

CONTINGENT PAYMENT BILL PASSES

After many years of effort on the part of subcontractors, suppliers and the staff of the Texas Construction Association, **SB 324**, the Contingent Payment bill passed both the Senate and the House and will become effective on September 1, 2007. Senator Bob Deuell of Greenville sponsored the bill in the Senate and Representative Warren Chisum of Pampa sponsored the bill in the House.

Getting an early start, SB 324 was the first bill heard in the Senate Business and Commerce Committee this Session and was the first bill passed by the Committee. The Committee vote was unanimous in favor of the bill and the bill was passed by the Senate on the first Local and Uncontested Calendar in mid-March. As is usual, Senate bills in the House are not generally considered on the House Floor until May as the House gives preference to House bills.

An unfriendly amendment was placed on the bill in the House Committee but was withdrawn in a deft parliamentary maneuver executed by Rep. Burt Solomons when the bill was considered on the House Floor. Except for one small technical change in the House, the measure that passed was the same as the originally filed bill. This bill represented the agreement forged by representatives of the Texas Construction Association and of the Texas Building Branch of the Associated General Contractors.

For background on the bill's development and a discussion of the principal aspects of the legislation, see the article on this page by TCA's Legal

Counsel, Richard Thomas.

Legislators who deserve special thanks for their support of this legislation include the Sponsors, Senator Bob Deuell and Rep. Warren Chisum; Senator Troy Fraser, the Chair of the Senate Business and Commerce Committee who gave a preferential setting; Rep. Burt Solomons who engineered the deletion of a bad amendment; Rep. Gary Elkins, Rep. Dwayne Bohac, and Rep. Armando Martinez, who served as Floor Leaders when the bill was considered on the House Floor; and the Chair of the House Business and Industry Committee who helped get the bill out of the Committee, Rep. Helen Giddings.

The staff and members of the Texas Building Branch of the Associated General Contractors also worked in support of the passage of the bill. Their efforts were important in getting the bill passed and are greatly appreciated.

The biggest thanks goes to the members of the Texas Construction Association who wrote letters, made phone calls, made contributions to the Political Action Committee, traveled to Austin, talked to Legislators and Staff, and testified in support of passage of the legislation. Also a special thanks to those TCA members who spent almost 3 years negotiating an agreement with the Texas Building Branch of the Associated General Contractors.

The bill will apply to construction contracts entered into on or after September 1, 2007. So watch what you sign before September 1!

THE CONTINGENT PAYMENT BILL

*By Richard Gary Thomas
Thomas, Feldman & Wilshusen, LLP*

Now that the Contingent Payment Bill passed, what does it mean? To answer that question one must understand what the Bill is, and what it is not.¹

Overview. First, the Bill is a compromise between numerous construction associations and a few general contracting companies. Before the Texas Construction Association was formed, the American

¹ This article is intended to be a broad general explanation to construction industry personnel of the concepts in the contingent Payment Bill. No attempt has been made to discuss all aspects and corresponding legal issues presented by the Bill. Due to its general nature, this article should not be used as legal advice or a legal opinion in specific situations. This discussion is too general to be applied in any specific situation. In that case, one should seek the advice of an attorney.

continued on page 4

IN THIS ISSUE

Member Mentions.....	2
The Best Show in Town.....	3
Governor's Pen at Work.....	4
Bills Go Down to the Wire.....	4
Amendments	5
Legislation Affecting Construction.....	6
TCA Political Action Committee— Its Importance to You.....	9
VIP Legislatures.....	10

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Mentions



Jo Wagner, CTO Inc, Harlingen, Texas is serving as National PHCC President for 2006-2007. She is only the 2nd female president in the history of PHCC, an association that began in 1883. Jo is also very active in legislation, testifying in support of the TCA Indemnification bill this session, and in support of the PHCC Indemnification bill in Washington, D.C. Jo has also strongly promoted careers in the trades, and especially encourages companies to hire single Moms.



Michael Maraldo, a member of the Southwest Terrazzo Association was elected President of the National Terrazzo Mosaic Association (NTMA) at the annual meeting of the association this past April. Maraldo, owner of Southern Tile & Terrazzo Company, Houston, and a third generation family owner of the company has been active in local, state, regional, and national association leadership positions for the past 19 years. The NTMA is a national association dedicated to professional growth and promotion activities for commercial specialty subcontractors associated with the terrazzo flooring industry.



Annual Sporting Clay Shoot will be hosted by ASA San Antonio on Thursday, August 30th at the San Antonio Gun Club. For more information on the event or sponsor information simply contact Heidi at the San Antonio Chapter at 210-349-2105.

Craig Kramer of Astro Fence Company, Houston, Texas is the recipient of the American Subcontractors Association's 2005-06 Chapter President of the Year Award for demonstrating superior leadership skills and motivating his chapter to achieve its goals.

"Under Craig's leadership, this chapter scored the highest of any chapter on its annual self-evaluation report and had membership growth of 15 percent," said 2006-07 ASA Vice President David Bradbury. "Craig articulated clear goals as he took office — increase the number of members, get the members involved, and put the chapter on the path to being the largest and strongest chapter of ASA...If achieved, these goals would put the chapter in a position to offer more to the members and to better serve subcontractors and the construction industry as a whole. And under Craig's leadership, the chapter achieved these goals — establishing an active Membership Committee to recruit new members, leading the directors in making regular calls to existing members to shore up membership retention, and, of course, assuring that the association has the benefits and services in place to meet the expectation of these members."



THE BEST SHOW IN TOWN

Sam Houston and Mirabeau B. Lamar would have been proud!

Sam Houston, the hero of Texas' Independence and the winner at San Jacinto, was the Republic of Texas' first President from 1836 until 1838. In 1838, Mirabeau B. Lamar was elected the Second President of the Republic of Texas. People at that time did not generally invite them to the same party. They simply did not play well together. One of the principal actions of President Lamar was to order that the Capitol of the Republic be moved from Houston to Austin, at that time an outpost still located in Comanche country. President Lamar did this because he could not bear having the Capitol of the Republic located in a city named after Sam Houston. Subsequently Sam Houston was elected President again in the early 1840's. One of his earliest acts was to send the Texas Rangers to Austin to reclaim the State Archives and move the documents back to Houston as one of the first steps in moving the Capitol back to Houston. The Rangers' wagons were stopped by a woman named Angelina Eberly who was prepared to fire a cannon on Congress Avenue, thus the Capitol remained in Austin.

The 80th Session of the Legislature had some similarities. At the very least they were simply not playing well together. The Session began with a contested Speaker's race. Rep. Tom Craddick narrowly won re-election to a third term as Speaker. Although the key vote on the Speaker's race was 80 to 69 supporting the Speaker, the Speaker actually prevailed when one House Member decided not to switch sides to the challenger and this caused four other members not to switch sides as well. If all five had switched, the vote would have been 75 to 74 in favor of the challenger.

The House seemed to operate well thereafter, perhaps moving a little slowly, until the last few weeks

of the Session. Then all Hades seemed to break loose. Some members felt that they were not getting a fair hearing on their legislation and that the rulings of the Speaker tended to favor the Speaker's supporters. A ruling of the Speaker was challenged and subsequently overturned by the body of the House. There were discussions concerning a motion to "remove the Speaker from the Chair", i.e., remove the Speaker and appoint someone else as Speaker. The only time a Speaker has been removed occurred in 1871.

For the last two weeks of the Session, there were rumors that this motion could be made at anytime. On the last week-end, the Speaker was asked concerning whether he would recognize a Member making such a motion. The ruling of the Speaker was that no Member would be recognized on such a motion. No one was recognized on such a motion before the House adjourned for good. The Speaker avoided the coup-at least for the present time.

Near the beginning of the Session and without conferring with the Legislature, the Governor by Executive Order required all girls when they became 6th Graders to be vaccinated to prevent the cancer causing HPV virus. He also proposed selling the lottery, continued to promote the building of the Trans Texas Corridor and promoted the increased building of tollroads. Regardless of the merits for or against the required vaccinations, the Legislature overturned the Governor's Executive Order requiring mandatory vaccinations. The Lottery remains state property as apparently there were no buyers and the Legislature was lukewarm concerning the proposal. Legislation was passed creating a quasi-moratorium on new toll roads.

While the Senate generally con-

siders itself the more deliberative and civilized of the two Chambers (caused in part perhaps by the fact that you only have 31 Senators while the House has 150 Members), the Senate was shut down for two days late in the Session while the Senators and the Lieutenant Governor met in closed Session to resolve differences after the Senator serving as the Dean of the Senate and the Lt. Governor engaged in a vigorous shouting match concerning bringing up a Voter ID bill for consideration. The bill failed to be considered when one Senator arose off his sick bed and appeared in the Senate to cast the deciding vote to prevent consideration (shades of the Alamo and Jim Bowie). Another Senator opposed to the legislation, who had just had a liver transplant, maintained a vigil at the Capitol to prevent the same bill from being considered despite the orders of his doctor to not attend the Session.

While all this was going on, the Legislature did do a lot of work. The hours for the Legislators and staff were long. The number of bills filed increased over the previous Legislative Session. In the House, 4,140 bills were filed, up 15 percent from 2 years ago. Senate filings were 2,058 bills, up 9 percent from two years ago. The numbers of bills that finally passed were similar to the previous Legislative Session. The numbers also demonstrated that it is more difficult to pass a bill than to kill one—77% of the House Bills filed failed to pass and 75% of the Senate bills failed to pass. Constitutional amendments fared worse: 91% of the House proposed constitutional amendments and 90% of the Senate proposed constitutional amendments failed.

All in all, it's probably a good thing that the constitution only allows the Legislature to meet in Regular Session every other year!

GOVERNOR'S VETO PEN AT WORK

Governor Vetoes for Third Time Ban on Use of Reverse Auctions

While Governor Perry did sign into law the contingent payment bill, he did veto HB 447 which included a section that banned the use of reverse auctions in construction contracts involving state and local public works projects. If nothing else, the Governor was consistent as this was the third consecutive time he vetoed a bill containing that section.

The reverse auction provision was a part of a comprehensive bill which consolidated the various alternative project delivery processes for most governmental entities into a single chapter of the Government Code. These various processes included construction manager-agent, competitive sealed proposals for construction services, construction manager-at-risk, design build and job ordering contracting. HB 447 set standards and made the procedures more uniform.

Governor Perry vetoed in excess of 50 bills passed by the Legislature in the 2007 legislative session. This was the second largest numbers of bills vetoed by a Texas Governor. The record is also held by Governor Perry as he vetoed 82 pieces of legislation during his first year in office in 2001.

One of the most prominent bills vetoed by the Governor involved HB 2006,

a measure reforming the laws regarding the ability to state and local governments to condemn private property through the use of eminent domain. While this bill received considerable support in the legislature, Governor Perry vetoed the bill on the primary basis it would potentially force the governmental entity over-pay to acquire property through eminent domain.

In addition to the power of the Governor to veto entire pieces of legislation, the Texas Governor has line item veto power over items listed in the newly passed \$51.9 billion state budget. Governor Perry used the line item veto to pare \$646 million from the budget for the next two fiscal years. Nearly half of the cuts came from striking a \$300 million line item relating to repaying the Federal Government moneys allegedly owed for Medicaid services. The higher education budgets were also principal targets of cuts. Community college appropriations designated for group health care insurance payments were cut \$154 million.

While the Texas Constitution limits the authority of the Governor in many areas, the power of the veto is alive and well in Texas and the current Governor is not bashful about exercising that power.

Subcontractors Association of Texas backed legislation to outright ban contingent pay clauses in construction contracts. Realizing subcontractors would be more effective with a broader coalition, ASA invited other subcontractor trade associations to meet and explore forming an organization of essentially a consortium of subcontractor organizations to promote the legislative interests of subcontractors. The outgrowth of that effort was the formation of TCA in 1998.

TCA then carried the torch of banning contingent payment clauses and began to achieve more progress than anyone outside the subcontracting industry expected. In 2002, AGC Texas Building Branch ("AGC") approached TCA about trying to find a way to arrive at a mutual agreement on the general issue of contingent pay. It was decided to have a series of meetings between representatives of TCA and AGC. The two groups hired a retired construction lawyer from North Carolina to facilitate or "mediate" the issue in hopes of arriving at an agreement. After six to eight all day negotiating sessions, a compromise bill was developed before the end of 2002. During the 2003 Texas Legislative Session, other construction associations sought, and were granted, input into the Bill. Still, several influential general contractors were dissatisfied and the Bill did not pass.

After more negotiating sessions in 2004, changes were made to arrive at a more refined compromise Bill. The Bill, nevertheless, did not pass in 2005 Legislative Session. In 2007, victory was achieved and the Bill is now law. It is effective for subcontracts and purchase orders entered into after September 1, 2007.

The Bill, therefore, reflects compromise. Neither general contractors or subcontractors and suppliers got everything they wanted. The Bill is quite complex because it had to meet the divergent interests of numerous people and groups involved in the compromise. It does not

BILLS GO DOWN TO WIRE BEFORE TIME RUNS OUT

The Indemnity and Consolidated Insurance Program bills went down to the wire before finally failing to pass in the recent State Legislative Session.

The bill banning the use of **broad form indemnity** clauses, **SB 324**, passed the Senate in mid-April by a substantial majority. However, opposition led by the petro-chemical industry and the Texas Civil Justice League were able to keep the legislation bottled up in the House Committee on Civil Practices. Efforts to reach a compromise agreement in the final days of the Session failed.

The sponsors of the legislation were Senator Robert Duncan and Representative Craig Eiland. They took active roles and did excellent jobs in pushing the legislation while taking on some extremely powerful opponents. The subcontractor and supplier community owes them a debt of gratitude for their efforts!

During the interim between Legislative Sessions, TCA will be meeting with the

opponents of the legislation to negotiate the indemnity issues. This past Session was the first time that a stand-alone bill banning broad form indemnity passed one Chamber and this greatly improves our standing on the issue. Our opposition now understands that this issue is not going away.

The **Consolidated Insurance Program** bills, **SB 354/HB 2014**, died in the final days despite reaching an agreement on the principal issues covered by the bills. The principal opponents of the legislation, the Texas Building Branch-AGC, the Texas Civil Justice League (representing primarily the petro-chemical industry) and a couple of public transportation authorities, all finally agreed to support the legislation. However, by the time this occurred, there was not enough time to pass the legislation through both chambers of the Legislature.

The final agreed version will likely be used as the blueprint for anticipated legislation in the next Session.

continued on page 7

Proposed Constitutional Amendments for November 6th Election Day

The Texas Constitution provides that the legislature, by a two-thirds vote of all members of each house, may propose amendments revising the constitution and that proposed amendments must then be submitted for approval to the qualified voters of the state. A proposed amendment becomes a part of the constitution if a majority of the votes cast in an election on the proposition are cast in its favor.

The following table lists the constitutional amendments being proposed by the Texas Legislature for the November 6th election. You may view the complete amendment at www.capitol.state.tx.us. At the home page, insert the bill number in the Search Legislation box.

Bill No.	Summary
<u>HJR 6</u>	Authorizing the denial of bail to a person who violates certain court orders or conditions of release in a felony or family violence case
<u>HJR 19</u>	Requiring a record vote be taken by a house of the legislature on final passage of any bill, other than certain local bills, of a resolution proposing or ratifying a constitutional amendment, or of any other non-ceremonial resolution, and to provide for public access on the Internet to those record votes.
<u>SJR 20</u>	Providing for the issuance of additional general obligation bonds by the Texas Water Development Board in an amount not to exceed \$250 million to provide assistance to economically distressed areas.
<u>SJR 29</u>	Authorizing the legislature to exempt all or part of the residence homesteads of certain totally disabled veterans from ad valorem taxation and authorizing a change in the manner of determining the amount of the existing exemption from ad valorem taxation to which a disabled veteran is entitled.
<u>HJR 30</u>	Allowing governmental entities to sell property acquired through eminent domain back to the previous owners at the price the entities paid to acquire the property.
<u>HJR 36</u>	Permitting a justice or judge who reaches the mandatory retirement age while in office to serve the remainder of the justice's or judge's current term.
<u>HJR 40</u>	Authorizing the legislature to provide that the maximum appraised value of a residence homestead for ad valorem taxation is limited to the lesser of the most recent market value of the residence homestead as determined by the appraisal entity or 110 percent, or a greater percentage, of the appraised value of the residence homestead for the preceding tax year.
<u>SJR 44</u>	Authorizing the legislature to permit the voters of a municipality having a population of less than 10,000 to authorize the governing body of the municipality to enter into an agreement with an owner of real property in or adjacent to an area in the municipality that has been approved for funding under certain programs administered by the Texas Department of Agriculture under which the parties agree that all ad valorem taxes imposed on the owner's property may not be increased for the first five tax years after the tax year in which the agreement is entered into.
<u>HJR 54</u>	Authorizing the legislature to exempt from ad valorem taxation one motor vehicle owned by an individual and used in the course of the owner's occupation or profession and also for personal activities of the owner.
<u>SJR 57</u>	Providing for the issuance of \$500 million in general obligation bonds to finance educational loans to students and authorizing bond enhancement agreements with respect to general obligation bonds issued for that purpose.
<u>SJR 64</u>	Providing for the issuance of general obligation bonds by the Texas Transportation Commission in an amount not to exceed \$5 billion to provide funding for highway improvement projects.
<u>SJR 65</u>	Authorizing the issuance of up to \$1 billion in bonds payable from the general revenues of the state for maintenance, improvement, repair, and construction projects and for the purchase of needed equipment.
<u>HJR 69</u>	Abolishing the constitutional authority for the office of inspector of hides and animals.
<u>HJR 72</u>	Clarifying certain provisions relating to the making of a home equity loan and use of home equity loan proceeds.
<u>HJR 90</u>	Requiring the creation of the Cancer Prevention and Research Institute of Texas and authorizing the issuance of up to \$3 billion in bonds payable from the general revenues of the state for research in Texas to find the causes of and cures for cancer.
<u>HJR 103</u>	Providing the continuation of the constitutional appropriation for facilities and other capital items at Angelo State University on a change in the governance of the university.

Select Legislation Affecting the Construction Industry

Bills that Passed:

SB 324. Contingent Payment. This measure limits the use of contingent payment clauses in construction contracts. The bill passed substantially as filed and reflects the agreement between the Texas Construction Association and the Texas Building Branch of the AGC.

HB 1268. Attorney Fees in Dispute with Public Entity. Provides that a construction contract involving a public entity containing a clause providing for recovery of attorney fees by the public entity if they are the prevailing party is not effective unless the contract also provides that the other parties to the contract may also recover attorney fees if they prevail.

HB 3928. Business Franchise Tax Clean-up. This measure makes technical corrections and other minor changes to the new business franchise tax. The only major change in the legislation involved allowing small businesses with more than \$300,000 up to \$900,000 to pay on a graduated scale the franchise tax. Businesses with revenues of \$300,000 or less are exempt from the tax.

HB 3147. Condominium Construction Defect Claims. The measure brings condominium construction defect claims under the purview of the Residential Construction Liability Act. This requires notice of any claims or defects prior to the filing of a lawsuit involving such claims. Under the change, the contractor would first be given an opportunity to resolve the claim before a suit is filed.

SB 9. "Safe School" Bill. The measure is amended to provide that construction employees responding to emergency service calls will not be subject to the bill's criminal background check and fingerprinting requirements. Legislative intent is also read into the record that these requirements are not extended to construction personnel working in a secured area that is not in direct contact with students.

HB 1029. Exemption from Electrical Licensing Requirements for Certain Work Performed by a Plumber. This bill exempts plumbers from having to hold an electrician's license when performing work involving a plumbing fixture or appliance including a water heater, food disposer, garbage disposal, water softener, dishwashing machine and clothes washing machine.

HB 463. Registration of Air Conditioning and Refrigeration Technicians. This measure requires a technician assisting a licensed air conditioning and refrigeration contractor in performing their work must be registered with the Texas Department of Licensing and Regulation.

HB 1038. Texas Residential Construction Commission. This measure makes several changes in the TRCC Act. Most involve giving greater rights to the consumer and making the homebuilder more responsible under the Act. The Commission is granted greater authority to fine builders who are not registered as the Act requires.

HB 2075. Retainage Held by the Department of Transportation for Highway Projects. The Texas Department of Transportation may retain up to 5% of the amount due on a project and may retain the amount until the project is completed or may release a portion or all at any time.

SB 749. Multidistrict Litigation Claims involving Asbestos and Silicosis Claims. Major legislation involving asbestos and silicosis claims was passed in 2005 and part of the litigation involved the establishment of multidistrict litigation pretrial courts to help resolve and review pre-trial issues and expedite the review and handling of these claims. This measure makes changes to clear up ambiguities of the process in order to enhance the review and disposition of the cases.

SB 1729. Relating to Elevators, Escalators, People Movers and other Related Equipment. This measure updated which Codes are applicable to the maintenance and installation of elevators, escalators, people movers, and similar equipment.

HB 1766. Theft of Wire and Cable. This measure enhances the punishment and the classification to a State Jail Felony for the theft of wire or cable that is at least 50% aluminum, bronze or copper. Punishment for such felony is not less than 180 days in jail nor more than 2 years and a fine not to exceed \$10,000.

SB 704. Assistance to Small Contractors for Certain State Construction Projects. This measure requires the Workforce Commission and the Department of Insurance to provide support and assistance for small contractors for their safety programs and for obtaining bonds.

Bills Passing but Vetoed.

HB 447. Consolidated of the Public Works Procurement Statutes Into Single Statute. Third time was not a charm. Governor Perry vetoed this bill for the third consecutive Session (the other two bills were similar to the current bill). The measure would have placed the various procurement statutes for public projects in one place and would have established standards and uniformity for procurement. In addition, the bill contained a provision banning the use of reverse auctions on public construction projects. This was also the third time for the ban to be vetoed.

Bills Failing to Pass.

SB 346. Bill Banning Broad Form Indemnification and Additional Insureds Clauses in Construction Contracts. This measure passed the Senate but stalled in the House Civil Practices Committee. This was the first time that a stand-alone bill banning the use of broad form indemnification clauses and additional insured clauses in construction contracts passed either Chamber of the Legislature. The challenge now is to pass both Chambers.

SB 354. Consolidated Insurance Program. This measure passed both Committees in the Senate and in the House. Despite having reached an agreement with the principal stakeholders in the legislation at that time, the bills died awaiting consideration on the Senate Floor because of lack of time left in the Session. This agreement provided a basis for the filing of this bill when the Legislature returns in 2009.

HB 497. Dispute Resolution Boards for Construction Projects. The TCA opposed this legislation which would have established Dispute Resolution Boards to resolve disputes on construction projects. While developing a process to resolve disputes is important, under this bill subcontractors and suppliers would have had little if any involvement in the process. Subcontractors and suppliers could not serve on the Board, had no input into the selection of the Board, may not have had any involvement in any of the dispute proceedings and would have been bound by decisions made by the Board.

HB 1413. Licensure of Fire Protection Sprinkler Technicians. This bill would have licensed fire sprinkler technicians. The Texas Fire Sprinkler Contractors Association was opposed to the legislation and worked diligently against the measure without success.

HB 1281. Licensure and Regulation of certain Journeyman and Apprentice Sheet Metal Workers. This measure which would have licensed sheet metal workers failed to pass when a point of order was called on the bill as it was considered on the House Floor.

SB 628. Expanding the Texas Residential Construction Commission Act to include Condominium Apartments. This measure died in the Senate Committee.

SB 650. Lien Reform Bill. This bill would have made important changes in our lien laws but failed to pass out of the Senate Committee.

Immigration Reform Bills. None of the bills dealing with immigration reform passed during this Session. Primarily, this was because the remedy is essentially a federal remedy and would require action by the Federal Congress. Also some of the measures had serious constitutional and legal questions. Most of the bills failed to even be considered in Committee.

Business Tax Reform. The only passing bills that involved the new business franchise tax were technical and corrective in nature. None of the bills filed that would have lowered the rate or provided other relief were seriously considered. The Legislature is waiting to see what the current franchise tax raises in terms of revenue. This measure will help to determine what changes could be made in the next Legislative Session.

Others. There were several bills involving such issues as minimum wage, tax credits for the providing of health care, preferences for public projects of those providing health care and small employers health insurance. None of these bills passed.

ban contingent payment clauses altogether. It is not the answer to all subcontractors' problems.

In my opinion, however, subcontractors and suppliers are much better off than they were before. There are now instances when contingent payment clauses are simply not enforceable. No longer can general contractors take comfort that the contingent payment clause will protect them all of the time. The Bill requires the general contractors to be much more proactive to receive benefits of the clause. In short, in many situations subcontractors can now win despite a contingent payment clause. That was essentially impossible until now.

When are contingent payment clauses unenforceable? The two most common reasons why owners do not pay general contractors are when (1) work is either defective or does not comply with the contract documents, and (2) the owner is insolvent or bankrupt. Who should bear the risk in these instances was hotly debated during the negotiation sessions. The Bill addresses both situations.

A. Defective or Noncompliant Work.

The Bill states that when the owner's nonpayment is the result of the general contractor failing to meet its contractual obligations, the contingent payment clause is unenforceable. This is the case unless the subcontractor or supplier seeking payment breached its contractual obligations, and that breach is one of the reasons why the owner is refusing to pay.

Accordingly, defective work caused by the general contractor, or another subcontractor, makes the contingent payment clause unenforceable to the subcontractor whose quality of work is not in dispute. In other words, the clause does not protect the general contractor. The general contractor must pay even though it has not been paid.

It simply makes no sense to punish a subcontractor or supplier that has properly performed its contract, and the Bill does not allow that to happen. Previously, the law was unclear and unsettled on this point, at best. At worst, the law

provided absolute protection to the general contractor. Now, however, the law is clear: When deficient work quality is the reason for the owner's nonpayment, the clause is no protection for a general contractor from a *properly* performing subcontractor or supplier.

In some cases, proving why the owner is refusing to pay the general contractor may be difficult. Nevertheless, subcontractors and suppliers now clearly have the right to do so, meaning they now have a chance to win. In my view, that is a great improvement. Hopefully, the subcontractors' and suppliers' improved positions will result in more voluntary payments, or at least, more settlements.

B. Owner's Financial Inability To Pay.

Who should run the risk of the owner's insolvency was the subject of many lengthy and heated discussions during negotiations. The general contractors simply would not agree to a Bill placing that risk on them. They saw it as an event that would threaten their own financial viability.

The compromise adopted by the Bill is that the enforceability of the clause is subject to an "unconscionability" test. A contingent payment clause is unenforceable if the judge, jury, or arbitrators find that it would be "unconscionable" to enforce it. That is a standard under which most subcontractors and suppliers should be pleased to be judged. It is believed that most fact finders would have sympathy upon a "poor old unpaid subcontractor" who properly performed its work. Subcontractors would not win every case, but at least they have a "fairness" argument that simply did not exist before this Bill.

Recognizing their vulnerability, the general contractors sought a "safe haven" from being judged by the standard of "unconscionability." Accordingly, the Bill provides that the clause is not unconscionable if:

1. Before the subcontract or purchase order becomes enforceable (by signing or otherwise), the general contractor gives the subcontractor or supplier, in writing, certain itemized and detailed financial information about the owner's ability to pay

- for the construction project; and
2. The general contractor either (a) makes reasonable efforts to collect the amount owed to the subcontractor or supplier, or (b) offers to assign to the subcontractor or supplier the general contractor's right to sue the owner for collection of the subcontractor's unpaid balance.

The Bill further provides that if the owner does not provide the financial information detailed in the Bill, the general contractor (and all subs and suppliers) are relieved from their obligations to start or continue performance of their contracts.

It is important to note that the subcontractor does not need to request the financial information. But the general contractor must timely provide it, at its own initiative, in order to avoid being judged by the "unconscionability" test.

In addition to providing the financial information to avoid "unconscionability," one of the things the general contractor must also do is make reasonable efforts to collect the subcontractor's or supplier's unpaid balance. What is reasonable is undefined in the Bill. Presumably, all circumstances will be considered. For example, if the owner is unable to pay, the general contractor could argue it would be unreasonable to sue the owner. On the other hand, the general contractor may not win that argument. Again, whether the general contractor's efforts were reasonable will be decided by the judge, jury, or arbitrators. Once again, this gives the subcontractors and suppliers a chance to win. Before this Bill, they had virtually no chance to win, but now they do. Hopefully, this will lead to more voluntary payments, or at least, result in settlements. Before this Bill, neither happened.

In lieu of making reasonable efforts to settle, the general contractor may choose to assign to the subcontractor the right to sue the owner for the subcontractor's unpaid balance. This assigned right to sue must not be subject to any defenses created by the general contractor. Otherwise, the general contractor will be subject to the "unconscionability" standard.

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An assignment does not automatically get the subcontractor paid. He must still sue the owner for it. But at least it puts the subcontractor in control of the collection process. The assignment means the subcontractor in control of its own destiny.

More situations when the clause is unenforceable.

C. The Clause Is Unenforceable When The Owner And General Contractor Are In Actuality One In The Same.

The contingent payment clause is not enforceable when the owner can effectively control the general contractor, or vice versa, through common directors, officers, owners, or otherwise. It is only fair that if the general contractor can control whether it gets paid by the owner, the contingent payment clause should be ineffective. That is what the Bill provides. Before the Bill, the subcontractor's right to collect in face of a contingent payment clause in this situation was, at best, unclear. At worst, the contingent payment clause totally protected the general contractor. Now, it is does not.

D. Stopping The Bleeding When The Owner Is Slow Pay Or Refuses To Pay During The Course of Construction.

The provisions of the Bill discussed above are more likely to aid in collecting final payments and perhaps later unpaid progress pay requests or invoices after the work is complete. Those provisions may not be much help when nonpayment occurs while the project is in the middle of construction.

The subcontractor is often faced with nonpayment of progress billings where the contract has a contingent payment clause coupled with a contract clause forcing the subcontractor or supplier to continue performance when a dispute occurs. What is the subcontractor or supplier to do? Is there a way they can stop the bleeding? Do they have to continue to keep providing labor and materials when the outlook of payment is questionable? Of course, the private and state public prompt pay acts give them the right to suspend performance. But that is

a rather drastic option that, in some circumstances, comes with steep financial risks. The Bill provides yet another "arrow in the quiver" of subcontractors and suppliers.

Notice Objecting To Future Enforceability of the Clause.

When the subcontractor or supplier is unpaid 46 days after it submitted an invoice or pay request, the Bill allows them to send a notice to the general contractor objecting to further enforceability of the contingent payment clause for future labor or materials. The notice does not become effective until the later of: (a) ten days after the general contractor receives the notice, or (b) 8 days after interest begins to accrue against the owner on privately or federally owned projects under their respective prompt pay acts, or (c) 11 days after interest begins to accrue against the owner on state public projects.

For example, on a privately owned project, interest begins to accrue against the owner on the 36th day after the general contractor submits its pay request. The contingent payment clause becomes unenforceable for future work beginning on the 44th day after the owner receives the general contractor's pay request, or 11 days after the general contractor receives the subcontractor's notice, whichever is later.

The notice, however, is ineffective if the owner has a good faith dispute over the amount owed to the general contractor that involves the notifying subcontractor's or supplier's work or materials. The general contractor must notify the subcontractor or supplier giving the notice of the owner's good faith dispute five days before the notice becomes effective, or five days after the general contractor receives the notice, whichever is later.

Admittedly, this entire notice process is complex and hard to understand. The Bill provides a lot of ways to negate the subcontractor's or supplier's notice. It also takes a long time for the notice to become effective. For the subcontractor to know the precise date it becomes effective, it must know the date the owner received the general contractor's pay request. Nevertheless, the date on which the subcontractor or supplier can start the process is easily determined, 46 days after their invoice was submitted to the gen-

eral contractor. If the general contractor wants to prevent the notice from becoming effective, it is the general contractor that must timely inform the subcontractor of such fact. Basically, the subcontractor can send the notice and simply wait to see what happens.

Upon receiving the notice, the general contractor is faced with a hard decision. Does he trust the owner to pay its bills and let the protection of the contingent payment clause disappear? If he does that, the general contractor bears the risk of the owner's nonpayment, or does the general contractor press hard for the owner's payment? If it is not made before the contingent payment clause becomes ineffective, should the decision be to suspend performance on all work as authorized by the prompt pay act? The simple sending of the notice of objection by the subcontractor can force the general contractor to make uncomfortable decisions. Hopefully, the ultimate outcome will be quicker voluntary payment from the owner resulting in a more free flow of payments to everybody else.

MISCELLANEOUS

A. Contingent Pay Clause Does Not Invalidate A Lien. Before the Bill, there was a debate among construction attorneys whether a contingent payment clause meant that subcontractors and suppliers could not assert a mechanics and materialmen's lien. Without going into the legal theories behind these issues, suffice it to say that the Bill states that a contingent pay clause cannot be used to invalidate the enforceability or perfection of a mechanic's lien.

B. The Application of the Bill Is Not Confined To General Contractors. The Bill applies not only to first tier subcontracts and purchase orders of the general contractor. It also applies to sub-subcontracts between first tier subcontractors and suppliers and their second tier sub-subcontractors and suppliers. Contingent pay clauses between subcontractors and their lower tier subs and suppliers are subject to the same rules.

C. Exclusions From The Bill. The Bill does not apply to all construction related contracts. Some of the contracts excluded from the Bill are contracts solely

continued on page 11

TCA POLITICAL ACTION COMMITTEE---ITS IMPORTANCE TO YOU

"Kind words and a gun will get you much farther along than kind words alone."

Attributed to Al Capone

To paraphrase Mr. Capone, kind words and a campaign contribution also undoubtedly garner greater attention from your elected representatives than kind words alone. The election process has become an expensive proposition and candidates for office cannot be successful without campaign contributions from individuals and political action committees. If an individual or organization is going to be involved in the legislative process, they have to be involved in the election process.

A Political Action Committee (PAC) is the name given to a group organized to combine the contributions of many individuals and make contributions to elect or defeat candidates for public office. The Texas Construction Association PAC is organized primarily to make contributions to individuals running for the Texas Legislature. Contributions are also often made for Texas statewide races such as those for Governor, Lt. Governor and Comptroller.

While the TCA Political Action Committee is small compared with many other PACs, including many PACs of groups and individuals who have interests that are harmful or detrimental to subcontractors and suppliers, the ability to at least make some contributions to sympathetic and influential legislators allows subs and suppliers to have influence on affairs that affect them.

Why do subcontractors and suppliers need a PAC? The Texas Legislature is involved in your business. Their decisions affect the way you do your business every day. They pass or defeat laws

involving your taxes, your tort liability, your contracts, your insurance protection, the roads you travel, the education of your workforce and a myriad of other issues. In order to have a say in these issues, you have to be involved and your Association must have the ability to make contributions to candidates who are sympathetic to your issues. If only your opponents have a PAC, you can rest assured that that they are not advancing your interests.

What does the PAC do? The Texas Construction Association PAC makes contributions primarily to candidates for the Texas Senate and House and to some statewide offices. The TCA staff provides information about the candidates, their positions and information on local subcontractor/supplier support to the TCA PAC Board which is composed of subcontractors and suppliers. The Board makes the decision as to which candidates to support or oppose. Factors considered include the candidates position on construction issues, support by local subcontractors and suppliers, and the "winnability" of the candidate.

Why should I contribute to the TCA PAC when I already make contributions to candidates? The TCA PAC is able to pool the resources of numerous subcontractors to have a greater impact than a single individual. Individual contributions are important and TCA members are encouraged to continue making individual contributions, but the combined dollars of the PAC has a greater impact on more races.

If I contribute to the TCA PAC, do I have a say

as to where the dollars go? All contributors to the PAC can let the PAC Board know which candidates the contributor supports or opposes. Input from members is one of the criteria that is used to make decisions to support or oppose. Better yet, become involved with the PAC. Volunteer to be on the PAC Board. Also as the TCA and its PAC grows, the TCA hopes to establish local PAC Boards to assist in the evaluation of local candidates.

Are there limits on how much I can contribute? There are no limits to how much an individual can contribute to the PAC.

The only limitation is that corporate funds cannot be used as contributions to candidates for the Legislature and statewide offices in Texas. The PAC contributions to the candidates have to be non-corporate dollars. Thus the funds contributed to the PAC must be non-corporate funds.

What is the goal of the TCA PAC for 2007? The PAC hopes to raise \$100,000 in 2007. The primary election is the first Tuesday in March, 2008 and contributions to some candidates will begin later in 2007.

When should I make a contribution? Right now. Contributions to the PAC can be made throughout the year.

How do I become involved with TCA PAC? Easy! Contact the Texas Construction Association if you want to become involved. Write a check to Texas Construction Association PAC and mail to 602 W. 13th, Austin, Texas 78701. For more information on the PAC, contact the TCA at 512/473-3773.

TCA★PAC Support Form

Name: _____
Company: _____
Address: _____
City/State/Zip Code: _____
Phone # _____ Fax #: _____
Email: _____

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

I am a believer! I want to show my support of the TCA★PAC by being made a badge member.
(Can not be corporate funds.)

Gold Badge
Gold Badge Member - \$1,000

Silver Badge
Silver Badge Member - \$500

Blue Badge
Blue Badge Member - \$250

Red Badge
Red Badge Member - \$100

I am a TRUE believer! Enclosed is my additional contribution of \$ _____

A non-corporate check payable to TCA★PAC is enclosed

Charge the non-corporate card below:

Visa Master Card American Express Discover

Name on credit card: _____
Card Billing Address: _____

Card Number: _____
Card Expiration Date: _____ Card ID Number (3-4 Digits): _____

Fax to: TCA★PAC 512-473-3777
Mail to : TCA★PAC 602 W 13th, Austin, TX 78701

VIP Legislators

Many legislators helped the construction industry, particularly subcontractors and suppliers during the last legislative session. Key legislators sponsored legislation on behalf of the Texas Construction Association and also helped defeat bad bills and bad amendments, as well as voting with our industry. Several legislators were especially helpful to the success of subcontractors and suppliers and these included:



**Sen. Bob Deuell,
Greenville**

Sen. Deuell was the Senate sponsor who successfully passed the Contingent Payment bill this past session. Subcontractors and suppliers had tried for several sessions to pass the bill out of the Senate and Sen.

Deuell was successful on his first try as sponsor. The Senator also voted for the indemnity bill banning the use of broad form indemnity clauses in construction contracts.



Rep. Warren Chisum, Pampa

Rep. Chisum was the House sponsor of the Contingent Payment bill. While serving as the Chair of the House Appropriations and being heavily engaged in the passage of the Appropriations bill, he took the time to sponsor and work to pass the

Senate version of the Contingent Payment bill through the House.



**Sen. Robert Duncan,
Lubbock**

Sen. Robert Duncan ventured where no Senator had ventured before. He passed a bill banning broad form indemnity clauses in construction contracts. Even though he faced very formidable

foes ranging from the oil and gas industry to the general contractors, he skillfully and eloquently advocated for the legislation and was able to pass the bill through the Senate.



**Rep. Craig Eiland,
Galveston**

Rep. Eiland was the House sponsor of the bill banning the use of broad form indemnification clauses in construction contract. He effectively

advocated for the bill in Committee. He took the time to ably question adverse witnesses when the bill was considered in Committee. His questioning and his advocacy on the issue displayed a knowledge of the issue unequalled by anyone in the House. He also spent an innumerable amount of hours attempting to negotiate the bill with the opposition.



**Sen. John Carona,
Dallas**

Sen. Carona has been a longtime supporter of the construction industry and of subcontractors and suppliers in particular. He was the Senate sponsor of the Consolidated Insurance Program bill of which he and his staff worked long and hard on its passage. Even though time ran out on the bill, the Senator and his staff helped to

forge an agreement on the bill among the primary stakeholders which will likely form the basis of legislation filed in the next Session.



Rep. John Smithee, Amarillo

Rep. Smithee has served as the Chair of the House Insurance Committee for many years. During that time he has supported the construction industry on

insurance issues important to the industry. He was the sponsor of the House version of the Consolidated Insurance Program bill and helped to pass the bill out of the Insurance Committee. He also assisted in reaching an agreement on the bill with those opposing the bill.



**Sen. Troy Fraser,
Horseshoe Bay**

Sen. Fraser serves as the Chair of the Senate Business and Commerce Committee. During the interim he committed to TCA his support of the contingent payment bill and helped to pass

the measure out of the Business and Commerce Committee. True to his word, the Contingent Payment bill was the first bill heard this session in Business and Commerce and was also the first bill passed out the Committee this session. He also was a strong supporter of banning broad form indemnification clauses.



**Rep. Burt Solomons,
Carrollton**

As well as serving as the Chair of Financial Institutions, Rep. Solomons is a long-time member of the House Business and Industry Committee where contingent pay-

ment and other issues important to subcontractors and suppliers are heard. He was instrumental in striking a bad amendment from the Contingent Payment bill on the House Floor and also filled in for the Sponsor of the bill to help pass the bill out of the House.



**Rep. Gary Elkins,
Houston**

Rep. Elkins is another longtime member of the Business and Industry Committee who has been very supportive of issues important to subcontractors and suppliers that have been heard in that committee. He supported the Contingent Payment bill each time it

was considered in Committee (over a period of several years) and served as a floor leader to assist passage this past session.



**Rep. Beverly Woolley,
Houston**

Rep. Woolley serves as Chair of the House Calendars Committee. This is one of the most important Committees in the House for the reason that this Committee determines which bills are set on the House Calendar for Floor consideration. Each of the last

three legislative sessions, Rep. Woolley has been instrumental in getting the bill set on the Calendar. Two sessions ago, she set the bill as the first bill on the entire calendar.



**Rep. Dwayne Bohac,
Houston**

Another long time member of the Business and Industry Committee, Rep. Bohac has been very supportive of legislation important to subcontractors and suppliers. He has voted for the

Contingent Payment bill each time it has been considered and also served as a floor leader when the bill was passed this session in the House.



\$\$\$** Propane Powered Forklift Tax Credit **\$\$\$

Propane used in forklifts is eligible for a 50-cent-per-gallon federal motor fuel tax credit. The credit runs through September 30, 2009, and could be extended!

1. Who files for the tax credit for propane used in forklifts?

In most cases, the customer files. Under IRS rules, the entity that buys the fuel and loads the propane cylinders onto the forklifts is considered the Alternative Fueler and is eligible to file for the credit.

2. What IRS forms are needed to claim the credit?

Each entity wishing to claim the credit must register by filing IRS Form 637. A sample Form 637 is available at www.propane.tx.gov. Once approved, the IRS will issue a 637 number with "AL" at the end, indicating IRS authorization to file as an alternative fueler.

Forklift operators that are not government entities claim the tax refund on their income tax return at the end of the year.

State and local government entities submit Form 8849, "Claim for Refund of Excise Taxes," on the gallons they use in a forklift or motor vehicle. They can file as often as they want, as long as they claim a credit of \$750 or more on each filing.

3. Where do I obtain the forms?

You can download the forms at www.irs.gov. You can view a sample completed Form 637 on AFRED's web site, www.propane.tx.gov.

4. How long do I have to file for the credit?

The credit must be claimed within three years following the close of the year the claim occurred.

5. Is there a limit to the amount I can claim?

No. You must have on file proper documentation of the propane purchased and used in the forklift during the period of the claim.

For more information about the propane motorfuel excise tax credit, contact Heather Ball, Railroad Commission of Texas, at (512) 463-7359 or e-mail heather.ball@rrc.state.tx.us.

The Contingent Payment Bill continued from page 8

involving design services or construction involving roads, bridges, highways, water supply and water plants, wastewater plants, wharfs, docks, airport runways, or related projects associated with civil engineering construction. Also, the Bill does not apply to detached single-family residences, duplexes, triplexes, and quadruplexes. One should refer to the Bill for a more complete listing of projects or contracts to which the Bill does not apply.

CONCLUSION

There is a lot that this Bill does, but there is a lot it does not do. It is not a panacea for subcontractors and suppliers. The Bill is complex and not the model of clarity. No doubt, the interpretation of the Bill will be the subject of litigation. The main reason for these characteristics stems from the Bill being the subject of compromise between different segments of the construction industry with divergent interests to protect. Each side fought hard to protect their interests. Another factor is the numerous associations and groups of companies demanding a voice in the language of the Bill.

Despite these characteristics, however, the Bill squarely addresses the two main factors involving nonpayment: (1) quality of work issues, and (2) the financial inability of an owner to pay. Before the Bill, subcontractors and suppliers had

a very expensive fight to void the applicability of the clause with, at best, a most uncertain outcome. Now, subcontractors and suppliers have a definite chance to win the battle. Subcontractors and suppliers even have the opportunity during the job to void the clause for future work if they are unpaid for at least 46 days.

No longer can general contractors feel the comfort of absolute contingent payment clause protection. To protect their contingent pay position, general contractors must actively take initiatives by providing unsolicited detailed financial information from owners. They must also send timely notices in certain situations. The administrative demands placed upon them by this Bill are numerous, and in my opinion, quite burdensome.

In the final analysis, the general contractors are not as protected as they used to be. It is hoped that this Bill will cause the general contracting community as a whole to be much more proactive in pursuing payment from the owner. Perhaps the general contractor will more prudently analyze the financial information about the owner's ability to pay before disseminating it to subcontractors. Hopefully, the uncertainties presented by the Bill will make the parties much more apt to be reasonable with each other and settle their differences rather than risk the chance of losing a battle. I am, and I think all of the subcontractors on the TCA negotiating team are, very hopeful subcontractors and suppliers will greatly benefit from this Bill.





TCA
**Texas
Construction
Association**

American Subcontractors
Association of Texas

Central Texas
Subcontractors Association

DFW Drywall &
Acoustical Contractors

Fire Equipment
Distributors of Texas

Texas Fire Sprinkler
Contractors Association

Mechanical
Contractors Association

National
Electrical Contractors
Association

Plumbing-Heating-
Cooling Contractors
Association

SMACNA
North Texas Chapter

Southwest Terrazzo
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