

Texas Construction Association

REPRESENTING TEXAS SUBCONTRACTORS AND SUPPLIERS

602 W. 13th Street

Austin, Texas 78701-1705

TEL: 512-473-3773

FAX: 512-473-3777

Web Site/Email: www.texcon.org

Subcontractor and Supplier Construction Legislative Newsletter-June 5, 2009

SPECIAL NOTE:

This newsletter contains several requests for TCA Members to contact the Governor. Please heed these and write or call immediately. The Governor is deciding on all bills shortly because his deadline is June 21.

THE 81ST TEXAS LEGISLATURE'S REGULAR SESSION HAS ENDED. WHAT A CRAZY AND SAD ENDING! Every session has its spellbinding moment. This session's "moment" lasted for days! Mired in political wrangling over Voter ID issue (whether to require a photo id to vote) the Senate started the session with the issue and the House ended with it. Key issues of TCA were caught in the House by the issue. Jason Embry of the Austin American-Statesman wrote a story on the issue. It can be found here:

<http://www.statesman.com/news/content/region/legislature/stories/05/31/0531voterid.html>

TCA PRIORITY BILLS

Last versions of the bills can be found on the TCA web site, www.texcon.org, by clicking the Legislation tab and then TCA Bills.

HB669 - Mechanic's, Contractor's and Materialman's Lien Bill - Unless Governor Perry kills it with a veto, lien claimants now have some breathing room as this bill lessens significantly the liability of a mechanic's lien claimant under the Fraudulent Lien Act (Chapter 12, Civil Practice & Remedies Code.) This bill, authored by Rep. Burt Solomons and sponsored by Sen. Chris Harris, provides that a person claiming a lien under Chapter 53, Property Code (mechanic's lien statute) is not liable under the Fraudulent Lien Act unless the claimant files the lien with intent to defraud. Since the inception of the act in 1997, lien claimants have been subject to severe civil penalties for inadvertent mistakes in a lien affidavit. And the concern has grown since some adverse court decisions were issued. Subcontractors and suppliers have long contended that the penalties for improper lien filings in Chapter 53 of the Property Code are sufficient and the Fraudulent Lien Act should not apply to the mechanic's lien. The Texas Legislature has agreed.

Ask the Governor to sign the bill. Send a letter now to:

The Honorable Rick Perry
Office of the Governor
P O Box 12428
Austin, TX 78711

If you want to call, the number is 512-463-2000. Ask to speak to the person handling HB669.

SB 555. (HB 818) Indemnification in Construction Contracts. In the final days of the legislative session, the House failed to consider SB 555, the construction indemnification bill, which thereby caused a premature death to this important legislation.

On Tuesday, May 19, the House Calendars Committee placed SB555 in the number two position on the Major State Calendar for debate on Thursday, May 21. Calendar is the list of bills that the House debates on the House floor. TCA staff was joyous at the prospect of the bill coming before the full House.

On Wednesday, May 20, two bills with passionate interests, the Unemployment Insurance bill (SB1569) and the 10% admission to universities bill (SB175) were up for debate. The House began debate on these bills, but did not finish on Wednesday. So these bills were carried over to the Thursday Major State Calendar ahead of SB555.

Thursday, May 21, brought long debates on SB1569 and SB175. The House did not finish these on Thursday so SB555 was not reached for debate that day. Additionally, on Thursday night, a Major State Calendar was posted for Saturday, May 23. That Calendar contained SB362, the Voter ID bill. (See Jason Embry's article) It and other major bills were behind SB555 on the schedule.

Ordinarily, being the second bill on a Major State Calendar with six days before the deadline for debate, a vote on the measure will be taken, usually on the day it is originally scheduled or the following day. On Friday, May 22, prior to the consideration of the Major State Calendar, the House began a Local and Uncontested Calendar consisting of over 200 bills. Ordinarily these bills are gavelled through with little debate and the vast majority passes unanimously. However, under the House Rules, each Local bill can be debated up to 10 minutes in addition to the 3 minutes the author gets to describe the bill. If the bill is debated for more than 10 minutes, it fails to pass and is withdrawn from the Local Calendar. The opponents of the Voter ID bill chose to discuss each bill for approximately 9 ½ minutes on second reading. (All bills must be read three times before the House: 1st when introduced; 2nd on second reading and this is typically the major floor debate; and 3rd on third reading when usually there is little debate and an occasional amendment.) When the Local bills were subsequently considered on third reading there were again 9 ½ minutes of debate on most bills.

This is a tactic called “chubbing” which is often used at the end of a legislative session to delay consideration of bills farther down the calendar. This time “chubbing” was raised to a higher art form than during most previous sessions.

Debating the bills on the Local Calendar had the effect of passing bills at a rate of about 4 per hour on both 2nd and 3rd reading. This caused the Local Calendar to take 5 DAYS to complete versus normally a few hours.

With the number of bills and the time required to go through the Local and Consent Calendar, SB175 was the only bill on Major State Calendar to be voted on before the deadline for second readings on Tuesday May 26. In addition to SB555, bills not debated were sunset legislation continuing the existence of several state agencies, including the Texas Department of Insurance, legislation dealing with the federal stimulus package and unemployment insurance, the Voter ID bill and about 30 other bills on the final Major State Calendar. PLUS, while it is not much solace, about 185 bills on the General State Calendar that follows the Major State Calendar also died for lack of consideration.

So despite being placed as the second bill on the Thursday, May 21, Major State Calendar, (considered a golden position) the measure was not considered by the House before the midnight Tuesday, May 27 deadline for bills to be heard. Instead a partisan dispute “Voter ID” bill, prevented consideration of our indemnification bill. SB 555 had only two negative votes in the 81st Legislative Session. It passed the Senate State Affairs Committee 8 to 1, passed the Senate by a vote of 30 to 1, and passed out of the House Judiciary and Civil Jurisprudence Committee by a vote of 8 to 0. Based upon the number of Representatives expressing support of the bill, TCA staff believes there were sufficient votes to pass the bill out of the Texas House, if it had been voted upon.

With the record of support in the Legislature and the hard work that so many subcontractors and suppliers have put into this effort over the years, TCA Members are challenged to renew their efforts during the interim to solicit the support of our State Senators and State Representatives to pass this legislation when they meet next Session. TCA Members have worked too long and with too much dedication not to see pass this legislation banning the uses of these unfair clauses in construction contracts. During the interim, and particularly the campaign season, we have to keep the issue before the individual legislators through communications and provide support for those Legislators who have been key factors in our efforts.

SB 1551. Consolidated Insurance Programs. This measure regulated Owner Controlled Insurance Programs and Contractor Controlled Insurance Programs and set standards for these insurance programs. Despite support from most of the stakeholders involved in these programs, a consensus from all the stakeholders could not be reached. An attempt to add the measure to the Texas Department of Insurance sunset bill was throttled when that bill succumbed in the House to the Vote ID chubbing.

BILLS PASSED AFFECTING CONSTRUCTION INDUSTRY & SUPPORTED BY TCA

Despite disappoints on some major initiatives by TCA, the construction industry had some successes in addition to HB669 described above. The bills can be found on the TCA web site by clicking the Legislation tab and then Other Bills. There are a couple of issues on which the Governor needs to hear from TCA Members requesting his support for the bill.

HB 987. Recovery of Attorney Fees. An amendment was added to this bill providing for recovery of attorney fees in a breach of contract suit against a local governmental entity. When the anti-sovereign immunity bill was passed a few Sessions ago, it provided that local governmental entities could recover attorneys fees in a breach of contract suit against the contractor, but contractors could not recover from the governmental entity. This amendment corrected the inequity.

Ask the Governor to sign the bill. Send a letter now to:

The Honorable Rick Perry
Office of the Governor
P O Box 12428
Austin, TX 78711

If you want to call, the number is 512-463-2000. Ask to speak to the person handling HB987.

HB 1513. Texas Construction Trust Fund Act. This measure made some changes in the Texas Construction Trust Fund Act (TCTFA), Chapter 162, Property Code to correct a couple of Appellate Court decisions. The first change provided that funds subject to the TCTFA (these are monies that have been set aside or paid to contractors on construction projects) are not subject to a subsequent claim by a bankruptcy trustee. In other words, if the money has been paid or set aside for a contractor, a bankruptcy trustee subsequently cannot reclaim the funds if an upstream payor enters bankruptcy.

The second change corrected a decision denying the protections provided to the contractor by the TCTFA involving a public project. The particular case held that the only remedy for a contractor for failure of payment on a public project is the payment bond. The contractor, who had relied upon a three-party check to provide payment, had already passed the deadlines required to perfect a claim under the payment bond. The Court held that the contractor could not invoke the provisions of the TCTFA. The change in the bill provides that the remedy provided by the TCTFA was available to the contractor in addition to the payment bond remedy.

Ask the Governor to sign the bill. Send a letter now to:

The Honorable Rick Perry
Office of the Governor
P O Box 12428
Austin, TX 78711

If you want to call, the number is 512-463-2000. Ask to speak to the person handling HB1513.

ADDITIONAL BILLS PASSED RELATING TO CONSTRUCTION

The bills can be found on the TCA web site by clicking the Legislation tab and then Other Bills.

HB 1410. Plumber Licensure Changes. This bill set standards and requirements for responsible master plumbers. Late in the Session it became a vehicle for previously dead House bills (or at least bills on life support) which were amended onto the measure. One bill added allowed plumbers to become licensed to provide residential fire sprinkler systems. A second amendment prohibited municipalities from adopting ordinances or codes which would require fire sprinkler systems to be installed in one or two-family dwellings.

HB 1758. Plumbers Apprentices. This measure, promoted by the Plumbing-Heating-Cooling Contractors of Texas, authorizes plumber's apprentice applicants for a plumber's license to apply up to 500 hours of classroom training as a credit towards the total number of hours or work experience to sit for the tradesman or journeyman plumber's license examination. HB 1758 authorizes an apprentice to sit for the license examination if he or she has received an associate of applied science degree from a plumbing technology program that includes on-the-job training. The bill has been signed by the Governor.

HB 2082. Local Preferences for Competitive Bidding. This measure provided that the local preferences given to bidders within 5% of the lowest bid who reside in the municipality is limited to expenditures of less than \$100,000. Presently the amount is unlimited.

HB 2515. Payment Bond Requirements for Cities and DFW Airport. DFW Airport filed legislation raising the minimum amount before a payment bond is required on city and DFW Airport projects from \$25,000 to \$50,000. TCA was instrumental in getting an amendment placed on the bill that provided that a contractor was entitled to a payment lien up to the amount of \$50,000 (from the present limitation of \$25,000). This change assured that the rights to a lien matched the payment bond changes.

HB 2667. Standards for Plumbing Fixtures. This measure provides standards for plumbing fixtures including some conservation standards for the fixtures.

HB 2730. DPS/School Criminal Background Checks. An amendment was added to the Department of Public Safety sunset bill that clarified that each employer on a school project is responsible for making the background checks of its own employees. This was probably the current practice although the statute was unclear. Additional legislative change is needed to eliminate duplicate background checks for each employee at each school and making the system more efficient and less costly. Work on this will be done during the interim.

HB 3129. Home Consumer Transaction Involving Plumbers, Air Conditioning Contractors and Electricians. Several sessions ago, the Texas Home Solicitation Act was passed allowing a consumer the right to cancel a home solicitation transaction within three days occurring at a consumer's residence. Plumbers, air conditioning contractors and electricians are subject to the Act and a consumer could cancel and require re-installation of the old product. This bill provides that the Act does not apply to a good or service if the transaction involving the goods or service is initiated by the consumer. This measure was supported by plumbing, air conditioning and electrical contractor groups.

SB 627. Criminal History Check of Employee Providing Residential Services. The requirement of a criminal history check of an employee providing residential services is satisfied if the employee is licensed and a criminal history check is performed by the licensing agency as a requirement of licensure.

OTHER SIGNIFICANT RELATED ISSUES

Franchise Tax aka Margins Tax Revision.

SB 4765. This measure raises the minimum revenue requirement for tax liability from \$300,000 to \$1,000,000 dollars before any margins tax is due subject to the passage of a smokeless tobacco tax which did in fact pass. This change expires on December 31, 2011. After that date the minimum revenue requirement for tax liability becomes \$600,000 with discounted tax amounts though a revenue ceiling of \$900,000.

Immigration Bills.

This Legislature chose not to address substantive bills dealing with illegal immigration during this Session. They took the position that this was a federal issue with the state having limited authority to pass immigration laws.

Texas Residential Construction Commission.

This Legislature chose not to continue in existence the Texas Residential Construction Commission.

MEASURES RELATING TO THE CONSTRUCTION INDUSTRY FAILING TO PASS

HB 1005. Employee Leave for Child Related Activities. This measure would have required employers to grant leave to employees to attend school related activities involving their children.

HB 1657. Workers' Compensation Statutory Employer. This bill was an attempt to overturn the Texas Supreme Court decision in *Entergy Gulf States Inc. v. Summers*. That case provided that an owner providing workers' compensation on a construction project can be considered a general contractor for the purpose of workers' compensation and thus avail itself of the workers' compensation bar to liability.

HB 1807. Regulation of Cranes. This measure would have required certification of crane operators and others involved in the use of cranes on construction projects.

HB 1854. Registration of Roofers. The measure would have required roofing contractors to be registered.

HB 1971. Registration of Fire Sprinkler Technicians. This measure died for the third of fourth consecutive Session.

HB 2091. Electrical Work on Motors in Unincorporated Areas. This measure would have allowed unlicensed individuals to work on electric motors in unincorporated areas.

HB 2600. Licensing of Sheet Metal Workers. Licensure of sheet metal workers failed to pass.

HB 2670. Interest Paid Under Prompt Pay Act by Governmental Entities. This measure would have relieved public entities from paying interest on late payments when there was a dispute between the parties.

HB 3913. Dispute Resolution. Measure would have provided for a dispute resolution process on construction projects between owners and general contractors but would have limited involvement of subcontractors.

SB 222. Arbitration and Arbitration Agreements. Measure would have limited the use of arbitration by contractors and others.

SB 1110. Procurement Standards Bill. This measure would have set standards and procedures for the various forms of procurement used by public entities.