

THE 2009 LEGISLATIVE SESSION: HOW THE CONSTRUCTION INDUSTRY FARED

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1. “Tangerine trees and marmalade skies” kind of a session

The 2009 regular session of the Texas Legislature was one of the most bizarre sessions in recent memory. The November 2008 election resulted in a House virtually evenly-split between the two parties, and in fact evenly split at the end of session when one legislator went into a coma from a heart attack in a Capitol elevator.

The incumbent Speaker was ousted by a relatively-inexperienced legislator from the same party, causing a total overhaul of committee assignments and a late start in the House. The Lieutenant Governor openly expressed an interest in running for a higher office held by a US Senator, who openly communicated her intent to run against the sitting Governor.

A deep, global recession led to a massive package of federal stimulus aid. A knockdown, drag out war occurred over – of all things – whether a photo ID should be required to vote, killing a large chunk of the record number of bills filed (20% over the previous record).

In the midst of this legislative maelstrom, over 7,000 bills were filed, and AGC-TBB monitored over 700 of them (10+%). Several bills passed, and failed, that affect the construction industry. **Official TBB bills and other TBB-involved bills are noted below in the comprehensive list of bills affecting the construction industry.**

2. Construction bills that PASSED

A. Arbitration

HB 1083 (Elkins) -- prohibits courts from ordering mediation in an action that is subject to the Federal Arbitration Act, except as otherwise agreed by the parties.

SB 1650 (Duncan) – allows immediate appeals when a court denies a petition to compel arbitration under the Federal Arbitration Act. This is already law for proceedings governed by the Texas arbitration act.

B. Building codes and governmental requirements

SB 820 (Duncan) – sets out the required notice and opportunity for public comment for a municipality of more than 100,000 people with regard to the adoption of or amendment to a national model building code for construction within its jurisdiction.

SB 1080 (Jackson) – In those situations where the OSHA general-duty clause conflicts with a statute within TCEQ's jurisdiction (or a TCEQ rule, order, or permit), SB 1080 creates an affirmative defense to enforcement. SB 1080 clarifies that when a facility manager must choose between environmental requirements or worker safety, worker safety takes priority.

C. Criminal history background checks

TBB BILL -- HB 2730 (Kolkhorst /Hinojosa) – Amended onto the Department of Public Safety (DPS) Sunset bill is a provision that clarifies that each employer on a school construction project is responsible for making the criminal background checks of its own employees. In other words, a general contractor or higher tier subcontractor is not responsible for making the background checks for a lower tier subcontractor's employees—provided that the general contractor obtains a written statement from each subcontracting entity certifying that such entity has obtained the required information for its employees (and has obtained similar certifications from each of its sub-subcontractors).

SB 627 (Carona) – clarifies that the requirement of a criminal history check of an employee providing “in-home” residential services is satisfied if (1) the employee is holds an occupational license in good standing and (2) a criminal history check is performed by the licensing agency as a requirement of licensure.

D. Government procurement

TBB BILL -- HB 987 (Creighton/West) – raises the threshold for requiring competitive (best value) procurements for school districts, counties, and local governmental entities from \$25,000 (in most cases) to \$50,000, and expressly authorizes school districts to employ electronic bidding procedures. Also, HB 987 authorizes contractors to recover attorney's fees in breach of contract suits against cities, school districts, and other local governmental entities.

HB 1972 (Hamilton) – raises the threshold for requiring competitive (best value) procurements for port commissions and authorities and navigation districts from \$25,000 to \$50,000.

TBB BILL -- HB 2082 (Isett) – Currently, cities with a population of less than 250,000 can give preference to a bidder who is a "resident of the municipality" and whose bid is within 5% of the lowest bid. HB 2082 caps the applicability of the preference to contracts of less than \$100,000. As a practical matter, this should eliminate most construction contracts from the preference.

HB 3668 (Hopson) – allows a non-resident bidder (i.e., a bidder that is not a taxpaying resident of a city) to sue to enjoin a contract made in violation of state laws on competitive bidding.

HB 4493 (Eiland) – similar to HB 987 and HB 1972 in that it raises the threshold for requiring competitive procurements for port and harbor facilities from \$25,000 to the applicable threshold for cities (currently \$50,000).

SB 229 (West) – authorizes local governments with a population of more than 100,000 to use the design-build procurement method after September 1, 2011.

E. Licensing (mostly plumbing) requirements

HB 2667 (Ritter) – makes rather extensive changes to the performance standards and other requirements for plumbing fixtures, including some conservation standards. Every plumber should read this bill.

HB 3129 (T. King) – Currently, the Texas Home Solicitation Act allows a consumer to cancel a home solicitation transaction within three days occurring at a consumer's residence. A consumer could cancel and require re-installation of the old product. This bill provides that the Act does not apply to a good or service involving plumbers, air conditioning contractors, and electricians if the transaction involving the goods or service is initiated by the consumer.

SB 1354 (Jackson) – an omnibus bill amending several provisions of the Plumbing License Law (Chapter 1301, Occupations Code).

SB 1410 (Jackson) – more changes to the Plumbing License Law, including (1) prohibiting municipalities from requiring fire protection sprinkler systems in a new or existing one or two-family dwelling, and (2) allowing plumbers to become licensed to provide residential fire sprinkler systems.

HB 1758 (Thompson) – authorizes plumber's apprentice applicants for a plumber's license to apply up to 500 hours of classroom training as a credit towards the total number of hours or work experience to sit for the tradesman or journeyman plumber's license exam. Also authorizes an apprentice who has received an associate of applied science degree from a plumbing technology program that includes on-the-job training to sit for the license examination.

F. Liens, bonds & construction trust funds

HB 669 (Solomons) – Currently, any incorrect information set out in a mechanic's lien affidavit exposes a claimant to a fraudulent lien claim and severe civil penalties. HB 669 provides that a mechanic's lien claimant is not liable under the fraudulent lien statute unless the claimant filed the lien "with intent to defraud."

TBB SUPPORTED -- HB 1513 (W. Smith) – revises the Construction Trust Fund statute (Chapter 162, Property Code), including: (1) protecting construction trust funds from voidable preference claims in bankruptcy, and (2) clarifying the applicability of the Construction Trust Fund statute to bonded projects. On the first issue, if money has been paid or set aside for a contractor, a bankruptcy trustee subsequently cannot reclaim the funds if an upstream payor enters bankruptcy. On the second issue, a court held that the only remedy for a contractor for failure of payment on a public project is the payment bond. HB 1513 clarifies that the Construction Trust Fund statute and the payment bond are both remedies for nonpayment on public projects.

HB 2515 (T. Smith) – raises the minimum amount before a payment bond is required on city and airport projects from \$25,000 to \$50,000; raises the minimum amount for which a contractor is entitled to a payment lien from \$25,000 to \$50,000; and eliminates the requirement that the

statutory notice with regard to the lien on funds must be given to the governmental entity before the funds are paid to the contractor.

G. Professional design issues

HB 1055 (Parker) – Extends the time period from 5 days to 20 days after the plans and specifications are issued, for a design professional (with primary design responsibility) to submit the plans and specifications to the Texas Department of Licensing and Regulation for review for ADA compliance.

SB 1201 (Carona) – revises the Certificate of Merit procedure for causes of action against architects and engineers by clarifying the qualifications of the licensed or registered professional executing the Certificate of Merit and requiring the Certificate of Merit to cover all claims (rather than just one negligent act or omission).

SB 2141 (Wentworth) **VETOED** – amends that portion of the statute of repose relating to architects, engineers, and design professionals by providing that the ten-year statute of repose precludes the right to bring in a design professional as a "responsible third party" in a lawsuit after the applicable repose period. Governor Perry vetoed SB 2141, and within one week the Texas Supreme Court issued a ruling in *Galbraith Engineering Consultants, Inc. v. Sam Pochucha* (June 26, 2009) that in effect overrides the Governor's veto and accomplishes the effect of SB 2141.

H. Other bills that passed

TBB SUPPORTED -- Theft of building materials -- HB 348 (Pena/Leibowitz) – stiffens penalties for theft of aluminum, bronze, or copper tubing, rods, and water gate systems.

Contingent pay -- SB 1969 (West) – a non-substantive move from Section 35.521, Business & Commerce Code to a new Chapter 56 of the Business & Commerce Code.

Education -- HB 3 (Eissler) – the school accountability bill, implements college readiness standards and enhances opportunities for students to concentrate on career and technology specialties.

School construction -- HB 3646 (Hochberg) – school finance bill (school bonds to be covered under Foundation School Program)

TBB SUPPORTED -- Fleet vehicles -- HB 3433 (Menendez)/**SB 1759** (Watson) – together these two bills create an optional "extended" license plate registration process that would cut costs by allowing companies with fleets of 25 or more vehicles to register those vehicles for a period of one to eight years. Businesses may have their company logo printed on the license plates for an additional fee.

Travis County storm water management -- SB 1299 (Watson) – gives Travis County the same authority as Harris and Bexar counties to implement fees and develop ordinances to carry out Storm Water Management Program duties.

3. *Construction bills that FAILED*

A. Indemnity in construction contracts

TBB BILL -- SB 555 (Duncan) – this coalition bill sought to restrict the right of parties to require broadform indemnity clauses in construction contracts. In a nutshell, it would eliminate broadform (and intermediate broad form) indemnity clauses and additional insured requirements in construction contracts, except with regard to claims for personal injury by employees of the indemnitor or its contractors and subcontractors (of any tier). SB 555 passed the full Senate with one “no” vote, passed out of the House committee 8-0, and was placed on the highest-priority calendar in the House, but died because of the Voter ID fiasco. This legislation is almost certain to re-appear in the 2011 Session.

B. Owner Controlled Insurance Programs (OCIPs)

TBB HAD CONCERNS -- SB 1551 (Carona) – sought to regulate and set standards for Owner Controlled Insurance Programs. A broad-based consensus could not be reached on the amount of restrictions to be imposed on the programs.

C. Entergy / workers compensation

TBB OPPOSED -- HB 1657 (Giddings) -- sought to overturn the Texas Supreme Court’s decision in *Entergy Gulf States, Inc. v. Summers*. In the *Entergy* case, the Supreme Court held that an owner may be a "general contractor" for purposes of the exclusive remedy defense provided by the Workers Compensation Act when the Owner furnishes the insurance coverage for a project. HB 1657 sought to preclude a premises owner from being a "general contractor.” HB 1657 narrowly passed the House and was never brought to the floor of the Senate (many observers have speculated that a threatened gubernatorial veto kept the bill from coming up in the Senate).

D. Alternative Procurements Consolidation

TBB BILL -- SB 1110 (Jackson) – would have (1) consolidated the multiple alternate project delivery statutes for various governmental entities into a single chapter of the Government Code; (2) expanded the types of entities authorized to use alternate delivery procedures (such as design-build and CM at Risk); (3) expanded the types of project in which CM at Risk and competitive sealed proposals can be used; (4) authorized job order contracting for certain types of projects; and (5) limited the use of interlocal agreements for design and construction services. SB 1110 passed the Senate and was placed on the highest-priority calendar in the House, but died because of the Voter ID fiasco.

E. Other bills that failed

Illegal immigration – all bills addressing this issue failed.

Texas Residential Construction Commission – gone. The Legislature declined to reauthorize this homebuilder-regulating agency, and it is currently winding down toward expiration. Presumably, so are many of its statutory provisions relating to registration, state-sponsored inspections and dispute resolution, statutory warranties, and inspections and standards for residential construction in unincorporated areas.

Several other construction-related bills failed to pass:

- **TBB BILL -- Allowing contractors to sue the state and state agencies for breach of contract**
- **TBB SUPPORTED -- Allowing contractors to sue local govt entities for delayed payments owed**
- Banning/limiting the use of arbitration by contractors and others
- Requiring employers to grant leave to employees to attend school-related activities involving their children
- **TBB HAD CONCERNS -- Certification of crane operators and crane assistance personnel**
- Registration of roofing contractors
- **TBB OPPOSED -- Registration of disaster remediation contractors**
- **TBB SUPPORTED -- Registration of CM Agents**
- Licensing of sheet metal workers
- Registration of fire sprinkler technicians
- Allowing unlicensed individuals to work on electric motors in unincorporated areas
- Relieving public entities from having to pay interest under the Prompt Pay Act on late payments when a dispute exists between the parties
- **TBB OPPOSED -- Relaxing the proof required for plaintiffs to recover damages for mesothelioma (asbestos)**
- **TBB OPPOSED -- Allowing personal injury plaintiffs to recover damages paid or incurred**
- **TBB OPPOSED -- Creation of state version of OSHA**
- Numerous tuition revenue bonds (TRBs) used to fund construction of higher education buildings
- Qui Tam bill which allows people to sue on the state's behalf to recover amounts owed
- Bill that would have created separate procurement laws for junior college districts

4. Taxes

Business tax (margins) – HB 4765 (Oliveira) raises the small business exemption for the margins tax from the current \$300,000 to \$1,000,000 for the next two years, then falling to \$600,000 in the years thereafter.

Business tax (unemployment) – In June 2009 Texas Workforce Commission Chairman Tom Pauken announced that unemployment insurance taxes will increase significantly in December 2009 to replenish the state trust fund, which is being exhausted by mounting layoffs. The amount

to be raised from employers is expected to be comparable to the amount raised in 2003—2.4% of all taxable wages.

Business tax (windstorm) -- In June 2009 the Texas Windstorm Insurance Association (TWIA) – the state’s insurer of last resort – recommended a premium increase of 10% for next year, the maximum amount allowed under new legislation. If adopted, the new rates would go into effect February 2010. The purpose of the hike is to replenish the TWIA catastrophe fund, which was wiped out by hurricanes *Ike* and *Dolly*.

Gas tax -- The “local option” transportation plan that would have given certain counties authority to levy a fuels tax to fund local transportation projects died on the last possible day of session.

Sales tax -- Numerous attempts were made to lift the 2% aggregate local sales tax cap, and all of them failed. With regard to sales tax administration, **SB 1199** (Ogden) entitles a seller to a credit or reimbursement equal to the amount of the sales tax refunded when a purchaser receives a full or partial refund of the sales price. Under current law, a partial credit or reimbursement of sales tax on refunds could not be received.

Sales tax (exemptions) -- Some new sales tax exemptions were enacted, including: **SB 958** (Hegar) for machinery and equipment exclusively used in an agricultural aircraft operation; **SB 1929** (Watson) for items sold to or used to construct, maintain, expand, improve, equip or renovate media production facilities at media production locations; and **HB 3144** (Gonzalez Toureilles) for items used on farms or ranches in the building of roads or water facilities or in the production of agricultural products.

Property tax (constitutional amendment) -- With little fanfare, the legislature enacted perhaps the most far-reaching property tax reforms since 1979. If approved by the voters in November, **HJR 36** (Otto) will give the state direct authority to enforce uniform appraisal standards and procedures, rather than requiring administrative and judicial enforcement to originate in the county where the tax is imposed. **HJR 36** would also allow the legislature to consolidate appraisal review boards (**HB 3611** Otto).

Property tax (appraisals) -- **HB 8** (Otto) clarifies appraisal standards for the use of comparable sales and requires chief appraisers to present substantial evidence for increasing the appraised value of property whose value was reduced on appeal in the prior year (**SB 771** Williams)—and creates a pilot program in certain counties for appeals of commercial property valued at more than \$1 million to the State Office of Administrative Hearings (**HB 3611** Otto).

Property tax (abatements) -- **HB 773** (Oliveira) extends for ten years the ability of local government to use tax abatements for economic development. Additionally, the Legislature clarified that property constructed or installed on leased land is eligible for abatement and that a taxing unit and property owner could agree to defer the commencement of the abatement period to a date after the date the agreement is executed (**SB 1458/HB 3896** by Seliger/Oliveira).

5. The July Special Session: one of the shortest in history

On July 1, 2009, lawmakers convened in a short, two-day special session and unanimously passed bills on two of the three issues that the Governor requested action. First, legislators approved sales of \$2 billion of highway bonds previously approved by voters---\$1 billion of which will be used to make loans to local governments Second, legislators extended the lives of five agencies that would have expired in September 2010 absent legislative action—and rearranged the schedule for the Sunset review process of several other agencies.

The five agencies that were set to expire are *TxDOT*, *Department of Insurance*, the *Racing Commission*, the *State Affordable Housing Corporation*, and the *Office of Public Insurance Counsel*. In the regular session, these five agencies’ extension was a casualty of the Voter ID fiasco. The special session fixed this by extending these five agencies’ lives and by scheduling the unfinished areas of their Sunset reviews for the interim leading up to the next legislation session in 2011.

The special session legislation also rearranged the Sunset review schedules for several agencies, to balance the workload. Between now and the next legislative session in 2011, legislators and staff will study reforms to agencies responsible for (among other things) the environment, oil and gas, utilities, telecommunications, water, and workers compensation.

Neither the Senate nor the House had the desire to pass legislation on the Governor’s third issue: extending the authority for TxDOT to enter into “Comprehensive Development Agreements” with private companies to build toll roads on specific projects. Several lawmakers said this was not an urgent issue and could wait until the 2011 Session without doing harm to the state.