation that contained virtually all of the language from SB 361 earlier passed by that chamber. By a vote of 23-8, the bill won final approval from the Senate.

Since HB 2093 was amended in the Senate, the House had either to concur in the amended version of the bill, not concur, or send it to a conference committee of House and Senate members to work on the bill and then bring it back to both chambers for final approval. All of this activity on the bill took place in the final days of the legislative session. Approval of the conference committee report on HB 2093 had a deadline of midnight Sunday, May 29; in the end HB 2093 won final approval two hours before the deadline. The House approved the bill by a vote of 120-22. Earlier in the day, the Senate approved it by a vote of 26-5.

What the Bill Does

Under HB 2093 broad form indemnity clauses will be void and unenforceable. Broad form indemnification clauses require a person to be responsible for the acts of another person including the sole acts of the other person. Under the bill, any indemnification provision in a construction contract that requires a person to indemnify another person against a claim caused by the negligence or fault, the breach or violation of a statute, ordinance, governmental regulation, standard, or rule, or the breach of contract of the indemnitee, its agent or employee or any third party under the control or supervision of the other person is void and unenforceable. Sole

and joint indemnification and defense obligations now placed on the backs of subcontractors and contractors will be unenforceable, while limited form indemnification and defense obligations will be permitted. Limited form allows for indemnification for one's own fault.

Requirements for subcontractors or general contractors to include another person as an additional insured in their general liability policies will be no greater than the indemnification allowed in HB 2093. *An exception in the bill will allow for broad form indemnity or additional insured coverage for employee claims.* The bill also contains a provision which will allow parties to enter into joint defense agreements after a claim is filed. In addition, general liability policies issued under a CIP will be required to have a minimum of three years of completed operations coverage.

HB 2093 includes several exemptions from the provisions of the bill. Some of these exemptions are as follows:

- General agreements of indemnity required by sureties as a condition of execution of bonds for construction contracts;
- Benefits and protections under the Texas Workers' Compensation laws;
- Benefits or protections under the Texas governmental immunity laws;
- Agreements related to wells for oil, gas, or water or to a mine for a mineral;
- License agreements between a railroad

company and third parties

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Sessions of the 82nd Texas Legislature Continued...

for construction work on the railroad's property that does not benefit the railroad;

- Copyright infringement;
- Residential construction contracts; and
- Municipal public works contracts.

HB 2093 will become law on January 1, 2012.

RETAINAGE LIEN

HB 1390 by Representative Joe Deshotel and Senator Craig Estes

Current Scene

One of the most complicated aspects of the Texas lien laws deals with notice deadlines required for subcontractors to perfect their retainage lien rights to contractual retainage they have earned and are owed. Many subcontractors fail to perfect their lien claims because of their failure to meet the early notice requirement. In addition, if a subcontractor wants to perfect its lien on retainage, the lien must be filed within 30 days after completion of the construction project. This deadline is complicated by the fact that it is very difficult to determine when a project is deemed "completed."

How the Bill Passed

During the session, changes were made to the original language in the bill. The language in the bill that was passed was a result of the work of TCA, Associated General Contractors-Texas Building Branch and Associated Builders and Contractors of Texas in crafting a bill that would garner the full support of those organizations. The legislation was overwhelmingly approved by both the House and the Senate.

What the Bill Does

This bill significantly changes how retainage lien rights are perfected. No longer is the subcontractor required to send a "Notice of Retainage" letter to the owner by the 15th day of the second month after they have begun work on a project. *Under the provisions of HB 1390 notice of contractual retainage from a subcontractor to the owner must be given within 30 days of the completion of the subcontractor's work on the project.*

In addition, *the bill extends the time in which a subcontractor is required to file a lien affidavit for its retainage.* HB 1390 extends the time for subcontractors to perfect their lien rights to retainage to the 15th day of the 4th month after the completion of a construction project (the same time given to the general contractor) unless the owner has notified the subcontractor that its lien affidavit must be filed within 30 days of the notice given by the owner to the subcontractor.

This law became effective on September 1, 2011.

LIEN WAIVER

HB 1456 by Representative Rob Orr and Senator Robert Deuell

Current Scene

Today, many waiver and release forms for progress payments and final payment address some issues associated with payment and other issues that have nothing to do with payment. Some forms reaffirm warranties, contain representations about known claims, or contain provisions related to indemnification as well as other non-payment issues. In other words, many *"waiver and release forms" contain so many other provisions not related to payment that subcontractors and suppliers*

must seek legal counsel to determine whether or not they should sign the forms.

How the Bill Passed

HB 1456 gained widespread support in the House and Senate, where the bill passed both chambers unanimously. During the legislative process the legislation was actively supported by the Lumbermen's Association of Texas, Associated General Contractors-Texas Building Branch, Associated Builders and Contractors of Texas and the National Association of Credit Managers.

What the Bill Does

HB 1456 addresses the problems associated with waiver and release forms encountered daily by subcontractors and suppliers by creating statutory forms for both conditional and unconditional waiver and release of mechanic's liens and payment bond claims. In order for a waiver and release to be effective, the form of lien waiver and release must be in substantial compliance with the statutory forms set out in HB 1456.

In the bill, four statutory forms have been created:

(a) Conditional Waiver and Release on Progress Payment; (b) Unconditional Waiver and Release on Progress Payment; (c) Conditional Waiver and Release on Final Payment; and (d) Unconditional Waiver and Release on Final Payment. The difference between "conditional" and "unconditional" is that a "conditional" waiver and release may be given prior to actual receipt of payment (i.e., it is conditioned upon a payment to be made).

When using a "conditional" waiver

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OVERVIEW OF REGULAR SESSION OF 82nd TEXAS LEGISLATURE

When the 82nd Texas Legislature convened its Regular Session in January this year, the political landscape in the Texas House of Representatives had dramatically changed since the last session in 2009, while the Texas Senate numbers remained the same—19 Republicans and 12 Democrats. The Republicans in the House had gained 25 seats since 2009, bringing their numbers to 101, while the Democrats went from 74 seats in 2009 to 49 seats in 2011. In this mix of changes, the 82nd Legislature included 35 freshman (over 20% of the chamber), 30 of whom were Republicans. The increase in Republican House members included two Democrats switching parties prior to the session. This “super majority” of Republicans was primed to push through a strong conservative agenda which included legislation dealing with voter identification, sanctuary cities, immigration, loser pays in lawsuits, sonograms before abortions, TSA groping bans, etc.

While the above-listed Republican agenda loomed large, the two biggest issues facing legislators were redistricting and passing a two-year budget with revenue projections approximately \$27 billion less than in the current biennium.

Texas legislators filed 5,796 bills in the Regular Session, and when the Legislature adjourned on May 30, the House and Senate had passed 1,379 of those bills. That translates into a 24 percent passage rate, slightly higher than that of 2009, which was 20 percent. Governor Perry vetoed 24 of those bills, with the remainder of the passed legislation becoming law.

Budget

The projected \$27 billion shortfall in revenue available for the 2012-2013 state budget, when compared to available state funds for the current biennium, was mitigated somewhat in May when Comptroller Susan Combs increased her revenue estimate by \$1.2 billion, thus decreasing the shortfall by the same amount. At the outset, Governor Perry and Republican leadership made a firm commitment to make cuts in current services and not raise taxes to make up this gap in revenues. As most observers expected, negotiations over the budget dominated the session. The two biggest areas of the state budget, education and health and human services, received a great deal of cuts. Among the cuts were reduced financial aid to low-income college students and state aid to nursing homes; additionally, the budget reduces the state employee workforce by 5,727 employees. In addition to cuts, the Legislature utilized an oft-used method of deferring certain expenses to the next biennium.

The use of the Economic Stabilization Fund, also known as the Rainy Day Fund, to lessen the amount of cuts was the subject of extensive debate during the session. With many statewide conservative groups and Governor Perry opposed to using the Fund, the issue quickly became a litmus test for Republicans' conservative credentials. Early in the session, a deal was struck to use a portion of the Rainy Day Fund to plug a \$3.2 billion deficit in the current 2010-2011 budget, leaving \$6.5 billion in the Fund. Observers have noted that the final budget has a projected Medicaid deficit of \$4.8

billion, which will have to be addressed in next session's supplemental budget. (The supplemental budget is used to fill any deficits from the previous session's budget.) Unless revenues rise significantly, there is a good chance that the Rainy Day Fund will be used to cover the Medicaid deficit, giving rise to continued debate on the best use of the Fund.

Immediately following the conclusion of the Regular Session, Governor Perry called a Special Session. The Special Session was necessary because many of the cuts made in the 2012-2013 budget assumed certain changes in law, many of which were included in SB 1811, which was filibustered and died on the day prior to last day of session. Similar legislation was passed in the Special Session that included many wide-ranging changes, including pushing key payments to public schools into the next budget cycle, increasing penalties for failure to file timely certain tax reports, as well as numerous changes to make state government more efficient.

Redistricting

As with every session following the ten-year census, in 2011 the Texas Legislature was charged with redrawing legislative, congressional and State Board of Education district boundaries. Such changes are necessary to reflect shifts in the state's population, as well as fluctuations in populations. The state gained four new congressional seats due to population growth.

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In 2001, when the Legislature was last charged with redistricting, it failed to redraw new legislative or congressional boundaries. As required by the Texas Constitution, the Legislative Redistricting Board (LRB), which is composed of the Speaker of the House, Lt. Governor, Land Commissioner and Comptroller, was charged with drawing the maps for the Texas House and Texas Senate, while a panel of three federal judges drew the congressional map. Arguing that the congressional map drawn by the federal judges failed to reflect accurately the state's Republican majority, Governor Rick Perry called several special sessions in the summer of 2003 to create a more Republican friendly map.

Not wanting to abdicate the responsibility for drawing the maps to the LRB, this year state lawmakers completed and approved new maps for legislative districts during the Regular Session. By nature, redistricting is an acrimonious process as members fight for their political futures and work hard to avoid being paired with other legislators or lose a great deal of their district voter base. The final version of the maps paired several House members into the same districts forcing them to run against one another in the 2012 elections and also giving some Republicans stronger districts, thus better ensuring their re-elections.

In the Senate, the biggest change occurred in Tarrant County, where current Democratic Senator Wendy Davis lost much of her district. Many anticipate that the revised senatorial district will be targeted by Republicans in the 2012 election.

Since the Legislature did not address Congressional redistricting during the regular session, Governor Perry added it to the call for the Special Session. Prior to redistricting, Republicans had a 23 to 9 majority over Democrats within Texas' congressional delegation. As with legislative redistricting, the Republican-led Legislature looked to increase the number of Republican seats. In the end, Republicans could have up to 26 seats under the newly created map. The four new congressional seats were added in South Texas, northeast Travis County along the I- 35 Corridor, Tarrant and Parker Counties in North Texas, and east Harris County into Southeast Texas.

Texas is one of several states required under the federal Voting Rights Act to seek pre-clearance for any redistricting maps in order to protect the electoral power of the state's minority populations. Throughout the redistricting process, Democrats claimed that the Republican-drafted maps did not accurately reflect Texas' growing minority population. Those maps are now being challenged on two fronts- federal courts in Washington, D.C. and San Antonio. Early indications are that the Texas Senate and the State Board of Education maps probably will meet federal scrutiny, but the Texas House and the state's congressional maps face strong legal challenges. It may be several months before there are final rulings on the maps. The state may not use the new maps in any election until they are approved. It is worth noting that previous challenges to redistricting maps have resulted in the state modifying maps to comply with the Voting Rights Act.

Sunset legislation

Each session, numerous state agencies come under Sunset review by the Legislature. This process allows the Legislature to evaluate the effectiveness of state agencies and identify and eliminate waste, duplication and inefficiencies in those agencies. Most state agencies undergo the sunset review process about every twelve years. The process starts during the interim before the next legislative session when the agencies slated for Sunset are reviewed by the Sunset Commission staff. The staff then makes recommendations regarding any changes needed in the state agencies to the Sunset Commission, which comprises members of the House and Senate, as well as two members of the public appointed by the Speaker of the House and the Lt. Governor. The Sunset Commission's recommendations are incorporated into Sunset legislation for each agency. These bills are often referred to as Christmas trees, since the bills attract numerous amendments that might or might not be related directly to the state agency addressed in the legislation. In recent sessions, many key sunset bills have failed to pass because of the numerous amendments legislators have attached to them. For example, some of the sunset legislation which has failed to pass recently dealt with the Texas Department of Insurance, Texas Youth Commission and the Texas Department of Transportation. Among the sunset legislation that passed this session were the bills addressing the Texas

Department of Insurance; the newly created Texas Juvenile

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More New Construction-Related Laws

The 82nd Texas Legislature, in addition to passing TCA priority bills, also passed several other bills directly affecting the construction industry.

Alternative Delivery Methods

HB 628 by Representative Bill Callegari and Senator Mike Jackson

This bill changes current law relating to the procurement and alternative delivery methods in the Education Code, the Local Government Code and sections of the Government Code by consolidating them in the Government Code. HB 628 applies to public junior colleges, but not to institutions of higher education; it exempts TxDOT, regional toll-road authorities, regional mobility authorities, and local government corporations that are exempt from competitive bidding requirements under the Transportation Code. *The bill prohibits reverse auctions in construction procurement and contains a provision to minimize frivolous lawsuits relating to defects in school construction.*

This law took effect September 1, 2011.

Public-Private Partnerships

SB 1048 by Senator Mike Jackson and Representative John Davis

This bill establishes a process for governmental entities to contract with private entities to construct, finance, and operate a variety of facilities, including ports, pipelines,

parking garages, hospitals, schools, and other public works projects. State highways are not included. Before considering a proposal, the governmental entity must adopt guidelines including criteria for selection, financial review, timeline, and other issues.

The bill was amended in the House with language provided by TCA that requires performance and payment bonds to be in place before the start of any projects contemplated under this law.

This law took effect on September 1, 2011.



Attorney's Fees on Lien and Bond Claims

SB 539 by Senator John Carona and Representative Tim Kleinschmidt

This bill amends Section 53.156 of the Texas Property Code to now require, rather than authorize, a court to award costs and reasonable attorney's fees in any proceeding to foreclose a lien or to enforce a claim against a bond, or to declare that any lien or claim is invalid or unenforceable under the law governing mechanic's, contractor's or materialman's liens.

This law became effective September 1, 2011 for actions commenced on or after that date.

Certificates of Insurance

SB 425 by Senator John Carona

This legislation amends the Texas insurance Code to state that a Certificate of Insurance is not a policy of insurance and does not alter, amend or extend coverage provided under the referenced policy. A property and casualty insurer or agent will not be allowed to issue a Certificate of Insurance that claims to give a person the right to notice of cancellation, nonrenewal, or material change with regard to the policy unless that person is named in the policy or in an endorsement to the policy and the policy or the endorsement requires this type of notice be given to that person. In addition, third parties are prohibited from requiring insurers or agents to issue any document or correspondence that is inconsistent

with statutory conditions and limitations with regard to Certificates of Insurance, but third parties are not prohibited from requiring the insured to furnish copies of the actual policy of insurance and the endorsements. Violations of this statute are subject to a civil penalty of up to \$1,000 per violation.

This law became effective on September 1, 2011, and is effective for Certificates of Insurance issued on or after January 1, 2012. ★



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1st Place Gross
Zach McGuire, Stan Morgan, Dennis Lewis, Jim Corry



Longest Drive Winner Phil Ritter
& Mike White (left)



Closest to Pin Winner Keith Colvin
& Brian Chester (left)

TCA's North Texas Golf Tournament Summer 2011



1st Place
Tim Walsh, Joe Rians,
Steve Rians, Chuck Martin (not shown)



2nd Place
Phil Ritter, Srinath Kasturi,
Steve Guyton, Clint Walker (not shown)



3rd Place
Tim Hartsuck, Bob Prange, Elmer Strieker, Ray Chadderdon

Overview of Regular Session of 82nd Texas Legislature Continued...

Justice Commission, which was created through the merger of the Texas Youth Commission and the Texas Juvenile Probation Commission; and the Texas Department of Transportation. Among those that failed to pass were sunset bills for the Public Utilities Commission and the Railroad Commission. Those agencies whose sunset bills were not passed were allowed to continue to operate through a bill passed late in the Session. Sunset legislation for those agencies will be filed in the next Regular Session in 2013.

Footnote Regarding the Republican Majority and Their

Legislative Initiatives

The 101-member supermajority of Republicans in the Texas House and the 19-12 majority in the Texas Senate, one vote short of a two-thirds supermajority, were poised to pass a number of Republican-supported initiatives into law. Governor Perry declared several of these issues as emergency items, thus giving those issues high priority. Among the emergency items that passed were SB 14, which requires individuals to show photo identification when voting; HB 15, which requires a woman to receive a sonogram before an abortion; and HB 274, which addresses tort

reform. The key emergency item that did not pass was HB 12, also known as the sanctuary cities bill, which would have prevented a local government from enacting an ordinance preventing law enforcement from enforcing federal immigration law. ★



Sessions of the 82nd Texas Legislature Continued...

and release, the form must specifically reference the particular payment to be made. It cannot be used to require a claimant to provide a blanket waiver of its lien rights prior to a specific, promised payment. The statute expressly prohibits contractual pre-waivers of lien rights except for contracts for labor or for labor and materials (but not materials-only contracts) for construction or "land development" of residential (single-family, townhouse or duplex) projects.

A last minute amendment to HB 1456 was added in the Senate dealing with the lien rights of persons providing landscaping services. Currently, in order to have a statutory lien, the claimant must have written contract with the owner or its agent. This effectively precludes subcontractors from being able to perfect mechanic's liens for landscaping services. HB 1456 amends current law so that the written contract can be with a contractor or subcontractor. In other words, subcontractors

furnishing landscaping services will be able to perfect statutory mechanic's liens.

This law will take effect on January 1, 2012, for contracts entered into on or after the effective date.



TCA High Priority Legislation That Did Not Pass

RETAINAGE TRUST ACCOUNT

SB 1425 by Senator Jeff Wentworth and Representative Joe Deshotel

SB 1425 would have required an owner/borrower of a construction project to deposit its retainage

responsibility in a bank account for the benefit of the subcontractors and general contractors. This bill died on the House Calendar.

LENDER NOTICE

HB 3040 by Representative Warren Chisum and Senator Robert Deuell

This legislation would have established a process whereby written notice would be given to prime contractors and subcontractors if there is a default on a construction loan. HB 3040 died in the House Calendars Committee.

Although the two measures listed above did not pass, *significant inroads were made to lay the groundwork for TCA to seek passage of bills dealing with these issues in 2013.* TCA will be working diligently throughout the interim legislative period on other construction-related issues of importance to the industry to bring them to the 83rd Texas Legislature in 2013. ★



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