

Senate Bill 792
80th Legislative Session

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SB 792 is the transportation bill passed by the 80th Texas Legislature after a very contentious session for transportation issues. The legislation will have a significant impact on toll authorities and the financing and development of toll roads in the state. Governor Perry signed the bill on June 11, 2007, and (with only minor exceptions) the provisions of the bill became effective when signed. Below is a summary of the legislation.

Concession CDA Moratorium

SB 792 places a moratorium on any CDA entered into on or after May 1, 2007 between a toll project entity (defined as TxDOT, RTAs, RMAs, or county toll authorities) and a private participant that allows the private participant to operate or collect revenue from the toll project. It also prohibits a toll project entity from selling a project to a private entity. Further, the legislation creates a legislative study committee to conduct public hearings and study the public policy implications of concession CDAs and prepare a written report by December 1, 2008. The moratorium provisions expire on September 1, 2009, which generally coincides with the scheduled review of TxDOT by the Sunset Advisory Commission.

There are exceptions to the moratorium for several projects, including:

- Projects associated with the Trinity Parkway in Dallas;
- Projects adding managed lanes to existing controlled access facilities in nonattainment or near nonattainment areas and for which an RFQ was issued prior to May 1, 2007;
- A project associated with Loop 9 (in Dallas)
- A project associated with any part of SH 99 (the “Grand Parkway” in Houston);
- A project associated with the portion of I-69 south of Refugio County;
- SH 161 in Dallas;
- A non-TTC project located in Grayson County;
- SH 121 in Dallas;
- A project located in a border county with a population of 300,000 or more (El Paso, Cameron, and Hidalgo Counties, provided that in El Paso the project must have been in an approved MPO plan prior to May 1, 2007).
- Projects for which a concession CDA was signed prior to May 1, 2007.

Market Valuation Process / Local Toll Project Entity (“LTPE”) Primacy

SB 792 provides that LTPEs (RMAs, RTAs, and county toll authorities) are to have primary responsibility (“primacy”) for toll project development within their areas. However, SB 792 contains a new procedure governing the development of toll projects called a market valuation (“MV”) analysis.

Unless otherwise agreed to by the LTPE and TxDOT, a MV must be conducted for all toll projects except those for which an RFQ was issued prior to May 1, 2007 and those projects specifically exempted in the bill (generally extensions of certain existing toll roads). The MV is to be based on terms agreed to by the LTPE and TxDOT for development, construction, and operation of a toll project, including initial toll rates; toll rate escalation; project scope; traffic & revenue projections; estimated cost to finance, construct, maintain and operate; market research; and other factors. The objective of the MV appears to be the quantification of the economic potential of a toll project (based on various factors) and the imposition of a requirement that the economic potential be captured and used to fund other projects in the region.

Overview of MV Process

Set forth below is a step-by-step overview of the MV process:

1. LTPE or TxDOT determines that a project should be developed as a toll project.
2. LTPE and TxDOT mutually agree on business terms for development of the project (including initial toll rates and toll rate escalation methodology).
 - If LTPE and TxDOT are unable to mutually agree on terms, neither the LTPE nor TxDOT may develop the project as a toll project.
3. LTPE and TxDOT mutually agree on a third party to develop a MV based on the agreed business terms (third party can be under contract with LTPE or TxDOT; but cannot have an investment in, or control or be controlled by, an entity that participates in the financing of the project subject to the MV).
 - If the LTPE and TxDOT are unable to agree on a third party to develop a MV, neither party may develop the project as a toll project.
4. LTPE and TxDOT have 90 days after receipt of draft MV to approve or negotiate a different valuation.
 - If the LTPE and TxDOT cannot agree on a valuation within 90 days, draft MV is deemed final and accepted.

5. ***RMA area only***: MPO shall determine whether toll project should be developed using the business terms in the MV.
 - If the MPO does not approve of development based on the business terms, neither party may develop the project as a toll project on those terms.
6. After MV is final (or MPO approves development in an RMA area under MV terms), LTPE has 6 months to exercise first option to develop project.
7. If option exercised and environmental review is not already underway, the environmental process must be started within 6 months of the exercise of the option.
8. If option exercised, within 2 years after completion of environmental LTPE must:
 - enter into a contract for construction of the project; and
 - either:
 - (i) commit to make a payment equal to the MV to a subaccount (held by TxDOT) to be used for other projects in the region;
 - (ii) commit to construct, within a period agreed to by TxDOT and the LTPE, projects in the region with construction costs equal to the MV amount; or
 - (iii) ***if in an RMA area***, for a period to be agreed to by TxDOT and the RMA, commit to using surplus revenues from the project to build additional transportation projects in an amount equal to the MV
9. If LTPE does not exercise option to develop or does not enter into a construction contract and make other commitments within 2 years, TxDOT has 2 months to exercise option to develop.
10. If TxDOT exercises option to develop, within 2 years after environmental is complete TxDOT must:
 - enter into a construction contract; and
 - either:
 - (i) commit to make a payment to a subaccount in an amount equal to the MV to be used for projects in the regions; or
 - (ii) commit to construct, within a period to be agreed upon by the LTPE and TxDOT, additional projects in an amount equal to the MV.
11. If TxDOT does not exercise the option to develop or fails to execute a construction contract or meet other commitments within 2 years, TxDOT and LTPE may meet again to determine revised business terms and re-start the MV analysis.

Other Issues Associated with MV and Toll Project Development

- LTPE shall be allowed to use state-owned ROW and access to the SHS.
- TxDOT may not require LTPE to pay for access to or use of ROW except to reimburse actual costs to be reimbursed to third parties.
- Parties must enter into an agreement for use of ROW; assure compliance with federal laws.
- LTPE and TxDOT may issue 30 year bonds to pay costs for projects under this section and to make deposits of MV amounts into subaccounts.
- Subaccounts are to be created in the state highway fund for each project, system or region; TxDOT holds it in trust for the region and “may” assign responsibility for allocating money in the subaccount to an MPO.
- Several HCTRA-related and NTTA projects are excluded from the MV analysis, as are projects for which an RFQ was issued prior to May 1, 2007.
- Section expires August 31, 2011.

Additional Provisions

In addition to the moratorium and MV provisions of SB 792, there are several other provisions which will be affect toll project development. The bill:

- Provides that concession CDA authority for TxDOT and RMAs expires August 31, 2009, but design/build CDA authority extends to August 31, 2011.
- Establishes the maximum term for CDAs at 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, and provides for the submission of alternative proposals having terms ranging from 10 to 50 years.
- Authorizes TxDOT to issue up to \$6 billion in bonds in an amount not to exceed \$1.5 billion each year (i.e., double the current authorization for “Ogden bonds”).
- Adds a new Chapter 371 to the Transportation Code, which applies to all toll project entities (TxDOT, RTAs, RMAs, and county toll authorities) and creates certain requirements that must be complied with prior to or in connection with entering into a CDA, including:
 - requiring a toll project entity to submit a CDA to the attorney general for review;
 - requiring submission of the names of short-listed proposers, a copy of the CDA, a copy of the proposal submitted by the apparent best value proposer, and a financial forecast to the Legislative Budget Board;
 - requiring submission of a traffic and revenue report to the state auditor;

- requiring development of a formula for making termination payments to terminate a concession CDA;
 - prohibiting a non-compete clause in a CDA (but permitting a CDA to provide for compensation for a loss of toll revenue attributable to development of certain projects and requiring payment by the concessionaire for an increase in revenue attributable to certain projects);
 - requiring disclosure of certain information and a public hearing on that information prior to entering into a contract;
 - permitting the issuance of bonds for purposes of making termination payments under a concession CDA.
- Makes the payment of a stipend by TxDOT or an RMA to an unsuccessful CDA proposer discretionary rather than mandatory.
 - Provides that contract payments or revenue received by the commission or TxDOT from CDAs must be used to finance projects in the region of the project generating the payments/revenue and establishes a formula for allocation of funds among department districts when a project is located in more than one district.
 - Requires MPOs to establish bylaws containing an ethics policy to prevent conflicts of interest among board members.

Provisions Affecting RMAs

Provisions of SB 792 affecting RMAs (many of which are discussed above) include:

- Concession CDA moratorium (except for specific projects listed).
- Primacy for development of toll projects.
- Access to state-owned ROW for projects without payment of compensation.
- MV required for toll projects.
- New Chapter 371 provisions requiring reporting, public hearings, restrictions and requirements for certain contract terms, etc.
- Statutory authority for concession CDAs expires August 31, 2009; design/build CDA authority preserved until August 31, 2011.
- CDA stipend payments become discretionary (rather than mandatory).

- Design-build procedures must not materially conflict with new procedures applicable to local governments.

Provisions Specific to TxDOT, RTAs, and County Toll Authorities

SB 792 contains several other provisions specific to TxDOT, RTAs, and county toll authorities, including:

- Requiring TxDOT to make public certain information related to the Trans-Texas Corridor.
- Provisions specific to particular projects undertaken by a county toll authority (exempting many from the MV process and establishing primacy for county toll authorities).
- Granting county toll authorities the right to exercise powers of RMAs and to enter into CDAs to the extent applicable to TxDOT or RTAs; authorizing the use of surplus revenues by county toll authorities for other road, street, or highway projects; granting county toll authorities the power of TxDOT with regard to participation in Trans-Texas Corridor projects; and granting county toll authorities the right to use state right-of-way.
- Provisions exempting several NTTA projects from the MV process (primarily extensions of existing projects)
- Granting RTAs the authority to enter into CDAs; authorizing the use of surplus revenues by RTAs for other road, street, or highway projects related to a toll project; permitting RTAs to procure a combination of engineering, design, and construction services in a single procurement and to let a contract for construction of a turnpike project by a construction manager-at-risk procedure; governing gifts and contributions to RTA directors; granting RTAs the right to use state right-of-way; and invalidating the TxDOT/NTTA Regional Protocol.

The foregoing is only a summary of SB 792. Interested parties should consult the text of the legislation for specific issues. Questions may be directed to Brian Cassidy, (512) 305-4855 (bcassidy@lockeliddell.com) or Lori Fixley Winland (512) 305-4718 (lwinland@lockeliddell.com)