



AGC – Texas Building Branch

Legislative Report

July 2013

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1. *Events leading up to the 2013 session*

Two of the state's Big Three leaders spent the interim running for federal office and losing in dramatic fashion, Governor Perry for President and Lt Governor Dewhurst for US Senate. The third, Speaker Straus, defeated a weak challenge from a sophomore legislator, fueled mostly by third-party groups outside the House chamber who were disgruntled over a similar, failed Speaker challenge from the 2011 Session.

The redistricting court battles repeatedly delayed the 2012 Primary elections, resulting in little time and attention for a true legislative interim.

The 2012 General elections resulted in roughly the same partisan split (2-1 Republican majority) for both the Senate and the House. The Senate welcomed 6 new senators (out of 31 senators), and the House welcomed 41 new members (out of 150), meaning roughly half the House was either a first- or second-term member.

The result of the above factors was that fewer "industry issues" (construction and otherwise) came to concrete resolution during the 2013 session, though progress was made on several.

Before the 2013 session, AGC-TBB spent the bulk of the interim working on the COGS issue with the Comptroller's office and other trade associations. In late 2012 TBB also had informal, back-channel discussions with higher ed systems, state agencies, and key legislators over concepts for state breach of contract legislation.

In stark contrast to the 2011 session, the Legislature did begin the 2013 session with a budget surplus and \$8 billion in the Rainy Day Fund.

2. *Sample titles of bills actually filed in the 2013 session*

Relating to honesty in state taxation

Relating to the creation of a commission to study drowsy driving

Relating to the regulation of dangerous wild animals

Relating to the applicability of massage therapy licensing requirements to a person employing certain muscle activation techniques

Relating to the sale and purchase of shark fins or products derived from shark fins

Relating to the punishment for the offense of theft of an alcoholic beverage

Relating to the regulation of big cats and nonhuman primates

Relating to the establishment of the veterinarian-client-patient relationship

- Relating to substituted service of citation through a social media website
- Relating to the use, sale, purchase, or possession of a license plate flipper device
- Relating to creating the offense of voyeurism
- Relating to the creation of a game animal meat safety task force
- Relating to authorizing certain current and former members of the state legislature to conduct a marriage ceremony
- Relating to the deregulation of weather modification operations
- Relating to liability for injuring a trespassing sheep or goat

3. AGC-TBB activities in the 2013 session



TBB held first-ever joint legislative reception with other construction associations, including ABC, TCA, and Homebuilders. Invitees were legislators, statewide officials, and high-level staff of Gov, Lt Gov, and Speaker. Over 50 legislators attended.

TBB Legislative Day – focused on state breach of contract

TBB Students Day

4. Two huge construction issues that succeeded

A. COGS (margins tax)

High profile, ongoing issue with Comptroller’s office over whether supervisory labor, per diem, travel, and other federally-deductible items are deductible under the state margins tax. Virtually every contractor in Texas deducted these items 100% in calculating their margins tax for the 2008, 2009, 2010, and 2011 tax years. A bar on deductions for these items would double-to-triple a contractor’s franchise tax, and apply it retroactively to 2008.

AGC-TBB successfully organized and led a coalition of trade associations, including ABC, TCA, and the Homebuilders. We hired tax consultant Karey Barton and drew others into our efforts, including AGC Highway, Leo Linbeck, Jr., and Bob Perry. These efforts led to all contractors undergoing tax audits to have their audits halted pending resolution. More importantly, these efforts led to a new COGS Rule §3.588, which became effective June 5, 2013. The rule essentially allows for all items that are federally deductible to also be 100% deductible on the state franchise tax, unless a state statute explicitly prohibits deduction at some other number (eg., 4%). This was a long, delicate, and complex process and a massive win for our industry.

B. State breach of contract (waiver of sovereign immunity)

The Governor signed HB 586 by Rep. Workman/Sen. Deuell, which waives sovereign immunity. This bill allows contractors to sue in court for breaches by state entities of architectural, engineering, and construction contracts for claims over \$250,000. TxDOT contracts are excluded, per agreement of TxDOT and AGC Highway. Claims under \$250,000 remain in the SOAH process. This was a multi-decade effort. More improvements can be made to this bill, as it was constantly up against deadlines the last two months of session with little room for drafting discretion.

5. *Other construction issues with definitive change*



Educational/workforce – HB 5 by Aycock/Patrick. Adds vocational/tech flexibility to K-12 curriculum and sharply reduces number of STAAR tests and number of students forced thru 4x4 college readiness curricula.

P3 – SB 211 by Nichols. Several issues have arisen, and continue to arise, over the hurried passage of the 2011 session’s P3 bill—SB 1048. These include the Capitol complex, confidentiality concerns, turnaround speed, and getting local entities to adopt rules. SB 211 puts

a moratorium on P3s for the Capitol complex and requires compliance with local zoning rules as well as approvals from additional state entities.

Employee misclassification on public works – HB 2015 by John Davis. Some contractors are treating their “employees” as independent contractors, which bring competitive advantages—but which also creates a host of industry problems. Stan Marek is pushing this issue, as is the Workers Defense Fund. Several stakeholder meetings were held, and the only bill that passed applies only to public jobs and only to GCs and first-tier subs.

Co-operative purchasing networks – HB 1050 by Callegari. These procurement entities are murky, highly profitable, and largely unregulated. Originally formed to get cost savings for purchasing commodities on a large scale, the co-ops have expanded into construction services, including thru JOC and the use of interlocal agreements. The result is a less competitive, less accountable environment. More transparency and protections are needed and HB 1050 defines purchasing cooperative for the first time in a state statute.

Limiting employer liability for hiring persons with criminal records – HB 1188 by Senfronia Thompson. Bill contains significant exceptions.

Water funding – SJR 1 by Williams/Pitts and HB 4 by Ritter/Fraser. Sets up State Water Implementation Fund and authorizes \$2 billion transfer from Rainy Day Fund to the SWIF, to be used for revolving loans. Requires voter approval in November 2013 election.

Franchise tax cuts – 2.5% rate cut in 2014, 5% rate cut in 2015. \$1 million minimum deduction for margins tax made permanent (HB 500 by Hilderbran).

6. Construction issues that progressed, but didn't pass



Lender notice of default – HB 2180 by Bell/Deuell. Would require lender to notify GC when owner defaults on loan, so GCs and subs can stop work sooner than under current law. Currently, an incentive exists for the lender to not notify contractors of default. Progress was made on the notice trigger. Work remains on the mechanics of the notice and the consequences of failing to notify.

Construction trust funds retainage – HB 3316 by Keffer. Would require all retainage withheld by the Owner from the GC to be deposited and held in a trust account, to the extent the funding came from loan proceeds. The Contractor and perfected lien claimants would have a priority (even over the lender) to those trust funds. This would correct the situation where a lender takes over a project from a defaulted borrower/owner and forecloses on the project, wiping out the Contractor's lien rights. Currently, the lender has no obligation to turn over the retainage to the Contractor. Bill author indicated he intends to pursue formal interim study.

School background checks portability – AGC-TBB led successful effort with ABC, TCA, Architects, and Engineers to draft amendment language acceptable to TASB. The ISDs currently vary widely on how they implement and enforce these requirements, and multiple background checks are often required simultaneously on the same worker. Had several agreed-to bill vehicles that died late, including the TEA Sunset bill. Also had complications from architects' Sunset bill and engineers' Sunset bill, which both will both require full-blown DPS fingerprint background checks to get/renew license. TBB has already approached TEA to see if rule implementation will work in lieu of statute.

Pre-notice system on mechanic's lien laws – HB 3553 by Oliveira/Rodriguez. Would change current lien laws to provide for a pre-notice option, like Arizona or Florida. TCA held a series of one-on-one stakeholder meetings late in the session, and then decided not to hold a hearing on the bill. The issue is already underway as a focus of TCA, ABC, and TBB for the interim, though outside the Capitol.

Purchasing cooperatives and roofing contracts – HB 123 by Anderson/Birdwell. Attempt to ban using purchasing co-ops for construction or roofing construction—or a minimum require more transparency and prohibit inside dealing thru agents, consultants, and spec writers. This issue will continue to gain both attention and support.

Employee misclassification on PRIVATE work – SB 676 by Carona. After several stakeholder meetings, ran into brick wall in both House and Senate, primarily due to opposition by large homebuilders and oil and gas/chemical industries.

Economic Development Corporations (EDCs) procurement – HB 2958 by Leach. Attempt to close loophole in that EDC procurement is essentially unregulated. Would apply same procurement laws that apply to other govt entities to EDCs.

Tuition revenue bonds (TRBs) – SB 16 by Zaffirini. House and Senate passed different versions of \$2+ billion of projects but couldn't agree before deadline.

Transportation funding? – being pushed in two special sessions, maybe third. Would be roughly \$1 billion per year.

7. Construction issues that made little to no progress

Mandatory workers comp – strongly opposed by several industries and by non-subscribers. Construction industry and assns are divided on the issue.

Mandatory rest breaks – HB 731 by Raymond/Rodriguez (WDP bill)

Mandatory 10-hour OSHA – SB 167 by Deuell/Hernandez Luna (WDP bill)

CIPs

Statute of limitations for prevailing wage rate claims

CM at Risk – HB 1977 (Kuempel) and HB 3202 (Creighton) – battle between two hard-to-reconcile positions

8. Possible additional issues for 2015 session

School finance – waiting on courts. District court reopens case on January 6, 2014.

Reform business tax to profit-based?

Sales tax rate discrepancy on labor between new construction versus remodels/rehab

Owner-caused delay damages – depending on *Zachry v. Port of Houston* outcome, may need legislative response to ruling denying a GC recovery of damages for delays caused by the owner

SOAH Sunset – (for claims under \$250,000), allow recovery of attorneys' fees

9. The 2014 elections

Governor – Perry out, Abbott in, Pauken in, Wendy Davis?

Lt Governor – Dewhurst for re-election, Staples in, Patterson in, Dan Patrick in

Atty General – Abbott out, Smitherman in, Branch in, Paxton?

Comptroller – Combs out, Hegar in, Medina in, Torres in, Hilderbran? Christi Craddick?

GLO – Patterson out, George P Bush in

Ag Comm – Staples out, Opiela in, Creighton? Hilderban? Merritt?

RRC – Porter for re-election, Stefani Carter in, Malachi Boyuls in

US Senate – Cornyn for re-election, opponents?