

By: Shapiro S.B. No. 965
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COMMITTEE SUBSTITUTE FOR S.B. No. 965 By: Shapiro

A BILL TO BE ENTITLED
AN ACT

relating to the powers and duties of a regional tollway authority
related to turnpikes and other related projects.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 366.003, Transportation Code, is amended
by adding Subdivision (9-a) to read as follows:

(9-a) "Surplus revenue" means the revenue of a
turnpike project or system remaining at the end of any fiscal year
after all required payments and deposits have been made in
accordance with all bond resolutions, trust agreements,
indentures, credit agreements, or other instruments and
contractual obligations of the authority payable from the revenue
of the turnpike project or system.

SECTION 2. Chapter 366, Transportation Code, is amended by
adding Subchapter H to read as follows:

SUBCHAPTER H. COMPREHENSIVE DEVELOPMENT AGREEMENTS

Sec. 366.401. COMPREHENSIVE DEVELOPMENT AGREEMENTS.

(a) An authority may use a comprehensive development agreement
with a private entity to design, develop, finance, construct,
maintain, repair, operate, extend, or expand a turnpike project.

(b) A comprehensive development agreement is an agreement
with a private entity that, at a minimum, provides for the design,
construction, rehabilitation, expansion, or improvement of a
turnpike project and may also provide for the financing,
acquisition, maintenance, or operation of a turnpike project.

(c) An authority may negotiate provisions relating to
professional and consulting services provided in connection with a
comprehensive development agreement.

(d) An authority may authorize the investment of public and
private money, including debt and equity participation, to finance
a function described by this section.

Sec. 366.402. PROCESS FOR ENTERING INTO COMPREHENSIVE
DEVELOPMENT AGREEMENTS. (a) If an authority enters into a
comprehensive development agreement, the authority shall use a
competitive procurement process that provides the best value for
the authority. An authority may accept unsolicited proposals for a
proposed turnpike project or solicit proposals in accordance with
this section.

(b) An authority shall establish rules and procedures for
accepting unsolicited proposals that require the private entity to
include in the proposal:

(1) information regarding the proposed project
location, scope, and limits;

(2) information regarding the private entity's
qualifications, experience, technical competence, and capability
to develop the project; and

(3) any other information the authority considers
relevant or necessary.

(c) An authority shall publish a notice advertising a
request for competing proposals and qualifications in the Texas
Register that includes the criteria to be used to evaluate the
proposals, the relative weight given to the criteria, and a
deadline by which proposals must be received if:

(1) the authority decides to issue a request for
qualifications for a proposed project; or

(2) the authority authorizes the further evaluation of an unsolicited proposal.

(d) A proposal submitted in response to a request published under Subsection (c) must contain, at a minimum, the information required by Subsections (b)(2) and (3).

(e) An authority may interview a private entity submitting an unsolicited proposal or responding to a request under Subsection (c). The authority shall evaluate each proposal based on the criteria described in the request for competing proposals and qualifications and may qualify or shortlist private entities to submit detailed proposals under Subsection (f). The authority must qualify or shortlist at least two private entities to submit detailed proposals for a project under Subsection (f) unless the authority does not receive more than one proposal or one response to a request under Subsection (c).

(f) An authority shall issue a request for detailed proposals from all private entities qualified or shortlisted under Subsection (e) if the authority proceeds with the further evaluation of a proposed project. A request under this subsection may require additional information the authority considers relevant or necessary, including information relating to:

(1) the private entity's qualifications and demonstrated technical competence;

(2) the feasibility of developing the project as proposed;

(3) engineering or architectural designs;

(4) the private entity's ability to meet schedules; or

(5) a financial plan, including costing methodology and cost proposals.

(g) In issuing a request for proposals under Subsection (f), an authority may solicit input from entities qualified under Subsection (e) or any other person. An authority may also solicit input regarding alternative technical concepts after issuing a request under Subsection (f).

(h) An authority shall evaluate each proposal based on the criteria described in the request for detailed proposals and select the private entity whose proposal offers the apparent best value to the authority.

(i) An authority may enter into negotiations with the private entity whose proposal offers the apparent best value.

(j) If at any point in negotiations under Subsection (i), it appears to the authority that the highest ranking proposal will not provide the authority with the overall best value, the authority may enter into negotiations with the private entity submitting the next-highest-ranking proposal.

(k) An authority may withdraw a request for competing proposals and qualifications or a request for detailed proposals at any time. The authority may then publish a new request for competing proposals and qualifications.

(l) An authority may require that an unsolicited proposal be accompanied by a nonrefundable fee sufficient to cover all or part of its cost to review the proposal.

(m) An authority may pay an unsuccessful private entity that submits a responsive proposal in response to a request for detailed proposals under Subsection (f) a stipulated amount in exchange for the work product contained in that proposal. A stipulated amount must be stated in the request for proposals and may not exceed the value of any work product contained in the proposal that can, as determined by the authority, be used by the authority in the performance of its functions. The use by the authority of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the authority and does not confer liability on the recipient of the stipulated amount under this subsection. After payment of the stipulated amount:

(1) the authority, with the unsuccessful private entity, jointly owns the rights to, and may make use of any work product contained in, the proposal, including the technologies, techniques, methods, processes, ideas, and information contained in the project design; and

(2) the use by the unsuccessful private entity of any portion of the work product contained in the proposal is at the sole risk of the unsuccessful private entity and does not confer liability on the authority.

(n) An authority may prescribe the general form of a comprehensive development agreement and may include any matter the authority considers advantageous to the authority. The authority and the private entity shall finalize the specific terms of a comprehensive development agreement.

(o) Section 366.185 and Subchapter A, Chapter 223, of this code and Chapter 2254, Government Code, do not apply to a comprehensive development agreement entered into under this subchapter.

Sec. 366.403. CONFIDENTIALITY OF INFORMATION. (a) To encourage private entities to submit proposals under this subchapter, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Sections 366.402(b)(1) and (2), unless the private entity consents to the disclosure of the information;

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement unless the private entity consents to the disclosure of the information or material; and

(3) information created or collected by an authority or its agent during consideration of a proposal for a comprehensive development agreement or during the authority's preparation of a proposal to the department relating to a comprehensive development agreement.

(b) After an authority completes its final ranking of proposals under Section 366.402(h), the final rankings of each proposal under each of the published criteria are not confidential.

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 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) 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) 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 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.

(d) A payment or performance bond or alternative form of security is not required for 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;

(3) an irrevocable bank letter of credit; 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.

Sec. 366.405. OWNERSHIP OF TURNPIKE PROJECTS. (a) A turnpike project that is the subject of a comprehensive development agreement with a private entity, including the facilities acquired or constructed on the project, is public property and is owned by the authority.

(b) Notwithstanding Subsection (a), an authority may enter into an agreement that provides for the lease of rights-of-way, the granting of easements, the issuance of franchises, licenses, or permits, or any lawful uses to enable a private entity to construct, operate, and maintain a turnpike project, including supplemental facilities. At the termination of the agreement, the turnpike project, including the facilities, are to be in a state of proper maintenance as determined by the authority and shall be returned to the authority in satisfactory condition at no further cost.

Sec. 366.406. LIABILITY FOR PRIVATE OBLIGATIONS. An authority may not incur a financial obligation for a private entity that designs, develops, finances, constructs, operates, or maintains a turnpike project. The authority or a political subdivision of the state is not liable for any financial or other obligation of a turnpike project solely because a private entity constructs, finances, or operates any part of the project.

Sec. 366.407. TERMS OF PRIVATE PARTICIPATION. (a) An authority shall negotiate the terms of private participation in a turnpike project under this subchapter, including:

(1) methods to determine the applicable cost, profit, and project distribution among the private participants and the authority;

(2) reasonable methods to determine and classify toll rates and the responsibility for setting toll rates;

(3) acceptable safety and policing standards; and

(4) other applicable professional, consulting, construction, operation, and maintenance standards, expenses, and costs.

(b) A comprehensive development agreement entered into under this subchapter may include any provision the authority considers appropriate, including a provision:

(1) providing for the purchase by the authority, under terms and conditions agreed to by the parties, of the interest of a private participant in the comprehensive development agreement and related property, including any interest in a turnpike project designed, developed, financed, constructed, operated, or maintained under the comprehensive development agreement;

(2) establishing the purchase price, as determined in accordance with the methodology established by the parties in the comprehensive development agreement, for the interest of a private participant in the comprehensive development agreement and related property;

(3) providing for the payment of an obligation incurred under the comprehensive development agreement, including an obligation to pay the purchase price for the interest of a private participant in the comprehensive development agreement, from any available source, including securing the obligation by a pledge of revenues of the authority derived from the applicable project, which pledge shall have priority as established by the authority;

(4) permitting the private participant to pledge its rights under the comprehensive development agreement;

(5) concerning the private participant's right to operate and collect revenue from the turnpike project; and

(6) restricting the right of the authority to terminate the private participant's right to operate and collect revenue from the turnpike project unless and until any applicable termination payments have been made.

(c) An authority may enter into a comprehensive development agreement under this subchapter with a private participant only if

the project is identified in the department's unified transportation program or is located on a transportation corridor identified in the statewide transportation plan.

(d) Section 366.406 does not apply to an obligation of an authority under a comprehensive development agreement, nor is an authority otherwise constrained from issuing bonds or other financial obligations for a turnpike project payable solely from revenues of that turnpike project or from amounts received under a comprehensive development agreement.

(e) Notwithstanding any other law, and subject to compliance with the dispute resolution procedures set out in the comprehensive development agreement, an obligation of an authority under a comprehensive development agreement entered into under this subchapter to make or secure payments to a person because of the termination of the agreement, including the purchase of the interest of a private participant or other investor in a project, may be enforced by mandamus against the authority in a district court of any county of the authority, and the sovereign immunity of the authority is waived for that purpose. The district courts of any county of the authority shall have exclusive jurisdiction and venue over and to determine and adjudicate all issues necessary to adjudicate any action brought under this subsection. The remedy provided by this subsection is in addition to any legal and equitable remedies that may be available to a party to a comprehensive development agreement.

(f) If an authority enters into a comprehensive development agreement with a private participant that includes the collection by the private participant of tolls for the use of a toll project, the private participant shall submit to the authority for approval:

(1) the methodology for:

(A) the setting of tolls; and

(B) increasing the amount of the tolls;

(2) a plan outlining methods the private participant will use to collect the tolls, including:

(A) any charge to be imposed as a penalty for late payment of a toll; and

(B) any charge to be imposed to recover the cost of collecting a delinquent toll; and

(3) any proposed change in an approved methodology for the setting of a toll or a plan for collecting the toll.

(g) Except as provided by this section, a comprehensive development agreement with a private participant that includes the collection by the private participant of tolls for the use of a toll project may be for a term not longer than 30 years.

Sec. 366.408. RULES, PROCEDURES, AND GUIDELINES GOVERNING SELECTION AND NEGOTIATING PROCESS. (a) To promote fairness, obtain private participants in turnpike projects, and promote confidence among those participants, an authority shall adopt rules, procedures, and other guidelines governing selection of private participants for comprehensive development agreements and negotiations of comprehensive development agreements. The rules must contain criteria relating to the qualifications of the participants and the award of the contracts.

(b) An authority shall have up-to-date procedures for participation in negotiations under this subchapter.

(c) An authority has exclusive judgment to determine the terms of an agreement.

Sec. 366.409. USE OF CONTRACT PAYMENTS. (a) Payments received by an authority under a comprehensive development agreement shall be used by the authority to finance the construction, maintenance, or operation of a turnpike project or a highway.

(b) The authority shall allocate the distribution of funds received under Subsection (a) to the counties of the authority based on the percentage of toll revenue from users, from each county, of the project that is the subject of the comprehensive development agreement. To assist the authority in determining the allocation, each entity responsible for collecting tolls for a project shall calculate on an annual basis the percentage of toll

revenue from users of the project from each county within the authority based on the number of recorded electronic toll collections.

SECTION 3. Subsection (f), Section 366.033, Transportation Code, is amended to read as follows:

(f) An authority may rent, lease, franchise, license, or otherwise make portions of any property of the authority, including tangible or intangible property, ~~[its properties]~~ available for use by others in furtherance of its powers under this chapter by increasing:

(1) the feasibility or efficient operation ~~[the revenue]~~ of a turnpike project or system; or

(2) the revenue of the authority.

SECTION 4. Subchapter B, Chapter 366, Transportation Code, is amended by adding Section 366.037 to read as follows:

Sec. 366.037. OTHER HIGHWAY PROJECTS. (a) In addition to the powers granted under this chapter and without supervision or regulation by any state agency or local governmental entity, but subject to an agreement entered into under Subsection (c), the board of an authority may by resolution, and on making the findings set forth in this subsection, authorize the use of surplus revenue of a turnpike project or system for the study, design, construction, maintenance, repair, and operation of a highway or similar facility that is not a turnpike project if the highway or similar facility is:

(1) situated in a county in which the authority is authorized to design, construct, and operate a turnpike project;

(2) anticipated to either:

(A) enhance the operation or revenue of an existing, or the feasibility of a proposed, turnpike project by bringing traffic to that turnpike project or enhancing the flow of traffic either on that turnpike project or to or from that turnpike project to another facility; or

(B) ameliorate the impact of an existing or proposed turnpike project by enhancing the capability of another facility to handle traffic traveling, or anticipated to travel, to or from that turnpike project; and

(3) not anticipated to result in an overall reduction of revenue of any turnpike project or system.

(b) The board in the resolution may prescribe terms for the use of the surplus revenue, including the manner in which the highway or related facility shall be studied, designed, constructed, maintained, repaired, or operated.

(c) An authority shall enter into an agreement to implement this section with the department, the commission, a local governmental entity, or another political subdivision that owns a street, road, alley, or highway that is directly affected by the authority's turnpike project or related facility.

(d) An authority may not:

(1) take an action under this section that violates, impairs, or is inconsistent with a bond resolution, trust agreement, or indenture governing the use of the revenue of a turnpike project or system; or

(2) commit in any fiscal year expenditures under this section exceeding 10 percent of its surplus revenue from the preceding fiscal year.

(e) In authorizing expenditures under this section, the board shall consider:

(1) balancing throughout the counties of the authority the application of funds generated by its turnpike projects and systems, taking into account where those amounts are already committed or programmed as a result of this section or otherwise; and

(2) connectivity to an existing or proposed turnpike project or system.

(f) Except as provided by this section, an authority has the same powers and may use the same procedures with respect to the study, financing, design, construction, maintenance, repair, and operation of a highway or similar facility under this section as are

available to the authority with respect to a turnpike project or system.

SECTION 5. The heading to Section 366.185, Transportation Code, is amended to read as follows:

Sec. 366.185. ENGINEERING, DESIGN, AND CONSTRUCTION SERVICES [~~COMPETITIVE BIDDING~~].

SECTION 6. Section 366.185, Transportation Code, is amended by amending Subsection (a) and adding Subsections (c) through (f) to read as follows:

(a) A contract made by an authority that requires the expenditures of public funds for the construction or maintenance of a turnpike project may [~~must~~] be let by a competitive bidding procedure in which the contract is awarded to the lowest responsible bidder that complies with the authority's criteria.

(c) An authority may procure a combination of engineering, design, and construction services in a single procurement for a turnpike project, provided that any contract awarded results in the best value to the authority.

(d) The authority shall adopt rules governing the award of contracts for engineering, design, construction, and maintenance services in a single procurement.

(e) Notwithstanding any other provision of state law, an authority may let a contract for the design and construction of a turnpike project by a construction manager-at-risk procedure under which the construction manager-at-risk provides consultation to the authority during the design of the turnpike project and is responsible for construction of the turnpike project in accordance with the authority's specifications. A construction manager-at-risk shall be selected on the basis of criteria established by the authority, which may include the construction manager-at-risk's experience, past performance, safety record, proposed personnel and methodology, proposed fees, and other appropriate factors that demonstrate the construction manager-at-risk's ability to provide the best value to the authority and to deliver the required services in accordance with the authority's specifications.

(f) The authority shall adopt rules governing the award of contracts using construction manager-at-risk procedures under this section.

SECTION 7. Subchapter F, Chapter 366, Transportation Code, is amended by adding Section 366.2575 to read as follows:

Sec. 366.2575. BOARD VOTE ON COUNTY REQUEST. The commissioners court of a county of an authority may request the board of the authority to vote on whether to build a project that the county requests.

SECTION 8. Subchapter G, Chapter 366, Transportation Code, is amended by adding Section 366.305 to read as follows:

Sec. 366.305. TRANS-TEXAS CORRIDOR PROJECTS. If an authority is requested by the commission to participate in the development of a turnpike project that has been designated as part of the Trans-Texas Corridor, the authority shall have, in addition to all powers granted in this chapter, all powers of the department related to the development of Trans-Texas Corridor projects.

SECTION 9. Subchapter A, Chapter 228, Transportation Code, is amended by adding Section 228.011 to read as follows:

Sec. 228.011. TOLL PROJECTS WITHIN THE BOUNDARIES OF A REGIONAL TOLLWAY AUTHORITY. (a) This section applies only to a toll project located within the boundaries of a regional tollway authority under Chapter 366.

(b) The tollway authority is the entity that has primary responsibility for the financing, construction, and operation of a toll project located within the boundaries of the authority.

(c) To the extent authorized by federal law or authorized or required by this title, the commission and the department shall assist the tollway authority in the financing, construction, and operation of a toll project located within the boundaries of the authority by allowing the authority to use highway right-of-way owned by the department and to access the state highway system.

(d) Subsections (b) and (c) do not limit the authority of

the commission or the department to participate in the cost of acquiring, constructing, maintaining, or operating a turnpike project of the tollway authority under Chapter 366.

(e) Before the commission or the department may enter into a contract for the financing, construction, or operation of a proposed or existing toll project any part of which is located within the boundaries of a tollway authority, the commission or department shall provide the authority the first option to finance, construct, or operate, as applicable, the portion of the toll project located within the boundaries of the authority:

(1) on terms agreeable to the authority, without the requirement of any payment to the commission or the department; and

(2) in a manner determined by the authority to be consistent with the practices and procedures by which the authority finances, constructs, or operates a project.

(f) An agreement entered into by the tollway authority and the commission or the department in connection with a project under Chapter 366 that is financed, constructed, or operated by the authority and that is on or directly connected to the state highway system may not require the authority to make any payments to the commission or the department.

(g) An agreement entered into by the tollway authority and the commission or department in connection with a project under Chapter 366 that is financed, constructed, or operated by the authority and that is on or directly connected to a highway in the state highway system does not create a joint enterprise for liability purposes.

(h) Before a final contract execution by the department for any comprehensive development agreement project, the commissioners court for any county in which a majority of the project is located must pass a supporting resolution.

(i) Once the authority or regional transportation council has received notice from the department relating to a project, the authority has 90 days to exercise the first right of refusal for construction of a toll project.

SECTION 10. (a) The Proposed TxDOT/NTTA Regional Protocol entered into between the Texas Department of Transportation and the North Texas Tollway Authority and approved on August 10, 2006, by the tollway authority and on August 24, 2006, by the department is void.

(b) On dissolution of the protocol under Subsection (a) of this section, the North Texas Tollway Authority will remain the operator for all turnpike projects within the service area of the authority.

(c) This section does not apply to a comprehensive development agreement for a managed lane facility toll project the major portion of which is located inside the boundaries of a county in which two or more municipalities each with a population of more than 300,000 are located and for which the Texas Department of Transportation has issued a request for qualifications before the effective date of this section.

SECTION 11. This Act takes effect September 1, 2007.

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