



AGC-Texas Building Branch Legislative Report July 2015

1. The weeks leading up to the 2015 Session

The tone for the session was set by an amassed stockpile of oil and gas tax revenues and two elections: the general election in November (which gave us a slew of new statewide officials and several new conservative senators) and the House speaker's election in January 2016—which for the first time that anyone can remember forced House members to cast divisive votes on the floor for speaker in an already-determined outcome. Those new senators immediately scrapped that body's longstanding tradition of the “two-thirds rule” required to bring bills up for a floor vote, in favor of the less stringent (and more partisan) “60-percent rule.”

In early January, new Comptroller Glenn Hegar issued his \$113 billion revenue estimate for 2016-2017, an 11-percent boost from the previous biennium. That figure set the stage for a session-long debate over cutting taxes and fulfilling state needs, all while uncertainty grew over dropping oil prices. House and Senate leadership pushed competing tax-relief packages, and Gov. Greg Abbott vowed to veto a budget unless it provided business tax relief. The governor also staked out his top five initiatives – ethics reform, pre-kindergarten expansion, transportation, border security, and higher education research funding.

In an 84th Texas Legislature populated by hot button issues like gun rights, border security, transportation and ethics reform, the construction industry quietly collected some huge victories. Those wins for contractors primarily came in the form of billions of dollars in new work, economic development and tax savings. The final adopted budget of \$209.4 billion (including federal funds) increased spending by 3.6 percent over the budget for the current biennium. The Legislature did not bust its constitutional “spending cap,” and left more than \$6 billion in the bank, along with an estimated \$11 billion the comptroller expects to be in the state's “Rainy Day Fund” by August 2017.

Overall, this session saw the most bills filed (6,276 total) since 2009, but the fewest passed and sent to the governor (1,323 total) since 1995. The deadline for the governor to veto bills has passed, however, the validity of some budget item vetoes, including \$260 million in state facilities funding, is still being contested.

2. On a humorous note, titles of bills actually filed in the 2015 Session

- Relating to a prohibition on ownership, control, or management of the Alamo complex by a foreign entity
- Relating to the establishment of an unmanned aircraft program in the office of the governor

- Relating to a provisional license to practice funeral directing or embalming
- Relating to the secure confinement of certain children
- Relating to prohibiting the reidentification of certain deidentified information and the release of reidentified information
- Relating to the tasting of alcoholic beverages by students enrolled in certain courses
- Relating to the use of a credit or charge card by certain state agencies to make certain purchases
- Relating to the use of fireworks at certain Texas Department of Transportation rest areas
- Relating to the naming by the Texas Historical Commission of certain areas without historical value that are on historic sites
- Relating to the operation of a golf cart or utility vehicle on a public highway in certain counties
- Relating to a written agreement concerning a projectile that travels across a property line
- Relating to abolishing shampoo apprentice permits
- Relating to adult day care
- Relating to the deregulation of hair braiding
- Relating to the planning and funding of water projects to be constructed in a region other than the region proposing the project

3. AGC-TBB activities in the 2015 session

AGC-TBB Legislative Day (March 12) – More than 120 contractors from across the state showed up at the Capitol to champion key construction industry causes, with a focus on higher education construction funding, breach of contract fixes, and statute of repose reform.

Legislative Day attendees met with several lawmakers’ offices and were personally visited as a group by new Lt. Gov. Dan Patrick, new Texas Facilities Commission Executive Director Harvey Hilderbran, nearly two dozen legislators, and several members of legislative staffs.

AGC-TBB Student Day (April 9)



Comptroller Glenn Hegar’s Business Advisory Group (ongoing) – Comptroller Hegar selected Corbin Van Arsdale, AGC-TBB Vice President and General Counsel, to be a member of the group that will meet periodically to help develop state tax policy.

AGC-TBB met regularly with several groups in session, including ABC of Texas, Texas Construction Association, Texas Building & Construction Trades, Texas Business Roundtable, Texas Taxpayers and Research Association.

4. Successful session yields billions of dollars in commercial projects for Texas contractors

A. Capital Funding

While the session was dominated by talks of tax relief to the tune of roughly \$4 billion, the discussion also revolved around a call for lawmakers to address the state's needs in many areas. That meant big money for state facilities, namely through the Texas Facilities Commission. With the passage of the 2016-17 budget, Texas is poised to see roughly \$1.7 billion in the construction of new buildings and repair of aging structures over the next two years. The lion's share of construction funding is contained in the budget for the Facilities Commission, which was granted \$1.34 billion in its total budget for the next two fiscal years. That figure is a more than 600-percent boost from its current budget of \$187.9 million. About \$160 million of that funding could be in jeopardy since the governor vetoed funding for three state projects, however, the validity of those vetoes is being contested by leaders in the Legislature.

Most of the Facilities Commission funding (via revenue bonds) - \$983.6 million - is set aside for construction of new state buildings. The rest of the funding - about \$217 million - is dedicated for health and safety and deferred maintenance projects at state facilities, along with an additional roughly \$20 million for emergency repairs in the current budget. Other state departments receiving deferred maintenance funding include Transportation (\$200 million), Parks and Wildlife (\$91 million), Criminal Justice (\$60 million), Public Safety (\$21 million), Military (\$19.5 million), Historical Commission (\$825,000). Deferred maintenance funding, though approved in the budget, will need to be approved by a joint oversight committee made of three House members appointed by the speaker and three Senate members appointed by the lieutenant governor. The members will assign funding and reporting facilities updates to the Legislature.

B. Campus construction funding

Texas contractors will see \$3.1 billion in construction projects at public universities over the next two years under the Legislature's approved budget. This successful push was in dire need this session, as such a package had not passed since 2006. The final piece of approved legislation - House Bill 100 - easily passed the House and Senate earlier in the session. However, the bill came to a standstill late in the session over a debate on the levels of funding.

Ultimately, the two versions of funding were worked out by a 10-member conference committee led by Rep. John Zerwas (R-Richmond) and Sen. Kel Seliger (R-Amarillo). The final version, which funds 64 projects across the state with each capped at \$90 million, has been signed by Gov. Greg Abbott and becomes effective Sept. 1, 2015. The tuition revenue bond (TRB) funding came at a crucial time, as state colleges have been searching for funding to squeeze increasing enrollments into aging facilities. Legislators



have not approved such a deal since 2006 when \$1.9 billion was bonded, though they came close last session only to see the measure fail at the last minute. Less than \$5 billion in TRB's has been authorized since the practice began in the 1970's, making this session's more than \$3 billion in funding especially significant.

5. Tax cuts give businesses big-time relief

The extraordinary revenue influx the state saw this session made tax relief a top initiative. While both chambers agreed on some form of relief from the state business franchise tax, the Senate plan to reduce property taxes was pitted against a call in the House to cut the state sales tax. The tax battle put several other funding measures on hold and meant a budget could not be finalized until tax cuts were resolved. Eventually, the two sides compromised on a 25 percent across-the board cut to the franchise tax coupled with a \$10,000 increase in the homestead property tax exemption, saving homeowners about \$125 per year on tax bills.



The franchise tax-cut measure, which Abbot signed into law, will save Texas businesses more than \$2 billion over the next two years and allow more businesses to use a simplified method of computing what they owe under the tax. The bill raises the revenue threshold on the flat-rate portion of the tax from \$10 million to \$20 million, meaning businesses with revenue levels over \$1 million and up to \$20 million can claim a lower tax

rate of 0.331 percent. Businesses with revenue under \$1 million will still avoid the tax altogether. The final version of the bill - which passed 137-8 in the House and 26-5 in the Senate - adopts House language that called for the 25-percent cut, rather than the 15-percent cut contained in the Senate tax-relief package.

6. Other construction issues with definitive change

Contracting transparency – As a result of scandals revealed within state agencies such as the Health and Human Services Commission early in the session, ethics reform became a top priority for Gov. Greg Abbott. Three major contracting reform bills passed.

SB 20 by Nelson is the omnibus state contracting bill that mandates additional oversight for state agencies. It requires agencies to post a list of contracts on its websites, including no-bid contracts before selection of the contractor. For larger contracts, the law will require additional disclosures and reporting requirements and express approval by the governing body of the contracting state agency. Agency employees and officials involved in contracting or management of contracts will be subject to strict conflict of interest prohibitions and disclosure requirements.

HB 23 by Sarah Davis mandates the disclosure of business and family relationships between local government officials and contractors. It lowers the threshold for disclosure of gifts to an official over a 12-month period from a contractor or other vendor from \$250 to \$100.

HB 1295 by Capriglione requires contractors entering into a contract with a local government entity or state agency, including colleges and universities, to submit a disclosure of interested parties form when those contracts exceed \$1 million or require action or a vote by the entity or agency's governing body. The disclosure form sets out those with controlling interests in the contractor and those who actively participate in facilitating or negotiating the contract on behalf of the contractor, including brokers, attorneys, and advisers.

Economic Development

P3's – HB 2475 by Geren establishes the Center for Alternative Finance and Procurement within the Texas Facilities Commission to assist governmental entities in the receipt of proposals, negotiation of agreements, and management of qualifying public-private partnership (P3) projects. The bill is intended to provide an "objective resource" for lawmakers and governmental entities when deciding whether to use alternative financing methods. The bill also prohibits "unsolicited proposals" from private entities for P3 projects.

Large data centers – HB 2712 by Geren provides a 20-year state and local sales tax exemption for the purchase of items necessary to operating data centers that qualify. Principal requirements include a five-year capital investment of \$500 million; a new or refurbished building facility of at least 250,000 sq. ft. that may include multiple buildings; and creation of at least 40 new full-time jobs paying at least 120 percent of the average county wage.

EDC's – HB 2772 by Armando Martinez expands the definition of an economic development corporation project to include transportation facilities, including land, buildings, infrastructure, facilities and improvements.

Insurance & Liability

Construction manager-at-risk – HB 2634 by Kuempel prohibits a governmental entity's architect or engineer from serving as a construction manager-at-risk, whether alone or in combination with another person. It also prevents entities related to the governmental entity's architect or engineer from being the construction manager at risk, meaning any entity in which the architect or engineer has an ownership interest or from which the architect or engineer has a right to receive any proceeds from payments to the construction manager-at-risk or that is a subsidiary or parent of or partner with an architect or engineer.



Duty to Defend – HB 2049 by Darby removes from law the obligations of architects and engineers to defend local governments and limits their obligation to repay local governments for liability from negligence or fault. The bill also allows local governments to be insured on the architect or engineer's general liability policy and establishes a standard of care for architects and engineers to perform services.

Texas Windstorm Insurance Act – SB 900 by Larry Taylor overhauls TWIA by making several changes to funding, board structure and representation stipulations. Under the bill, insurance companies, coastal residents and inland residents would each have three representatives on the association's board. Payouts for catastrophic storms would come from a mix of premiums, public securities and a catastrophe reserve trust fund.

Miscellaneous

Cooperative Contracts

SB 1281 by Zaffirini allows a local government to participate in a cooperative purchasing program with another local government of this state or another state or with a local cooperative organization of this state or another state.

HB 3342 by Kuempel authorizes the Texas Facilities Commission (TFC) to enter into one or more compacts, interagency agreements, or cooperative purchasing agreements directly with one or more state governments, agencies of other states, or other governmental entities or to participate in, sponsor, or administer a cooperative purchasing agreement through an entity that facilitates those agreements for the purchase of goods or services. This bill excludes the purchases of engineering or architectural services.

Licensing Fees – HB 7 by Darby gets rid of hundreds of dollars of annual licensing fees for dozens of Texas professions including engineers, architects, and attorneys. Each of the 16 professions will see their annual fees reduced by at least \$200. In addition, some professions, including engineers, will also see reduced fees for renewing licenses that have already been expired for a certain time frame. The legislation also lowers from 2 percent to 1.5 percent the surcharge the state charges for the sale, lease or rental of used and new "off-road, heavy-duty diesel equipment."



Immigration – SB 374 by Schwertner requires state agencies and public universities to vet new employees by using the federal electronic verification of employment authorization program, or E-verify. The verification applies to new hires only and does not apply to independent contractors doing business with state agencies. The Texas Workforce Commission will adopt rules and prescribe forms to implement the program.

Condo defect claims – HB 1455 by Phil King applies to actions brought forth by condo unit owner associations for construction defect or design claims for condo regimes having eight

or more units. The law requires condo owners be notified of such defect claims and requires a majority vote of owners before actions initiated by the association can proceed. It also requires a third-party inspection and opportunity to cure the defects.

Municipal contracting – SB 810 by Seliger allows school districts and municipalities located wholly or partially in a county in which the district is located to contract with district resources to pay a portion of costs for design, improvement or construction of an instructional facility, stadium or athletic facility that is owned by, controlled by or on the property of the municipality.

Texas Mobility Fund – HB 122 by Pickett prohibits the Texas Transportation Commission from issuing obligations for certain highway and mobility projects under the Texas Mobility Fund after 1/1/15. The bill allows TTC to issue those obligations if TTC or TxDOT requires toll roads to be included in a regional mobility plan for a local authority to receive an allocation from the fund. The measure also allows TTC to issue obligations to refund outstanding obligations to provide savings to the state and issue outstanding variable rate obligations.

State Office of Administrative Hearings (SOAH) – HB 2154 by Dutton authorizes a SOAH judge to dismiss a default case and remand it to the referring agency for informal disposition as long as it is not a case in which the administrative judge is authorized to make a final decision. The bill also continues tax hearings at SOAH, removes the separate sunset date for these hearings, and removes outdated statutory provisions that give the perception of undue influence by the comptroller in these hearings.



7. Issues that progressed, but did not pass

Local bidder place of business – SB408 by Rodriguez would have allowed counties to give local preference to bidders located in the county, a maneuver already granted to cities and other municipalities. The bill passed both chambers but was vetoed by the governor.

Worker's comp. "wrap" insurance – HB 1668 by Workman would clarify current law saying when an independent contractor may be treated as an employee for workers' compensation purposes under a "wrap" insurance program. This bill survived the House committee process but was ultimately killed by a technical "point of order" on the House floor.

Breach of contract (sovereign immunity) cleanup – HB 1124 by Workman would make the state statute consistent with the breach of contract statutes of counties and local governments. The legislation would have, among other things, removed requirements that: claims must be based on the breach of an "express provision" of the contract; claims for delay or acceleration caused by an owner and claims to recover attorney's fees must be expressly authorized by the contract; additional work claims must be based solely upon a written change order. The bill also would have removed the \$250,000 threshold for claims to proceed under Chapter 114 (claims

below the threshold must currently go through the State Office of Administrative Hearings, or SOAH). The bill ran out of time sitting on the House calendar when the deadline hit but was revived as a floor amendment, where it received overwhelming support on a record vote by House members. But ultimately that amendment failed to survive the conference committee process, where all non-author amendments were stripped.

Large-risk insurance exemptions – HB 1132 by Workman increases the minimum monetary thresholds on an insured's total insured property values, total annual gross revenues, and total premiums for large-risk exemptions. This bill overwhelmingly passed the House with 138 favorable votes but was held up in the Senate committee process.

County fire codes – HB 684 by Sheets would allow counties of any size to adopt a fire code. This bill passed the House with 81 votes but was stopped short in the Senate committee process.

8. Possible additional issues for 2017 session

Breach of Contract (Sovereign Immunity) – Seeking additional cleanup language in the state code (described above) to put state statute in line with local governments.

Trust Fund Retainage – Legislation was filed to address the perceived inequity caused by the virtual inability to recover retainage withheld by an owner from the contractor in the event of foreclosure of a prior-perfected security interest in the property on which the improvements were constructed. Legislation was filed this session and in previous sessions to include withheld retainage (statutory and contractual) in the law's definition of trust fund, requiring owners to deposit withheld retainage in a separate trust (or escrow) account to be available for the contractor and its subcontractors prior to payments of the owner's other debts.



Lender Notice of Owner Default – Legislation was filed this session as in previous years to require a construction lender to notify the contractor of any owner default under the construction loan and the decision by the lender to accelerate the loan or seek foreclosure. This would give the contractor and subcontractors the right to suspend work until receiving proper assurances of payment.

Statute of Repose - This recurring legislative issue involves reducing the liability of contractors and design professionals arising from latent construction and design defect claims brought years after the completion of construction. This year's legislative effort focused on reducing the statute of repose from 10 to six years, placing Texas in line with most other states, or reducing the actual liability by 10 percent each year following completion of the project. The focus next session may be on requiring express notice and the right to cure any defect prior to bringing action for a latent construction or design defect.

Worker Misclassification - Workers in Texas continue to face problems with being labeled as “independent contractors” in order to avoid laws requiring statutory worker's compensation

insurance on public works projects. Legislative efforts to increase the penalties and impose new requirements were unsuccessful this session but could reemerge in 2017.

Mechanic's Lien Law Revision - A group of attorneys are expected to resume meeting on this issue. The attorneys were appointed by several construction industry groups last year and had been meeting as a working group to draft a new lien law based on a preliminary notice system. The draft circulated by the group included a number of significant open issues that could not be resolved by the end of the 2015 legislative session, and efforts have been put on hold.

School finance – The Texas Supreme Court this fall will hear the state make its case on more than \$5 billion it cut from school finance in 2011, possibly forcing the state to find new funding for schools in the form of taxes. While the state is counting on funding hikes from this session to bolster its case against more than 600 school districts, a lower court ruled last year that the school finance system is unfair, inadequate and unconstitutional. The state appealed the Travis County district judge's ruling last August and will have its case heard Sept. 1.

School background checks – Seeking a uniform standard to be applied across the board to create a uniform system of checks, including portability. Currently, school districts vary widely in their implementation and enforcement of state requirements.