

ASSEMBLY BILL

No. 1265

Introduced by Assembly Member Perea

February 27, 2015

An act to amend Section 143 of the Streets and Highways Code, relating to transportation.

LEGISLATIVE COUNSEL'S DIGEST

AB 1265, as introduced, Perea. Transportation projects: comprehensive development lease agreements.

Existing law authorizes the Department of Transportation and regional transportation agencies, as defined, to enter into comprehensive development lease agreements with public and private entities, or consortia of those entities, for certain transportation projects that may charge certain users of those projects tolls and user fees, subject to various terms and requirements. These arrangements are commonly known as public-private partnerships. Existing law provides that a lease agreement may not be entered into under these provisions on or after January 1, 2017.

This bill would extend this authorization indefinitely and would delete obsolete cross-references and make technical changes to these provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 143 of the Streets and Highways Code
- 2 is amended to read:

1 143. (a) (1) “Best value” means a value determined by
2 objective criteria, including, but not limited to, price, features,
3 functions, life-cycle costs, and other criteria deemed appropriate
4 by the department or the regional transportation agency.

5 (2) “Contracting entity or lessee” means a public or private
6 entity, or consortia thereof, that has entered into a comprehensive
7 development lease agreement with the department or a regional
8 transportation agency for a transportation project pursuant to this
9 section.

10 (3) “Design-build” means a procurement process in which both
11 the design and construction of a project are procured from a single
12 entity.

13 (4) “Regional transportation agency” means any of the
14 following:

15 (A) A transportation planning agency as defined in Section
16 29532 or 29532.1 of the Government Code.

17 (B) A county transportation commission as defined in Section
18 130050, 130050.1, or 130050.2 of the Public Utilities Code.

19 (C) Any other local or regional transportation entity that is
20 designated by statute as a regional transportation agency.

21 (D) A joint exercise of powers authority as defined in Chapter
22 5 (commencing with Section 6500) of Division 7 of Title 1 of the
23 Government Code, with the consent of a transportation planning
24 agency or a county transportation commission for the jurisdiction
25 in which the transportation project will be developed.

26 (5) “Public Infrastructure Advisory Commission” means a unit
27 or auxiliary organization established by the ~~Business,~~
28 ~~Transportation and Housing~~ Agency that advises the department
29 and regional transportation agencies in developing transportation
30 projects through performance-based infrastructure partnerships.

31 (6) “Transportation project” means one or more of the following:
32 planning, design, development, finance, construction,
33 reconstruction, rehabilitation, improvement, acquisition, lease,
34 operation, or maintenance of highway, public street, rail, or related
35 facilities supplemental to existing facilities currently owned and
36 operated by the department or regional transportation agencies
37 that is consistent with the requirements of subdivision (c).

38 (b) (1) The Public Infrastructure Advisory Commission shall
39 do all of the following:

1 (A) Identify transportation project opportunities throughout the
2 state.

3 (B) Research and document similar transportation projects
4 throughout the state, nationally, and internationally, and further
5 identify and evaluate lessons learned from these projects.

6 (C) Assemble and make available to the department or regional
7 transportation agencies a library of information, precedent,
8 research, and analysis concerning infrastructure partnerships and
9 related types of public-private transactions for public infrastructure.

10 (D) Advise the department and regional transportation agencies,
11 upon request, regarding infrastructure partnership suitability and
12 best practices.

13 (E) Provide, upon request, procurement-related services to the
14 department and regional transportation agencies for infrastructure
15 partnership.

16 (2) The Public Infrastructure Advisory Commission may charge
17 a fee to the department and regional transportation agencies for
18 the services described in subparagraphs (D) and (E) of paragraph
19 (1), the details of which shall be articulated in an agreement entered
20 into between the Public Infrastructure Advisory Commission and
21 the department or the regional transportation agency.

22 (c) (1) Notwithstanding any other provision of law, only the
23 department, in cooperation with regional transportation agencies,
24 and regional transportation agencies, may solicit proposals, accept
25 unsolicited proposals, negotiate, and enter into comprehensive
26 development lease agreements with public or private entities, or
27 consortia thereof, for transportation projects.

28 (2) Projects proposed pursuant to this section and associated
29 lease agreements shall be submitted to the California Transportation
30 Commission. The commission, at a regularly scheduled public
31 hearing, shall select the candidate projects from projects nominated
32 by the department or a regional transportation agency after
33 reviewing the nominations for consistency with paragraphs (3)
34 and (4). Approved projects may proceed with the process described
35 in paragraph (5).

36 (3) The projects authorized pursuant to this section shall be
37 primarily designed to achieve the following performance
38 objectives:

39 (A) Improve mobility by improving travel times or reducing
40 the number of vehicle hours of delay in the affected corridor.

1 (B) Improve the operation or safety of the affected corridor.

2 (C) Provide quantifiable air quality benefits for the region in
3 which the project is located.

4 (4) In addition to meeting the requirements of paragraph (3),
5 the projects authorized pursuant to this section shall address a
6 known forecast demand, as determined by the department or
7 regional transportation agency.

8 (5) At least 60 days prior to executing a final lease agreement
9 authorized pursuant to this section, the department or regional
10 transportation agency shall submit the agreement to the Legislature
11 and the Public Infrastructure Advisory Commission for review.
12 Prior to submitting a lease agreement to the Legislature and the
13 Public Infrastructure Advisory Commission, the department or
14 regional transportation agency shall conduct at least one public
15 hearing at a location at or near the proposed facility for purposes
16 of receiving public comment on the lease agreement. Public
17 comments made during this hearing shall be submitted to the
18 Legislature and the Public Infrastructure Advisory Commission
19 with the lease agreement. The Secretary of ~~Business, Transportation~~
20 ~~and Housing~~ or the chairperson of the Senate or Assembly fiscal
21 committees or policy committees with jurisdiction over
22 transportation matters may, by written notification to the
23 department or regional transportation agency, provide any
24 comments about the proposed agreement within the 60-day period
25 prior to the execution of the final agreement. The department or
26 regional transportation agency shall consider those comments prior
27 to executing a final agreement and shall retain the discretion for
28 executing the final lease agreement.

29 (d) For the purpose of facilitating those projects, the agreements
30 between the parties may include provisions for the lease of
31 rights-of-way in, and airspace over or under, highways, public
32 streets, rail, or related facilities for the granting of necessary
33 easements, and for the issuance of permits or other authorizations
34 to enable the construction of transportation projects. Facilities
35 subject to an agreement under this section shall, at all times, be
36 owned by the department or the regional transportation agency,
37 as appropriate. For department projects, the commission shall
38 certify the department's determination of the useful life of the
39 project in establishing the lease agreement terms. In consideration
40 therefor, the agreement shall provide for complete reversion of the

1 leased facility, together with the right to collect tolls and user fees,
2 to the department or regional transportation agency, at the
3 expiration of the lease at no charge to the department or regional
4 transportation agency. At the time of the reversion, the facility
5 shall be delivered to the department or regional transportation
6 agency, as applicable, in a condition that meets the performance
7 and maintenance standards established by the department or
8 regional transportation agency and that is free of any encumbrance,
9 lien, or other claims.

10 (e) Agreements between the department or regional
11 transportation agency and the contracting entity or lessee shall
12 authorize the contracting entity or lessee to use a design-build
13 method of procurement for transportation projects, subject to the
14 requirements for utilizing such a method contained in Chapter 6.5
15 (commencing with Section ~~6800~~ 6820) of Part 1 of Division 2 of
16 the Public Contract Code, other than Sections ~~6802, 6803, 6821~~
17 and ~~6813~~ 6822 of that code, ~~if those provisions are enacted by the~~
18 ~~Legislature during the 2009-10 Regular Session, or a 2009-10~~
19 ~~extraordinary session.~~ *code.*

20 (f) (1) (A) Notwithstanding any other provision of this chapter,
21 for projects on the state highway system, the department is the
22 responsible agency for the performance of project development
23 services, including performance specifications, preliminary
24 engineering, prebid services, the preparation of project reports and
25 environmental documents, and construction inspection services.
26 The department is also the responsible agency for the preparation
27 of documents that may include, but need not be limited to, the size,
28 type, and desired design character of the project, performance
29 specifications covering the quality of materials, equipment, and
30 workmanship, preliminary plans, and any other information deemed
31 necessary to describe adequately the needs of the department or
32 regional transportation agency.

33 (B) The department may use department employees or
34 consultants to perform the services described in subparagraph (A),
35 consistent with Article XXII of the California Constitution.
36 Department resources, including personnel requirements, necessary
37 for the performance of those services shall be included in the
38 department's capital outlay support program for workload purposes
39 in the annual Budget Act.

1 (2) The department or a regional transportation agency may
2 exercise any power possessed by it with respect to transportation
3 projects to facilitate the transportation projects pursuant to this
4 section. The department, regional transportation agency, and other
5 state or local agencies may provide services to the contracting
6 entity or lessee for which the public entity is reimbursed, including,
7 but not limited to, planning, environmental planning, environmental
8 certification, environmental review, preliminary design, design,
9 right-of-way acquisition, construction, maintenance, and policing
10 of these transportation projects. The department or regional
11 transportation agency, as applicable, shall regularly inspect the
12 facility and require the contracting entity or lessee to maintain and
13 operate the facility according to adopted standards. Except as may
14 otherwise be set forth in the lease agreement, the contracting entity
15 or lessee shall be responsible for all costs due to development,
16 maintenance, repair, rehabilitation, and reconstruction, and
17 operating costs.

18 (g) (1) In selecting private entities with which to enter into
19 these agreements, notwithstanding any other provision of law, the
20 department and regional transportation agencies may utilize, but
21 are not limited to utilizing, one or more of the following
22 procurement approaches:

23 (A) Solicitations of proposals for defined projects and calls for
24 project proposals within defined parameters.

25 (B) Prequalification and short-listing of proposers prior to final
26 evaluation of proposals.

27 (C) Final evaluation of proposals based on qualifications and
28 best value. The California Transportation Commission shall
29 develop and adopt criteria for making that evaluation prior to
30 evaluation of a proposal.

31 (D) Negotiations with proposers prior to award.

32 (E) Acceptance of unsolicited proposals, with issuance of
33 requests for competing proposals. Neither the department nor a
34 regional transportation agency may award a contract to an
35 unsolicited bidder without receiving at least one other responsible
36 bid.

37 (2) When evaluating a proposal submitted by the contracting
38 entity or lessee, the department or the regional transportation
39 agency may award a contract on the basis of the lowest bid or best
40 value.

1 (h) The contracting entity or lessee shall have the following
2 qualifications:

3 (1) Evidence that the members of the contracting entity or lessee
4 have completed, or have demonstrated the experience, competency,
5 capability, and capacity to complete, a project of similar size,
6 scope, or complexity, and that proposed key personnel have
7 sufficient experience and training to competently manage and
8 complete the design and construction of the project, and a financial
9 statement that ensures that the contracting entity or lessee has the
10 capacity to complete the project.

11 (2) The licenses, registration, and credentials required to design
12 and construct the project, including, but not limited to, information
13 on the revocation or suspension of any license, credential, or
14 registration.

15 (3) Evidence that establishes that members of the contracting
16 entity or lessee have the capacity to obtain all required payment
17 and performance bonding, liability insurance, and errors and
18 omissions insurance.

19 (4) Evidence that the contracting entity or lessee has workers'
20 compensation experience, history, and a worker safety program
21 of members of the contracting entity or lessee that is acceptable
22 to the department or regional transportation agency.

23 (5) A full disclosure regarding all of the following with respect
24 to each member of the contracting entity or lessee during the past
25 five years:

26 (A) Any serious or willful violation of Part 1 (commencing with
27 Section 6300) of Division 5 of the Labor Code or the federal
28 Occupational Safety and Health Act of 1970 (P.L. 91-596).

29 (B) Any instance where members of the contracting entity or
30 lessee were debarred, disqualified, or removed from a federal,
31 state, or local government public works project.

32 (C) Any instance where members of the contracting entity or
33 lessee, or its owners, officers, or managing employees submitted
34 a bid on a public works project and were found to be nonresponsive
35 or were found by an awarding body not to be a responsible bidder.

36 (D) Any instance where members of the contracting entity or
37 lessee, or its owners, officers, or managing employees defaulted
38 on a construction contract.

39 (E) Any violations of the Contractors' State License Law
40 (Chapter 9 (commencing with Section 7000) of Division 3 of the

1 Business and Professions Code), including, but not limited to,
2 alleged violations of federal or state law regarding the payment of
3 wages, benefits, apprenticeship requirements, or personal income
4 tax withholding, or Federal Insurance Contributions Act (FICA)
5 withholding requirements.

6 (F) Any bankruptcy or receivership of any member of the
7 contracting entity or lessee, including, but not limited to,
8 information concerning any work completed by a surety.

9 (G) Any settled adverse claims, disputes, or lawsuits between
10 the owner of a public works project and any member of the
11 contracting entity or lessee during the five years preceding
12 submission of a bid under this article, in which the claim,
13 settlement, or judgment exceeds fifty thousand dollars (\$50,000).
14 Information shall also be provided concerning any work completed
15 by a surety during this five-year period.

16 (H) If the contracting entity or lessee is a partnership, joint
17 venture, or an association that is not a legal entity, a copy of the
18 agreement creating the partnership or association that specifies
19 that all general partners, joint venturers, or association members
20 agree to be fully liable for the performance under the agreement.

21 (i) No agreement entered into pursuant to this section shall
22 infringe on the authority of the department or a regional
23 transportation agency to develop, maintain, repair, rehabilitate,
24 operate, or lease any transportation project. Lease agreements may
25 provide for reasonable compensation to the contracting entity or
26 lessee for the adverse effects on toll revenue or user fee revenue
27 due to the development, operation, or lease of supplemental
28 transportation projects with the exception of any of the following:

29 (1) Projects identified in regional transportation plans prepared
30 pursuant to Section 65080 of the Government Code.

31 (2) Safety projects.

32 (3) Improvement projects that will result in incidental capacity
33 increases.

34 (4) Additional high-occupancy vehicle lanes or the conversion
35 of existing lanes to high-occupancy vehicle lanes.

36 (5) Projects located outside the boundaries of a public-private
37 partnership project, to be defined by the lease agreement.

38 However, compensation to a contracting entity or lessee shall
39 only be made after a demonstrable reduction in use of the facility
40 resulting in reduced toll or user fee revenues, and may not exceed

1 the difference between the reduction in those revenues and the
2 amount necessary to cover the costs of debt service, including
3 principal and interest on any debt incurred for the development,
4 operation, maintenance, or rehabilitation of the facility.

5 (j) (1) Agreements entered into pursuant to this section shall
6 authorize the contracting entity or lessee to impose tolls and user
7 fees for use of a facility constructed by it, and shall require that
8 over the term of the lease the toll revenues and user fees be applied
9 to payment of the capital outlay costs for the project, the costs
10 associated with operations, toll and user fee collection,
11 administration of the facility, reimbursement to the department or
12 other governmental entity for the costs of services to develop and
13 maintain the project, police services, and a reasonable return on
14 investment. The agreement shall require that, notwithstanding
15 Sections 164, 188, and 188.1, any excess toll or user fee revenue
16 either be applied to any indebtedness incurred by the contracting
17 entity or lessee with respect to the project, improvements to the
18 project, or be paid into the State Highway Account, or for all three
19 purposes, except that any excess toll revenue under a lease
20 agreement with a regional transportation agency may be paid to
21 the regional transportation agency for use in improving public
22 transportation in and near the project boundaries.

23 (2) Lease agreements shall establish specific toll or user fee
24 rates. Any proposed increase in those rates not otherwise
25 established or identified in the lease agreement during the term of
26 the agreement shall first be approved by the department or regional
27 transportation agency, as appropriate, after at least one public
28 hearing conducted at a location near the proposed or existing
29 facility.

30 (3) The collection of tolls and user fees for the use of these
31 facilities may be extended by the commission or regional
32 transportation agency at the expiration of the lease agreement.
33 However, those tolls or user fees shall not be used for any purpose
34 other than for the improvement, continued operation, or
35 maintenance of the facility.

36 (k) Agreements entered into pursuant to this section shall include
37 indemnity, defense, and hold harmless provisions agreed to by the
38 department or regional transportation agency and the contracting
39 entity or lessee, including provisions for indemnifying the State
40 of California or the regional transportation agency against any

1 claims or losses resulting or accruing from the performance of the
2 contracting entity or lessee.

3 (l) The plans and specifications for each transportation project
4 on the state highway system developed, maintained, repaired,
5 rehabilitated, reconstructed, or operated pursuant to this section
6 shall comply with the department's standards for state
7 transportation projects. The lease agreement shall include
8 performance standards, including, but not limited to, levels of
9 service. The agreement shall require facilities on the state highway
10 system to meet all requirements for noise mitigation, landscaping,
11 pollution control, and safety that otherwise would apply if the
12 department were designing, building, and operating the facility.
13 If a facility is on the state highway system, the facility leased
14 pursuant to this section shall, during the term of the lease, be
15 deemed to be a part of the state highway system for purposes of
16 identification, maintenance, enforcement of traffic laws, and for
17 the purposes of Division 3.6 (commencing with Section 810) of
18 Title 1 of the Government Code.

19 (m) Failure to comply with the lease agreement in any significant
20 manner shall constitute a default under the agreement and the
21 department or the regional transportation agency, as appropriate,
22 shall have the option to initiate processes to revert the facility to
23 the public agency.

24 (n) The assignment authorized by subdivision (c) of Section
25 130240 of the Public Utilities Code is consistent with this section.

26 (o) A lease to a private entity pursuant to this section is deemed
27 to be public property for a public purpose and exempt from
28 leasehold, real property, and ad valorem taxation, except for the
29 use, if any, of that property for ancillary commercial purposes.

30 (p) Nothing in this section is intended to infringe on the authority
31 to develop high-occupancy toll lanes pursuant to Section 149.4,
32 149.5, or 149.6.

33 (q) Nothing in this section shall be construed to allow the
34 conversion of any existing nontoll or nonuser-fee lanes into tolled
35 or user fee lanes with the exception of a high-occupancy vehicle
36 lane that may be operated as a high-occupancy toll lane for vehicles
37 not otherwise meeting the requirements for use of that lane.

38 (r) The lease agreement shall require the contracting entity or
39 lessee to provide any information or data requested by the
40 California Transportation Commission or the Legislative Analyst.

1 The commission, in cooperation with the Legislative Analyst, shall
2 annually prepare a report on the progress of each project and
3 ultimately on the operation of the resulting facility. The report
4 shall include, but not be limited to, a review of the performance
5 standards, a financial analysis, and any concerns or
6 recommendations for changes in the program authorized by this
7 section.

8 (s) Notwithstanding any other provision of this section, no lease
9 agreement may be entered into pursuant to the section that affects,
10 alters, or supersedes the Memorandum of Understanding (MOU),
11 dated November 26, 2008, entered into by the Golden Gate Bridge
12 Highway and Transportation District, the Metropolitan
13 Transportation Commission, and the San Francisco County
14 Transportation Authority, relating to the financing of the U.S.
15 Highway 101/Doyle Drive reconstruction project located in the
16 City and County of San Francisco.

17 ~~(t) No lease agreements may be entered into under this section~~
18 ~~on or after January 1, 2017.~~