

CONSTRUCTION AND THE LAW IN TEXAS

Highway Funding and Legislative Developments for 2015

The 84th Legislative session proved to be extremely productive for the heavy and highway side of the construction industry. Major funding bills passed the legislature although some require action by constitutional amendment before the progress of the session will be complete.

On November 3rd, the voters will decide whether \$2.5 billion per year can be transferred from the state's general revenue received from sales taxes to the highway fund. The funding has a trigger provision designed to ensure other state obligations receive funding before the dedicated revenue goes to the highway fund. That trigger is \$28 billion in total sales tax revenue. According to the Texas Comptroller's website, the total sales tax revenue collected by the state in 2014 was \$27.4 billion, in 2013 it was \$26 billion, in 2012 it was \$24.1 billion, and in 2011 it was \$21.5 billion. As you can see, our sales tax collections have not hit the \$28 billion trigger, but collected revenue has steadily increased each year since the Great Recession ended. With the projected gains in population growth, economic and consumer activity, the expectation is that the trigger will be reached by the time the allocation starts in 2018.

Also on the voter's plate in November will be a question about allocating motor vehicle sales tax. The allocation of this tax revenue will be \$430 million each year starting in 2020. The threshold trigger for this allocation is \$5 billion in collected revenue. In 2014, the state collected \$4.2 billion in motor vehicle sales tax revenue, in 2013 it was \$3.9 billion, in 2012 it was \$3.6 billion, and in 2011 it was \$3 billion. Again, with the increased economic activity and population gains in Texas, the

projections are that the taxes will exceed the trigger by the time the transfer would begin to take effect.

The constitutional amendment that voters will see on the November 3rd ballot is going to be Proposition 7. The passage of this ballot measure is extremely important to the industry and the state at-large. The AGC of Texas will be leading the charge to educate the electorate about Prop. 7. Given the success of the industry's efforts in 2014 with Prop. 1, it is reasonable to expect the passage of this amendment. Prop. 1 passed with 80 percent support from all voters in an election with relatively high turnout by Texas' standards. According to the Texas Secretary of State's website, in 2014, when there was a gubernatorial election, 33 percent of registered voters showed up at the polls. By contrast, in 2013, when the water funding ballot measure was voted on in an off-year election, only 8 percent of registered voters showed up.

The November election in 2015 will be another off-year election without significant races bringing people to the polls. In these elections, only the most active and dedicated voters tend to turn out. While it is clear from the 80 percent support of Prop. 1 last year that a vast majority of Texans support an increased investment and focus on transportation, there may be motivated anti-tax group that want to see these measures fail. Accordingly, a robust voter education and publicity campaign is warranted for Prop. 7. With almost \$3 billion per year of funding set for determination in November, it is extremely important that people who are involved in construction educate and motivate people to come out and vote. This election

will further the implementation of work focused on addressing the state's infrastructure requirements.

Separate from the initiatives that will go before the voters, the Legislature made other progress in the battle to secure sufficient funding to maintain and improve our transportation system. A significant victory towards this goal was the ending of diversions from the state highway fund. The new budget bill that has now become law prevents \$600 million in each of the next two years from being diverted from the Texas Department of Transportation (TxDOT)'s highway fund to the Department of Public Safety for policing. And, while a constitutional amendment will be needed to permanently end this diversion, statutory mechanisms have been built into the bills dealing with public safety to ensure the allocation of these funds stays with TxDOT until a constitutional amendment can be worked out for presentment to the voters.

In addition to funding measures, the Legislature succeeded in passing a number of other significant bills. Because of contracting issues outside of the construction arena, there was an extremely high level of scrutiny on procurement and purchasing transparency. Part of that movement reached TxDOT and road construction. One significant reform measure limits the number of design/build projects TxDOT can perform each year to three. The limitations and scrutiny on alternative delivery methods now mirror the limitations and scrutiny placed on other governmental agencies. Also, the new legislation requires that TxDOT only use design/build for projects that exceed \$250 million.

Another alternative delivery bill that



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A Balanced Approach to Construction Law.

passed was the CMAR reform bill. This bill ends the practice where a design engineer, or an affiliated construction company, serve as a construction manager at-risk and the design engineer.

In a similar vein of legislative oversight on alternative delivery methods, procurement, and toll roads, the legislature passed a bill that prohibits toll road authorities from using eminent domain to condemn property. This legislation was largely viewed as curbing the ability of toll road authorities to use public private partnerships to construct more roads.

Finally, a bill that would have had significant adverse effects on the industry – particularly the heavy construction industry and water infrastructure contractors – was killed in both chambers. The bill would have expanded the Texas Buy American Program. The bill that is currently in effect has proven to be problematic in both the water and energy sector simply because of the diversity of the world's economy. The failure of sponsors to pass this bill was a significant victory for the industry in 2015. 🐾

