

- SUBJECT:** Changing TxDOT payment process to contractors for highway projects
- COMMITTEE:** Transportation — committee substitute recommended
- VOTE:** 6 ayes — Krusee, Harper-Brown, Harless, Hill, Macias, Murphy
0 nays
3 absent — Phillips, Deshotel, Haggerty
- WITNESSES:** For — (*Registered, but did not testify:* Richard M. Bruns, Texas Construction Association; Kristen Ogden, Associated General Contractors of Texas)
Against — None
On — Amadeo Saenz, Texas Department of Transportation
- BACKGROUND:** Transportation Code, sec. 223.009 allows TxDOT to pay partial amounts of money owed to a contractor for working on a highway project. The total amount of the payments is limited to 95 percent of the value of the work done.
- Transportation Code, sec. 223.010(a) mandates that TxDOT keep 5 percent of the contract price until the project is deemed complete and acceptable. The only exceptions to this requirement fall under these subsections:
- Transportation Code, sec. 223.010(h), which mandates that 4 percent of the contract price be retained by the agency for projects using recycled materials until the project is deemed complete and acceptable.
 - Transportation Code, sec. 223.010(i), which explains that the provisions apply only to contracts providing for environmental mitigation efforts, maintenance, or a performance period after construction is complete. It also allows TxDOT to release a portion of the money retained under subsection (a) once a project is complete but before it is accepted as long as the amount of money

given to the contractor does not exceed the amount needed to maintain compliance with the contract.

The 79th Legislature in 2005 approved HB 2702 by Krusee, creating Transportation Code, sec. 223.205 for TxDOT to require private parties engaged in a comprehensive development agreement with the agency to provide performance and payment bonds. The performance bond ensures the contractor completes the contract in a manner acceptable to TxDOT, and the payment bond ensures subcontractors and suppliers are protected if the contractor fails to pay them in full. The agency requires the contractors to put up a performance and payment bond equaling 10 percent of the contract, although the actual cost borne by the contractor is typically less than 1 percent.

The Federal Highway Administration issued new contract requirements for all highway projects involving federal dollars effective April 2006, requiring contractors to put up a retainage bond equaling 10 percent of the contract price in lieu of setting aside retainage.

DIGEST:

CSHB 2075 would amend Transportation Code, sec. 223.009 to remove the 95 percent cap on partial payments authorized for a contractor in a highway construction project. The bill also would eliminate the requirement for TxDOT to keep 5 percent of the contract price and would allow the agency to keep an unspecified percentage until a project was complete and accepted. It would make the subsection applicable to all types of highway projects by repealing a provision covering projects using recycled materials and one specifying the types of projects eligible under the subsection.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2007.

**SUPPORTERS
SAY:**

CSHB 2075 would allow TxDOT to create a uniform payment process for highway construction projects by aligning state standards with newly revised federal procedures. The agency already is using this practice on the majority of highway projects, and the older procedures have become unnecessary due to recent changes the state has made to create a new system for ensuring all work on highway projects meets its standards. In such a heavily regulated process, the ability for TxDOT to streamline one

aspect would be a benefit not just for the state but also for the contractors and sub-contractors working on highway projects.

Roughly 90 percent of highway projects in Texas involve some federal funding and are subject to the new federal guidelines mandating the use of retainage bonds. Current state policy for the remaining 10 percent of highway projects not bound by federal guidelines requires the contractor pay 4 to 5 percent of the contract price. Under both scenarios, the money is used to ensure the contractors complete the work to the satisfaction of TxDOT and is returned to the contractor once the project has been deemed complete and acceptable. Also, new state law allowing contractors to purchase performance and payment bonds creates a mechanism for TxDOT to ensure its standards are being met without imposing as large a financial burden as the current retainage standards.

This bill would benefit all parties involved in these agreements. TxDOT no longer would have two types of contracts for state and federal projects, which would reduce administrative complexity, but it still would have a tool with which it could ensure projects were being completed in an acceptable fashion. Contractors would not be required to put up so much money. Subcontractors – typically smaller firms, which had seen a proportional withholding of their payment – could receive more money more quickly, a real benefit because of the nature of their work and the size of their companies. Often, they do a few months worth of work on a multi-year project. Because these companies have more limited resources than larger firms, waiting several years before receiving full payment is a real hardship.

The changes from the original version of the bill would allow TxDOT flexibility, should federal standards change again, to return to a retainage system in lieu of a retainage bond.

**OPPONENTS
SAY:**

This bill should be amended to restore the 5 percent cap on retainage to ensure that TxDOT would not have carte blanche to decide how much money to keep should federal standards change and the state return to the current system. Giving the agency flexibility is one thing, but there should be some limitation to protect contractors and subcontractors should it decide to return to a retainage system.

NOTES:

CSHB 2075 differs from the original version by removing references to the 5 percent retainage limit and replacing them with general provisions allowing TxDOT to retain an unspecified percentage of the contract until the project was deemed complete and acceptable.