

AGC - Texas Building
Branch Report to the
Membership on the
82nd Texas Legislature



The 2011 Legislative Session: changes to the construction industry

by Corbin Van Arsdale
Vice President & General Counsel, AGC-TBB



1. The setting going into session

Governor Perry just came off re-election and was being spoken of as a potential candidate for US President. Lieutenant Governor Dewhurst also came off re-election and was privately discussing running for the US Senate after session. The Senate partisan split remained unchanged from 2009 (19 Rs, 12 Ds), with two new senators.

The House partisan split swung widely to the right, from 76 Rs and 74 Ds (2009) to 101 Rs and 49 Ds, with two party switchers and just under forty new House members. Many of these newly-elected House members were more conservative and swept into office by the Tea Party wave from the mid-term congressional elections. No one was predicting 101 Republicans, as most estimates were in the 83-87 range. The House re-elected Joe Straus as Speaker, and a general contractor and active AGC member, Paul Workman, was elected to the House in southwest Austin.

The overriding issues heading into session were a record-high \$25 billion deficit, redistricting responsibilities, and Sunset review of 28 agencies—including some of major importance. The consensus prediction was that the Session would be hard, strained, and even nasty—and it was. It even spilled over into an immediate full-length special session containing significant political and policy issues. Rather than the usual celebrations that follow the end of the session, this year exhausted legislators quietly and promptly returned to their districts, with little fanfare. Many retirements are expected.

2. The stats

Almost 6,000 bills were filed, of which 1,485 became law and 24 were vetoed.

3. Outcomes on general issues



Budget – HB 1 (Rep. Pitts/Sen. Ogden) – To fix the \$25 billion budget shortfall (which was the largest in Texas history), the Legislature passed massive spending cuts (\$15.2 billion), used some of the Rainy Day Fund, and kept taxes at the status quo. \$6.5 billion was left remaining in the Rainy Day Fund.

Guns - SB 321 (Sen. Hegar) allows concealed handgun licensees to store their firearms in their vehicles while parked on private property.

Eminent domain - SB 18 (Sen. Estes) makes changes that reform various aspects of the power of eminent domain and condemnation.

Lawsuit Reform - HB 274 “Loser Pay” (Rep. Creighton) helps with early dismissal of meritless lawsuits and allows for cases to be resolved more quickly and less expensively by reinforcing the offer and settlement provisions already in the code. Allows a judge to make a loser in a civil case pay legal fees for the prevailing side, and creates an expedited process for disputes under \$100,000. This bill does **not** require that the loser to a lawsuit pay the winner’s attorneys fees.

Election reform – Voters must now show a photo ID to vote, as required by SB 14 (Sen. Fraser), the Voter ID bill.

Redistricting – For the first time in twenty years, the Legislature successfully redrew maps for the House, Senate, Congress, and the State Board of Education. All 181 legislative seats will be up for re-election in 2012.

4. Outcomes on construction issues

Alternative delivery methods - HB 628 (Rep. Callegari)

This bill, in one form or another, passed the Legislature twice, was vetoed twice, was killed by Voter ID chubbing, and is now finally signed into law. This bill is the product of sixteen years of task force meetings by members of the Texas Building Branch of AGC, the Texas Society of Architects, Texas Council of Engineering Companies, and the Associated Builders & Contractors.

The bill takes the language regarding procurement and alternative delivery methods (Design-Build, Construction Management, Job Order Contracting, etc.) from the

Education Code, Local Government Code, and the Government Code and consolidates them into Chapter 2264 of the Government Code.

The bill applies to public junior colleges, but not to institutions of higher education. The bill specifically exempts TxDOT, regional toll-road authorities, regional mobility authorities, and local government corporations exempt from competitive bidding requirements under the Transportation Code Chapter 43, from the requirements of Chapter 2267. It prohibits reverse auctions in construction procurement.

The bill provides for certain reforms in how school construction defect cases are handled, notably requiring notice of such suits to the Commissioner of Education, an opportunity for the Commission to join in the action, and provides that recoveries on jobs receiving State funding must be used for repair on the funded project. Any net recovery not used for repairs must be returned to the State.

The law takes effect September 1, 2011, and will apply only to a contract or construction project for which a government entity first requests bids on or after that date.

Public-private partnerships (P3) - SB 1048 (Sen. Jackson)

Modeled after Virginia's Public Private Partnership law, this bill establishes a process under which governmental entities may contract with private entities to construct, finance, and operate a variety of facilities, including ports, pipelines, parking garages, hospitals, schools, and other public works. State highways are excluded.

The bill provides for solicited or unsolicited proposals. Before considering a proposal the governmental entity must adopt guidelines including criteria for selection, financial review, timeline, and other issues. A proposal may be approved if it is in the public interest, subject to the execution of a comprehensive agreement. The entity may contract with the private party for services to be provided in exchange for service payments. The contracting person has the power to develop the project, collect payments, and assess user fees approved by the governmental entity. The comprehensive agreement must address plan review, inspection, insurance, termination, lease payments, business terms, and other issues.

The contracting person is required to design and construct the project in conformance with design-build procedures in state law (Local Government Code, Education Code, etc.) and Chapter 2253 regarding bonding. The governmental entity and the contracting person must comply with the Professional Services Procurement Act. A Partnership Advisory Commission is created within the legislative branch to review proposals.



The law is not mandatory and exclusive. A public entity may enter into P3s if it has other statutory authority to do so. It does, however, provide a road map for the public entity that is unfamiliar with the process and wants to consider such a partnership.

The law takes effect September 1, 2011.

Indemnity – late amendment by Sen. Duncan of a scaled-back version of his indemnity compromise bill (SB 361) onto the CIP bill HB 2093 (by Rep. Thompson)

For almost the entire legislative Session, HB 2093 was simply a bill that sought to provide more transparency and uniformity to “consolidated insurance programs” (wrap policies) for construction projects. Notwithstanding much haggling among various groups, including carriers, large brokerage houses, general contractors, and public owner groups, compromise legislation finally emerged. Nothing earth-shaking. Its most important feature is to require all such policies to include completed operations coverage for no less than three years.

But in the closing days of the legislative Session, HB 2093 became quite controversial as indemnity legislation (taken from SB 362 / HB 2010) was added to the bill. The indemnity language added to HB 2093 was the result of the “mediated” compromise in 2009 between the Texas Building Branch-AGC, the Texas Construction Association, and the Texas Civil Justice League that voids “broad and intermediate” form indemnity and defense requirements, as well as Additional Insured coverage providing for broad or intermediate form indemnity, except in connection with employee bodily injury claims.

As we all recall, the legislation effort to enact this compromise language failed in 2009, primarily as a result of the late-hour “chubbing” in the House over Voter ID. The 2009 opponents (mostly public and private Owners and some large, individual contractors) were more vocal in 2011. The Texas Civil Justice League changed its staff leadership, dropped its support for the indemnity compromise, and reversed its position—becoming actively opposed. The indemnity bill easily passed the Senate, but as a result of the increased and more organized opposition, the legislation was tied up in House committee and effectively dead until it was scaled-back and amended onto the CIP bill (HB 2093).

To neutralize some opposition, the compromise indemnity language was changed to exclude city projects and residential construction. Also, joint defense agreements entered into after a claim has been filed was also added. The bill passed the House and, despite numerous claims of a guaranteed veto, the Governor signed the bill into law.

In a nutshell, HB 2093 does the following:

1. As a general rule, HB 2093 prohibits a person (the indemnitor) from indemnifying another person (the indemnitee) from claims or damages to the extent caused by the indemnitee's negligence. Indemnity clauses violating this prohibition will be void and unenforceable. This general prohibition applies to both claims arising from the indemnitee's sole negligence (which is "broad form" indemnity) and the indemnitee's partial negligence (which is "intermediate form" indemnity).
2. The general prohibition extends to obligations to defend claims (other than "joint defense agreements" entered into *after* a claim has been asserted). In other words, the contract cannot require an indemnitor to "defend" the indemnitee for claims based upon the indemnitee's negligence. The practical problem with this restriction on the defense obligation is that the decision to defend must be made before there is any finding of fault. Accordingly, this will mean that everyone will have to hire their own lawyers (which is often the case in the real world... especially for larger claims).
3. Additional Insured endorsements to an indemnitor's liability insurance policy that purport to provide coverage to an indemnitee for its sole or partial negligence are also void and unenforceable. This means that the currently available Additional Insured endorsements that provide coverage for the indemnitee's partial negligence, so long as the claim arises from the indemnitor's work, will no longer be enforceable in Texas. It is very likely that ISO will prepare specific Additional Insured endorsement forms for Texas (but see # 4 below).
4. The restrictions on indemnification (both with regard to claims and defense of claims) and on Additional Insured endorsements do NOT apply to on-the-job employee bodily injury claims. Accordingly, an indemnitee can still make the indemnitor defend and indemnify the indemnitee for its sole, as well as partial, negligence for a personal injury claim by an employee of the indemnitor (or its subcontractors). This means that the current broad or intermediate form Additional Insured endorsements will still be enforceable in Texas for on-the-job personal injury claims.
5. While HB 2093 does restrict Additional Insured endorsements, parties can still obtain insurance to cover these risks. A "consolidated insurance program" (such as an OCIP or CCIP) can provide coverage for all named insureds (which really serves the same purpose as an Additional Insured endorsement to one party's insurance policy). Additionally, Owners can purchase an Owners and Contractors Protective Liability policy. This policy is often furnished by the Contractor through its CGL insurer, but it is a separate policy protecting the Owner from bodily injury and property damage claims arising out of ongoing operations performed for the Owner by the Contractor on a construction project and for the Owner's acts or omissions in connection with the "general supervision" of those operations. While it does not provide "completed operations coverage", it does cover the Owner's risk from "vicarious" or "derivative" liability claims arising from the ongoing work of the project. OCP policies are currently affordable and commercially available.

Over the course of the next few weeks, quite a lot will be written about HB 2093 and how it will impact the construction industry and the risk profile for Owners, General Contractors and Subcontractors. HB 2093 takes a surprisingly simple approach to the very complex issue of indemnity. It will remain to be seen if the approach works well.

This law takes effect January 1, 2012 for CIPs for projects that begin on or after the effective date and for “original contracts” (and their subcontracts) entered into on or after the effective date.

School background checks - HB 398 / SB 1042 (Sen. Hegar / Rep. Jackson) – BOTH identical bills were signed!

In 2007, the 80th Legislature passed SB 9, which among other things, required background checks for teachers, administrators, other school employees, and employees, and employees of businesses that contract with school districts. One unintended consequence of this portion of the bill was that subcontractors were not required to check the background of their own employees, but general contractors were responsible for checking the background of both their own employees and the various subcontractors' employees. This created practical problems and also legal problems, with one employer being responsible for, and having access to, another employer's employee criminal background information.

In 2009, an amendment to correct the problem was added to the Department of Public Safety of Texas (DPS) Sunset bill (HB 2730). The Senate passed the DPS Sunset bill with this amendment. Due to a drafting error, the amendment created an unintended consequence by referencing the section for teacher background checks, instead of the section for non-teachers. These bills correct this.

This law takes effect September 1, 2011.

Retainage notices - HB 1390 (Rep. Deshotel)

Most practitioners would agree that the most complicated part of the Texas mechanic's lien laws has to do with the interplay between “statutory retainage” (which is somewhat unique to Texas law) and “contractual retainage” and the often misunderstood procedures for perfecting claims against those different types of retainage. For better or worse, HB 1390 makes significant changes in the statutory requirements for perfecting claims against both “statutory retainage” and “contractual retainage.”



Currently, the deadline for a derivative claimant (a claimant other than an original contractor) to give a notice of contractual retainage is the 15th day of the second month following the first delivery of materials or performance of work after the claimant has agreed to the contractual retainage. Because of the early notice requirement, many subcontractors and suppliers fail to timely perfect lien claims for the contractual retainage withheld from their monthly progress payments. By the time many claimants realize that there might be a problem with the payment of their contractual

retainage, it is often too late to perfect a claim for most of that retainage.

Even if a notice is properly and timely sent under the current statute, claimants often lose their lien rights because they wait to file their lien affidavit within the extended time period permitted under Section 53.052 of the Texas Property Code (15th day of the 4th month after the claimant's indebtedness accrues). Because a notice of contractual retainage typically does not include "fund-trapping" language, the lien affidavit often perfects a claim limited to the "statutory retainage" the owner was required to withhold. If the owner has properly withheld statutory retainage for at least 30 days after final completion and has closed out the project before the claimant files its lien affidavit, the claimant may end up with a "timely" but a worthless lien claim.

HB 1390 attempts to address both of these major problems for claimants. With regard to the notice of contractual retainage, HB 1390 extends the preliminary notice deadline by moving it to the 30th day after the claimant's work is completed, terminated or abandoned or the original contract is terminated or abandoned (whichever occurs first). Under current law, many claimants were required to send the notice before any significant work was done under their subcontract. Now, they can wait until their subcontract is complete (or the original contract has been terminated or abandoned) before sending the notice.

Because the preliminary notice will still not be a "fund-trapping" letter (arguably, a claimant could include "fund-trapping" language but most claimants will elect not to do so because of the problems it causes for owners and contractors in managing progress payments), claimants still have the problem of meeting the early deadline for filing a lien affidavit before the owner has paid out the statutory retainage (i.e., 30 days after completion of the original contract).

HB 1390 addresses this problem by creating an exception to the early lien filing requirement for statutory retainage. If a claimant has properly and timely sent its notice of contractual retainage, the claimant does not have to file its lien affidavit to meet the early statutory retainage deadline. It can wait until the end of the extended period set out in Section 53.052. But that period can be cut short as follows:

1. If an owner files an affidavit of completion and the owner sent a copy of the affidavit to the claimant within the time and in the manner required under Sec. 53.106, the claimant must file its lien affidavit within 40 days after the date of completion stated in the affidavit;

2. If an owner sends a notice relating to termination or abandonment of the original contract to the claimant within the time and in the manner required under Sec. 53.107, the claimant must file its lien affidavit within 40 days after the date of termination or abandonment stated in the notice; or

3. If an owner sends a written notice of demand for the claimant to file its lien affidavit within the time and in the manner required under the newly added Sec. 53.057(g), the claimant must file its lien affidavit within 30 days after the owner sent the notice to the claimant.

Obviously, this is all very complicated. However, HB 1390 addresses very complicated issues and is based upon an underlying logic that does make some sense. An owner can still have the benefit of an early close-out of the project by complying with the statutory retainage requirements. The close-out period does get extended by 10 days in most situations (as a practical matter it now becomes 40 days instead of 30 days after final completion).

HB 1390 also extends the period an owner can safely pay out statutory retainage with regard to those subcontractors who send timely notices of contractual retainage (those claimants could have a lien on the statutory retainage by waiting the full period for filing their lien affidavit -- which could be several months after completion); however, it gives the owner the ability to send a written demand to a claimant who has sent notice to require the claimant to file the lien affidavit early or lose its claim. This gives the owner a tool for getting all claims on record so they can be paid or bonded around within 40 days after the completion of the project. If the owner complies with the statute, it still gets almost the same protection for early close-out of the project as exists under current law.

HB 1390 amends Section 53.105 to make it clear that a claimant does have a lien on statutory retainage if the owner does not comply with the statutory retainage requirements and the claimant complies with the lien perfection requirements in Subchapter C (*i.e.*, filing the affidavit within the extended lien filing deadlines).

*****Given the complexity of the issues and this legislation, it is recommended that all contractors and their attorneys spend some time reviewing the changes in HB 1390 before it goes into effect.*****

This law takes effect for claims arising under original contracts entered into on or after on September 1, 2011.

High-performance, sustainable-design building standards - HB 51 (Rep. Lucio III)

This bill requires the adoption of energy-efficiency standards for certain state-owned buildings to align with high-performance design, construction, and renovation standards. The bill applies to new state buildings and to renovations for which the cost exceeded 50% of the value of the existing facility. These standards will be set by the Texas Facilities Commission through an advisory committee and will apply to institutions of higher education, public education instructional facilities, and certain state agencies. The Texas Department of Criminal Justice and the Texas Youth Commission are exempted.

The standards must:

- be developed by a municipally-owned utility or a nationally recognized consensus-based process;
- provide minimum requirements for energy use, natural resources use, and indoor air quality;
- require documentation for certification;
- require a third-party review; and
- encourage the use of Texas materials.

This law takes effect September 1, 2011. These standards and requirements will apply only to facilities for which a contract for design services was entered into on or after September 1, 2013.

Change order approval for certain public projects - HB 679 (Rep. Button)

Raises change order threshold to \$50K for certain local governmental entities (including water districts) and allows for the delegation of such change order approval to a designated employee.

This law takes effect September 1, 2011.

Lien waiver forms - HB 1456 (Rep. Orr)

This bill adds a new Subchapter L entitled “Waiver and Release of Lien or Payment Bond Claim” to Chapter 53 of the Texas Property Code. It provides for statutory forms for waiver and release of mechanic’s liens and payment bond claims, both conditional (upon receipt of payment) and unconditional (full and final). In order for a waiver and release to be effective, the form of lien waiver and release must be in substantial compliance with the statutory forms.

Four statutory forms have been created:

- (a) Conditional Waiver and Release on Progress Payment;
- (b) Unconditional Waiver and Release on Progress Payment;
- (c) Conditional Waiver and Release on Final Payment; and
- (d) Unconditional Waiver and Release on Final Payment.

The difference between “conditional” and “unconditional” is that a “conditional” waiver and release may be given prior to actual receipt of payment (i.e., it is conditioned upon a payment to be made). When using a “conditional” waiver and release, the form must specifically reference the specific payment to be made. It cannot be used to require a claimant to provide a blanket waiver of its lien rights prior to a specific, promised payment.

The statute expressly prohibits contractual waivers of lien rights except for contracts for labor or for labor and materials (but not materials-only contracts) for construction or “land development” of residential (single-family, townhouse or duplex) projects.

A party seeking a release of a perfected lien or bond claim will not have to use the statutory forms.

A last minute amendment was added in the Senate which was totally unrelated to waivers and releases. It amends Section 53.021(d) of the Texas Property Code with regard to the lien rights of persons providing landscaping services. Currently, in order to have a statutory lien, the claimant must have had a written contract with the owner or its agent. This effectively precludes subcontractors from being able to perfect mechanic's liens for those services. HB 1456 amends that language so that the written contract can be with a contractor or subcontractor. In other words, subcontractors furnishing landscaping services will be able to perfect statutory mechanic's liens.

This law takes effect for contracts entered into on or after effect on January 1, 2012.

Certificates of insurance - SB 425 (Sen. Carona)

This bill adds Chapter 1811, entitled "Certificates of Property and Casualty Insurance," to the Texas Insurance Code. It requires forms for Certificates of Insurance for property and casualty coverage to be approved by the Texas Department of Insurance ("TDI"). Standard ACCORD and ISO forms will be deemed approved by TDI.

The statute clearly points out that a Certificate of Insurance is not a policy of insurance and does not alter, amend, or extend coverage afforded by the referenced policy. It further provides that a property and casualty insurer or agent may not issue a Certificate of Insurance that purports to alter, amend, or extend the coverage or terms and conditions of an insurance policy. It expressly provides that a Certificate of Insurance may not purport to give a person the right to notice of cancellation, nonrenewal, or material change with regard to the policy unless that person is named in the policy or an endorsement to the policy and the policy or endorsement requires such notice to be given to that person.

Third parties are prohibited from requiring insurers or agents to issue any document or correspondence that is inconsistent with statutory conditions and limitations with regard to Certificates of Insurance. There was House floor debate (i.e. legislative intent) that made it clear that a party is not prohibited from requiring the insured to furnish copies of the actual policy of insurance and the endorsements.

Persons violating the statute are subject to a civil penalty of up to \$1,000 for each violation.

This law takes effect September 1, 2011 and is effective for certificates of insurance issued on or after January 1, 2012.

Attorneys' fees on lien and bond claims - SB 539 (Sen. Carona)

This bill amends Section 53.156 of the Texas Property Code by changing “may” to “shall” with regard to a court’s award of costs and reasonable attorney’s fees in a proceeding to foreclose a lien, enforce a payment bond claim, or declare a lien or claim to be invalid or unenforceable. A court still has wide discretion to determine what amount of costs and fees would be “equitable and just.” Homebuilders are exempt.

This law takes effect September 1, 2011 and apply to suits filed on or after that date.

Ban on ISDs building hotels - SB 764 (Sen. Williams)

This bill prohibits a school district from imposing taxes, issuing bonds, or authorizing the use of school district employees or school district property, money, or other resources to acquire property to build and operate a hotel. The bill also seeks to prohibit a board of trustees of an independent school district from entering into any type of lease agreement for hotels. The bill was largely in response to a Beaumont ISD hotel project.

This law has already taken effect.

Wage theft – SB 1024 (Sen. Rodriguez)

This bill addresses instances when employers fail to pay workers their promised wages. The bill amends current law to maintain that a person commits theft of service if, with intent to avoid payment, that person fails to make full payment after receiving notice demanding payment if the compensation was to be paid periodically. The intent to avoid payment for a service may be formed at any time during or before a pay period, and the partial payment of wages alone is not sufficient evidence to negate the actor's intent to avoid payment for a service.

This law takes effect September 1, 2011

Purchasing co-ops

This hotly-fought issue almost gave the alternative delivery bill its fourth death. This issue became a lightning rod on several bills and will be a big issue in the interim and for the 2013 Session. The use of interlocal agreements to purchase construction services thru co-ops is a murky, largely unregulated practice. More transparency and protections are needed. HB 628, HB 800, SB 1811, and SB 1 (special session) were all affected in the process.

State breach of contract (sovereign immunity)

This legislation got one step from the Governor's desk, more than once, thanks to Rep. Paul Workman's dogged efforts in amending his bill (HB 1041) onto two crucial bills, SB 1811 (regular session) and SB 1 (special session). Also, AGC members mobilized to make numerous calls and contacts with legislators, which significantly advanced the issue for the next session. Sen. Duncan figures prominently on this issue—as the chair of the relevant committee (Senate State Affairs), as a member of the budget-writing committee (Senate Finance), and as the legislator for Texas Tech. We made large in-roads with him on this issue, and are considering alternatives ranging from outright suits, to mandatory arbitration, to lifting the \$ caps in the SOAH process.

5. Issues pushing to the surface for the interim and 2013 Session

- Taxes/school finance – a school lawsuit is imminent; an even larger shortfall is expected due to deep forthcoming federal spending cuts, some of which will be passed thru to states
- Remedy for State breach of contract (i.e., sovereign immunity)
- Portability of school background checks
- Co-op purchasing through interlocal agreements – needs sunlight and protections
- CIPs – changes in indemnity will push this issue to the forefront for OCIPs and CCIPs
- Workforce development – Houston initiative
- Workers Comp
- Statutory employer
- Misclassification of workers – is generating negative media coverage

6. In closing

One point that deserves mention is that AGC-TBB and the various other construction/infrastructure trade associations worked collaboratively to solve problems, and maintained good relations—in spite of sometimes passionate, intra-industry disagreement. The industry was served well by how contractors and their government affairs representatives conducted themselves towards one another during a heated legislative session.

Also, special thanks goes to the following attorneys for their help (unpaid!) in negotiating these issues, drafting the legislation/amendments, and reporting the results (some language which is included in this report):

Robert Bass (he's in private law practice)
Steve Nelson (he's a surety)
Tom Vaughn (he's a GC)

It's hard to convey the special recognition these guys deserve for their work. As a team, they simply intellectually outgunned just about everyone they encountered in the Capitol – legislators, lobbyists, staffers, and trade associations alike – solving complicated problems at every turn. It was fun to watch them in action, as they bent our opponents' opinions—and earned their respect in the process.

There are too many people within the AGC family to name who helped fabulously and sacrificially to make this a successful session. Our TBB Executive Committee members, Board members, Legal Affairs members, Chapter Executives, and individual contractor members were always ready to drop everything and help—and not a single time failed to do so. Not even once. You all know who you are, and so do we.

Michael J. Chatron - President

Corbin Van Arsdale - Vice President and General Counsel

Teresa Garza - Executive Assistant

Wade Long – Lobbyist

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