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May 24, 2019

The Honorable Bob Hall
Chair, Committee on Agriculture
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

The Honorable Lois Kolkhorst
Chair, Committee on Public Health
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0253

Re: Whether the Texas Transportation Commission is authorized to enter into a facility agreement under the North Tarrant Express Comprehensive Development Agreement (RQ-0281-KP)

Dear Senator Hall and Senator Kolkhorst:

You ask whether the Texas Department of Transportation (the "Department") "has legal authority to enter into another facility agreement under the North Tarrant Express Comprehensive Development Agreement . . . when authority to enter into such contracts expired on August 31, 2017,"¹ per Senate Bill 1730 ("S.B. 1730"), passed by the Eighty-third Legislature.²

Chapter 223, subchapter E of the Transportation Code governs the Department's authority to enter into comprehensive development agreements with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand certain highway projects. *See generally* TEX. TRANSP. CODE §§ 223.201–.209. The Legislature originally authorized the Department to enter into comprehensive development agreements in 2005 for a limited time period.³ You note that S.B. 1730, enacted by the Eighty-third Legislature in 2013, extinguished the Department's authority to enter into any new comprehensive development agreements after August 31, 2017. Request Letter at 1; S.B. 1730 (amending TEX. TRANSP. CODE § 223.201(i)). However, S.B. 1730 did not invalidate agreements entered into prior to that date. *See* S.B. 1730.

The Department entered into the North Tarrant Express Comprehensive Development Agreement on June 23, 2009, and that agreement remains operational. *See* TEX. TRANSP. CODE

¹Letter from Honorable Bob Hall, Chair, Senate Comm. on Agric., & Honorable Lois Kolkhorst, Chair, Senate Comm. on Pub. Health, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Apr. 2, 2019) <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

²*See* Act of May 23, 2013, 83d Leg., R.S., ch. 1234, § 1, 2013 Tex. Gen. Laws 3113, 3114.

³*See* Act of May 29, 2005, 79th Leg., R.S., ch. 281, § 2.21, 2005 Tex. Gen. Laws 778, 790–91.

§ 223.2012(a). In 2011, the Legislature enacted section 223.2012 of the Transportation Code, providing specific authority and direction to the Department for the North Tarrant Express Project. *See id.* In that section, the Legislature authorized the comprehensive development agreement to “provide for negotiating and entering into facility agreements for future phases or segments of the project at the times that the department considers advantageous to the department.” *Id.* § 223.2012(b). Thus, the Legislature acknowledged that while the Department entered into the comprehensive development agreement in 2009, it would need ongoing authority to enter into facility agreements for specific phases of the project in the future.⁴ Through section 223.2012(b) of the Transportation Code, the Legislature granted the Department legal authority to enter into facility agreements under the North Tarrant Express Comprehensive Development Agreement when the Department considers it advantageous to do so. *See id.*

In addition to asking about authority to enter into facility agreements, you explain that the Department is using “a change order to the original facility agreement to expand the scope of work.” Request Letter at 1. You question whether the Department’s procedure is a permissible means to expand the scope of work under an existing facility agreement. *Id.* at 3. Chapter 223, subchapter E, does not discuss change orders specifically, but as discussed above, the Department possesses ongoing authority to enter into new facility agreements for specific phases of the project within the scope of the comprehensive development agreement. Furthermore, the Legislature authorized the Department to “negotiate any matter in a comprehensive development agreement for the North Tarrant Express project that the department considers advantageous to the department.” TEX. TRANSP. CODE § 223.2012(e). Given this broad authority, a court would likely conclude that the Department may use a change order to expand the scope of work within a facility agreement as long as that work is encompassed in the scope of work under the comprehensive development agreement.⁵ *See id.* § 223.201(f)(3) (authorizing the Department to enter into a comprehensive development agreement for “the Interstate Highway 35W project in Tarrant County from Interstate Highway 30 to State Highway 114”).

You also question whether the Department is authorized to enter into or change terms to a facility agreement without engaging in competitive bidding. Request Letter at 3. The Legislature required the Department to engage in competitive bidding procedures when entering into the comprehensive development agreement. *See* TEX. TRANSP. CODE § 223.203(a) (requiring the Department to “use a competitive procurement process that provides the best value”). But the Legislature expressly exempted the Department from competitive procurement processes for the subsequent facility agreements with the project developer under the comprehensive development agreement:

⁴Any facility agreements the Department enters into “for the North Tarrant Express project must terminate on or before June 22, 2061.” TEX. TRANSP. CODE § 223.2012(d).

⁵In November of 2018, the Department requested a legal sufficiency review of the North Tarrant Express Segment 3C Change Order and Amended and Restated Facility Agreement for the North Tarrant Express Segments 3A, 3B, and 3C Facility by the Office of the Attorney General, and this office determined that both were legally sufficient.

The department is not required to use any further competitive procurement process to enter into one or more related facility agreements with the developer or an entity controlled by, to be controlled by, or to be under common control with the developer under the comprehensive development agreement for the North Tarrant Express project.

Id. § 223.2012(c). Thus, when the Department enters into or changes terms to a facility agreement with the project developer, the Legislature does not require that it use competitive bidding.

S U M M A R Y

By operation of section 223.2012(b) of the Transportation Code, the Legislature granted the Department of Transportation authority to enter into facility agreements under the North Tarrant Express Comprehensive Development Agreement when the Department considers it advantageous to do so.

A court would likely conclude that the Department may use a change order to expand the scope of work within a facility agreement as long as that work is encompassed in the scope of work under the comprehensive development agreement.

Pursuant to subsection 223.2012(c) of the Transportation Code, the Legislature does not require the Department to use a competitive procurement process to enter into a facility agreement with the developer or an entity controlled by, to be controlled by, or to be under common control with the developer under the comprehensive development agreement for the North Tarrant Express project.

Very truly yours,



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