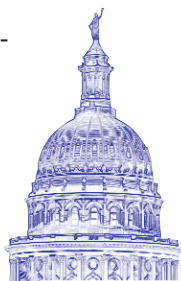


2003 Legislative Session Overview

Many Challenges and New Leadership

This was a very challenging session for each and every legislator. By the time they were finished, many were exhausted from the physical, mental and political pressures of the session. With a budget deficit of \$9.9 billion, soaring homeowners insurance premiums, the need for liability reform and growing dissatisfaction regarding the way our public schools are financed, this was to be the most challenging session in decades.

New leadership and new members in both chambers only added to the challenge. Governor Perry was facing his first legislative session. David Dewhurst, whose only previ-



ous governmental experience was serving as the land commissioner for one term, was beginning his first session as Lt. Governor. While Rep. Tom Craddick, a 33-year veteran of the Texas House, was serving his first term as Speaker of the House — a very different and challenging position.

In the House, 40 out of a total 150 members began their first term — the greatest change since 1972 when the Sharpstown Scandal precipitated a larger turnover. With the change in leadership in the House, many new committee chairmen, who had either never served as a chairman or had chaired other less substantial committees, were appointed. In the Senate, six of the 31 new senators were elected.

Accomplishments

Including the fact that no one shot anyone else, the Legislature addressed most of the major issues before it.

Business in general and the construction industry had good sessions overall.

With a combination of spending cuts,

measures to make the state government more efficient, some accounting changes (e.g., pay on September 1 rather than August 31), probably what will be some monetary downloading to local governmental entities, and elimination of some services, the Legislature passed a budget bill that balanced the budget — or, as in the game of horseshoes, was close enough. This accomplishment means no new taxes for our industry.

In addition, a measure was passed that gave greater regulatory authority to the Commissioner of Insurance for both homeowners and auto

see **LEGISLATIVE SESSION OVERVIEW**
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Fax: 512.473.3777
www.texcon.org

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314 Highland Mall Blvd., Suite 510
Austin, TX 78752
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Member Mentions

APHCC-Texas

The APHCC-Texas quarterly publication, The Texas Journal, won best publication at the national PHCC Convention in Toronto, and APHCC-Texas won the national PHCC Membership Award for the most new members.

Eddie Holub from Modern Plumbing in Pasadena is the new national PHCC president. The 2003 PHCC-Texas officers are: president, Steve Burch (Modern Plumbing, Pasadena); president-elect, Tim Chapman (Pope Plumbing, Dallas); secretary, Doug Turner (Doug Turner Plumbing, Sugar Land), treasurer, Craig Lewis (R.E.C. Industries, Bryan) and immediate past president, Tony Cox (United Mechanical, Dallas).

ASA-Houston

The American Subcontractors Association-Houston chapter members recently elected three new members to the board of directors: Kevin Brewer, Elite Plumbing Corporation; Mike Holland, Marek Brothers Systems and Barbara Lyons, Baker Concrete. Each will serve a two-year term beginning July 1, 2003. Current board members who were elected to serve another two-year term beginning July 1, 2003 are: David Mouton, Tobin & Rooney, Inc.; Craig Kramer, Astro Fence Company; Eric Hanson, Wm. Rigg Company, and Sandy Farrell, Farrell Roofing & Sheet Metal Company.

Texas Fire Sprinkler Contractors Association

On August 15, 2003 at the TxFSCA general meeting to be held in Dallas, a check for \$30,000.00 will be presented to Children's Medical Center of Dallas. This check represents the money raised at the 14th Annual TxFSCA Charity Golf Classic that benefits Children's Medical Center.

On September 29, 2003, the 2nd Annual "Swing for the Cure" Tournament, which benefits the Susan G. Komen Breast Cancer Foundation, will be held at Gleanlock Farms Golf Club in Houston. This event is co-sponsored by Western States Fire Protection Co and TxFSCA.

On October 17, 2003, the American Fire Sprinkler Association and the Texas Fire Sprinkler Contractors will sponsor a free seminar on the most current edition of the NFPA 13 Standard. The seminar will feature Mr. Phil Brown as presenter. This seminar is open to anyone interested in the fire protection industry but is targeted at authorities having jurisdiction.

Texas Glass Association

The really Big 5 state regional show for the glass and glazing industry, TEXpo 03, will be held at the Adams Mark Hotel in San Antonio, Texas, October 2-4, 2003. In conjunction, there will be a golf tournament on Thursday, October 2 at the Golf Club of Texas. Check out the information on the Texas Glass Association web site: www.texas-glass.org.

With Strong Support From TCA, Legislature Passes Right to Suspend Work and Right to Sue County's Bills

The Texas Legislature passed two significant bills for the construction industry during the closing days of the session. HB 2397 authored by Representative Frank Corte and sponsored by Senator Tommy Williams allows subcontractors and general contractors to suspend work on public projects when they have not been paid in accordance with the prompt pay statute. SB 1017 authored by Senator Jeff Wentworth and sponsored by Representative Joe Nixon restores the right of subcontractors and general contractors to sue a county when it breaches a contract.

HB 2397 provides substantially the same rights on public projects that are currently provided on private projects. When a subcontractor or general contractor has not been paid, an undisputed pay request can be given to the owner that work will be suspended in 10 days, unless payment is made. After the 10 days the general or subcontractor is not required to provide labor or materials and is not responsible for damages for suspending work. The owner may give notice within the 10 days that the reason for nonpayment is a bona fide dispute. This notice must include a list of the specific reasons for nonpayment, and the contractor or subcontractor is to be given an opportunity to cure.

For highway-related contracts entered into with the Texas Department of Transportation for the construction or maintenance of a highway or related facility, the notice period after the prompt pay noncompliance is 20 days instead of 10 days.

SB 1017 nullified a Texas Supreme Court decision from last summer that granted counties the protection of sovereign immunity, which includes protection from being sued for breach of a construction contract. This bill restored that

right. Presentment of the claim would first have to be made to the Commissioner's Court, who must then neglect or refuse to pay the bill within 60 days of presentment.

Damages recoverable are: 1) the balance due and owed under the contract, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration; 2) the amount allowed for change orders or additional work required to carry out the contract; 3) attorney's fees; and 4) interest on the amount owed. However, recovery cannot include consequential or exemplary damages against the county.

This legislation started with little opposition, but once the bill reached

the House, the county organizations mounted a substantial fight to stop it. To pass the legislation, the members and staff of the Texas Construction Association and the Associated General Contractors-Texas Building Branch worked together in down-to-the-wire negotiations and revisions with the various organizations representing the Texas counties.

For the text of the bills, go to the legislation button of the TCA web site: www.texcon.org or contact TCA on 512-473-3773.

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House Bill 4

Major Tort Legislation Passes

This session, many legislators were dedicated to making changes to the civil justice system in Texas. The hard work of Rep. Joe Nixon and Senator Bill Ratliff paid off with the passing of House Bill 4. This bill marks the first major change in tort reform since the 1995 legislation and will bring significant changes to the Texas civil litigation process. For those unfamiliar with the term tort, it is a legal term referring to a wrong committed against another, independent of contract; it is not a criminal act. "Tort Reform" brings about changes in different Texas statutes that pertain to the parties involved in civil disputes. These statutes affect subcontractors and suppliers involved in civil actions regardless of whether they are plaintiffs or defendants.

There are many changes made by the 133-page bill. Some, such as health care, are specific to certain businesses, while others will apply to all businesses. Below is a brief discussion of a few topics with direct relevance to construction. A comprehensive summary of the entire bill and the complete text of the bill can be found at the legislation page of the TCA web site: www.texcon.org.

One important feature of HB 4 is the settlement offer procedure. This provides incentives for parties to make and accept reasonable settlement offers early in lawsuits by shifting litigation-related costs when a party refuses a pre-trial settlement offer that turns out to be as good as or better than what that party ultimately wins. New Texas law will allow a defendant to initiate this cost-shifting mechanism, and once

he or she does, any party may make a written offer of settlement to one or more of the other parties. With the cost-shifting procedure in effect, if a defendant makes an offer that is rejected, and the plaintiff does not obtain judgment for at least 80 percent of the amount, the attorney fees and costs incurred after the rejection must be paid by the plaintiff. On the flip side, if a plaintiff makes an offer that is rejected, and the judgment exceeds 120 percent of the amount, the attorney fees and costs incurred by the plaintiff after rejection must be paid by the defendant. The amount of these fees and costs shifted cannot exceed the sum of non-economic damages, punitive damages, and 50 percent of the economic damages.

HB 4 also changes laws governing proportionate responsibility to assure that Texas juries may assess fault to all parties who contributed to the claimant's harm. This ensures that defendants will only be responsible for the portion of fault attributable to them, because a jury is allowed to consider the conduct of all potentially responsible persons when determining fault for a plaintiff's injury. This fault can be allocated to any responsible person, including a bankrupt criminal, a person beyond the court's jurisdiction, or an employer with workman's compensation immunity. A defendant pays only the assessed percentage of the judgment. **This provision will have significant implications in employee injury actions for employer subcontractors who are indemnified under broad form indemnification clauses.**

Another construction-related provision of HB 4 will require a plaintiff filing suit against an architect or licensed professional engineer to file a Certificate of Merit with its complaint. The Certificate of Merit must be in affidavit form and must set forth at least one negligent act, error or omission claimed to exist. It must also be signed by an expert witness who holds a Texas license in the field and actively practices the same subject area as the defendant.

For non-manufacturing suppliers, the bill gives greater protection than currently exists. A seller that does not manufacture the product will not be liable for harm caused by the product. There are exceptions — if it is proved that the seller helped to design the product, altered the product, installed the product, made wrong factual representations about the product, exercised control over the warnings or instructions about the product, knew of the defect at the time of the sale, or if the manufacturer is insolvent or not subject to the jurisdiction of the court.

The statute of repose of 15 years might help contractors. Recently, manufacturing workers have attempted to bring actions against contractors by claiming they were exposed to asbestos or other dangerous products from construction operations in the manufacturing plants. Some of these actions are for alleged exposures that occurred many years ago. The changes made in HB 4 might limit some of these actions.

VIP Legislators

Many legislators helped the construction industry and subcontractors/suppliers have a successful legislative session. Key legislators working on construction-related legislation passed helpful legislation or amendments, defeated bad legislation or amendments, and put great effort into issues important to subcontractors and suppliers. Key legislators included:

Sen. Jeff Wentworth, San Antonio

Sponsor of the bill that restored the right to sue counties when they breach a construction contract. He also was a co-author of the Senate version of the contingent payment bill.

Rep. Joe Nixon, Houston

Sponsor of the bill restoring the right to sue counties and sponsor of the Omnibus Tort Reform bill.

Rep. Warren Chisum, Pampa

Author of the contingent payment bill and primarily responsible for getting it set as the first bill on the major state calendar near the end of the session. He also passed legislation that funds the Emissions Rebate program, which provides rebates for those buying energy/pollution efficient equipment in nonattainment locales.

Rep. Frank Corte, San Antonio

Sponsor of the bill granting the right to suspend work on public projects when not paid.

Sen. Tommy Williams, Woodlands

Sponsor of successful legislation giving subcontractors the right to suspend work on public projects when they are not paid.

Rep. Burt Solomons, Carrollton

Served on the Business and Industry subcommittee, which had jurisdic-

tion over most of the issues concerning construction. He was instrumental in helping get important legislation to subcontractors/suppliers out of the committee.

Rep. Gary Elkins, Houston

Served on the Business and Industry subcommittee as vice-chair and chair of the subcommittee that passed out a favorable version of the contingent payment bill.

Rep. Trey Martinez-Fischer, San Antonio

served on the Business and Industry committee and served on the subcommittee that passed the contingent payment bill. He was very helpful on the contingent payment bill and other subcontractor legislation.

Sen. Eddie Lucio, Brownsville

Co-author of the contingent payment bill and supporter of all TCA legislation. The senator also worked the Senate floor to defeat amendments unfavorable to subcontractors.

Rep. Tommy Merritt, Longview

Amended the Omnibus Tort Reform bill to include a provision prohibit-



ing broad form indemnification clauses in construction contracts. It was eventually stripped off the bill in the Senate, but the effort raised the profile of the issue and several senators now may be interested in sponsoring a bill next session. Rep. Merritt successfully amended a bill that prohibited indemnification clauses in state contracts last session.

Senator Craig Estes, Wichita Falls

Sponsored a bill relating to the state use of reverse auctions and added an amendment that would prohibit the use of reverse auctions in state contracts for construction services. The bill passed but was vetoed by the governor for other reasons.

Rep. Beverly Woolley, Houston

Served as chair of the Calendars committee. She was responsible for getting important legislation to subcontractors and suppliers set on the House floor calendar. This included setting the contingent payment bill as the first bill on the major state calendar.



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insurance. The measure provided that insurance carriers would have to file their proposed rates for approval by the commissioner.

HB 4 (the Omnibus Tort Reform Bill), a bill having benefits for business and the construction industry, was passed. Even more sweeping than previous reform efforts in 1987 and 1995, some provisions in the bill include: tightening requirements in order to bring a class action, allowance of litigation cost recovery when a party fails to reasonably settle a suit (Offer and Settlement provision), tightening of the comparative negligence statute, and changes in the

products law which would benefit non-manufacturing sellers of products.

Also, a constitutional amendment was passed, which will go before the voters on September 13 (see summary of Proposition 12 in the constitutional amendments section) and has great potential to benefit the construction industry. This proposition ratifies the constitutionality of the limits on non-economic damages in medical malpractice cases and also grants the authority to future Legislatures to put limits on non-economic damages in all other type of lawsuits. This would include construction industry suits involving personal injury.

As this goes to press, Governor Perry has called the Legislature into session for the purpose of congressional redistricting. The governor would like to see new congressional districts drawn with the expectation that the majority of the districts will shift from Democratic to Republican representation. The governor may add extra issues to the called session and may call another session early next year to find a replacement for the so-called "Robin Hood" system of school finance — a major issue not addressed by the Legislature during the regular session that ended June 2.

Contingent Payment Bill Fails Passage

A major legislative agenda item for the Texas Construction Association was the Contingent Payment bill, SB 256/HB 541. This bill prescribed the circumstances under which contingent payment (pay-if-paid) clauses would be enforceable in Texas. The bill ran out of time and luck at the end of the legislative session and failed to pass. The leadership of TCA has made no bones about it — We will be back!

The legislative session began with an agreed compromise bill on contingent payment between the Associated General Contractors-Texas Building Branch and the Texas Construction Association. Both organizations and their members worked hard for passage. However, opposition arose from the Associated General Contractors-Heavy Highway and some general

contractors, which slowed the bill enough to make time a critical factor.

The House version of the bill was set as the first bill on the major state calendar for consideration on the House floor when it and all other bills on the same calendar got caught in the crossfire on congressional redistricting during the second week of May. The bill died that week when the deadline passed for the consideration of House bills.

Despite TCA bowing to the requests of senators to make changes in the bill to make it better for general contractors, strong lobbying by the opposition kept the Senate version bottled up in the Senate committee on business and commerce. Like the preceding session, the bill had a hearing in committee, but no vote was taken. No other bills became available to attach the contingent

payment bill as an amendment that would have sustained a germaneness challenge.

Many subcontractors and general contractors testified or registered in support of the bill's passage. Those testifying or registering against passage included representatives from Austin Industries, AGC of Texas-Highway, CENTEX, Zachry Construction and Texas Good Roads.

Unless it gets addressed in a called session, this issue will be back before the Legislature in 2005. While the compromise bill did not pass, many who originally opposed the bill became supportive and saw the need for passage. This took all session to accomplish but then it was too late in the session to get the bill passed. The TCA Board will meet during the interim to determine what type of bill to prepare for next session.

Health Insurance, Property and Workers' Compensation Insurance Bill Passed

While much of the focus this session involved the regulation of homeowners and auto insurance, the Legislature also passed bills relating to health insurance and group property insurance, and workers' compensation self-insurance.

SB 10 sponsored by Senator Kip Averitt allows small employers to form group health cooperatives with other small and large employers in order to obtain health coverage for their employees.

Similarly HB 897 by Rep. Beverly Woolley clarifies that a "small employer health coalition" is a single employer for insurance purposes. This prevents insurers from canceling policies with small employer health coalitions because they do not consider them to be a single employer. This promotes the development of the coalitions similar to the efforts in SB10.

SB 541 by Senator Tommy Williams allows insurers and health maintenance organizations to offer policies that — in whole or in part — do not provide state mandated health benefits. Full disclosure to the policyholder of which mandated benefits are not offered is required.

In the property insurance arena, HB 1865 by Rep. Dennis Bonnen, authorizes insurers to write commercial group property insurance for a group of businesses as long as the businesses have identifiable underwriting characteristics or are part of an association whose members are engaged in similar undertakings.

HB2095 by Rep. Robby Cook allows employers who work in the same type of business and belong to a trade association in Texas to join together to self-insure for workers' compensation. This legislation is based on the model act for group self-insurance adopted by the National Association of Insurance Commissioners and draws from provisions in the Texas Insurance Code

applicable to commercial insurance companies and the Texas Workers' Compensation Act applicable to individually certified self-insured employers. The Texas Construction Association is actively exploring the establishment of a self-insured fund

as prescribed by this bill as a benefit for its members. Interested companies should contact the TCA office on 512-473-3773.

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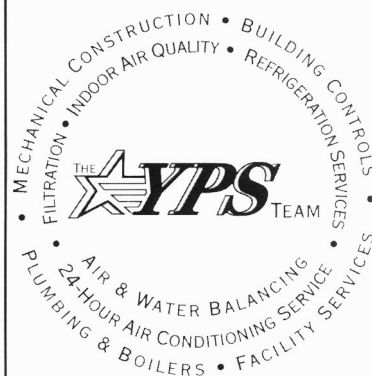
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