

# **HOT TOPICS IN PUBLIC/PRIVATE PARTNERSHIPS**

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State Bar of Texas  
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**TEXAS MINORITY COUNSEL PROGRAM**  
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Austin, TX

**CHAPTER 7**

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## **EDUCATION**

B.A, with distinction, Political Science, San Diego State University  
J.D., with Certificate of Concentration in Civil Litigation, University of California Hastings College of the Law

## **PROFESSIONAL ACTIVITIES**

Partner, Gordon & Rees, LLP  
Former Judicial Law Clerk, Judge Franklin D. Burgess, U.S. District Court for the Western District of Washington  
Vice Chair of the California AGC CLC San Francisco Bay Area Chapter  
Steering Committee Member of ABA Forum on the Construction Industry, Division 10  
Member of ABA Forum on Construction Industry Diversity Committee  
Board Member Caleb-Joshua Education & Humanitarian Project

## **LAW-RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS**

Member Golden Key National Honor Society  
Member and Former Chapter President, Pi Sigma Alpha, Political Science Honor Society, San Diego State University  
Co-Author/Speaker for ABA Forum on Construction Industry:  
    Counting Chickens While they Hatch and the Double-Edged Sword of Tracking Project Claims and Delays (April 2014)  
    Terminations, ABA Fundamentals of Construction Law Program (Nov. 2013)  
Speaker for Law Seminars International Public Private Partnership Workshop (Mar. 2014)  
    Project Conception: Anatomy of a P3P and Tips for Selecting the Right Approach  
    Dispute Resolution Terms to Facilitate a Long-Term Relationship for Long-Term Project  
Speaker at NECA National Convention (October 2009, 2011, 2013)  
    Recent Developments in Integrated Project Delivery  
    Alternative Energy Projects: Rules and Regulations You Must Know to Assess Business Opportunities  
    Green Contracting: State and Federal Methods  
Speaker for ELECTRI International (2011)  
    Power Purchase Agreements: How They Work and What You Need to Know  
Contributing Author, ABA Forum on Construction 50 State and Federal Update (2012, 2013)  
Contributing Author, Wiley Construction Law Update, Aspen Publishing (2005, 2008)



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*You want us on your side.<sup>SM</sup>*



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**M**ary Colchin Johndroe vigorously represents clients in civil litigation, including construction, contract, eminent domain, inverse condemnation, property rights, and government law cases. She has handled cases at all levels of the legal system; before commissions and administrative agencies, in trials and appeals within Texas state and federal courts, including the Texas and U.S. Supreme Courts. Ms. Johndroe joined Cantey Hanger in 1986 and was elected partner in 1992.

#### PRINCIPAL PRACTICE AREAS

- Construction
- Eminent Domain/Property Rights
- Litigation

#### EDUCATION

- Baylor University School of Law, Waco, Texas (J.D., 1986)
- University of Texas at Arlington, Arlington, Texas (B.A. Sociology, 1979)  
- graduate work in Urban Affairs

#### EXPERIENCE

- Adjunct Professor, Texas A&M University School of Law – Spring 2014
- Adjunct Professor, Texas Wesleyan University School of Law – Spring 2013 (Construction Law)
- Represented municipality in eminent domain proceedings and negotiation of property interests to extend airport runway – involved relocation of rail and utilities on more than 50 parcels.
- Counsel to international airport handling condemnations and risk avoidance in business disputes.
- Lead attorney defending large hospital against condemnation by the State achieving lucrative settlement far in excess of award.
- Attorney in charge representing river authority in substantial construction litigation cases resulting in favorable resolutions.
- Obtained desirable judgments and dismissal as lead and sole counsel for river authority in eminent domain and inverse condemnation proceedings.
- Represented municipality in defense of suit seeking to invalidate property tax resulting in summary judgment for client.
- Represented landowners in condemnations by the State in Tarrant, Dallas and Hood counties.
- Lead attorney in complex multi-party construction litigation defending Canadian company. Obtained very favorable settlement in the midst of Daubert proceedings against plaintiff's engineering experts.
- Lead attorney defending utility companies in numerous personal injury, contract and property damage cases.
- Represented landowners and obtained 1 million + jury verdict in Parker County case involving condemnation for electric transmission lines.
- Obtained 1.5 million settlement in Parker County involving condemnation case for a gas pipeline.
- Obtained 1.2 million jury verdict in Hood County involving condemnation case for a highway taking.

#### BAR ADMISSIONS & CERTIFICATIONS

- Licensed to practice law in Texas in 1986
- Admitted to practice before the United States District Court, Northern District of Texas
- State Bar of Texas  
- Litigation Section

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- Construction Law Section
- Tarrant County Bar Association
  - Construction Law Section
- Women's Bar Association, Board Member, 2012-2013
- Martindale Hubbell "AV Preeminent" Rating

#### **PROFESSIONAL & COMMUNITY INVOLVEMENT**

- Texas Bar Foundation, Life Fellow
- Tarrant County Bar Foundation, Fellow
- Women Influencing Business – Fort Worth Chamber of Commerce
- Arlington Chamber of Commerce – Business Development Advisory Council
- Women's Chamber of Commerce of Texas
- International Right of Way Association
- National Association of Women Business Owners, Supporting Member
- The Women's Center, Council of Honor
- The Women's Foundation of North Texas
- First Texas Council of Camp Fire Blue Ribbon Award, 1996
- YWCA Tribute to Women in Business Award, 1999
- Great Women of Texas, 2007 Woman of Influence
- Fort Worth Business Press Great Women of Texas Alumni Group
- Big Brothers Big Sisters of Tarrant County, Charter Member, Attorneys for Littles
- Texas' Legal Leaders – Top Rated Lawyers (ALM – 2013)

#### **NEWS & EVENTS**

- Cantey Hanger Eminent Domain Litigation Partners Win \$1.1 Million Judgment for Developers
- Mary Johndroe presents "on condemnation" to the Tarrant County Bar Association, CLE Seminar for the Environmental Law Section, February 27, 2014

#### **PUBLICATIONS & PRESENTATIONS**

- "[The Eminent and Inverse Environment – The Interplay Between Environmental Issues and Condemnation](#)", Tarrant County Bar Association, CLE Seminar for the Environmental Law Section, February 27, 2014
- Burselson Area Chamber of Commerce, "Becoming a Woman of Influence," Power of Heels, January 17, 2013
- "Pilot Program for Property Tax Appeals Begins in 2010", *Fort Worth Business Press*, July 6-12, 2009
- *Boyer, Inc. v. Trinity River Authority of Texas*, 279 S.W.3d 354 (Tex. App.— Fort Worth 2008, pet. denied)
- *Tarrant Appraisal District v. Moore*, 845 S.W.2d 820 (Tex. 1993)
- *Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547 (Tex. App.—Fort Worth 1990, pet. denied), cert. denied, 498 U.S. 1126, 112 L.Ed.2d 1194 (Feb. 25, 1991)
- H. Wendorf & D. Schlueter, *Supplement to Texas Rules of Evidence Manual*, 1985



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**RELEVANT WORK**

**FERROVIAL AGROMAN US CORP.  
WEBBER, LLC**

June 2006 - Present

*General Counsel and Corporate Secretary*

Develop and manage all facets of US Legal Department relating to the US construction subsidiaries of Ferrovial, S.A., dedicated to the construction, management and development of US infrastructure. Representative experience includes acting as lead US counsel on contract formation and negotiation for the design and construction of large transportation P3 projects in the United States, valued at more than \$10B, as well as numerous other multimillion dollar design-build projects for public and private entities.

*Previously*

**SHEEHY, SERPE AND WARE, P.C.,** *Attorney*

**MALONEY, MARTIN & MITCHELL, LLC,** *Law Clerk/ Attorney*

**EDUCATION**

**Southern Methodist University-Cox School of Business, Dallas**

*General Counsel Forum Institute for Leadership in Law, Spring 2011*

**IESE Business School, University of Navarra, Madrid, Spain**

*Executive Management Program, Summer 2008*

**University of Houston Law Center, Houston**

*Juris Doctor, May 2000*

**University of Texas, Austin**

*Bachelor of Arts, cum laude, 1997*

**AFFILIATIONS AND BAR ADMISSIONS**

Spain-Texas Chamber of Commerce (Board Member)  
Texas AGC Legislative Drafting & Review Committee  
Texas State Bar  
Georgia State Bar



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## WHAT IS A PUBLIC PRIVATE PARTNERSHIP?

1



No generally-adopted definition. In broadest sense:

- \*A partnership of public and private sectors;
- \*Performance of a public project;
- \*Cost typically borne by users, not taxpayers;
- \*A shifting of traditional risks and responsibilities.

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## NATIONAL TREND TOWARD MORE P3S

33 states have laws authorizing P3s for transportation and other projects

- Up from 23 states in 2006
- Six states considering enabling legislation in 2014

States with Transportation PPP Enabling Legislation as of Feb. 8, 2014  
(Updated from page 15 of the 2010 NCSL PPP Toolkit)

Legend:  
■ Broad enabling legislation  
■ Limited or project-specific legislation  
□ No legislation

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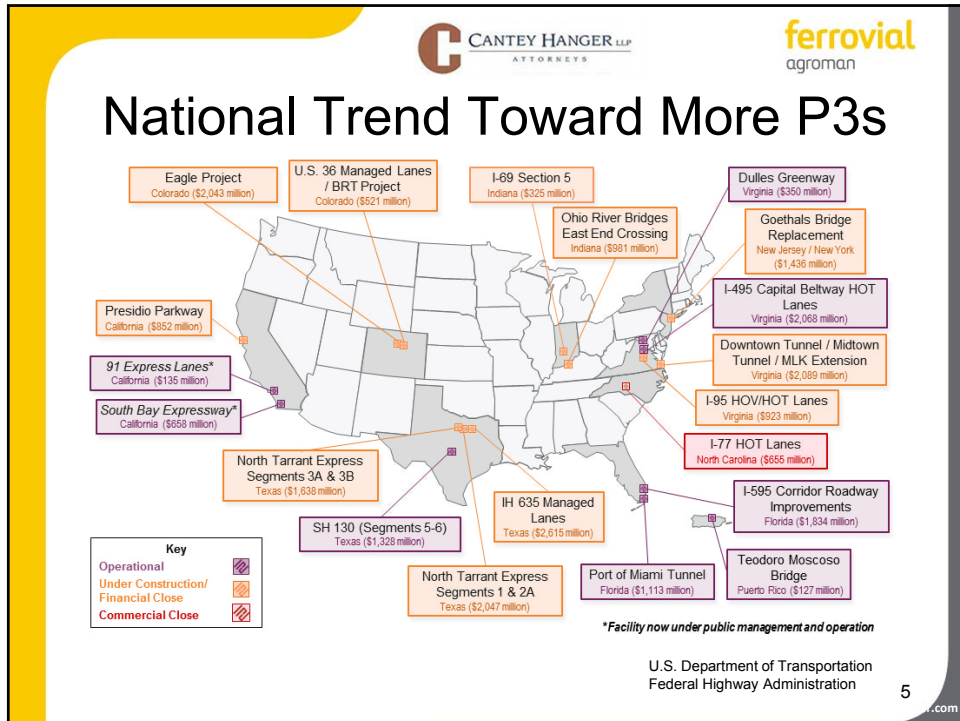
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## NATIONAL TREND TOWARD MORE P3S

- Investment in P3 projects increased fivefold between 1997 and 2008
- ~\$61B has been committed to P3 projects in last 25 years, with about half approved in the last five years
- Size of P3 projects has also increased in recent years

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## Texas Trend Toward More P3s (With Room For Growth)

- Texas has more P3 projects than any other state
- 20% of P3 projects that are operational, under construction, or closed are in Texas
- Percentage of P3 dollars is growing

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## **Texas P3 Options**

### **(1) Transportation – Highways**

- \* Chapter 223 Texas Transportation Code (Bids & Contracts for Highway Projects)
- \* Chapter 227 Texas Transportation Code (Trans-Texas Corridor) (repealed eff. June 17, 2011)
- \* Chapter 228 Texas Transportation Code (State Highway Toll Projects) (formerly Chapter 361)
- \* Chapter 284 Texas Transportation Code (Causeways, Bridges, Tunnels, Turnpikes, Ferries, and Highways)
- \* Chapter 370 Texas Transportation Code (Regional Mobility Authorities)

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### **(2) Most Other Facilities**

- \* Chapter 2267 Texas Government Code (Public and Private Facilities and Infrastructure)
  - any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing care facility, recreational facility, public building, technology facility . . . available to a governmental entity for public use, or any improvements to real property owned by a governmental entity.

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## Transportation Context

TxDOT contracts a private partner to renovate, design, construct, operate, maintain, finance, or manage a facility.

TxDOT retains ownership of the facility BUT the private partner may invest a significant amount of capital to finance the project.

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## Legislative History

2003: H.B. 3588 authorizes the short-lived “Trans-Texas Corridor”;

2007: S.B. 792 authorizes fifty-year concessions.

2011: S.B. 1420 authorizes TxDOT to enter into 11 additional P3 projects.

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## P3 Models Used in Texas

- TxDOT uses two types of P3 Agreements:
  1. Design-Build Agreements; and
  2. Concession Agreements
- Both are considered Comprehensive Development Agreements (CDAs)

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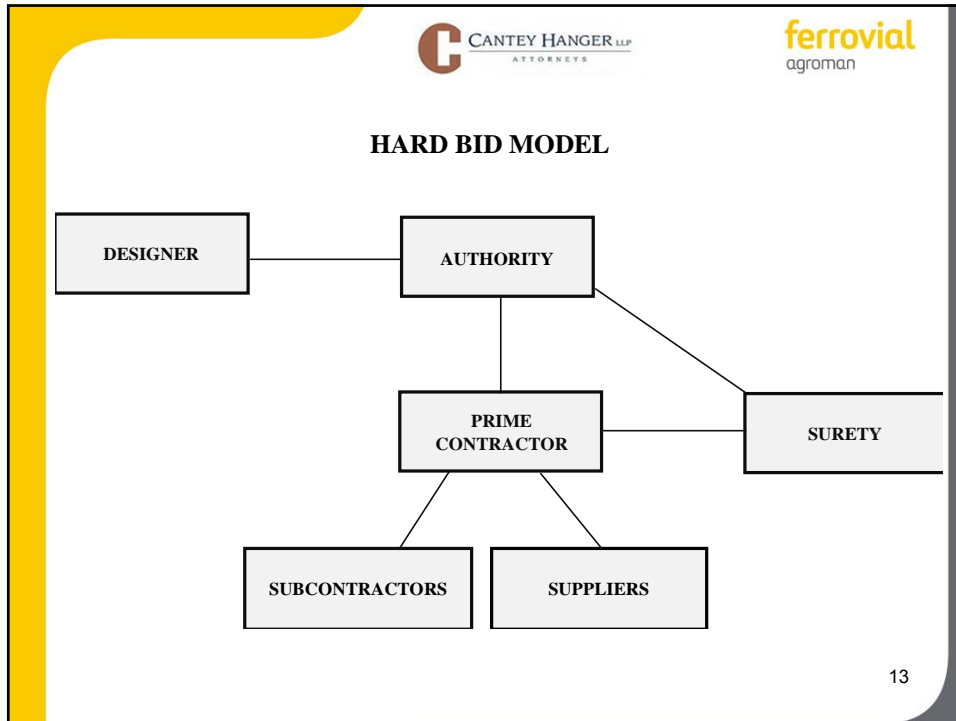
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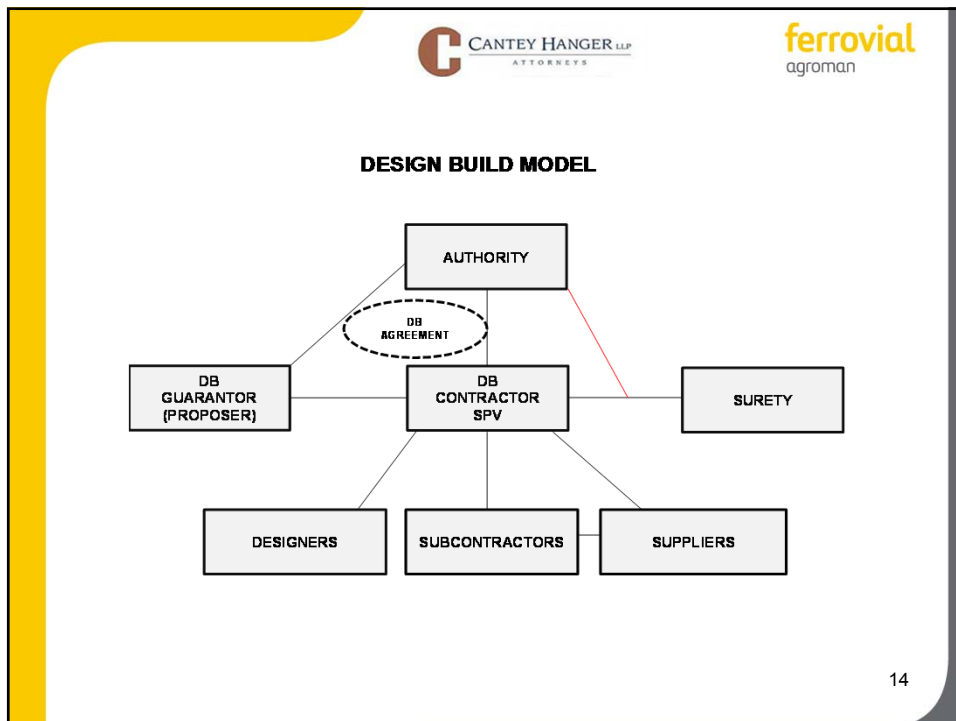
## KEY DIFFERENCES



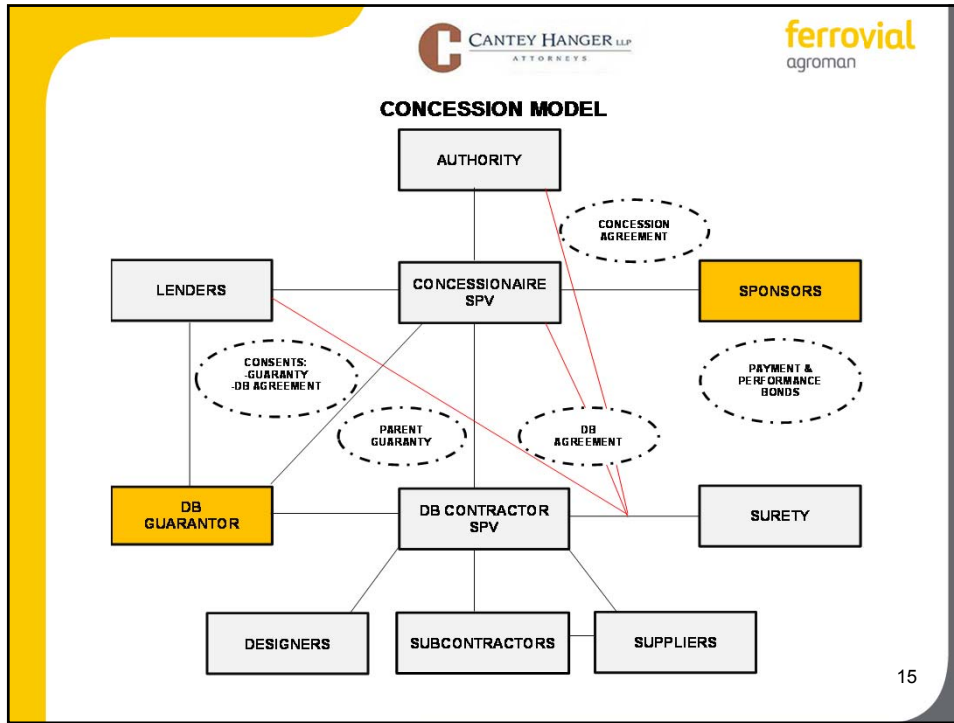
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**Executed Major TxDOT Projects**

Date Signed	Project	Developer	Type of P3
19 June 2002	SH130 (Segs. 1-4)	Lone Star Infrastructure	Design-Build (\$3.2B)
22 March 2007	SH 130 (Segs. 5-6)	SH 130 Concession Co.	Concession (\$1.3B)
23 June 2009	North Tarrant Express (Segs. 1 & 2W)	NTE Mobility Partners	Concession (\$1.6B)
4 September 2009	LBJ Express	LBJ Infrastructure Group	Concession (\$2.1B)
6 October 2009	DFW Connector	Northgate Constructors	Design-Build (\$1.02B)
20 February 2012	Horseshoe	Pegasus Link Constructors	Design-Build (\$800M)
1 March 2013	North Tarrant Express (Seg. 3A)	NTE Mobility Partners Segments 3	Concession (\$1.4B)
22 March 2013	SH 99 Grand Pwky (Segs. F1, F2, G)	Zachry-Odebrecht	Design-Build (\$1.45B)
17 May 2013	I-35E (Phase 1)	AGL Constructors	Design-Build (\$1.3B)

**TOTAL: \$14.17 Billion** 16.com







## Some Upcoming P3 Projects

RFQ ISSUE	Project	Developer	Type of P3
AWARDED	SH 183	SouthGate Mobility Partners	Design-Build (~850M)
ISSUED	US 181 Harbor Bridge	TBD	Design-Build (~\$700M)
ISSUED	SH 99 Grand Pwky (Segs. H, I-1, I-2)	TBD	Design-Build (~\$800M)
ISSUED	SH 288	TBD	DBFOM/Conc. (~\$1.1B)
ISSUED	SH 360	TBD	Design-Build (~\$300M)
ISSUED	Bergstrom Expressway	TBD	Concession (~\$585M)
TBD	Dallas to Houston HSR	TBD	TBD (???)

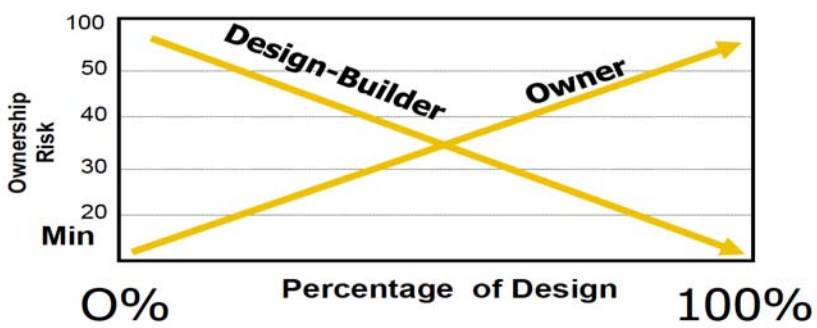
**TOTAL: Expanding** 17







## How Does TxDOT Manage This Much Risk?

### Shifting Risk





Principles of Design-Build - Copyright © 2009 by DBIA

## Risk-Shifting and Other P3 Issues

- ROW Acquisition and Eminent Domain
- Design
- Sales and Use Tax
- DBE Compliance
- Bonding Requirements
- Liability Limitations (CPRC 97.002)

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## ROW Acquisition and Eminent Domain

Chapter 223 Texas Transportation Code provides:

TxDOT may enter into a P3 agreement with a private entity to design, develop, finance, construct, maintain, repair, operate, . . .



. a:

- (1) toll project;
- (2) state highway improvement project that includes both tolled and non-tolled lanes . . . ;
- (3) state highway improvement project in which the private entity has an interest in the project;
- (4) state highway improvement project financed wholly or partly with the proceeds of private activity bonds, . . . ; or
- (5) non-tolled state highway improvement project authorized by the legislature.

TEX. TRANSP. CODE § 223.201(a)(1)-(5) (Vernon Supp. 2014).

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(a) Except as provided by Subsection (b), TxDOT shall assume:

- (1) all risks and costs associated with:
  - (A) changes and modifications to the scope of the project requested by TxDOT;
  - (B) unknown or differing conditions at the site;
  - (C) environmental clearance and other regulatory permitting; and
  - (D) natural disasters and other force majeure events; and
- (2) all costs associated with property acquisition, other than costs associated with acquiring a temporary easement . . . .

(b) A **design-build contractor may assume some or all of the risks or costs** described by Subsection (a) if the terms of the assumption are reflected in the final request for proposals . . . .

TEX. TRANSP. CODE § 223.248(a)(1)(A)-(D)(2)(b) (Vernon Supp. 2014).

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Chapter 2267 of the Texas Government Code provides:

- (a) At the **request of the contracting person**, the responsible **governmental entity may exercise any power of eminent domain** that it has under law to acquire any land or property interest to the extent the responsible governmental entity dedicates the land or property interest to public use and finds that the action serves the public purpose of this chapter.
- (b) Any amounts to be paid in any eminent domain proceeding shall be **paid by the contracting person**.

TEX. GOV'T CODE § 2267.062(a)(b) (Vernon Supp. 2014).

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## GRAND PARKWAY

**6.1.1** All Project ROW, . . . excluding temporary interests . . . , shall be acquired in the name of the State. Developer shall undertake and complete the acquisition of all Project ROW, . . .

**6.1.2** TxDOT shall: (a) provide review and approval or disapproval of Acquisition Packages for Project ROW, and (b) . . . , undertake eminent domain proceedings, if necessary, for Project ROW.

**6.2.1** TxDOT shall be responsible for the purchase price for all parcels within the Schematic ROW. . . . **Developer shall be responsible for performing and the costs** (excluding the purchase price) **of all right of way engineering**, surveying, appraisals, administration, **acquisition**, environmental permitting . . . all costs . . . of negotiation and, . . . support services for condemnation proceedings.

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**6.2.2** . . . Property outside the Schematic ROW that is acquired for **drainage easements** hereunder shall be treated as Developer-Designated ROW.

**6.2.3** Developer shall be responsible for . . . all costs in . . . acquiring all Developer-Designated ROW, including: (a) the cost of acquisition services . . . ; (b) the cost of condemnation proceedings . . . , including private attorneys' fees and expert witness fees, and all fees and expenses for exhibits, transcripts, photos . . . , other than the Attorney General's direct fees; (c) the purchase prices, court awards or judgments, and special commissioner's awards for all Developer-Designated ROW . . .

**6.2.4** All costs and expenses for the acquisition of any **temporary right** or interest in real property, . . . that Developer determines necessary or desirable . . . in constructing the Project, such as for work space, contractor laydown areas, materials storage areas or temporary Utility Adjustment, . . . shall be Developer's sole responsibility, to be undertaken at Developer's sole cost and expense.

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**6.2.5** Developer shall ***not be entitled to any increase in the Price or any time extension*** as a result of: (a) Site conditions associated with any Developer-Designated ROW . . . ; and (b) any delay, inability or cost associated with the acquisition of any Developer-Designated ROW . . .

**13.5.3 Limitation on Time Extensions**

Any ***extension*** of a Completion Deadline allowed hereunder ***shall exclude any delay*** to the extent that it: (a) did not impact a Critical Path, (b) was ***due to*** the fault or negligence, or act or failure to ***act of any Developer-Related Entity***, (c) is concurrent with any other unrelated delay to a Critical Path that is Developer’s responsibility hereunder, or (d) could reasonably have been avoided by Developer, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work . . .

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**17.1 Liquidated Damages Respecting Delays**



**17.1.1** Developer shall be liable for and pay to TxDOT liquidated damages with respect to any failure to achieve Substantial Completion and Final Acceptance of any Segment of the Project . . . . The amounts of such liquidated damages are as follows:

(a) For Segment F-1, ***\$39,000 for each day*** after the applicable Substantial Completion Deadline, for Segment F-2 ***\$54,000 for each day*** after the applicable Substantial Completion Deadline, and for Segment G, ***\$54,000 for each day*** after the applicable Substantial Completion Deadline and through the date of Substantial Completion for the applicable Segment, but, for all Segments, ***not to exceed 365 days*** per Segment;

- ***\$39,000 x 365 = \$14,235,000***
- ***\$54,000 x 365 = \$19,710,000***
- ***\$54,000 x 365 = \$19,710,000***

**TOTAL = \$53,655,000**

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**SECTION 18. INDEMNIFICATION**

**18.1 Indemnity by Developer**

**18.1.1** . . . . DEVELOPER SHALL RELEASE, PROTECT, DEFEND, INDEMNIFY AND HOLD HARMLESS THE INDEMNIFIED PARTIES FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, SUITS, JUDGMENTS, INVESTIGATIONS, LEGAL OR ADMINISTRATIVE PROCEEDINGS, DEMANDS AND LOSSES, IN EACH CASE IF ASSERTED OR INCURRED BY OR AWARDED TO ANY THIRD PARTY, ARISING OUT OF, RELATING TO OR RESULTING FROM:

(a) THE BREACH OR **ALLEGED BREACH OF** ANY OF THE **CONTRACT** DOCUMENTS BY ANY DEVELOPER-RELATED ENTITY;

. . . .



(d) THE ACTUAL OR ALLEGED CULPABLE ACT, ERROR, OMISSION, NEGLIGENCE, BREACH OR MISCONDUCT OF ANY DEVELOPER-RELATED ENTITY IN OR ASSOCIATED WITH PERFORMANCE OF THE WORK;

. . . .

(k) THE FRAUD, BAD FAITH, **ARBITRARY OR CAPRICIOUS ACTS**, OR VIOLATION OF LAW BY ANY DEVELOPER-RELATED ENTITY IN OR ASSOCIATED WITH THE PERFORMANCE OF THE WORK;

(l) **INVERSE CONDEMNATION, TRESPASS, NUISANCE OR SIMILAR TAKING** OF OR HARM TO REAL PROPERTY BY REASON OF: (i) THE FAILURE OF ANY DEVELOPER-RELATED ENTITY TO COMPLY WITH . . . . THE CONTRACT DOCUMENTS . . . . (ii) THE INTENTIONAL MISCONDUCT OR NEGLIGENCE OF ANY DEVELOPER-RELATED ENTITY, OR (iii) THE ACTUAL PHYSICAL ENTRY ONTO OR ENCROACHMENT UPON ANOTHER'S PROPERTY BY ANY DEVELOPER-RELATED ENTITY.

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A condemnor is required to prove its **right to condemn** the property at issue in a condemnation proceeding. *City of Austin v. Whittington*, 384 S.W.3d 766, 772-73 (Tex. 2012).

- including establishing that the property is being taken for a **public use**. *Id.* at 772, citing TEX. CONST. art. I § 17; and
- that the property taken is **necessary** to achieve that public use. *Id.* at 772; TEX. TRANSP. CODE § 203.052(a) (Vernon 2011).

Where the legislature has declared a certain thing to be for a public use, there is a presumption in favor of this declaration. *Id.* at 777.

Once the **presumption of public use and necessity** arises, the landowner can **contest** it only **by establishing** affirmative defenses such as fraud, bad faith, or **arbitrary and capricious actions**. *Id.*

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A condemnor must properly determine that a taking is required for an authorized public use and necessity. *Id.* at 777-78; TEX. TRANSP. CODE § 203.052(a) (Vernon 2011).

A condemnor has a duty to properly exercise its discretion to determine the parameters of land to be taken for a project. *Malcomson Road Util. Dist. v. Newsom*, 171 S.W.3d 257, 275 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Whittington*, 384 S.W.3d at 783-84.

A condemnor **abdicates its discretion** when it does not conduct proper due diligence in determining what and how much land to condemn. *Id.*

A condemnor's abdication of its discretion to determine what or how much land to condemn constitutes **arbitrary and capricious** action by the condemnor. *Malcomson*, 171 S.W.3d at 275.

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Sections 21.019 and 21.0195 of the Texas Property Code require the trial court to **dismiss a proceeding** when a condemnor does not have the right to condemn and award the landowner its **damages**, and all **attorneys' and experts' fees** and expenses incurred by the landowner.

Sections 21.019 and 21.1095 of the Texas Property Code are intended to make the landowner whole and to discourage the condemnor from seeking condemnation unfairly or irresponsibly. *Id.*, citing *Brazos County Water Control & Impr. Dist. No. 1 v. Salvaggio*, 698 S.W.2d 173, 176 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)

Shifting the risks and burden to pay these dismissal costs to a private entity would impermissibly remove the disincentive to the condemnor by contractually indemnifying the condemnor for costs and expenses under the Texas Property Code should the condemnation fail. *Malcomson*, 171 S.W.3d at 275.

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The Texas Property Code also requires that a trial court ***dismiss a condemnation proceeding*** if the State fails to bring the proceeding properly. TEX. PROP. CODE §§ 21.012(b)(1), 21.0195(c) (Vernon 2011).

The State fails to bring a condemnation proceeding properly ***when it fails to adequately describe all of the property and interests to be condemned***, which is necessary for a court to acquire subject matter jurisdiction over the case. TEX. PROP. CODE § 21.012(b)(1) (Vernon 2011); *Brown v. State*, 984 S.W.2d 348, 350 (Tex. App.—Fort Worth 1999, pet. denied).

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## TEX. PROP. CODE § 21.012

### § 21.012. Condemnation Petition

(a) If the United States, this state, a political subdivision of this state, a corporation with eminent domain authority, or an irrigation, water improvement, or water power control district created by law wants to acquire real property for public use but is unable to agree with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.

**(b) The petition must:**

- (1) describe the property to be condemned;
- (2) state the purpose for which the entity intends to use the property;
- (3) state the name of the owner of the property if the owner is known; and
- (4) state that the entity and the property owner are unable to agree on the damages.

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## TEX. PROP. CODE § 21.0195(c)

### § 21.0195. Dismissal of Certain Condemnation Proceedings; Texas Department of Transportation

(a) This section applies only to the dismissal of a condemnation proceeding that involves the Texas Department of Transportation.

(b) The department may move to dismiss a proceeding it files, and the court shall conduct a hearing on the motion. The court may grant the motion only if the court determines that the property owner's interest will not be materially affected by the dismissal. The department may not dismiss the condemnation proceedings merely to institute new proceedings that involve substantially the same condemnation against the same property owner solely to obtain a lower condemnation award.

(c) If a court dismisses a condemnation proceeding on the motion of the department or as a result of the failure of the department to bring the proceeding properly, the court shall make an allowance to the property owner for the value of the department's use of the property while in possession of the property, any damage that the condemnation has caused to the property owner, and any expenses the property owner has incurred in connection with the condemnation, including reasonable and necessary fees for attorneys.

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**Drainage** work by (or on behalf of) the State, which causes alteration of water discharge on property resulting in damages **is a taking**, as a matter of law. *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 540 (Tex. 2013); *Skeen v. State*, 550 S.W.2d 713, 715 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

In *Kopplow*, the City was held liable for **inverse condemnation** resulting from drainage facilities it constructed, despite that no flooding had yet resulted, because the City knew that it was substantially certain to result in the future. *Id.*

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SB 0045


New Culverts Showing Erosion

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# Video



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## Design Submittals

**Summary of Issue:** CDA requires extensive review and approval of design submittals, resulting in multiple review cycles. Comments may relate to contract interpretation, matters of preference and general observations, making resolution time-consuming and misaligned with project priorities.



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## Design Submittals

- SH 130 Segments 5 & 6
  - 6.3.2.1: Whenever TxDOT is entitled to review and comment on, or to affirmatively approve, a Submittal, TxDOT shall have a period of **14 days** to act after the date it receives an **accurate and complete Submittal** and all necessary information and documentation concerning the subject matter.
  - 6.3.2.4: If TxDOT is in receipt of more than **ten concurrent Submittals in the aggregate** that are subject to review and comment or approval, **TxDOT may extend the applicable period for it to act to that period in which TxDOT can reasonably accommodate the Submittals.**



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## Design Submittals

- NTE Segments 3A & 3B
  - 6.3.2.1 [SAME LANGUAGE]
  - 6.3.2.4 [SAME LANGUAGE], PLUS
    - . . . and no such extension shall constitute a TxDOT-Caused Delay, TxDOT Change, Relief Event, Compensation Event or other basis for any Claim.



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## Sales and Use Tax

- Texas Tax Code § 151.311 – Items Incorporated Into or Used for Improvement of an Exempt Entity
  - In public highway construction contracts, purchase of tangible personal property is exempt if it is incorporated into the project
  - To be exempt, the tangible personal property must be:
    1. necessary and essential for the performance of the contract; and
    2. completely consumed at the job site.



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## Sales and Use Tax

- SH 130 Segments 5 & 6 – Exhibit 23
  - The Parties acknowledge that on the Effective Date Developer delivered to TxDOT a **standby letter of credit** in the face amount of **\$29.1 million** to secure Developer's and the Design-Build Contractor's legal **obligations**, if any, **to pay State sales tax** on account of acquisition of goods, materials, equipment, supplies and services incorporated into, or used for performance and completion of, the original Construction Work for the Facility (i.e. excluding Upgrades, Renewal Work and O&M Work) (referred to herein as "such State sales tax").



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## Sales and Use Tax

- LBJ Express and NTE Express
  - 24.2.2: In the event . . . required by Comptroller to pay sales tax on Expendable Materials, TxDOT shall reimburse Developer for such sales tax. If materials purchased for the Work are not wholly used or expended on the Project, such that they do not qualify as Expendable Materials, Developer will be responsible for applicable sales taxes.

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## February 1, 2012 Ruling

<b>S U S A N</b> <b>C O M B S</b>	TEXAS COMPTROLLER <i>of</i> PUBLIC ACCOUNTS P.O. Box 13528 • AUSTIN, TX 78711-3528	
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February 1, 2012



John Munoz, CPA  
 Deputy Director, Finance  
 Texas Department of Transportation  
 Dewitt C. Greer State Highway Bldg.  
 125 E. 11th Street  
 Austin, Texas 78701-2483

Re: 11255377-Request for Texas Sales and Use Tax Exemption for Tangible Personal Property and Services Purchased to Construct Public Highway System

Dear Mr. Munoz:

Please accept this in response to the August 30, 2011 letter from Executive Director Amadeo Saenz, who submitted a ruling request with respect to the taxability of items used in and for Comprehensive Development Agreements currently in use by the Texas Department of Transportation ("TxDOT").



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## Sales and Use Tax

The fact that TxDOT, a governmental entity of the State of Texas, pursuant to the Texas Transportation Code, may enter into a comprehensive development agreement with a private contractor or developer to provide for the design and construction, rehabilitation, expansion, or improvement of real property that is open and accessible to the public and/or used solely to operate and maintain such facilities, in conjunction with the facts set out above, establish that the improvements in question pass the primary use and benefit test expressly stated in Rule 3.291(c)(2). Therefore, the CDAs qualify as exempt contracts as defined in Rule 3.291(a)(5) and are eligible for exemption from sales and use tax pursuant to Sections 151.309 and 151.311 of the Texas Tax Code.



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## DBE Compliance

- DBE = Disadvantaged Business Enterprise
- Eligibility (49 CFR Part 26)
  - DBE owners may not:
    - Have personal net worth that exceeds \$1.32 million
    - Average over \$22.41 million in gross receipts annually in a three year period of time

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## DBE Compliance

- Lump sum contracts include costs with little chance for DBE participation:
  - Cost of insurance
  - Cost of bonds
  - Costs of letters of credit
  - Utility relocation work associated with Owner Managed Utility Adjustments

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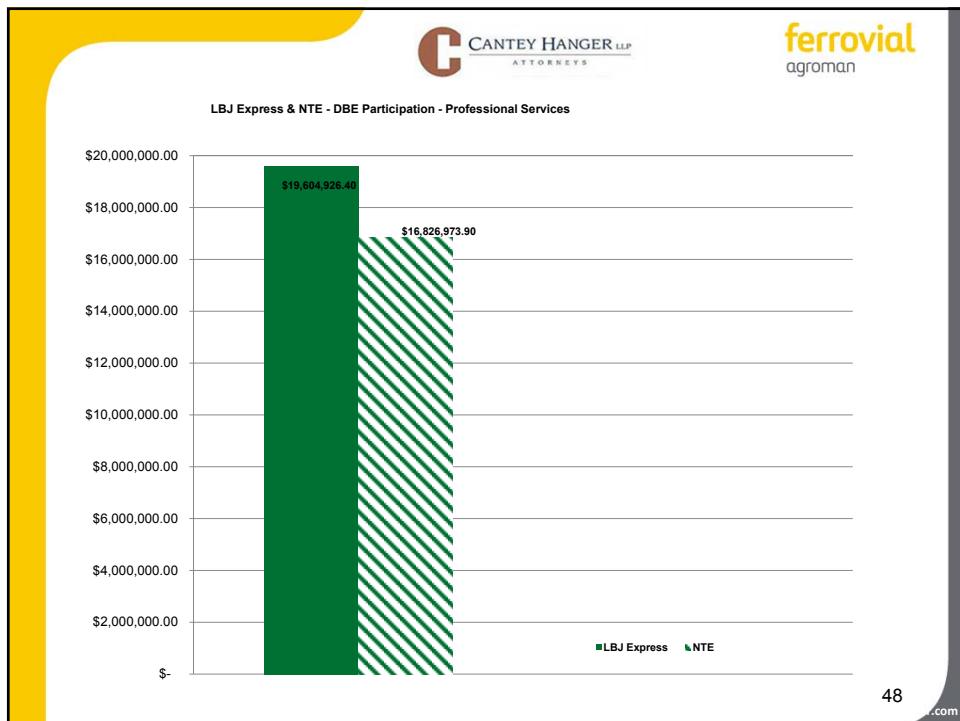
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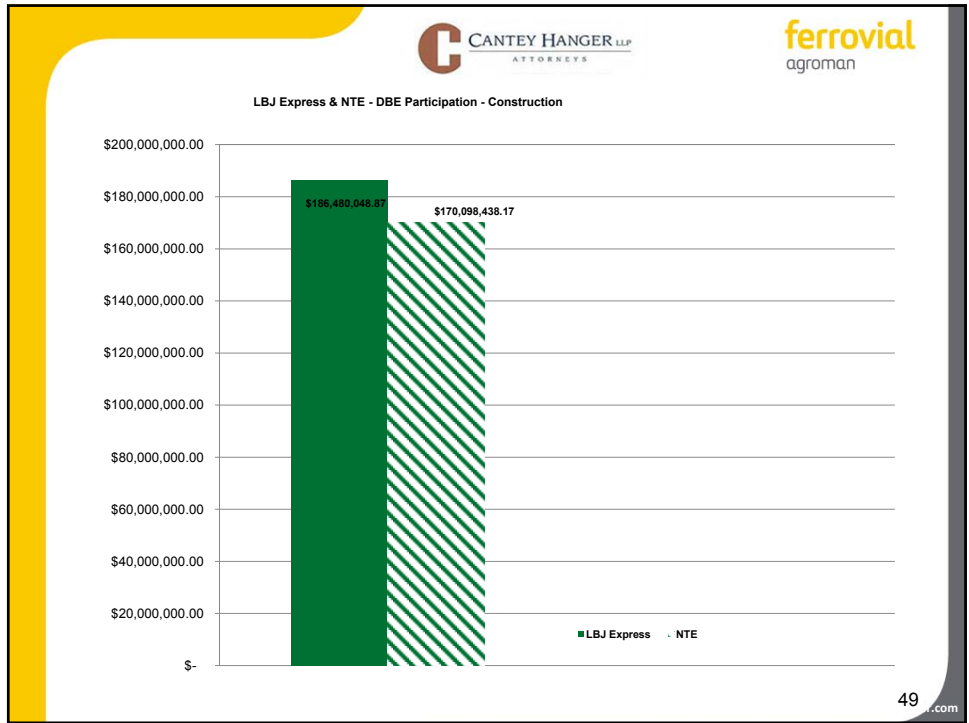
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## DBE Compliance

- LBJ Express and NTE Express
  - The goal for DBE participation in the Work required under this Agreement for **professional services and construction** of the Project shall be 12.12%.

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### Texas Transportation Code

§ 223.205. PERFORMANCE AND PAYMENT SECURITY.

The department shall require a private entity entering into a CDA to provide a **performance and payment bond** or an alternative form of security shall be:



- (b) **in an amount equal to the cost of constructing** or maintaining the project.
- (c) If the department determines that it is **impracticable** for a private entity to provide security in the amount described by Subsection (b), the department shall set the amount of the bonds or the alternative forms of security.



## Bonding Requirements

- SH 130 Segments 5 & 6
  - Payment and Performance Bonds: \$250,000,000.00
- LBJ Express and NTE Express
  - Letter of Credit: \$250,000,000.00
- NTE Segments 3A & 3B, Grand Parkway & Future Projects
  - Payment and Performance Bonds: 100 percent of the Price Attributable to the Construction Work

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## Liability Limitations

- Texas law provides liability protections to contractors who contract with TxDOT to construct or repair roadways:
  - “**A contractor** who constructs or repairs a highway, road, or street for the Texas Department of Transportation **is not liable to a claimant** for personal injury, property damage, or death arising from the performance of the construction or repair **if**, at the time of the personal injury, property damage, or death, **the contractor is in compliance with contract documents** material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.” CPRC § 97.002

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## Project Information

LBJ Express Project Video:  
<http://www.youtube.com/watch?v=qMc-ZPWo2nQ>  
(YouTube Search: "LBJ Express Project Video")

NTE Express Project Video:  
<http://www.youtube.com/watch?v= DXkZ2yCLWA>  
(YouTube Search "NTE Express –West Segment" and "NTE Express – East Segment")

Latest News:  
[www.lbjexpress.com](http://www.lbjexpress.com)  
[www.northtarrantexpress.com](http://www.northtarrantexpress.com)

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# QUESTIONS?



THANK YOU

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