

Date of Hearing: April 11, 2016

ASSEMBLY COMMITTEE ON TRANSPORTATION

Jim Frazier, Chair

AB 2742 (Nazarian) – As Introduced February 19, 2016

**SUBJECT:** Transportation projects: comprehensive development lease agreements

**SUMMARY:** Extends the sunset date on provisions that authorize public-private partnership (P3) agreements for transportation. Specifically, **this bill:**

- 1) Extends from 2017 to 2030 the sunset date on provisions that authorize the California Department of Transportation (Caltrans) and regional transportation authorities to enter into P3 agreements for transportation.
- 2) Adds Santa Clara Valley Transportation Authority (VTA) to the list of regional transportation agencies that are authorized to use P3 authority.
- 3) Exempts P3 agreements from non-applicable provisions of existing law governing the Caltrans' and regional transportation agencies' use of design-build contracting authority.
- 4) Delete obsolete provisions.

**EXISTING LAW:**

- 1) Defines key terms, most notably "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 Caltrans or regional transportation agencies.
- 2) Until January 1, 2017, grants 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 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) Requires all P3 agreements to authorize the use of tolls and user fees for the use of the facility being constructed.

**FISCAL EFFECT:** Unknown

**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.

In 2009, authority to enter into P3 agreements for transportation was expanded. Specifically, SBX2 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 that used the authority granted under SBX2 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 AB 2742 so that P3 agreements can continue as a viable option for state and regional transportation agencies to fund transportation infrastructure when other funds are not readily available. According to the author, "California's transportation infrastructure—consisting of streets, highways, bridges, and transit operations—is suffering a shortage of necessary investments for the operations and maintenance of existing facilities and dedicated funding sources for new improvements. The extension of P3s will give California another tool in its toolbox to meet its ambitious transportation infrastructure goals and remain competitive in the global marketplace." AB 2742 is supported by a number of transportation agencies and industry organizations that contend P3 authority is an important tool in delivering complex projects in a cost-effective and expeditious manner.

Opponents of AB 2742 argue that P3 agreements by their very nature result in work that is traditionally performed by public employees being outsourced to private entities. They also object to provisions of the bill that exempt P3s from certain requirements governing design-build authority, as set forth in AB 401 (Daly), Chapter 586, Statutes of 2013. These requirements ensure that public employees maintain responsibilities for specific aspects of design-build projects entered into by Caltrans or a regional transportation agency. On this note, the Professional Engineers in California Government (PECG), writing in opposition to AB 2742 unless it is amended, believes the role of construction inspection is a critical government function that is necessary on any infrastructure project, particularly on complex P3 projects. PECG is seeking amendments to ensure this function remains the responsibility of public employees.

*Committee comments:*

- 1) 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.
- 2) Regarding the opponents' concerns that this bill circumvents statutory protections for public employees that were set forth in AB 401, it is worth noting that AB 2742 exempts P3 agreements from provisions related to design-build contracts *entered into by Caltrans or by regional transportation agencies*. These are not the agencies that would typically be entering into a design-build contract under a P3 agreement. These agencies would enter into a P3 agreement with the *contracting entity or lessee* who would, in turn, use design-build authority, as is provided for in AB 2742. The exemptions provided for in AB 2742 are

technically and logically accurate. Whether or not similar provisions should or should not apply to P3 agreements is another matter.

*Related legislation:* AB 1265 (Perea) of 2015 was identical to this bill. AB 1265 was returned to the Chief Clerk by the Assembly Appropriations Committee pursuant to Joint Rule 56.

ABX1 2 (Perea), which is identical to AB 2742, is pending in the First Extraordinary Session.

SBX1 14 (Cannella), nearly identical to this bill, would extend P3 authority indefinitely.

SBX1 14 is pending in the Senate Transportation and Infrastructure Development Committee.

SB 158 (Huff), which would provide a narrow exception to the 2017 sunset date for P3s. SB 158 was returned to the Secretary of the Senate by the Senate Transportation and Housing Committee pursuant to Joint Rule 56.

*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.

AB 401 (Daly), Chapter 586, Statutes of 2013, authorizes Caltrans and regional transportation agencies to use design-build procurements for highways and expressways, under certain conditions.

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 (Nunez), 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 Transportation Commission  
Los Angeles County Metropolitan Transportation Authority  
Mobility 21  
Orange County Transportation Authority  
Santa Clara Valley Transportation Authority  
Transportation Agency for Monterey County  
Transportation California

**Opposition**

American Federation of State, County and Municipal Employees, AFL-CIO  
California State Council of the Service Employees International Union  
Professional Engineers in California Government

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