

## **BILL ANALYSIS**

C.S.S.B. 1048  
By: Jackson  
Economic & Small Business Development  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Interested parties contend that, in the last decade, approximately two-thirds of the states, including Texas, have enacted legislation to address certain forms of public-private endeavors. These legislative measures have been enacted predominantly to deliver transportation, public assembly, and corrections projects, and several states have adopted comprehensive permissive statutes that allow flexibility for such joint endeavors to be applied to a wide range of infrastructure needs. Public-private partnerships are not new in Texas and have been used to deliver some of the state's most visible projects and to further scientific research and development at state universities.

The Texas Legislature has enacted measures in recent legislative sessions authorizing certain governmental entities to enter into development agreements specifically related to their respective public functions. Interested parties note that legislation is needed to provide structure and clear authority regarding delivery of public projects in conjunction with private investment that will decrease the financial burden of repairing existing infrastructure as it ages and satisfy the demand of new infrastructure as the state population continues to grow. Such legislation, the parties note, would be permissive and would apply to infrastructure needs of any Texas governmental entity in a manner that allows flexible joining of private sector creativity and capital with public need in a manner deemed advantageous to the taxpayer. C.S.S.B. 1048 seeks to achieve those goals through statutory changes relating to the creation of public and private facilities and infrastructure.

### **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. 1048 amends the Government Code to enact provisions to implement the legislature's finding that authorizing private entities or other persons to develop or operate one or more qualifying projects would serve the public safety, benefit, and welfare by making such projects available to the public in a more timely or less costly fashion and to provide governmental entities with the greatest flexibility in contracting with private entities or other persons to provide certain public services. The bill exempts from its provisions highway financing, design, construction, maintenance, or operation; a transportation authority; and any telecommunications, cable television, video service, or broadband infrastructure other than technology installed as part of a qualifying project that is essential to the project. The bill establishes that the procedures in the bill's provisions are not exclusive and that the bill's provisions do not prohibit a responsible governmental entity from entering into an agreement for or procuring public and private facilities and infrastructure under other authority. The bill establishes that its provisions do not alter the eminent domain laws of this state or grant the power of eminent domain to any person who is not expressly granted that power under other state law.

C.S.S.B. 1048 prohibits a person from developing or operating a qualifying project unless the person obtains the approval of and contracts with the responsible governmental entity under the bill's provisions. The bill authorizes the person to initiate the approval process by submitting a proposal requesting approval and authorizes the responsible governmental entity to request proposals or invite bids for the development or operation of a qualifying project. The bill requires a person submitting a proposal requesting such project approval to specifically and conceptually identify any facility, building, infrastructure, or improvement included in the proposal as a part of the qualifying project. The bill requires the responsible governmental entity, on receipt of a proposal initiating the approval process, to determine whether to accept the proposal for consideration under certain governmental entity guidelines and requires a responsible governmental entity that does not accept a proposal for consideration to return the proposal, all fees, and the accompanying documentation to the person submitting the proposal. The bill authorizes the responsible governmental entity to reject such a proposal at any time.

C.S.S.B. 1048 requires a responsible governmental entity, before requesting or considering a proposal for a qualifying project, to adopt and make publicly available guidelines that enable the governmental entity's compliance with the bill's provisions and that are reasonable, encourage competition, and guide the selection of projects under the purview of the responsible governmental entity. The bill sets out specific content requirements for the guidelines.

C.S.S.B. 1048 authorizes a private entity or other person to submit a proposal requesting approval of a qualifying project by the responsible governmental entity and lists specific items that must accompany the proposal unless otherwise waived by the responsible governmental entity. The bill authorizes a responsible governmental entity to request proposals or invite bids from persons for the development or operation of a qualifying project. The bill requires a responsible governmental entity to consider the total project cost as one factor in evaluating the proposals received and specifies that the responsible governmental entity is not required to select the proposal that offers the lowest total project cost. The bill sets out other factors that the responsible governmental entity is authorized to consider. The bill authorizes the responsible governmental entity to approve as a qualifying project the development or operation of a facility needed by the governmental entity, or the design or equipping of a qualifying project, if the responsible governmental entity determines that the project serves a specific public purpose. The bill authorizes the responsible governmental entity to determine that a project's development or operation as a qualifying project serves the public purpose if the project meets specified criteria relating to public need, the project's estimated costs, and timely development or operation for the project. The bill authorizes the responsible governmental entity to charge a reasonable fee to cover the costs of processing, reviewing, and evaluating the proposal, including reasonable legal fees and fees for financial, technical, and other necessary advisors or consultants.

C.S.S.B. 1048 provides that the approval of a responsible governmental entity that is a state board, commission, department, or other state agency, including an institution of higher education, is subject to the private entity or other person entering into an interim or comprehensive agreement with that entity. The bill requires the responsible governmental entity, on approval of the qualifying project, to establish a date by which project-related activities must begin and authorizes the entity to extend the date. The bill requires the responsible governmental entity to take appropriate action to protect confidential and proprietary information provided by the contracting person under an agreement. The bill requires each responsible governmental entity, before entering into the negotiation of an interim or comprehensive agreement, to submit copies of detailed proposals to the Partnership Advisory Commission established by the bill. The bill establishes that the bill's provisions and an interim or comprehensive agreement entered into under those provisions do not enlarge, diminish, or affect any authority a responsible governmental entity has to take action that would impact the state's debt capacity.

C.S.S.B. 1048 authorizes a responsible governmental entity to contract with a contracting person for the delivery of services to be provided as part of a qualifying project in exchange for service payments and other consideration as the governmental entity considers appropriate. The bill

requires a person submitting a proposal to a responsible governmental entity to notify each affected jurisdiction by providing a copy of its proposal to that jurisdiction and requires the affected jurisdiction that is not the responsible governmental entity, within a specified deadline, to submit in writing to the responsible governmental entity any comments the jurisdiction has on the proposed qualifying project and indicate whether the facility or project is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan. The bill requires the responsible governmental entity to consider those comments before entering into a comprehensive agreement with a contracting person.

C.S.S.B. 1048 authorizes a governmental entity, after obtaining any appraisal of the property interest that is required under other law in connection with the conveyance, to dedicate any property interest, including land, improvements, and tangible personal property, for public use in a qualifying project if the governmental entity finds that the dedication will serve a public purpose by minimizing a qualifying project's cost to the governmental entity or reducing the project's delivery time. The bill authorizes a governmental entity, in connection with a dedication, to convey any property interest, including a license, franchise, easement, or any other right or interest the governmental entity considers appropriate, subject to conditions imposed by general law and subject to the rights of an existing utility under a license, franchise, easement, or other right under law, to the contracting person for the consideration determined by the governmental entity, which may include the contracting person's agreement to develop or operate the qualifying project.

C.S.S.B. 1048 grants the contracting person the power granted by general law to a person that has the same form of organization as the contracting person, the power granted by a statute governing the business or activity of the contracting person, and the power to develop or operate the qualifying project and to collect lease payments, impose user fees, or enter into service contracts in connection with the project's use. The bill prohibits a contracting person from imposing a user fee or increasing the amount of a user fee until the fee or increase is approved by the responsible governmental entity. The bill authorizes the contracting person to own, lease, or acquire any other right to use or operate the qualifying project. The bill authorizes the contracting person to do the following: finance a qualifying project in the amounts and on the terms determined by the contracting person; to issue debt, equity, or other securities or obligations; enter into sale and leaseback transactions; and secure any financing with a pledge of, security interest in, or lien on any or all of its property, including all of its property interests in the qualifying project. The bill authorizes the contracting person, in operating the qualifying project, to establish classifications according to reasonable categories for assessment of user fees and, with the responsible governmental entity's consent, adopt and enforce reasonable rules for the qualifying project to the same extent as the responsible governmental entity.

C.S.S.B. 1048 requires the contracting person to do the following: develop or operate the qualifying project in a manner that is acceptable to the responsible governmental entity and in accordance with any applicable interim or comprehensive agreement; keep the qualifying project open for public use at all times, or as appropriate based on the project's use, after its initial opening on payment of the applicable user fees, lease payments, or service payments; maintain, or provide by contract for the maintenance or upgrade of, the qualifying project, if required by the interim or comprehensive agreement; cooperate with the responsible governmental entity to establish any interconnection with the qualifying project requested by the responsible governmental entity; and comply with any applicable interim or comprehensive agreement and any lease or service contract. The bill authorizes the qualifying project's temporary closure because of emergencies or, with the responsible governmental entity's consent, to protect public safety or for reasonable construction or maintenance activities. The bill provides that the bill's provisions do not prohibit a contracting person from providing additional services for the qualifying project to the public or persons other than the responsible governmental entity if providing the additional service does not impair the contracting person's ability to meet the person's commitments to the responsible governmental entity under any applicable interim or

comprehensive agreement.

C.S.S.B. 1048 requires the contracting person, before developing or operating the qualifying project, to enter into a comprehensive agreement with the responsible governmental entity. The bill requires the comprehensive agreement to include specified provisions relating to the following: delivery of performance and payment bonds and letters of credit or other security; review and approval of project plans and specifications; project inspection; public liability insurance provisions; project monitoring; reimbursement for services provided by the governmental entity; periodic filing of financial statements; and policies and procedures governing the respective parties' rights and responsibilities if the comprehensive agreement is terminated or there is a material default by the contracting person.

C.S.S.B. 1048 sets out additional provisions that the comprehensive agreement is either required or authorized to include, including provisions relating to the following: any user fee, lease payment, or service payment established by agreement of the parties; funding sources for grants or loans made by the responsible governmental entity to the contracting person; the contracting person's duties and terms the responsible governmental entity determines serve the public purpose; notice of default and cure rights for the benefit of the contracting person and persons providing financing for the qualifying project; other lawful terms to which the contracting person and the responsible governmental entity mutually agree; and provisions in which the authority and duties of the contracting person cease and the qualifying project is dedicated for public use to the responsible governmental entity or an affected jurisdiction, as applicable. The bill requires any change in the terms of the comprehensive agreement to which the parties agree to be added to the comprehensive agreement by written amendment and authorizes the comprehensive agreement to provide for the development or operation of phases or segments of the qualifying project.

C.S.S.B. 1048 authorizes the responsible governmental entity, before or in connection with the negotiation of the comprehensive agreement, to enter into an interim agreement with the contracting person proposing the development or operation of the qualifying project. The bill authorizes the interim agreement to authorize the contracting person to begin project phases or activities for which the contracting person may be compensated, establish the process and timing of the negotiation of the comprehensive agreement, and contain any other provision related to any aspect of the development or operation of a qualifying project that the parties consider appropriate.

C.S.S.B. 1048 authorizes the contracting person and the responsible governmental entity to use any funding resources available, including accessing designated trust funds and borrowing or accepting grants from a state infrastructure bank. The bill authorizes the responsible governmental entity to take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose and to enter into any contracts required to receive the assistance. The bill makes any money received from state or federal government sources, if the responsible governmental entity is a state agency, subject to appropriation by the legislature. The bill authorizes the responsible governmental entity to determine that it serves the public purpose for all or part of a qualifying project's cost to be directly or indirectly paid from the proceeds of a local, state, or federal government grant or loan.

C.S.S.B. 1048 authorizes the responsible governmental entity, if the contracting person commits a material default, to assume the responsibilities and duties of the contracting person of the qualifying project. The bill grants the responsible governmental entity, if the entity assumes the contracting person's responsibilities and duties, all the rights, title, and interest in the qualifying project, subject to any liens on revenue previously granted by the contracting person to any person providing financing for the project. The bill authorizes a responsible governmental entity that has the power of eminent domain under state law to exercise that power to acquire the qualifying project in the event of a material default by the contracting person. The bill authorizes any person who has provided financing for the qualifying project, and the contracting person to

the extent of its capital investment, to participate in the eminent domain proceedings with the standing of a property owner. The bill authorizes the responsible governmental entity to terminate, with cause, any applicable interim or comprehensive agreement and exercise any other rights and remedies available to the governmental entity at law or in equity and to make any appropriate claim under the letters of credit or other security or the performance and payment bonds required under the comprehensive agreement.

C.S.S.B. 1048 authorizes the responsible governmental entity, if the entity elects to assume the responsibilities and duties for a qualifying project, to develop or operate the qualifying project, impose user fees, impose and collect lease payments for the use of the project, and comply with any applicable contract to provide services. The bill requires the responsible governmental entity to collect and pay to secured parties any revenue subject to a lien to the extent necessary to satisfy the contracting person's obligations to secured parties, including the maintenance of reserves, and requires the liens to be reduced correspondingly and released when paid off. The bill authorizes the responsible governmental entity, before any payment is made to or for the benefit of a secured party, to use revenue to pay the qualifying project's current operation and maintenance costs, including compensation to the entity for its services in operating and maintaining the qualifying project. The bill provides that the right to receive any payment is considered just compensation for the qualifying project. The bill prohibits the full faith and credit of the responsible governmental entity from being pledged to secure any financing of the contracting person the governmental entity assumed when it assumed responsibility for the qualifying project.

C.S.S.B. 1048 authorizes the responsible governmental entity, at the contracting person's request, to exercise any power of eminent domain that it has under law to acquire any land or property interest to the extent that the responsible governmental entity dedicates the land or property interest to public use and finds the action serves the public purpose and requires any amounts to be paid in any eminent domain proceeding to be paid by the contracting person. The bill requires the contracting person and each facility owner, including a public utility, a public service company, or a cable television provider, whose facilities will be affected by a qualifying project to cooperate fully in planning and arranging the manner in which the facilities will be affected. The bill requires the contracting person and responsible governmental entity to ensure that a facility owner whose facility will be affected by a qualifying project does not suffer a disruption of service as a result of the construction or improvement of the qualifying project.

C.S.S.B. 1048 authorizes a governmental entity possessing the power of eminent domain to exercise that power in connection with the relocation of facilities affected by the qualifying project or that must be relocated to the extent that the relocation is necessary or desirable by construction of, renovation to, or improvements to the qualifying project. The bill requires the governmental entity to exercise its power of eminent domain to the extent required to ensure an affected facility owner does not suffer a disruption of service as a result of the construction or improvement of the qualifying project during the construction or improvement or after the qualifying project is completed or improved. The bill requires the contracting person to pay any amount owed for the crossing, constructing, or relocating of facilities.

C.S.S.B. 1048 grants a peace officer of this state or of any affected jurisdiction the same powers and jurisdiction within the area of the qualifying project as the officer has in the officer's area of jurisdiction and authorizes the officer to access the qualifying project at any time to exercise the officer's powers and jurisdiction.

C.S.S.B. 1048 establishes that provisions of law relating to state purchasing generally, purchasing methods, and building construction and acquisition, any interpretations, rules, or guidelines of the comptroller of public accounts and the Texas Facilities Commission, and interpretations, rules, or guidelines developed under provisions of law relating to statewide contract management do not apply to a qualifying project. The bill authorizes a responsible governmental entity to enter into a comprehensive agreement only in accordance with guidelines

that require the contracting person to design and construct the qualifying project in accordance with procedures that do not materially conflict with those specified in existing statutes specified by the bill. The bill clarifies that its provisions do not authorize a responsible governmental entity or a contracting person to obtain professional services through any process except in accordance with the Professional Services Procurement Act. The bill prohibits identified team members, including the architect, engineer, or builder, from being substituted or replaced once a project is approved and an interim or comprehensive agreement is executed without the written approval of the responsible governmental entity.

C.S.S.B. 1048 requires the responsible governmental entity, not later than the 10th day after the date the entity accepts a submitted proposal, to provide notice of the proposal in the manner prescribed in the bill for that entity. The bill requires the responsible governmental entity to make available for public inspection at least one copy of the proposal and provides that this provision does not prohibit the entity from posting the proposal in another manner considered appropriate by the entity to provide maximum notice to the public of the opportunity to inspect the proposal. The bill prohibits trade secrets, financial records, or other records of the contracting person excluded from disclosure under the state open records law from being posted or made available for public inspection except as otherwise agreed to by the responsible governmental entity and the contracting person. The bill requires the responsible governmental entity to hold a public hearing on the proposal during the proposal review process not later than the 30th day before the date the entity enters into an interim or comprehensive agreement. The bill requires a responsible governmental entity to make available the proposed agreement on completion of the negotiation phase for the development of an interim or comprehensive agreement and before an interim agreement or comprehensive agreement is entered into. The bill requires a responsible governmental entity that has entered into an interim agreement or comprehensive agreement to make procurement records available for public inspection on request and provides that, for purposes of this provision, procurement records do not include the trade secrets of the contracting person or financial records, including balance sheets or financial statements of the contracting person, that are not generally available to the public through regulatory disclosure or other means. The bill establishes that cost estimates relating to a proposed procurement transaction prepared by or for a responsible governmental entity are not open to public inspection and that any inspection of procurement transaction records is subject to reasonable restrictions to ensure the security and integrity of the records. The bill makes these provisions applicable to any accepted proposal regardless of whether the process of bargaining results in an interim or comprehensive agreement.

C.S.S.B. 1048 establishes the Partnership Advisory Commission as an advisory commission in the legislative branch to advise responsible governmental entities, as applicable, on proposals received under the bill's provisions. The bill sets out the composition of the commission and provides that the legislative members serve on the commission until the expiration of their terms of office or until their successors qualify and that the members appointed by the governor serve at the will of the governor. The bill provides for the election and terms of a presiding officer and an assistant presiding officer, reimbursement of members' expenses incurred in performing member duties, periodic meetings, and the provision of administrative staff support.

C.S.S.B. 1048 requires the Texas Legislative Council to provide legal, research, and policy analysis services to the commission, requires the staffs of the House Appropriations Committee, Senate Finance Committee, and comptroller to provide technical assistance, and requires the comptroller or a state agency to provide additional assistance as needed. The bill requires a copy of the commission's proceedings to be filed with the legislative body that the presiding officer serves. The bill requires each responsible governmental entity receiving a detailed proposal for a qualifying project, before beginning to negotiate an interim or comprehensive agreement, to provide copies of the proposal to the commission's presiding officer and the chairs of the House Appropriations Committee and Senate Finance Committee or their designees. The bill exempts from commission review any proposed qualifying project with a total cost of less than \$5 million and any proposed qualifying project with a total cost of more than \$5 million but less

than \$50 million for which money has been specifically appropriated as a public-private partnership in the General Appropriations Act.

C.S.S.B. 1048 authorizes the commission to undertake additional reviews of any qualifying project that will be completed in phases and for which an appropriation has not been made for any phase other than the current phase of the project. The bill requires the commission, not later than the 10th day after the date the commission receives a complete copy of the detailed proposal for a qualifying project, to determine whether to accept or decline the proposal for review and notify the responsible governmental entity of the commission's decision. The bill requires the commission, if the commission accepts a proposal for review, to provide its findings and recommendations to the responsible governmental entity not later than the 45th day after the date the commission receives complete copies of the detailed proposal. The bill provides that if the commission does not provide its findings or recommendations to the responsible governmental entity by that date, the commission is considered to have declined review of the proposal and to not have made any findings or recommendations on the proposal. The bill requires the responsible governmental entity on request of the commission to provide any additional information regarding a qualifying project reviewed by the commission if the information is available to or can be obtained by the responsible governmental entity. The bill requires the commission to review accepted detailed proposals and provide findings and recommendations to the responsible governmental entity.

C.S.S.B. 1048 establishes that review by the commission does not constitute approval of any appropriations necessary to implement a subsequent interim or comprehensive agreement. The bill prohibits the responsible governmental entity from beginning negotiation of an interim or comprehensive agreement until the commission has submitted its recommendations or declined to accept the detailed proposals for review. The bill requires the responsible governmental entity, not later than the 30th day before the date a comprehensive or interim agreement is executed, to submit to the commission and the chairs of the House Appropriations Committee and Senate Finance Committee or their designees a copy of the proposed interim or comprehensive agreement and a report describing the extent to which the commission's recommendations were addressed in the proposed interim or comprehensive agreement. The bill provides that records and information afforded protection by the bill's provisions that are provided by a responsible governmental entity to the commission continue to be protected from disclosure when in the possession of the commission. The bill establishes that its provisions relating to the Partnership Advisory Commission apply only to a responsible governmental entity as defined by the bill.

C.S.S.B. 1048 defines "affected jurisdiction," "commission," "comprehensive agreement," "contracting person," "detailed proposal," "develop," "governmental entity," "interim agreement," "lease payment," "material default," "operate," "qualifying project," "responsible governmental entity," "revenue," "service contract," "service payment," and "user fee" and sets out legislative findings and purpose.

C.S.S.B. 1048 provides that information in the custody of a responsible governmental entity that relates to a proposal for a qualifying project is exempt from the requirements of the state open records law if the information consists of memoranda, staff evaluations, or other records prepared by the responsible governmental entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of filed proposals for which public disclosure before or after the execution of an interim or comprehensive agreement would adversely affect the financial interest or bargaining position of the responsible governmental entity and for which the basis for such a determination is documented in writing by the responsible governmental entity or if the records are provided by a contracting person to a responsible governmental entity or affected jurisdiction and contain trade secrets of the contracting person, financial records of the contracting person that are not generally available to the public through regulatory disclosure or other means, or other information submitted by the contracting person that, if made public before the execution of an interim or comprehensive agreement, would adversely affect the financial interest or bargaining position of the responsible governmental entity or the person. The

bill provides that the bill's provisions do not authorize the withholding of information concerning the terms of any interim or comprehensive agreement, service contract, lease, partnership, or agreement of any kind entered into by the responsible governmental entity and the contracting person or the terms of any financing arrangement that involves the use of any public money or the performance of any person developing or operating a qualifying project. The bill provides for the meanings of "affected jurisdiction," "comprehensive agreement," "contracting person," "interim agreement," "qualifying project," and "responsible governmental entity," for purposes of these provisions, by reference.

#### **EFFECTIVE DATE**

September 1, 2011.

#### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.S.B. 1048 differs from the original, in provisions relating to approval of a qualifying project by a responsible governmental entity, by providing that a responsible governmental entity is required to consider the total project cost as one factor in evaluating the proposals received, but is not required to select the proposal that offers the lowest total project cost, whereas the original provides that the entity is required to consider price as one factor in evaluating the proposals received, but is not required to select the proposal that offers the lowest price.

C.S.S.B. 1048 differs from the original, in provisions relating to dedication and conveyance of public property, by providing that after obtaining any appraisal of the property interest that is required under other law in connection with the conveyance, a governmental entity is authorized to dedicate any property interest for public use in a qualifying project if certain conditions are met, whereas the original authorizes a governmental entity to dedicate any property interest for public use in a qualifying project if certain conditions are met.

C.S.S.B. 1048, in provisions relating to the powers and duties of the contracting person, contains a provision not included in the original prohibiting the contracting person from imposing a user fee or increasing the amount of a user fee until the fee or increase is approved by the responsible governmental entity.

C.S.S.B. 1048 differs from the original, in provisions relating to eminent domain, by specifying that at the request of the contracting person, the responsible governmental entity is authorized to exercise any power of eminent domain that it has under law to acquire any land or property interest to the extent that the responsible governmental entity dedicates the land or property interest to public use and finds that the action serves a public purpose, whereas the original authorizes such exercise of eminent domain power on a finding that the action serves a public purpose and does not specify the dedication of that land or property interest to public use.

C.S.S.B. 1048 differs from the original, in provisions relating to the composition and terms of the Partnership Advisory Commission, by providing that the legislative members serve on the commission until the expiration of their terms of office or until their successors qualify, whereas the original provides that the legislative members and the lieutenant governor serve on the commission for that term.

C.S.S.B. 1048 differs from the original in nonsubstantive ways to conform with certain bill drafting standards.