

By: Harper-Brown

H.B. No. 3650

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to the authority of the Texas Department of Transportation  
3 to enter into availability payment agreements for the design,  
4 development, financing, construction, maintenance, or operation of  
5 a highway project.

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

7 SECTION 1. Chapter 223, Transportation Code, is amended by  
8 adding Subchapter G to read as follows:

9 SUBCHAPTER G. AVAILABILITY PAYMENT AGREEMENTS

10 Sec. 223.301. AUTHORITY. (a) The department may enter into  
11 an agreement with a private entity for the design, development,  
12 financing, construction, maintenance, or operation of a toll or  
13 nontoll facility on the state highway system under which the  
14 private entity is compensated through milestone or periodic  
15 payments based on the private entity's compliance with performance  
16 requirements defined in the agreement.

17 (b) Performance requirements in an agreement entered into  
18 under this chapter may include requirements relating to the  
19 availability of lanes for use by the traveling public.

20 (c) Subchapter A of this chapter and Chapter 2254,  
21 Government Code, do not apply to an agreement entered into under  
22 this subchapter.

23 Sec. 223.302. SOURCE OF PAYMENT. (a) Subject to  
24 Subsections (b) and (c), the department may use any available funds

1 for the purpose of making a payment under an agreement entered into  
2 under this subchapter, including money in the state highway fund  
3 that is required to be used for public roadways by the Texas  
4 Constitution or federal law.

5 (b) The total amount of compensation paid out of the state  
6 highway fund may not exceed the amounts that are:

7 (1) eligible to be paid from those funds under the  
8 Texas Constitution; and

9 (2) incurred or are reasonably anticipated to be  
10 incurred by the private entity during the term of the agreement.

11 (c) The department's obligation to make a payment is subject  
12 to the availability of funds appropriated by the legislature that  
13 may be used for that purpose or other funds that may be used for that  
14 purpose.

15 (d) The department may hold money that is to be used to  
16 satisfy payment obligations of the department under an agreement  
17 entered into under this subchapter, including money from the state  
18 highway fund that is to be used for payments under this section, in  
19 a reserve fund or trust account created under an agreement with a  
20 commercial bank, depository trust company, or other entity.

21 Sec. 223.303. STIPULATED AMOUNT FOR UNSUCCESSFUL  
22 PROPOSERS. (a) The department may pay an unsuccessful proposer  
23 that submits a responsive proposal to a request for proposals for an  
24 agreement under this subchapter a stipulated amount for the work  
25 product contained in the proposal. The stipulated amount must be  
26 specified in the request for proposals and may not exceed the value  
27 of any work product contained in the proposal that the department

1 determines can be used by the department in the performance of the  
2 department's functions.

3 (b) After payment of the stipulated amount, the department  
4 and the unsuccessful proposer jointly own the rights to the work  
5 product contained in the unsuccessful proposal, including the  
6 technologies, techniques, methods, processes, ideas, and  
7 information contained in the proposal, and the department may use  
8 that work product.

9 (c) The use by the department or the unsuccessful proposer  
10 of any portion of the work product contained in an unsuccessful  
11 proposal is at the sole risk of that entity and does not confer on  
12 the other entity liability or a right to compensation.

13 Sec. 223.304. PERFORMANCE OR PAYMENT BOND. (a) The  
14 department shall require a private entity entering into an  
15 agreement with the department under this subchapter to provide:

- 16 (1) a performance and payment bond; or  
17 (2) an alternative form of security authorized by  
18 Section 223.205.

19 (b) Except as provided by Subsection (c), a performance and  
20 payment bond or alternative form of security shall be in an amount  
21 equal to the cost of constructing the facility.

22 (c) If the department determines that it is impracticable  
23 for a private entity to provide security in the amount described by  
24 Subsection (b), the department shall set the security in an amount  
25 sufficient to:

- 26 (1) ensure the proper performance of the agreement;  
27 and

1           (2) protect:

2                   (A) the department; and

3                   (B) persons who have a direct contractual  
4 relationship with the private entity or a subcontractor of the  
5 private entity to supply labor or material.

6           Sec. 223.305. OTHER TERMS. An agreement entered into under  
7 this subchapter may include any provision that the department  
8 considers appropriate, including a provision:

9                   (1) for the purchase by the department, under terms  
10 agreed to by the parties, of the interest of the private entity in  
11 the agreement and related property, including any interest in a  
12 highway or other facility designed, developed, financed,  
13 constructed, maintained, or operated under the agreement;

14                   (2) that establishes the purchase price, or the  
15 methodology to be used to determine the purchase price, for the  
16 interest of the private entity in the agreement and related  
17 property; or

18                   (3) for the payment of obligations incurred under the  
19 agreement, including any obligation to pay the purchase price for  
20 the interest of the private entity in the agreement and related  
21 property, from any lawfully available source, including the  
22 securing of the obligation by a pledge of revenues of the commission  
23 or the department derived from the facility that is subject to the  
24 agreement, with the priority for the pledge set by the department.

25           Sec. 223.306. CONFIDENTIALITY OF INFORMATION. (a) To  
26 encourage private entities to submit proposals under this  
27 subchapter, the following information is confidential, is not

1 subject to disclosure, inspection, or copying under Chapter 552,  
2 Government Code, and is not subject to disclosure, discovery,  
3 subpoena, or other means of legal compulsion for its release until a  
4 final contract for a proposed project is entered into:

5       (1) all or part of a proposal that is submitted by a  
6 private entity for an agreement under this subchapter, except  
7 information regarding the location, scope, or limits of a proposed  
8 project and information regarding the private entity's  
9 qualifications, experience, technical competence, and capability  
10 to develop the project, unless the private entity consents to the  
11 disclosure of the information;

12       (2) supplemental information or material submitted by  
13 a private entity in connection with a proposal for an agreement  
14 under this subchapter, unless the private entity consents to the  
15 disclosure of the information or material; and

16       (3) information created or collected by the department  
17 or its agent during consideration of a proposal for an agreement  
18 under this subchapter.

19       (b) After the department completes its final ranking of  
20 proposals submitted under this subchapter, the final rankings of  
21 each proposal under each of the published criteria are not  
22 confidential.

23       Sec. 223.307. OWNERSHIP OF FACILITIES. (a) A state highway  
24 or another facility that is the subject of an availability payment  
25 agreement under this subchapter is public property and shall be  
26 owned by the department.

27       (b) Notwithstanding Subsection (a), the department may

1 enter into an agreement that provides for the lease of  
2 rights-of-way, the granting of easements, the issuance of  
3 franchises, licenses, or permits, or any lawful uses to enable a  
4 private entity to construct, operate, and maintain a project,  
5 including supplemental facilities. At the termination of the  
6 agreement, the highway or other facilities are to be in a state of  
7 proper maintenance as determined by the department and shall be  
8 returned to the department in satisfactory condition at no further  
9 cost.

10 Sec. 223.308. RULES. The commission may adopt rules  
11 necessary to implement this subchapter. Rules adopted by the  
12 commission may include criteria for determining the most qualified  
13 entities to submit proposals, and for the award of an agreement to  
14 the private entity determined to provide the best value for the  
15 department.

16 SECTION 2. This Act takes effect immediately if it receives  
17 a vote of two-thirds of all the members elected to each house, as  
18 provided by Section 39, Article III, Texas Constitution. If this  
19 Act does not receive the vote necessary for immediate effect, this  
20 Act takes effect September 1, 2013.