

2005 Texas Legislature TCA Agenda

They're Backkkkkk!!!!!!!

The 79th Legislative Session convened on January 11, 2005. For the next 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 to 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 or owner for their negligent wrongdoing even though the Subcontractor may have done nothing improper. The indemnification includes the subcontractor paying 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

their 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.

Sovereign Immunity - Right to Enforce Contracts with Public Entities.

A State Appeals Court in Dallas recently ruled that School Districts have sovereign immunity and they cannot be sued for breaching their contracts. In April, the Texas Supreme Court heard a case involving a landscaper suing a city for breach of contract and the city has asserted sovereign immunity as a bar to being sued. The right to resolve disputes and to have a remedy to enforce a contract with a state or municipality must be restored. If a subcontractor has a contract with a state or a city and it

*see TCA AGENDA
continued on page 2*

IN THIS ISSUE

- Member Mentions2
- Construction Power Program3
- Legislative Basics4
- WorkSafe Program7
- TCA Member Profile8

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Member Mentions

ASA-Houston

ASA-Houston Chapter held its Annual Excellence in Construction Awards Dinner on Friday, January 21, 2005, at the Houston Junior League. ASA members nominated and voted for individuals/companies in six categories: Outstanding General Contractor of the Year; Outstanding Architect/ Engineer of the Year; Outstanding Project Superintendent of the Year; Outstanding Project Manager of the Year; Project Over \$15 Million; Project \$5 - \$15 Million; Project Under \$5 Million. The winners will be announced at the event.

For more information about the event, contact ASA-Houston Chapter Executive Director, Brianna Boudreau, (281) 403-6301, asa@asahouston.org.

ASA North Texas

ASA North Texas Chapter received "Exemplary Chapter" recognition at the ASA National Leadership Forum in Denver, CO. There are 43 chapters across the country; nine received the award for 2003/2004.

On Feb. 24, 2005, ASA North Texas will have its 27th Annual Awards Night & Silent Auction at the Belo Mansion & Pavilion, in the Arts District Dallas, TX. Cocktails and Silent Auction start at 6:00, followed by the Dinner and Awards Presentations at 7:30.

We are expecting 500-600 attendees, including ASA Members, General Contractors, Engineering & Architectural Firms, and Owners & Developers.

ASA-San Antonio

ASA-San Antonio will be holding it's

10th Annual Awards Banquet on Thursday, February 24, at St. George Maronite Center in San Antonio. The San Antonio Chapter's Awards Banquet is known as one of the best in the area and is well attended by the construction industry. The event is so popular it was moved to a larger location because it has sold out for the past five years. This year's entertainment will be a comedian Rick Roberts from Nashville.

Texas Glass Association

Deb Levy was presented with the LOU GREEN Award at Texas Glass Association's TEXpo held in Galveston, Texas in October.

Texas Glass Association partnered with Deb and her newly formed company, Key Communications, as publisher of *GLASSNEWS* and *AGRR*, two magazines focusing on the glass industry in Texas. In 1991 the first TEXpo was a total wipeout due to the massive flooding in downtown Houston. Subsequent years have brought education, information, classes, and exhibits to the Texas glass industry. Deb now publishes *AGRR*, *Architects Guide To Glass*, *Door And Window Maker Mold & Moisture Management*, *SHELTER*, *USGlass*, *Window & Film Magazine* and operates only on glass.com. Key Communications manages regional trade shows and management conferences throughout the United States. This all began because of Deb and her desire to bring regional opportunities to the industry. The Texas Glass Association is one of the largest chapters of the National Glass Association with divisions in North Texas and Houston. The LOU GREEN Award is presented to the most outstanding glass professional in the TGA membership. TGA appreciates Deb and her efforts to elevate the glass industry.

TCA AGENDA

continued from page 1

cannot be enforced, two things will likely happen: fewer contractors will compete for these contracts and those that do will likely increase their bids to cover the increased risk of entering a contract for which no remedy is available in the event of a breach. Sovereign immunity for contractual disputes must be eliminated!

Workers Compensation Reform.

During the interim the the Texas Workers' Compensation Commission was reviewed by the Legislature to determine how effective the agency has been performing. The Sunset Commission recommended that the Commission be abolished and that its functions be split between the Texas Department of Insurance and the Texas Workforce Commission. While it is uncertain what the Legislature

will do, it is a certainty that there will be major changes in the way the agency operates. TCA is urging passage of more effective health care cost containment and stronger anti-fraud measures. Availability of health care in the workers' compensation system is also a concern.

Owner Controlled Insurance

Program. Last Session the Legislature considered a bill that would have required the use of these programs on every public project. While they may be beneficial on some very large projects, the use of OCIPs should not be mandated. Many Subcontractors have had bad experiences with these insurance policies. There are oftentimes gaps in coverage, no completed-operations coverage (coverage for damages occurring after the subcontractor completes his/her portion of the work), improper delegation of loss experience to the subcontractor under the projects and numerous other problems.

Standards should be developed and required of these policies include completed operations coverage and elimination of gaps in coverage.

Limiting Use of Reverse Auctions.

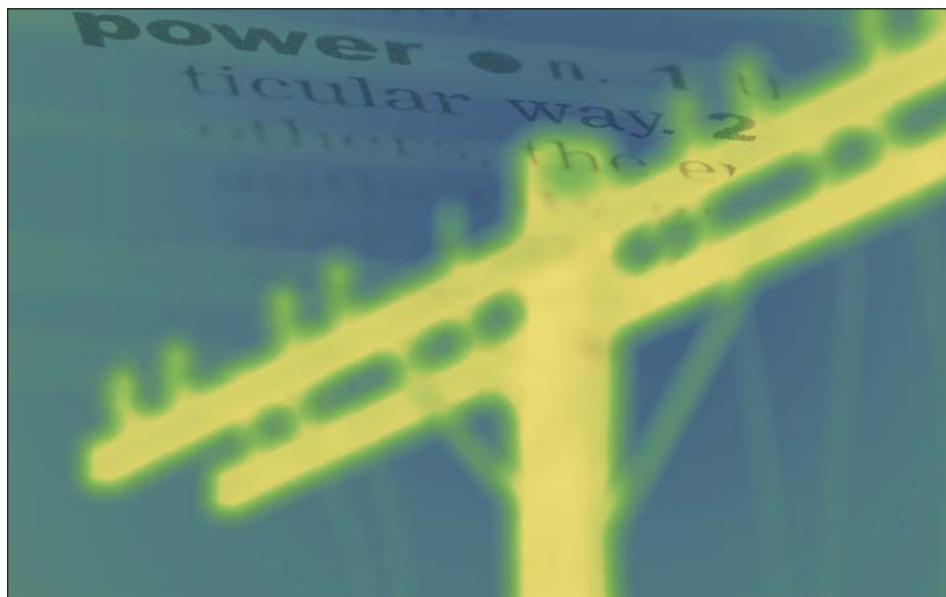
Reverse auctions are being used more often in construction contracts. Last Session a bill was considered to require reverse auctions to be used on at least 10 percent of Public Projects. Reverse auctions are a public bid shopping procedure that creates havoc in an already complicated bidding procedure.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

School Finance and Tax Reform.

Quality schools are essential to having an educated work force and a quality business climate. Most businesses are willing to pay their share of the burden to have good schools but are not anxious to pay more than their share. If a broad-based business tax is considered as one of the solutions, the tax should be fairly distributed amongst all businesses and professionals. Also it should not disproportionately place the burden upon labor-intensive industries as opposed to capitol-intensive industries—and vice versa.

Construction Power:

Saving money for TCA members through volume purchasing of electricity.



The Energy markets have turned inside out and upside down over the last two years. Contracting for electric power is always a complex task and has become even more difficult. Construction Power, the Texas Construction Association (TCA) power procurement program, in partnership with Association Power, LLC (AP), is being designed to meet these new challenges.

When Texas deregulated retail electric power in 2002, Texas got a power market dependent upon natural gas fuel for the generation of the majority of power. This has given Texas a most significant market feature—the price of power tracks the price of natural gas. Historically, natural gas ranged in price between \$2.00 and \$3.50, and often moved within a month. Sophisticated power procurers locked prices when they were low (near \$2.00) and floated the price when it was high.

AP built a sophisticated group coop-purchasing program that consistently found the best prices on the market. AP also selected the right contract structure according to the current market conditions. In conjunction with its sister governmental program, Public Power Pool (P3), P3/AP

is the largest group-purchasing coop (aggregation group) in Texas. AP consistently saves members at least 5% over what they would be able to procure as a single entity.

In the last two years, prices have radically increased and become significantly more volatile. Natural gas now trades above \$7, and sometimes as high as \$10. No one knows whether the floor for prices is \$3, \$4, \$5, or \$6. Prices often move as much as \$0.50 in a day.

With this new market reality, the 5% savings from AP's aggregation can be dwarfed by the wild 50% changes in power prices. The risk and value today is in managing the price volatility risk. The best approach is the one used by utilities for decades: dollar cost averaging and actively managing a portfolio of supply options and hedges.

AP is changing its stable of consultants and redesigning its procurement process to manage this risk. TCA members can expect to receive a proposal from AP in the first part of 2005 outlining the Construction Power aggregation option and why it is the best option for customers to purchase electric power. Please do not hesitate to contact AP at ap@associationpower.org or toll free at 1-866-278-3692 for more information.

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's 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 half a 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 determined by both houses every 10 years. District boundaries are based on the US Census, and are established so that approximately the same number of Texans are 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. Gov 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-third's 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 order 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 to 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 before 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

LEGISLATIVE DATES OF INTEREST

Tuesday, January 11, 2005 (1st Day)
79th Legislature convenes at noon.

Friday, March 11, 2005 (60th Day)
Deadline for filing bills and joint resolutions other than local bills, emergency appropriations, and bills that have been declared an emergency by the Governor.

Monday, May 30, 2005 (140th Day)
Last day of the 79th Regular Session.

Sunday, June 19, 2005 (20th Day following final adjournment)
Last day Governor can sign or veto bills passed during the previous session.

Monday, August 29, 2005 (91st Day following final adjournment)
Date that bills without specific effective dates (that could not be effective immediately) become law.

opposite chamber. The bill is then presented at the third reading.

Amendments to the bill at the third reading require a two-thirds majority.

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 originating 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 work out 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 neither signs the bill nor vetoes it within 10 days, then the bill becomes law. If the bill is sent within the final 10 days 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/.

HOW TO SPEAK TO YOUR LEGISLATOR

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 legislators has a good rea-

son 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 of 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.

TCA Staff Interview

The TCA editor recently visited with Raymond Risk, Harold Freeman, and Richard Bruns of the Texas Construction Association to get their thoughts on the 2005 Texas Legislative Session.

What are the TCA Goals for the upcoming legislative year?

Risk: We will focus on the contingent payment bill and work hard to get it passed. With the AGC-TBB and the ABC pushing for the bill too, we'll have a very good shot at getting it through. We'll also be working on gaining relief from the sovereign immunity doctrine that the state invokes regularly and that other public entities are now trying to use. Public entities need to stand by their bargain when they sign a contract and not hide behind the doctrine of sovereign immunity.

Freeman: Forced responsibility for someone else's negligence has to end. Now insurance companies are removing coverage for the exposure from their policies. So gaining relief from broad form indemnification clauses is a top priority. We'll also have an opportunity this year to make reforms in the workers' compensation statutes to provide a fair system for the employers and employees, as well as the medical providers.

Bruns: Raymond and Harold mentioned issues of high priority for TCA. In addition, there have been a rapidly growing number of complaints concerning consolidated insurance programs. There needs to be some minimum requirements that these programs must meet if they are to be used on construction projects.

What do you predict the biggest challenge to be?

Risk: These are all hard issues. After having the bill last session and gaining even more support for it during the interim, one would think the contingent payment bill won't be as tough, but I think it will still be quite a challenge.

Bruns: True, but we've fought for indemnification relief for many years too and the opposition is still there for it. It is always opposed by owners' groups.

Freeman: I remember the last great battle on workers' compensation. The players in that effort will be at the table again. These are groups, associations, companies, and individuals who have a large stake in the workers' compensation arena. I think it will be a real dog-fight again. Oh, did I also mention that school finance reform is happening this session? We want to make sure that the

bill is a fair bill. We want to make sure that in the case of an increased business tax, that all segments of business are taxed fairly. In other words, that everyone participates equally.

Which has the greatest possibility of passage?

Risk: Contingent payment has the greatest probability of passage due to the hard work of subcontractors and the general contractors over the past few years. A workers' compensation bill will pass and I think the legislature will rise to the occasion and find a solution to school finance. The question will be when?

Freeman: The state budget bill is the only one that will surely pass. There is no way to predict anything else.

What can members do?

Freeman: Get to know your representative and senator. The more contact we have with them, more successful we are. All politics is local.

Bruns: Our members need to visit immediately their legislators to discuss the TCA issues. This can be in their district offices. Also, they need to come to Austin and the first opportunity will be the TCA Walk on the Capitol on Tuesday, January 25th.

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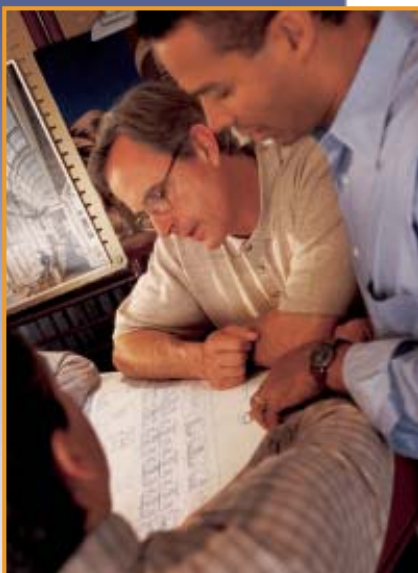
WE'LL SHOW YOU HOW!



Reduce risk, loss and the cost of insurance.

The Texas Construction Association/WorkSafe safety program for TCA members does just that!

Worksafe's Training Management System (TMS) has had positive financial impacts on its clients' insurance premiums, with savings ranging from 20 to 50 percent.



The WorkSafe TMS Advantage.

- Highly effective in reducing workplace loss ratios
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- Automatically maintains an accurate and complete record of the integrated testing, providing the employer record-keeping that exceeds the expectations of underwriters and OSHA
- Offered in English and Spanish
- Designed for seventh-grade education level
- Results in highest comprehension levels
- Train on demand in nonproductive times

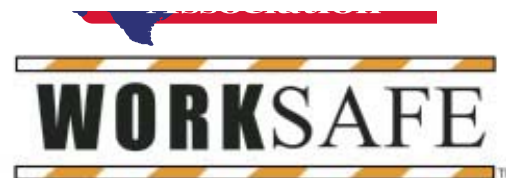


WorkSafe Delivers.

WorkSafe is changing the way industry receives its safety training, advancing it from a typically hourly based, outdated consulting approach to a cutting-edge safety and training solution. The WorkSafe Training Management System (TMS) is the most comprehensive safety training/loss prevention system available, with proven results that affect the profitability of clients.

WorkSafe Produces Results.

With its wide array of products and services, WorkSafe can assist your company not only with training, but also with overall safety compliance. In addition to the TMS, the WorkSafe program offers several other key products and services to facilitate the benefits of a safe working environment. Some of these include written occupational safety and health programs, new employee orientation videos, mock OSHA inspections, formation and participation in safety committees, OSHA negotiations, and many more.



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TCA Member Profile

Q & A With Nancy Jones

Executive Director of the Associated Plumbing-Heating-Cooling Contractors of Texas (APHCC)

What is your biggest concern for the upcoming session?

We will be focusing on the following issues with TCA: Limiting Use of Contingent Payment Clauses; Prohibiting Indemnification Clauses; Sovereign Immunity - Right To Sue Public Entities; Workers Compensation Reform; Owner-controlled Insurance Program; and Limiting Use of Reverse Auctions.

What can members do?

Contact their legislators and ask them to vote with us on these issues.

How do you get your members involved?

First, we educate them on the issues and the political process. Then we ask for their help on key issues; their calls, faxes, e-mails and personal visits are critical. We also ask for contributions to our Political Action

Committee. We have a new "181 Club" - named for the number of state legislators. Members pay a certain amount to join; in return they receive special legislative updates, an invitation to a legislative dinner during the session, and an invitation to a special reception at our convention.

How do you keep your members informed about important issues?

We send out Legislative e-mail memos during and after the session; we focus on legislative issues in our quarterly magazine, in a monthly industry newspaper and in our chapter newsletters.

General thoughts on the subcontracting industry:

They need our association (APHCC as well as TCA) to protect their business interests. General contractors are represented by large and powerful associations with strong lobbying programs;



Left to right: Dewwayne Luman, R.E.C. Industries, Bryan, Tx; Nancy Jones, APHCC Executive Director; State Representative Fred Brown (District 14); and Craig Lewis, R.E.C. Industries, Bryan - APHCC President-Elect.]

we as subcontractors, must focus on growth and influence in the legislature.

What, in your opinion, is the most important issue to the subcontracting industry?

Tort reform. The legal profession has targeted the subcontractor industry as its next revenue source (mold, construction defect, etc.). We must continue to speak out against frivolous lawsuits.

What is the most important issue for your particular industry?

I would consider the TWO most important issues to be a) Increasing insurance costs and b) lack of young, trained technicians.



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