



AGC-Texas Building Branch 2019 Legislative Report

1. *How the stage was set for the 2019 legislative session*

The 2019 Session started on January 8, 2019, but the scene was set much earlier—by 2017’s Hurricane Harvey and by the November 2018 general election. The November 2018 election had three important results: (1) the Governor and Lt Governor won re-election, but by much smaller margins than anticipated—against relatively unknown opponents with far less funding; (2) the Democrats picked up seats in both the Texas House and Senate—the latter of which was enough to block bills from coming up for Senate floor votes and confirming non-consensus gubernatorial appointees; and (3) the House elected a new Speaker in Angleton State Rep. Dennis Bonnen—which shuffled the committee assignments and power structure in the House.

These post-election dynamics, combined with the Harvey response and a laser-focus by leadership on delivering property tax relief and school finance reform, led to a more pragmatic, results-driven session—with less time spent than previous sessions on divisive social issues and more time on tackling practical government problems.

2. *Session stats*

- 7,324 total bills filed (2nd highest in Texas history)
- 1,429 total bills passed
 - 460 Senate bills passed
 - 969 House bills passed (most HBs since 2001)
- Over 1,000 of the 1,429 total bills that passed did so in the last week of the session
- Governor vetoed 56 bills (2nd highest in Texas history)
- The majority of new laws became effective September 1, 2019.
- The text of any bill (and background information) can be retrieved online at <https://capitol.texas.gov/Home.aspx> by entering the bill number (e.g., “HB 24” or “SB 123” or “HJR 17”).

3. *Fifteen actual bills that were filed in the 2019 Session*

HB 234/SB 824 - Relating to the local regulation of the sale of lemonade or other beverages by children.

HB 410 - Relating to the personal use exemption for domestic rabbit meat.

HB 428 - Relating to the solicitation of pen pals by certain inmates of the Texas Department of Criminal Justice.



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HB 730 - Relating to exempting certain homeless individuals from the payment of tuition and fees at public institutions of higher education

HB 972 - Relating to repealing the authority of a county to regulate hunting with bows and arrows in certain subdivisions

HB 1610 - Relating to powdered alcohol

HB 2558 - Relating to prohibited retaliation against state employees for referring to climate change or global warming

HB 2596/SB 86 - Relating to the regulation of raising or keeping six or fewer chickens by a political subdivision

HB 2717 - Relating to the use of a turn signal before turning a vehicle

HB 3017 - Relating to nonconsensual pelvic examinations

HB 3646/SB 2084 - Relating to operating a motor vehicle while a person is occupying the trunk of the motor vehicle

HB 4544 - Relating to municipal control of coyotes

HJR 135 - Proposing a constitutional amendment abolishing daylight saving time in Texas

SB 130 - Relating to the use of hypnotically induced testimony in a criminal trial.

SB 2287 - Relating to the random drug testing of members of the legislature during a legislative session

4. *Major state issues*

School finance (HB 3) – The Legislature pumped significant funds into K-12 schools—which will (1) reduce the school property tax starting in 2020; (2) add money for school employee raises; and (3) increase the State’s share (vs the local ISDs’ share) of funding schools by 7%.

Imposing lower revenue caps on local governments (SB 2) – These become effective when local governments adopt their budgets in Fall 2020 and will slow property tax growth and cause some structural city and county budget gaps. The current 8% property tax rollback rate will lower to 2.5% for school districts and to 3.5% for cities and counties. Any rates set above that will require direct voter approval in an election. Ironically, several local governments are raising their tax rates this year the full 8% specifically to maximize their revenue ceiling in anticipation of the new 2020 constraints—taking advantage of a one-year loophole in the legislation.



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Hurricane Harvey/disaster response (HB 7, SB 6, SB 7, SB 8, HJR 4) – Overall, 53 bills and 2 constitutional amendments passed on these issues:

- Creates Texas’ first statewide flood plan
- Proposes a statewide “Flood Infrastructure Fund” – will be on Nov 2019 statewide ballot
- Creates the “Texas Infrastructure Resiliency Fund”
- \$1.7 billion was appropriated from the Rainy Day Fund for flood control/repair projects
- Requires the Texas Division of Emergency Management to establish guidelines for local governments on disaster response/recovery/debris removal.

Economic development – The Legislature did several things to continue providing competitive tools for the Texas economy, including the following:

- reauthorized until 2029 the State’s program that allows local governments to give tax breaks to companies who create jobs in Texas;
- fully funded (\$150 million) the Texas Enterprise Fund, which the Governor uses to lure employers to Texas in competition with other states; and
- approved \$110 million for cities’ hotel/convention construction projects by loosening restrictions on the use of hotel occupancy tax (HOT) for specific projects.

Ban on State personal income tax (HJR 38) – will be on the November 2019 statewide ballot

Legalizing marijuana – Several bills on this issue failed. But one bill (HB 1325) did pass and went into law June 10, 2019 that legalizes CBD and other hemp products that contain less than .3% THC. One unintended consequence is that Texas prosecutors and law enforcement don’t have the technology to determine THC levels of substances seized on detainments. Jurisdictions are deciding on a city-by-city basis how they will handle possession of legal hemp vs illegal marijuana products, while cities scramble to acquire the technology law enforcement needs to analyze THC levels.

5. **Major AGC-TBB construction issues**

A. Big wins on construction defects

New law requires school construction defects lawsuit proceeds to be spent on actually repairing the defects (HB 1734 by Holland (Sen Lucio)) – This new law requires all school districts to notify the Texas Education Agency (TEA) in writing when suing for defects, by sending a copy of the petition and an itemization of the alleged defects. If not, the suit is dismissed. Any monies recovered by the school district in that suit, by verdict or settlement, must be spent on actually repairing the defects. Alternatively, the school district may seek TEA’s written approval to spend some or all of those monies on something else. The school



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district must also send TEA an itemized accounting of the repairs made. If the Texas Attorney General (AG) believes the school district isn't complying, the AG can step in with fines and injunctions. The AG must send annual reports to the Governor, TEA, and the Legislature on defects lawsuits that are filed. Effective 9-1-2019.

New law grants contractors a "right to repair/cure" defects on public building projects (HB 1999 by Leach (Sen Creighton)) – Before suing a contractor or architect/engineer for defects on a commercial building project, the owner must give a detailed, written report of the alleged defects to the contractors/architect/engineer—who then have 30 days to inspect the alleged defects and 120 days to repair the defects or enter into an agreement to repair the defects. The new law has exceptions for: contractors who can't provide bonding/insurance; contractors previously terminated for cause; contractors convicted of a felony; and situations requiring emergency repairs. Effective 9-1-2019.

New law restricting local governments' hiring of plaintiff's lawyers on contingency fees for pursuing construction defects cases (HB 2826 by Greg Bonnen (Sen Huffman)) – This was a coalition effort led by the Texans for Lawsuit Reform. This new law requires local governments to procure contingency fee lawyers similarly to how they would procure other professional services: in a public meeting, not behind closed doors; by board vote; by selecting the most qualified firm; by publicly stating the reason for hiring, firm qualifications, nature of relationship with the firm, why owner can't use in-house lawyers, why owner can't use hourly lawyers, etc. Before the local government can contract with the contingency fee lawyer, the attorney general must review and pre-approve the contract. Payment of attorney's fees to the contingency lawyer firm cannot be approved until time records are verified as reasonable and necessary. The new law also makes any contingency fee lawyer contracts disclosable public information. Effective 9-1-2019.

B. Progress on other AGC-TBB construction issues

Contractors not liable for design defects (HB 2901 by Leach) – This heavily negotiated bill passed out of House committee and almost reached a consensus compromise version. But the oil and gas industry became hotly opposed and disrupted negotiations, and the bill died before reaching the House floor. In a positive development, a narrower bill (HB 2899 by Leach) passed into law making contractors no longer liable for design defects *on road projects*. HB 2899 became effective 6-2-2019. The broader bill will be a priority issue in the interim and in the 2021 Session.



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Shorten the “statute of repose” (time for suing for defects) from 10 years to a shorter period (HB 1737 by Holland) – This bill passed out of committee for the first time ever, on a 5-4 vote. But the bill did not survive for a floor vote and was intensely opposed by trial lawyers, public owners, and private owners (oil and gas, manufacturers, chemical companies, apartments, developers). This will be a priority issue in the interim and in the 2021 Session.

Uniform general conditions (UGCs) for K-12 contracts (SB 1297 by Powell) – This bill would include school districts in the State’s UGCs process. It passed the full Senate 31-0 and passed the House committee 11-0—but did not reach a floor vote due to political reasons unrelated to the substance of the bill. This will be a priority issue in the interim and in the 2021 Session.

Statutory recovery of attorney’s fees for state breach of contracts where the amount in controversy is over \$250,000 (HB 1185 by Cyrier) – This bill is unfinished business from previous sessions. It passed the House 122-13 but died in Senate committee due to late Comptroller data submitted in the hearing. This will be a priority issue in the 2021 Session.

Local preemption bills - “paid sick leave” etc. (Senator Creighton / Representative Phelan) – The cities of Austin, Dallas, and San Antonio have passed “paid sick leave” ordinances to regulate private employer-employee relationships on paid sick leave. In response, four local preemption bills were filed and passed the full Senate and through House committee—but did not make it to a House floor vote:

SB 2485 (employee benefits)

SB 2486 (employee scheduling/overtime)

SB 2487 (employee sick/vacation/holiday/vacation/personal leave)

SB 2488 (applicant or employee criminal history)

Lawsuits have been filed challenging the Austin, San Antonio, and Dallas paid sick leave ordinances. The Austin suit was successful at the court of appeals and is currently at the Texas Supreme Court. The San Antonio and Dallas suits are still at the trial court level. AGC-TBB is participating as an amicus in these suits, as are several other business associations. This will be a priority issue in the 2021 Session.

6. *Other construction issues that passed into law*

Limiting cities’ ability to specify building products, materials, or standards used in residential and commercial construction outside of adopted codes (HB 2439) – Mostly pushed by the residential construction industry as a way to build more affordable homes and counter masonry requirements, the bill flew under the radar all session—and the new law is creating controversy. The new law does have



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exemptions for windstorm/hail coverage compliance and for historical/cultural buildings. To minimize the law's unintended effects, many cities are using the tool of planned developments, or developing incentive agreements with builders, to wire around those parts of the new law that might damage the aesthetics of new commercial developments. Effective 9-1-2019.

Disclosure of certain contracting information under public information law (SB 943) – As originally filed, the bill would have made contractors directly subject to public information requests as if they were a governmental entity (among other things). AGC-TBB worked to strip those provisions out. As passed, the new law expands public disclosure for government contracts and bidders, adds recordkeeping duties, and revises exceptions to required disclosures. Exceptions to the new law including contracts under \$1 million and situations that would harm competition, disclose trade secrets, or disclose confidential proprietary information. Effective 1-1-2020.

Project labor agreements on state projects (HB 985) – This new law prevents governmental entities from requiring or prohibiting pre-hire collective bargaining agreements on construction using state money or state credit—universities, state buildings, most school buildings. Effective 9-1-2019.

Expanding architect/engineer certificate of merit requirements to other claims (SB 1928) – Currently, before suing an architect or engineer for negligence, one must first file a “certificate of merit.” This new law expands that prerequisite to third-party claims such as cross claims and counter claims. Effective 6-10-2019.

Bans on government contracts with companies that boycott Israel (HB 793) – This new law bans governments from entering into contracts valued at or above \$100,000 with any company that has 10 or more employees and boycotts Israel. The new law also requires provisions in the contract to that effect. Effective 5-7-2019.

Texas Workforce Commission apprentice grants to private entities for workforce training (HB 2784) – This new law creates the “Texas Industry-Recognized Apprenticeship Programs Grant Program” within the Texas Workforce Commission. The new law creates a dedicated account in the State’s general revenue fund and authorizes reimbursement grants of up to \$10,000 to non-governmental entities for each person trained in an apprenticeship program. The program limits the training duration to no more than 26 weeks; gives preference to the unemployed, veterans; ex-prisoners; and under-employed—and requires 12 months of employment following the training the receive the grant. The new law authorizes the Workforce Commission to establish rules for the grant program and requires annual reporting to the Legislature and on the Workforce Commission’s website. Effective 9-1-2019.



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7. *Other construction issues that progressed but didn't pass*

Modernizing and simplifying lien laws (HB 589, HB 3498) – After multiple sessions/interims of several construction groups working collaboratively to draft and re-draft legislation to modernize our lien laws to (1) require only one, up-front notice and (2) replace paper notices with web-based notices, the residential construction industry broke off and filed -- late in the process -- a competing bill that would keep the multi-notice, paper-based system but attempt to simplify some aspects of the complicated lien laws. Having two competing bills hampered either one progressing, and neither bill moved in the process. Simplifying lien laws will remain a prominent issue.

Authorizing \$3.8 billion in tuition revenue bonds (TRBs) for higher ed construction projects (HB 2000) – University building construction was not a priority issue going into the 2019 Session. Everyone was surprised when the bill began moving and launched out of the House on a 132-9 vote. The leadership was not behind the bill, and it went nowhere in the Senate. This will be a priority issue in the 2021 Session.

Expiration of the Plumbers' board and attempting to move regulation of plumbing to TDLR (SB 621) – This was a bitterly-fought battle as to whether to keep plumber licensing with its board or dissolve the board and move licensing directly to TDLR. The bill to keep the plumbers' board alive was voted down on the House floor, effectively killing the agency and leaving plumbers unlicensed. But Governor Abbott stepped in and continued the plumbers' board thru 2021 by executive order, citing the emergency response needed for Hurricane Harvey. This unorthodox situation is creating lots of unforeseen issues in the interim and will continue to be a front-burner conflict from now through the 2021 Session.

Making CMAR more like low-bid in subcontractor selection (SB 808) – This bill was pushed by two east Texas legislators and surprised everyone by its resiliency despite opposition. The original-filed version would have required general contractors on CMAR jobs to use price for at least 50% of weight in choosing subcontractors. The bill was later amended to require subcontractors' price to account for at least 40% of the selection weight instead of 50%. The bill wasn't killed until the second-to-last day of session.

Prequalification for civil projects (HB 2585) – This bill would have authorized governments to do optional pre-qualification on contractors for civil works projects. As written, many were concerned that it would also incidentally apply to commercial builders. It passed the House and went nowhere in the Senate.

Incorporating outside documents into construction subcontracts (HB 2268) – This bill was pushed by some subcontractors and would have voided provisions in subcontracts that reference documents outside the actual subcontract, if those documents weren't provided to the subcontractor by the general contractor or upper-tier subcontractor. The bill made little progress.



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Restoring contractual sovereign immunity to cities for responding to disasters (SB 1575) – This bill was a misguided Harvey-response being pushed by the City of Galveston for FEMA/GLO flow-through grants. As written, it would have reinstated contractual sovereign immunity for cities on disaster response contracts to an overly broad degree, including to the commercial building industry. AGC-TBB helped attach a House floor amendment that would protect commercial builders’ ability to sue cities for breach of contract. In any event, the bill was vetoed by Governor Abbott, so cities remain without sovereign immunity for breach of construction contracts.

Authorizing counties to require electronic bids/proposals for competitive bidding (SB 124) – This bill passed with little opposition or controversy but was one of the rare bills vetoed by Governor Abbott while the session was still underway.

Additional construction-related bills of interest saw little-to-no movement this Session, including the following:

- Increasing penalties for misclassifying workers on public projects
- Mandatory workers compensation for construction
- Requiring E-verify on non-TxDOT state projects
- using Texas Workforce Commission data to determine prevailing wage rates for certain public work contracts
- Statewide preemption of local plumbing codes
- preference for Texas employee-owned companies

8. *The 2019-2020 interim*

- In Fall 2019, the Texas Facilities Commission will begin working on the next round of revisions to the state’s Uniform General Conditions (UGCs). This is required by statute every five years, and the UGCs are incorporated into state building contracts. AGC-Texas Building Branch has a statutory seat on the Facilities Commission’s UGCs committee.
- A number of firms have outstanding, unresolved audits re: the state’s R&D margins tax credit in terms of (1) the scope of the credit, (2) differences with the federal government’s R&D income tax credit criteria, and (3) possible retroactive application of any Comptroller ruling. AGC-TBB has a seat on the Comptroller’s Business Advisory Group and is closely monitoring this issue
- The House and Senate committees will begin interim studies, including holding committee hearings, on a variety of issues TBA later in Fall 2019. These hearings/studies will run thru Fall 2020, culminating in reports to be delivered to the Legislature just before the 2021 Session. Statute of repose and design defects may be included in these studies.



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- Political/elections: The November 2020 campaigns for all the Texas House seats, and half of the Texas Senate seats, have already begun. Official ballot filing starts in November 2019 and runs for one month. Complicating matters is (1) the overlapping November 2020 US presidential election, (2) an organized and well-funded effort by the Democrat party to re-take the majority in the Texas House, (3) hotly-contested redistricting in the 2021 Session, and (4) a scandal embroiling the Texas House over a secret meeting between House Speaker Dennis Bonnen and conservative political gadfly Michael Quinn Sullivan that was audio recorded. The latter is being investigated by the Texas Rangers after being asked to do so by the House General Investigating Committee.

9. Construction issues for the 2021 Session

- Pass tuition revenue bonds (TRBs) to fund the next round of public university building construction
- Clean-up to construction defects legislation passed in 2019
- Shorten the statute of repose from 10 years (+2 = 12 years) to a shorter period
- Uniform general conditions for K-12 building contracts
- Statutory recovery of attorney's fees for state breach of contracts where the amount in controversy is over \$250,000
- Contractors not liable for design defects in commercial construction
- Modernize lien laws to single pre-notice (and possibly web-based notice)
- Legislative response to appellate court confusion on quantum meruit contractor claims
- Defense: negative changes to procurement laws—particularly pre-qualification, job order contracting, CMAR, and E-verify