

SUBJECT: Revising performance and payment security requirements for CDAs

COMMITTEE: Transportation — committee substitute recommended

VOTE: 11 ayes — Phillips, Martinez, Burkett, Y. Davis, Fletcher, Guerra, Harper-Brown, Lavender, McClendon, Pickett, Riddle

0 nays

WITNESSES: For — Howard Cowan, Texas Surety Federation; (*Registered, but did not testify*): Michael Chatron (AGC Texas Building Branch); Terri Hall (Texas TURF); Tara Snowden (Zachry Corporation); Michael White (Texas Construction Association)

Against — None

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, RTA, or RMA, as applicable. These sections require 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 an RTA or an RMA.

DIGEST: CSHB 1134 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. The bill would require an irrevocable letter of credit to be from a bank acceptable to TxDOT, the RTA, or the RMA that had an office in the state 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 certain sufficient value was impracticable unless the contract amount exceeded \$250 million in construction costs. TxDOT, an RTA, or an RMA could require an additional amount of security that they deemed acceptable in addition to the security of \$250 million or greater. The bill would prohibit a security from covering the portion of the CDA that included only design or planning services, the performance of preliminary studies, or the acquisition of real property.

The bill would take effect September 1, 2013, and would apply only to a CDA for which a best-value proposer was selected on or after the effective date.

SUPPORTERS  
SAY:

CSHB 1134 would protect Texas taxpayers, ensuring that the roads funded by their tax dollars were 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 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 1134 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 more than 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 bank located in the state.

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 1134, prudently balancing the needs for flexibility and security in establishing construction contracts. The state needs to ensure it is properly protected for these contracts since it is ultimately the taxpayer who is on the hook.

**OPPONENTS SAY:**

CSHB 1134 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. These tolling entities prefer the flexibility of being able to mix surety bonds with other forms of security, such as parent guarantees from well capitalized firms, and this bill would limit their discretion in being able to do so. The bill's added restrictions on alternative securities would limit flexibility in establishing CDAs and could slow the urgently needed construction of roads around the state.

By significantly restricting 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 rulemaking 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 statutorily marginalizing them, as CSHB 1134 would do.

CSHB 1134 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 and mix it with alternative forms of security that may be more accessible to smaller firms.