

By: Phillips

H.B. No. 3789

A BILL TO BE ENTITLED

AN ACT

relating to the development of toll projects through public-private partnerships.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle G, Title 6, Transportation Code, is amended by adding Chapter 373 to read as follows:

CHAPTER 373. PUBLIC-PRIVATE PARTNERSHIPS FOR TOLL PROJECTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 373.001. DEFINITIONS. In this chapter:

(1) "Public-private partnership" means a contractual agreement between a toll project entity and a private entity that provides for private sector participation in the design, construction, financing, operation, and maintenance of a toll project under this chapter.

(2) "Toll project" means one or more tolled lanes of a highway or an entire toll highway and any improvement, extension, or expansion to the highway, including:

(a) a facility to relieve traffic congestion and promote safety;

(b) a bridge, tunnel, overpass, underpass, interchange, entrance plaza, approach, toll booth, toll plaza, service road, ramp, or service center;

(c) an administration, storage, or other building, operations center, maintenance or other facility, equipment, or

1 system the toll project entity considers necessary to operate the
2 project;

3 (d) property rights, easements, and interests the toll
4 project entity acquires to construct, maintain, or operate the
5 project;

6 (e) a parking area or structure, rest stop, park, and
7 any other improvement or amenity the toll project entity considers
8 necessary, useful, or beneficial for the operation and maintenance
9 of the project; and

10 (f) a nontolled facility that is appurtenant to and
11 necessary for the efficient operation and maintenance of the
12 project, including a connector, service road, access road, ramp,
13 interchange, bridge, or tunnel.

14 (3) "Toll project entity" means an entity authorized by law
15 to acquire, design, construct, finance, operate, and maintain a
16 toll project, including:

- 17 (a) the department under Chapter 228;
18 (b) a regional tollway authority under Chapter 366;
19 (c) a regional mobility authority under Chapter 370;
20 or
21 (d) a county under Chapter 284.

22 (Sections 373.002-373.050 reserved for expansion)

23 SUBCHAPTER B. PUBLIC-PRIVATE PARTNERSHIPS

24 Sec. 373.051. PUBLIC-PRIVATE PARTNERSHIPS AUTHORIZED. (a)
25 A toll project entity may enter into a public-private partnership
26 that provides for the design, development, financing,
27 construction, maintenance, repair, operation, extension, or

1 expansion of a toll project.

2 (b) A regional tollway authority, a regional mobility
3 authority, or a county under Chapter 284 may not enter into a
4 public-private partnership pursuant to this chapter for a toll
5 project that extends beyond the boundaries of the toll project
6 entity and any counties adjacent to the toll project entity.

7 (c) The department may not enter into a public-private
8 partnership pursuant to this chapter for a toll project that
9 extends beyond the boundaries of a department district and any
10 counties adjacent to the district.

11 (d) A toll project entity may negotiate provisions relating
12 to professional and consulting services provided in connection with
13 a public-private partnership authorized by this section.

14 Sec. 373.052. PROCESS FOR ENTERING INTO PUBLIC-PRIVATE
15 PARTNERSHIPS. (a) If a toll project entity enters into a public-
16 private partnership, the toll project entity shall use a
17 competitive procurement process that provides the best value for
18 the toll project entity.

19 (b) A toll project entity shall publish a notice of
20 availability of a request for qualifications or proposals in
21 connection with the procurement of a public-private partnership
22 under this chapter in the Texas Register and shall publish the
23 request for qualifications or proposals on the toll project
24 entity's website.

25 (c) A toll project entity that intends to enter into a
26 public-private partnership under this chapter shall issue a request
27 for qualifications that includes:

1 (1) information regarding the project location,
2 scope, budget, and schedule;

3 (2) the criteria to be used to evaluate the responses
4 and the relative weight given to the criteria;

5 (3) a deadline by which responses must be received;
6 and

7 (4) any other information the toll project entity
8 considers relevant or necessary.

9 (d) The toll project entity shall evaluate each response to
10 the request for qualifications based on the criteria described in
11 the request for qualifications and may qualify or shortlist private
12 entities to submit detailed proposals under Subsection (e). The
13 toll project entity must qualify or shortlist at least two private
14 entities to submit detailed proposals for a project under
15 Subsection (e) unless the toll project entity does not receive more
16 than one proposal or one response to a request under Subsection (c).

17 (e) The toll project entity shall issue a request for
18 detailed proposals from all private entities qualified or
19 shortlisted under Subsection (d) if the toll project entity
20 proceeds with the further evaluation of a proposed public-private
21 partnership. A request under this subsection may require
22 additional information relating to:

23 (1) the private entity's qualifications and
24 demonstrated technical competence;

25 (2) the feasibility of developing the project as
26 proposed;

27 (3) engineering or architectural designs;

1 (4) the private entity's ability to meet schedules;

2 (5) a financial plan, including costing methodology
3 and cost proposals;

4 (6) the information identified in Section 373.059
5 concerning the rights of the toll project entity to purchase the
6 interest of the private entity in the toll project that is the
7 subject of the public-private partnership; and

8 (7) any other information the toll project entity
9 considers relevant or necessary.

10 (f) A private entity responding to a request for detailed
11 proposals issued under Subsection (e) may submit alternative
12 proposals based on public-private partnerships having different
13 terms, with the alternative terms in multiples of 10 years, ranging
14 from 10 years from the later of the date of final acceptance of the
15 project or the start of revenue operations by the private entity to
16 50 years from the later of the date of final acceptance of the
17 project or the start of revenue operations by the private entity,
18 not to exceed a total term of 52 years or any lesser term provided in
19 a public-private partnership agreement.

20 (g) In issuing a request for detailed proposals under
21 Subsection (e), the toll project entity may solicit input from
22 entities qualified under Subsection (d) or any other person. The
23 toll project entity may also solicit input regarding alternative
24 technical concepts after issuing a request under Subsection (e).

25 (h) The toll project entity shall evaluate each proposal
26 based on the criteria described in the request for detailed
27 proposals and select the private entity whose proposal offers the

1 apparent best value to the toll project entity.

2 (i) The toll project entity may enter into negotiations with
3 the private entity whose proposal offers the apparent best value.

4 (j) If at any point in negotiations under Subsection (i) it
5 appears to the toll project entity that the highest ranking
6 proposal will not provide the toll project entity with the overall
7 best value, the toll project entity may enter into negotiations
8 with the private entity submitting the next highest ranking
9 proposal.

10 (k) The toll project entity may withdraw a request for
11 qualifications or a request for detailed proposals at any time. The
12 toll project entity may then publish a new request for
13 qualifications.

14 (l) A toll project entity may accept unsolicited proposals
15 for a proposed public-private partnership. If a toll project
16 entity accepts an unsolicited proposal pursuant to this subsection,
17 the toll project entity shall issue a request for competing
18 proposals and qualifications that includes the information
19 required by Subsection (c) and shall evaluate those proposals and
20 qualify or shortlist private entities to submit detailed proposals
21 consistent with Subsection (d). The toll project entity may
22 require that an unsolicited proposal be accompanied by a
23 nonrefundable fee sufficient to cover all or part of its cost to
24 review the proposal.

25 (m) The toll project entity may prescribe the general form
26 of a public-private partnership agreement and may include any
27 matter the toll project entity considers advantageous to the toll

1 project entity. The toll project entity and the private entity
2 shall finalize the specific terms of a public-private partnership.

3 (n) Notwithstanding the requirements of this section, if a
4 toll project entity has entered or enters into a comprehensive
5 development agreement or a public-private partnership for one or
6 more segments or phases of a toll project, it may enter into a
7 public-private partnership, one or more facility implementation
8 agreements, or any other agreement which provides for the design,
9 construction, financing, acquisition, maintenance, or operation of
10 any additional segments or phases of the toll project if such
11 agreement is with the same party that was a party to the previous
12 comprehensive development agreement or public-private partnership.
13 No additional process shall be required prior to execution of an
14 agreement under this subsection provided that the toll project
15 entity finds that the terms and conditions of such agreement are
16 fair and reasonable.

17 (o) Subchapter A of Chapter 223, Transportation Code, and
18 Chapter 2254, Government Code, do not apply to a public-private
19 partnership entered into under this chapter.

20 Sec. 373.053. CONFIDENTIALITY OF INFORMATION. (a) To
21 encourage private entities to submit proposals under this chapter,
22 the following information is confidential, is not subject to
23 disclosure, inspection, or copying under Chapter 552, Government
24 Code, and is not subject to disclosure, discovery, subpoena, or
25 other means of legal compulsion for its release until a final
26 contract for a proposed project is entered into:

27 (1) all or part of a proposal that is submitted by a

private entity for a public-private partnership, unless the private entity consents to the disclosure of the information;

(2) supplemental information or material submitted by a private entity in connection with a proposal for a public-private partnership, unless the private entity consents to the disclosure of the information or material; and

(3) information created or collected by the toll project entity or its agent during consideration of a proposal for a public-private partnership.

(b) After the toll project entity completes its final ranking of proposals under Section 373.052(h), the final rankings of each proposal under each of the published criteria are not confidential.

Sec. 373.054. PERFORMANCE AND PAYMENT SECURITY. (a) Notwithstanding Section 223.006, Transportation Code, and the requirements of Subchapter B, Chapter 2253, Government Code, a toll project entity shall require a private entity entering into a public-private partnership under this chapter to provide a performance and payment bond or an alternative form of security in an amount sufficient to:

(1) ensure the proper performance of the agreement;
and

(2) protect:
(A) the toll project entity; and
(B) payment bond beneficiaries who have a direct contractual relationship with the private entity or a subcontractor of the private entity to supply labor or material.

1 (b) A performance and payment bond or alternative form of
2 security shall be in an amount equal to the cost of constructing or
3 maintaining the toll project.

4 (c) If the toll project entity determines that it is
5 impracticable for a private entity to provide security in the
6 amount described by Subsection (b), the toll project entity shall
7 set the amount of the bonds or the alternative forms of security.

8 (d) A payment or performance bond or alternative form of
9 security is not required for the portion of a public-private
10 partnership that includes only design or planning services, the
11 performance of preliminary studies, or the acquisition of real
12 property.

13 (e) The amount of the payment security must not be less than
14 the amount of the performance security.

15 (f) In addition to or instead of a performance and payment
16 bond, the toll project entity may require one or more of the
17 following alternative forms of security:

18 (1) a cashier's check drawn on a financial entity specified
19 by the toll project entity;

20 (2) a United States bond or note;

21 (3) an irrevocable bank letter of credit; or

22 (4) any other form of security determined suitable by
23 the toll project entity.

24 (g) The toll project entity by rule shall prescribe
25 requirements for an alternative form of security provided under
26 this section.

27 Sec. 373.055. OWNERSHIP OF TOLL PROJECTS. A toll project

1 that is the subject of a public-private partnership with a private
2 entity, including the facilities acquired or constructed on the
3 project, is public property and shall be owned by the toll project
4 entity or another public entity to which the toll project entity may
5 transfer the project.

6 Sec. 373.056. LIABILITY FOR PRIVATE OBLIGATIONS. The toll
7 project entity may not incur a financial obligation for a private
8 entity that designs, develops, finances, constructs, maintains, or
9 operates a toll project under this chapter. The state or a
10 political subdivision of the state is not liable for any financial
11 or other obligations of a project solely because a private entity
12 constructs, finances, or operates any part of the project.

13 Sec. 373.057. TERMS OF PRIVATE PARTICIPATION. (a) The toll
14 project entity shall negotiate the terms of private participation
15 under this chapter, including:

16 (1) methods to determine the applicable cost, profit,
17 and project distribution among the private entity and the toll
18 project entity;

19 (2) reasonable methods to determine and classify toll
20 rates and responsibility for the setting of tolls;

21 (3) acceptable safety and policing standards; and

22 (4) other applicable professional, consulting,
23 construction, operation, and maintenance standards, expenses, and
24 costs.

25 (b) A public-private partnership entered into under this
26 chapter must include a provision providing for the purchase by the
27 toll project entity of the interest of a private entity in the

1 public-private partnership and related property as required by
2 Section 373.059 and may include any other provision the toll
3 project entity considers appropriate.

4 (c) The toll project entity may enter into a public-private
5 partnership under this chapter with a private entity only if the
6 project is identified in the department's unified transportation
7 program or is located on a transportation corridor identified in
8 the statewide transportation plan.

9 (d) Section 373.056 does not apply to the obligations of the
10 toll project entity under a public-private partnership.

11 (e) Notwithstanding anything in Section 201.112,
12 Transportation Code, or other law to the contrary, and subject to
13 compliance with the dispute resolution procedures set out in the
14 public-private partnership agreement, an obligation of the toll
15 project entity under a public-private partnership entered into
16 under this chapter to make or secure payments to a person because
17 of the termination of the agreement, including the purchase of the
18 interest of a private participant or other investor in a project,
19 may be enforced by mandamus against the toll project entity in a
20 district court located in a county where all or part of the toll
21 project entity is located, and the sovereign immunity of the toll
22 project entity is waived for that purpose. Notwithstanding the
23 foregoing, the district courts of Travis County shall have
24 exclusive jurisdiction and venue over and to determine and
25 adjudicate all issues necessary to adjudicate any action brought
26 against the commission or the department under this subsection. The
27 remedy provided by this subsection is in addition to any legal and

equitable remedies that may be available to a party to a public-private partnership.

(f) If the toll project entity enters into a public-private partnership with a private entity that includes the collection by the private entity of tolls for the use of a toll project, the private entity shall submit to the toll project entity for approval:

(1) the methodology for:

(A) the setting of tolls; and

(B) increasing the amount of the tolls;

(2) a plan outlining methods the private entity will use to collect the tolls, including:

(A) any charge to be imposed as a penalty for late payment of a toll; and

(B) any charge to be imposed to recover the cost of collecting a delinquent toll; and

(3) any proposed change in an approved methodology for the setting of a toll or a plan for collecting the toll.

(g) A public-private partnership with a private entity that includes the collection by the private entity of tolls for the use of a toll project may be for a term not longer than 50 years from the later of the date of final acceptance of the project or the start of revenue operations by the private entity, not to exceed a total term of 52 years.

Sec. 373.058. PROHIBITION AGAINST LIMITING OR PROHIBITING CONSTRUCTION OF TRANSPORTATION PROJECTS. (a) A public-private partnership may not contain a provision that limits or prohibits

1 the construction, reconstruction, expansion, rehabilitation,
2 operation, or maintenance of a highway or other transportation
3 project, as that term is defined by Section 370.003, by the toll
4 project entity or other governmental entity, or by a private entity
5 under a contract with the toll project entity or other governmental
6 entity.

7 **(b) Except as provided by Subsection (c), a public-private**
8 agreement may contain a provision authorizing the toll project
9 entity to negotiate with the private entity for the loss of toll
10 revenues attributable to the construction by the toll project
11 entity of a limited access highway project located within an area
12 that extends up to four miles from either side of the centerline of
13 the project developed under the agreement, less the private
14 entity's decreased operating and maintenance costs attributable to
15 the highway project, if any. A provision under this section may be
16 effective only for a period of 30 years or less from the effective
17 date of the agreement.

18 **(c) A public-private partnership may not require the toll**
19 project entity to provide compensation for the construction of:

20 **(1) a project contained in the state transportation**
21 plan or a transportation plan of a metropolitan planning
22 organization in effect on the effective date of the public-private
23 partnership agreement;

24 **(2) work on or improvements to a highway project**
25 necessary for improved safety, or for maintenance or operational
26 purposes;

27 **(3) a high occupancy vehicle exclusive lane addition**

1 or other work on any highway project that is required by an
2 environmental regulatory agency;

3 (4) a transportation project that provides a mode of
4 transportation that is not included in the project that is the
5 subject of the public-private partnership; or

6 (5) a highway designated an interstate highway.

7 (d) The private entity has the burden of proving any loss of
8 toll revenue resulting from the construction of a highway project
9 described by Subsection (b).

10 (e) A public-private partnership that contains a provision
11 described by Subsection (b) must require the private entity to
12 provide compensation to the toll project entity in the amount of
13 any increase in toll revenues received by the private entity that
14 is attributable to the construction of a highway project described
15 by Subsection (b), less the private entity's increased operation
16 and maintenance costs attributable to the highway project, if any.

17 Sec. 373.059. TERMINATION BY PURCHASE. (a) A
18 public-private partnership agreement must contain a provision
19 authorizing the toll project entity to purchase, under terms
20 agreed to by the parties:

21 (1) the interest of a private entity in the toll
22 project that is the subject of the agreement; and

23 (2) related property, including any interest in a
24 highway or other facility designed, developed, financed,
25 constructed, operated, or maintained under the public-private
26 partnership agreement.

27 (b) The provision must include a schedule stating a specific

1 price for the purchase of the toll project at certain intervals
2 from the date the project opens, not less than one year and not to
3 exceed five years, over the term of the public-private partnership
4 agreement.

5 (c) The provision must authorize the toll project entity to
6 purchase the private entity's interest at a stated interval in an
7 amount not to exceed the lesser of:

8 (1) the price stated for that interval; or

9 (2) the then fair market value of the private entity's
10 interest, provided that the fair market value is not less than the
11 private entity's outstanding debt at that time, plus reasonable
12 costs associated with the purchase as defined in the public-private
13 partnership agreement.

14 (d) A toll project entity may not, under any circumstance,
15 purchase the private entity's interest for an amount higher than
16 the stated interval amount.

17 (e) A contract provision to purchase the private entity's
18 interest at the then fair market value as described by Subsection
19 (c)(2) must contain a provision, mutually agreed on by the toll
20 project entity and the private entity, detailing the calculation
21 used to determine that value.

22 (f) The toll project entity shall request a proposed
23 termination-by-purchase schedule in each request for detailed
24 proposals and shall consider and score each schedule in each
25 evaluation of proposals.

26 (g) A private entity shall, not later than 12 months before
27 the date that a new price interval takes effect, notify the toll

1 project entity of the beginning of the price interval. The toll
2 project entity must notify the private entity as to whether it will
3 exercise the option to purchase under this section not later than
4 six months after the date it receives notice under this subsection.

5 (h) A toll project entity must notify the private entity of
6 the toll project entity's intention to purchase the private
7 entity's interest under this section not less than six months
8 before the date of the purchase.

9 Sec. 373.060. TERMINATION OF CERTAIN PUBLIC-PRIVATE
10 PARTNERSHIPS. (a) If a toll project entity elects to terminate a
11 public-private partnership under which a private entity receives
12 the right to operate and collect revenue from a toll project, the
13 toll project entity may:

14 (1) issue bonds or other obligations to:
15 (A) make any applicable termination payments to
16 the private entity; or

17 (B) purchase the interest of the private entity
18 in the toll project or related property; or

19 (2) provide for the payment of obligations of the
20 private entity incurred pursuant to the public-private partnership
21 agreement.

22 (b) A toll project entity has the same powers and duties
23 relating to the financing of payments under Subsection (a)(1) as
24 the toll project entity has under other applicable laws of this
25 state, including Chapters 228, 284, 366, and 370 of this code and
26 Chapter 1371, Government Code, relating to the financing of a toll
27 project of that entity, including the ability to deposit the

1 proceeds of bonds or other obligations and to pledge, encumber, and
2 expend the proceeds and revenues of a toll project as provided by
3 law.

4 (c) The powers held by the toll project entity include the
5 power to authorize the issuance of bonds or other obligations and to
6 pay all or part of the costs of a payment described in Subsection
7 (a)(1), in the amount determined by the toll project entity. Costs
8 associated with a payment under Subsection (a)(1) are considered a
9 cost of the project.

10 (d) This section shall be liberally construed to effect its
11 purposes.

12 Sec. 373.061. ACQUISITION OF PROPERTY. The acquisition of
13 property for a toll project subject to a public-private partnership
14 under this chapter shall be subject to all other laws regarding the
15 acquisition and condemnation of property by the toll project
16 entity, including Chapter 21, Property Code.

17 Sec. 373.062. RULES, PROCEDURES, AND GUIDELINES GOVERNING
18 SELECTION AND NEGOTIATING PROCESS. (a) A toll project entity shall
19 adopt rules, procedures, and guidelines governing selection of a
20 private entity for a public-private partnership and negotiations to
21 promote fairness, obtain private participation in projects, and
22 promote confidence among private entities. The rules must contain
23 criteria relating to the qualifications of the participants and
24 the award of the contracts.

25 (b) The toll project entity shall have up-to-date
26 procedures for participation in negotiations under this chapter.

27 (c) The toll project entity has exclusive judgment to

1 determine the terms of a public-private partnership.

2 SECTION 2. Sections 223.201(a) and (b), Transportation
3 Code, are amended to read as follows:

4 (a) Subject to Section 223.202, the department may enter
5 into a comprehensive development agreement with a private entity to
6 design, develop, finance, construct, ~~maintain, repair, operate,~~
7 extend, or expand a:

8 (1) toll project; or

9 (2) ~~facility or a combination of facilities on the~~
10 ~~Trans-Texas Corridor;~~

11 ~~(3) state highway improvement project that includes~~
12 ~~both tolled and nontolled lanes and may include nontolled~~
13 ~~appurtenant facilities;~~

14 ~~(4) state highway improvement project in which the~~
15 ~~private entity has an interest in the project; or~~

16 ~~(5) state highway improvement project financed wholly~~
17 ~~or partly with the proceeds of private activity bonds, as defined by~~
18 ~~Section 141(a), Internal Revenue Code of 1986.~~

19 (b) In this subchapter, "comprehensive development
20 agreement" means an agreement that, at a minimum, provides for the
21 design and construction, rehabilitation, expansion, or improvement
22 of a project described in Subsection (a) and may also provide for
23 the financing, ~~acquisition, maintenance, or operation~~ of a project
24 described in Subsection (a).

25 SECTION 3. Section 284.003(a), Transportation Code, is
26 amended to read as follows:

27 (a) A county, acting through the commissioners court of the

1 county, or a local government corporation, without state approval,
2 supervision, or regulation, may:

3 (1) construct, acquire, improve, operate, maintain,
4 or pool a project located:

5 (A) exclusively in the county;

6 (B) in the county and outside the county; or

7 (C) in one or more counties adjacent to the
8 county;

9 (2) issue tax bonds, revenue bonds, or combination tax
10 and revenue bonds to pay the cost of the construction, acquisition,
11 or improvement of a project;

12 (3) impose tolls or charges as otherwise authorized by
13 this chapter;

14 (4) construct a bridge over a deepwater navigation
15 channel, if the bridge does not hinder maritime transportation;

16 (5) construct, acquire, or operate a ferry across a
17 deepwater navigation channel;

18 (6) in connection with a project, on adoption of an
19 order exercise the powers of a regional mobility authority
20 operating under Chapter 370; or

21 (7) enter into a comprehensive development agreement
22 with a private entity to design, develop, finance, construct,
23 maintain, repair, operate, extend, or expand a proposed or existing
24 project in the county to the extent and in the manner applicable to
25 the department under Chapter 223 or to a regional tollway authority
26 under Chapter 366, provided that a comprehensive development
27 agreement that provides for the design, construction, and financing

1 of a toll project and also provides for the acquisition,
2 maintenance, or operation of the project must comply with the
3 requirements of Chapter 373, Transportation Code.

4 SECTION 4. Sections 366.401, Transportation Code, is
5 amended by adding Subsection (e) to read as follows:

6 (e) A comprehensive development agreement entered into
7 pursuant to this subchapter that provides for the design,
8 construction, and financing of a toll project and also provides for
9 the acquisition, maintenance, or operation of the project must
10 comply with the requirements of Chapter 373, Transportation Code.

11 SECTION 5. Sections 370.305(a) and (b), Transportation
12 Code, are amended to read as follows:

13 (a) An authority may use a comprehensive development
14 agreement with a private entity to construct, ~~maintain, repair,~~
15 ~~operate,~~ extend, or expand a transportation project.

16 (b) A comprehensive development agreement is an agreement
17 with a private entity that, at a minimum, provides for the design
18 and construction of a transportation project and may also provide
19 for the financing, ~~acquisition, maintenance, or operation~~ of a
20 transportation project.

21 SECTION 6. Sections 223.201(f), (h) and (i), Transportation
22 Code, and Sections 370.305(d), (e) and (f), Transportation Code,
23 are repealed.

24 SECTION 7. This Act takes effect immediately if it receives
25 a vote of two-thirds of all the members elected to each house, as
26 provided by Section 39, Article III, Texas Constitution. If this
27 Act does not receive the vote necessary for immediate effect, this

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1 Act takes effect September 1, 2011.