

# GEORGIA BRANCH, AGC

## 2012 PRE-SESSION LEGISLATIVE REPORT

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### Issues on the National Stage

Recent political news is focused on the Republican Presidential primaries. Iowa and New Hampshire's primaries are behind us, and South Carolina and Florida are just around the corner. Leading up to this summer and the time for Georgians to cast their votes, the field should be smaller with the stakes at their highest going into the general election season.

In late 2011, Chapter President Tony Pellicano, Chapter Vice President Ken Swofford and Chapter Executive Vice President Mike Dunham and I attended the AGC of America Leadership Conference in Washington, DC. Our annual participation at this conference reinforces our sincere appreciation of the incredible amount of knowledge and expertise our AGC of America staff has assembled. They do a remarkable job representing the commercial construction industry in our nation's Capitol. A portion of the conference is dedicated time where attendees are asked to visit with members of their Congressional delegation. Our top legislative priority was securing co-sponsors of legislation that would **Repeal the 3 % Withholding Law**.

We chose to meet with Georgia's Young Gun representatives versus our old friends (*although we couldn't pass on our long-standing open-door invite with Rep. Westmoreland*). We lobbied the younger members of the Georgia delegation on the importance of repealing the 3% withholding law, and shored up their support of the repeal of the law. We met with Congressmen Austin Scott (Tifton), Rob Woodall (Lawrenceville), Tom Graves (Ranger). Each committed their support to the measure, and were co-sponsors of the repeal legislation. The measure was overwhelmingly passed in both the House and Senate and on November 21, 2011 President Obama signed into law the 3 Percent Withholding Repeal and Jobs Creation Act. The law permanently repeals the requirement that federal, state, and large local governments begin withholding 3 percent of each payment of \$10,000 or more to a contractor after January 1, 2013. The bill is the culmination of a five-year effort by AGC of America, chapters, members and industry stakeholders to repeal the 2006 provision. AGC members built a strong foundation for repeal based in fact, reason and activism.

I extend my sincere appreciation to each Georgia Branch, AGC member for writing their members of Congress and expressing how important repeal of this measure was to the nation's economy recovery and our specific industry. This collective effort secured a significant bipartisan victory in an era when bipartisanship seldom happens. There hasn't been much good news coming out of Washington for some time, but the permanent repeal of this law is a great reason to celebrate.

### Georgia's 2012 General Assembly Legislative Issues

On Monday, January 9, the Georgia General Assembly convened the 2012 Legislative Session, which is in the second year of a two-year legislative cycle. All bills remaining from the 2011 session are immediately eligible for debate thus the legislative pace will be much faster than last year with over 1,000 bills already in play.

It didn't take long for a *Dust Up* to occur in the Senate between Lt. Governor Cagle, Senate President Pro Tem Tommie Williams and Chip Rogers over the body's leadership. Governor Deal thought he helped broker a resolution on Monday between the parties, only to learn the deal (*no pun intended*) quickly fell apart on Tuesday. It is within this context that the Georgian Branch, AGC will implement this year's legislative program.

### Good Legislative Intentions Can Result in Bad Public Policy

One of Georgia Branch, AGC's core operating principles is *Less Government is Better*. Our primary game plan doesn't change much from year to year. We understand the need to play defensive ball against many of legislative proposals that are well-intended, but lead to bad public policy. Our down economy is sure to further complicate matters, with many legislative officials having more well-intended ideas in an effort to help, yet the concepts are proven to actually hurt business. There is never a shortage of these types of proposals and we are proud of the opportunity we've earned over the years to have a seat at many meetings with sponsors where we can explain our concerns as they relate to construction and many times the entire business community.

## **AGC Excited about Governor Deal's Innovative "Competitiveness Initiative"**

This Initiative is bringing state government and the business community together at the Governor's request to develop a long-term strategy for economic development. In Governor Deal's presentation Tuesday to the State Chamber of Commerce and in his State of the State address, he outlined major components of the Initiative.

### **Deal supports removal of sales tax on energy used in manufacturing**

"In an age of much higher energy costs, this will impact a large component of manufacturers' overall cost structure and vastly improve the competitive position of our producers," Deal said. "Today, in executive offices right here in Georgia, business leaders are making the business decision to expand manufacturing activity and facilities in neighboring states. Every time they make that decision, we miss out on new investment in our communities and new job opportunities for Georgians."

### **Sales and use tax exemptions for construction materials used in projects of regional significance**

"The result is simple but powerful: local governments have more options to incentivize investment and job growth. When it comes down to Georgia versus Virginia or Florida, the competition is tight. It often goes down to the wire -- even into overtime -- and this is one field goal Georgia can't afford to miss." *There are high expectations that this effort has the potential to help the construction industry.*

"The competitiveness initiative was tasked with improving our business climate," Deal said. "We have to couple these reforms with infrastructure improvements and solid steps toward training our workforce for the jobs of tomorrow." *The governor touted elements of his 2013 budget that make additional investments in the Savannah Port and in building capacity for water supply.*

"A deeper Savannah Harbor means greater efficiency for 21,000 U.S. companies, 75 percent of which are headquartered outside of Georgia. A U.S. Army Corps of Engineers study has shown that the deepening will reduce shipping costs for private companies by at least \$100 million a year. Neither Georgia nor this nation can afford to delay a project that provides customers with a tool that reduces their costs. Savannah is now the second busiest port for containerized exports in the United States. In a challenging 2011, exports from Savannah grew a full 12 percent."

The budget also includes \$45.7 million for reservoirs, the second installment in a four-year plan. "Local governments can now apply for the low-interest loans and state direct investment and we are one step closer to enhanced water security in this state," Deal said. "With our state's population projected to grow by an additional 4.6 million people over the next two decades, it is imperative that we expand water supply."

### **Lastly, he emphasized the need for ratifying the T-SPLOST across the state this summer.**

"We are falling behind, and local communities have put together project lists that are worthy of support. We have to get our people and goods moving again. Georgia can either go forward with this wise investment or our transportation system will be stuck in the past while we're stuck in traffic."

## **Georgia Branch, AGC's Primary Issues**

**One of the most important issues facing the industry is in the Court System:** Georgia Branch, AGC and 11 other construction associations along with the Georgia Chamber of Commerce filed a Friend of the Court Brief in late December 2011 urging the Georgia Supreme Court to review the lower court decision of the Georgia Court of Appeals in the *Estate of Pitts v. City of Atlanta*. This is an extremely important case to the construction industry and the business community in general. If left unchanged, it could have a devastating impact on the way we do business.

On October 5, 2011 the Georgia Court of Appeals issued an opinion in *Estate of Pitts v. City of Atlanta*. This opinion resulted out of a civil lawsuit brought by the estate of a worker killed during construction of the Maynard Jackson International Terminal at the Atlanta Airport. A trucking company employee delivering material to the site, ran over and killed an employee of a subcontractor working at the site. The decedent's employer did not have sufficient insurance to satisfy the judgment obtained against it, and the decedent's estate sued the City of Atlanta (the Owner), the JV Construction Manager ("CM"), and a joint venture subcontractor ("Subcontractor").

The plaintiff sued these defendants on breach of contract and tort causes of action. The trial court granted summary judgment for all defendants on both legal theories; however, the Court of Appeals reversed the trial court's ruling on the breach of contract claim, finding that the decedent's estate had standing to sue the City, the CM, and the Subcontractor for breach of contract as an intended third-party beneficiary of those contracts.

According to Judge Chris McFadden, the defendants owed contractual duties to make sure that there was sufficient insurance coverage. These requirements were incorporated into the contract through the Project's Owner Controlled Insurance Program (OCIP) and then flowed down through the first tier subcontract. This coverage applied to all "project participants," a term the court broadly construed to include all persons who worked on the construction project. The court broadly construed this despite the fact the subcontract contained a provision stating sub-subcontractors and suppliers were not intended third-party beneficiaries of the subcontract.

This case is very troubling to the construction industry and for business in general, for many reasons. It broadly extends the concept of third-party beneficiary status, and eviscerates the worker's comp exclusivity rule by holding that an injured or deceased construction worker has a breach of contract action against the upstream parties, and that breach of contract claims, unlike tort claims, are not barred by the worker's comp exclusivity rule.

If this case stands, any time a worker is injured or killed on a project, the savvy plaintiff's attorney will assert a breach of contract action against the GC's and subs involved (and perhaps other project participants, up to and including the owner). Current Georgia law and industry practice make it difficult enough to verify insurance coverage required by parties in privity of contract. This court decision holds parties responsible for verification of required coverage two and three tiers removed, without any viable mechanism to verify the insurance coverage in question. The construction industry simply cannot function if this case stands. The entire construction community appears to be united in our support of overturning this damaging decision. If this issue is not taken up by the Georgia Supreme Court, AGC and others will be looking for a legislative remedy.

**AGC will again be working with Georgia Department of Revenue on Sales & Use Tax Regulations:** One of AGC's primary focuses this year will be our continued joint efforts with the Georgia Department of Revenue to help promulgate new Georgia DOR Rules & Regulations that are consistent with legislative changes in our Georgia Contractor Sales & Use Tax Law. We have also asked for assistance in creating a viable mechanism for GCs to verify residency status of subcontractors which will allow them to determine if subs have properly registered with the Department, clearly defining a GC's obligations under the law.

**AGC supports Governor's proposal to invest in future workforce development needs:** Georgia Branch, AGC has been invited to participate in a press conference on January 17 to roll out details.

**Public Works Procurement Issues:** The Chapter will be working with public owner partners in state and local government to address a number of issues that have surfaced largely as a result of our down economy. There have been numerous lawsuits and bid protests that have occurred around the state as a result of improper procurement solicitations and contract awards. We fully support all of our viable construction delivery methods, but bid/proposal solicitations and contract awards must be publicly advertised and competitively awarded pursuant to our state laws.

Georgia Branch, AGC's positions on legislative proposals will be developed under the direction of the legislative committee and the Georgia Branch AGC Board of Directors. Please contact me at [woodall@agcga.org](mailto:woodall@agcga.org) or by phone at 678.298.4116 should you have questions about topics included this report or relating to any legislation introduced during the 2012 session impacting the construction industry.