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February 24, 2010

Bill Bilyeu
County Administrator
Collin County Commissioners Court
2300 Bloomdale Road, Suite 4192
McKinney, Texas 75071

RE: Tomlin Infrastructure Group LLC unsolicited proposal/Outer Loop

Dear Mr. Bilyeu:

This letter provides the legal opinion you have requested on five questions pending before the Collin County Commissioners Court. The questions concern an unsolicited proposal from the Tomlin Infrastructure Group LLC ("TIG") regarding Segment 3 of the Outer Loop. After discussing it with you, I am providing the answers in a very short opinion letter, to which I have added exhibits which provide the authority for the opinions expressed.

The questions are primarily concerned with the necessity or use of a comprehensive development agreement ("CDA") by the Collin County Tollroad Authority ("CCTRA"). As you know, the primary authority for the CCTRA is contained in Chapter 284 of the Texas Transportation Code. Chapter 284 also permits tollroad authorities to exercise the powers of a regional mobility authority under Chapter 370 of the Texas Transportation Code, which CCTRA has done with regard to the project defined as the Outer Loop. Chapter 284 also allows CCTRA to enter CDAs under the terms of either Chapter 223 relative to TxDOT, or Chapter 366, regarding a regional tollway authority (eg, the North Texas Tollway Authority). Chapter 370, regarding the regional mobility authority, also has provisions similar to 366 and 223 for the use of CDAs.

Two concepts are clear in looking at these various chapters and statutes. First, last year the legislature found it necessary to terminate TxDOT's ability, under Chapter 223, to enter into a CDA. That is primarily a result of the legislature's displeasure of the agreement reached by the governor's and TxDOT's negotiations with CINTRA, for the Trans-Texas Corridor. In addition, a regional mobility authority's ability to enter into a CDA expired last August, with a few exceptions, which in turn expire in August of 2011. It is clear that the legislature will take action against governmental entities whose actions are deemed by the legislature to be too favorable to the private party, and/or not in the best interest of the taxpayers.

The legislature provided in Chapters 223, 366 and 370 relatively clear directions for how those respective entities should have entered into CDAs. As the remaining authority we have for a CDA is contained in Chapter 366, I have included a copy of the provisions regarding the CDA from 366.401 as Exhibit A. The CDA approval process by TXDOT and RTC, discussed in Question 2, is set forth in Exhibit B. In the event an unsolicited proposal to design, build, and operate a tollroad is received, the county may not simply proceed to negotiate that agreement. First, the county must have, in place, a specific set of criteria needed and necessary for the evaluation of such a proposal to be sure that the county obtains the “best value”. Additional requirements are advertising in the Texas Register for competing proposals, and other provisions designed to be sure that the public is well-served by competitive, competing proposals. I have attached the criteria adopted by the RTC for the evaluation of CDA’s as Exhibit C.

With that introduction, let’s move to the specific questions. All references in the answers are to the Texas Transportation Code, unless otherwise noted. Any italics or boldface in the exhibits referenced in the answers is put there for emphasis, and your convenience in reviewing the documents.

1. Does the receipt of the unsolicited proposal from TIG trigger any requirement to respond to it?

ANSWER: No. Submitted as an “unsolicited proposal”, it is presumed that it is not submitted in response to any prior RFQ or RFP issued by the county. However, should the county wish to respond to it, the rules in Chapter 366, commencing at Section 401, should be followed (see Exhibit A). This includes the preparation and adoption of rules with which to evaluate such proposals, and advertising in the Texas Register (and elsewhere) for competing proposals, with such public input as may be necessary and appropriate. In discussing the receipt of the unsolicited proposal with you, we have been requested to prepare a list of the appropriate criteria, and will do so. If the county wishes to proceed with the negotiation with TIG, then the prerequisite is the adoption of that criteria, and the solicitation of competing proposals. Please see Exhibit C for an example from the RTC. The provisions of the NTTA are much more detailed.

2. Does the selection of a company to build, finance, and operate a toll road always trigger the requirements to use a comprehensive development agreement? If so, what is the degree of TxDOT or RTC approval? If the proposal instead is not comprehensive in nature, and is for building, or financing, or operating a tollroad, is a CDA necessary?

ANSWER:

(a) CCTRA Requirements for a CDA:

Section 284.003 provides that the CCTRA may enter into a CDA with a private entity to “design, develop, finance, construct, maintain, repair, operate, extend, or expand a proposed or existing project in the county...” This authorization, using the word “may”, does not suggest that the county has an alternative to not use a CDA and enter into a different agreement with a private entity to “comprehensively”, design, build, finance, and maintain a tollroad. The use of the word

“may”, suggests that the CDA route with a private entity is the alternative to the county building the road in the traditional manner of defining the project, issuing bonds, and using authorized procurement measures for awarding the contract of construction. The terms under which a CDA may be negotiated and approved by the CCTRA, require any proposal, unsolicited or otherwise, for comprehensive development of a tollroad should follow the rules noted above. Please see Exhibit A, for statutes applicable to CDAs for the Collin County Tollroad Authority. The definition of a CDA is set forth in Exhibit A, at section 366.401. The process for entering into a CDA is shown in Exhibit A, Section 366.402.

(b) Approval by the Texas Transportation Commission, TXDot, and RTC:

Section 284.003 of the code provides that the tollroad authority may essentially operate a county tollroad's business free of state approval. However, the statute then provides for some major exceptions.

A metropolitan planning organization (“MPO”), such as RTC, has the right and duty to review and approve any “action”, taken by the CCTRA under Chapter 284. This includes a project the subject of a CDA, if not the CDA itself, for the four issues over which the RTC has the ability under the statute to review: air quality, use of toll revenue, use of right-of-way and access to federal aid highways. On these matters, which are obviously significant for a project such as the Outer Loop, the MPO has approval powers. The MPO also has the ability to require compliance by the CCTRA with federal regulations, which includes environmental concerns through the National Environmental Protection Act (“NEPA”).

TxDOT is authorized to take any action deemed necessary to assure compliance with federal requirements to enable the state to receive federal funds. This “take action” provision does not suggest a direct ability to demand pre-approval of a CDA. However, TxDOT does have regulatory authority over any state highway funds, or work, on a state highway. Since the Texas Transportation Commission has the ability to declare any project under Chapter 284 a state highway (284.008), a CDA would have to be worded to protect the project's purposes in the event the Commission was inclined to do so.

There is not a specific section of 284 requiring TxDOT or RTA pre-approval of a CDA. There are several provisions which allow or require an “action” or “project” of the CCTRA to be reviewed, and would clearly include the ability to review a CDA which was the “action”, or authorizes the “project”.

It is also true that, as in many Texas Statutes, Chapter 284 has provisions which would appear to be in conflict with each other, causing potential confusion and concern. I have applied normal rules of construction (general language is controlled by specific terms, etc.) in my answer.

If the proposal is not “comprehensive”, then a CDA may not be required. Construction of a public toll road may be done as a normal procurement item, such as you use now to construct county roads. Whether financing or operating as separate items would require a CDA would depend on the terms negotiated. For example, the law

provides the toll rates and ultimate ownership of the road should not be left solely to a private party. (See 366.407, Terms of Private Participation, in Exhibit A)

3. Can the CCTRA solicit for a design build team and can that solicitation include ranking by the team's ability to finance the project?

ANSWER: Yes, the CCTRA may employ the design build method of procurement for a tollroad project, following state requirements for notice and opportunity to submit competing proposals for the award of the design build contract. As the county is required to obtain the “best value” for the project, and if the design build includes a proposal that the design build team also provide financing, it can be included. However, it is likely a design, build, finance proposal for a public tollroad would require the use of a CDA, rather than just the rules of procurement under design build. The question is at what point does the contract move from the design build of a public road to a more comprehensive approach of design, build, finance, and potentially operate a public road? The former is a matter of procurement. The latter is likely to cross the line into the requirement of a CDA. Details such as precisely how much input and control the court has over the design of the road, the establishment of tolls and their rates, and other operational issues would be important to determine before a CDA, or a no CDA, decision is made.

4. Can the CCTRA accept right of way or property and then guarantee the gifting entity the right to operate a toll road on the property for some number of years?

ANSWER: No, the provisions of Chapter 366.401 (et. seq.) regulate the county's obligation to solicit proposals. That obligation to solicit would negate any ability to “guarantee” the award of a lease or license for the operation of the tollroad to one entity. If, on the other hand, requests for solicitations are made in accordance with the statutes, and the gifting entity did meet those requirements, including those noted above in the answer to No. 2, providing the “best value” to the county, the CDA could be executed with the gifting entity. See Exhibit A for provisions of 366.401.

5. Without utilizing a private toll road corporation, can a private toll road operator set toll rates without CCTRA or other approval?

ANSWER: The CCTRA is required to establish tolls and finances as part of the CDA in accordance with 366.407 (see page 10 of this opinion), part of which is shown below:

“Sec. 366.407. TERMS OF PRIVATE PARTICIPATION. (a) An authority shall negotiate the terms of private participation in a turnpike project under this subchapter, including:

- (1) methods to determine the applicable cost, profit, and project distribution among the private participants and the authority;
- (2) reasonable methods to determine and classify toll rates and the responsibility for setting toll rates;.....”

And, the CDA must also address the following requirements from sections (f) and (g) of 366.407.

“(f) If an authority enters into a comprehensive development agreement with a private participant that includes the collection by the private participant of tolls for the use of a toll project, the private participant shall submit to the authority 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 participant 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) Except as provided by this subsection, a comprehensive development agreement with a private participant that includes the collection by the private participant 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 participant, not to exceed a total term of 52 years. The contract must contain an explicit mechanism for setting the price for the purchase by the department 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.”

In addition, 284.003 at (g) (on page 16 of this opinion) provides the RTC has approval powers over the use of toll revenue. Presuming for a moment the CDA dealing with the requirements above in 366.407 has been reviewed and approved by the RTC, there could be a provision in the CDA dealing specifically with subsequent review by the RTC of toll rate changes, or distribution of toll proceeds.

It should be noted that the RTC passed a resolution in 2005 promoting the NTTA as the preferred operator for toll roads.

I look forward to discussing this opinion with you and the court. Please let me know if there are any additional matters you would like me to include in the opinion.

Sincerely,

James E. Shepherd

Enclosures: Exhibit A – Chapter 366.400
Exhibit B – CDA Approval Process – Chapter 284
Exhibit C – CDA Approval Process of the RTC

SUBCHAPTER H. COMPREHENSIVE DEVELOPMENT AGREEMENTS

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

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

(c) An authority may negotiate provisions relating to professional and consulting services provided in connection with a comprehensive development agreement.

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

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

Sec. 366.402. PROCESS FOR ENTERING INTO COMPREHENSIVE DEVELOPMENT AGREEMENTS. (a) If an authority enters into a comprehensive development agreement, the authority shall use a competitive procurement process that provides the best value for the authority. An authority may accept unsolicited proposals for a proposed turnpike project or solicit proposals in accordance with this section.

(b) An authority shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

- (1) information regarding the proposed project location, scope, and limits;
- (2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project; and
- (3) any other information the authority considers relevant or necessary.

(c) An authority shall publish a notice advertising a request for competing proposals and qualifications in the Texas Register that includes the criteria to be used to evaluate the proposals, the relative weight given to the criteria, and a deadline by which proposals must be received if:

- (1) the authority decides to issue a request for qualifications for a proposed project; or
- (2) the authority authorizes the further evaluation of an unsolicited proposal.

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

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

(f) An authority shall issue a request for detailed proposals from all private entities qualified or shortlisted under Subsection (e) if the authority proceeds with the further evaluation of a proposed project. A request under this subsection may require additional information the authority considers relevant or necessary, including information relating to:

- (1) the private entity's qualifications and demonstrated technical competence;
- (2) the feasibility of developing the project as proposed;
- (3) engineering or architectural designs;
- (4) the private entity's ability to meet schedules; or
- (5) a financial plan, including costing methodology and cost proposals.

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

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

(i) An authority may enter into negotiations with the private entity whose proposal offers the apparent best value.

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

(k) An authority may withdraw a request for competing proposals and qualifications or a request for detailed proposals at any time. The authority may then publish a new request for competing proposals and qualifications.

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

(m) An authority may pay an unsuccessful private entity that submits a responsive proposal in response to a request for detailed proposals under Subsection (f) a stipulated amount in exchange for the work product contained in that proposal. A stipulated amount must be stated in the request for proposals and may not exceed the value of any work product contained in the proposal that can, as determined by the authority, be used by the authority in the performance of its functions. The use by the authority of any design element contained in an unsuccessful proposal is at the sole risk and discretion of the authority and does not confer liability on the recipient of the stipulated amount under this subsection. After payment of the stipulated amount:

(1) the authority, with the unsuccessful private entity, jointly owns the rights to, and may make use of any work product contained in, the proposal, including the technologies, techniques, methods, processes, ideas, and information contained in the project design; and

(2) the use by the unsuccessful private entity of any portion of the work product contained in the proposal is at the sole risk of the unsuccessful private entity and does not confer liability on the authority.

(n) An authority may prescribe the general form of a comprehensive development agreement and may include any matter the authority considers advantageous to the authority. The authority and the private entity shall finalize the specific terms of a comprehensive development agreement.

(o) Section 366.185 and Subchapter A, Chapter 223, of this code and Chapter 2254, Government Code, do not apply to a comprehensive development agreement entered into under this subchapter.

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

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

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Sections 366.402(b)(1) and (2), 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 comprehensive development agreement unless the private entity consents to the disclosure of the information or material; and

(3) information created or collected by an authority or its agent during consideration of a proposal for a comprehensive development agreement or during the authority's preparation of a proposal to the department relating to a comprehensive development agreement.

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

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

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

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

(2) protect:

(A) the authority; 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.

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

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

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

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

(f) In addition to, or instead of, performance and payment bonds, an authority may require the following alternative forms of security:

(1) a cashier's check drawn on a financial entity specified by the authority;

(2) a United States bond or note;

- (3) an irrevocable bank letter of credit; or
- (4) any other form of security determined suitable by the authority.

(g) An authority by rule shall prescribe requirements for alternative forms of security provided under this section.

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

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

(b) Notwithstanding Subsection (a), an authority may enter into an agreement that provides for the lease of rights-of-way, the granting of easements, the issuance of franchises, licenses, or permits, or any lawful uses to enable a private entity to construct, operate, and maintain a turnpike project, including supplemental facilities. At the termination of the agreement, the turnpike project, including the facilities, are to be in a state of proper maintenance as determined by the authority and shall be returned to the authority in satisfactory condition at no further cost.

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

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

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

Sec. 366.407. TERMS OF PRIVATE PARTICIPATION. (a) An authority shall negotiate the terms of private participation in a turnpike project under this subchapter, including:

- (1) methods to determine the applicable cost, profit, and project distribution among the private participants and the authority;
- (2) reasonable methods to determine and classify toll rates and the responsibility for setting toll rates;

(3) acceptable safety and policing standards; and
(4) other applicable professional, consulting, construction, operation, and maintenance standards, expenses, and costs.

(b) A comprehensive development agreement entered into under this subchapter may include any provision the authority considers appropriate, including a provision:

(1) providing for the purchase by the authority, under terms and conditions agreed to by the parties, of the interest of a private participant in the comprehensive development agreement and related property, including any interest in a turnpike project designed, developed, financed, constructed, operated, or maintained under the comprehensive development agreement;

(2) establishing the purchase price, as determined in accordance with the methodology established by the parties in the comprehensive development agreement, for the interest of a private participant in the comprehensive development agreement and related property;

(3) providing for the payment of an obligation incurred under the comprehensive development agreement, including an obligation to pay the purchase price for the interest of a private participant in the comprehensive development agreement, from any available source, including securing the obligation by a pledge of revenues of the authority derived from the applicable project, which pledge shall have priority as established by the authority;

(4) permitting the private participant to pledge its rights under the comprehensive development agreement;

(5) concerning the private participant's right to operate and collect revenue from the turnpike project; and

(6) restricting the right of the authority to terminate the private participant's right to operate and collect revenue from the turnpike project unless and until any applicable termination payments have been made.

(c) An authority may enter into a comprehensive development agreement under this subchapter with a private participant only if the project is identified in the department's unified transportation program or is located on a transportation corridor identified in the statewide transportation plan.

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

(e) Notwithstanding any other law, and subject to compliance with the dispute resolution procedures set out in the comprehensive development agreement, an obligation of an authority under a comprehensive development agreement entered into under this subchapter to

make or secure payments to a person because of the termination of the agreement, including the purchase of the interest of a private participant or other investor in a project, may be enforced by mandamus against the authority in a district court of any county of the authority, and the sovereign immunity of the authority is waived for that purpose. The district courts of any county of the authority shall have exclusive jurisdiction and venue over and to determine and adjudicate all issues necessary to adjudicate any action brought under this subsection. The remedy provided by this subsection is in addition to any legal and equitable remedies that may be available to a party to a comprehensive development agreement.

(f) If an authority enters into a comprehensive development agreement with a private participant that includes the collection by the private participant of tolls for the use of a toll project, the private participant shall submit to the authority 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 participant 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) Except as provided by this subsection, a comprehensive development agreement with a private participant that includes the collection by the private participant 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 participant, not to exceed a total term of 52 years. The contract must contain an explicit mechanism for setting the price for the purchase by the department 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.

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

Sec. 366.408. RULES, PROCEDURES, AND GUIDELINES GOVERNING SELECTION AND NEGOTIATING PROCESS. (a) To promote fairness, obtain private participants in turnpike projects, and promote confidence among those participants, an authority

shall adopt rules, procedures, and other guidelines governing selection of private participants for comprehensive development agreements and negotiations of comprehensive development agreements. The rules must contain criteria relating to the qualifications of the participants and the award of the contracts.

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

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

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

Sec. 366.409. USE OF CONTRACT PAYMENTS. (a) Payments received by an authority under a comprehensive development agreement shall be used by the authority to finance the construction, maintenance, or operation of a turnpike project or a highway.

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

Added by Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 9.03, eff. June 11, 2007.

CDA APPROVAL PROCESS

(Note---284.003 (a)and (e) are limited by (d) and (g) below.)

Sec. 284.003. PROJECT AUTHORIZED; CONSTRUCTION, OPERATION, AND COST. **(a) A county, acting through the commissioners court of the county, or a local government corporation, without state approval, supervision, or regulation, may:**

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

(A) exclusively in the county;

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

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

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

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

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

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

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

(7) enter into a comprehensive development agreement with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand a proposed or existing project in the county to the extent and in the manner applicable to the department under Chapter 223 or to a regional tollway authority under Chapter 366.

(Note—the department’s ability under 223 to enter into a CDA expired in 2009. The CCTRA would follow the rules in Ch. 366 to enter into a CDA, which are the rules which bind an RTA. I have attached those requirements as Exhibit A.)

(b) The county or a local government corporation may exercise a power provided by Subsection (a)(6) only in a manner consistent with the other powers provided by this chapter. To the extent of a conflict between this chapter and Chapter 370, this chapter prevails.

(c) A project or any portion of a project that is owned by the county and licensed or leased to a private entity or operated by a private entity under this chapter to provide transportation services to the general public is public property used for a public purpose and exempt from taxation by this state or a political subdivision of this state.

(d) If the county constructs, acquires, improves, operates, maintains, or pools a project under this chapter, before December 31 of each even-numbered year the county shall submit to the department a plan for the project that includes the time schedule for the project and describes the use of project funds. The plan may provide for and permit the use of project funds and other money, including state or federal funds, available to the county for roads, streets, highways, and other related facilities in the county that are not part of a project under this chapter. **A plan is not subject to approval, supervision, or regulation by the commission or the department, except that:**

(1) **any use of state or federal highway funds must be approved by the commission;**

(2) **any work on a highway in the state highway system must be approved by the department; and**

(3) **the department shall supervise and regulate work on a highway in the state highway system.**

(e) **Except as provided by federal law, an action of a county taken under this chapter is not subject to approval, supervision, or regulation by a metropolitan planning organization.**

(f) The county may enter into a protocol or other agreement with the commission or the department to implement this section through the cooperation of the parties to the agreement.

(g) **An action of a county taken under this chapter must comply with the requirements of applicable federal law. The foregoing compliance requirement shall apply to the role of metropolitan planning organizations under federal law, including the approval of projects for conformity to the state implementation plan relating to air quality, the use of toll revenue, and the use of the right-of-way of and access to federal-aid highways. Notwithstanding an action of a county taken under this chapter, the commission or department may take any action that is necessary in its reasonable judgment to comply with any federal requirement to enable the state to receive federal-aid highway funds.**

(Note—The section below states a CCTRA project, or any part of same, may be declared part of the state highway system by the Commission. This means any contract with a private party, CDA or otherwise, would need careful drafting to survive, should the commission take this action. See (3))

Sec. 284.008. POWERS OF COMMISSION. (a) **The commission may:**

(1) provide for and contribute toward the acquisition, construction, improvement, operation, maintenance, or pooling of a project under this chapter and under terms

to which the commission and the local government corporation or county agree that are consistent with the rights of bondholders or a person operating the project under a lease or other contract;

(2) lease a project under terms:

(A) to which the county or local government corporation acting under this chapter and the commission agree; and

(B) that are consistent with the bond instrument; and

(3) **declare any part of a project under this chapter to be a part of the state highway system and operate any part of a project as part of the state highway system, to the extent that property and contract rights in the project and bonds are not affected unfavorably.**

(b) Sections 222.031 and **284.003 do not limit the commission's authority to:**

(1) operate or maintain a project under this chapter; or

(2) contribute to the cost of acquisition, construction, improvement, maintenance, operation, or pooling of a project as provided by Subsection (a).

(c) **Except as provided by Subsection (d), a project becomes a part of the state highway system and the commission shall maintain the project without tolls when:**

(1) all of the bonds and interest on the bonds that are payable from or secured by revenues of the project have been paid by the issuer of the bonds or another person with the consent or approval of the issuer; or

(2) a sufficient amount for the payment of all bonds and the interest on the bonds to maturity has been set aside by the issuer of the bonds or another person with the consent or approval of the issuer in a trust fund held for the benefit of the bondholders.

(d) **A county may request that the commission adopt an order stating that a project will not become part of the state highway system under Subsection (c). If the commission adopts the order:**

(1) Section 362.051 does not apply to the project;

(2) the project must be maintained by the county; and

(3) the project will not become part of the state highway system unless the county transfers the project under Section 284.011.

Acts 1995, 74th Leg., ch. 165, Sec. 1, eff. Sept. 1, 1995.

Amended by:

Acts 2005, 79th Leg., Ch. 281, Sec. 2.49, eff. June 14, 2005.

Acts 2007, 80th Leg., R.S., Ch. 264, Sec. 8.04, eff. June 11, 2007

