



Spring 2007

REPRESENTING TEXAS SUBCONTRACTORS AND SUPPLIERS

## 2007 Texas Legislature TCA Agenda

### They're Baaaaack!!!!

The 80<sup>th</sup> Legislative Session convened on January 9, 2007. For 140 days, legislators will discuss issues of concern for subcontractors and suppliers. TCA will be there representing your interests in the Legislature. Following is a summary of key issues on which the Texas Construction Association will focus during this Session.

**Limiting Use of Contingent Payment Clauses.** Most contracts presented to subcontractors provide that the general contractor does not have to pay the subcontractor if the owner does not pay, even when the subcontractor performs the work properly. The subcontractor can perform the work perfectly and not be paid because of someone else's mistake. Furthermore, the subcontractor has no recourse against the general contractor to get payment for his or her work. A subcontractor should have the right to get paid for satisfactory work.

The Texas Construction Association and the Associated General Contractors-Texas Building Branch have reached a compromise agreement on limiting the use of contingent payment clauses and will have legislation reflecting the compromise agreement. The legislation will limit the use of the clauses and eliminate the abuses.

The proposed legislation would prevent the use of a contingent payment clause if the reason for the owner's nonpayment is defective work performed by the general

contractor and payment cannot be withheld from the subcontractor. Likewise, if the reason for the owner's nonpayment is due to the work performed by a different subcontractor, the general contractor cannot use the contingent payment clause to not pay the subcontractor who performed up the standard. Also the clause could not be enforced if to do so would be otherwise unconscionable. The proposed legislation also clarifies that the contingent payment clause cannot be used to defeat lien or bond claims of the subcontractor.

**Prohibiting Indemnification Clauses.** Most construction contracts contain clauses providing that the subcontractor indemnify the general contractor and owner for their negligent wrongdoing even though the subcontractor may have done nothing improper. The indemnification also requires that the subcontractor pay the entire cost of defending the claim regardless of the percentage of fault. Our liability system is based upon the principle of each person being responsible for his or her conduct. To allow a party to transfer its responsibility for its own conduct goes against this principle and reduces or removes any incentive to maintain a safe workplace for the person shifting the risk. Studies have shown that shifting of risks increases the total cost of risk on a project and also hinders quality. Allowing contractual indemnity most often shifts the risk to another who is generally less able to absorb the risk.

**Additional Insurance and Waivers of Subrogation.** Additional insured endorsements and waivers of subrogation should be restricted in their application. Additional insured endorsements effectively give the owner the coverage of the subcontractor's policy. These endorsements should be used only to protect the additional insured for the subcontractor's negligence. Also, with these endorsements being revamped markedly by the insurance carriers, subcontractors face new exposure. Similarly, waivers of subrogation on workers' compensation policies shift the burden away from the responsible party in an accident.

**Owner Controlled Insurance Program.** Known as Owner Controlled or Contractor Controlled Insurance programs, the use of these AWrap-Up@ programs are increasing in Texas. While possibly a money saver for the owner, the CIPs are plagued by poor administration, gaps in coverage or lack of coverage, insufficient limits, questionable safety and back to work programs, auditing practices that cause subcontractor's retainage to be withheld even longer. In many cases, the exposure a subcontractor faces working on a CIP is unknown. In the 2003 session, TCA helped defeat legislation that would have required the use of OCIP's on every public project. Standards should be set for CIPs in Texas.

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**Limiting Use of Reverse Auctions.** Reverse auctions are being used more often in construction contracts. Last Session a bill was considered to require reverse auctions to be used on at least 10 percent of Public Projects. Reverse auctions are a public bid shopping procedure that creates havoc in an already complicated bidding procedure. They may work fine when you are buying products such as pencils, but reverse auctions are not a good procurement method for construction projects.

**Retainage.** Should subcontractors continue to be bankers? It is the rare banker that will lend money at no interest. Yet subcontractors do so when retainage is withheld from their progress payments. If retainage will continue to be withheld for properly completed work, then interest should be paid. Contractors should no longer be bankers for construction projects in Texas.

### *Other Issues to Watch*

**Lien Law Reform.** The Texas mechanic's and materialman's lien law is full of potholes for the unwary. And the unwary is often times the subcontractor. A complete revamping of the Texas lien law system is in order. If the legislature will not enact a broad reform, it should at least plug some of those potholes.

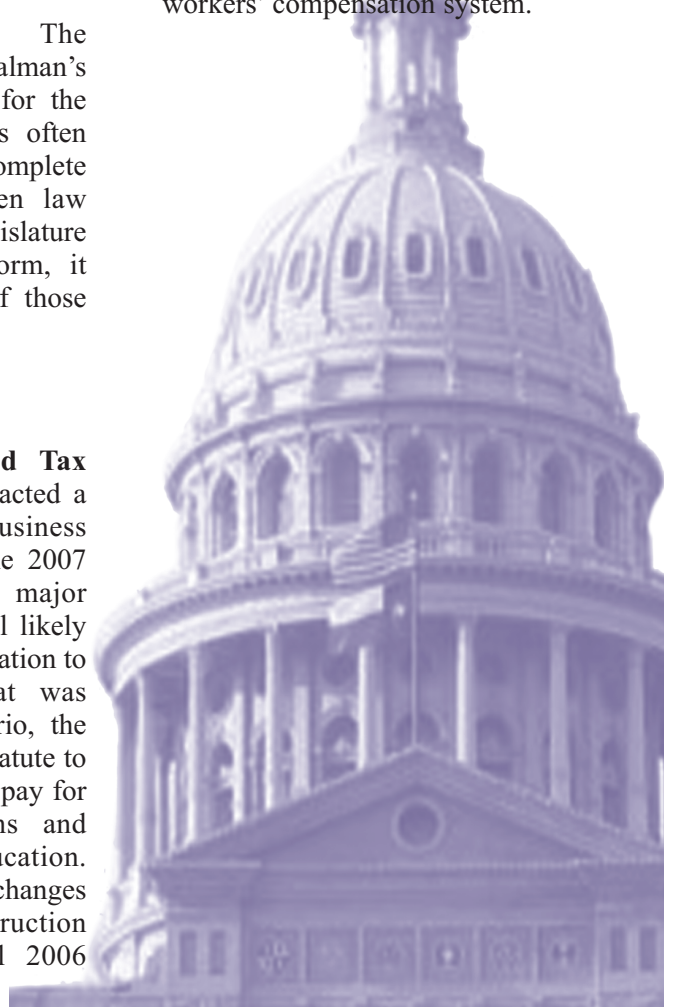
### *Alternative Delivery Systems*

**School Finance and Tax Reform.** The Legislature enacted a major revision to the business franchise tax beginning in the 2007 tax year. As with any major legislation, the legislature will likely do some tweaking of the legislation to make certain it does what was intended. Worst case scenario, the legislature has to amend the statute to look for additional funding to pay for the property tax reductions and additional funding for education. TCA will be watching for changes that will affect the construction industry. (See TCA's Fall 2006

Newsletter for a closer look at the franchise tax bill.)

**Sovereign Immunity.** In 2005, the Texas Legislature struck a blow to the doctrine of sovereign immunity for local governmental entities by virtually eliminating it as a defense in contractual matters. Since then, cases have moved through the courts and findings have been detrimental to public entities. The construction industry will need to guard against erosion or repeal of this important law. The right to resolve disputes and to have a remedy to enforce a contract with a state or municipality must be maintained.

**Workers' Compensation Reform.** Many employers are applauding the recent changes made to the workers' compensation statutes. While the full effect of these changes has not yet been felt, it is likely that some changes to the new law will be introduced. The construction industry should be watchful for changes that might erode positive reforms in the workers' compensation system.





## INTEGRITY OF A BUILDER

*It's not just what you do . . .  
it's who you are!*

-Written by Pat Kiley

*The perspectives and conclusions in this article come from someone who is not a builder, but rather a person that has observed and interacted with builders for over 23 years. The author has been both an association executive representing commercial building firms and a consultant working with their CEOs and senior executives. From these experiences, he has concluded there are several characteristics that this rare breed of real builders has in common, regardless of the size of firms they run, the type of market they serve or other individual differences such as age, gender or race.*

This article is about builders, those amazing men and women who actually put work in place using their own labor. It is not necessarily about contractors, because, all too sadly, that term has come to mean something different than builders. Too many contracting firms today are brokers not builders. Neither is it about Construction Managers or Program Managers. Here again, many of these firms have never put any work in place. While many of them are fine firms, they are not really "at risk" firms under most of their contracts.

This article is only about those strong and unique individuals that have the character strength, construction competency, and business aptitude to run successful firms that truly build things. It is about bold risk takers, those people willing to build projects for a guaranteed price and a guaranteed schedule or to reach in their own pocket if they don't, a startling trait when you realize that most of the time they are building prototypes, "one-of-a-kind" structures, often out in the weather!

Just what are these common traits among true builders? First, they have great respect for the work that they do. They consider it privileged, almost sacred, work: they build the structures that serve humanity. They build the infrastructure that supports our lives: the roads, bridges, dams and power plants;

the airports, fire and police stations and other public facilities. They build the places where we work, worship, heal, learn and where we celebrate our spirit through the venues of sports or performances.

Second, they have an inherent sense of fairness and respect. They play by the "rules of the game". They respect traditions and fair competition. They honor those that have paved the way for them. They applaud each other's success. They are willing to give time and money to make their industry better.

Third, they have a deep level of construction and business competency. They know what they are doing. They understand the means and methods of their trade, and they are continuous learners, seeking the best possible practices. They also understand business matters, contracts, financial issues and customer and employee relationships. They are real pros who are justifiably proud of the way they perform their work.

Fourth, they have real courage. They have the courage to stand behind their proposals or bids that give firm pricing and schedules. The courage to face conflict. The courage to make the tough calls required in any business. And the courage to take the long view, making decision that are in the long range best interest of their firms, their people and their industry. Fortunately, most are privately-held, and they are not subject to the brutal master of quarterly earnings, which often forces short term, expedient thinking.

Fifth, they have great character strength, old-fashion integrity. A prominent Houston minister once defined character as, "who you are in the dark when your mother and father are not watching you". Builders know themselves. They take great pride in being responsible and accountable. Even though there are always lengthy contracts, their word is truly their bond. "What I say or what my people say is what we do".

This quality of builders really stands out so positively today when headlines

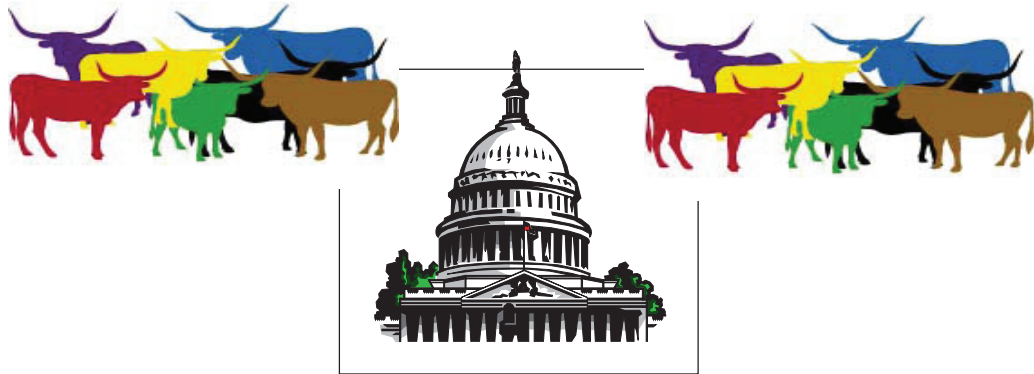
have brought many examples of high profile, public company CEO's pleading ignorance as a defense to actions of their employees that have brought deceit and harm. No builder seeks to be excused from accountability, because he did not know what his employees were doing. As a matter of fact, there are many examples of builders who had the very legitimate legal defense of bankruptcy, who chose instead to sell personal assets and pay their creditors. A sense of responsibility is their hallmark.

Finally, builders show genuine caring. They care for their people, their customers, their industry and their community. There are many examples in company after company of builders providing generous support to their employees and customers, helping them through illness, rehabilitation or unexpected losses. Then, there are the countless hours of volunteer work or direct financial support that these builders give to their industry or to their community. Real builders are deeply imbued with a powerful sense of obligation about giving back to the people and organizations that have given support to them.

So the marks of a true builder are consistent and clear. For people who have earned this title, there is every reason to be excited and proud. Few can claim this crown. But, there is also an obligation to create the real builders of the future, to identify people who have the raw qualities and then to mentor and to teach them, never letting them forget that being a builder is not what you do, it is who you are.

*Pat Kiley is a principal in Kiley Advisors, a firm that works with commercial construction company CEO's and Senior Executives on matters of Leadership and Strategy. This article is distilled from comments he made to the construction science graduation banquet at Texas A&M University.*

# It's time again we were "herd" in Austin !



**W**e're trying to get as many of our members as possible in Austin for the next Legislative Session so our voices can be heard regarding upcoming legislation that affects subcontractors & suppliers. There's strength in numbers, and legislators listen when a large group of voters voice the same concerns. We won't have any influence if we aren't heard. The larger our 'herd', the louder our thunder will be.

## 2007 TCA ★ PAC Roundup & Walk on the Capitol

*Sponsored by the Members of Texas Construction Association*

### AGENDA

**Monday, January 29, 2007 - TCA ★ PAC Roundup**  
**Cedar Street Courtyard, 208 West 4th Street, Austin**

**3:00 - 5:00 pm**

*80th Legislation Session Forecast from Legislator(s)*

*Learn about Contractors Issues*

*Rally Support for the Visit to the Capitol*

**Reception - 5:30 - 8:00 pm**

*Opportunity to visit & have drinks with your Legislators & Staff*

**Tuesday, January 30, 2007 - Walk on the Capitol**

**Intercontinental Stephen F. Austin, Capitol Ballroom B**

**701 Congress (@ 7th Street), Austin**

<i>Continental Breakfast with the Sponsors</i>	<i>7:00 am</i>
<i>Breakfast Speaker</i>	<i>7:30 am</i>
<i>Briefing - TCA Staff</i>	<i>8:30 - 9:00 am</i>
<i>Walk to Capitol to Talk with Legislators</i>	<i>9:30 am - 4:00 pm</i>
<i>Debriefing at Hotel</i>	<i>Immediately after Walk</i>

*The Intercontinental Stephen F. Austin Hotel is offering rooms @ \$178 for TCA members.*

*When calling the Hotel (512) 457-8800, ask for the Texas Construction Association rate.*

*Hotel reservations must be made by January 8, 2007 (Monday)*

*Call TCA at 512-473-3773 if roomblock is full.*

*Please mail or fax your registration ASAP!!*

## REGISTRATION FORM

Mail this form with your check ASAP to:  
Texas Construction Association  
602 W. 13th Atreet, Austin, TX 78701-1705

Or FAX to:  
Texas Construction Association  
(512) 473-3777

### 2007 TCA★PAC Roundup & Walk on the Capitol

*We hope to see you there!*

☐ I will attend the Roundup on the 29th

☐ I will attend the Walk on the 30th

Name \_\_\_\_\_

Company \_\_\_\_\_

Adress w/City & Zip \_\_\_\_\_

Phone (    ) \_\_\_\_\_ Fax (    ) \_\_\_\_\_

Email \_\_\_\_\_

*Please use separate sheet for each attendee or for each credit card if using more than one to pay.*

☐ I'll be a Roundup Sponsor for ☐ \$2,500 ☐ \$1,000 ☐ \$500 (May use corporate funds)

☐ A check is enclosed ☐ Charge the card below ☐ Please invoice me

☐ I won't be able to attend, but I'm enclosing my personal check for \$ \_\_\_\_\_ as my TCA★PAC contribution or my corporate check for sponsorship.

☐ I'm a believer! I want to show my support of the TCA★PAC by being a Badge member. (May NOT use corporate funds)

☐ Gold Badge Member - \$1,000 ☐ Silver Badge Member - \$500 ☐ Blue Badge Member - \$250 ☐ Red Badge Member - \$100

☐ A non-corporate check is enclosed ☐ Charge the non-corporate card below ☐ Please invoice me

☐ My check (payble to TCA★PAC) is enclosed

☐ Credit card: ☐ Visa ☐ Master Card ☐ Discover ☐ American Express

Name on Credit Card \_\_\_\_\_ Expiration Date: \_\_\_\_\_

Card Billing Address \_\_\_\_\_

Card No. \_\_\_\_\_ Card ID NO. (3-4 digits) \_\_\_\_\_



#### TCA Member Associations



American Subcontractors Association of Texas  
Associated Plumbing-Heating-Cooling Contractors of Texas  
Central Texas Subcontractors Association  
DFW Drywall & Acoustical Contractors Association  
Fire Equipment Distributors of Texas  
Mechanical Contractors Association of Texas  
National Electrical Contractors Association  
Sheet Metal & Air Conditioning National Association

Southwest Terrazzo Association  
Texas Council-Painting & Decorating Contractors  
Texas Fence Association  
Texas Fire Sprinkler Contractors Association  
Texas Glass Association  
Texas Iron Workers Employers' Association  
Texas Masonry Council  
Texas Structural Steel Institute



## LEGISLATIVE BASICS

### Back to Basics

Perhaps this is your first time to consider getting involved in the legislative process seriously. For newcomers, the process can seem daunting. Below you will find a brief introduction of the legislature in Texas.

### The Legislature

The Legislature is the lawmaking body in Texas. It is a bicameral system, meaning it consists of two legislative chambers – the Senate and the House of Representatives.

The Senate has 31 members, with each member representing approximately a half million residents. The House of Representatives has 150 members, with each member representing approximately 113,000 residents.

Senate members are elected for a four-year term. House members are elected for a two-year term. All legislators must be US citizens, qualified voters when elected, and residents of their represented district for one year prior to election. Members of both houses are elected to districts that are based on the US Census, and are established so that approximately the same number of Texans is in each district.

The Legislature meets in Austin for the Regular Session every two years beginning on the second Tuesday in January every odd-numbered year. Regular Sessions have a limited duration of 140 days. However, the Governor can call Special Sessions during other times. Special Sessions are limited to 30 days and to issues designated by the Governor.

Both the House and the Senate may enact, amend, and repeal laws and resolutions, submit all constitutional amendments to the voters, and approve the state budget. Each house judges the election and qualification of its members, elects its own officers (with the exception of the Lt. Governor in the Senate), and sets and enforces its own rules. These rules govern the organization, procedures, and membership for both the House and Senate and originate in the State Constitution, the statutes, and the standing rules of the House and Senate. The rules may be suspended by the majority in each house. Both Houses are required to have a two-thirds majority to conduct business.

The Speaker of the House is the presiding officer of the House of Representatives and makes committee assignments. The Lieutenant Governor is the presiding officer of the Senate. Unlike the Speaker of the House, the Lieutenant Governor is elected in a statewide election. He is the second

highest official in Texas.

### Bills

A bill must be approved by both chambers before it is sent to the Governor for final approval or veto. A Representative must submit a required number of copies to the chief clerk of the house, who then numbers each document sequentially according to the order it was received. A Senator must submit the required number of copies to the secretary of the senate, who then numbers each document sequentially according to the number it was received. For both the House and the Senate, the number of bills that can be introduced during the first 60 days is unrestricted. Except for local bills or bills relating to matters declared an emergency by the Governor, the introduction of a bill after the 60 day deadline requires the approval of four-fifths of the chamber members present.

### Committees

Because of the volume of work and the time limits of Sessions, both chambers work from a committee system to ensure thoughtful consideration of proposed bills. Bills cannot be considered on the floor prior to a committee report on the bill. Therefore, the passage of a bill hinges on the committee decision.

All committee action and voting must take place in meetings open to the public. Although a committee is not required to solicit public testimony, public testimony is almost always solicited on bills of outstanding importance, allowing citizens the opportunity to present arguments on different sides of an issue. In the Senate, a public hearing must be held on a bill before it can be reported from committee. Committees can decide to make a report on a bill or take no action. The report consists of the committee's recommendations, the committee's vote, a detailed analysis of the bill, a fiscal statement, and other necessary attachments.

### On the Floor

According to the Texas Constitution, a bill must be read three times in the presence of each chamber before it can be passed. Action on a bill does not occur until the second reading of the bill. At the second reading, the caption of the bill is read again and subject to debate by the entire chamber. At this time, the bill can be amended by a simple majority vote. The final step in the second reading is a vote for engrossment, if the bill is in the originating chamber, or passage to third reading, if the bill is in the opposite chamber. The bill is then presented at the third reading. Amendments to the bill at the third read-

ing require a two-thirds majority vote.

While the Texas Constitution requires three readings on three days for every bill, a bill can be given an immediate third reading following the vote for engrossment or third reading by a four-fifths majority vote. While the Senate typically uses this, the House rarely uses this exception.

If a bill is passed after the third reading by a simple majority vote, the bill is certified for final passage. The bill is engrossed, if in the originating chamber, and sent to the opposite chamber. After the bill has passed three readings in the opposite chamber, it is returned to the original chamber. If there are no amendments to the bill, it is enrolled. Both the Speaker and the Lieutenant Governor sign the bill and it is sent to the Governor. If the bill is returned to the origination chamber with amendments, it must agree to all of the amendments before it can be enrolled. If it does not agree to all of the amendments, then a conference committee is created to workout the differences.

The Conference Committee is made up of five members from each chamber. After the committee meets and agrees to changes, a report is made and given to both houses for approval or disapproval. The report cannot be amended, but must be accepted in its entirety. If either chamber finds the report unacceptable, the bill can be returned to the Conference Committee for further debate, or a second committee Team may be created in its place. If the report of the Conference Committee is accepted by both chambers, then the bill is enrolled, signed by the presiding officers, and sent to the Governor. If the Conference Committee does not reach agreement or if both chambers do not agree on the conference report, the bill is dead.

### Into Law

The Governor has 10 days to sign, veto, or pass the bill without signature. If the bill is vetoed while still in session, the bill is returned to the originating chamber with the Governor's reasons attached. The bill can overrule the Governor's veto with a two-thirds majority vote in each house. If the Governor receives legislation within the last 10 of the Session, the Governor has 20 days after the last day of Session to act.

*For more information on the Legislature in Texas, please visit the Texas Legislature Online Web site at [www.capitol.state.tx.us/](http://www.capitol.state.tx.us/).*

## ☆☆☆☆ HOW TO SPEAK TO YOUR LEGISLATOR ☆☆☆☆

*-Written by Joe Gagen*

You want to make a difference, but where do you begin? Joe Gagen, a legislative consultant based in Austin, recently offered some advice to TCA members who want to get involved in the legislative process.

The first thing you need to do is establish contact with your legislator. According to Gagen, one of the most important things to keep in mind when speaking to legislators is to remember the tremendous volume of issues that legislators must deal with during a session. One senator compared it to drinking water out of a fire hose. Unfortunately, this means that legislators cannot scrutinize every bill with the attention each bill deserves.

To compensate for this, legislators turn to people they trust, people they know, when considering a bill. Trust is a byproduct of developing a relationship with your legislator. So one of the most important ways members can be effective is to cultivate a relationship with your legislator. Start this relationship as early as possible. Gagen referred to a previous conversation he had with former Senator Cain. "Because of the complexity and diversity of issues, as well as a lack of time, legislators depend heavily not only on their staff, but on constituents to provide them with information. Legislators have so many people communicating with them, it is only natural to give more weight to those you have known the longest and trust, and to those who have a clear and concise message."

"It's like any business relationship," says Gagen. "You trust some suppliers more than others because you know them, because you have worked with them and know how they conduct themselves in business. It is the same for legislators." Volunteer, work on their campaigns, get to know them and share your views with them.

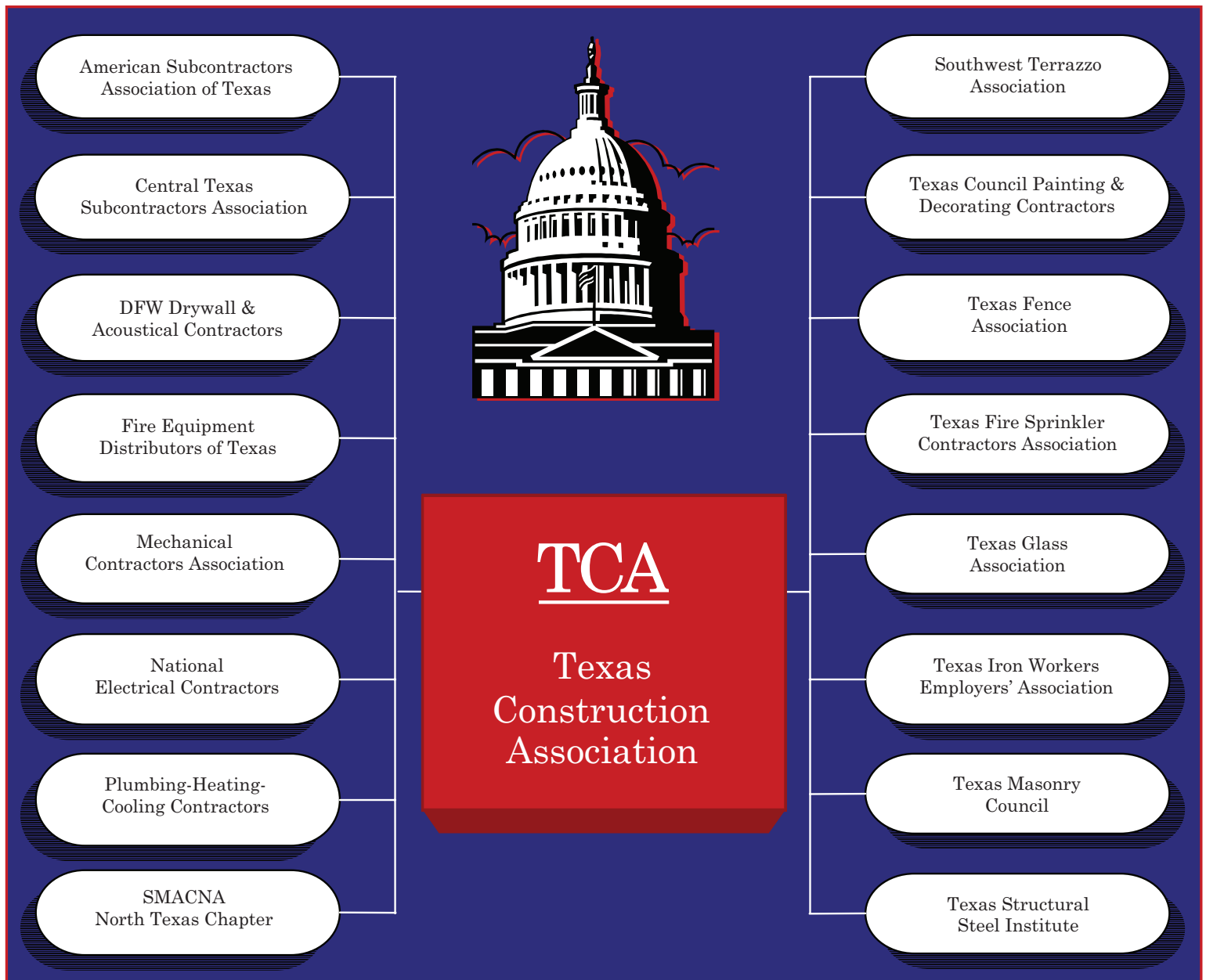
After contacting your legislator, one of the best ways to share information is with personal stories. Tell your legislator why the bill will alleviate a problem or create one. Give them an example from your personal history as a way to help them understand the effects the bill will have for your business. Your goal is to show the legislator the effects this bill will have on your industry.

For those that have never contacted a legislator before, here are some things to remember. If you are a constituent, your legislator has a good reason for wanting to talk to you. He wants to hear from you. When you contact them, tell them about yourself—what you do and your relevant experiences—and that you want to be a resource for them. Talk about the legislation that matters to you, but also let them know that you want to help them by being a resource for them.

If you find yourself called to testify before a committee, the rules still apply. Keep your testimony brief. Speak clearly and use personal stories and anecdotes. You want to give legislators concrete examples about what the legislation will do. Will it solve a problem? Will it create a problem? Give them personal examples that demonstrate why you are for or against the bill.

Also, the dynamic of every committee is different. Try to get to there early so you can observe the committee environment. This will help you determine the most effective way to interact with committee members.

*Joe Gagen has been involved professionally in political and legislative matters for over 30 years. He can be reached at 512-327-4383 or by e-mail at joegagen@sprintmail.com.*



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