

BILL ANALYSIS

C.S.H.B. 2518
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State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

The Government Code currently requires payment and performance bonds for public work contracts, with a few exceptions. The general contractor purchases a performance bond as security for performing the work under the contract. The general contractor purchases a payment bond as security for payment of the subcontractors' and suppliers' invoices. In a growing trend, private entities are now leasing public property and constructing improvements. Publicly owned land cannot be subjected to a mechanic's or materialman's lien. An unfortunate unintended consequence of the practice is that there is no effective protection of the right to payment for the subcontractors and suppliers whose labor and materials are used for newly built improvements to leased property. Subcontractor and supplier claimants cannot file mechanic's liens against the real property because it is owned by a governmental entity and is thus immune from attachment by lien or otherwise.

Some members of the industry have called on the state to remedy this unintended gap in protection for innocent subcontractors and suppliers and, at the same time, provide a benefit to the owning governmental entities and, by extension, the citizens whose interests they represent. C.S.H.B. 2518 seeks to answer those calls by mandating certain terms that must be included in a lease between a governmental entity and a private entity, which are that any construction on the leased property must be bonded and that the lessee must notify the governmental entity before the commencement of construction so that the governmental entity may have an opportunity to verify the bonds.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

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. 2518 amends the Government Code to require a lease between a governmental entity and another person regarding public property to contain lease terms requiring the person to do the following:

- include in each contract for the construction, alteration, or repair of an improvement to the leased property a condition that the contractor execute the following bonds:
 - a payment bond that conforms to the bond requirements to pay liens or claims related to a mechanic's, contractor's, or materialman's lien; and

- a performance bond in an amount equal to the amount of the contract for the protection of the governmental entity and conditioned on the faithful performance of the contractor's work in accordance with the plans, specifications, and contract documents; and
- provide to the governmental entity, at least 90 days before the date the construction, alteration, or repair of any improvement to the leased property begins, a notice of commencement that:
 - identifies the public property where the work will be performed;
 - describes the work to be performed;
 - states the total cost of the work to be performed;
 - includes copies of the performance and payment bonds; and
 - includes a written acknowledgment signed by the contractor stating that copies of the performance and payment bonds will be provided to all subcontractors not later than the fifth day after the date a subcontract is executed.

A governmental entity, on or before the 10th day after the date the entity receives an incomplete notice of commencement that does not include the required copies of the performance and payment bonds, may notify the leaseholder that the construction, alteration, or repair may not proceed due to the leaseholder's failure to provide the required copies. The bill creates a Class A misdemeanor offense for a person who materially misrepresents information in a notice of commencement.

C.S.H.B. 2518 makes statutory provisions establishing a governmental entity's liability as a surety on failure to obtain a payment bond from a prime contractor under a public work contract also applicable to a governmental entity that fails to include the requisite lease terms in a lease, except that a governmental entity is exempt from liability as a surety if a person leasing property from the entity fails to submit to the entity the required notice of commencement.

C.S.H.B. 2518 applies only to a lease for public property entered into or renewed by a governmental entity on or after the bill's effective date. The bill defines "governmental entity" by reference as a governmental or quasi-governmental authority authorized by state law to make a public work contract.

EFFECTIVE DATE

September 1, 2023.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 2518 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

Whereas the introduced extended the applicability of state law governing the use of performance and payment bonds for public work contracts to a contract of qualifying value for work performed on public property leased by a nongovernmental entity from a governmental entity, other than a contract entered into to lease public property from a river authority that owns electric generation capacity in excess of 1,000 megawatts, the substitute does not. The substitute instead sets out required lease terms for a lease between a governmental entity and another person regarding public property. These required lease terms include bond payment requirements and the requirement to provide the governmental entity a notice of commencement, both of which were included in the introduced. Specific differences, however, are as follows:

- whereas the introduced imposed on a prime contractor entering into a public work contract with a nongovernmental entity leasing public property from a governmental entity the requirement to execute a performance bond or payment bond at least 10 days before beginning work under the contract, if the contract is of large enough value to trigger existing bond requirements for governmental public works contracts, the

substitute includes among the required lease terms a requirement that the person leasing property from a governmental entity include in a contract for the construction, alteration, or repair of an improvement to the leased property a condition that the contractor execute both a payment bond and a performance bond, without any condition about the value of the contract; and

- with respect to the notice of commencement:
 - whereas the introduced required a nongovernmental entity that leases public property from a governmental entity and enters into a public work contract with a prime contractor to require the contractor to submit a notice of commencement to the governmental entity at least 10 days before beginning the work, the substitute includes among the required lease terms a requirement that the person leasing property from a governmental entity provide to the governmental entity a notice of commencement at least 90 days before the date construction, alteration, or repair of any improvement to the leased property begins;
 - the substitute omits the requirement from the introduced that the notice identify the applicable public work contract and includes a requirement absent from the introduced that the notice include copies of the performance and payment bonds and a written acknowledgement signed by the contractor stating that copies of the required performance and payment bonds will be provided to all subcontractors not later than the fifth day after the date a subcontract is executed;
 - the substitute includes a provision absent from the introduced that authorizes a governmental entity, on or before the 10th day after receiving an incomplete notice of commencement that does not include the required copies of the performance and payment bonds, to notify the leaseholder that construction, alteration, or repair may not proceed; and
 - the substitute creates a Class A misdemeanor offense for a person who materially misrepresents information in a notice of commencement, whereas the introduced did not create an offense.

In changing the scope of the bill's provisions, the substitute also omits the provision from the introduced imposing a 10-day deadline for a prime contractor under a public works contract with a governmental entity to execute the required bonds at least 10 days before beginning work under the contract.