

# CONSTRUCTION AND THE LAW IN TEXAS

## The 85th Legislature: A Preview

**W**hile the dust from the presidential election is still settling, Texas is moving right into the 85th Legislative Session. This session appears to be lining up much differently from the previous session. While the leadership remains the same, the tenor of the session is markedly different than that of two years ago. The primary reason for this shift is not the change in the national political landscape, but rather economic changes due to the decline in activity and revenue resulting from the weakened oil and gas sector.

### Construction and Infrastructure Spending

As a result of the slowing in the energy sector, the amount of money available for the state's budgetary needs is significantly less coming into the 85th legislative session than it was for the previous session. The construction industry and the industry trade groups supporting the industry were successful in passing bills in the last session that led to the ballot initiative known as Prop 7. That initiative, coupled with the ballot initiative known as Prop 1 from the 2013 session created significant sources of funding for water and transportation infrastructure. Due in part to the success of the last two sessions and also due to the lack of excess financial resources, we should not expect to see additional spending legislation this session.

Because of the tightening of the state's appropriations belt, those in the construction industry can expect to see a significant effort in the upcoming session aimed at protecting the gains that have been made in the last two sessions. Certainly, traffic is not getting better and our infrastructure is not maintaining or improving itself. The public remains very aware of

the need to continue investing in infrastructure. The passage of a massive \$720 million transportation bond in Austin is evidence that the public still has a focus on improving traffic and congestion on our roads and highways.

This awareness and continued concern should help those in our industry seeking to protect the funding required to maintain and improve the systems currently in place. While many of the changes approved by voters are protected by constitutional amendments, not all of the funding for the heavy and highway construction industry is constitutionally protected. As such, it will be imperative for all members of the industry to remind the public and our elected representatives that the need for infrastructure has not diminished.

Another key initiative for the transportation side of the industry in the upcoming session is the Sunset review of the Texas Department of Transportation (TxDOT). There will be legislation affecting TxDOT that is a result of the Sunset Commission's review of the agency and the recommendations contained in the Commission's report. The industry, as a close partner with TxDOT, will feel the effects of significant changes at TxDOT. We can expect industry groups such as the AGC of Texas to be active in the Sunset review process.

### Federal Possibilities

This discussion of the political and economic climate moving into the next legislative session would be incomplete if the presidential election went unaddressed. President-elect Trump ran on a promise of improving the American economy and job market. A key piece of his promised agenda is a significant increase in infrastructure investment and spending. He's promised anywhere between \$500 billion to \$1 tril-

lion to improve American infrastructure.

The various proposals Trump has advocated lack specificity. His initial proposal has been modified and changed over time. Recently, proposals mirroring the structure of the Texas Water Development Board's Prop 1 funding and financing program have been put forward as a potential means for funding infrastructure improvements. In addition to the lack of specificity and shifting structure of Trump's ultimate infrastructure initiative, it is unknown how much money will be allocated to Texas.

The plan most frequently proposed by Trump relies heavily on tax relief vehicles as a means for incentivizing private entities to invest in infrastructure projects. In trying to secure private financing of these projects rather than allocation of general tax revenue of government debt through bond programs, Trump's plan creates uncertainty.

As has been discussed in the past with respect to the Federal Highway Bills, uncertainty is no friend to the industry due to the investment and length of time major projects need to get off the ground. Further, while the use of public-private partnerships and comprehensive development agreements (the most common private funding mechanisms for infrastructure investment by private funding sources) can bring private dollars into the public arena for funding these projects, these vehicles can be limited in their application and all require some revenue stream for the private partners. In Texas, the strong sentiment against toll roads will hamper any effort to use these vehicles to fund road and highway improvements.

### Non-Funding Issues Likely in the 85th

One initiative that has been under review and discussion for the past few years is a wholesale rewrite of the Mechanic's and Materialman's Lien laws. The lien laws were analyzed by a committee of construction lawyers and that group has made recommendations for their revision. In general, the change would move Texas towards a pre-notice state. That change would make it far easier to properly perfect lien claims and would simplify and eliminate some of the more burdensome notice requirements currently in our statutes. The recommendations, if adopted, would require a significant change and I suspect it will require at least two or three sessions to educate the members about the changes and build support for them before we see a significant change. Also, given the fact that these recommendations would make filing liens easier, I suspect we'll see oppo-



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A Balanced Approach to Construction Law.

Finally, as in sessions past, there will likely be bills introduced aimed at clarifying and possibly expanding the public construction procurement provisions in chapter 2269 of the Texas Government Code. In the past, we've seen proposal to allow expanded use of design-build and more alternative means for qualification or pre-qualification of contractors. These bills are likely again this session.

