



Winter 2009

REPRESENTING TEXAS SUBCONTRACTORS AND SUPPLIERS

# 2009 Texas Legislature TCA Agenda

**Déjà Vu All Over Again**

*The 81<sup>th</sup> Legislative Session convened on January 13, 2009. For 140 days, legislators will discuss issues of concern for subcontractors and suppliers. At least we hope there will be discussion each day! TCA will be representing its member's construction interests in the Legislature. Following is a summary of key construction issues on which the Texas Construction Association will focus during this Session:*

**Prohibiting Indemnification Clauses.**

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

**Additional Insured Requirements.**

Most of the contracts containing indemnification clauses also contain clauses requiring the subcontractor to add the general contractor and owner as additional insureds to the subcontractor's liability policy. Additional insured endorsements should be restricted in their application. Additional insured endorsements effectively give the owner the coverage of the subcontractor's policy.

These endorsements should be used only to protect the additional insured for the subcontractor's negligence. Also, with these endorsements being revamped markedly by the insurance carriers, subcontractors face new exposure. It is becoming increasingly difficult for subcontractors to purchase additional insured coverage when the indemnified party is concurrently negligent. It is virtually impossible to purchase additional insured coverage when the indemnified party is solely negligent or when there is no negligence on the part of the subcontractor.

**Consolidated Insurance Program.**

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

**Retainage.**

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

**Lien Law Reform.**

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

**Tax Reform.**

In 2006, the Legislature enacted a major revision to the business franchise tax and adopted what has been called the "margins tax". 2007 was the year the tax took effect and this tax was paid during 2008. The impact of the tax has been very uneven but most business entities saw their taxes increase-many saw substantial increases. Service oriented businesses in particular saw big increases. TCA is monitoring this issue closely. There likely will be several bills making changes in the tax and TCA will be working with the legislature to remove any negative impact to TCA members.

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## ***2009 Texas Legislature TCA Agenda Continued...***

### **Sovereign Immunity.**

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



### **Contingent Payment Clauses.**

TCA helped pass landmark legislation in 2007 limiting the use of contingent payment clauses. The law has been in effect since September 1, 2007. TCA will be monitoring all legislation filed and opposing any legislation which makes changes detrimental to the bill passed in 2007.

### **Workers' Compensation Reform.**

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

### **Alternate Delivery Systems.**

Currently local governmental entities and state agencies use several alternatives to traditional low-bid delivery of construction projects. The statutes governing these procedures are located in several different statutes and have limited uniformity. Legislation is being proposed that consolidates the alternate delivery systems used by various local governments and state agencies for their construction projects into a single chapter of the Government Code. This provides both a greater ease of locating the applicable law as well as standardizing the various alternatives used by the different entities.

### **School Criminal History Background Checks.**

During the last Session legislation was passed requiring criminal history background checks of all school employees and personnel as well as contractors with the school district and their employees who contract with the school districts. This has been interpreted by the Texas Education Agency to include subcontractors and their employees working on construction projects. Legislation is expected to further clarify who must provide criminal history checks, simplifying the process of securing the criminal history checks and limiting the necessity of duplicate checks for each school district. ★



# A Smattering of Other Business in the 81st Legislature

Members of the Texas House completed their first order of business prior to opening of the 81<sup>st</sup> Legislative Session in selecting Joe Strauss (R-San Antonio) as Speaker of the House. TCA Members may remember, at the opening of last session, former Speaker Tom Craddick was challenged by Rep. Jim Pitts. Although Craddick was elected to a third term as Speaker, his authority was challenged on the closing days of the session when members attempted to force a vote that would have removed him from his post. In electing Strauss, many hope that it will allow the House to work in a more bipartisan manner; at the very least, it will allow the House to avoid a contested Speaker's race on the opening day of the session.

Comptroller Susan Combs has announced that state revenue will drop \$9.1 billion over the next two years. Estimates from last summer predicted a budget surplus of as much as \$15 billion. In delivering the revenue estimate, Comptroller Combs noted that the national economic downturn was beginning to be felt in Texas. The shortfall will likely impact efforts to revise the revised franchise tax (margins tax), which has generated less revenue than was initially forecast and has been criticized for its impact on small businesses.

Since 1977, the Sunset Act has required most state agencies to be reviewed an average of once every twelve years. The primary goal of this review is to determine whether or not an agency's functions continue to be needed. The Sunset process works by setting a date on which an agency will be abolished unless legislation is passed to continue its functions. This process allows the Legislature to examine an agency and

make fundamental changes, if needed, or in some cases abolish the agency or merge it with another one. During the interim session, the time between the regular legislative sessions, the Sunset Advisory Commission evaluated each agency scheduled for review and makes recommendations on how to improve each agency. These recommendations are forwarded to the Sunset Advisory Commission, which is made up of five members of the House, five members of the Senate and two public members, the Sunset Advisory Commission holds public hearings on each agency, and votes on the recommendations. These recommendations are then drafted into a bill. Among those agencies that will be reviewed this session are the Texas Department of Insurance, the Texas Youth Commission, the Texas Department of Transportation, as well as the Texas Residential Construction Commission. During the interim, TRCC was roundly criticized by consumer advocates, and Sunset staff recommended that the agency be abolished, citing its lack of enforcement mechanisms. However, the Sunset Commission voted to continue the agency and strengthen its ability to protect consumers by establishing an Office of the Ombudsman within the agency.

The impact of Hurricane Ike is still being felt throughout our state and a variety of measures likely will be considered that are aimed at assisting recovery efforts and lessening the impact of future hurricanes. Potential topics include "hardening" of electric lines, which would make them less susceptible to damage during future storms and cleaning and replenishing beaches that were damaged in the storm. The Legislature will also likely look at creating a

new method of financing the Texas Windstorm Insurance Association, which is the insurer of last resort for individuals who cannot obtain adequate coverage on the open market.

Although Texas' housing market has not felt the economic downturn as greatly as other areas of the country, there will likely be measures aimed at increasing consumer education and disclosures, especially for those consumers in the subprime mortgage market. Additionally, for those who are or may be subject to foreclosure, the Legislature may consider providing more tools to help understand the foreclosure process and the resources available to help them.

The scramble for lean state dollars will reach to areas such as public schools, health care, water resources, energy, and higher education. This session will be even more difficult due to the loss of investment income and in most cases loss of investment principal on a variety of state funds, including retirement funds and the permanent university fund. With a prevalent resistance to not raise taxes, the legislature will be challenged to meet the needs of the state with fewer dollars. ★



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



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

## **2009 TCA☆PAC Roundup & Walk on the Capitol**

*Sponsored by the Members of the Texas Construction Association*

### **AGENDA**

#### **Monday, January 26, 2009 – TCA☆PAC Roundup & Legislator Reception**

J Black's, 710 W. 6<sup>th</sup> Street, Austin

5:30 - 8:00 pm

*Opportunity to visit & have drinks and h'ors de oeuvres' with your Legislators & their Staff*

#### **Tuesday, January 27, 2009 ☆ Walk on the Capitol**

Doubletree Guest Suites Hotel

303 West 15<sup>th</sup> Street, Austin

<i>Breakfast with the Sponsors</i>	<i>7:00 a.m.</i>
<i>Breakfast Speaker</i>	<i>7:30 a.m.</i>
<i>Issues Briefing - TCA Staff</i>	<i>8:30 – 9:00 a.m.</i>
<i>Walk to Capitol to Talk with Legislators</i>	<i>9:30 – 3:00 pm</i>
<i>Debriefing at Hotel</i>	<i>Immediately after walk</i>

*The Doubletree Guest Suites Hotel is offering rooms @ \$189 for TCA members until 1-14-09 or the TCA block is full. Go to the Events Button on the TCA web site, [www.texcon.org](http://www.texcon.org), or ask for the Texas Construction Association rate on 800-222-8733.*

**Please mail or fax your registration ASAP!!**

# REGISTRATION FORM

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

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

## 2009 TCA☆PAC Roundup & Walk on the Capitol

*We hope to see you there!*

☐ I will attend the Roundup on the 26th

☐ I will attend the Walk on the 27<sup>th</sup>

Name \_\_\_\_\_  
Company \_\_\_\_\_  
Address w/City & Zip \_\_\_\_\_  
Phone ( ) \_\_\_\_\_ Fax ( ) \_\_\_\_\_  
Email \_\_\_\_\_

*Please use a separate sheet for each attendee.*

☐ I'll be a Roundup Sponsor for ☐ \$2,500 ☐ \$1,000 ☐ \$500 (May use corporate funds)  
☐ A check is enclosed ☐ Charge the card below ☐ Please invoice me  
☐ Credit card: ☐ Visa ☐ Master Card ☐ Discover ☐ American Express

Name on Credit Card \_\_\_\_\_ Expiration Date: \_\_\_\_\_  
Card Billing Address \_\_\_\_\_  
Card No. \_\_\_\_\_ Card ID NO. (3-4 digits) \_\_\_\_\_

☐ I'm a believer! I want to show my support of the TCA ☆PAC by being a Badge member. (May NOT use corporate funds)  
☐ Gold Badge Member - \$1,000 ☐ Silver Badge Member - \$500 ☐ Blue Badge Member - \$250 ☐ Red Badge Member - \$100  
☐ A non-corporate check is enclosed ☐ Charge the non-corporate card below ☐ Please invoice me  
☐ My check (payable to TCA ☆PAC) is enclosed  
☐ Credit card: ☐ Visa ☐ Master Card ☐ Discover ☐ American Express

Name on Credit Card \_\_\_\_\_ Expiration Date: \_\_\_\_\_  
Card Billing Address \_\_\_\_\_  
Card No. \_\_\_\_\_ Card ID NO. (3-4 digits) \_\_\_\_\_



### TCA Member Associations

American Subcontractors Association of Texas  
Central Texas Subcontractors Association  
DFW Drywall & Acoustical Contractors Association  
Fire Equipment Distributors of Texas  
Mechanical Contractors Association of Texas  
National Electrical Contractors Association  
Plumbing-Heating-Cooling Contractors of Texas  
Precast Concrete Manufacturers Association  
Southwest Specialty Contractors Association

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



# Legislative Basics

## **Back to Basics**

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

### **The Legislature**

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

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

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

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

Both the House and the Senate may enact, amend, and repeal laws and resolutions, submit all constitutional amendments to the voters, and approve the state budget. Each house judges the election and qualification of its members, elects its own officers (with the exception of the Lt. Governor in the Senate), and sets and enforces its own rules. These rules govern the organization, procedures, and membership for both the House and Senate and originate in the State Constitution, the statutes, and the standing rules of the House and Senate. The rules may be suspended by the majority in each house. Both Houses are required to have a two-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 number it was received. For both the House and the Senate, the number of bills that can be introduced during the first 60 days is unrestricted. Except for local bills or bills relating to matters declared an emergency by the Governor, the introduction of a bill after the 60 day deadline requires the approval of four-fifths of the chamber members present.

### **Committees**

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

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

### **On the Floor**

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

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

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

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

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

### **Into Law**

The Governor has 10 days to sign, veto, or pass the bill without signature. If the bill is vetoed while still in session, the bill is returned to the originating chamber with the Governor's reasons attached. The bill can overrule the Governor's veto with a two-thirds majority vote in each house. If the Governor neither signs the bill nor vetoes it within 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/](http://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 legislator has a good reason for wanting to talk to you. He wants to hear from you. When you contact them, tell them about yourself—what you do and your relevant experiences—and that you want to be a resource for them. Talk about the legislation that matters to you, but also let them know that you want to help them by being a resource for them.

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

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

*Joe Gagen has been involved professionally in political and legislative matters for over 30 years. He can be reached at 512-473-2627 or by e-mail at [joegagen@sprintmail.com](mailto:joegagen@sprintmail.com).*







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Construction  
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Central Texas  
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Southwest Terrazzo  
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Texas Council Painting &  
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Texas Crane  
Owners Association

Texas Fire Sprinkler  
Contractors Association

Texas Glass  
Association

Texas Iron Workers  
Employers' Association

Texas Masonry  
Council

Texas Structural  
Steel Institute

Room to Grow!!



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