

SUBJECT: Considering TxDOT buildings part of the state highway system

COMMITTEE: Transportation — committee substitute recommended

VOTE: 9 ayes — Krusee, Phillips, Callegari, Casteel, Hamric, Hill, West

0 nays

2 absent — Deshotel, Flores

WITNESSES: For — None

Against — None

On — Steve Simmons, Texas Department of Transportation

BACKGROUND: Transportation Code, sec. 221.001(1) defines “highway” as a public road or part of a public road, a bridge, culvert, or a related structure.

Sec. 201.1055 grants the Texas Department of Transportation (TxDOT) the power to contract with a private entity for the design or construction of a district office headquarters facility or the lease of departmental property to the contractor in a district located in a county with a population of 3.3 million or more (Harris).

If TxDOT leases property to the contractor, provisions exist to allow the contractor to construct and retain ownership of a building on that property and to give TxDOT the option of purchasing the building constructed on that property by the contractor.

DIGEST: CSHB 2137 would expand the definition of “highway” in Transportation Code, sec. 221.001(1) to include “building” in addition to a public road, bridge, culvert, and related structures.

The bill specifies that TxDOT could contract with a private entity to perform site development and the construction and design of buildings and related facilities on property belonging to either TxDOT or a private entity. This could take place on any property, regardless of the county in which it was located.

Also, TxDOT could enter into agreements involving the exchange of TxDOT property in return for the construction of buildings and related facilities by contractors. The bill specifically would exempt TxDOT from standard requirements for the incorporation of the Texas Building and Procurement Commission's uniform general conditions into building construction contracts.

CSHB 2137 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect on September 1, 2005. It would apply to contracts for which TxDOT first advertised or solicited bids or proposals on or after that date.

**SUPPORTERS
SAY:**

CSHB 2137 would establish in statute that all TxDOT buildings are part of the state highway system. This clarification would protect the state in future disputes with contractors or sureties regarding the non-performance of construction services.

In a recent case, a surety, which had furnished a performance bond for a private entity that had defaulted on a contract to build a research and technology center for TxDOT, failed to exhaust TxDOT's administrative procedures relating to a dispute over expenses to complete the original contract. As a result, TxDOT filed suit against the surety for failure to perform under its performance bond, and the surety filed a countersuit based on the state's failure to meet the obligations of the original contract and the subsequent takeover agreement. The Austin Court of Appeals ruled that the surety was not required to exhaust the administrative procedures because the contract was not covered by a statute that prescribes administrative remedies in the highway construction context, and further that the state had waived its sovereign immunity by initiating litigation.

TxDOT long has possessed the legal authority to enter into various types of construction and design contracts with private entities, and this authority should be made clear in law. CSHB 2137 simply would clarify the law to more accurately reflect its original intent and to protect the state from future suits or liability.

**OPPONENTS
SAY:**

Contracts or agreements between private entities and TxDOT that do not relate directly to public roads should not be considered part of the state highway system for legal purposes.

NOTES: The committee substitute differs from the original bill in that it specifies that TxDOT could contract with a private entity to perform site development and the construction and design of buildings and related facilities on property belonging to either TxDOT or a private entity.