

## **BILL ANALYSIS**

Senate Research Center  
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S.B. 17  
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Transportation & Homeland Security  
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### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

S.B. 792 from 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.

As proposed, S.B. 17 repeals the market valuation process in 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. S.B. 17 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 CDA's.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Sections 223.208(b) and (h), Transportation Code, as follows:

(b) Requires that a comprehensive development agreement (agreement) entered into under this subchapter or Section 227.023(c) (relating to entering into comprehensive development agreements), include a provision providing for the purchase by the Texas Department of Transportation (TxDOT) of the interest of a private participant in the agreement and related property as required by Section 371.101 and is authorized to include any other provision TxDOT considers appropriate. Deletes existing text authorizing that an agreement entered into under this subchapter or Section 227.023(c) include any provision that TxDOT considers appropriate, including provisions providing for the purchase by TxDOT, under terms and conditions agreed to by the parties, of the interest of a private participant in the agreement and related property, including any interest in a highway or other facility designed, developed, financed, constructed, operated, or maintained under the agreement and establishing the purchase price for the interest of a private participant in the agreement and related property, which price is authorized to be determined in accordance with the methodology established by the parties in the agreement. Makes nonsubstantive changes.

(h) Deletes existing text requiring that the agreement contain an explicit mechanism for setting the price for the purchase by TxDOT of the interest of the private participant in the agreement and related property, including any interest in a highway or other facility designed, developed, financed, constructed, operated, or maintained under the agreement.

SECTION 2. Amends Section 228.0055(a), Transportation Code, to require that payments, project savings, refinancing dividends, and other revenue received by the Texas Transportation Commission (TTC) or TxDOT under an agreement be deposited into a separate subaccount for

the project from which TTC or TxDOT receives those monies and be used by TTC or TxDOT to finance the construction, maintenance, or operation of transportation projects or air quality projects in the region.

SECTION 3. Amends Section 228.006(a), Transportation Code, to require TTC 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.

SECTION 4. Amends Section 284.004(b), Transportation Code, to authorize a county, in addition to authority granted by other law, to use and access state highway right-of-way in accordance with Sections 228.011 (Toll Projects in Certain Counties) and 373.102, rather than Sections 228.011 and 228.0111 (Toll Projects of Local Toll Project Entities).

SECTION 5. Amends Section 284.061(d), Transportation Code, to provide that subject to the reimbursement requirements of Section 373.102, a county has full easements and rights-of-way through, across, under, and over any property owned by this state that are necessary or convenient to construct, acquire, or efficiently operate a project under this chapter.

SECTION 6. Amends Section 366.170(c), Transportation Code, to provide that this subsection does not affect the obligation of the regional tollway authority (authority) under other state law, including Section 373.102, to compensate or reimburse the state for the use or acquisition of an easement or right-of-way on property owned by or on behalf of the state.

SECTION 7. Amends Sections 366.407(b) and (g), Transportation Code, as follows:

(b) Requires that an agreement entered into under this subchapter include a provision, providing for the purchase by the authority of the interest of a private participant in the agreement as required by Section 371.101 and authorizes an agreement to include any other provision the authority considers appropriate, including certain provisions. Deletes existing text authorizing an agreement entered into under this subchapter to include any provision the authority considers appropriate, including a provision providing that the purchase by the authority, under the terms and conditions agreed to by the parties, of the interest of a private participant in the agreement and related property, including any interest in a turnpike project designed, developed, financed, constructed, operated, or maintained under the agreement, and establishing the purchase price, as determined in accordance with the methodology established by the parties in the agreement, for the interest of a private participant in the agreement and related property. Makes nonsubstantive changes.

(g) Deletes existing text providing for an exception as provided by this subsection, and requiring that the contract contain an explicit mechanism for setting the price for the purchase by TxDOT of the interest of the private participant in the contract and related property, including any interest in a highway or other facility designed, developed, financed, constructed, operated, or maintained under the contract. Makes a nonsubstantive change.

SECTION 8. Amends Section 370.169(c), Transportation Code, to provide that this subsection does not affect the obligation of the authority under other law, including Section 373.102, to compensate or reimburse this state for the use or acquisition of an easement or right-of-way on property owned by or on behalf of this state.

SECTION 9. Amends Section 370.311(b), Transportation Code, to require that an agreement entered into under Section 370.305 (Comprehensive Development Agreements) include a provision authorizing the authority to purchase, under terms agreed to by the parties, the interest of a private equity investor in a transportation project as required by Section 371.101.

SECTION 10. Amends Section 371.002, Transportation Code, as added by Section 11.01, Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007, as follows:

Sec. 371.002. **APPLICABILITY.** Provides that this chapter does not apply to a project for which TTC selected an apparent best value proposer before May 1, 2007 or a publicly owned and operated toll project, as defined by Section 373.001.

SECTION 11. Amends the heading to Section 371.052, Transportation Code, as added by Section 11.01, Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007, to read as follows:

Sec. 371.052. **NOTIFICATION TO LEGISLATIVE BUDGET BOARD.**

SECTION 12. Amends Section 371.101, Transportation Code, as added by Section 11.01, Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007, as follows:

Sec. 371.101. New heading: **TERMINATION BY PURCHASE.** (a) Requires that an agreement 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 that is the subject of the agreement and related property, including any interest in a highway or other facility designed, developed, financed, constructed, operated, or maintained under the agreement.

(b) Requires that the provision 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.

(c) Requires that the provision 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 then fair market value of the private entity's interest, which is authorized to include the amount of outstanding debt at that time, as authorized in the agreement.

(d) Requires the toll project entity to request a proposed termination-by-purchase schedule in each request for detailed proposals and is to consider and score each schedule in each evaluation of proposals.

(e) Requires a private entity, not later than 12 months before the date that the new price interval takes effect, to notify the toll project entity of the beginning of the price interval. Requires the toll project entity to notify the private entity as to whether it will exercise the option to purchase under this section not later than six months after the date it receives notice under this subsection.

(f) Requires a toll project entity to notify the private entity of the project entity's intention to purchase the private entity's interest under this section not less than six months before the date of the purchase. Deletes existing text requiring a toll project entity having rulemaking authority by rule and a toll project entity without rulemaking authority by official action to develop a formula for making termination payments to terminate an agreement under which a private participant receives the right to operate and collect revenue from a toll project, and requiring that a formula to calculate an estimated amount of loss to the private participant as a result of the termination for convenience. Deletes existing text of Subsection (b) requiring that the formula be based on investments, expenditures, and the internal rate of return on equity under the agreed base case financial model as projected over the original term of the agreement, plus an agreed percentage markup on that amount. Deletes existing text of Subsection (c) prohibiting a formula under Subsection (b) from including any estimate of future revenue from the project, if not included in an agreed base case financial model under Subsection (b) and prohibiting compensation to the private participant upon termination for convenience from exceeding the amount determined using the formula under Subsection (b).

SECTION 13. Amends Section 371.102, Transportation Code, as added by Section 11.01, Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007, as follows:

Sec. 371.102. TERMINATION OF CERTAIN COMPREHENSIVE DEVELOPMENT AGREEMENTS. (a) Creates this subsection from existing text. Authorizes the entity, if a toll project entity elects to terminate an agreement under which a private participant receives the right to operate and collect revenue from a project, to issue bonds or other obligations. Deletes existing text that authorizes the entity, if authorized to issue bonds for that purpose, to issue bonds to make any applicable termination payments to the private participant or purchase the interest of the private participant in the agreement or related property.

(b) Provides that a toll project entity has the same powers and duties relating to the financing of payments under Subsection (a)(1) (relating to issuing bonds or other obligations) as the toll project entity has under other applicable laws of this state, including Chapters 228 (State Highway Toll Projects), 284 (Causeways, Bridges, Tunnels, Turnpikes, Ferries, and Highways in Certain Counties), 366 (Regional Tollway Authorities), and 370 (Regional Mobility Authorities), of this code and Chapter 1371 (Obligations for Certain Public Improvements), Government Code, 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 as provided by law.

(c) Provides that the powers held by the toll project entity include the power to authorize the issuance of bonds or other obligations and to pay all or part of the costs of a payment described in Subsection (a)(1), in the amount determined by the toll project entity under Section 371.101. Provides that costs associated with a payment under Subsection (a)(1) are considered a cost of the project.

(d) Requires that this section be liberally construed to effect its purposes.

SECTION 14. Amends Sections 371.103(b) and (c), Transportation Code, as added by Section 11.01, Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007, as follows:

(b) Provides that a provision under this subsection is authorized to be effective only for a period of 30 years or less from the effective date of the agreement.

(c) Prohibits an agreement from requiring the toll project entity to provide compensation for the construction of a highway designated an interstate highway. Makes nonsubstantive changes.

SECTION 15. Amends Subtitle G, Title 6, Transportation Code, by adding Chapter 373, as follows:

#### CHAPTER 373. TOLL PROJECTS LOCATED IN TERRITORY OF LOCAL TOLL PROJECT ENTITY

##### SUBCHAPTER A. GENERAL PROVISIONS

Sec. 373.001. DEFINITIONS. Defines "local toll project entity," "privately operated or controlled toll project," "publicly owned and operated toll project," and "toll project."

Sec. 373.002. APPLICABILITY. (a) Provides that this chapter does not apply to a toll project described in Section 228.011.

(b) Provides that this chapter does not apply to any project for which TxDOT has issued a request for qualifications or request for competing proposals and qualifications before May 1, 2007, except for the State Highway 161 project in Dallas County; the eastern extension of the President George Bush Turnpike from State Highway 78 to IH 30 in Dallas County; the Phase 3 and 4 extensions of the Dallas North Tollway in Collin and Denton Counties from State Highway 121 to the Grayson County line, and the planned future extension into Grayson County,

regardless of which local toll project entity develops the extension into Grayson County; the Lewisville Lake bridge and portions of FM 720 widening projects in Denton County; or the Southwest Parkway (State Highway 121) in Tarrant County from Dirks Road/Altamesa Boulevard to IH 30.

Sec. 373.003. **PROJECT OWNED IN PERPETUITY.** Provides that unless a toll project is sold or otherwise transferred to another toll project entity in accordance with applicable law, including Sections 228.151 (Lease, Sale, or Transfer of Toll Project or System), 284.011 (Transfer of Project to Department), 366.036 (Transfer of Turnpike Project or System), 366.172 (Lease, Sale, or Conveyance of Turnpike Project), and 370.171 (Lease, Sale, or Conveyance of Transportation Project), a toll project procured by TxDOT or a local toll project entity determined by the process under Subchapter B is owned by that entity in perpetuity.

Sec. 373.004. **GOVERNMENTAL AND NOT COMMERCIAL TRANSACTIONS.** Provides that a transaction involving a local toll project entity under Section 228.011 or this chapter is not primarily commercial in nature but is an inherently governmental transaction whose purpose is to determine governmental jurisdiction, ownership, control, or other responsibilities with respect to a project.

Sec. 373.005. **VALUATION DETERMINATION.** Requires that any determination of value, including best value, under this chapter or other applicable federal or state law for an agreement or other public-private partnership arrangement involving a toll project located in the jurisdiction of a local toll project entity take into consideration factors the entity determines appropriate, including factors that are significant, but not quantifiable, such as 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.

Sec. 373.006. **LEGAL CHALLENGES CONCLUDED.** Provides that, for the purposes of this chapter, 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.

[Reserves Sections 373.007-373.050 for expansion.]

#### **SUBCHAPTER B. PROCESS TO DETERMINE ENTITY TO DEVELOP, FINANCE, CONSTRUCT, AND OPERATE TOLL PROJECT**

Sec. 373.051. **INITIATION OF PROCESS.** (a) Authorizes the local toll project entity, at any time after a metropolitan planning organization approves the inclusion of a toll project to be located in the territory of a local toll project entity in the metropolitan transportation plan, to notify TxDOT in writing of the local toll project entity's intent to initiate the process described in this subchapter.

(b) Authorizes TxDOT, at any time after a metropolitan planning organization approves the inclusion of a toll project to be located in the territory of a local toll project entity in the metropolitan transportation plan and all necessary environmental approvals for the toll project have been secured, to notify the local toll project entity in writing of TxDOT's intent to initiate the process described in this subchapter.

Sec. 373.052. **PUBLIC PROJECT BY LOCAL TOLL PROJECT ENTITY.** (a) Provides that a local toll project entity has the first option to develop, finance, construct, and operate a toll project as a publicly owned and operated toll project. Provides that a local toll project entity has not more than 180 days after the date on which notification under Section 373.051(a) is provided, or notification under Section 373.051(b) is received to decide whether to exercise the option. Authorizes the option period under this subsection to be extended an additional 90 days by agreement of TxDOT and the local toll project entity.

(b) Requires the local toll project entity, if a local toll project entity exercises the option under Subsection (a), after exercising the option to 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.

Sec. 373.053. PUBLIC PROJECT BY DEPARTMENT. (a) Provides that if a local toll project entity fails or declines to exercise the option to develop, finance, construct, and operate a toll project under Section 373.052(a), or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.052(b), TxDOT has the option to develop, finance, construct, and operate the toll project as a publicly owned and operated project. Provides that TxDOT has not more than 60 days after the date the local toll project entity fails or declines to exercise its option under Section 373.052(a) or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.052(b) to decide whether to exercise its option.

(b) Requires TxDOT, if TxDOT exercises its option under Subsection (a), after exercising the option to 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, to 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, to enter into a contract for the construction of the toll project.

Sec. 373.054. PRIVATE PROJECT BY LOCAL TOLL PROJECT ENTITY. (a) Provides that if TxDOT fails or declines to exercise the option to develop, finance, construct, and operate a toll project under Section 373.053(a), or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.053(b), 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. Provides that the local toll project entity has not more than 60 days after the date TxDOT fails to exercise its option under Section 373.053(a) or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.053(b) to decide whether to exercise its option.

(b) Requires the local toll project entity, if the local toll project entity exercises its option under Subsection (a), after exercising the option to 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.

Sec. 373.055. PRIVATE PROJECT BY DEPARTMENT. (a) Provides that if a local toll project entity fails or declines to exercise the option to develop, finance, construct, and operate a toll project under Section 373.054(a), or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.054(b), TxDOT has the option to develop, finance, construct, and operate the toll project as a privately operated or controlled toll project. Provides that TxDOT has not more than 60 days after the date the local toll project entity fails or declines to exercise its option under

Section 373.054(a) or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.054(b) to decide whether to exercise its option.

(b) Requires TxDOT, if TxDOT exercises its option under Subsection (a), after exercising the option to 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, to 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, to enter into a contract for the construction of the toll project.

Sec. 373.056. RE-INITIATION OF PROCESS. Authorizes either entity, if the process described by Sections 373.051, 373.052, 373.053, 373.054, and 373.055 concludes without the local toll project entity or TxDOT entering into a contract for the construction of the toll project, to re-initiate the process under this subchapter by submitting notice to the other entity in the manner provided by Section 373.051.

Sec. 373.057. ALTERATION OF PROCESS. (a) Authorizes TxDOT or the applicable local toll project entity to waive any step or steps of the process under this subchapter.

(b) Authorizes TxDOT and the applicable toll project entity, by written agreement, to extend any time limit under this subchapter.

Sec. 373.058. SHARING OF PROJECT-RELATED INFORMATION. (a) Requires the local toll project entity or TxDOT, as applicable, 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 Section 373.052, 373.053, 373.054, or 373.055, to make available its traffic estimates, revenue estimates, plans, specifications, surveys, appraisals, and other work product developed for the toll project to the other entity.

(b) 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.

Sec. 373.059. QUARTERLY PROGRESS REPORTS. Requires TxDOT or the local toll project entity, as applicable, after TxDOT or the local toll project entity exercises an option under this subchapter, as applicable, to issue a quarterly report on the progress of the development of the toll project. Requires that the report be made available to the public.

Sec. 373.060. ENVIRONMENTAL REVIEW. (a) Authorizes TxDOT or the local toll project entity to begin any environmental review process that may be required for a proposed toll project before initiating the process under this subchapter.

(b) Requires the local toll project entity, if a local toll project entity initiates the process for development of a toll project under Section 373.051(a) and has not begun the environmental review of the project, to begin the environmental review within 180 days of exercising the option.

[Reserves Sections 373.061-373.100 for expansion.]

## SUBCHAPTER C. USE OF RIGHT-OF-WAY BY LOCAL TOLL PROJECT ENTITY

Sec. 373.101. USE OF STATE HIGHWAY RIGHT-OF-WAY. (a) Requires TTC and TxDOT, consistent with federal law, 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 under Subchapter B 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.

(b) Authorizes the local toll project entity or TTC, notwithstanding any other law, to agree to remove the toll project from the state highway system and transfer ownership to the local toll project entity.

Sec. 373.102. REIMBURSEMENT FOR USE OF STATE HIGHWAY RIGHT-OF-WAY. (a) Prohibits TTC 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 Subsection (b).

(b) Requires a local toll project entity to reimburse TxDOT for TxDOT's 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. Requires that the amount, if TxDOT cannot determine that amount, be determined based on the average historical right-of-way acquisition values for comparable right-of-way located in proximity to the project on the date of original acquisition of the right-of-way.

(c) Authorizes the local toll project entity, in lieu of reimbursement, to agree to pay to TxDOT, for an agreed period of time, a portion of the net revenues of the project.

(d) Requires that the money received by TxDOT under this section be deposited in the state highway fund and, except for reimbursement for costs owed to a third party, be used to fund additional projects in the TxDOT district in which the toll project is located.

(e) Authorizes TTC or TxDOT to waive the requirement of reimbursement under this section.

Sec. 373.103. AGREEMENT FOR USE OF RIGHT-OF-WAY. Requires a local toll project entity to enter into an agreement with TxDOT for any project for which the entity has exercised its opinion to develop, finance, construct, and operate the project under Subchapter B and for which the entity intends to use state highway right-of-way. Requires that the agreement contain 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.

Sec. 373.104. LIABILITY FOR DAMAGES. (a) Provides that TTC and TxDOT, notwithstanding any other law, 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 this subchapter, regardless of the legal theory, statute, or cause of action under which liability is asserted.

(b) Provides that an agreement entered into by a local toll project entity and TxDOT 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.

Sec. 373.105. COMPLIANCE WITH FEDERAL LAW. Authorizes TTC or TxDOT, notwithstanding an action taken by a local toll project entity under this subchapter, to take action that in its reasonable judgment is necessary to comply with any federal requirement to enable this state to receive federal-aid highway funds.

SECTION 16. Repealers: Sections 228.0111 (Toll Projects of Local Toll Project Entities), and 228.012 (Project Subaccounts), Transportation Code.



Repealer: Section 371.052(c) (relating to requiring a toll project entity to provide certain reports to the state auditor), Transportation Code, as added by Section 11.01, Chapter 264 (S.B. 792), Acts of the 80th Legislature, Regular Session, 2007.

SECTION 17. Effective date: September 1, 2009.