BY KERRI RANNEY[1]

LIEN RIGHTS OF CONSTRUCTION MANAGERS

With the ever-changing and dynamic construction industry, the face of the general contractor is changing. Owners now hire construction managers to help plan, oversee and/or monitor and inspect construction, with no direct responsibility to actually perform the work. This article will discuss whether a construction manager who does not actually perform construction work on a project has furnished "labor" within the meaning of the lien statute, entitling the construction manager to perfect a valid lien to secure payment for its construction related services. This case note only discusses Texas law as it relates to mechanics' lien claims of a construction manager arising under private (non-public) contracts.

Initially, only "manual work" was protected under Texas' laborer lien laws.[2] However, the Texas Supreme Court has followed a "long-standing rule of liberal construction for protection of laborers and materialmen" for decades.[3] The liberal construction of §53.021 of the Texas Property Code has contributed to the broadening of lien rights available to those who furnish services on a project.

Design professionals, including architects and engineers, were specifically given statutory lien rights in 2006 as to plans prepared "*under or by virtue of a written contract with the owner or the owner's agent, trustee, or receiver.*"[4] Lower-tier engineering subcontractors are presumably entitled to lien rights under §53.021 because the engineering subcontract exists *by virtue of* a written contract with the Owner. However, the law makes no mention whether a construction manager is protected under §53.021.

The services of a construction manager typically involve assistance to the Owner in planning a project and keeping it on schedule and within budget. A construction manager is a consultant who is knowledgeable in the construction industry and gives the Owner advice and recommendations during the design process. The construction manager's coordination and oversight services typically does not require the construction manager to directly perform any of the work.

The case of *Branecky v. Seaman* is instructive on the issue of whether §53.021 will entitle a construction manager to secure the right to payment.[5] *Branecky* was decided before §53.021 was amended to include architects and engineers; it addressed whether an architect had a common law lien right even though it only had prepared plans for an aborted project. Finding that the architect had not, in fact, "superintended construction" and had "merely prepared plans and specifications," the Court held:

> "We construe the statutory definitions of labor and work to require more than the preparation of *preliminary* plans and drawings for a project which is never commenced in order to establish a lien." *(Emphasis added.)*

Noting that plans are often prepared on a conceptual level to help reach a decision whether to build a project, the Court found significant the fact that work never began.[6] This meant there was no improved property upon which to file a lien.[7] Thus, it would stand to reason that a construction manager may have no lien rights if its services are only preliminary in nature, and rendered in connection with a project on which no construction ever occurs.

Is a different result attained if the construction manager assists in the actual construction of a project for serv-

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[2]Bell Oil & Refining Co. v. Price, 251 S.W. 559, 562 (Tex. Civ.App., 1922, no pet.).

[3]University Sav. & Loan Assoc. v. Security Lumber Co., 423 S.W.2d 287, 296 (Tex. 1967)(ruling that a mechanic's lien superseded a deed of trust lien).

[4]TEX. PROP. CODE § 53.021 (2006). The subsection in its entirety states:

> "An architect, engineer, or surveyor who prepares a plan or plat under or by virtue of a written contract with the owner or the owner's agent, trustee, or receiver in connection with the actual or proposed design, construction, or repair of improvements on real property or the location of the boundaries of real property has a lien on the property."

[5]Branecky v. Seaman, 688 S.W.2d 117, 119 (Tex.App.-Corpus Christi, 1984, writ ref'd n.r.e.).

[6]*Id.*

[7]*Id.*

ices such as construction oversight, scheduling, and inspection services? Allowing lien rights to secure payment for these types of service would seem appropriate from a public policy standpoint.

Under the logic of the Court in *Advance'd Temps., Inc. v. Reliance Sur. Co.*, 165 S.W.3d 1, 4 (Tex. App.-Corpus Christi, 2004, pet. granted),[8] a construction manager's services during the construction of the project may qualify as "furnishing labor" for a construction project. In *Advance'd Temps*, the Court found a temporary employment agency was entitled to lien rights to protect its right to payment even though it never directly performed any work, but rather furnished the construction labor for the performance of the work.[9] The agency was found to have done all the things the contractor would have been required under the contract to do in order to perform the work, including the qualifying of the employees, the furnishing of insurance, and actually paying the workers through its own account. The Court stated:

> "To construe the statute [to] require every lien claimant to engage in the business of construction is contrary to the legislature's intent to construe the lien statute liberally for the purpose of protecting laborers and materialmen."[10]

Regardless of the silence of §53.021 on the issue, the right of a construction manager to a lien would appear to be certain at least as to the value of their labor upon *buildings* under Art. XVI, §37 of the Texas Constitution, which gives a lien to all "artisans . . . of every class" for the value of their labor upon buildings. Also, "Architects who prepare plans and specifications for, and superintend the placing of materials in, *and supervise* the erection of, improvements are within the meaning and intent of the statute."[11] (*Emphasis added.*) See also the case of *Sanguinett & Staats v. Colorado Salt Co.*,[12] in which the Court ruled:

> ". . . An architect who prepares the drawings, plans, and specifications for a building, and superintends the erection thereof, may as truly be said to perform labor thereon as any one who takes part in the work of construction."

Based on the foregoing authorities, if a construction manager actually coordinates the construction and delivery of labor and materials on the project, and actually superintends the project, Texas courts should determine that the construction manager is entitled to a lien to secure payment for its services.

Conclusion

It is clear that the Texas Supreme Court and the Legislature intended that Texas laws should be broadly interpreted to protect those furnishing labor services for a construction project. This protection was recently expanded to protect architects and engineers, who do not directly perform the construction work. While it is silent as to the rights of a construction manager, it appears clear that a construction manager who performs all the functions of a general contractor without physically self-performing any of the work should be viewed by the courts as furnishing labor to an Owner for a construction project, for which lien rights should be available. However, unlike an architect or engineer expressly protected under §53.021, the construction manager will probably not be entitled to lien rights if its work was limited to preliminary, preparatory services for a project on which work never actually commenced.

[8] *Aff'd* by Reliance Nat'l Indem. Co. v. Advance'd Temps, Inc. 2007 Tex. LEXIS 529 (Tex., June 8, 2007).

[9] *See Advance'd*, 165 S.W.3d at 6.

[10] *Id.*

[11] 38 Tex.Jur.2d, § 3, p. 542.

[12] 150 S.W. 490 (Tex.Civ.App. –Forth Worth, 1912, writ ref'd.).