

Date of Hearing: April 24, 2017

ASSEMBLY COMMITTEE ON TRANSPORTATION

Jim Frazier, Chair

AB 1454 (Bloom) – As Amended March 21, 2017

SUBJECT: Transportation projects: lease agreements

SUMMARY: Deletes the January 1, 2017, sunset date on provisions that previously authorized public-private partnership (P3s) agreements for transportation.

EXISTING LAW:

- 1) Defines key terms, most notably the following:
 - a) "Transportation project" to mean one or more of the following: planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of highway, public street, rail, or related facilities supplemental to existing facilities currently owned and operated by the California Department of Transportation (Caltrans) or regional transportation agencies; and
 - b) "Public Infrastructure Advisory Commission" to mean an entity established by the California State Transportation Agency to advise Caltrans and regional transportation agencies
- 2) Vests the Public Infrastructure Advisory Commission with responsibilities related to disseminating information regarding P3 experiences and research.
- 3) Until January 1, 2017, granted Caltrans and regional transportation agencies, as defined, authority to enter into P3 agreements--that is, comprehensive development lease agreements with public or private entities, or consortia thereof, under the following conditions:
 - a) The California Transportation Commission (CTC) must review and approve proposed P3 projects;
 - b) Proposed projects must be primarily designed to improve mobility, improve the operations or safety of the affected corridor, and provide quantifiable air quality benefits; and,
 - c) Proposed projects must also address known forecast demands.
- 2) Prescribes the review and approval process for proposed P3 agreements.
- 3) For projects on the state highway system, requires Caltrans to be the responsible agency for performance of project development work, including the development of performance specifications, preliminary engineering, prebid services, environmental documents, and construction inspection services; authorizes Caltrans to do the work using in-house employees or contractors.

- 4) Provides that no agreement may infringe on the authority of Caltrans or a regional transportation agency to develop, maintain, repair, rehabilitate, operate, or lease any transportation projects.
- 5) Authorizes lease agreements to provide for reasonable compensation to the contracting entity for adverse effects on toll revenue or use fee revenue due to another project, with the following exceptions:
 - a) Projects identified in the applicable regional transportation plan;
 - b) Safety projects;
 - c) Improvement projects that will result in incidental capacity increases;
 - d) Additional high-occupancy vehicle (HOV) lanes or the conversion of existing lanes to HOV lanes; or,
 - e) Projects located outside the boundaries of the P3 project, as determined by the lease agreement.
- 6) Requires all P3 agreements to authorize the use of tolls and user fees for the use of the facility being constructed.
- 7) Provides that all P3 agreements must require that any excess toll or user fee revenue be paid to the State Highway Account except that any excess revenue under a lease agreement with a regional transportation agency may be paid to the regional transportation agency for use in improving public transportation near the project.
- 8) Sets forth other, related requirements of P3 agreements.
- 9) Clarifies that the authority to enter into P3s does not translate into authority to allow the conversion of any existing non-tolled lane, with the exception of high-occupancy vehicle lanes that may be converted to high-occupancy toll lanes.

FISCAL EFFECT: In an earlier, virtually identical bill, AB 1265 (Perea) of 2015, the Assembly Appropriations Committee noted the following fiscal effect:

"Indeterminate future costs or savings depending on the outcomes of the projects selected for future P3s as opposed to other procurement methods that might have been used on those projects. Given that these are likely to be large, complex projects, the costs or savings could be significant."

COMMENTS: California's first venture into P3s for transportation was with AB 680 (Baker), Chapter 107, Statutes of 1989, which authorized Caltrans to enter into P3 agreements for up to four projects. Caltrans built two projects under this authorization. The first project was ten miles of tolled express lanes in the median of the existing State Route (SR) 91 in Orange County and the subsequent project was SR 125 in San Diego County to connect the area near the Otay Mesa border crossing with the state highway system. For each project, Caltrans used a single contract with a private partner to design, construct, finance, operate, and maintain the facility.

AB 1467 (Núñez), Chapter 32, Statutes of 2006, authorized, until January 1, 2012, Caltrans and regional transportation agencies to enter into P3 for transportation projects designed to improve goods movement. Projects were limited to two in northern California and two in southern California. Three toll lane applications (in Riverside, San Diego, and Los Angeles counties) were authorized under this authority.

In 2009, authority to enter into P3 agreements for transportation was expanded. Specifically, SB 2X 4, (Cogdill), Chapter 2, Statutes of 2009, authorized Caltrans and regional transportation agencies to enter into an unlimited number of P3 agreements for a broad range of highway, road, and transit projects, through December 31, 2016. In January 2011, Caltrans entered into its first P3 under this new authority for the Presidio Parkway project, a 1.6-mile segment of SR 101 that connects the Golden Gate Bridge to city streets in San Francisco. This particular P3 requires the private partner to complete the second phase of the design and reconstruction of the southern approach to the Golden Gate Bridge and to operate and maintain the roadway for 30 years. In exchange, the state will make payments estimated to total roughly \$1.1 billion to the private partner over the life of the contract.

In a 2012 report entitled "Maximizing State Benefits from Public-Private Partnerships," the Legislative Analyst's Office (LAO) examined the two state infrastructure projects undertaken in recent years using P3 agreements, one of them being the Presidio Parkway project which used the authority granted under SB 2X 4. In this examination, the LAO cites a number of potential benefits of successful P3 agreements, including:

- 1) They can transfer project risks to the private partner;
- 2) They may provide greater price and schedule certainty;
- 3) They allow for more innovative design and construction techniques;
- 4) They can free up public funds for other purposes;
- 5) They can provide quicker access to project financing; and,
- 6) They can provide a higher level of maintenance than might otherwise be provided.

The LAO also, noted, however, that P3 agreements are not without their potential drawbacks, including:

- 1) Increased financing costs;
- 2) Greater possibility of unforeseen challenges (due primarily to the extended time periods involved in P3 agreements);
- 3) Limits to government's flexibility;
- 4) Greater risks due to more complex procurement processes; and,
- 5) Fewer bidders.

The author introduced this bill to re-authorize P3 authority because he believes previous P3 "partnerships have been a critical tool to deliver transportation projects across the state."

Writing in opposition of the bill unless it is amended, the Professional Engineers California Government (PECG) argues that this bill lacks clarity regarding Caltrans' responsibilities for construction inspection. PECG is requesting amendments that borrow from previous legislation [AB 401 (Daly), Chapter 586, Statutes of 2013] in which these responsibilities were clarified.

PECG's proposed amendments are meant to address a 2011 court ruling in response to litigation it prompted regarding P3 statutes. In its lawsuit, PECG alleged that Caltrans did not have authority to enter into a P3 agreement on the Presidio Parkway project. As evidence, PECG pointed to existing law that reads, in part, "...for projects on the state highway system, the department is the responsible agency for the performance of project development services..." PECG argued that, because Caltrans did not perform pre-development work on this project, the department did not, therefore, have the authority to enter into a P3 agreement. The court disagreed with PECG and ruled that existing law does not require Caltrans to actually *perform* the work, only to be *responsible for the performance* of the work, as in, exert supervisory control of the work. The court found that Caltrans fulfilled this requirement by virtue of being the owner of the system and by entering into cooperative agreements for any work done by others on the system.

PECG's proposed amendments would explicitly state that Caltrans shall perform construction inspection services, using either employees or contractors.

Committee comments: It would be difficult to argue that California's experiences with P3 transportation projects have been unqualified successes. Each was heavily embroiled in litigation and each was subjected to criticisms of excessive costs, insufficient risk transference, and prolonged delays. (In fairness, however, these same criticisms could be applied to virtually all of California's large, complex transportation projects, independent of the procurement or financing methods used to develop and construct them.)

Related legislation: AB 496 (Fong), among other things, re-authorizes P3 agreements until 2030. AB 496 is not set for a hearing in this committee.

SB 422 (Wilk) and SB 768 (Allen) are very nearly identical to this bill. Both bills are scheduled to be heard in Senate Transportation and Housing on April 25, 2017.

Previous legislation: AB 749 (Gorell) of 2013 would have extended the sunset date for provisions that grant authority to Caltrans and to others to enter into P3s for transportation projects. AB 749 was referred to this committee but was not heard at the request of the author.

SBX2 4 (Cogdill), Chapter 2, Statutes of 2009, authorized, until January 1, 2017, Caltrans and regional transportation agencies to enter into an unlimited number of P3 agreements. To date, only one project, the Presidio Parkway, has been approved under this authority.

AB 1467 (Núñez), Chapter 32, Statutes of 2006, authorized, until January 1, 2012, Caltrans and regional transportation agencies to enter into P3 agreements for certain transportation projects.

AB 680 (Baker), Chapter 107, Statutes of 1989, authorized Caltrans to enter into P3 agreements for up to four projects. Caltrans built two projects under this authorization.

REGISTERED SUPPORT / OPPOSITION:

Support

Associated General Contractors, California and San Diego chapters

Opposition

American Federation of State, County, and Municipal Employees
California School Employees Association
Professional Engineers in California Government

Analysis Prepared by: Janet Dawson / TRANS. /