

BILL ANALYSIS

Senate Research Center

C.S.S.B. 965
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Transportation & Homeland Security
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

C.S.S.B. 965 makes adjustments to the regional tollway authority chapter of the Transportation Code, which will only affect the North Texas Tollway Authority (NTTA).

C.S.S.B. 965 allows the authority to enter into comprehensive development agreements (CDAs). It also gives NTTA design-build authority, similar to regional mobility authority (RMA) language, and construction manager-at-risk authority, similar to other Texas political entities. This bill also adds intangible property, such as software and know-how, to the assets or property which the authority may rent, lease, franchise, license, or otherwise make available. A provision, similar to RMA language, is added to authorize the authority to use all powers available to participate in the Trans-Texas Corridor. Finally, the NTTA will be allowed to use available toll revenues, under limited circumstances, for the design and construction of non-tolled roads in the service area.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to a regional tollway authority in SECTION 1 (Sections 366.402, 366.404, and 366.408, Transportation Code) and SECTION 6 (Section 366.185, Transportation Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 366.003, Transportation Code, by adding Subdivision (9-a), to define "surplus revenue."

SECTION 2. Amends Chapter 366, Transportation Code, by adding Subchapter H, as follows:

SUBCHAPTER H. COMPREHENSIVE DEVELOPMENT AGREEMENTS

Sec. 366.401. COMPREHENSIVE DEVELOPMENT AGREEMENTS. (a) Authorizes a regional tollway authority (authority) to use a comprehensive development agreement (CDA) with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand a turnpike project.

(b) Provides that a CDA is an agreement with a private entity that, at a minimum, provides for the design, construction, rehabilitation, expansion, or improvement of a turnpike project and may also provide for the financing, acquisition, maintenance, or operation of a turnpike project.

(c) Authorizes an authority to negotiate provisions relating to professional and consulting services provided in connection with a CDA.

(d) Authorizes an authority to authorize the investment of public and private money, including debt and equity participation, to finance a function described by this section.

Sec. 366.402. PROCESS FOR ENTERING INTO COMPREHENSIVE DEVELOPMENT AGREEMENTS. (a) Requires an authority, if the authority enters into a CDA, to use a competitive procurement process that provides the best value for the

authority. Authorizes an authority to accept unsolicited proposals for a proposed turnpike project or solicit proposals in accordance with this section.

(b) Requires an authority to establish rules and procedures for accepting unsolicited proposals that require the private entity to include certain information in the proposal.

(c) Requires an authority to publish a notice advertising a request for competing proposals and qualifications in the Texas Register that includes the criteria to be used to evaluate the proposals, the relative weight given to the criteria, and a deadline by which proposals must be received if the authority takes certain actions.

(d) Requires a proposal submitted in response to a request published under Subsection (c) to contain, at a minimum, the information required by Subsections (b)(2) and (3).

(e) Authorizes an authority to interview a private entity submitting an unsolicited proposal or responding to a request under Subsection (c). Requires the authority to evaluate each proposal based on the criteria described in the request for competing proposals and qualifications and authorizes the authority to qualify or shortlist private entities to submit detailed proposals under Subsection (f). Requires the authority to qualify or shortlist at least two private entities to submit detailed proposals for a project under Subsection (f) unless the authority does not receive more than one proposal or one response to a request under Subsection (c).

(f) Requires an authority to issue a request for detailed proposals from all private entities qualified or shortlisted under Subsection (e) if the authority proceeds with the further evaluation of a proposed project. Authorizes a request under this subsection to require certain additional information the authority considers relevant or necessary.

(g) Authorizes an authority, in issuing a request for proposals under Subsection (f), to solicit input from entities qualified under Subsection (e) or any other person. Authorizes an authority to also solicit input regarding alternative technical concepts after issuing a request under Subsection (f).

(h) Requires an authority to evaluate each proposal based on the criteria described in the request for detailed proposals and select the private entity whose proposal offers the apparent best value to the authority.

(i) Authorizes an authority to enter into negotiations with the private entity whose proposal offers the apparent best value.

(j) Authorizes an authority, if at any point in negotiations under Subsection (i) it appears to the authority that the highest ranking proposal will not provide the authority with the overall best value, to enter into negotiations with the private entity submitting the next-highest ranking proposal.

(k) Authorizes an authority to withdraw a request for competing proposals and qualifications or a request for detailed proposals at any time, and to then publish a new request for competing proposals and qualifications.

(l) Authorizes an authority to require that an unsolicited proposal be accompanied by a nonrefundable fee sufficient to cover all or part of its cost to review the proposal.

(m) Authorizes an authority to pay an unsuccessful private entity that submits a proposal in response to a request for detailed proposals under Subsection (f) a stipulated amount in exchange for the work product contained in that proposal. Requires the stipulated amount to be stated in the request for proposals and

prohibits it from exceeding the value of any work product contained in the proposal that can, as determined by the authority, be used by the authority in the performance of its functions. Provides that the use by the authority of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the authority and does not confer liability on the recipient of the stipulated amount under this subsection. Sets forth certain effects resulting after payment of the stipulated amount.

(n) Authorizes an authority to prescribe the general form of a CDA and to include any matter the authority considers advantageous to the authority. Requires the authority and the private entity to finalize the specific terms of a CDA

(o) Provides that Section 366.185 (Competitive Bidding), Subchapter A, Chapter 223, of this code, and Chapter 2254 (Professional and Consulting Services), Government Code, do not apply to a CDA entered into under this subchapter.

Sec. 366.403. CONFIDENTIALITY OF INFORMATION. (a) Provides that, to encourage private entities to submit proposals under this subchapter, certain information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552 (Public Information), Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into in a certain manner.

(b) Provides that, after an authority completes its final ranking of proposals under Section 366.402(h), the final rankings of each proposal under each of the published criteria are not confidential.

Sec. 366.404. PERFORMANCE AND PAYMENT SECURITY. (a) Requires an authority, notwithstanding the requirements of Subchapter B, Chapter 2253, Government Code, to require a private entity entering into a comprehensive development agreement under this subchapter to provide a performance and payment bond or an alternative form of security in an amount sufficient to cover certain costs.

(b) Requires a performance and payment bond or alternative form of security to be in an amount equal to the cost of constructing or maintaining the project.

(c) Requires an authority, if an authority determines that it is impracticable for a private entity to provide security in the amount described by Subsection (b), to set the amount of the bonds or the alternative forms of security.

(d) Provides that a payment or performance bond or alternative form of security is not required for the portion of an agreement that includes only design or planning services, the performance of preliminary studies, or the acquisition of real property.

(e) Prohibits the amount of the payment security from being less than the amount of the performance security.

(f) Authorizes an authority to require certain alternative forms of security, in addition to, or instead of, performance and payment bonds.

(g) Requires an authority by rule to prescribe requirements for alternative forms of security provided under this section.

Sec. 366.405. OWNERSHIP OF TURNPIKE PROJECTS. (a) Provides that a turnpike project that is the subject of a CDA with a private entity, including the facilities acquired or constructed on the project, is public property and is owned by the authority.

(b) Authorizes an authority, notwithstanding Subsection (a), to enter into an agreement that provides for the lease of rights-of-way, the granting of easements, the issuance of franchises, licenses, or permits, or any lawful uses to enable a

private entity to construct, operate, and maintain a turnpike project, including supplemental facilities. Provides that, at the termination of the agreement, the turnpike project, including the facilities, are to be in a state of proper maintenance as determined by the authority and are required to be returned to the authority in satisfactory condition at no further cost.

Sec. 366.406. LIABILITY FOR PRIVATE OBLIGATIONS. Prohibits an authority from incurring a financial obligation for a private entity that designs, develops, finances, constructs, maintains, or operates a turnpike project. Provides that the authority or a political subdivision of the state is not liable for any financial or other obligation of a turnpike project solely because a private entity constructs, finances, or operates any part of the project.

Sec. 366.407. TERMS OF PRIVATE PARTICIPATION. (a) Requires an authority to negotiate the terms of private participation in a turnpike project under this subchapter relating to methods, practices, expenses, and responsibilities.

(b) Authorizes a CDA entered into under this subchapter to include any provision the authority considers appropriate, including specific provisions.

(c) Authorizes an authority to enter into a CDA under this subchapter with a private participant only if the project is identified in the TxDOT unified transportation program or is located on a transportation corridor identified in the statewide transportation plan.

(d) Provides that Section 366.406 does not apply to an obligation of an authority under a CDA, nor is an authority otherwise constrained from issuing bonds or other financial obligations for a turnpike project payable solely from revenues of that turnpike project or from amounts received under a CDA.

(e) Authorizes, notwithstanding any other law, and subject to compliance with the dispute resolution procedures set out in the CDA, an obligation of an authority under a CDA entered into under this subchapter to make or secure payments to a person because of the termination of the agreement, including the purchase of the interest of a private participant or other investor in a project, to be enforced by mandamus against the authority in a district court of any county of the authority, and the sovereign immunity of the authority is waived for that purpose. Requires the district courts of any county of the authority to have exclusive jurisdiction and venue over and to determine and adjudicate all issues necessary to adjudicate any action brought under this subsection. Provides that the remedy provided by this subsection is in addition to any legal and equitable remedies that may be available to a party to a CDA.

(f) Requires, if an authority enters into a CDA with a private participant that includes the collection by the private participant of tolls for the use of a toll project, the private participant to submit certain information to the authority for approval.

(g) Authorizes, except as provided by this section, a CDA with a private participant that includes the collection by the private participant of tolls for the use of a toll project to be for a term not longer than 30 years.

Sec. 366.408. RULES, PROCEDURES, AND GUIDELINES GOVERNING SELECTION AND NEGOTIATING PROCESS. (a) Requires an authority, to promote fairness, obtain private participants in turnpike projects, and promote confidence among those participants, to adopt rules, procedures, and other guidelines governing selection of private participants for CDAs and negotiations of CDAs. Requires the rules to contain criteria relating to the qualifications of the participants and the award of the contracts.

(b) Requires an authority to have up-to-date procedures for participation in negotiations under this subchapter.

(c) Provides that an authority has exclusive judgment to determine the terms of an agreement.

Sec. 366.409. **USE OF CONTRACT PAYMENTS.** (a) Requires payments received by an authority under a CDA to be used by the authority to finance the construction, maintenance, or operation of a turnpike project or a highway.

(b) Requires the authority to allocate the distribution of funds received under Subsection (a) to the counties of the authority based on the percentage of toll revenue from users, from each county, of the project that is the subject of the CDA. Requires each entity responsible for collecting tolls for a project to calculate on an annual basis the percentage of toll revenue from users of the project from each county within the authority based on the number of recorded electronic toll collections, to assist the authority in determining the allocation.

SECTION 3. Amends Section 366.033(f), Transportation Code, to authorize an authority to rent, lease, franchise, license, or otherwise make portions of any property of the authority, including the tangible or intangible property, rather than its properties, available for use by others in furtherance of its powers under this chapter by increasing the feasibility or efficient operation, rather than revenue, of a turnpike project or system or the revenue of the authority.

SECTION 4. Amends Subchapter B, Chapter 366, Transportation Code, by adding Section 366.037, as follows:

Sec. 366.037. **OTHER HIGHWAY PROJECTS.** (a) Authorizes the board of any authority (board), by resolution, in addition to the powers granted under this chapter and without supervision or regulation by any state agency or local governmental entity, but subject to an agreement entered into under Subsection (c), and on making the findings set forth in this subsection, to authorize the use of surplus revenue of a turnpike project or system for the study, design, construction, maintenance, repair, and operation of a highway or similar facility that is not a turnpike project if the highway or similar facility meets certain criteria.

(b) Authorizes the board in the resolution to prescribe terms for the use of the surplus revenue, including the manner in which the highway or related facility is required to be studied, designed, constructed, maintained, repaired, or operated.

(c) Requires an authority to enter into an agreement to implement this section with TxDOT, the Texas Transportation Commission (TTC), a local governmental entity, or another political subdivision that owns a street, road, alley, or highway that is directly affected by the authority's turnpike project or related facility.

(d) Prohibits an authority from taking certain actions.

(e) Requires the board to consider certain issues in authorizing expenditures under this section.

(f) Provides that, except as provided by this section, an authority has the same powers and may use the same procedures with respect to the study, financing, design, construction, maintenance, repair, and operation of a highway or similar facility under this section as are available to the authority with respect to a turnpike project or system.

SECTION 5. Amends the heading to Section 366.185, Transportation Code, to read as follows:

Sec. 366.185. **ENGINEERING, DESIGN, AND CONSTRUCTION SERVICES.**

SECTION 6. Amends Section 366.185, Transportation Code, by amending Subsection (a) and adding Subsections (c) through (f), as follows:

(a) Authorizes, rather than requires, a contract made by an authority that requires the expenditures of public funds for the construction or maintenance of a turnpike project to be let by a competitive bidding procedure in which the contract is awarded to the lowest responsible bidder that complies with the authority's criteria.

(c) Authorizes an authority to procure a combination of engineering, design, and construction services in a single procurement for a turnpike project, provided that any contract awarded results in the best value to the authority.

(d) Requires the authority to adopt rules governing the award of contracts for engineering, design, construction, and maintenance services in a single procurement.

(e) Authorizes an authority, notwithstanding any other provision of state law, to let a contract for the design and construction of a turnpike project by a construction manager-at-risk procedure under which the construction manager-at-risk provides consultation to the authority during the design of the turnpike project and is responsible for construction of the turnpike project in accordance with the authority's specifications. Requires a construction manager-at-risk to be selected on the basis of criteria established by the authority, which may include the construction manager-at-risk's experience, past performance, safety record, proposed personnel and methodology, proposed fees, and other appropriate factors that demonstrate the construction manager-at-risk's ability to provide the best value to the authority and to deliver the required services in accordance with the authority's specifications.

(f) Requires the authority to adopt rules governing the award of contracts using construction manager-at-risk procedures under this section.

SECTION 7. Amends Subchapter F, Chapter 366, Transportation Code, by adding Section 366.2575, as follows:

Sec. 366.2575. BOARD VOTE ON COUNTY REQUEST. Authorizes the commissioners court of a county of an authority to request the board of the authority to vote on whether to build a project that the county requests.

SECTION 8. Amends Subchapter G, Chapter 366, Transportation Code, by adding Section 366.305, as follows:

Sec. 366.305. TRANS-TEXAS CORRIDOR PROJECTS. Requires an authority, if the authority is requested by the TTC to participate in the development of a turnpike project that has been designated as part of the Trans-Texas Corridor, to have, in addition to all powers granted in this chapter, all powers of the TxDOT related to the development of Trans-Texas Corridor projects.

SECTION 9. Amends Subchapter A, Chapter 228, Transportation Code, by adding Section 228.011, as follows:

Sec. 228.011. TOLL PROJECTS WITHIN THE BOUNDARIES OF A REGIONAL TOLLWAY AUTHORITY. (a) Provides that this section applies only to a toll project located within the boundaries of a regional tollway authority under Chapter 366.

(b) Provides that the tollway authority is the entity that has primary responsibility for the financing, construction, and operation of a toll project located within the boundaries of the authority.

(c) Requires TTC and TxDOT, to the extent authorized by federal law or authorized or required by this title, to assist the tollway authority in the financing, construction, and operation of a toll project located within the boundaries of the authority by allowing the authority to use highway right-of-way owned by TxDOT and to access the state highway system.

(d) Provides that Subsections (b) and (c) do not limit the authority of TTC or TxDOT to participate in the cost of acquiring, constructing, maintaining, or operating a turnpike project of the tollway authority under Chapter 366.

(e) Requires TTC or TxDOT, before TTC or TxDOT is authorized to enter into a contract for the financing, construction, or operation of a proposed or existing toll project any part of which is located within the boundaries of a tollway authority, to provide the authority the first option to finance, construct, or operate, as applicable, the portion of the toll project located within the boundaries of the authority on terms agreeable to the authority, without the requirement of any payment to TTC or TxDOT, and in a manner determined by the authority to be consistent with the practices and procedures by which the authority finances, constructs, or operates a project.

(f) Prohibits an agreement entered into by the tollway authority and TTC or TxDOT in connection with a project under Chapter 366 that is financed, constructed, or operated by the authority and that is on or directly connected to the state highway system from requiring the authority to make any payments to TTC or TxDOT.

(g) Provides that an agreement entered into by the tollway authority and TTC or TxDOT in connection with a project under Chapter 366 that is financed, constructed, or operated by the authority and that is on or directly connected to a highway in the state highway system does not create a joint enterprise for liability purposes.

(h) Requires the commissioners court for any county in which a majority of the project is located, before a final contract execution by TxDOT for any CDA project, to pass a supporting resolution.

(i) Provides that, once the authority or regional transportation council has received notice from TxDOT relating to a project, the authority has 90 days to exercise the first right of refusal for construction of a toll project.

SECTION 10. (a) Provides that the Proposed TxDOT/ North Texas Tollway Authority (NTTA) Regional Protocol entered into between TxDOT and NTTA and approved on August 10, 2006, by the tollway authority and on August 24, 2006, by TxDOT is void.

(b) Provides that on dissolution of the protocol under Subsection (a) of this section, NTTA will remain the operator for all turnpike projects within the service area of the authority.

(c) Provides that this section does not apply to a CDA for a managed lane facility toll project the major portion of which is located inside the boundaries of a county in which two or more municipalities each with a population of more than 300,000 are located and for which TxDOT has issued a request for qualifications before the effective date of this section.

SECTION 11. Effective date: September 1, 2007.