

SUBJECT: Process for comprehensive agreements for public-private projects

COMMITTEE: Economic and Small Business Development — committee substitute recommended

VOTE: 5 ayes — J. Davis, Vo, Miles, Murphy, Sheets
0 nays
2 absent — R. Anderson, Reynolds

SENATE VOTE: On final passage, April 19 — 30-1 (Nichols)

WITNESSES: *(On House companion bill, HB 2432:)*
For — Chris Lloyd, McGuire Woods Consulting and Balfour Beatty Construction; Rodney Moss, Balfour Beatty Construction; Jeffrey Broaddus, Broaddus & Associates; Richard Lindsay, Satterfield & Pontikes Construction, Inc.; *(Registered, but did not testify:)* Jeff Burdett, Texas Cable Association; ML Calcote, Real Estate Councils of Texas; Martha Dickie, Austin Bar Association Courthouse Committee; Mary Dietz, Lea Noelke, David Whittlesey, Austin Bar Association; Jon Fisher, Associated Builders and Contractors of Texas; Michael Golden, Austin Young Lawyers Association; David Lancaster, Texas Society of Architects; Jim Sewell, Gallagher Construction; Tara Snowden, Zachry Corporation; Ed Sterling, Texas Press Association, Texas Daily Newspaper Association; Frank Turner, City of Plano; Tom Vaughn, Vaughn Construction; Bill Whitehurst

Against — Terri Hall, Texas TURF, Texans for Accountable Government, Galveston County Tea Party, We Texans; Don Dixon; *(Registered, but did not testify:)* Keith Elkins, Freedom of Information Foundation of Texas; Rachel Delgado; Russell Doyle

On — Raymond Risk, Texas Construction Association; Corbin Van Arsdale, AGC-TBB; *(Registered, but did not testify:)* David Mattax, Office of the Attorney General)

DIGEST: CSSB 1048 would add Government Code, ch. 2267 to allow governmental entities to enter into comprehensive agreements, and ch. 2268, to create a Partnership Advisory Commission to review proposed agreements.

Ch. 2267: Authorizing comprehensive agreements. The bill would add Government Code, ch. 2267, to authorize governmental entities — defined as a state board, commission, agency, higher education institution, and other political subdivision — to enter into comprehensive agreements to construct qualifying public projects, including buildings, hospitals, schools, public works, recreational facilities, and others. Provisions would be liberally constructed and would not prohibit a governmental entity from entering into an agreement under other authority in current law.

The bill would not apply to:

- the financing, design, construction, maintenance, or operation of a state highway;
- a public transportation authority created through existing laws; or
- telecommunications, cable television, video service, or broadband infrastructure unless it was installed as a necessity for a qualifying project.

Bid and approval process. A person could not develop a qualifying project without contracting with a responsible governmental entity under the bill. An approval process could be initiated by a person submitting a proposal or by a governmental entity requesting proposals or inviting bids. A private entity or other person could submit a proposal requesting approval of a project. The proposal would have to include specific documents, unless waived by the entity.

A governmental entity could request proposals or invite bids for the development or operation of a qualifying project. An entity would have to consider the total project cost but would not be required to select the proposal that offered the lowest total cost. The entity could consider a list of factors in the bill when evaluating a proposal.

The governmental entity would determine whether to accept the proposal for consideration in accord with procedures established in the bill. A governmental entity that determined not to accept a proposal would return all fees and accompanying documentation to the person who submitted the proposal. A proposal could be rejected at any time.

A governmental entity would have to adopt and make available guidelines that encouraged competition and guided the selection of projects under its purview. Guidelines would have to conform to a list of specific criteria in the bill.

The entity could approve a qualifying project if it determined that the project served a public purpose. A project would serve a public purpose if:

- there was a public need for or benefit from the proposed project;
- the estimated cost of the project was reasonable in relation to similar facilities; and
- the person's plans would result in the timely development or operation of the qualifying project.

A government entity could charge a reasonable fee to cover the costs of processing, reviewing, and evaluating a proposal. The governmental entity would have to establish a date, subject to extension, for when activities would have to begin. The entity would have to take appropriate action to protect confidential and proprietary information.

A person submitting a proposal to a governmental entity would have to provide a copy of its proposal to each municipality and county in which the project was located. Within 60 days of receiving a proposal, the jurisdiction would submit to the governmental entity any comments on the proposed project.

Contractors. The project contractor would have the authority granted by general law and statutes governing contractors. The contractor also could develop or operate a qualifying project and could collect lease payments, impose users fees, and enter into service contracts. A contractor could not impose or adjust a user fee without approval from the governmental entity. A contractor could own, lease, or acquire any other right to use or operate a qualifying project.

A contractor also could finance a project, including by issuing debt and other securities, on his or her terms. A contractor would have to:

- develop or operate the qualifying project in a manner that was acceptable to the governmental entity and in accord with any agreements;

- keep the project open for use by the public as appropriate based on its use;
- maintain the qualifying project, if required by agreement;
- cooperate with the responsible governmental entity to establish any requested interconnection with the project; and
- comply with any applicable agreement or service contract.

Interim agreements. A governmental entity and a contractor could enter into an interim agreement prior to negotiating a comprehensive agreement. The interim agreement could authorize the contractor to begin work on early project phases and activities, establish the process and timing of negotiations over the comprehensive agreement, and contain any other provisions the parties considered appropriate.

Comprehensive agreements. A contractor would have to enter a comprehensive agreement with a governmental entity prior to developing a project. The comprehensive agreement would have to adhere to specific requirements in the bill, including a review of project plans and specifications, an inspection of the project, maintenance of public liability insurance, and policies and procedures governing the rights and responsibilities of the governmental entity and the contractor if the project was terminated or there was a material default by the contractor.

The comprehensive agreement would have to provide for any user fee or other payment established by the parties, including a method governing how the fee would be set. An agreement could include a provision authorizing the governmental entity to grant or loan public money to the contractor. An agreement would have to include the duties of the contractor and could contain terms that the governmental entity determined served the project's public purpose. Parties could change the terms of a comprehensive agreement by amendment.

Parties to a comprehensive agreement could use any funding resources available. The governmental entity could take any action to obtain federal, state, or local funding that served the public purpose of the project. If the governmental entity was a state agency, then any money received would be subject to legislative appropriation. A governmental entity would serve the public purpose if all or part of the costs of a project were paid from proceeds from a local, state, or federal government.

If the contractor had a material default, the governmental entity could assume the contractor's responsibilities and duties and could use eminent domain to acquire the project if granted this authority by separate laws. The bill would specify powers available to a governmental entity that assumed responsibilities for a project due to a default and would include provisions for settling financial obligations. The entity would have to collect and pay any revenue necessary to satisfy the contractor's obligations to secured parties. An entity could, with cause, terminate any interim or comprehensive agreement and could exercise other rights and remedies available to the entity at law or in equity.

The governmental entity and contractor would have to ensure that a facility owner affected by a comprehensive agreement would not suffer a disruption of services as a result of construction.

Existing procurement rules would not apply to a comprehensive agreement. A governmental entity could only enter into a comprehensive agreement in accord with guidelines and procedures that did not materially conflict with existing provisions governing building construction and acquisition and design-build contracts.

Property and eminent domain. A governmental entity could dedicate any property interest for public use in a qualifying project upon finding that doing so would serve a public purpose. In connection with the dedication, an entity could convey any property interest to the contractor in exchange for money or another thing of value, which could include the agreement to develop or operate the project.

The bill would affirm that it did not alter any existing eminent domain laws or powers. The governmental entity could, upon the request of the contractor, exercise any power of eminent domain it had under the law to acquire property that it would dedicate to a public use. It also could take property to relocate facilities affected by the project or that had to be relocated for other purposes related to the construction.

Open records. A governmental entity would have to publicly post a proposal within 10 days of accepting it. An entity would have to make procurement records available for an agreement on request. Trade secrets, financial records, and other records excluded from open-records laws could not be posted or otherwise made available to the public. A governmental entity would have to hold a public hearing on a proposal at

least 30 days before entering into an agreement. Cost estimates relating to a proposed transaction would not be open to public inspection.

Partnership Advisory Commission. CSSB 1048 would add Government Code, ch. 2268 to establish the Partnership Advisory Commission in the legislative branch to advise governmental entities acting under provisions in the bill. The commission would have 11 members, composed of:

- the chair of the House Appropriations Committee or a designee;
- three representatives appointed by the speaker;
- the chair of the Senate Finance Committee or a designee;
- three senators appointed by the lieutenant governor; and
- three representatives of the executive branch, appointed by the governor.

Commission members could not receive compensation but would be entitled to reimbursement of reasonable expenses. The commission would have to meet quarterly and would have assistance from the staff of the presiding officer, whom the members would elect.

Commission review. The commission would have to receive a copy of an interim and comprehensive agreement proposal to review before a governmental entity could begin negotiations. The commission would not review a project with a cost below \$5 million or a project with a cost less than \$50 million that had received specific legislative appropriations as a public-private partnership.

The commission would have to determine whether to accept or decline to review a proposal within 10 days of receiving the proposal. If the commission agreed to review a proposal, it would have to provide findings and recommendations within 45 days of receiving it. If the commission did not provide findings within that timeframe, it would be considered to have declined a review. Commission review would not constitute an approval of any appropriations necessary for an agreement. The governmental entity could not begin negotiation until the commission submitted its recommendations.

A governmental entity would have to submit to the commission a proposed agreement and a report on how it addressed commission recommendations at least 30 days before entering into an agreement.

Findings and recommendations. The bill would set forth criteria for the contents of findings and recommendations. The governmental entity would have to provide additional information at the commission's request. Information protected from public disclosure in negotiating agreements would retain this exemption.

Effective date. The bill would take effect September 1, 2011.

SUPPORTERS
SAY:

CSSB 1048 would enhance the effectiveness and transparency of public-private partnerships that the state already authorizes in the development of public facilities such as schools, hospitals, and public buildings. Taking measures to expedite and reduce the cost of public projects is necessary for a burgeoning state like Texas. Project delays can increase costs, as land and building materials become more expensive. CSSB 1048 would establish a unified and straightforward process for governmental entities to follow when pursuing public-private partnerships for the development of critical public projects. The bill would not change any state laws or powers governing eminent domain.

State law already recognizes public-private partnerships, but the provisions are diffuse across many codes and as such are not streamlined into a clear, manageable development process. Similar provisions as those in CSSB 1048 already have been adopted by 26 states and have met with great success. In fact, CSSB 1048 is modeled after a public-private partnership statute in Virginia that has been successfully used to develop over 100 projects in less than a decade. Carefully structured public-private partnership agreements save time and taxpayer money. Maximizing the purchasing power of public funds is especially important in light of recent budgetary shortfalls affecting governments at all levels in the state.

Texas already has in place a number of innovative project development options for government entities. These options, however, lack consistency in important respects and do not provide uniform processes for stakeholder and citizen involvement in the review process. As a result, would-be developers often have difficulty obtaining necessary financing. Lenders and bond purchasers have been reluctant to participate in current innovative development arrangements due to lingering uncertainty in the process, and governmental entities have shied away in some cases due to unclear statutory authority. Even still, public entities have used existing innovative development provisions to good effect to develop Cowboys

Stadium in Arlington, the Texas Brain and Spine Institute in Bryan, the American Airlines Center/Victory Park in Dallas, and others.

CSSB 1048 would strive to provide a predictable, replicable, and transparent procurement process that public entities would be able to use to develop projects effectively and efficiently. The bill would create clearly delineated processes for reviewing proposed developments and would deploy a number of checks and balances to ensure oversight of proposed agreements. Establishing the review process with the Partnership Advisory Commission would install a valuable check on comprehensive agreements in subjecting them to the oversight of a commission with a majority of elected representatives.

The bill would not aim to replace conventional procurement methods. In fact, it expressly would allow a public entity to enter into a procurement agreement under separate authority in current law. The bill would be permissive, allowing public entities to follow the process it would establish but not barring them from other methods in current law. The process in the bill would not always be advantageous, but it would afford another path for developing projects that were uniquely complex, of great magnitude, or where a public-private partnership would yield certain efficiencies.

Contrary to what some claim, the bill would not abridge competition. The process in the bill would require even more information about proposals than conventional procurement methods through the review process and would increase competition and fair procurement practices by enhancing transparency. The bill explicitly would exclude road projects and would establish review processes that were never applied to comprehensive development agreements for toll projects. A comparison between road projects and those that would be authorized under the bill is misleading.

**OPPONENTS
SAY:**

CSSB 1048 would perpetuate the same flawed practices that have been perpetuated in comprehensive development agreements for toll road projects. The bill would allow public entities to effectively sell public assets to private entities through agreements that, more often than not, result in bad long-term deals for the public they supposedly benefit.

The long-term leases of many comprehensive agreements in effect cede public assets to private entities. There would be no limit on the maximum duration of comprehensive agreements in the bill, as there is with toll road

development agreements, which could give rise to agreements lasting an untold number of years — in effect, in perpetuity. There is no way to legitimately place a value on a comprehensive agreement that extends so far into the future and represent with confidence that the public entity is getting a good deal for taxpayers. There are too many complicating variables for this to be feasible.

While comprehensive agreements may appear to benefit the public in abstraction, in practice they often result in huge subsidies to private interests and relinquishing control of valuable public assets. A provision in the bill, for example, would allow taxpayers to assume the private entities' debt if that entity defaulted, shielding private entities from many risks associated with development and leaving the public on the hook if the private entity failed to deliver the project. Other provisions would allow public entities to transfer land and use their eminent domain authority — which the Legislature currently is trying to reign in — to take land for the private entity. These windfalls represent significant subsidies for private entities contracting for these projects that distort free enterprise and turn over taxpayer funds to private interests through opaque methods.

The bill would allow for “best-value” bidding as opposed to conventional low-bid competitive procurement. This would open the door to favoritism and other unfair practices that would allow public entities to grant projects to inside parties. Public-private partnerships in effect take a governmental function and privatize it without true competition and free market principles. More often than not, they are government-sanctioned monopolies for private entities in the form of sweetheart deals that do not adequately protect the public interest in a project.

Recent abuses along these lines prompted the 80th Legislature in 2007 to place a limited moratorium on comprehensive development agreements for toll projects. That year, lawmakers heard numerous examples of the Texas Department of Transportation providing substantial, indirect subsidies to private developers that robbed the projects of much of their fiscal advantages while signing away the public investment in these projects for the foreseeable future. While the comprehensive agreements the bill would authorize would be different than those for toll roads, there is no reason to think they will not be subject to the same abuses.

OTHER
OPPONENTS
SAY:

The Partnership Advisory Commission process established in the bill would not be effective at protecting against abuses of comprehensive agreement authority. While the commission members may be well-intentioned, they would not have the local and legal expertise required to evaluate these massive and technical agreements. State officials or their designees would not be in a good position to evaluate a local project outside of their district, and they would not have the time required to fully acquaint themselves with the specific details of a given project.

Comprehensive development agreements for toll road projects currently are reviewed by the attorney general and the state auditor. This would be a better oversight option for these contracts, since these entities are accustomed to reviewing complex legal documents.

NOTES:

The House committee substitute to the Senate-passed version of bill added a provision prohibiting a contract from imposing an additional user fee until the fee was approved by a governmental entity.

The House companion bill, HB 2432 by J. Davis, was considered in a public hearing on April 7 and was reported favorably, as substituted, by the House Economic and Small Business Development Committee on April 14.