

## PUNCH LIST

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General contractors such as Mortenson, Messer and PCL say project collaboration is happening much earlier and with greater transparency than before the pandemic.

Lump sum. Bid and buy. Read and rip. These were the terms that dominated preconstruction before the pandemic.

"Our industry historically has been driven by the traditional construction manager at risk model, where the owner will start with the architect and begin design before bringing the GC onboard," said Nathan Lingard, director of design phase at Minneapolis-based Mortenson Construction. "This planning and design phase of the project is a period of time where there is high uncertainty."

Informed largely by siloed partners and a disjointed handoff, that approach to preconstruction — measured roughly as the period from a project's initial concept to its groundbreaking — was always fraught with discord and miscommunication between project stakeholders.

But industry watchers say that all changed when COVID-19 hit.

As projects shuttered amidst shelter-in-place restrictions and global supply chains collapsed, designers, owners and GCs found themselves collectively back at the drawing board, having tough but ultimately fruitful conversations on how to get things done.

"The pandemic helped to slow things down in a way where we could focus resources and attention on things that were challenging projects," said Eric Orquiola, director of preconstruction at Denverbased PCL Construction.

"We are in a much more transparent and open communication dialogue with designers and clients to date, and bringing trades as well as suppliers to the table, too," Orquiola said. "The movement away from the hard bid model has been about shared communication, shared planning and shared challenges, and it's something that we are starting to see quite a bit."

### **EARLIER STARTS, CLOSER COMMUNICATION**

Since the pandemic, the adoption of more progressive and inclusive delivery models have shown promise in alleviating preconstruction strife. Lean construction and flow scheduling have helped to boost communication and shorten project durations, and integrated project delivery models bring parties together contractually to share in ownership and risk as a way to motivate goodwill.

That's a good thing, since when a project goes south, imperfect preconstruction triggers all sorts of plan and drawing inconsistencies, inefficient supply and material purchasing, poor trade coordination and often heavy cost and schedule overruns that only reinforce the animosity between already isolated stakeholders.

Regardless of delivery model, general contractors say preconstruction project collaboration is happening much earlier, and with greater transparency and communication, than before the pandemic.

"It starts with the first interview. Now more than ever, the owners want to meet the preconstruction and estimating and project management teams," said Matthew Verst, vice president of cost planning and estimating at Cincinnati-based Messer Construction. "It's changed the whole philosophy of what preconstruction entails. Twenty years ago it was 'Build me a budget and check in when it changes.' Now the real-time communication of information amplifies what the construction manager can do for the client, and likewise drives what the client's expectations are from the GC."

### **SHRINKING TIMELINES**

Increasingly, client expectations are to complete projects faster. Even as generators, transformers, switch gears and other large-scale infrastructure items continue to face year-long supply chain delays, the newfound ability of project team collaboration to overcome supply and scheduling snafus

## MEET THE ROUNDTABLE CONTRIBUTORS



Refugio Alvarez
Safety Director
King of Texas Roofing



Refugio has over 18 years of construction/manufacturing safety experience in the Dallas area. As King of Texas Roofing Company's Safety Director, he is responsible for developing strategies to improve the company's safety performance in its drive toward zero injuries. Refugio manages all safety programs to ensure a safe workplace including safety orientations, skill training, emergency preparedness, proper job instruction, and the use of protective equipment. He also assures that the workplace is in compliance with OSHA safety standards and that periodic safety audits are conducted. Refugio works closely with King of Texas' management team in a collaborative effort to enhance the safety culture throughout all of King of Texas' projects. He is currently a member of the NRCA and works with the organization developing better safety standards for the roofing industry. Prior to joining King of Texas, Refugio worked as a Bilingual Safety Instructor, assisting in the safety and job skills training of over 6,000 construction industry students.



Joe Smith Owner & President Cornerstone Safety



Joe Smith and Cornerstone Safety been serving Texas for over 25 years. Cornerstone Safety offers a full array of Bilingual Safety and Training services, and they are HUB / MWBE certified. Cornerstone customizes full Safety Programs consisting of OSHA type jobsite Inspections and OSHA required Training for its clients. They have a excellent reputation for providing stellar safety and health programs and OSHA required training. "Safety is our passion."





Garrin Fant
Construction Law Attorney
Cutler Smith, P.C.



Garrin Fant is a shareholder of, and supervising attorney for, the firm. He is Board Certified in Construction Law by the Texas Board of Legal Specialization. Mr. Fant has an extensive litigation background with over 20 years experience as a formidable and successful trial and appellate attorney in both state and federal courts, as well as resolving disputes through mediation or arbitration.

Mr. Fant focuses his practice on complex construction and commercial litigation matters, insurance defense, jobsite injury, and catastrophic construction defect cases. Mr. Fant is involved with the Dallas Bar Association, the State Bar of Texas, and numerous construction industry groups, sharing his knowledge and expertise with the construction community through presenting at seminars and to trade organizations.

Mr. Fant is a graduate of Louisiana State University and the University of Arkansas School of Law.



### Jeff Wolfla

Vice President, Insurance & Safety BSBD Insurance Agency

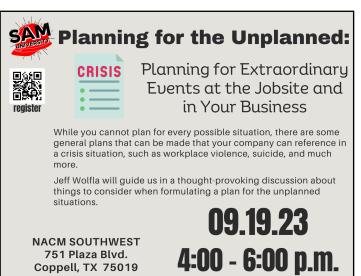


Jeff received his Bachelor of Science Degree from Texas Tech University. He is a certified Construction Risk Insurance Specialist and Certified Electrical Safety Compliance Professional. Jeff is also a Certified OSHA Outreach Trainer, and an Electrical Safety, Trenching and Excavation, Fall Protection and Confined Space Trainer. Outside of work, Jeff and his wife Tara enjoy traveling the U.S. and being active outdoors. Jeff is an avid golfer and collector of sports memorabilia, and he enjoys competition of all kinds including a good challenge on the cornhole boards. He is also an accomplished marathon runner, completing the Dallas BMW Marathon in 2019.

As Vice President, Insurance and Safety Services for Boyd, Shackleford, Barnett & Dixon, LLC, Jeff is responsible for providing clients with property and casualty insurance, while offering the value-add of safety consulting to those he serves.

Be sure to join us on Tuesday, September 19 to hear Jeff's presentation on Planning for the Unplanned.

## **UPCOMING EVENTS**

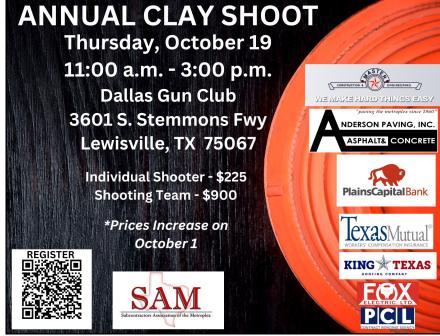


Coppell, TX 75019









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## PAID...OR NOT?

Subcontractor often find themselves having to work with general contractors that they do not know very well; when times are good, out of state contractors flood across the border into Texas, "making hay while the sun shines", and when business is slower, subcontractors often bid to general contractors they do not know well, in order to keep cash flow flowing.

Against this backdrop, every subcontractor is pleased when, at the end of a long and difficult collection process, they ultimately receive that long-awaited final payment. The money goes in the bank, the file goes into storage, and the crews move on to the next project. Another successful job, in the books, in the bank, and out of mind.

### Or is it?

Bubba (you will recall, he's always getting in trouble in these pages) called me, and when I got him calmed down from all the sputtering and cussing, told me he had received a letter from a lawyer, demanding he send back the money he was paid for completing a project almost a year earlier. He sent me the letter, and here is part of what it said:

"Bubba Trowell, President Bubba's Masonry and Stuff

Dear Mr. Trowell:

The undersigned is counsel for Mr. Takit Bakk, the Trustee in Bankruptcy for Stranger Builders. On May 23, 2004, Stranger Builders filed for protection pursuant to the provisions of the Bankruptcy Code, and the Trustee's review of payment records has shown that your firm was paid the total sum of \$217,221.00, during the 90 days preceding the date of the bankruptcy filing.

Pursuant to the provisions of Federal Bankruptcy Law, payments made to your firm during the 90 day preference period before the bankruptcy filing are "Preference Payments" and, therefore, must be paid back to the Bankruptcy Estate so that they may be fairly and equitably distributed to all of the creditors of the bankrupt estate...."

There was a lot of other technical legal jargon in the letter, but the bottom line is, the Trustee in bankruptcy of the bankrupt general contractor expected to get all of the money the general contractor had paid Bubba's company, during the 90 days preceding the bankruptcy filing, back. "That ain't right," exclaimed Bubba, and I was compelled to tell him, "that may not be right, but it's the law."

Federal Bankruptcy Law is designed to protect the creditors of a bankrupt entity by closely scrutinizing payments made by the bankrupt during the 90 days immediately preceding its bankruptcy filing. The idea is that the bankrupt party may be paying his friends and buddies, to the detriment of other creditors, and that all creditors should be treated relatively equally. As you can imagine, there are exceptions to this

doctrine, and subcontractors should always try to conduct their business such that they will benefit from these exceptions, and be able to keep their money. The main exceptions to the preference doctrine are (1) payments made in the "ordinary course of business," and (2) payments made in exchange for "new value." What follows are practical examples of each.

### ORDINARY COURSE OF BUSINESS

The "ordinary course of business" exception to preference payments is intended to protect routine and ordinary transactions from being set aside as a result of a bankruptcy. One example would be where a merchant or seller has net-30 terms, and the debtor has been routinely paying on its account in accordance with the terms. The bankruptcy law recognizes that, in these circumstances, it is unlikely that a payment to such a creditor is made in preference to other creditors, because it is not unusual or exceptional.

In the construction context, "ordinary course of business" can be a tough nut to crack, especially with the way business and payment practices have evolved in recent years. While it may be "ordinary" for general contractors to pay slowly, bankruptcy courts are often hesitant to recognize such payment practices as being "ordinary course of business" payments, and this is especially true when general contractor is paying for one project with the funds received on a subsequent project, or subsequent draw. Application of the "ordinary course of business" doctrine has been spotty, at best, in the construction arena - it is certainly not a sure thing.

### **NEW VALUE**

The "new value" exception to the preference payment doctrine can be more valuable to subcontractors, especially with proper planning. The bankruptcy law recognizes that, if a creditor gives something of value in exchange for a payment it receives ("new value"), then the payment received should not be characterized as a preference payment and, therefore, should not be recoverable.

One example of "new value" could be a specific agreement to return to work at a construction project at which work has been suspended for nonpayment, but, in order for this approach to work, you need to have negotiated the right to suspend work if you are not paid (or satisfied the stop-work provisions in the applicable Prompt Payment Statute). It is also very important that, when circumstances like this arise, you document well that you are taking specific action in reliance upon the payment being made, such as returning to the job site, or performing additional or changed scopes of work.

Another potent defense to the preference doctrine is new value that consists of releasing of a known and vested right, frequently, a lien or bond claim right. There are traps for the unwary in Texas law, which makes this potentially difficult to use.

As you no doubt know, Mechanic's Lien filing for Texas subcontractors is a two step process-you send the statutory notices of unpaid account, and then, you file the Affidavit for Mechanic's Lien in the real property records. On a substantial majority of projects, the act of sending the Notices of Unpaid Account is sufficient to shake the money tree, get you paid, and therefore, you never proceed to the step of filing an Affidavit for Mechanic's Lien. Unfortunately, while the bankruptcy law recognizes the release of an existing Mechanic's Lien claim (one which has been filed and perfected) adds new value which would preclude recovery of monies paid in exchange for the Release, if you gave a Release or a Waiver of the right to claim a lien, without having first filed an Affidavit for Mechanic's Lien, the bankruptcy law does not consider you to have released anything at all. This bears repeating-the Release, in exchange for payment, of the right to claim a lien is not new value which would avoid recovery of preference payments. This is in contrast to the law of some states, which effectively impose a mechanic's lien on real property, in favor of the subcontractors and suppliers, immediately upon their having set foot on the project; in these jurisdictions, the act of delivering a Waiver or Release in exchange for payment is a genuine release of a matured lien claim, and serves as new value.

Texas subcontractors are often trapped by this conundrum because they are not in the practice of filing liens on projects when they are getting paid, even if the payments are sporadic or late.

### WHAT CAN YOU DO?

As in so many other things, the best defense against preference

payment repayment is being well-educated about the contractors you are doing business with, and taking appropriate action based upon what you learn. What this means is, be sure you have an idea about the financial stability and performance and payment practices of the general contractor and, if you have any question whatsoever, be aggressive about documenting your files and perfecting your claim rights. On projects of extended duration (and masonry contractors are often involved in such projects), keep close tabs on the routine payment practices of the general contractor; if you observe a change in the way payments are handled (and this applies, especially, with regard to change or added work), you should subject the project to heightened scrutiny and careful attention indeed. On private work, you should already be sending lien notices (including retainage notices at the beginning of the project, and notices of unpaid account on an ongoing basis), in accordance with the Texas Property Code; if you are feeling especially uncertain about the contractor's stability, when the time comes for a substantial payment to be made, you might even consider preparing and recording an Affidavit for Mechanic's Lien prior to accepting payment, then delivering a partial Release of Lien, to the extent of payment received, in exchange for the payment received. This measure may sound extreme, but being asked for a couple of hundred thousand dollars back after a project has finished is worse!



Sewell "Spike" Cutler Cutler Smith, P.C. 214.914.0800 scutler@cutler-smith.com



## **MOST LIENED PROJECT ADDRESSES (BY TOTAL \$)**

Company Name	City	# of Liens	Total Liens
2600 E. Meadows Blvd.	Mesquite	13	\$2,866,894.83
150 W. Main St.	Richardson	18	\$2,760,691.82
1102 N. Shiloh Rd.	Garland	15	\$2,510,435.67
8030 Park Ln. Ste. 150	Dallas	10	\$2,416,004.60
800 N. Harwood St.	Dallas	7	\$1,670,656.73

## **MOST LIENED COMPANIES (BY NUMBER OF LIENS)**

Company Name	# of Project Addresses	# of Liens	Total Liens
Landmark at Meadows 139 LLC	3 (Meadows Blvd.)	28	\$3,972,730.68
Richardson Gateway LLC	1 (150 W. Main St.)	17	\$2,511,241.14
Hartman Income Reit or Hartman Spe LLC	9	16	\$289,676.29
Reserve at Shiloh LLC	1 (1102 N. Shiloh Road)	15	\$2,510,435.67
Mm Jackson Parking B LLC	3	11	\$3,670,888.27

# DEPARTMENT OF LABOR ANNOUNCES PROPOSED CHANGES TO CLAIRFY REGULATIONS ON AUTHORIZED EMPLOYEE REPRESENTATION DURING OSHA INSPECTIONS

Seeks public, stakeholder comments on proposed changes

**WASHINGTON** – The U.S. Department of Labor today announced a notice of proposed rulemaking to revise regulations regarding who can be authorized by employees to act as their representative to accompany the department's Occupational Safety and Health Administration compliance officers during physical workplace inspections.

Specifically, the proposed rule clarifies that employees may authorize an employee, or they may authorize a non-employee third party if the compliance officer determines the third party is reasonably necessary to conduct an effective and thorough inspection.

The proposed changes also clarify that third-party representatives are not limited to industrial hygienists or safety engineers, two examples included in the existing regulation. Third-party representatives may be reasonably necessary because they have skills, knowledge or experience that may help inform the compliance officer's inspection. This information may include experience with particular hazards, workplace conditions or language skills that can improve communications between OSHA representatives and workers.

"Congress considered worker participation a key element of workplace safety and health inspections when it passed the Occupational Safety and Health Act," explained Assistant Secretary for Occupational Safety and Health Doug Parker. "This proposal aims to make inspections more effective and ultimately make workplaces safer by increasing opportunities for employees to be represented in the inspection process."

In addition to the NPRM's proposed revisions, OSHA is also seeking public comment on the criteria and degree of deference OSHA should give to employees' choice of representative in determining whether a third party can participate in an inspection.

The Occupational Safety and Health Act gives the employer and employees the right to have a representative authorized by them accompany OSHA officials during a workplace inspection to aid the investigation. Employee participation and representation is critical to an inspector's ability to complete a thorough and effective workplace investigation and helps OSHA gather information about the job site's conditions and hazards.

The proposed revisions do not change existing regulations that give OSHA compliance officers the authority to determine if an individual is authorized by employees and to prevent someone from participating in the walkaround inspection if their conduct interferes with a fair and orderly inspection, or to limit participation to protect employer trade secrets.

Submit comments at Regulations.gov, the federal eRulemaking portal by Oct. 30, 2023. Include Docket Number OSHA-2023-0008 on all submissions. Read the Federal Register notice for more information.

Learn more about OSHA.

### **Media Contact:**

Victoria Godinez, 202-693-4667, godinez.victoria.c@dol.gov

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## THE FASTER PACE OF CONSTRUCTION

has owners looking at preconstruction as the Rosetta stone for speedier market delivery.

"Coming out of the pandemic, everything, including delivery in general, has been supercharged and moved up faster," said David Alford, regional vice president of preconstruction for St. Louis-based McCarthy Building Cos. "But it put us in the fast lane of where we were already trying to go anyway: Bringing GCs on earlier in the game had been something we had been pushing for a real long time."

He added that getting teams in early to collectively address supply chain challenges has been an added bonus.

At Mortenson, Lingard estimates that preconstruction timelines have shrunk by a third post-pandemic, putting more pressure on designers, planning and material procurement specifically. "It condenses the window and makes it more critical to really be aligned and focused," he said. "We don't do our project

teams any favors by delivering a design or plan that is half-baked for them to figure out how to build."

Alford agrees, and said preconstruction strategies can help find efficiencies across the design-build lifecycle, even if the preconstruction discipline per se remains somewhat immune to the time squeeze.

"We don't want people rushing and producing an output that is not as great," he said. "Preconstruction is so critical to teeing up a job that is right that it's better to take a couple more days when you need it most to get a great design that is constructible versus just rushing it."

This is the first of three articles about the increasing importance of preconstruction since the COVID-19 pandemic.

Next up: The promise of technology in preconstruction.

By Chris Wood, www.constructiondive.com



## MEMBERSHIP BENEFITS

## Get the most out of your Membership!

## SAM'S LIEN INFORMATION

SAM collects and compiles the information on Mechanics Liens filed in Tarrant and Dallas Counties on an ongoing basis. This information is available in a searchable spreadsheet on our website for our members. We are able to observe some trends and common owner issues. During our regular meetings, we invite our attendees to share their work experience with General Contractors, Engineers, and Architects as a way to help others when evaluating contracts and projects. Our members find these two features the most valuable aspect of their membership in SAM.

**NEW!** Find the complete Top 10 Lists for the tables below in tabs in the Lien Spreadsheet.

Contact Carrie Buckley today for more information - 817.266.1909 or director@sam-dfw.org.

### CREDIT INFORMATION WITH NACM

SAM and NACM (the National Association of Credit Managers) formed a partnership at the beginning of the year. During our monthly meetings, a representative with NACM will answer credit questions about general contractors. SAM Members may request credit reports outside of our monthly meetings for a nominal fee.

NACM offers collection services as well. They will not file liens on your behalf, but they will collect on those accounts that you would not file a lien for.

Contact Tony Clark with NACM or Carrie Buckley for more information about this NEW Membership Benefit.

Tony Clark - tony@nacmsw.com Carrie Buckley - director@sam-dfw.org



## TCA SAFETY MANAGEMENT PROGRAMS

Your company is a member in the Texas Construction Association (TCA) when your company joins SAM.

TCA offers many benefits to its members that you can utilize today.



The Texas Construction Association (TCA) wants all their members to work in the safest, most efficient possible manner. That is why TCA has partnered with TW Safety (TWS). TWS provides a 3rd party solution to manage your business and your client's health, safety and environmental requirements without the burden and overhead costs of hiring additional full-time employees. This includes client and project-specific safety program requirements from pre-qualification bidding to ongoing quarterly reviews. Through an exclusive partnership only offered by TCA, all members of TCA are eligible to receive a 40% discount on the service provided by TWS.

For more information please contact Patrick Finnegan at <a href="mailto:pfinnegan@texcon.org">pfinnegan@texcon.org</a> or click <a href="mailto:heee">heee</a> (Member Access Only).

## **NEW CONSTRUCTION LAWS ARE IN EFFECT**

Check out the complete list of NEW Construction Laws effective September 1, 2023 on TCA's Website here.

### **GET SOCIAL IN CONSTRUCTION**

I am in my mid-forties, so I am right on the cusp of when social media didn't mean much and when it started to mean everything. And I might be a little late to the party, but I have discovered the power and true beauty of LinkedIn in the last several weeks. LinkedIn is similar to Facebook, but most use the application for business purposes.

Promote Your Company - LinkedIn is a powerful tool to share information about your company without your message getting lost in the political posts on Facebook.

Promote Yourself - Company posts grow legs when you repost on your personal page. This serves as a double whammy because your company gains exposure and you are the catalyst. You can repost anything from people you follow, too. There is excellent construction-related content all over LinkedIn.

Connect with Customers and Vendors - LinkedIn will keep you informed of what your customers and vendors are up to. Not everyone is active on the social media platform, but those that are find it to be a wonderful outlet to brag on company accomplishments and employee recognition.

Connect with Other Industry Professionals - I have connected with several construction industry professionals that I have never met in person. They all post excellent content and promote our industry. The vibe from them is very much the same that we foster in SAM - share information and cheer for everyone to be successful. I have found it to be validating for the culture and practices we have grown in SAM.

I wanted to share a few member pages to follow and construction professionals to connect with so that you can hopefully share in my recent positive experience.

**Follow SAM Member Companies** - Note that you can connect to Employees withinin each company (as long as they have a LinkedIn Page):

Sunstate Equipment Co., LLC

King of Texas Roofing Company, LP

Neuco & Associates, Inc.

Unity Insurance Partners

PlainsCapital Bank

Facility Construction Services - FCS Dallas

Midway Sealcoating & Striping

**PCL Contract Bonding Agency** 

PCI Construction - Utilities & PCI Construction, Inc.

Elyon Fire & Life Safety Astro Sheet Metal Co., Inc.

Woodwright Wrangler Roofing
TrendHR Gibraltar Glass Inc.

Anderson Paving, Inc. INSURICA

### **Follow other Associations:**

- Central Texas Subcontractors Association
- APWC Texas

### **Follow Industry Professionals:**

- Matt Graves Matt has a weekly podcast and newsletter.
- Lance Furuyama Lance is building a tool to ease the prequalification process for subcontractors.
- Brian Hunt, CPA, CPC There are truly six degrees of separation from Brian Hunt when you work in construction.
   We share many contacts.
- Gloria Marie Fuentes Gloria hosts LinkedIn Live Networking Events. It is like a Zoom call without the video.

### **OUR ASSOCIATION LEADERSHIP**

**Eric Hernandez** - USI Southwest President

Membership Committee Chair

**Bryan Kindopp -** Staley Steel Vice President

**Debbie Parker -** King of Texas Roofing Secretary

Safety Committee Chair

**George McGraw -** PlainsCapital Bank Treasurer

Government Affairs Committee Chair

**Becca Neu -** Neuco & Associates SAM University Committee Chair

**Josue Garay -** Garay's Concrete Work Director

**Matthew Singel -** Anderson Paving Director

Robert Petitti - INSURICA Director

**Spike Cutler -** Cutler-Smith, P.C. Legal Counsel scutler@cutler-smith.com

### **How Can You Help SAM?**

We need committee members to help brainstorm and execute new ideas that the committees decide to implement in SAM.

This Association was created for YOU, the subcontractors in Dallas-Fort Worth. Your involvement is the key to your getting what you want from SAM!

Contact Carrie to sign up as a committee member.



Subcontractors Association of the Metroplex Carrie Buckley, Executive Director P.O. Box 210261 | Bedford, Texas 76095 817.266.1909

