

BILL ANALYSIS

C.S.H.B. 1134
By: Darby
Transportation
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Bonds are a commonly accepted method of providing performance and payment security for a public construction contract in Texas. For example, a performance bond ensures that the work will be performed, while a payment bond ensures that the persons supplying labor and materials will be paid. 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 (TxDOT), a regional tollway authority, or a regional mobility authority.

Although current law authorizes TxDOT or the regional authority to substitute any alternative form of security that they determine to be suitable, concerns have been expressed that the vagueness of that law could cause TxDOT or such a regional authority inadvertently to fail to obtain adequate security for a project without knowing that it had failed to do so, consequently putting the state and taxpayers at risk if the project were to fail.

C.S.H.B. 1134 seeks to remedy this risk by clarifying statutory provisions relating to performance and payment security for comprehensive development agreements with TxDOT, a regional tollway authority, or a regional mobility authority.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 1134 amends the Transportation Code to specify that the performance and payment bond required for certain comprehensive development agreements by the Texas Department of Transportation (TxDOT), a regional tollway authority, or a regional mobility authority, as applicable, is to be issued by a corporate surety authorized to issue surety bonds in Texas. The bill requires the amount of such a bond or alternative form of security to be sufficient to protect contractors, subcontractors, and suppliers, rather than payment bond beneficiaries, and to equal the cost of constructing, rather than constructing or maintaining, the project, with a certain exception. The bill provides an exception for a contract price that exceeds \$250 million in construction costs, requiring the amount of security for such a project to be set at not less than \$250 million. The bill authorizes TxDOT, a regional tollway authority, or a regional mobility authority, as applicable, to require an additional amount of security or other form of acceptable guaranty for such a project if it is determined that additional security or guaranty is required to achieve the objectives of the performance and payment security.

C.S.H.B. 1134, in provisions establishing that a payment or performance bond or alternate form of security is not required for certain services, studies, or acquisitions, including design or planning services, prohibits the performance security from covering those services, studies, or acquisitions, including preliminary design or planning services. The bill, in a provision

establishing that the amount of the payment security must not be less than the amount of the performance security, establishes that the amount of the payment security is separate from and in addition to the performance security. The bill specifies that the authorization for TxDOT, a regional tollway authority, or a regional mobility authority to require an irrevocable bank letter of credit as an alternate form of security is for an irrevocable bank letter of credit from an acceptable financial institution that has an office in Texas at which the letter of credit may be presented for payment. The bill removes the authority to require any other form of security determined to be suitable as an alternate form of security.

C.S.H.B. 1134 requires a comprehensive development agreement to include provisions specifying how a claimant may submit a claim and how the claim process will be administered if TxDOT, a regional tollway authority, or a regional mobility authority, as applicable, authorizes payment security to be provided by a means other than a payment bond issued by a corporate surety authorized to issue surety bonds in Texas. The bill requires the claims procedures to be posted on the applicable website.

EFFECTIVE DATE

September 1, 2013.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 1134 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. Section 223.205, Transportation Code, is amended to read as follows:

Sec. 223.205. PERFORMANCE AND PAYMENT SECURITY. (a)

Notwithstanding Section 223.006 and the requirements of Subchapter B, Chapter 2253, Government Code, the department shall 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:

(1) ensure the proper performance of the agreement; and

(2) protect:

(A) the department; and

(B) security [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) Except as provided by Subsection (c), the [A] performance and payment bond or

HOUSE COMMITTEE SUBSTITUTE

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(1) ensure the proper performance of the agreement; and

(2) protect:

(A) the department; and

(B) contractors, subcontractors, and suppliers [payment bond beneficiaries] who have a direct contractual relationship with the private entity or with a subcontractor of the private entity to supply labor or material for the project.

(b) Except as provided by Subsection (c), the [A] performance and payment bond or

~~alternative form of~~ security shall be in an amount equal to the cost of constructing ~~or maintaining~~ the project.

(c) If the contract amount exceeds \$250 million in construction costs, and the department determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), the department ~~may~~ shall set the amount of the ~~[bonds or the alternative forms of]~~ security at or above \$250 million, as determined by the department to be in the best interest of this state.

(d) ~~The [A payment or performance bond or alternative form of]~~ 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.

(e) The amount of the payment security must not be less than the amount of the performance security.

(f) In addition to or instead of a performance and payment bond, the department may require one or more of the following alternative forms of security:

- (1) a cashier's check drawn on a financial entity specified by the department;
- (2) a United States bond or note; or
- (3) an irrevocable bank letter of credit from a United States domiciled bank acceptable to the department ~~;~~ ~~or~~ ~~[(4) any other form of security determined suitable by the department].~~

~~[(g) The department by rule shall prescribe requirements for an alternative form of security provided under this section.]~~

~~alternative form of~~ security shall be in an amount equal to the cost of constructing ~~[or maintaining]~~ the project.

(c) If the contract price exceeds \$250 million in construction costs, and the department determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), the department ~~may~~ shall set the amount of ~~[the bonds or the alternative forms of]~~ security at not less than \$250 million.

~~(c-1) The department may require an additional amount of security or other form of guaranty acceptable to the department in addition to the amount set by the department under Subsection (c) if the department determines that additional security or guaranty is required to achieve the objectives of Subsection (a).~~

(d) ~~The performance [A payment or performance bond or alternative form of]~~ security is not required for and may not cover the portion of an agreement that includes only preliminary design or planning services, the performance of preliminary studies, or the acquisition of real property.

(e) The amount of the payment security is separate from and in addition to the performance security and must not be less than the amount of the performance security.

(f) In addition to or instead of a performance and payment bond issued by a corporate surety authorized to issue surety bonds in this state, the department may require one or more of the following alternative forms of security:

- (1) a cashier's check drawn on a financial entity specified by the department;
- (2) a United States bond or note; or
- (3) an irrevocable bank letter of credit from a financial institution acceptable to the department that has an office in this state at which the letter of credit may be presented for payment ~~;~~ ~~or~~ ~~[(4) any other form of security determined suitable by the department].~~

~~[(g) The department by rule shall prescribe requirements for an alternative form of security provided under this section.]~~

~~(h) If the department authorizes payment security to be provided by a means other than a payment bond issued by a corporate surety authorized to issue surety bonds in this state, the comprehensive development agreement must include provisions specifying how a claimant may submit a claim and how the claim process will be administered. The department shall post the claims procedures for the project on its website.~~

SECTION 2. Section 366.404, Transportation Code, is amended to read as follows:

Sec. 366.404. PERFORMANCE AND PAYMENT SECURITY. (a)

Notwithstanding the requirements of Subchapter B, Chapter 2253, Government Code, an authority shall 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:

- (1) ensure the proper performance of the agreement; and
- (2) protect:
 - (A) the authority; and
 - (B) ~~security [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) Except as provided by Subsection (c), the [A performance and payment bond or alternative form of] security shall be in an amount equal to the cost of constructing or maintaining the project.

(c) If the contract amount exceeds \$250 million in construction costs, and the [an] authority determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), the authority may [shall] set the amount of the [bonds or the alternative forms of] security at or above \$250 million, as determined by the authority to be in the authority's best interest.

SECTION 2. Section 366.404, Transportation Code, is amended to read as follows:

Sec. 366.404. PERFORMANCE AND PAYMENT SECURITY. (a)

Notwithstanding the requirements of Subchapter B, Chapter 2253, Government Code, an authority shall 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 surety bonds in this state or an alternative form of security in an amount sufficient to:

- (1) ensure the proper performance of the agreement; and
- (2) protect:
 - (A) the authority; and
 - (B) ~~contractors, subcontractors, and suppliers [payment bond beneficiaries]~~ who have a direct contractual relationship with the private entity or with a subcontractor of the private entity to supply labor or material for the project.

(b) Except as provided by Subsection (c), the [A] performance and payment bond or alternative form of security shall be in an amount equal to the cost of constructing [or maintaining] the project.

(c) If the contract price exceeds \$250 million in construction costs, and the [an] authority determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), the authority shall set the amount of [the bonds or the alternative forms of] security at not less than \$250 million.

(c-1) The authority may require an additional amount of security or other form of guaranty acceptable to the authority in addition to the amount set by the authority

~~under Subsection (c) if the authority determines that additional security or guaranty is required to achieve the objectives of Subsection (a).~~

(d) ~~The [A payment or performance bond or alternative form of]~~ 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.

(e) The amount of the payment security must not be less than the amount of the performance security.

(f) In addition to, or instead of, performance and payment bonds, an authority may require the following alternative forms of security:

- (1) a cashier's check drawn on a financial entity specified by the authority;
- (2) a United States bond or note; or
- (3) an irrevocable bank letter of credit from a United States domiciled bank acceptable to the authority [~~;~~~~or~~]

~~[(4) any other form of security determined suitable by the authority].~~

~~[(g) An authority by rule shall prescribe requirements for alternative forms of security provided under this section.]~~

SECTION 3. Section 370.308, Transportation Code, is amended to read as follows:

Sec. 370.308. PERFORMANCE AND PAYMENT SECURITY. (a) Notwithstanding Section 223.006 and the requirements of Subchapter B, Chapter 2253, Government Code, an authority shall

(d) The performance ~~[A payment or performance bond or alternative form of]~~ security is not required for and may not cover the portion of an agreement that includes only preliminary design or planning services, the performance of preliminary studies, or the acquisition of real property.

(e) The amount of the payment security is separate from and in addition to the performance security and must not be less than the amount of the performance security.

(f) In addition to, or instead of, performance and payment bonds issued by a corporate surety authorized to issue surety bonds in this state, an authority may require the following alternative forms of security:

- (1) a cashier's check drawn on a financial entity specified by the authority;
- (2) a United States bond or note; or
- (3) an irrevocable bank letter of credit from a financial institution acceptable to the authority that has an office in this state at which the letter of credit may be presented for payment [~~;~~~~or~~]

~~[(4) any other form of security determined suitable by the authority].~~

(g) An authority by rule shall prescribe requirements for alternative forms of security provided under this section.

(h) If the authority authorizes payment security to be provided by a means other than a payment bond issued by a corporate surety authorized to issue surety bonds in this state, the comprehensive development agreement must include provisions specifying how a claimant may submit a claim and how the claim process will be administered. The authority shall post the claims procedures for the project on its website.

SECTION 3. Section 370.308, Transportation Code, is amended to read as follows:

Sec. 370.308. PERFORMANCE AND PAYMENT SECURITY. (a) Notwithstanding Section 223.006 and the requirements of Subchapter B, Chapter 2253, Government Code, an authority shall require

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:

- (1) ensure the proper performance of the agreement; and
- (2) protect:
 - (A) the authority; and
 - (B) security [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) Except as provided by Subsection (c), the [A performance and payment bond or alternative form of] security shall be in an amount equal to the cost of constructing or maintaining the project.

(c) If the contract amount exceeds \$250 million in construction costs, and the [an] authority determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), the authority may [shall] set the amount of the [bonds or the alternative forms of] security at or above \$250 million, as determined by the authority to be in the authority's best interest.

(d) The [A payment or performance bond or alternative form of] 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.

(e) The amount of the payment security must not be less than the amount of the performance security.

(f) In addition to performance and payment bonds, an authority may require the following alternative forms of security:

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 surety bonds in this state or an alternative form of security in an amount sufficient to:

- (1) ensure the proper performance of the agreement; and
- (2) protect:
 - (A) the authority; and
 - (B) contractors, subcontractors, and suppliers [payment bond beneficiaries] who have a direct contractual relationship with the private entity or with a subcontractor of the private entity to supply labor or material for the project.

(b) Except as provided by Subsection (c), the [A] performance and payment bond or alternative form of security shall be in an amount equal to the cost of constructing [or maintaining] the project.

(c) If the contract price exceeds \$250 million in construction costs, and the [an] authority determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), the authority shall set the amount of [the bonds or the alternative forms of] security at not less than \$250 million.

(c-1) The authority may require an additional amount of security or other form of guaranty acceptable to the authority in addition to the amount set by the authority under Subsection (c) if the authority determines that additional security or guaranty is required to achieve the objectives of Subsection (a).

(d) The performance [A payment or performance bond or alternative form of] security is not required for and may not cover the portion of an agreement that includes only preliminary design or planning services, the performance of preliminary studies, or the acquisition of real property.

(e) The amount of the payment security is separate from and in addition to the performance security and must not be less than the amount of the performance security.

(f) In addition to performance and payment bonds issued by a corporate surety authorized to issue surety bonds in this state, an

- (1) a cashier's check drawn on a financial entity specified by the authority;
- (2) a United States bond or note; or
- (3) an irrevocable bank letter of credit from a United States domiciled bank acceptable to the authority [~~;~~ ~~or~~

~~[(4) any other form of security determined suitable by the authority].~~

~~[(g) An authority by rule shall prescribe requirements for alternative forms of security provided under this section.]~~

SECTION 4. The changes in law made by this Act apply only to a comprehensive development agreement for which a best value proposer is selected on or after the effective date of this Act. A comprehensive development agreement for which a best value proposer was selected before that date is governed by the law as it existed at the time the best value proposer was selected, and the former law is continued in effect for that purpose.

SECTION 5. This Act takes effect September 1, 2013.

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- (1) a cashier's check drawn on a financial entity specified by the authority;
- (2) a United States bond or note; or
- (3) an irrevocable bank letter of credit from a financial institution acceptable to the authority that has an office in this state at which the letter of credit may be presented for payment [~~;~~ ~~or~~

~~[(4) any other form of security determined suitable by the authority].~~

(g) An authority by rule shall prescribe requirements for alternative forms of security provided under this section.

(h) If the authority authorizes payment security to be provided by a means other than a payment bond issued by a corporate surety authorized to issue surety bonds in this state, the comprehensive development agreement must include provisions specifying how a claimant may submit a claim and how the claim process will be administered. The authority shall post the claims procedures for the project on its website.

SECTION 4. Same as introduced version.

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