Texas Department of Transportation

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May 4, 2007

The Honorable Fred Hill
Texas House of Representatives
P.O. Box 2910
Austin, TX 78768

Dear Chairman Hill:

Thank you for your letter requesting the Texas Department of Transportation (TxDOT) to provide an analysis of the effect of HB 1892 on projects in your region. In short, this bill will delay projects currently under procurement within the Dallas-Fort Worth region, and may cause some projects to be halted altogether. Despite changes made in the Senate, allowing subdivisions of local government to take over the state highway system challenges the framework of federal statute and puts the state in violation of federal laws. Furthermore, the bill represents a significant departure from the way projects in metropolitan areas are currently planned, funded, and constructed. Details on each project are provided below.

SH 121 CDA: This project is farthest along in the procurement process, a best value proposer has been selected, and we were planning to execute the contract as early as June.

First, if this bill becomes law, we will have to begin negotiating the required changes to the SH 121 CDA with Cintra. This will lengthen the development timeline of the project, and at this point we are uncertain how long negotiations might take, or whether Cintra will agree to the changed terms. The three primary provisions in the contract that must be changed are: the competing facilities provisions, the formula for determining termination compensation (the "buyback formula"), and the 50 year operations term in the contract. Currently, under the terms determined by the Regional Transportation Council (RTC), Cintra would be authorized to operate the project for 50 years, beginning when the first segment of the project is opened to traffic. Under the language in HB 1892, the 50 years must start as soon as the contract is executed, effectively reducing the term by several years.

Second, the buyback formula specified by HB 1892 may not include an estimate of future revenue from the project. This materially impacts the risk to Cintra that the state will terminate the contract at some future date, and results in termination compensation significantly lower than contemplated when Cintra submitted its proposal. Cintra will have to price this risk and will either reduce the concession fee accordingly or decide to withdraw their proposal. The buyback requirement is such a stark change in the CDA program we feel this bill may prevent the state from entering into any concession agreements in the future.

Third, the scope of the re-negotiations could open up the procurement to protest by one or more proposers. Since the terms will change significantly, it is also possible that Cintra will decide not to move forward with the execution of the CDA, or the Federal Highway Administration could direct us to cancel the CDA procurement. In either of these cases, we would have to restart the approximate 12-18 month procurement process to match the new terms required under the bill.

Fourth, if this bill becomes law, and if there is a concession payment, we will have to notify the RTC that only projects in the TxDOT Dallas District are eligible to use funds from the SH 121 CDA. Since HB 1892 mandates that concession payments must be spent in the department district where the project is located and since the SH 121 project is located solely within the Dallas TxDOT District, the RTC may only use these funds on projects within the Dallas District. As you may be aware, the RTC intended to use some of the concession payment from SH 121 on projects in the Forth Worth District. As a result, these projects in the Fort Worth District will be placed on hold until other funding can be identified.

SH 161 CDA: We were expecting to ask the short list of proposers to provide us their detailed proposals this fall. However, the terms on this CDA must be changed in the middle of this procurement, in the same way that the SH 121 terms must be changed. These term changes will likely result in the need for a state cash subsidy to cover project shortfalls. At this point in time no such funds have been identified. The same risk of protest exists for this project as well. In addition, the bill requires us to allow the North Texas Tollway Authority (NTTA) three months to decide if they want to develop the project, and six months to enter into a contract. If NTTA is unable to meet these deadlines, we may not have enough time to go through another procurement process on the project before our authority to enter into CDAs expires. In addition, the uncertainty with respect to the role of NTTA in the SH 161 procurement may cause proposers to withdraw from the procurement. They have expressed significant concern regarding the fairness of the procurement process given NTTA's inclusion. A reduction in the number of proposers will materially influence the competitive nature of the CDA process, costing the state both value and innovation.

Loop 9 CDA: A Request for Qualifications has not been issued for Loop 9. However, Cintra, as part of the TTC-35 CDA development contract and Master Development Plan, has proposed that this project is ready for development. We are currently reviewing information provided by Cintra and will soon make a decision about whether to allow Cintra to self-perform the project as a connecting facility to the TTC-35 project or to ask for competitive proposals from the private sector.

Regardless, our financial analysis shows that the new 40 year term requirement for this project would reduce the project's feasibility and require a cash subsidy from the state. Until funding becomes available for the project, it will be placed on hold. As you know, this project has been on the planning books for 20 years and the RTC has indicated this project is vital to the region.

Managed Lanes: DFW Connector, North Tarrant Express, and IH-635. These projects are in various stages of development, with the IH-635 managed lanes farthest along in the process. The same actions that will be taken on SH 161 will be taken with these projects, including the need for a state cash subsidy to cover project shortfalls. One item of note is that the RTC had planned to use $28 million from the SH 121 concession payment on the DFW Connector. However, since this project is within the Fort Worth TxDOT district, the concession payment cannot be spent on the DFW Connector. As a result, the RTC and TxDOT will have to reallocate funding for the shortfall that will result from this bill's enactment.

Funding of Other Projects with Concession Fees: You asked how projects that were planning to be funded using concession fees will be affected. If the SH 121 CDA is delayed and the concession fee reduced, many of the non-tolled projects that the RTC intended to fund with those payments will no longer have funding. The RTC will have to make decisions on the projects to cut. Delaying the construction of these projects and the other projects discussed in this letter may have significant adverse environmental impacts, including impacts on the region's ability to meet air quality standards.

Development of Other Projects: You asked how this bill will affect the development of projects planned beyond the moratorium since the moratorium will have lasting effects beyond two years. The moratorium expires the day after the state's authority to enter into CDAs expires. Unless the legislature takes a positive action to renew the program in 2009, there will be no new CDA projects. Also, given the current climate developers will be very slow to return to Texas, if they return at all. Florida, Virginia, Georgia, and California, among others, are all aggressively seeking to supplement their transportation systems through private development. It is likely that by the time the moratorium expires and the legislature renews the CDA program in Texas, investors will have made decisions to invest their funds in those states rather than Texas.

As you know, the RTC has asked us to evaluate SH 183, IH-30/US80, US 67, SH 170, and SH 360 as part of our CDA program. Development on these projects will cease until a new funding source is identified for these projects.

Rail Projects: Cintra, as part of the TTC-35 CDA development contract and Master Development Plan, has proposed a major rail project from North of Fort Worth to Laredo. We are currently reviewing information provided by Cintra and will soon make a decision about whether to allow Cintra to self-perform the project as a connecting facility to the TTC-35 project or to ask for competitive proposals from the private sector. If we authorize Cintra to move forward, the Tower 55 problem in Fort Worth will be eliminated. However, we were examining 50-70 year term lengths on this project in order to make it financially feasible. If the term is limited to 40 years, this project will require a large subsidy from the state in order to be built. As a result, until funding can be identified development on this project will cease.

Political Subdivision Use of State Right of Way: Even with the inclusion of broad statements in the bill that attempt to help the state comply with federal law, a prevailing concern with regard to the sweeping powers and unilateral decision making of counties, regional mobility authorities, and regional tollway authorities under HB 1892 is an obvious violation of the intent of federal law regarding the state's ultimate responsibility for transportation systems. Under those regulations, the state department of transportation's charge is to provide a seamless transportation network that connects people and goods to places around the state. This bill fractures the state's ability to ensure that this goal is met.

The ability of local and regional entities to exercise unilateral authority under HB 1892 to use existing state right of way also results in an encumbrance on TxDOT property that will raise the cost of issuing toll revenue bonds or prevent their issuance altogether, will possibly preclude the execution of pass-through toll agreements, and will adversely affect the state's negotiating position in a CDA.

Future adverse impacts: You asked if there will be any other potential adverse impacts on transportation in the region. Unless the legislature renews the CDA program in 2009 or provides a new funding source for transportation, the state will be able to invest very few dollars in new capacity on the state highway system in the near future. In 2010, $435 million will be available for new capacity in the state; in 2011, $388 million will be available; in 2012, $170 million will be available, and in 2013, only $34 million will be available for new capacity in the entire state. The rising costs to maintain the current system, greater usage of the system, and federal funding rescissions mean that as time goes on, more traditional funding is shifted to preserving the current system rather than reducing congestion on our already over burdened highway system.

In summary, all of the projects discussed above may experience delays of months if not years. It's also possible that some projects will never be built if new funding sources are not provided. Thank you for the opportunity to comment.

Sincerely,

M. W. Behrens

Michael W. Behrens, P.E.
Executive Director

cc: Maribel P. Chavez, P.E., Fort Worth District Engineer, TxDOT
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