

## **Comprehensive Development Agreements to Facilitate the Trans-Texas Corridor**

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The Texas Department of Transportation documents that lane miles on Texas highways increased by a mere 3 percent in the 1990s, while vehicle miles traveled in the state during that decade increased by more than 40 percent. Highway expansion is needed, and as part of the solution, Gov. Rick Perry has proposed construction of the Trans-Texas Corridor. According to its official website, the corridor is "a proposed multi-use, statewide network of transportation routes in Texas that will incorporate existing and new highways, railways and utility right-of-ways." Its estimated cost, at present, ranges from \$145 to \$180 billion.

With such an ambitious project, the question naturally arises as to how it should be financed. As Texans have consistently disfavored gas-tax increases, traditional sources of funding would prove inadequate. Through recent legislation, however, Texas has situated itself as a pioneer state by introducing an innovative paradigm to finance, build, operate and maintain major highways, the financial heart of which is toll revenue financing.

In June 2003 the Texas Legislature passed HB 3588, furnishing the state with financial mechanisms that would accelerate the desired transportation improvements. The law, ratified by a state constitutional amendment in September 2003, authorizes, among other things, a \$3 billion bond issue to be used for highway improvement projects and empowers Regional Mobility Authorities, entities charged with constructing, maintaining, and operating regional toll facilities, to issue revenue bonds backed by tolls as well as to enter into (until August 31, 2011) Comprehensive Development Agreements (formerly Exclusive Development Agreements) with private entities to design, construct and operate toll road facilities.

The Texas Transportation Code defines a CDA as "an agreement with a private entity that, at a minimum, provides for the design and construction of a transportation project and may also provide for the financing, acquisition, maintenance or operation of [such]." While governmental entities have traditionally relied on private contractors to execute public works projects, CDAs, as the name suggests, provide a streamlined project delivery method that significantly broadens the role and scope of the participation of private entities in public-private partnerships. Previously, transportation projects relied upon a bid-build concept. With CDAs, the emphasis shifts to a design-build philosophy, allowing the private entity a greater degree of involvement in and control over the transportation project, resulting, at least in theory, in fewer modifications once the project is under way.

The same general provisions that govern contractors in standard public works projects, delineated in the Government Code, apply to private entities under CDAs. Under the Transportation Code, such entities entering into a CDA with the appropriate governmental body must furnish security in order to protect both the governmental agency and payment bond beneficiaries. Such security can take the traditional form of performance and payment bonds, or may take an alternative form. (Note that no security is generally needed if the private party has engaged merely in design and planning.)

The legislation on CDAs takes special pains to emphasize the competitiveness and fairness of the process governmental bodies undergo to acquire and enter into CDAs. To begin, the government often solicits proposals for a project, but it can, following established rules and procedures, accept

unsolicited ones as well.

The ultimate goal for the government is to effectuate a competitive procurement process to obtain the best value. To this end, the legislation sets forth a selection process to make a best value determination. The inquiry includes the proposal price, but also considers factors such as the technical design or approach, the level and quality of innovation and the qualifications, experience and key personnel of the proposing entity.

There are at least two incentives for private parties to submit proposals on transportation projects. First, the legislation provides that the majority of information submitted in proposals and discussed during negotiations is confidential and undiscoverable. The legislation also mandates that the government pay even unsuccessful private entities who submit proposals a stipulated amount specified in its request for proposals for expenses incurred with proposal preparation.

Despite this payment and the rejection of their proposals, the unsuccessful entities lose exclusive rights to their work product. The government jointly owns the rights to any "technologies, techniques, methods, processes and information" contained in rejected proposals, while simultaneously disclaiming any liability incurred by the private entity who may, on its own, employ any portion of its proposal. In the same vein, once the governmental body accepts a proposal, it enjoys all rights to the proposal's content, which becomes the government's work product.

A governmental body such as an RMA, cannot only prescribe the general form of the CDA, it enjoys almost unlimited latitude in including whatever it considers to be advantageous. While the government and private parties agree to a CDA's terms only after negotiation, it is clear that the government retains the upper hand.