

- SUBJECT:** Revising performance and payment security requirements for CDAs
- COMMITTEE:** Transportation — committee substitute recommended
- VOTE:** 6 ayes — Phillips, Darby, Y. Davis, Harper-Brown, Lavender, McClendon
0 nays
5 absent — Bonnen, Fletcher, Martinez, Pickett, Rodriguez
- WITNESSES:** For — Howard Cowan, Texas Surety Federation; Terri Hall, Texas TURF, TAG; (*Registered, but did not testify:* Michael Chatron, AGC Texas Building Branch; Thomas Ratliff, American Insurance Association; Michael White, Texas Construction Association)

Against — Celeste Morris; (*Registered, but did not testify:* Mary Anderson, Texans Against Tolls; Heather Fazio, Libertarian Party of Texas; Melissa Cubria, Texas Public Interest Research Group; Thomas Davis; Pam Dickinson; Russell Doyle; Robert Morrow; Beverly Nuckols; Randall Peterson; Travis Snavely)
- BACKGROUND:** Transportation Code, title 6 regulates roadways. Within that title, sec. 223.205, sec. 366.404, and sec. 370.308 establish nearly identical requirements for performance and payment security for a comprehensive development agreement (CDA) between a private contractor and the Texas Department of Transportation (TxDOT), a regional tollway authority (RTA), or a regional mobility authority (RMA), respectively. If a construction contract defaults, performance security ensures that funds are available to complete the project, while payment security ensures that the workers and suppliers on the job get paid.

The three sections require a private entity entering into a CDA to provide either a performance and payment bond or an alternative form of security of certain sufficient value. The acceptable alternative forms of security are cashier's check, U.S. bond or note, irrevocable letter of credit, or any other form of security determined suitable by TxDOT or the RTA or RMA, as applicable. These sections mandate TxDOT, RTAs, and RMAs to prescribe, by rule, requirements for an alternative form of security.

If TxDOT determines that it is impracticable for a private entity to provide security of the certain sufficient value mentioned above, TxDOT must set the amount of the security. The same is required of a RTA or a RMA.

DIGEST:

CSHB 2032 would amend the performance and payment security requirements for a CDA between a private entity and TxDOT, an RTA, or an RMA, as provided by Transportation Code, sec. 223.205, sec. 366.404, or sec. 370.308.

The bill no longer would allow TxDOT, an RTA, or an RMA to determine other forms of security to be suitable as alternative forms, and it would remove their associated rule-making authorities. The bill would require an irrevocable letter of credit to be from a U.S. domiciled bank acceptable to TxDOT, the RTA, or the RMA and a performance and payment bond to be issued by a corporate surety authorized to issue bonds in Texas.

The bill would not allow TxDOT, an RTA, or an RMA to set the amount of security if the standard sufficient value was impracticable unless the contract amount exceeded \$250 million in construction costs. If it did, TxDOT, the RTA, or the RMA could set the amount at or above \$250 million, as determined by TxDOT, the RTA, or the RMA to be in the best interest of the state. The bill would prohibit a security provided from covering the portion of the CDA that includes only design or planning services, the performance of preliminary studies, or the acquisition of real property.

The bill would take effect September 1, 2011, and would apply only to a CDA for which a best value proposer was selected on or after the effective date.

**SUPPORTERS
SAY:**

CSHB 2032 would protect Texas taxpayers, ensuring that the roads funded by their tax dollars got completed. The bill also would protect a construction project's suppliers and laborers, which often work for small or midsize subcontractor businesses that depend on the project's payment security if the general contractor defaults. The current language regulating alternative securities is so vague and gives state regulators such broad and subjective authority that the entities directly involved in a CDA may unintentionally under-secure a project, leaving the state, taxpayers, and subcontractors exposed to risk.

CSHB 2032 would remove this ambiguity from statute and allow use of only the most secure methods of protection available for these projects. Performance and payment bonds, the traditional means of securing construction projects, have served the state and the nation well for over 100 years. Such bonds are a highly liquid and readily accessible form of security, as are cashier's checks, U.S. notes or bonds, and irrevocable letters of credit from a U.S. domiciled bank. These options provide a reliable, ready source of funding if a contractor defaults. All of these options, but only these options, would remain available for securing CDA projects under CSHB 2032, prudently balancing the needs for flexibility and security in establishing construction contracts.

The bill would have no fiscal implication to the state, and the Alamo RMA, the Grayson County RMA, the Cameron County RMA, and the North Texas Tollway Authority anticipate no fiscal impact due to the bill as well.

**OPPONENTS
SAY:**

CSHB 2032 would limit the ability of TxDOT, an RTA, or an RMA to assist a CDA construction business by negotiating suitable alternative securities on its behalf. The bill's new restrictions on alternative securities would limit flexibility in establishing CDAs and slow the urgently needed construction of roads around the state.

By eliminating all agency and authority discretion in finding suitable alternative securities, the bill would use a sledgehammer to address a concern that could be resolved with a sculptor's chisel. Under current law, TxDOT, RTAs, and RMAs have to prescribe, by rule, requirements for alternative forms of security. The rule-making processes of these entities are always open to public and stakeholder input. Each of these entities has an open comment period during their public meetings in which the public or stakeholders can propose suggested revisions to the rules, and these groups are also welcome to submit electronic or written comments on proposed rules or suggested changes. If stakeholders feel the agency and authority rules on alternative securities are too lax in some regard, they should help fine-tune those rules, rather than completely eradicating them, as CSHB 2032 would do.

CSHB 2032 could prohibit small and mid-size construction businesses from entering into a CDA for a large project because they would be unlikely to have the equity or resources needed to provide the new \$250 million minimum security. These businesses have a better opportunity to

enter into such construction contracts under current law, which gives TxDOT, an RTA, or an RMA greater discretion to lower the required amount of security.

OTHER
OPPONENTS
SAY:

While CSHB 2032 would improve taxpayer protection, the bill should go further, fully eliminating the concept of “impracticable to secure” and requiring a construction contractor to provide security for 100 percent of the standard sufficient security value in all cases. Allowing TxDOT, an RTA, or an RMA to lower the required amount of the security for a gargantuan road construction project to \$250 million would reduce the liability of the contractor and shift it onto the taxpayers.