



# Don't Become Roadkill

## New TXDOT Rules Can Alter Claim Deadlines on Highway Projects

Most subcontractors and suppliers providing materials or labor on Texas construction projects are familiar with the deadlines set forth under Texas law for asserting lien claims and payment bond claims. For public works projects, Texas law requires governmental entities to ensure that general contractors obtain payment and performance bonds. The relevant deadlines applicable to public projects in Texas are set forth in Chapter 2253 of the Texas Government Code, and many construction industry professionals have a basic understanding of the process. However, pursuant to legislation enacted in 2005, the Texas Department of Transportation (TxDOT) has the ability to enter Comprehensive Development Agreements (CDA) for the purpose of completing highway construction projects. According to TxDOT, a CDA is “the tool TxDOT uses to enable private development by sharing the risks and responsibilities of design and construction.”<sup>1</sup> Significantly, CDAs can alter the deadlines for asserting claims in connection with TxDOT projects, giving rise to potential catastrophes for subcontractors and suppliers who have simply followed the familiar protocol laid out under Chapter 2253.

CDAs for two recent major TxDOT highway construction projects in the Dallas-Fort Worth Metroplex require the developers to post letters of credit rather than traditional payment and performance bonds.

Under Section 223.205 of the Texas Transportation Code, in negotiating CDAs, TxDOT can require typical payment and performance bonds, *or* an alternative form of security, such as a letter of credit.<sup>2</sup> When TxDOT authorizes an alternative form of security, the claims process can vary from project to project based on the specific requirements set forth in the security documents for such project.

For instance, CDAs for two recent major TxDOT highway construction projects in the Dallas-Fort Worth Metroplex—the North Tarrant Express Project and the LBJ 635 Project—require the developers to post letters

of credit rather than traditional payment and performance bonds.<sup>3</sup> For those two projects, the CDAs, rather than Texas law, provide the deadlines for asserting claims. While the deadlines are similar to those found under Texas law governing lien and bond claims, there are critical differences. Perhaps most notably, both CDAs require claimants who do not have a direct contractual relationship with the prime contractor to assert claims *no later than the 15th day of the second month* after each month in which any of the claimed labor was performed or any of the claimed material was provided. This timeframe is an entire month shorter than the deadline to assert claims under Chapter 2253 of the Texas Government Code, which requires downstream claimants to assert claims by the 15th day of the *third* month after each month in which any of the claimed labor was performed or any of the claimed material was provided. For these two projects, it is possible that subcontractors and suppliers diligently following the procedures set out in Chapter 2253 could lose their claims. Additionally, given the recent implementation of TxDOT's CDA program, it is unclear whether the legal interpretations of mechanic's lien and payment bond claims afforded by Texas courts to protect laborers and materialmen, such as the doctrines of “liberal construction” and “substantial compliance,” would apply to claims made under CDAs.<sup>4</sup>

In connection with some projects undertaken pursuant to CDAs, TxDOT has required traditional payment and performance bonds. The requirements for asserting claims on CDA projects with traditional bonds is somewhat muddled by the fact that neither the CDAs nor the bonds themselves reference the Government Code, or set forth any deadlines. Nevertheless, given that TxDOT has required payment and performance bonds on these projects, as opposed to an “alternative form of security,” it appears that the usual Chapter 2253 claims procedures applicable to public projects would apply.

Along these lines, in October 2013, construction began on the massive North Tarrant Express (I35 Express Project) expansion, a \$4.8 billion, 28-mile project, extending from Dallas to Denton. The first phase of the project is predicted to be substantially complete in May 2017. It is anticipated that the project will create over 900 jobs and

require more than 400 cubic feet of concrete. The development agreement executed between TxDOT and AGL Constructors, dated May 17, 2013, requires the developer to secure payment and performance bonds in the amount of \$25,000,000, and increasing to roughly \$700,000,000, as additional work is authorized by TxDOT. Accordingly, it appears most likely that the typical Chapter 2253 procedures will apply to claims made on the I35 Express Project.

The important lesson for those providing materials or labor on Texas highway construction projects is that it is no longer sufficient for subcontractors and suppliers on TxDOT projects to simply follow the deadlines set forth under Chapter 2253. Instead, subcontractors and suppliers must obtain a copy of the CDA, ideally before any labor or materials are provided, and review the terms to determine if there is an alternative form of security on the project. The CDAs can be obtained from TxDOT and, indeed, most of the CDAs are available on TxDOT's website. When TxDOT requires an alternative form of security, potential claimants must carefully review the time deadlines for asserting claims. These deadlines are likely to have slight, but critically important differences from Chapter 2253 procedures. If, on the other hand, TxDOT requires traditional payment bond on the project, the usual Chapter 2253 claim deadlines should be followed: notice of non-payment must be provided to the prime contractor by the 15th day of the second month after the month in which the unpaid labor or material was furnished, and notice of payment bond claims to the prime contractor and the surety must be provided by the 15th day of the third month after the month in which the unpaid labor or material was furnished.

CDAs are a recent development and undoubtedly, the various legal contours associated with the program will be fleshed out over time. For the time being, suffice it to say, subcontractors and suppliers should use an abundance of caution in seeking to protect their financial interests in connection with work performed or materials provided on TxDOT projects. ■

1. Texas Department of Transportation, *Current Comprehensive Development Agreements*, <http://www.txdot.gov/business/partnerships/current-cda.html> (last visited Nov. 1, 2013).

2. See Tex. Transp. Code Ann. § 223.205 (Vernon) ("the department shall require a private entity entering into a comprehensive development agreement under this subchapter to provide a performance and payment bond or an alternative form of security...").

3. For a thorough analysis of Texas Transportation Code Chapter 223 and a case study regarding the North Tarrant Express Project, see Brian W. Erikson, *Comprehensive Development Agreements – A Trap for the Unwary: A Case Study*, 10 Constr.L.J. 7 (2012) ("Erikson").

4. See Erikson at 12.

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