

REPRESENTING TEXAS SUBCONTRACTORS AND SUPPLIERS

2011 Texas Legislature Begins

The 82nd Texas Legislature convened on January 11, 2011. TCA staff and members will continue discussions that have taken place over the last 1-1/2 years to acquaint legislators with subcontractor and supplier issues and to seek their support of TCA's legislative agenda. Our agenda is ambitious, but the issues are important for all of TCA member businesses and their employees. The following is a summary of the priority legislation set by the TCA board.

Broad Form Indemnification. Most construction contracts today contain what are called broad form indemnification clauses. These require the subcontractor to indemnify the general contractor and/or owner for any negligent act they may commit even though the subcontractor may have done nothing improper. In addition, the clause requires the subcontractor to pay the entire cost of defending any claim against the general contractor or owner, regardless of the fact that the subcontractor may have done nothing wrong. The concept of a person not being responsible for his or her wrongful acts flies in the face of the liability system in Texas—that each individual should be responsible for his or her own acts and not shift to someone else the responsibility for paying claims resulting from his or her actions. Neither general contractor nor subcontractor should be required to shoulder the responsibility for an owner's negligent act or failure to act. The shifting of responsibility from an owner to a general contractor and a general contractor to a subcontractor reduces the incentive for an owner to maintain a safe workplace. Studies have concluded that this shifting of risks

results in an increase in the total cost of construction. This contractual indemnity shifts the entire financial burden for negligent acts to the subcontractor, the party who is usually least able to absorb such risk. Subcontractors are not insurance companies! In 2009, the bill that would have banned broad form indemnification clauses in construction contracts made it through the Senate, but became the victim of partisan politics related to the voter id legislation. TCA is supporting the same bill in 2011 and will work for its passage into law.

Retainage. Subcontractors are bankers. They use their capital or borrow money to finance construction of buildings for an owner. They put up 100% of the labor and materials and get paid 90%. The 10% they don't get every month is called retainage. Under the current Texas lien laws, that 10% is effectively a loan. The ability to secure that loan with a lien is fraught with peril. There are nonsensical requirements in the lien law that, if missed, a lien for retainage becomes exceedingly difficult or impossible. Why should the law require a subcontractor to tell an owner what the owner already knows? Why should a subcontractor need to file a lien to protect retainage when payment of the retainage is not due yet? TCA worked during the interim with the ABC of Texas and the AGC-Texas Building Branch to craft a bill which will revamp the requirements needed to preserve the lien right for retainage. TCA will encourage the legislature to pass the bill quickly to provide relief from the crazy retainage scheme of the lien laws.

Escrow of Retainage. Where's the money? Owners are required by statute

to retain 10% of the value of the work put in place each month. What happens to the money? Does the owner even have it or does the lender typically keep it? The reality is that the subcontractor puts up 100% of the work in a month and only gets 90% payment for it. The 10% retainage must be protected. TCA supports a bill which will require that the retained amount be placed in an escrow account for the benefit of the construction team. The 10% must be protected in case the worst scenario occurs and the owner becomes insolvent.

Lien Waiver. A supplier, subcontractor, or general contractor should not be required to waive its lien right until it receives good payment for work performed or materials supplied. Further, lien waivers should be simply lien waivers, and not documents for other contractual issues. TCA will support a bill this session that will establish standardized lien waiver

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forms. These forms will be the only valid form to allow a supplier, subcontractor, or general contractor to waive its lien rights on progress payment and final payment and will be conditioned on getting paid.

Consolidated Insurance Program (CIPs). Known typically as Owner Controlled or Contractor Controlled Insurance Programs, the use of these "Wrap-Up" programs is problematic in Texas. While these programs are usually a money saver for the Owner, CIPs are currently 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 2003, TCA helped defeat legislation that would have required the use of OCIP's on every public project and has since

worked to establish minimum standards for CIPs. Standards should be set for CIPs in Texas. In 2011, TCA is working for passage of legislation which will establish standards for CIPs to resolve the current issues related to their use.

Loan Default. A lender likes to have a completed building for its loan collateral. Presently, a lender can just keep quiet about an owner's default on a loan and the construction team can keep pouring money into the project. Of course, this will add value to the project and, should the lender foreclose, the construction team will have no security in the project. Insolvent owner. Liens wiped out at foreclosure. Not pretty for the team. The construction team needs to be notified by the lender when an owner is defaulting on a loan. A bill supported by TCA will require such a notice so that construction can be stopped until payment arrangements are made. ★



A Smattering of Other Business in the 82nd Legislature

The Texas Legislature convenes in Austin on January 11, 2011. Here's a preview of some of the statewide issues that will shape the session.

The two biggest tasks facing the Legislature are writing a budget in the face of an estimated \$15-\$25 billion deficit and redistricting, which is the drawing of new boundaries for legislative, congressional, and State Board of Education districts. The exact amount of the deficit will not be known until Comptroller Susan Combs releases her biennial revenue estimate, which determines how much revenue is available for the Legislature to appropriate. Regardless, it will be the largest deficit the state has faced since 2003, when there was a \$10 billion deficit. At that time, the Legislature relied primarily on cuts in services and increased fees to plug the gap.

In the face of the upcoming deficit, the state leadership has directed state agencies to reduce their budget requests; Governor Perry and leaders in the Senate and House have stated often that a tax increase is not an option to address the looming budget deficit. Because of this, many people expect to see numerous cuts throughout the state budget, including areas such as higher and public education, criminal justice, and health & human service agencies. The state's Rainy Day Fund, which is approximately \$8 billion, may be used to address the deficit. It won't be easy to use this money since access requires a two-thirds vote of the House and Senate.

The chief cause of the budget deficit is falling sales tax collections, which accounts for around 60% of state revenue. Another contributing factor to the budget deficit is property tax reduction, which the Legislature enacted in 2006 when it reduced school property taxes and expanded the franchise tax. At the time, it was thought that the expanded franchise tax and reduced property taxes would offset each other so there would be no fiscal impact to the state. The franchise tax, however, is generating less revenue than anticipated, contributing to the hole that must be filled by the Legislature.

Redistricting is the other primary task of

the Legislature this session. The Legislature is charged with redistricting in the first regular session following release of the decennial census. While the purpose of redistricting is to ensure that each legislative and congressional district has the same population, in practice, the process is often used to solidify partisan advantages. Over the past decade, Texas' population has increased from 20.9 million to 25.1 million people. Because of this, our state will gain an additional four congressional seats, which the Legislature will also be responsible for creating. At the same time, Texas' population is becoming more urban, so rural areas of the state, such as the Panhandle and East Texas, will likely lose representation. Special interest groups will encounter greater time constraints and increased pressure getting their issues through the Legislature during a session when the highly charged and very partisan task of redistricting is on the table.

The growing dominance of the Republican party will also be a major storyline this session. Prior to the November election, Republicans held a 76-74 majority in the Texas House, and some observers thought a Democratic majority was within reach; however, Republicans won 99 seats in the election. And in December, two formerly Democratic Representatives, Aaron Pena of Edinburg and Allan Ritter of Nederland switched to the Republican Party, giving Republicans 101 seats in the Texas House and a super majority, which is defined as 100 or more members. It takes 100 votes to establish a quorum of the Texas House and pass constitutional amendments. In the Senate, the partisan mix remains the same, with 19 Republicans and 12 Democrats. Because of the Senate's "two-thirds rule", which requires two-thirds of Senators present to agree to bring up a bill for consideration, the 12 Senate Democrats may have a crucial role to play in advancing Democratic positions. All could change if the Senate eliminates the two-thirds rule.

Following the November election, there were grumblings among certain Republican members of the House that

current Speaker Joe Strauss is not conservative enough; these members cited the fact that Speaker Strauss was elected with large Democratic support at the beginning of the 2009 session. As 2011 begins, two Republicans have declared their candidacy against Speaker Strauss: Warren Chisum of Pampa and Ken Paxton of McKinney. Although most observers believe that the Speaker Strauss will remain speaker, neither of his opponents has conceded the race and both are actively campaigning. And there is a chance the matter will not be decided until opening day of the legislative session. While often the Speaker's race is virtually decided well in advance, the race this session may not be decided until the election on the first day of the session.

Expect the Legislature to again consider legislation that would require individuals to show photo identification when voting. Last session, the parliamentary maneuvers used to delay consideration of such legislation also prevented final consideration of legislation that would have restricted the use of indemnification clauses in construction contracts, a TCA high priority issue.

The Legislature will also likely give ample consideration to a host of immigration measures. Legislation ranging from Arizona style immigration enforcement to expanding the number of employers required to verify their employees' citizenship through the federal e-verify system has already been filed. With the budget problems, gambling forces will be making a strong push to bring casinos to Texas as a means to raise revenue.

Add to this the large number of state agencies up for Sunset Review this session. Sunset Review is a process where an agency's operations are examined and the agency is terminated or given a new set number of years to continue. This takes an extraordinary amount of legislative effort and time and is compounded when legislators attempt to amend the bills dealing with the Sunset Review process.

Buckle Up! The session is here. ★

Your Voice is Needed.



Come to Austin!

2011 TCA*PAC Roundup & Walk on the Capitol

January 31 - February 1, 2011

Sponsored by Members of the Texas Construction Association

Monday - TCA*PAC Roundup & Legislator Reception

Opportunity to visit & have drinks and hors d'oeuvres with your Legislators & their Staff

Maria Maria

415 Colorado Street, Austin

5:30-8:00 pm

Tuesday - Walk on the Capitol

Doubletree Guest Suites Hotel

303 West 15th Street, Austin

Breakfast with Sponsors	7:00 am
Breakfast Speaker	7:30 am
Issues Briefing - TCA Staff	8:30 - 9:00 am
Walk to Capitol to Talk with Legislators	9:30 - 4:00 pm
Debriefing at Hotel	Immediately After Your Walk

The Doubletree Guest Suites Hotel is offering rooms at \$184 for TCA members until January 9, 2011 or until the TCA block is full. Go to www.austinsuites.doubletree.com, Convention Code: TCA, or ask for the Texas Construction Association rate at 800-222-8733.

There is strength in numbers. Legislators listen to a large group of voters voicing the same concerns.

The Texas Legislature needs to hear Our Voices.

Mail this form with your check ASAP to:
Texas Construction Association
1011 San Jacinto, Suite 330
Austin, TX 78701-2494

Registration Form

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

2011 TCA★PAC Roundup & Walk on the Capitol

January 31 - February 1, 2011

I will attend the Roundup on the 31st

I will attend the Walk on the 1st

Name _____

Company _____

Address w/City & Zip _____

Phone () _____ Fax() _____

Email _____

Please use a separate sheet for each attendee. Thank you!

Sponsorship

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: _____

Company Name _____

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

My check (payable to TCA PAC) is enclosed

Charge the non-corporate 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) _____



TCA Member Associations

- American Subcontractors Association of Texas
- Central Texas Subcontractors Association
- DFW Drywall & Acoustical Contractors Association
- Mechanical Contractors Association
- National Electrical Contractors Association
- Plumbing-Heating-Cooling Contractors Association
- Precast Concrete Manufacturers Association
- Southwest Terrazzo Association
- Texas Council Painting & Decorating Contractors
- Texas Crane Owners Association
- Texas Fire Sprinkler Contractors Association
- Texas Glass Association
- Texas Iron Workers Employers' Association
- Texas Masonry Council
- Texas Structural Steel Institute



Texas Legislative Process 101

Texas Legislative Process 101: A Primer on the Texas Legislature

There are many aspects of the legislative process that make it difficult to understand. For those of you venturing into this realm for the first time, the below overview of the Texas Legislature will help shed light on what goes on at the Capitol for 140 days every two years.

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 on average 800,000 residents. The House of Representatives has 150 members, with each member representing on average 167,000 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. The Lieutenant Governor is the presiding officer of the Senate. Unlike the Speaker of the House, who is elected by the Representatives, 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 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, that chamber 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 of the Session, then 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 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 the hearing early so you can observe the committee environment. This will help you determine the most effective way to interact with committee members. ★





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