

SUBJECT: Expanding and extending CDA authority

COMMITTEE: Transportation — committee substitute recommended

VOTE: 8 ayes — Phillips, Martinez, Y. Davis, Fletcher, Guerra, Harper-Brown, Pickett, Riddle

2 nays — Burkett, Lavender

1 absent — McClendon

WITNESSES: For — C. Brian Cassidy, Alamo RMA, Cameron County RMA, Camino Real RMA, Central Texas RMA, Grayson County RMA, North East Texas RMA; Duane Gordy, Community Development Education Foundation; Mike Heiligenstein, Central Texas Regional Mobility Authority; (*Registered, but did not testify:* Brent Connett, Texas Conservative Coalition; David Garcia, Cameron County Regional Mobility Authority; Daniel Gonzalez, Texas Association of REALTORS; Beth Ann Ray, Austin Chamber of Commerce; Vic Suhm, Tarrant Regional Transportation Coalition)

Against — Terri Hall, Texas TURF; Jeff Judson, San Antonio Tea Party; Pat Dossey; Don Dixon; Robert Morrow; (*Registered, but did not testify:* Dennis Edwards, TexasConservatives.org; Dale Huls, Clear Lake Tea Party; Teresa Beckmeyer; Bill Molina)

On — Michael Morris, North Central Texas Council of Governments; Phil Wilson, Russell Zapalac, Texas Department of Transportation

BACKGROUND: Comprehensive development agreements (CDAs) are contracts with private entities to finance, construct, maintain, operate, or expand a tolled highway project. Current law grants TxDOT and Regional Mobility Authorities (RMAs) the authority until 2015 to enter into a CDA only for specific projects listed in statute.

DIGEST: CSHB 3391 would increase the number of projects that TxDOT could design, develop, finance, construct, operate, or maintain by entering into a CDA. It also would extend to 2017 from 2015 the authority to enter into a CDA for other projects already designed in state law.

Projects that would become eligible for CDA agreements until 2017 under the bill include:

- SH 183 Expanded (SH 114 and Loop 12)
- I-35/US 67 Gateway;
- I-35 E (SH 183 to Dallas North Tollway);
- Loop 9;
- US 181 (Harbor Bridge);
- Loop 49;
- Loop 375 Border Highway;
- Loop 1604 (I-35 to SH 16);
- Northeast Parkway (El Paso).

Projects that the bill would extend authority to develop to 2017 include:

- Grand Parkway;
- I-35 E managed lanes;
- North Tarrant Express Segments 3A and 3B;
- North Tarrant Express Segments 3C and 4;
- SH 183, from SH 121 to I-35E;
- US Highway 290 (Harris County);
- SH 288;
- South Padre Second Causeway;
- Outer Parkway (US77/83 to FM 1847);
- US 183; and
- Loop 1 /MOPAC FM 734 to Cesar Chavez.

TxDOT CDA authority. The bill would revise provisions governing TxDOT's authority to enter into CDAs. Such projects would, with some exceptions, have to obtain environmental clearance for the project or its initial scope by August 31, 2017. The bill would authorize TxDOT to enter into a CDA for a nontolled state highway improvement authorized by the Legislature and to combine two or more projects in a CDA.

RMAs. The bill would allow an RMA formed by a county with a population greater than 700,000 that bordered Mexico (El Paso and Hidalgo counties) to enter into a CDA for the Hidalgo County Loop Project, the International Bridge Trade Corridor Project, and projects associated with commuter rail.

Termination for convenience. The bill would revise termination for convenience provisions to require that a CDA under which a private participant received the right to operate and collect revenue from a toll project would have to contain a provision authorizing TxDOT, a regional tollway authority, an RMA, or a county to terminate the agreement and purchase the participant's interest and property associated with the project.

The contract would have to specify the price to purchase rights to the project at specific intervals from the date the toll project opened. The purchase price would be the lesser of the price stated for the interval or the greater of amounts specified in the CDA, plus:

- fair market value of the private participant's interest, or
- outstanding debt specified in the CDA.

The price for termination could be adjusted to reflect changes in the agreement stemming from a required expansion or reconstruction not provided for in the original agreement.

A request for proposals for a CDA would have to include the proposed price breakdown and would be part of the evaluation scoring matrix. A private participant would have to provide notice before a new price interval took effect, and the contracting entity would have to respond with a statement of its intent on whether or not to exercise the option to purchase.

Effective date. This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2013.

**SUPPORTERS
SAY:**

CSHB 3391 would enable the state, regional mobility authorities (RMAs), and some border counties to enter into CDAs with private entities for the development of specific tolled highway projects. The bill would add CDA authority for some projects and extend this authority by two years for others. The transportation projects designated in the bill were each identified by local entities as critical to addressing pressing infrastructure needs. Each of the projects listed is very unlikely to receive financing in the near term if restricted to development with currently available public resources.

Private financiers can bring abundant resources to toll projects that are unavailable to the public sector. Many private toll road developers have international asset and capital bases that they may leverage to finance the initial acquisition and construction of toll facilities. Private toll road development agreements may bring the state more initial income in the form of concession agreements, provide the state a portion of ongoing revenue collections, and relieve the state from the responsibility of building or maintaining the road.

By leasing the rights to develop and operate toll projects to private entities, the state shields itself from the unavoidable risks associated with these projects. These risks are inherent in every aspect of toll development. Estimates of initial construction costs, maintenance and operation costs, the number of drivers willing to pay tolls, and the price drivers would pay to use toll roads are all unknown values that determine the ultimate profitability of the project.

Miscalculations in project planning and market studies could cause revenue forecasts to fall short, creating risks of project failure and bankruptcy. Leasing toll projects to private developers eliminates such risks for the state and provides revenue in the form of concession fees and other contractually specified returns. States may refuse to aid private toll operators who lease the rights to develop unprofitable toll roads.

Private developers often maintain and operate toll facilities more efficiently and consistently. Private entities have a vested interest in maintaining toll roads because deteriorating road quality affects the number of drivers using the road and the amount of revenue collected by the tolling authority. State maintenance of roads, by contrast, is subject to the vagaries of politics and the legislative appropriations process. Money may be directed to new road construction and away from maintenance and operation, and such diversions from maintenance could result in declining road quality over time.

In response to public perceptions of abuse, the Legislature adopted key protections to ensure that CDA contracts are in keeping with public interests. For instance, a toll entity is barred from entering into a CDA unless the attorney general deems the proposed agreement legally sufficient. The Legislature also has adopted rules restricting so-called “noncompete” clauses. Under current law, no CDA agreement can prevent the construction of a transportation project, and compensation agreements

are limited to a loss of toll revenue attributable to construction within a certain radius of the project.

CSHB 3391 also would add further protections by clarifying law on requirements for termination for convenience clauses. Under the bill, any CDA would have to include a provision authorizing a public entity to repurchase the rights to the project. This would act as a safeguard against unforeseen developments by allowing the public to buy back the project at a pre-specified price.

OPPONENTS
SAY:

CSHB 3391 would continue the flawed practice of turning over valued public assets to the private sector. The value of the transportation assets the state loses by leasing out development rights for toll roads usually exceeds the benefits it might enjoy as a result of ceding such rights. The capacity of private financing to minimize the risks inherent in developing a toll road is overstated. Private developers are not likely to gamble with toll roads that they do not expect to yield significant net profits over their lifetime, and it is unlikely that the state could deny credibly financial or contractual assistance to a private interest operating a failing tollway. Toll projects that do not expect to yield generous returns on investment are not sought as aggressively by private interests.

Because roads are built only at great public expense and are built on rights-of-way often acquired through eminent domain, and because roads act as critical public assets by giving motorists access to important destinations, the state is deeply invested in their continued, viable operation. As a result, the notion that the state simply could deny requests for intervention or assistance that, if withheld, could lead to the failure and closure of a tollway is highly questionable. If a private company leased a toll project that failed to be profitable, the state would be compelled to take on the expense of buying out the private entity and assume maintenance of the road or to amend the contract to include terms more favorable to the private interest.

CDAs have a well-documented record of leading to bad outcomes for the general public. CDAs essentially are state-sanctioned monopolies that receive the authority for half a century to tax customers for what is a public good. Many CDAs are structured with non-compete clauses that actually penalize the state for making improvements to public, non-tolled roads in the vicinity that could draw drivers away from the project. This basically holds the best interests of taxpayers hostage to a private entity

for the foreseeable future.

The best course for toll road development would be to restrict the option of development only to public tolling entities. Public tolling entities share pressures to maintain toll roads as time passes, and they have more flexibility and self-determination in decision-making than does the state. Public tolling entities also provide for the recirculation of revenue from toll roads into the maintenance of local transportation infrastructure. Successful public toll roads become future engines of transportation funding, while privately funded toll roads export revenue to shareholders.

Toll roads are an unfair form of double-taxation and impose exorbitant fees on users who are compelled by worsening congestion on public non-tolled roads to pay the toll. The bill would be yet another measure that avoids addressing the core issue facing the state — insufficient funding for transportation projects. The state needs to address the core issue facing highway funding and take action to secure the funding for roads that the state needs.

**OTHER
OPPONENTS
SAY:**

CSHB 3391 would continue the vexing practice of authorizing CDAs for specific projects listed in statute. This puts the Legislature in the position of choosing which projects are best suited for development as a CDA during the legislative session. The Legislature is ill-equipped to make these types of specific, project-level decisions. Instead of continuing the practice of designating specific projects, it should adopt a statewide framework that allows for ongoing decisions about which projects are most suitable for development as CDAs.

NOTES:

The companion bill, SB 1730 by Nichols, was passed by the Senate on April 16 and reported favorably as substituted by the House Transportation Committee on April 25.

The introduced version of HB 3391 did not list any specific CDA projects but would have placed a limit on the CDA projects that TxDOT could enter into at 10 per biennium.