HOUSE
RESEARCH
ORGANIZATION bill analysis 5/22/2009

SB 404
Carona (W. Smith)
(CSSB 404 by W. Smith)

SUBJECT: Four-year extension for state's ability to enter into a CDA

COMMITTEE: Transportation — committee substitute recommended

VOTE: 8 ayes — Pickett, Phillips, Callegari, Dunnam, Guillen, Harper-Brown, Merritt, W. Smith

0 nays

3 absent — Y. Davis, McClendon, T. Smith

SENATE VOTE: On final passage, April 6 — 29-2 (Davis, Hegar)

WITNESSES: For — (*Registered, but did not testify:* Brian Cassidy, Alamo RMA; Central Texas RMA; Camino Real RMA; North East Texas RMA; Cameron County RMA)

Against — None

BACKGROUND: SB 792 by Williams, enacted by the 80th Legislature in 2007, placed a limited, two-year moratorium on the state's ability to enter into contracts that would authorize private entities to operate or collect revenue on toll roads. With some exceptions, the bill also accelerated, from August of 2011 to August of 2009, the expiration date for TxDOT's authority to enter into comprehensive development agreements (CDAs), which are contracts with private entities to finance, construct, maintain, operate, or expand a tolled highway project. It also limited the spending of revenue from these agreements to the geographic area in which the revenue was collected.

DIGEST: CSSB 404 would change the termination date, from August 31, 2009, to August 31, 2013, of the authority of the state to enter into comprehensive development agreements (CDAs). The bill also would change from August 31, 2011, to August 31, 2015, the termination date of the authority to enter into certain other CDAs, such as those in connection with a project located in an air quality nonattainment zone or for which TxDOT issued a request for qualifications prior to May 1, 2007.

The bill would take effect only if SB 17 or similar legislation relating to the design, development, financing, construction, and operation of certain toll projects became law. If the stated condition was met, the bill would take effect September 1, 2009.

SUPPORTERS SAY:

CSSB 404 would extend the state's ability to enter into CDAs with private entities for the development and operation of toll roads. Private financiers can bring abundant resources to toll projects that may be unavailable to the public sector. Many private toll road developers have international asset and capital bases that they may leverage to finance the initial acquisition and construction of toll facilities. Private toll road development agreements may bring the state more initial income in the form of concession agreements, provide the state a portion of ongoing revenue collections, and relieve the state from the responsibility of building or maintaining the road.

By leasing the rights to develop and operate toll projects to private entities, the state shields itself from the unavoidable risks associated with these projects. These risks are inherent in every aspect of toll development. Estimates of initial construction costs, maintenance and operation costs, the number of drivers willing to pay tolls, and the price drivers would pay to use toll roads are all unknown values that determine the ultimate profitability of the project.

Miscalculations in project planning and market studies could cause revenue forecasts to fall short, creating risks of project failure and bankruptcy. Leasing toll projects to private developers eliminates such risks for the state and provides revenue in the form of concession fees and other contractually specified returns. States may refuse to aid private toll operators who lease the rights to develop unprofitable toll roads. Florida, for example, has turned down requests for help from private toll developers.

Private developers often maintain and operate toll facilities more efficiently and consistently. Private entities have a vested interest in maintaining toll roads because deteriorating road quality affects the number of drivers using the road and the amount of revenue collected by the tolling authority. State maintenance of roads, by contrast, is subject to the vagaries of politics and the legislative appropriations process. Money may be directed to new road construction and away from maintenance and operation, and such diversions from maintenance could result in declining road quality over time.

The bill would include a provision making it contingent on the final enactment of SB 17 or similar legislation, which would create processes for selecting an entity to develop a toll project and by what means it would be developed. CSSB 17 would present a balanced approach to public and private toll road development in the state. The bill would retain primacy for local tolling authorities over private entities while allowing the latter to develop toll projects in the event that local tolling authorities were not interested in or able to develop eligible projects. The balance achieved in CSSB 17, however, would depend on the successful extension of CDA authority in CSSB 404.

OPPONENTS SAY:

CSSB 404 would continue the flawed practice of turning over valued public assets to the private sector. The value of the transportation assets the state loses by leasing out development rights for toll roads usually exceeds any benefits it might enjoy as a result of ceding such rights. The capacity of private financing to minimize the risks inherent in developing a toll road is overstated. Private developers are not likely to gamble with toll roads that they do not expect to yield significant net profits over their lifetime, and it is unlikely that the state could deny credibly financial or contractual assistance to a private interest operating a failing tollway. Toll projects that do not expect to yield generous returns on investment are not sought as aggressively by private interests.

Because roads are built only at great public expense and are built on rights-of-way often acquired through eminent domain, and because roads act as critical public assets by giving motorists access to important destinations, the state is deeply invested in their continued, viable operation. As a result, the notion that the state simply could deny requests for intervention or assistance that, if withheld, could lead to the failure and closure of a tollway is highly questionable. If a private company leased a toll project that failed to be profitable, the state would be compelled to take on the expense of buying out the private entity and assume maintenance of the road or to amend the contract to include terms more favorable to the private interest.

The best course for toll road development is to restrict the option of development only to local tolling authorities. Local, public tolling authorities share pressures to maintain toll roads as time passes, and they have more flexibility and self-determination in decision-making than does the state. Local, public tolling authorities also provide for the recirculation of revenue from toll roads into the maintenance of local transportation infrastructure. Successful public toll roads become future engines of transportation funding, while privately funded toll roads export revenue to shareholders.

OTHER OPPONENTS SAY:

SB 17 would preserve the misdirected option of developing toll roads for local tolling authorities or by private entities through CDAs. Toll roads are an unfair form of double-taxation and impose exorbitant fees on users who become compelled by worsening congestion on public non-tolled roads to pay for use of toll roads. Recent policies pushing the construction of most or all new highways as toll projects are resulting in reduced choices for Texas consumers.

The bill would be one more measure that avoids addressing the core issue facing the state — a motor fuels tax that has been declining in relative value since 1991. The state needs to address the core issue facing highway funding and increase or index to inflation the motor fuels tax, preferably both. Continuing the flawed policy of developing new roads as tolled roads at every opportunity has troubling implications for future mobility and the long-term economic health of the state.

NOTES:

The House committee substitute changed the Senate-passed version by reducing the extension of the state's ability to enter into a CDA from six years to four years.