

**SUBJECT:** Availability payment agreements for highway projects

**COMMITTEE:** Transportation — favorable, without amendment

**VOTE:** 10 ayes — Phillips, Martinez, Burkett, Fletcher, Guerra, Harper-Brown, Lavender, McClendon, Pickett, Riddle

0 nays

1 absent — Y. Davis

**WITNESSES:** For — Mark Hilderbrand, Kiewit Corporation; (*Registered, but did not testify*: Robert E. Johnson Jr., Kiewit Corporation; Rodney Moss, Balfour Beatty; Lawrence Olsen, Texas Good Roads Assn; Dean Radeloff, Odebrecht-USA; Tara Snowden, Zachry Corporation; Dan Stoppenhagen, Fluor; Vic Suhm, Tarrant Regional Transportation Coalition)

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

On — Phil Wilson and Russell Zapalac, TxDOT; (*Registered, but did not testify*: James Bass, TxDOT; Michael Morris, North Central Texas Council of Governments)

**DIGEST:** HB 3650 would allow the Texas Department of Transportation (TxDOT) to enter into an availability payment agreement with a private entity for the design, development, financing, construction, maintenance, or operation of a toll or non-tolled road on the state highway system. An availability payment agreement would provide for compensation for a private entity through milestone or periodic payments based on the entity's compliance with defined performance requirements.

The Texas Transportation Commission could adopt rules necessary to implement availability payment agreements. Rules adopted could include criteria for determining the most qualified entities to submit proposals and for the award of an agreement to the private entity determined to provide the best value.

**Funding.** TxDOT could use any available funds to make an availability payment, including money in the State Highway Fund (Fund 6) that was required to be used for public roadways.

Compensation paid out to Fund 6 could not exceed eligible amounts and would have to be incurred or expected to be incurred by the private entity over the term of the agreement.

TxDOT's obligation to make a payment would be subject to the availability of funds appropriated for that purpose or other available funds. TxDOT could hold money to be used to satisfy payment obligations under an availability payments agreement in a reserve fund or trust created under an agreement.

**Agreements.** TxDOT would require a private entity entering into an availability payment agreement to provide a performance and payment bond or alternative form of security equal to the cost of constructing the facility.

TxDOT could choose to include other provisions it deemed appropriate, including a method and means for the purchase of the private entity's interest in the agreement and related property, and for the payment of obligations incurred under the agreement.

State laws governing competitive bids for highway contracts and state and local contracts and fund management would not apply to availability payments.

**Proposals.** TxDOT could pay an unsuccessful proposer that submitted a responsive proposal. After payment, TxDOT and the proposer jointly would own the rights to the work in the proposal.

Various materials submitted in connection with a proposal would be confidential and not subject to public information or disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract was executed. Final rankings of proposals would not be confidential.

**Ownership.** A state highway or other facility subject to an availability

payment agreement would be owned by TxDOT. TxDOT could enter into an agreement to provide for the lease of rights-of-way, the granting of easements, and other lawful uses to enable the private entity to complete the project. All facilities would be returned to TxDOT in satisfactory condition at no additional cost.

**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:**

HB 3650 would equip TxDOT with another tool to develop highway projects in a time of increasing congestion and limited resources. Granting TxDOT the ability to enter into availability payments agreements could provide a path to completion for some projects that otherwise would languish for lack of funding.

Availability payments agreements represent a new contractual structure that provides payment for performance irrespective of demand. Under an availability payment agreement, a private entity that partnered with TxDOT would build a highway and put its financing into the project and then get paid back over time with guaranteed long-term payments that would never exceed the dollar amount agreed to in the contract. Payments from TxDOT for the project would begin when the highway project became fully functional. Payments would be subject to legislative appropriation.

There are various benefits to the availability payments model. Unlike a comprehensive development agreement (CDA), under an availability payment contract, the state maintains ownership and control over the highway project. CDAs, on the other hand, involve long-term leases up to 50 years and relinquishing future toll revenue to a private entity. Priority payments agreements, on the other hand, are shorter term (usually closer to 25-30 years) and secure the state's ability to enjoy the long-term financial benefits of a project (i.e., excess toll revenue).

The availability payments model would open the door to creative public-private partnerships (P3s) that offer innovative solutions that would not otherwise be plausible. Florida has put the availability payments model to use and has received significant interest from developers proposing to construct managed land projects. There is no reason to believe similar

successes are not possible in Texas. At the least, there is no harm in creating the framework to allow proposals for a highway project that would be of benefit to the state.

Availability payments contracts would provide a good intermediate step between constructing a road with state funds, which are in short supply, and developing the project under a CDA. While the state would not be shielded from risk to the extent it is under a CDA agreement, it would not be exposed to risk for project maintenance and construction. The state would assume the risk of financing the project in exchange for retained control and ownership.

OPPONENTS  
SAY:

HB 3650 would not protect taxpayers to the extent that proponents claim. While obligations to finance availability payment contracts may not formally be on the public balance sheet, the state still is contractually obligated to pay. The availability payments model retains the risk for project financing and therefore leaves taxpayers on the hook if the project eventually fails to perform to expectations.

HB 3650 would not generate revenue, but instead would drain already diminished resources for transportation. In order to make the long-term payments, the Legislature would have to divert funds from other pressing needs or issue bonds. The availability payments model likely would be subject to the same sorts of abuses that are perpetuated in CDA contracts and that have been widely publicized.

Availability payment agreements are essentially mechanisms for financing more toll roads, which 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 avoided 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.