

Texas Construction Association

NEWSLETTER

Spring 2012

REPRESENTING TEXAS SUBCONTRACTORS AND SUPPLIERS

Todd Hewitt Elected Chair of TCA

Todd Hewitt, long-time member of the Texas Construction Association's board of directors, was elected chairman at the April meeting of the board of directors. Hewitt is President of Texas Fifth Wall Roofing Systems and represents the Central Texas Subcontractors Association on the TCA board.

Hewitt succeeds **Steve Rians** who served as TCA chair in 2010 and 2011. Rians, a member of the TCA board of directors since its inception in 1998, represented the Texas Fire Sprinkler Contractors Association and is resigning from that role. He will be replaced by David Stone of American Fire Systems. Rians is the Director of Operations, Southwest Region, for American Fire Protection Group.

Other changes on the TCA board....

In addition to Hewitt, the new officers of TCA are: **Brian Chester** of United Mechanical in Dallas. Chester will serve as Vice-Chair. He represents the American Subcontractors Association – North Texas Chapter. **Ken Boen** of Boen Plumbing in Waco. Boen will serve as Secretary. He represents the Plumbing-Heating-Cooling Contractors of Texas. **Victor Longo** of National Terrazzo, Tile, and Marble in Houston will serve as Treasurer. He represents the Southwest Terrazzo Association.

Before stepping down from the board, Rians praised the work of Paul Holden as TCA's Treasurer and head of the audit committee. Holden, who represented the DFW-Drywall and Acoustical Contractors Association, recently resigned from the TCA board. ★



Todd Hewitt (right) congratulates Steve Rians on his retirement as Chairman

Announcing a New TCA Member Benefit

The Texas Construction Association has joined forces with **Humana** to offer a multi-faceted health care program for TCA Member Companies. Higginbotham Insurance Agency is providing exclusive sales and service for this TCA Members program, in conjunction with its Health Risk Management.

It's known that an active company-wide wellness program with employee incentives, in addition to helping create a healthier workforce, can help reduce premiums. The Texas Construction Association member program with Humana includes the exclusive Humana Vitality wellness program with each medical insurance policy for no additional premium.

Humana will offer to TCA Member Companies a **premium discount** off Humana's **guaranteed issue** medical insurance policies for employers with 2-50



employees, as well as a **premium discount** for employers with 51-99 employees.

Employers with over 99 employees are provided **special custom pricing**. This new partner program also includes discounts for related specialty coverage for dental, vision, disability and life. Workplace voluntary benefits such as coverage for cancer, critical illness, as well as other supplemental benefits are available.

Humana will provide underwriting for each Member Company. For more detailed information or for referral to a local agent, contact Dick Lapanen on 512-457-4005 or mobile 512-354-6054 or by email at dlepanen@higginbotham.net.

And remember, TCA Membership benefits also include a Workers' Compensation Insurance purchasing group with Texas Mutual. Through its group purchasing power, TCA members receive discounted premiums on Texas Mutual Workers' Compensation Insurance. In addition to providing lower premiums to its subcontractor members, the

program allows for participants to be eligible for Texas Mutual Insurance Company's regular company dividend and they are also eligible for the special TCA group dividend. All dividends are based on performance and are not guaranteed. Coverage can be purchased through the member's insurance agent. ★

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TCA BOARD

OFFICERS

Todd Hewitt - Chair
Central Texas
Subcontractors Association

Brian Chester - Vice Chair
American Subcontractors Association
North Texas Chapter

Ken Boen - Secretary
Plumbing-Heating-Cooling
Contractors of Texas

Victor Longo - Treasurer
Southwest Terrazzo Association

Raymond Risk - President /CEO
Texas Construction Association

DIRECTORS

Carolyn Barten
Texas Council - Painting & Decorating
Contractors of America

Mackie Bounds
American Subcontractors
Association of Texas

Jerry Bratton
Texas Structural Steel Institute

Keith Colvin
Texas Iron Workers Employers' Association

Mike Kanetzky
National Electrical Contractors Association

Paul Odom
Texas Masonry Council

Glenn Randle
Mechanical Contractors Association of Texas

Harvey Smith
Precast Concrete Manufacturers Association

David Stone
Texas Fire Sprinkler Contractors Association

Allan Woodruff
Texas Crane Owners Association

Jerry Wright
Texas Glass Association

Legal Counsel

Richard Thomas
Thomas, Feldman & Wilshusen

Message from the President

Spring seems to always bring an increase in activities and when it's an election year the buzz is extra amplified. Texas Construction Association Political Action Committee has been busy working through the assessment process to determine which candidates have shown support and concern for the issues affecting the construction industry's subcontractors and suppliers. The due diligence has been completed. In the center of this issue you'll find the list of candidates for the Texas House and the Texas Senate who TCA's PAC has endorsed. The committee believes the election of these candidates will be beneficial to the construction industry and appreciates your consideration of their candidacy for the 2012 Primary election.

The primary campaigns are going full bore. The primary election is May 29, with early voting starting May 14. For many races, there will be no general election competition since the main opposing party did not field a candidate. This makes the primary very important and your involvement by making PAC contributions or working in the campaigns can make a difference. Call TCA Vice President Mike White, for more information on the races. His telephone number is 512-473-3773.

I hope you find the articles in this issue relevant and interesting.

Best Regards,

Raymond

TCA★PAC - Houston Area Shotgun Shoot Fundraiser

TCA★PAC Fundraiser

Monday, August 27, 2012

**The Greater Houston Gun Club
6700 McHard Road, Houston, Texas 77053
www.greaterhoustongunclub.com**

Save the Dates!



82nd Texas Legislative Session TCA★PAC Roundup & Walk on the Capitol

TCA★PAC Roundup

Monday, January 28, 2013

Walk on the Capitol

Tuesday, January 29, 2013

**Doubletree Guest Suites by Hilton Hotel
303 W. 15th Street, Austin – 800-222-8733
More Details at www.texcon.org**



Issues for the 2013 Legislative Session

Recently, the TCA Board of Directors added the following issues to its agenda for 2013 legislative session which will begin in January.

Retainage Trust Fund



Problem

It is common practice in the construction industry that an owner who is not self-funding usually borrows only 90% of the monthly construction costs during a project, leaving the retainage with the lender. The 10% retainage has not been loaned to the owner by the lender and the lender is under no obligation to release that money if an owner defaults on the construction loan.

Background

In 2011, SB 1425 by Sen. Jeff Wentworth and HB 1428 by Rep. Joe Deshotel were filed. SB 1425 was passed by the Senate and a House committee and, in the end, died on the House Calendar when the deadline for passing Senate bills in the House passed. The original bill filed would have required lenders for a construction project to put the retainage in an escrow account for the benefit of construction firms that provide labor and materials to a project. The bill that passed the Senate and made it to the House floor had been changed to require an owner to include the retainage in the money he or she borrows to pay the monthly construction costs. After payment of retainage, the owner could use the balance in the trust fund account for other purposes.

Solution

A bill to address this issue would require an owner each month to borrow 100% of the monthly construction costs over the life of a project. All of the borrowed funds, including the retainage, would be subject to the Construction Fund Act and the owner would have a legal obligation to pay all monies earned and due to contractors and subcontractors, including retainage.

Consolidated Insurance Programs



Problem

Known typically as Owner Controlled or Contractor Controlled Insurance Programs, these programs are used by the construction

industry. While possibly a money saver for a project owner or general contractor, the CIPs are plagued by poor administration, gaps in coverage for subcontractors, insufficient limits, high deductibles, questionable safety and back to work programs, and auditing practices that cause subcontractors' retainage to be withheld even longer than usual. In many cases, the exposure a subcontractor faces working on a CIP is unknown.

Background

The insurance provided through a CIP is usually general liability insurance and workers' compensation insurance, with the goal of reducing overall insurance costs for the project by providing one policy covering everyone. CIP legislation had been filed for a number of sessions leading up to the 2011 session. Each time new legislation was filed in previous sessions, provisions contained in previous versions of CIP bills had been removed with the goal of garnering more support for and minimizing opposition to the legislation.

In 2011, HB 2093 by Rep. Senfronia Thompson and SB 1337 by Sen. Leticia Van de Putte were filed. The provisions of the original bill would establish certain standards for the coverage provided by and for effective administration of CIPs. HB 2093 was heard in the House Committee on Insurance where strong opposition from many business sectors of the economy was voiced. The bill sponsor lacked enough votes to get the bill out of committee.

Later in the session, it was determined that HB 2093 would be used as a "vehicle" for indemnification language that would be added to the bill in the Senate. The "CIP" bill that was voted out of the House committee, approved by the full House, and favorably voted out of the Senate Committee on State Affairs only contained language requiring a minimum of three years of completed operations coverage. HB 2093 was amended with indemnification language on the Senate floor and was eventually signed into law by Governor Perry. The three-year completed operations coverage remained in the final version of the bill.

Solution

A bill to address this issue would contain basically the same language that was in HB 2093 as originally filed in 2011, which addressed a number of issues including coverage for completed operations until the Statute of Repose expires, requiring that policy limits be adequate to protect everyone on a job, and establishing minimum administrative standards for CIPs.

Lender Notice to Contractors



Problem

Typically, when an owner defaults on a construction loan, subcontractors and contractors continue to work on a project unaware of the default with no assurance they will be paid for their labor and materials. In the current economic climate, the potential for a construction loan borrower to default on the loan is greater.

Background

There is no statute in Texas that requires a lender on a construction project to give any notice to subcontractors and contractors when a default on the construction loan or financing agreement occurs. Similarly, there typically is no contractual obligation for the lender to notify anyone working on the construction project of the default. A lender may feel it is prudent to not provide any notification because the lender wants the project to be completed to give more value to its collateral even if this is to the detriment of the subcontractors and contractors. If construction companies continue to work on the project after the default, they may never receive payment for post-default work because the owner may be insolvent and their lien interest will be subordinate to the lender's lien interest.

In 2011, HB 3040 by Rep. Warren Chisum and SB 1173 by Sen. Robert Deuell were filed. HB 3040 was heard in the House Business and Industry Committee and was voted out of committee. The final House committee bill only created a duty on the part of the lender to give written notice of the default to a contractor.

Continued on page 6...

Texas Construction Association *Political Action Committee*

Election Day: Tuesday, May 29
Early Voting Begins: Monday, May 14

Below is a listing of candidates for the Texas House and the Texas Senate that have been endorsed by the Texas Construction Association Political Action Committee for the 2012 primary election. The PAC is composed of subcontractors and suppliers who are members of the Texas Construction Association. The endorsements reflect candidates who have been supportive of subcontractor and supplier issues in the Legislature or those whom the committee believes will be supportive if elected. With early voting for the Primary Election beginning May 14. It is important that everyone be informed voters. Your support of these candidates is appreciated as the PAC believes their election will be beneficial to our industry.

OFFICE	CANDIDATE	CITY	PARTY
<u>Texas Senate:</u>			
SD 2	Bob Deuell	Greenville	R
SD 4	Tommy Williams	The Woodlands	R
SD 5	Charles Schwertner	Georgetown	R
SD 9	Todd Smith	Bedford	R
SD 11	Larry Taylor	Friendswood	R
SD 16	John Carona	Dallas	R
SD 25	Jeff Wentworth	San Antonio	R
SD 26	Leticia Van de Putte	San Antonio	D
SD 28	Robert Duncan	Lubbock	R
SD 30	Craig Estes	Wichita Falls	R
SD 31	Kel Seliger	Amarillo	R
<u>Texas House:</u>			
HD 3	Cecil Bell, Jr.	Magnolia	R
HD 5	Bryan Hughes	Mineola	R
HD 7	Tommy Merritt	Longview	R
HD 8	Byron Cook	Corsicana	R
HD 10	Jim Pitts	Waxahachie	R
HD 11	Chuck Hopson	Jacksonville	R
HD 12	Kyle Kacal	College Station	R
HD 14	John Raney	College Station	R
HD 15	Rob Eissler	The Woodlands	R
HD 18	John Otto	Dayton	R
HD 19	Mike Hamilton	Lumberton	R
HD 21	Allan Ritter	Nederland	R
HD 22	Joe Deshotel	Beaumont	D
HD 23	Craig Eiland	Galveston	D
HD 32	Todd Hunter	Corpus Christi	R
HD 34	Connie Scott	Corpus Christi	R
HD 37	Rene Oliveira	Brownsville	D



HD 39	Armando Martinez	Weslaco	D
HD 47	Paul Workman	Spicewood	R
HD 58	Rob Orr	Burleson	R
HD 59	Sid Miller	Stephenville	R
HD 62	Larry Phillips	Sherman	R
HD 64	Myra Crownover	Denton	R
HD 73	Doug Miller	New Braunfels	R
HD 77	Marisa Marquez	El Paso	D
HD 86	John Smithee	Amarillo	R
HD 91	Barbara Nash	Arlington	R
HD 98	Vicki Truitt	Keller	R
HD 108	Dan Branch	Dallas	R
HD 113	Cindy Burkett	Mesquite	R
HD 114	Kenneth Sheets	Dallas	R
HD 115	Bennett Ratliff	Carrollton	R
HD 121	Joe Straus	San Antonio	R
HD 122	Lyle Larson	San Antonio	R
HD 127	Dan Huberty	Houston	R
HD 129	John Davis	Houston	R
HD 132	Bill Callegari	Katy	R
HD 133	Jim Murphy	Houston	R
HD 138	Dwayne Bohac	Houston	R
HD 141	Senfronia Thompson	Houston	D

Issues for the 2013 Legislative Session Continued...

who, in turn, would be required to give written notice of the default to all subcontractors on the project. The bill never made it to the House floor for a vote. There was no Senate action on SB 1173 other than a referral to the Senate Business and Commerce Committee.

Solution

A bill to address this issue would require lenders to give timely, written notice of a default on the construction loan to contractors and subcontractors allowing them to cease work on the project until they receive guarantees for payment for labor and materials for any future work on the project.

Lien Law Reform



Problem

Texas' lien laws are considered by many to be the most burdensome and complex in the country and it is extremely difficult to navigate through those laws. There are a number of requirements in the laws that if not followed as they are written will trip up subcontractors and suppliers and, in effect, result in the loss of certain lien rights available to them.

Background

The original intent of the lien laws to provide a statutory remedy to secure payment for labor, materials, or machinery furnished in the improvement of property has been lost in, among other issues, the different notice requirements placed on subcontractors to secure their lien rights. There are a number of requirements in the laws that, if not followed as they are written, will trip up subcontractors and suppliers and, in effect, result in the loss of certain lien rights available to them.

Solution

A bill to address this issue could focus on some specific areas in the lien laws that require the most immediate attention or on a complete overhaul of the lien laws. During the legislative interim, The House Business & Industry Committee is reviewing the lien laws with the goal of recommending legislation that will make the processes and procedures for perfecting and maintaining one's lien rights straightforward, and compliance with them should not be difficult and a stumbling block to maintaining lien rights.

Misclassification of Employees



Problem

Employers who misclassify their workers have a competitive advantage in bidding for jobs and divert work from employers who do pay taxes, overtime and workers' compensation premiums for their workers.

Background

Misclassification of employees as independent contractors, also known as workplace fraud, is widespread in the construction industry in Texas. In one major metropolitan area of the state, it is estimated that as a result of construction workers being misclassified by their employers as independent contractors an estimated \$9 million in revenue in that area is lost as a result of unpaid state unemployment insurance taxes and federal taxes.

In 2011, HB 2989, known as the Workplace Fraud Prevention Act, by Rep. Joe Deshotel was filed. The bill was heard in the House Business & Industry Committee and later voted out of that committee. No further action was taken on it.

Solution

A bill to address this issue should require contractors to properly classify an individual performing construction services as an employee and should provide strong penalties for non-compliance. Additionally, to carry out the goals of the legislation, language could be included to require workers in certain specialty trades to have some type of minimum certification requirements to perform that work.

Franchise Tax



Problem

In a 2006 called session, the Texas Legislature amended the franchise tax statute to lower the rate and include more entities while also lowering the school property tax. Part of the franchise tax revision included changes to the calculation of the cost of goods sold deduction for construction companies. Recently, the Texas Comptroller of Public Accounts, the agency charged with enforcing the franchise tax law, has been auditing construction companies and has taken a position on the calculation of cost of goods sold that does not follow the method most construction companies use. It appears that the Comptroller's method results in substantial increased tax for construction companies.

Solution

Currently, TCA and other industry trade associations have been conducting in-depth meetings with the Comptroller's staff with the hope of reaching an agreement satisfactory to the construction industry. If a solution is not obtained, then it will likely take legislative action to address the problem. And even if an agreement is reached with the Comptroller, the franchise tax is likely to be in play during the 2013 session since the revenue raised by the 2006 changes has not been sufficient to offset the lower school property tax as was anticipated. ★



A CLAIM FOR WHICH YOU THOUGHT YOU HAD COVERAGE.

TCA Member Companies are strongly encouraged to talk with your insurance agents about this recent insurance development.

In a typical construction contract, you are required to indemnify the general contractor or owner (or both) for acts of negligence of the general contractor or owner. The contract usually requires the indemnification to include the sole negligence of the general contractor or owner and your general liability insurance policy typically provides coverage for this indemnification obligation. Although HB2093, passed by the Texas Legislature in 2011, invalidates many instances of indemnification for sole negligence, you want to have insurance to cover that indemnity obligation in the instances when it is still valid.

You or your agent, unwittingly, may allow for this coverage to be removed. Here's why:

The Insurance Service Office (ISO) promulgates forms for the insurance industry. While form usage by an insurance company is optional, it is likely that the forms contained in your general liability insurance policy are ISO forms or derivations of those forms.

ISO issued forms to reflect changes in the law made by HB2093. HOWEVER, many insurance experts are concerned that one form in particular, the **new CG 33 90 05 12**, provides for a REDUCTION in coverage from the basic coverage provided under a commercial general liability, perhaps without the policyholder's knowledge.

ISO Form CG 24 26 Amendment of Insured Contract Definition is an optional form that has been in existence for several years. CG 24 26 alters the coverage under the policy by modifying the definition of "insured contract". The effect of this endorsement is to remove coverage to the policyholder for its obligation for indemnification for a claim that arises from the indemnified party's sole negligence. Thus, the policyholder will only have coverage for its indemnification obligation, if the policyholder contributed in whole or in part to the bodily injury or property damage.

An insurance company's boiler plate policy language may provide coverage for sole negligence (which, by the way, is allowed under HB2093 in cases involving claims by the policyholder's employee), but it may attach form CG 24 26 to remove that coverage from a

policy. If so, it is likely that the insurance agent would take note of this reduction in coverage and advise the policyholder.

State specific forms are frequently used to make a standard policy comply with a state's law. The changes passed in HB2093 do not require a new form for compliance, but the title of new form **CG 33 90 05 12**, "Texas Changes - Amendment of Insured Contract Definition" creates a confusion in perception that it is a required form. The substance of the form is the same as the previous form, CG 24 26.

WHAT TO DO: Policyholders should be on the lookout at renewal for this form. You should carefully review with your insurance agent the coverage provided by your policy for the indemnification obligations you incur. Your agent should be alerted to this because it is very easy for the agent's policy review process to overlook the endorsement and its implications. Agents often see relatively innocuous endorsements with "TEXAS CHANGES" in the heading.

THE TAKEAWAY: DON'T GET CAUGHT HAVING NO COVERAGE. ★



"Since 2008, TexasMutual has mailed me dividend checks that average 26% of the premiums I paid them! That's not chump change. I look forward to mail from my insurance company!" -Steve Everage
Air Craft Mechanical

"I don't think business owners are aware just how significant TexasMutual dividends can be. Over the past 3 years, I've had 34% of my premiums returned to me as dividends. That's no small amount!" -Jerry Wright
AAA Glass



Reduce Your Costs and Workplace Injuries. 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 healthcare network option.

Here for Texas. Here to Stay.®

TexasMutual
Insurance Company

Texas' leading provider of workers' compensation insurance



Ask your agent about the Texas Construction Association safety group, visit www.txconstructionwc.com, call Gina O'Hara at (512) 330-9836, ext. 6324 or email gina@txconstructionwc.com.

Dividends are based on performance and are not guaranteed.





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