

BILL ANALYSIS

Senate Research Center
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S.B. 638
By: Paxton
Transportation
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As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Bonds are a traditional way to provide performance and payment security for a public construction contract in Texas. A performance and payment bond or alternative form of security is required of a private entity that enters into a comprehensive development agreement with the Texas Department of Transportation, a regional tollway authority, or a regional mobility authority. The law currently allows an entity to require any alternative form of security that the entity determines to be suitable.

S.B. 638 amends current law relating to performance and payment security for certain comprehensive development agreements to reduce potential risk to the state for a highway project.

As proposed, S.B. 638 amends current law relating to performance and payment security for certain comprehensive development agreements.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Department of Transportation is rescinded in SECTION 1 (Section 223.205, Transportation Code) of this bill.

Rulemaking authority previously granted to a regional tollway authority is rescinded in SECTION 2 (Section 366.404, Transportation Code) of this bill.

Rulemaking authority previously granted to a regional mobility authority is rescinded in SECTION 3 (Section 370.308, Transportation Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 223.205, Transportation Code, as follows:

Sec. 223.205. PERFORMANCE AND PAYMENT SECURITY. (a) Requires the Texas Department of Transportation (TxDOT), notwithstanding Section 223.006 and the requirements of Subchapter B (General Requirements; Liability), Chapter 2253, Government Code, to require a private entity entering into a comprehensive development agreement under this subchapter to provide a performance and payment bond issued by a corporate surety authorized to issue bonds in this state or an alternative form of security in an amount sufficient to ensure the proper performance of the agreement and protect TxDOT and security beneficiaries, rather than payment bond beneficiaries, who have a direct contractual relationship with the private entity or a subcontractor of the private entity to supply labor material.

(b) Requires that the security, except as provided by Subsection (c), rather than requires that the performance and payment bond or alternative form of security, be in an amount equal to the cost of constructing or maintaining the project.

(c) Authorizes TxDOT, if the contract amount exceeds \$250 million in construction costs, and TxDOT determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), to set the

amount of the security at or above \$250 million, as determined by TxDOT to be in the best interest of this state, rather than requires TxDOT to set amount of the bonds or alternative forms of security, if TxDOT determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b).

(d) Provides that the security is not required for and may not cover, rather than providing that a payment or performance bond or alternate form security is not required for, the portion of an agreement that includes only design or planning services, the performance of preliminary studies, or the acquisition of real property.

(e) Makes no changes to this subsection.

(f) Authorizes TxDOT, in addition to or instead of a performance and payment bond, to require one or more of the following alternative forms of security: a cashier's check drawn on a financial entity specified by TxDOT, a United States bond or note, or an irrevocable bank letter of credit from a United States domiciled bank acceptable to TxDOT. Deletes existing text authorizing TxDOT to accept any other form of security determined suitable by TxDOT.

Deletes existing Subsection (g) requiring TxDOT by rule to prescribe requirements for an alternative form of security provided under this section.

SECTION 2. Amends Section 366.404, Transportation Code, as follows:

Sec. 366.404. PERFORMANCE AND PAYMENT SECURITY. (a) Requires a regional tollway authority organized under this chapter (authority), notwithstanding the requirements of Subchapter B, Chapter 2253, Government Code, to require a private entity entering into a comprehensive development agreement under this subchapter to provide a performance and payment bond issued by a corporate surety authorized to issue bonds in this state or an alternative form of security in an amount sufficient to ensure the proper performance of the agreement, and protect the authority, and security, rather than payment bond, beneficiaries who have a direct contractual relationship with the private entity or a subcontractor of the private entity to supply labor or material.

(b) Requires that the security, except as provided by Subsection (c), rather than requiring that a performance and payment bond or alternative form of security, be in an amount equal to the cost of constructing or maintaining the project.

(c) Authorizes, rather than requires, the authority, if the contract amount exceeds \$250 million in construction costs, and the authority determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), to set the amount of the security at or above \$250 million, as determined by the authority to be in the authority's best interest. Makes a conforming change.

(d) Provides that the security is not required for and may not cover the portion of an agreement that includes only design or planning services, the performance of preliminary studies, or the acquisition of real property. Makes a conforming change.

(e) Makes no changes to this subsection.

(f) Authorizes an authority, in addition to, or instead of, performance and payment bonds, to require the following alternative forms of security: a cashier's check drawn on a financial entity specified by the authority, a United States bond or note, or an irrevocable bank letter of credit from a United States domiciled bank acceptable to the authority. Deletes existing text authorizing an authority to require any other form of security determined suitable by the authority.

Deletes existing Subsection (g) requiring an authority by rule to prescribe requirements for alternative forms of security provided under this section.

SECTION 3. Amends Section 370.308, Transportation Code, as follows:

Sec. 370.308. PERFORMANCE AND PAYMENT SECURITY. (a) Requires a regional mobility authority (authority), notwithstanding Section 223.006 and the requirements of Subchapter B, Chapter 2253, Government Code, to require a private entity entering into a comprehensive development agreement under Section 370.305 to provide a performance and payment bond issued by a corporate surety authorized to issue bonds in this state or an alternative form of security in an amount sufficient to ensure the proper performance of the agreement; and protect the authority; and security beneficiaries, rather than payment bond beneficiaries, who have a direct contractual relationship with the private entity or a subcontractor of the private entity to supply labor or material.

(b) Requires that the security, except as provided by Subsection (c) be in an amount equal to the cost of constructing or maintaining the project. Makes a conforming change.

(c) Authorizes, rather than requires, the authority, if the contract amount exceeds \$250 million in construction costs, and the authority determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), to set the amount of the security at or above \$250 million, as determined by the authority to be in the authority's best interest. Makes conforming and nonsubstantive changes.

(d) Provides that the security is not required for and may not cover the portion of an agreement that includes only design or planning services, the performance of preliminary studies, or the acquisition of real property. Makes a conforming change.

(e) Makes no changes to this subsection.

(f) Authorizes an authority, in addition to performance and payment bonds, to require the following alternative forms of security: a cashier's check drawn on a financial entity specified by the authority, a United States bond or note, or an irrevocable bank letter of credit from a United States domiciled bank acceptable to the authority. Deletes existing text authorizing an authority, in addition to performance and payment bonds, to require any other form of security determined suitable by the authority.

Deletes existing Subsection (g) requiring an authority by rule to prescribe requirements for alternative forms of security provided under this section.

SECTION 4. Makes application of the changes in law made by this Act prospective.

SECTION 5. Effective date: September 1, 2013.