

BILL ANALYSIS

C.S.S.B. 17
By: Nichols
Transportation
Committee Report (Substituted)

BACKGROUND AND PURPOSE

S.B. 792, Acts of the 80th Legislature, Regular Session, 2007, enacted a moratorium on most comprehensive development agreements (CDAs); created a "market valuation" process, by which the Texas Department of Transportation could proceed with certain transportation projects; created a September 2009 sunset date on most CDAs; and created a study committee to review and make recommendations on whether and how Texas should proceed with CDAs. The market valuation process created under S.B. 792 has proven to be unduly expensive, contentious, and time-consuming.

C.S.S.B. 17 repeals the market valuation process established by S.B. 792; establishes a streamlined process for project delivery; creates a first right of refusal guarantee for local and state entities to build future toll projects; and ensures all methods of public transportation finance are exhausted before a private entity can finance, build, and operate a toll project. The bill establishes several provisions that are required to be included in any future private toll road contract, and establishes a process and protections in the event CDAs are continued, but does not authorize or expand the state's ability to enter into private CDAs.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.S.B. 17 amends the Transportation Code to add provisions relating to toll projects located in the territory of a local toll project entity and make conforming and other changes in provisions relating to the Texas Department of Transportation (TxDOT), a county toll project entity, a regional tollway authority, and a regional mobility authority. The bill adds provisions to Chapter 371, Transportation Code, relating to comprehensive development agreements for highway toll projects, as added by Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007, and makes that chapter inapplicable to a publicly owned and operated toll project as defined in the bill. The bill repeals the law governing state highway toll projects of local toll project entities and sets forth transition provisions relating to the repeal of that law.

Toll Projects Located in the Territory of a Local Toll Project Entity

C.S.S.B. 17 describes a process to determine the entity to develop, finance, construct, and operate a toll project in the territory of a local toll project entity and provides for a local toll project entity's use of state highway right-of-way or access to the state highway system. The bill defines a "local toll project entity" for purposes of these provisions as an entity, other than TxDOT, that is authorized by law to acquire, design, construct, finance, operate, and maintain a toll project, including a regional tollway authority, regional mobility authority, or county toll project entity. The bill makes these provisions inapplicable to a toll project described by provisions relating to state highway toll projects in certain counties and to the following projects:

- the State Highway 161 project from State Highway 183 to IH 20 in Dallas County;
- the U.S. 281 project in Bexar County from Loop 1604 to the Comal County line;
- the Loop 49 project from IH 20 to State Highway 110 in Smith County;
- the DFW Connector project in Tarrant and Dallas Counties (State Highway 114 from State Highway 114L Business to east of International Parkway and State Highway 121 from north of FM 2499 to south of State Highway 360);
- the North Tarrant Express project in Tarrant and Dallas Counties (IH 820 and State Highway 121/State Highway 183 from IH 35W to State Highway 161, IH 820 east from State Highway 121/State Highway 183 to Randol Mill Road, and IH 35W from IH 30 to State Highway 170);
- the U.S. 290 project from east of U.S. 183 to east of FM 973 in Travis County;
- the State Highway 99 (Grand Parkway) project;
- the IH 635 managed lanes project in Dallas County (IH 635 from east of Luna Road to Greenville Avenue and IH 35E from south of the Loop 12/IH 35E split to south of Valwood Parkway);
- Phase 4 extension of the Dallas North Tollway in Collin and Denton Counties from U.S. 380 to the Grayson County line to be developed by the North Texas Tollway Authority;
- the Southwest Parkway (State Highway 121) in Tarrant County from Dirks Road/Altamesa Boulevard to IH 30; or
- the Loop 9 project in Dallas County.

C.S.S.B. 17 establishes that a toll project procured by TxDOT or a local toll project entity under the bill's provisions, unless the project is sold or otherwise transferred in accordance with applicable law, is owned by that entity in perpetuity. The bill provides that transactions under these provisions are inherently governmental transactions and not primarily commercial in nature. The bill requires any determination of value, including best value, under these provisions or other applicable federal or state law for a comprehensive development agreement (CDA) or other public-private partnership arrangement involving a toll project for which a local toll project entity has exercised its option under this bill and has complied with all other applicable conditions to take into consideration factors the entity determines appropriate, including factors related to oversight of the toll project, maintenance and operations costs of the toll project, the structure and rates of tolls, economic development impacts of the toll project, and social and environmental benefits and impacts of the toll project. The bill establishes that for purposes of these provisions, all legal challenges to development of a toll project are considered concluded when a judgment or order of a court with jurisdiction over the challenge becomes final and unappealable.

C.S.S.B. 17 authorizes a local toll project entity, at any time after a metropolitan planning organization (MPO) approves the inclusion of a toll project to be located in the territory of the entity in the metropolitan transportation plan, to notify TxDOT in writing of the entity's intent to initiate the process to determine the entity to develop, finance, construct, and operate the toll project. The bill authorizes TxDOT to notify the entity in writing of TxDOT's intent to initiate the process at any time after an MPO has approved the inclusion of a toll project to be located in the territory of the entity in the metropolitan transportation plan and TxDOT has issued a finding of no significant impact for the project; or, for a project for which an environmental impact statement is prepared, TxDOT has approved the final environmental impact statement for the project; or, for a project subject to environmental review requirements under federal law, the United States Department of Transportation Federal Highway Administration (FHWA) has issued a finding of no significant impact; or, for a project for which an environmental impact statement is prepared, the department has submitted a final environmental impact statement to FHWA for approval.

C.S.S.B. 17 provides that a local toll project entity has the first option to develop, finance, construct, and operate the toll project as a publicly owned and operated toll project. The bill establishes that a local toll project entity has not more than 180 days after receiving notice to decide whether to exercise this option, unless FHWA issues a record of decision for an

environmental impact statement submitted by TxDOT more than 60 days after the date TxDOT provides the notice, in which event the local toll project entity has 120 days after the date of record decision is issued to exercise its option. The bill authorizes the option period to be extended an additional 90 days by agreement of TxDOT and the local toll project entity. The bill specifies that if the local toll project entity exercises this option, the entity must, within 180 days after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development of the toll project are secured and all legal challenges to development are concluded, advertise for the initial procurement of required services, including, at a minimum, design services for the project; and within two years after the date on which all environmental approvals necessary for the development are secured and all legal challenges to development are concluded, enter into a contract for the construction of the toll project. The bill makes these 180-day and two-year time periods applicable at other times in the process, as described below.

C.S.S.B. 17 provides that if a local toll project entity fails or declines to exercise the option to develop, finance, construct, and operate a toll project as a publicly owned and operated project or fails or declines to advertise for procurement or enter into a construction contract as required, TxDOT has the option to develop, finance, construct, and operate the toll project as a publicly owned and operated project. The bill establishes that TxDOT has not more than 60 days to exercise this option and that if TxDOT exercises this option, the 180-day and two-year time periods described above are applicable. The bill provides that if TxDOT fails or declines to exercise this option, the local toll project entity has the option to develop, finance, construct, and operate the toll project as a privately operated or controlled toll project. The bill establishes that the local toll project entity has not more than 60 days to exercise this option and that if the entity exercises this option, the 180-day and two-year time periods described above are applicable. The bill provides that if the local toll project entity fails or declines to exercise this option, TxDOT has the option to develop, finance, construct, and operate the toll project as a privately operated or controlled toll project. The bill establishes that TxDOT has not more than 60 days to exercise this option and that if TxDOT exercises this option, the 180-day and two-year time periods described above are applicable. The bill defines "publicly owned and operated toll project," "privately operated and controlled toll project," and "toll project."

C.S.S.B. 17 authorizes TxDOT or a local toll project entity to re-initiate this process by submitting notice to the other entity if the process concludes without either entity entering into a contract for the construction of the toll project, and the bill authorizes either entity, at any time during the process, to decline to exercise an option of the entity. The bill requires the local toll project entity, if TxDOT declines to exercise its option before the 120th day after the date notification is provided to, or received by, the entity, to decide whether to exercise its option not later than the later of the 180th day after the date notice is provided or received or the end of the option period as extended. The bill authorizes TxDOT and the applicable local toll project entity, by written agreement, to extend any time limit under the bill's provisions.

C.S.S.B. 17 provides that if a local toll project entity or TxDOT fails or declines to exercise an option or fails or declines to advertise for procurement or enter into a construction contract under this process, the local toll project entity or TxDOT, as applicable, must make available its traffic estimates, revenue estimates, plans, specifications, surveys, appraisals, and other work product developed for the toll project to the other entity. The bill requires TxDOT or the local toll project entity, as applicable, on entering into a contract for the construction of the toll project, to reimburse the other entity for shared project work product that it uses. The bill requires TxDOT or a local toll project entity that exercises an option under this process to issue a quarterly report on the progress of the development of the toll project and to make the report available to the public. The bill requires TxDOT or the local toll project entity to begin any environmental review process that may be required for a proposed toll project before initiating this process. The bill requires a local toll project entity, if the entity initiates this process and has not begun the environmental review of the project, to begin the environmental review within 180 days of exercising an option under this process.

C.S.S.B. 17 establishes that if a toll project is in the territory of more than one local project entity, only the local toll project entity that was first to be authorized by law to construct toll projects in that territory may exercise the options and other rights under this bill to develop, finance, construct, and operate the project. The bill establishes that a local toll project entity exercising an option or other right under this provision may do so only with respect to the portion of the project located in the territory of the entity and may do so on behalf of another toll project entity in whose territory the project will be located.

C.S.S.B. 17 requires, consistent with federal law, the Texas Transportation Commission and TxDOT to assist a local toll project entity in the development, financing, construction, and operation of a toll project for which the local toll project entity has exercised its option to develop, finance, construct, and operate the project by allowing the local toll project entity to use state highway right-of-way and to access the state highway system as necessary to construct and operate the toll project. The bill authorizes the local toll project entity and the commission to agree to remove the toll project from the state highway system and transfer ownership to the local entity, notwithstanding any other law.

C.S.S.B. 17 prohibits the commission or TxDOT from requiring a local toll project entity to pay for the use of state highway right-of-way or access, except to reimburse TxDOT for actual costs incurred by TxDOT that are owed to a third party, including the federal government, as a result of that use by the local toll project entity and as required under the process to determine the entity to develop, finance, construct, and operate a toll project. The bill requires a local toll project entity to reimburse TxDOT for its actual costs to acquire the right-of-way in the manner provided in the payment schedule agreed to by TxDOT and the local toll project entity. The bill requires the amount of such a reimbursement, if TxDOT cannot determine that amount, to be determined based on the average historical right-of-way acquisition value for comparable right-of-way located in proximity to the project on the date of original acquisition of the right-of-way. The bill authorizes the local entity to agree to pay to TxDOT a portion of the revenues of the project in lieu of reimbursement, in the amount and for the period of time agreed to by the local toll entity and TxDOT. The bill requires the money received by TxDOT to be deposited in the state highway fund and, except for reimbursement for costs owed to a third party, used to fund additional projects in TxDOT district in which the toll project is located. The bill authorizes the commission or TxDOT to waive the requirement of reimbursement.

C.S.S.B. 17 requires a local toll project entity to enter into an agreement with TxDOT for any project for which the entity has exercised its option to develop, finance, construct, and operate the project and for which the entity intends to use state highway right-of-way. The bill requires the agreement to include provisions necessary to ensure that the local toll project entity's construction, maintenance, and operation of the project complies with the requirements of applicable state and federal law. The bill specifies that the commission and TxDOT are not liable for any damages that result from a local toll project entity's use of state highway right-of-way or access to the state highway system under these provisions. The bill provides that an agreement entered into by TxDOT and a local toll project entity in connection with a toll project that is financed, constructed, or operated by the local toll project entity and that is on or directly connected to a highway in the state highway system does not create a joint enterprise for liability purposes. The bill authorizes the commission or TxDOT to take any action that in its reasonable judgment is necessary to comply with any federal requirement to enable Texas to receive federal-aid highway funds, notwithstanding an action taken by a local toll project entity under these provisions.

Comprehensive Development Agreements for Highway Toll Projects

C.S.S.B. 17 requires a CDA for a highway toll project to contain a provision authorizing the toll project entity to purchase, under terms agreed to by the parties, the interest of a private participant in the toll project and related property, including any interest in a highway or other

facility designed, developed, financed, constructed, operated, or maintained under the agreement. The bill requires the provision to include a schedule stating a specific price for the purchase of the toll project at certain intervals from the date the project opens, not less than one year and not to exceed five years, over the term of the agreement and to authorize the toll project entity to purchase the private entity's interest at a stated interval in an amount not to exceed the lesser of the price stated for that interval or the greater of the then fair market value of the private entity's interest or an amount equal to the amount of outstanding debt at that time, as specified in the CDA. The bill prohibits, under any circumstance, the toll project entity from purchasing the private entity's interest for an amount higher than the stated interval amount and requires a contract to purchase the private entity's interest at fair market value to contain a provision, mutually agreed upon by the toll project entity and the private participant, detailing the calculation used to determine the value. The bill requires the toll project entity to request a proposed termination-by-purchase schedule in each request for detailed proposals and to consider and score each schedule in each evaluation of proposals. The bill requires a private entity, not later than 12 months before the date that a new price interval takes effect, to notify the toll project entity of the beginning of the price interval, and requires the toll project entity to notify the private entity as to whether the toll project entity will exercise the option to purchase not later than six months after receiving the notice. The bill requires a toll project entity to notify the private entity of the toll project entity's intention to purchase the private entity's interest not less than six months before the date of the purchase. The bill removes provisions relating to the requirement for a toll project entity to develop a formula for making termination payments to terminate a CDA under which a private participant receives the right to operate and collect revenues from a toll project. The bill makes these provisions inapplicable to the following projects:

- the State Highway 161 project in Dallas County;
- the DFW Connector project in Tarrant and Dallas Counties;
- the North Tarrant Express project in Tarrant and Dallas Counties;
- the State Highway 99 (Grand Parkway) project;
- the IH 635 managed lanes project in Dallas County;
- the Loop 9 project in Dallas County;
- a project located south of Refugio County on the ISTEHA High Priority Corridor identified in certain sections of the federal Intermodal Surface Transportation Efficiency Act of 1991, as amended by Section 1211 of the federal Transportation Equity Act for the 21st Century, if the project is part of the highway corridor designated by those laws;
- the following projects to be developed in connection with the projects described above: the Corpus Christi Southside Mobility Corridor; the State Highway 358 managed lanes project and the State Highway 286 managed lanes project in Nueces County; and the State Highway 550 spur project and the West Loop project in Cameron County; or
- a project on the IH 69 corridor in Bowie County.

C.S.S.B. 17 authorizes a toll project entity that elects to terminate a CDA under which a private participant receives the right to operate and collect revenue from the project to issue other obligations, in addition to bonds, to make termination payments to the private entity or to purchase the interest of the private participant in the CDA or related property. The bill grants the toll project entity the same powers and duties relating to financing a payment to terminate a CDA or purchase a private interest in a CDA as the entity has under other applicable Texas laws relating to the financing of a toll project of that entity, including the ability to deposit the proceeds of bonds or other obligations and to pledge, encumber, and expend the proceeds and revenues of a toll project. The bill grants the toll project entity the power to authorize the issuance of bonds or other obligations and to pay all or part of the costs of a payment to terminate a CDA or purchase a private interest in a CDA in the amount determined by the toll project entity. The bill specifies that costs associated with such a payment are considered to be a cost of the project and requires these provisions to be liberally construed to effect their purposes.

C.S.S.B. 17 authorizes a CDA containing a provision authorizing a toll project entity to compensate a private participant for the loss of toll revenues attributable to a limited access highway project constructed by the entity to be effective only for a period of 30 years or less from the effective date of the CDA. The bill adds a highway designated an interstate highway to the construction projects for which a CDA may not require a toll project entity to provide compensation. The bill makes these provisions inapplicable to the following projects:

- the State Highway 161 project in Dallas County;
- the DFW Connector project in Tarrant and Dallas Counties;
- the North Tarrant Express project in Tarrant and Dallas Counties;
- the State Highway 99 (Grand Parkway) project;
- the IH 635 managed lanes project in Dallas County; or
- the Loop 9 project in Dallas County.

Conforming and Other Changes Pertaining to Toll Project Entities

C.S.S.B. 17 requires a CDA relating to a project on the state highway system or Trans-Texas Corridor or a regional tollway authority project to include a provision providing for the purchase by TxDOT of the interest of a private participant in the CDA and related property, as required by provisions relating to CDAs for highway toll projects, and authorizes the CDA to include any other provision TxDOT considers appropriate in the CDA, including certain specified provisions. The bill removes language requiring a purchase by TxDOT to be under terms and conditions agreed to by the parties. The bill removes provisions authorizing a provision in a CDA for those projects to establish the purchase price for the interest of a private participant in the CDA and requiring the CDA to include an explicit price-setting mechanism for setting the purchase price. The bill makes these provisions inapplicable to the following projects:

- the State Highway 161 project in Dallas County;
- the DFW Connector project in Tarrant and Dallas Counties;
- the North Tarrant Express project in Tarrant and Dallas Counties;
- the State Highway 99 (Grand Parkway) project;
- the IH 635 managed lanes project in Dallas County; or
- the Loop 9 project in Dallas County.

C.S.S.B. 17 requires the commission to authorize the use of surplus revenue of a toll project or system to pay the costs of a transportation project, highway project, or air quality project within a region, rather than a TxDOT district, in which any part of the toll project is located. The bill requires TxDOT to allocate the distribution of surplus toll revenue to TxDOT districts in the region that are located in the boundaries of the MPO in which the toll project or system producing the surplus revenue is located based on the percentage of toll revenue from users in each TxDOT district of the project or system. The bill requires each entity responsible for collecting tolls for a project or system, to assist TxDOT in determining the allocation, to calculate on an annual basis the percentage of toll revenue from users of the project or system in each TxDOT district based on the number of recorded electronic toll collections.

Transition Provisions Pertaining to the Repeal of Section 228.0111, Transportation Code

C.S.S.B. 17 repeals Section 228.0111, Transportation Code, relating to state highway toll projects of local toll project entities, and establishes that this repeal does not affect the following projects, which are governed by that section as it existed immediately before the effective date of this bill:

- the State Highway 161 project in Dallas County;
- the U.S. 281 project in Bexar County;
- the Loop 49 project in Smith County;

- the DFW Connector project in Tarrant and Dallas Counties;
- the North Tarrant Express project in Tarrant and Dallas Counties;
- the U.S. 290 project in Travis County;
- the State Highway 99 (Grand Parkway) project;
- the IH 635 managed lanes project in Dallas County;
- Phase 4 extension of the Dallas North Tollway in Collin and Denton Counties;
- the Southwest Parkway in Tarrant County; or
- the Loop 9 project in Dallas County.

C.S.S.B. 17 establishes that for purposes of Section 228.0111 relating to the State Highway 99 (Grand Parkway) project, the local toll project entity or TxDOT, as applicable, must enter into a contract for the construction of at least one segment of the project in the two-year period after the date on which all environmental requirements necessary for the development of the toll project are secured and all legal challenges to development are concluded. The bill establishes that for each of the remaining segments, if TxDOT and a local toll project entity have entered into a CDA for the advance funding of the initial segment, a local toll project entity or TxDOT, as applicable, is not required to enter into a construction contract for any remaining segment before the second anniversary of the date a construction contract for a segment contiguous to that remaining segment has been entered into.

C.S.S.B. 17 also repeals Section 371.052(c), Transportation Code, as added by Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007.

EFFECTIVE DATE

On passage, or, if the act does not receive the necessary vote, the act takes effect September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.S.B. 17 authorizes the Texas Department of Transportation (TxDOT) to initiate the process to determine the entity to develop, finance, construct, and operate a toll project located in the territory of a local toll project entity if certain conditions are met, including that TxDOT has submitted a final environmental impact statement to the Federal Highway Administration (FHWA) if necessary, whereas the original requires all necessary environmental approvals for the toll project to have been secured before TxDOT may initiate the process. The substitute adds a provision not included in the original to establish timelines if FHWA issues a record of decision for an environmental impact statement submitted by TxDOT. The substitute adds provisions not included in the original to authorize TxDOT or a local toll project entity to decline to exercise an option at any time during the process and to establish requirements of a local toll project entity if TxDOT declines to exercise its option before a certain date. The substitute removes a provision in the original authorizing TxDOT or a local toll project entity to waive any step or steps of the process. The substitute adds a provision not included in the original to establish procedures for a project located in the territory of more than one local toll project entity. The substitute adds a provision not included in the original to exempt the Loop 9 project in Dallas County from the process.

C.S.S.B. 17 adds provisions not included in the original to exempt certain projects from provisions relating to termination of a CDA by purchase and the effective period of certain contract provisions authorizing a private participant to be compensated. The bill removes a provision in the original requiring provisions relating to termination of CDAs for highway toll projects to apply to certain projects. The substitute adds a provision not in the original to require the provision in a contract to purchase a private entity's interest in a toll project at a certain value to be mutually agreed on by the toll project entity and the private participant. The substitute adds a provision not included in the original to exempt additional projects from provisions relating to the terms of private participation in a CDA. The substitute makes its provisions effective on

passage, or, if the bill does not receive the necessary vote, September 1, 2009, whereas the original makes its provisions effective September 1, 2009.

C.S.S.B. 17 differs from the original in nonsubstantive ways by using language reflective of certain bill drafting conventions.