By:  Kolkhorst, Perry S.B. No. 421

(In the Senate - Filed January 23, 2019; February 14, 2019, read first time and referred to Committee on State Affairs; March 14, 2019, reported adversely, with favorable Committee Substitute by the following vote: Yeas 9, Nays 0; March 14, 2019, sent to printer.)

COMMITTEE VOTE

               Yea Nay Absent  PNV

Huffman         X

Hughes          X

Birdwell        X

Creighton       X

Fallon          X

Hall            X

Lucio           X

Nelson          X

Zaffirini       X

COMMITTEE SUBSTITUTE FOR S.B. No. 421 By:  Nelson

A BILL TO BE ENTITLED

AN ACT

relating to the acquisition of real property by an entity with eminent domain authority.

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

SECTION 1.  Section 21.0113, Property Code, is amended by amending Subsection (b) and adding Subsections (c), (d), and (e) to read as follows:

(b)  An entity with eminent domain authority has made a bona fide offer if:

(1)  an initial offer is made in writing to a property owner that includes:

(A)  an offer of compensation in an amount equal to or greater than 145 percent of the market value of the property sought to be acquired and damages, if any, to any of the property owner's remaining property, based on:

(i)  an appraisal report on the property by a certified appraiser; or

(ii)  a market study of the property conducted by a certified appraiser; and

(B)  the complete written appraisal report or market study that forms the basis for the amount of the offer of compensation under Paragraph (A);

(2)  a final offer is made in writing to the property owner that includes an offer of compensation in an amount equal to or greater than the amount of the offer of compensation included in the initial offer;

(3)  the final offer is made on or after the 30th day after the date on which the entity makes a written initial offer to the property owner;

(4)  before making a final offer, the entity obtains a written appraisal report from a certified appraiser selected or approved by the property owner of the value of the property being acquired and the damages, if any, to any of the property owner's remaining property;

(5)  the final offer is equal to or greater than the amount of the written appraisal report [~~obtained by the entity~~];

(6)  the following items are included with the final offer or have been previously provided to the owner by the entity:

(A)  a copy of the written appraisal report;

(B)  a copy of the deed, easement, agreement, or other instrument conveying the property sought to be acquired; and

(C)  the landowner's bill of rights statement prescribed by Section 21.0112; and

(7)  the entity provides the property owner with at least 14 days to respond to the final offer and the property owner does not agree to the terms of the final offer within that period.

(c)  Notwithstanding Subsection (b), a private entity as defined by Section 21.031 has made a bona fide offer only if the entity:

(1)  satisfies the requirements of Subsection (b); and

(2)  includes in the initial offer:

(A)  notice of the terms described by Section 21.0114(b) for which the property owner may negotiate to be included in a deed, easement, agreement, or other instrument of conveyance relating to the property; and

(B)  notice that the property owner will also receive a final offer accompanied by an appraisal.

(d)  Notwithstanding Subsections (b) and (c), a private entity subject to Subchapter B-1 has made a bona fide offer only if the entity:

(1)  satisfies the requirements of Subsections (b) and (c);

(2)  includes in the initial offer a copy of the notice of the property owner information meeting required by Section 21.036; and

(3)  participates in the meeting in the manner prescribed by Section 21.038.

(e)  A court with jurisdiction of a condemnation proceeding involving property for which an entity is required to make a bona fide offer under this section may:

(1)  determine whether the entity has complied with the requirements of Subsection (b), including whether the entity or the entity's certified appraiser intentionally omitted damages to the property owner's remaining property; and

(2)  if the court determines that the entity has not complied with the requirements of Subsection (b):

(A)  abate a pending proceeding; and

(B)  make an award of such relief as the court considers appropriate.

SECTION 2.  Subchapter B, Chapter 21, Property Code, is amended by adding Sections 21.0114 and 21.0115 to read as follows:

Sec. 21.0114.  REQUIRED TERMS FOR INSTRUMENTS OF CONVEYANCE BY CERTAIN PRIVATE ENTITIES. (a)  Except as provided by Subsections (c) and (d), a deed, easement, agreement, or other instrument of conveyance provided to a property owner by a private entity, as defined by Section 21.031, that has or asserts the power of eminent domain to acquire the property interest to be conveyed must include the following terms, as applicable:

(1)  if the instrument conveys a pipeline right-of-way easement:

(A)  the maximum number of pipelines that may be installed in the easement;

(B)  the maximum diameter, excluding any protective coating or wrapping, of each pipeline to be installed in the easement;

(C)  the type or category of substances permitted to be transported through each pipeline to be installed in the easement;

(D)  a general description of any aboveground equipment or facility the private entity intends to install, maintain, or operate on the surface of the easement;

(E)  the best available description of the location of the easement, which may include a metes and bounds or centerline description, a plat, or an aerial or other map-based depiction of the location of the easement on the property;

(F)  the maximum width of the easement;

(G)  the minimum depth at which each pipeline to be installed in the easement will initially be installed;

(H)  a provision identifying whether the private entity intends to double-ditch areas of the easement that are not installed by boring or horizontal directional drilling;

(I)  a provision limiting the private entity's right to assign the entity's interest under the deed, easement, agreement, or other instrument of conveyance without:

(i)  written notice to the property owner at the last known address of the person in whose name the property is listed on the most recent tax roll of any taxing unit authorized to levy property taxes against the property; or

(ii)  if the assignee, including an assignee that is an affiliate or subsidiary of or entity otherwise related to the private entity, will not operate each pipeline installed on the easement as a common carrier line or gas utility, the express written consent of the property owner, provided the property owner does not unreasonably withhold consent;

(J)  a provision describing whether the easement rights are exclusive, nonexclusive, or otherwise limited;

(K)  a provision limiting the private entity's right to grant a third party access to the easement area for a purpose that is not related to the construction, safety, repair, maintenance, inspection, replacement, operation, or removal of each pipeline to be installed in the easement;

(L)  a provision regarding the property owner's right to actual monetary damages arising from the construction and installation of each pipeline to be installed in the easement, or a statement that the consideration for the easement includes any monetary damages arising from the construction and installation of each pipeline to be installed in the easement;

(M)  a provision regarding the property owner's right after initial construction and installation of each pipeline to be installed in the easement to actual monetary damages arising from the repair, maintenance, inspection, replacement, operation, or removal of each pipeline to be installed in the easement;

(N)  a provision regarding the private entity's rights and obligations regarding the removal, cutting, use, repair, or replacement of any gates or fences that cross the easement or will be used by the private entity;

(O)  a provision regarding the private entity's obligation to maintain the easement, including leveling of the easement, and a provision regarding the entity's obligation to restore the property owner's property used by the private entity to original condition or as near to original condition as is reasonably practicable or a statement that the private entity will reimburse the property owner for actual monetary damages incurred by the property owner that arise from damage to the property caused by the private entity and not restored;

(P)  a provision regarding:

(i)  the repair and restoration of areas used or damaged outside the easement area to their original condition or better, to the extent reasonably practicable; or

(ii)  the payment of actual monetary damages for areas not restored; and

(Q)  a provision describing the private entity's rights of ingress, egress, entry, and access on, to, over, and across the easement, including the location where the entity will access the easement; and

(2)  if the instrument conveys an electrical transmission right-of-way easement:

(A)  a general description of any use of the surface of the easement the entity intends to acquire;

(B)  the best available description of the location of the easement, which may include a metes and bounds or centerline description, a plat, a map-based depiction of the location of the easement, or another legally sufficient description of the location of the easement on the property;

(C)  the maximum width of the easement;

(D)  the manner in which the entity will access the easement;

(E)  a provision limiting the private entity's right to grant a third party access to the easement area for a purpose that is not related to the transmission line's construction, safety, maintenance, inspection, or operation;

(F)  a provision regarding the property owner's right to actual monetary damages arising from the construction, maintenance, repair, replacement, or future removal of lines and support facilities in the easement, or a statement that the consideration for the easement includes such future damages;

(G)  a provision regarding the private entity's rights and obligations regarding the removal, cutting, use, repair, or replacement of any gates or fences that cross the easement or will be used by the entity;

(H)  a provision regarding the entity's obligation to maintain the easement and restore the easement to the easement's original contours and grades and a provision regarding the entity's obligation to restore the easement following any future damages caused by the private entity or a statement that the consideration for the easement includes such future damages;

(I)  a provision regarding:

(i)  the repair and restoration of areas used or damaged outside the easement area to their original condition or better, to the extent reasonably practicable; or

(ii)  the payment of actual monetary damages for areas not restored;

(J)  a provision describing whether the easement rights are exclusive, nonexclusive, or otherwise limited; and

(K)  a prohibition against the assignment of the entity's interest in the property to an assignee, including an assignee that is an affiliate or subsidiary of or entity otherwise related to the private entity, that will not operate as a utility subject to the jurisdiction of the Public Utility Commission of Texas or the Federal Energy Regulatory Commission without:

(i)  written notice to the property owner at the last known address of the person in whose name the property is listed on the most recent tax roll of any taxing unit authorized to levy property taxes against the property; and

(ii)  the express written consent of the property owner or record owner on the tax records.

(b)  A property owner may negotiate for the following terms to be included in a deed, easement, agreement, or other instrument of conveyance described by Subsection (a):

(1)  a provision regarding the property owner's right to negotiate to recover damages for tree loss and the income loss from disruption of agricultural production or hunting;

(2)  a prohibition against any use of the property being conveyed, other than a use stated in the deed, easement, agreement, or other instrument of conveyance, without the express written consent of the property owner;

(3)  a provision:

(A)  requiring the private entity to maintain at all times while the private entity uses the easement, including during construction and operations on the easement, liability insurance:

(i)  issued by an insurer authorized to issue liability insurance in this state; and

(ii)  insuring the property owner against liability for personal injuries and property damage sustained by any person caused by the use of the easement by the private entity or the private entity's agents or contractors; or

(B)  if the private entity is subject to the jurisdiction of the Public Utility Commission of Texas or has a net worth of at least $25 million, requiring the private entity to indemnify the property owner against liability for personal injuries and property damage sustained by any person caused by the use of the easement by the private entity or the private entity's agents or contractors; and

(4)  a provision that the terms of the deed, easement, agreement, or other instrument of conveyance will bind the successors and assigns of the property owner and private entity.

(c)  A private entity, as defined by Section 21.031, or the property owner may:

(1)  negotiate for and agree to terms and conditions not required by Subsection (a) or provided by Subsection (b), including terms and conditions not included in a subsequent condemnation petition; and

(2)  agree to a deed, easement, agreement, or other instrument of conveyance that does not include the terms required by Subsection (a).

(d)  Except as provided by this subsection, this section does not prohibit a private entity from amending the terms required by Subsection (a) after the private entity makes an initial offer or final offer to a property owner as required by Section 21.0113. A private entity that changes the terms required by Subsection (a) must provide a copy of the amended deed, easement, agreement, or other instrument of conveyance to the property owner not later than the 14th day before the date the private entity files a condemnation petition relating to the property.

(e)  A private entity that amends a deed, easement, agreement, or other instrument of conveyance after the initial offer or final offer is not required to satisfy again any requirement of that section that the private entity has previously satisfied.

(f)  A court with jurisdiction of a condemnation proceeding involving property the acquisition of which is subject to the requirements of this section may:

(1)  determine whether the private entity has complied with the requirements of this section; and

(2)  if the court determines that the private entity has not provided to a property owner a deed, easement, agreement, or other instrument of conveyance that complies with the requirements of this section:

(A)  abate a pending proceeding;

(B)  order the private entity to provide to the property owner a deed, easement, agreement, or other instrument of conveyance that complies with the requirements of this section; and

(C)  order the private entity to pay to the property owner:

(i)  all costs related to the private entity's failure to comply with this section; and

(ii)  any reasonable attorney's fees and other professional fees incurred by the property owner that are directly related to the private entity's failure to comply with this section.

Sec. 21.0115.  EX PARTE COMMUNICATION. (a)  A private entity, as defined by Section 21.031, that wants to acquire real property for a public use, the entity's representative, or the owner of the real property may not, without first attempting to include the property owner or the entity, as applicable, engage in ex parte communication concerning the merits of the condemnation with:

(1)  a court that has jurisdiction of a condemnation proceeding involving the property; or

(2)  a special commissioner appointed in the condemnation proceeding.

(b)  A private entity shall provide written notice to a property owner of any communication between the entity and a court or special commissioner described by Subsection (a) for which the property owner is not present.

(c)  For the purposes of this section, "private entity" includes:

(1)  the entity's attorney; and

(2)  any third-party contractor of the entity, including a right-of-way agent.

SECTION 3.  Section 21.012, Property Code, is amended by adding Subsection (b-1) to read as follows:

(b-1)  In addition to the contents prescribed by Subsection (b), a petition filed by a private entity as defined by Section 21.031 must state the terms to be included in the instrument of conveyance under Section 21.0114.

SECTION 4.  Chapter 21, Property Code, is amended by adding Subchapter B-1 to read as follows:

SUBCHAPTER B-1. ACQUISITION OF PROPERTY BY CERTAIN PRIVATE ENTITIES

Sec. 21.031.  DEFINITION. In this subchapter, "private entity":

(1)  includes:

(A)  a corporation authorized to exercise the power of eminent domain to acquire private property for public use; and

(B)  any affiliate or subsidiary of or entity related to a corporation described by Paragraph (A), including a corporation organized under Chapter 67, Water Code, if the affiliate, subsidiary, or other entity was formed for purposes of a project for which property may be acquired through eminent domain; and

(2)  does not include a railroad operating in this state on or before January 1, 2019.

Sec. 21.032.  APPLICABILITY OF SUBCHAPTER. This subchapter applies only to a private entity that wants to acquire for the same public use one or more tracts or parcels of real property:

(1)  located entirely in one county; and

(2)  owned by at least four property owners.

Sec. 21.033.  NOTICE OF INTENT. (a)  Not later than the 45th day before the date a private entity makes an initial offer to acquire real property under this chapter, the entity must send a written notice of intent to a court that would have jurisdiction of a condemnation proceeding involving the property.

(b)  A notice sent under Subsection (a) must:

(1)  state the private entity's intent to acquire real property for public use;

(2)  specify the public use;

(3)  identify the real property the entity intends to acquire and the owners of the property; and

(4)  disclose the date by which the entity will make the initial offer.

Sec. 21.034.  PROPERTY OWNER INFORMATION MEETING. (a)  Not later than the 30th day after the date a court receives a notice of intent required by Section 21.033, the private entity shall select the date on which a public meeting regarding the proposed acquisition will be held.

(b)  The meeting described by Subsection (a):

(1)  must take place:

(A)  in a public location appropriate to the size and nature of the meeting in the county in which the real property is located; and

(B)  at a time when the property owners identified by the private entity under Section 21.033 may reasonably be able to attend; and

(2)  may not take place earlier than the 14th day after the date a private entity makes an initial offer to a property owner identified in the notice of intent under Section 21.033.

Sec. 21.035.  PERSONS AUTHORIZED TO ATTEND PROPERTY OWNER INFORMATION MEETING. In addition to the property owner and the private entity, the following individuals may attend a meeting held under Section 21.034:

(1)  an individual invited by the property owner who is related to the property owner within the third degree by consanguinity or affinity, as determined under Chapter 573, Government Code;

(2)  an attorney or appraiser representing the property owner;

(3)  any individual with a real property interest in the property subject to the initial offer under Section 21.0113; and

(4)  any public official.

Sec. 21.036.  NOTICE OF PROPERTY OWNER INFORMATION MEETING IN INITIAL OFFER. A private entity that gives a notice of intent under Section 21.033 must include with the entity's initial offer notice of the meeting to be held under Section 21.034, including the date, time, and location of the meeting.

Sec. 21.037.  PARTICIPATION BY PRIVATE ENTITY REQUIRED. A representative of the private entity that gives a notice of intent under Section 21.033 shall:

(1)  attend the meeting; and

(2)  participate in the meeting in the manner prescribed by Section 21.038.

Sec. 21.038.  PROPERTY OWNER INFORMATION MEETING AGENDA. At a meeting scheduled under Section 21.034:

(1)  the private entity shall present:

(A)  the information contained in the landowner's bill of rights statement required to be provided to a property owner under Section 21.0112;

(B)  a description of the public use for which the entity wants to acquire the real property, including technical details;

(C)  if applicable, a statement of the terms required under Section 21.0114 to be included in a deed, easement, agreement, or other instrument of conveyance provided by the entity to the property owner;

(D)  the method and factors used by the entity to calculate the entity's initial offer, including:

(i)  how damages to remaining property were evaluated; and

(ii)  if the entity used a property appraisal report or market value study, the name of the person that performed the appraisal or study;

(E)  the entity's justification for the proposed public use, including any materials used by the entity to obtain a determination that the project is a public use;

(F)  the legal and factual basis for the entity's exercise of its eminent domain authority;

(G)  the name and contact information of any third-party contractor to be used by the entity to acquire the land or undertake the project; and

(H)  a description of any regulatory process required for approval of the project, including any evaluation of the project's necessity, and information about how a property owner may participate in the process; and

(2)  each property owner identified by the private entity under Section 21.033 or the property owner's designee, must be given an opportunity to ask questions and make comments regarding:

(A)  the rights of the property owners;

(B)  the proposed public use; and

(C)  terms required under Section 21.0114 to be included in a deed, easement, agreement, or other instrument of conveyance provided by the entity to a property owner.

Sec. 21.039.  CONTACT AFTER PROPERTY OWNER INFORMATION MEETING. A private entity may not contact a property owner to whom the entity has made an initial offer before the seventh day after the date of the meeting held under Section 21.034.

Sec. 21.0391.  CERTIFICATION OF ENTITY PARTICIPATION IN PROPERTY OWNER INFORMATION MEETING REQUIRED. (a)  After a private entity participates in a meeting held under Section 21.034, the entity shall submit evidence documenting its participation to the court to which the entity gave notice of intent under Section 21.033. The court shall review the evidence submitted by the entity and, if the court determines that the entity has satisfied the requirements of this subchapter, shall certify that the entity has satisfied the requirements of this subchapter.

(b)  In this subsection, "electric utility" means an entity subject to Chapter 37, Utilities Code, and this subchapter. Notwithstanding any other provision of this subchapter, a court shall certify that an electric utility has satisfied the requirements of this subchapter if the electric utility participates in a hearing under Chapter 37, Utilities Code, that also complies with the requirements of this subchapter.

(c)  A private entity may not acquire property to which this subchapter applies unless the entity receives a certification under Subsection (a) or (b) with respect to the property.

Sec. 21.0392.  PUBLICATION AND PROVISION OF CERTAIN MATERIALS. A private entity shall:

(1)  publish on an Internet website any materials presented under Section 21.038(1)(E); and

(2)  provide to property owners identified by the entity under Section 21.033 any materials presented under Section 21.038(1)(E).

SECTION 5.  Section 21.042, Property Code, is amended by adding Subsection (d-1) to read as follows:

(d-1)  In estimating injury or benefit under Subsection (c) in a condemnation proceeding relating to the acquisition of real property by an entity subject to Subchapter B-1, the special commissioners shall consider, in addition to the considerations required under Subsection (d), an injury or benefit to the remaining property as a result of:

(1)  the characteristics of any infrastructure on the condemned property, including the size or visibility of the infrastructure or the pressure or voltage range provided by the infrastructure;

(2)  any limitation of future expansion of the remaining property; and

(3)  terms of the easement acquired in connection with, or the alignment of an easement in connection with, the condemnation.

SECTION 6.  The changes in law made by this Act apply only to the acquisition of real property in connection with an initial offer made under Chapter 21, Property Code, on or after the effective date of this Act. An acquisition of real property in connection with an initial offer made under Chapter 21, Property Code, before the effective date of this Act is governed by the law applicable to the acquisition immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 7.  This Act takes effect September 1, 2019.

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