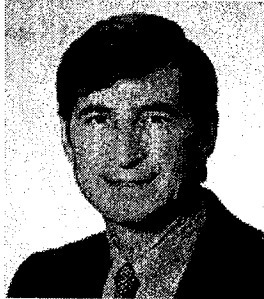


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Brian Cassidy represents regional mobility authorities and other public and private entities involved in the development of toll roads and other transportation infrastructure. His activities include advising clients on complex procurements, public/private partnerships, state and federal project approval, project financing, innovative financing options, right-of-way acquisition, intergovernmental agreements, open meetings issues, and Public Information Act compliance. He has been involved in the development of major transportation legislation (including HB 3588, HB 2702, and SB 792), and has testified in many legislative hearings on transportation policy issues. Mr. Cassidy also works on matters relating to utility infrastructure, including telecommunications tower siting, forced access issues, franchise fee and right-of-way disputes, and utility service agreements. In addition, he is a frequent speaker and writer on transportation issues and legislation, regional mobility authorities, utility infrastructure and property rights issues, and administrative law.

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**Invited Testimony of Brian Cassidy
Before the
Senate Committee on Transportation and Homeland Security**

Interim Charge 4: Public Policy Implications of Comprehensive Development Agreements

Texas State Capitol
Committee Hearing Room E1.016
Austin, Texas
October 13, 2010

My name is Brian Cassidy, and I am a partner in the law firm of Locke Lord Bissell & Liddell LLP. Our firm represents many of the tolling authorities throughout the state, including six regional mobility authorities (RMAs). Since the first RMA was formed 8 years ago, I have worked extensively with these entities.

I appreciate the opportunity to testify before the Committee. My testimony, which addresses issues related to Interim Charge 4, is set forth below.

RMA OVERVIEW

There are currently eight RMAs in the state. They are:

1. Alamo RMA (Bexar County)
2. Cameron County RMA (Cameron County)
3. Camino Real RMA (City of El Paso)
4. Central Texas RMA (Travis and Williamson Counties)
5. Grayson County RMA (Grayson County)
6. Hidalgo County RMA (Hidalgo County)
7. North East Texas RMA (12 counties: Smith, Gregg, Cherokee, Harrison, Rusk, Upshur, Bowie, Cass, Panola, Titus, Van Zandt, and Wood)
8. Sulphur River RMA (Delta, Hopkins, Hunt and Lamar Counties)

RMAs are formed at the request of local entities—in most cases by one or more counties that have chosen to form an RMA for a specific project or purpose. They are governed by a board of directors appointed by the entities forming the authority, with the chairman of the board appointed by the Governor. The result is that RMAs are *locally* formed and *locally* controlled, and these are characteristics which have been vital to their success. As the lack of adequate funding has forced the state to rely on tolling as a means of financing new roads (or the expansion of capacity in existing corridors), potential toll projects have been met, in some areas, with political and citizen opposition. However, the prospect that tolling will be implemented and administered by a locally controlled entity has helped to garner the support and confidence of local leaders and elected officials. That support has resulted in several important projects being advanced notwithstanding the lack of traditional funding.

DISCUSSION

RMAs are governed by Chapter 370 of the Transportation Code. Chapter 370 authorizes RMAs to develop a wide-range of transportation projects and grants them a variety of tools with which to procure the development of those projects. Among those tools are comprehensive development agreements, or CDAs. At a minimum, CDAs must incorporate the design and construction elements of a project. A CDA may also include (in addition to design and construction) finance, operations, and maintenance functions. If a CDA incorporates only the design and construction elements of a project it is often referred to as a “Design/Build CDA”, whereas if it also includes the finance, operations, and maintenance features it may be referred to as a “Concession CDA”. The Legislature recognized the distinction between Design/Build CDAs and Concession CDAs when it enacted SB 792 in 2007. SB 792 provided that Concession CDA authority expired August 31, 2009, but extended authority for CDAs that do not involve financing (i.e., “Design/Build CDAs”) until August 31, 2011.

In addition to TxDOT and RMAs, two other types of tolling authorities have CDA authority. County toll road authorities (“CTRAs”), which operate under Chapter 284 of the Transportation Code, and regional toll authorities (“RTAs”), which operate under Chapter 366 of the Transportation Code, both have CDA authority. However, unlike RMAs (despite the similarity between these three types of regional entities), the CDA authority for CTRAs and RTAs does not expire. Both types of entities have retained full authority to implement these important tools for project delivery, which is an option that RMAs would generally like to retain as well.

Design/Build CDAs

A project developed through a Design/Build CDA is designed and constructed by a developer selected by the RMA but is still financed, operated and maintained by the RMA itself. Design/Build CDAs are therefore much like the design/build contracts that cities and counties are authorized to enter into for certain public works projects. The design/build model has several important advantages over the traditional design/bid/build delivery method in which design and construction services must be procured separately. Design/Build CDAs accelerate the development of needed transportation improvements by shortening the project delivery time and promote innovation through increased interaction between the design and construction teams. They also allow RMAs to transfer certain risks to project developers while receiving commitments for a guaranteed project delivery date at a guaranteed price. That certainty is welcomed by rating agencies and investors who will be assessing potential investments in RMA issued bonds. As start-up entities (with no taxing authority), RMAs have little in the way of financial resources to absorb the financing and other costs associated with project delays and cost overruns. Transferring the risk of these occurrences to the private sector is an important option. Design/Build CDAs are therefore a reliable, important, and heretofore non-controversial tool for RMAs. Yet without legislative action, RMAs’ Design/Build CDA authority will expire on August 31, 2011.

Concession CDAs

A project developed through a Concession CDA is designed, constructed, financed, operated, and maintained by a private entity selected by the RMA. Under (prior) Texas law the term of a Concession CDA may extend up to 52 years. A Concession CDA is what many people think of upon hearing the term “CDA”, which can be a source of confusion and unnecessary controversy.

A typical Concession CDA structure will require a concessionaire to design, construct, operate and maintain a tolled facility, and to collect tolls from that facility. A portion of the toll revenues will be remitted to the project owner (i.e., the public sector entity), while a portion of the toll revenues will be retained by the concessionaire. There may also be an “up front” payment made to the project owner by the concessionaire for the right to enter into the concession arrangement, but both that payment, and the amount of future revenue sharing, are negotiable items and will vary by project. Because a Concession CDA involves the finance, maintenance, and operations elements of a project, Concession CDAs have been met with opposition in some communities from those concerned about private financing, foreign investment in public infrastructure, and private operations of public roads. This is true even though state law is clear that ownership of a project which is the subject of a Concession CDA *must* be maintained by the public sector owner (i.e., “ownership” of a project will never be transferred to a private entity), and operations are strictly governed by contract provisions.

Some RMAs operate in communities where the Concession CDA model has been disfavored; other RMAs (and the local leadership in those communities) have been receptive to the potential that Concession CDAs offer. This exemplifies the local control that the RMA model provides, and supports the position that the decision to use Concession CDAs is one that should be made at the local level by those most impacted by the choice of project delivery method. Therefore, RMAs are supportive of reauthorization of Concession CDAs so that local communities can retain the flexibility to decide at a local level whether to use this authority in the same manner that other local entities (e.g., CTRAs and RTAs) are able to do so.

Extension of CDA Authorization

As discussed above, CDAs are an important project delivery tool, helping RMAs to accelerate the development of needed transportation projects while allowing them to transfer certain risks to the private sector. Extending CDA authority enhances local control by giving local communities the flexibility to make local decisions regarding project delivery, including whether a project should be developed through a Design/Build CDA, a Concession CDA, or some other method. RMAs need as many tools as possible to deliver infrastructure to the regions they serve. *The Committee should consider recommending an extension of CDA authority for RMAs, ensuring that RMAs and the local communities that they serve have access to the same project delivery tools available to CTRAs and RTAs.*

Project Specific Concession CDA Authorization

Alternatively, in the event that a general reauthorization of both Design/Build and Concession CDA authority is not feasible, RMAs would support a bifurcated approach to CDA reauthorization that provides for a general extension of Design/Build CDA authority and project-specific authorization for Concession CDAs. As noted above, there are some important differences between Design/Build CDAs and Concession CDAs. Design/Build CDAs are a reliable and heretofore non-controversial tool similar to the design/build authority enjoyed by counties and cities and should therefore be reauthorized for use on all RMA projects. Concession CDAs, while more controversial, remain an important and desirable tool for some local communities and projects. Certain projects are particularly well-suited to the Concession CDA model due to both the nature of the project itself and the level of local support. Concession CDA authority should, at a minimum, be extended for those projects. While a project-specific Concession CDA reauthorization would afford RMAs less flexibility than a general reauthorization, RMAs recognize that such an approach could be an effective way to balance the need for Concession CDAs as a project delivery tool for certain local communities against some of the concerns which have been raised regarding Concession CDAs. *Should the Committee decide not to recommend a general extension of all CDA authority for RMAs, the Committee should consider recommending a general extension of Design/Build CDA authority, along with an extension of Concession CDA authority for RMAs on a project-specific basis.*

SUMMARY OF RECOMMENDATIONS

- The Committee should consider recommending an extension of CDA authority for RMAs, ensuring that RMAs and the local communities that they serve have access to the same project delivery tools available to other local transportation entities (e.g., CTRAs and RTAs).
- Alternatively, the Committee should consider recommending a general extension of Design/Build CDA authority, along with an extension of Concession CDA authority for RMAs on a project-specific basis.