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## The Trans-Texas Corridor Plan: Will Best Value Highway Contract Procurement under Comprehensive Development Agreements Leave the Lowest Competitive Bidder in the Dust Comment.

Jason C. Petty

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# COMMENTS

## THE TRANS-TEXAS CORRIDOR PLAN: WILL “BEST VALUE” HIGHWAY CONTRACT PROCUREMENT UNDER COMPREHENSIVE DEVELOPMENT AGREEMENTS LEAVE THE LOWEST COMPETITIVE BIDDER IN THE DUST?

JASON C. PETTY

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## I. INTRODUCTION

### A. *Travel and Transportation in Texas*

Many a Texas road had its humble beginnings as an Indian trail.<sup>1</sup> As population centers developed in Texas, frequent travel and communication between Mexico, dispersed settlements, trading centers, and Spanish Catholic missions became necessary.<sup>2</sup> These circuitous routes were hardly more than rocky paths, scarred by deep ruts from wagon wheels, or packed earth that

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1. Press Release, Tex. Dep't of Transp., Crossroads of the Americas: Trans Texas Corridor Plan Report Summary 4 (June 2002) ("Many of the state's roadways followed or were close to the old trails used by Native Americans and the other cultures which came after them."); accord Cleo F. Evans, *Transportation in Early Texas* 40 (Aug. 1940) (unpublished M.A. thesis, St. Mary's University) (on file with Louis J. Blume Library, St. Mary's University) (discussing the Old Comanche Trail and considering it to be "probably a slight improvement on an old Indian trail").

2. See A TEXAS LEGACY: THE OLD SAN ANTONIO ROAD AND THE CAMINOS REALES, A TRICENTENNIAL HISTORY, 1691-1991, at 43 (A. Joachim McGraw et al. eds., 1998) (1991) ("[T]he mail had to get through; supplies and payrolls had to be delivered to garrisons; missionaries had to transfer; goods had to be moved; occasionally even a casual wayfarer came along."); cf. Ralph A. Wooster, *Statehood, War, and Reconstruction, in TEXAS: A SESQUICENTENNIAL CELEBRATION* 93, 102 (Donald W. Whisenhunt ed., 1984) (noting the existence and location of major roads in the years immediately before Texas's secession from the Union in January of 1861). "Ox-carts and wagons carried heavy freight along Texas roads, while stagecoaches transported mail, men, and freight." Ralph A. Wooster, *Statehood, War, and Reconstruction, in TEXAS: A SESQUICENTENNIAL CELEBRATION* 93, 102 (Donald W. Whisenhunt ed., 1984). Historians have remarked upon the "significant contrast" between the development pattern of routes through Texas and "the development of other historical roads in North America." A TEXAS LEGACY: THE OLD SAN ANTONIO ROAD AND THE CAMINOS REALES, A TRICENTENNIAL HISTORY, 1691-1991, at 37 (A. Joachim McGraw et al. eds., 1998) (1991). "Spanish overland routes into Texas contrasted with English and French riparian trade routes in North America. In Texas, most of the Spanish routes ran from southwest to northeast and across, rather than along major rivers. . . . [F]ew [Texas rivers] are consistently deep enough for year-round shipping." *Id.* "[M]any of the state's streams were narrow and shallow with sand bars and tangled brush at the mouths," frustrating most river traffic and forcing Texans to "depend[] upon the roads for transportation." Ralph A. Wooster, *Statehood, War, and Reconstruction, in TEXAS: A SESQUICENTENNIAL CELEBRATION* 93, 102 (Donald W. Whisenhunt ed., 1984).

became an impassable muck after a rain.<sup>3</sup> Although gradual county and, to a lesser degree, statewide improvements were made throughout the nineteenth century,<sup>4</sup> the lamentable condition of Texas roads remained largely unchanged until the invention and popularization of the automobile at the turn of the twentieth century.<sup>5</sup> Soon thereafter, eager volunteers formed local “Good Roads” associations to improve and maintain roads suitable for the increased speeds permitted by automobile travel.<sup>6</sup>

By an act in 1917, the Texas Legislature created the State

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3. See OSCAR OSBURN WINTHER, *THE TRANSPORTATION FRONTIER: TRANS-MISSISSIPPI WEST, 1865–1890*, at 148–49 (Holt, Rinehart and Winston, Inc. 1964) (compiling travelers’ comments in the two *post-bellum* decades). “If the road makers had gone to work with the intention of throwing obstructions into them they could have hardly succeeded better.” *Id.* “[I]n the spring . . . ‘our roads are . . . a canal filled with mud and water, more fit for a boat than for wagons.’” *Id.* One Texas state road official responded to a United States Department of Agriculture survey published in 1868, stating that “[o]ur roads are not worked, the wagoner makes his own way . . . [and the r]oad laws in this magnificent State, like other laws, [are] seldom executed.” *Id.*

4. See John D. Huddleston, *Highway Development: A “Concrete” History of Twentieth-Century Texas*, in *TEXAS: A SESQUICENTENNIAL CELEBRATION* 252, 254 (Donald W. Whisenhunt ed., 1984) (noting that since state control of road projects was enfeebled by “post-Reconstruction poverty” imposed by graft, county administration of Texas roads was the nineteenth-century norm); see also OSCAR OSBURN WINTHER, *THE TRANSPORTATION FRONTIER: TRANS-MISSISSIPPI WEST, 1865–1890*, at 150–51 (Holt, Rinehart and Winston, Inc. 1964) (relating the efforts in road improvement lobbying at the national level of, among others, the League of American Wheelmen, an association of cycling enthusiasts “which counted membership in the thousands, represent[ing] practically every state and territory”).

5. See John D. Huddleston, *Highway Development: A “Concrete” History of Twentieth-Century Texas*, in *TEXAS: A SESQUICENTENNIAL CELEBRATION* 252, 254–55 (Donald W. Whisenhunt ed., 1984) (illustrating perceptively that “[t]he automobile represented a transportation challenge different from the railroad. For railroads, the track by necessity preceded the rolling stock. In the case of the automobile, the rolling stock came first and necessitated adequate track.”). “[T]he opening of the twentieth century ushered in an improved public attitude toward road improvement and a consciousness that a new administrative and technological revolution[, e.g., the advent of the automobile,] was just then getting underway.” OSCAR OSBURN WINTHER, *THE TRANSPORTATION FRONTIER: TRANS-MISSISSIPPI WEST, 1865–1890*, at 162–63 (Holt, Rinehart and Winston, Inc. 1964). “Just as every poor farmer had owned a horse, every poor tenant living in a tarpaper shack in Texas owned some kind of car,” emphasizing the need for good roads which, once completed, “hastened economic improvements, urbanization, and school consolidation in almost every region of the state.” T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* 649 (Collier Books 1980) (1968).

6. John D. Huddleston, *Highway Development: A “Concrete” History of Twentieth-Century Texas*, in *TEXAS: A SESQUICENTENNIAL CELEBRATION* 252, 255 (Donald W. Whisenhunt ed., 1984) (“To promote . . . [the completion of new and better roads suitable for automobiles], the Texas Good Roads Association organized in 1911 and conducted education programs statewide.”).

Highway Department.<sup>7</sup> Known since 1991 as the Texas Department of Transportation,<sup>8</sup> or TxDOT, the former State Highway Department soon was granted full authority in the funding, construction, and maintenance of Texas's state highway system.<sup>9</sup> In 1925, the 39th Texas Legislature vested the highway department with the sovereign authority to acquire right of way to build roads either by use of the state's condemnation power or by outright purchase.<sup>10</sup> When the Depression struck, Texas's large number of farmers and ranchers—compared with her relatively small population of industrialists and corporate stockholders—left the state's economy largely unfazed in the 1930s.<sup>11</sup> Perhaps acting

7. Act of Apr. 4, 1917, 35th Leg., R.S., ch. 190, §§ 1–28, 1917 Tex. Gen. Laws 416. “There is hereby created a department . . . to be known as the State Highway Department.” *Id.* § 1. Before viewing the Texas Legislature as overly solicitous regarding road conditions, it is to be noted that “[i]n 1916, [the United States] Congress passed a national highway act and pledged matching funds for all states. A codicil to the act declared that no state could receive assistance unless it had a central highway agency to coordinate road building.” John D. Huddleston, *Highway Development: A “Concrete” History of Twentieth-Century Texas*, in TEXAS: A SESQUICENTENNIAL CELEBRATION 252, 255 (Donald W. Whisenhunt ed., 1984) (summing up the process by which Texas's network of roads developed from primitive trails into superhighways). Under the able leadership of Texas legend Dewitt C. Greer, the engineer who oversaw the shift into farm-to-market roads and on to interstate highways, “Texas’ road program had matured into one of the nation’s finest.” *Id.* at 267.

8. TEX. TRANSP. CODE ANN. § 201.003(a) (Vernon 1999 & Supp. 2006) (“A reference in law to the State Highway Department, Texas Highway Department, or State Department of Highways and Public Transportation means the Texas Department of Transportation.”).

9. See Act of Apr. 2, 1925, 39th Leg., R.S., ch. 186, §§ 1–17, sec. 4, 1925 Tex. Gen. Laws 456 (placing Texas highway improvement “under the exclusive and direct control of the State Highway Department and with appropriations made by the Legislature out of the State Highway Fund”).

10. Act of Apr. 2, 1925, 39th Leg., R.S., ch. 186, § 14, 1925 Tex. Gen. Laws 456, 458–59 (providing that “the State Highway Commission shall have the right . . . to acquire such land or lands for the public use and benefit as may be necessary for the new or wider right of way,” and that “the owner of such . . . land shall be paid therefor out of the State Highway Fund”). Upon a “fail[ure] to agree upon the amount to be paid therefor, then the Attorney General . . . shall proceed to condemn the same for and on behalf of the State of Texas.” *Id.*

11. John D. Huddleston, *Highway Development: A “Concrete” History of Twentieth-Century Texas*, in TEXAS: A SESQUICENTENNIAL CELEBRATION 252, 260 (Donald W. Whisenhunt ed., 1984). “Relatively few Texans owned corporate stocks, and a majority of Texans—the farmers—had lived through commodity price crises before.” *Id.* “The Depression was taken more calmly” because “[t]he mass of Texans were still poor in 1928; they were more adapted to relative poverty than the American groups now hit the hardest.” T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 650 (Collier Books 1980) (1968).

counterintuitively to the Depression's worst effects, the highway department was actually free to "pursue[] a vigorous construction program" of highway projects.<sup>12</sup>

This urge to pave Texas multiplied in the post-World War II period—a period which saw the institution of Texas's extensive network of rural farm-to-market roads, funded largely by the 1949 Colson-Briscoe Act.<sup>13</sup> Initially, 7,500 miles of farm-to-market roads were planned.<sup>14</sup> By 1962, the state plan for farm-to-market roads had swollen to 35,000 miles.<sup>15</sup> In 1989 the forecast called for 41,755 miles of rural highways.<sup>16</sup> Over a period of fifty years the

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12. John D. Huddleston, *Highway Development: A "Concrete" History of Twentieth-Century Texas*, in TEXAS: A SESQUICENTENNIAL CELEBRATION 252, 264 (Donald W. Whisenhunt ed., 1984) (recalling that "the Texas road program actually prospered during the [D]epression" (emphasis added)). "In the period, 1935–39, approximately \$100,000 a day or \$6,500 per mile had been expended." *Id.* This endeavor was possible because "Texan morale and fundamental concepts of society essentially remained unchanged, despite the market crash," there being in Texas "none of the massive unemployment and crushing fear which pervaded the industrial North and East." *Id.* at 260.

13. Act of Mar. 24, 1949, 51st Leg., R.S., ch. 51, § 1, 1949 Tex. Gen. Laws 85. The Colson-Briscoe Act defined a farm-to-market road as one that "shall serve rural areas primarily and shall connect farms, ranches, rural homes and sources of natural resources such as oil, mines, timber, etc., and/or water loading points, schools, churches and points of public congregation, including community developments and villages." *Id.* at 86. Funds were to be distributed to Texas counties "relative to the most needed unimproved rural roads in the counties involved," and "in a manner to insure equitable and judicious distribution of funds and work among the several counties of the state." *Id.* In determining allocation, county commissioners courts were to be consulted by the State Highway Department, TxDOT's administrative forbear. *Id.* The distribution of these funds between, and even within, counties did not always go smoothly. *See, e.g., Alley v. Jones*, 311 S.W.2d 717, 718 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.) (seeking an injunction of a funds allocation order by the Commissioners Court of Montgomery County when the commissioner and constituents of one precinct felt they were receiving too little money). "[I]n a state where the population was scattered across immense distances . . . [and] some farmers had to haul cotton more than 100 miles to gins or markets [in] . . . [t]owns and cities [that could] lay hundreds of miles apart," there was but one public service upon which Texas's "rural and urban interests all agreed" to spend huge amounts of money: roads. T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* 649 (Collier Books 1980) (1968). "Although the progress was hardly uniform—some Texas counties got their first paved roads in the 1940's—by the 1950's even the rural, farm-to-market roads in underpopulated areas were superior to most U.S. highways in the East." *Id.*

14. Kirk Kite, *Highway Development*, in 3 THE NEW HANDBOOK OF TEXAS 608 (Ron Tyler et al. eds., 1996), available at <http://www.tsha.utexas.edu/handbook/online/articles/HH/erh2.html> (citing the September 1967 special issue of *Texas Highways* which celebrated the fifty-year anniversary of the Texas Highway Department and chronicled its achievements).

15. *Id.*

16. *Id.*

system became “the most extensive network of secondary roads in the world,” as farm-to-market and ranch-to-market roads were built to connect outlying areas of Texas to major state highway and interstate arteries.<sup>17</sup> The highway department acquired land for these projects by purchase or through exercise of Texas’s eminent domain power.<sup>18</sup>

Postwar Texas transportation shifted into overdrive when, in 1956, President Dwight D. Eisenhower signed into law an act establishing the National System of Interstate and Defense Highways.<sup>19</sup> The network of roads known today as the Interstate Highway System “span[s] a total of 46,876 miles throughout the United States . . . and has allowed the Nation to create unprecedented economic expansion and opportunities for millions of United States citizens.”<sup>20</sup> What is recognized as a boon to the carriage of men and materials in the twenty-first century, however, was at the time viewed as a menace to rural and urban denizens

17. *Id.*; see also Act of Mar. 24, 1949, 51st Leg., R.S., ch. 51, § 1, 1949 Tex. Gen. Laws 85 (declaring that the farm-to-market “roads shall be capable of early integration with the previously improved Texas Road System and at least one end should connect with a road already or soon to be improved on the State System of Roads”).

18. See Act of Apr. 2, 1925, 39th Leg., R.S., ch. 186, § 14, 1925 Tex. Gen. Laws 456 (granting State Highway Commission the right to exercise purchase or eminent domain powers to obtain right-of-way for Texas road projects).

19. Pub. L. No. 84-627, 70 Stat. 374, 378 (codified as amended at 23 U.S.C. §§ 101–190 (2005)) (emphasizing the importance of the interstate highway system in national defense). Interestingly, in 1919 a young Lieutenant Colonel Eisenhower spent sixty-two days caravanning across the United States with a transcontinental motor convoy. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *TRANSP. L.J.* 235, 314 (2003); accord JANET F. DAVIDSON & MICHAEL S. SWEENEY, *ON THE MOVE: TRANSPORTATION AND THE AMERICAN STORY* 267 (Nat’l Geographic Soc’y 2003) (relating the tale of President Eisenhower’s inspiration for the interstate project). Averaging a steady five miles per hour, two months of travel was required in order to reach San Francisco’s Union Square from the White House in Washington, D.C. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *TRANSP. L.J.* 235, 314 (2003). Later, as Supreme Allied Commander in Europe, Eisenhower saw firsthand the superiority of that “great public works project of the Third Reich”: Hitler’s four-lane autobahns. *Id.* This network of highways “facilitated the expeditious movement of the Wehrmacht to invade nearly every nation that bordered Germany . . . [while remaining] relatively impervious to air attack.” *Id.*

20. 152 *CONG. REC.* S3,158 (daily ed. Apr. 5, 2006) (containing statement of Sen. Inhofe commemorating the fiftieth anniversary of the Interstate System, “proclaim[ing] 2006 . . . [to be] the Golden Anniversary Year of the Dwight D. Eisenhower National System of Interstate and Defense Highways”); see also JANET F. DAVIDSON & MICHAEL S. SWEENEY, *ON THE MOVE: TRANSPORTATION AND THE AMERICAN STORY* 267 (Nat’l Geographic Soc’y 2003) (noting President Eisenhower’s belief that highway “[c]onstruction would stabilize employment and help bolster national defense”).

alike.<sup>21</sup> By some accounts, the new four-lane superhighways altered too much the pace and character of our nation's landscape.<sup>22</sup>

Whatever controversies existed at the time have largely faded into history, and current opinion generally favors the extensive commercial development and settlement that has fostered along the roadside.<sup>23</sup> Presently, over 3,233 miles of interstate highway have been completed in Texas, a longer portion of the interstate system than any other state.<sup>24</sup> Concerns have arisen, however, regarding the long-term viability and sustainability of this system.<sup>25</sup> Texas's blessing and curse of a population explosion

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21. 152 CONG. REC. S3,158 (daily ed. Apr. 5, 2006) (recording the comment of Sen. Inhofe).

[A]t the time there were those who felt the plan was too ambitious, too expensive and consequently not a good use of scarce [f]ederal dollars. I am sure all would agree that not only was it a good use of scarce [f]ederal dollars, but that the nation has enjoyed a many-fold return on the expenditure.

*Id.* Although initially "states received highway funding according to population," eventually federal dollars were allocated "by proportion of interstate miles instead." JANET F. DAVIDSON & MICHAEL S. SWEENEY, *ON THE MOVE: TRANSPORTATION AND THE AMERICAN STORY* 270 (Nat'l Geographic Soc'y 2003). Texas, for example, which built massive amounts of highways, received a great deal of revenue and experienced a tremendous "boom in population and industry." *Id.*

22. *Compare* JOHN STEINBECK, *TRAVELS WITH CHARLEY: IN SEARCH OF AMERICA* 81 (Viking Press 1962) ("When we get these thruways across the whole country . . . it will be possible to drive from New York to California without seeing a single thing."), *with* CHARLES KURALT, *A LIFE ON THE ROAD* 192 (G.P. Putnam's Sons 1990) ("The interstate highway system is a wonderful thing. It makes it possible to go from coast to coast without seeing anything or meeting anybody.").

23. *See* JANET F. DAVIDSON & MICHAEL S. SWEENEY, *ON THE MOVE: TRANSPORTATION AND THE AMERICAN STORY* 271 (Nat'l Geographic Soc'y 2003) ("Between 1967 and 1970, interstate construction displaced nearly 169,000 people, three-fourths of whom lived in cities. . . . Protesters scored some victories," however, halting urban interstates in Boston and San Francisco). "Workers traveled into cities that had been beyond the reach of a daily commute, and suburban communities along the interstates flourished." *Id.* at 267–70.

24. *See* Interstate System Design, <http://www.fhwa.dot.gov/programadmin/interstate.cfm> (last visited Dec. 17, 2007) (noting that California ranks second in interstate mileage with over 2,455 miles).

25. *See* Trans-Texas Corridor: About TTC, [http://ttc.keeptexasmoving.com/about/rapid\\_growth.aspx](http://ttc.keeptexasmoving.com/about/rapid_growth.aspx) (last visited Dec. 17, 2007) (expressing concerns that "[a]s futuristic as the interstate system was in its day, it had a planned life span of only 30 years," and that now, fifty years later, "nearly 9.5 million people—or about 45 percent of all Texans—live within 50 miles of I-35"). Despite claims of a daily increasing irrelevance, no one can doubt that "[t]he state's farm-to-market systems, begun in 1949, and [the Texas Highway Department's] participation in the 1956 federal interstate program stand today as enduring achievements." John D. Huddleston, *Highway Development: A "Concrete"*



nearly unparalleled in modern America is compounded by the fact that almost all of its population growth is occurring in and along the triangle of interstate highways that connects the Dallas-Fort Worth, Houston, and San Antonio-Austin areas.<sup>26</sup>

“[The Texas Department of Transportation (TxDOT)] carried Texas through the 20th century, but each milestone must serve as a reminder that every challenge Texas faced in the past demanded a new approach for the future. The same is true today . . . .”<sup>27</sup> This demographic surge, this demand for new approaches to building and maintaining highways in Texas—whether legal, logistic, or administrative—was the impetus for the birth of the Trans-Texas Corridor.<sup>28</sup>

### B. *Crossroads of the Americas: The Trans-Texas Corridor Plan*

In a letter to TxDOT in January 2002, Texas Governor Rick Perry proposed a twenty-first century transportation network for

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*History of Twentieth-Century Texas*, in TEXAS: A SESQUICENTENNIAL CELEBRATION 252, 267 (Donald W. Whisenhunt ed., 1984).

26. See Steve H. Murdock et al., *Dynamic Population Change in Size and Diversity*, in TEXAS ALMANAC 2002–2003, at 286 (Mary G. Ramos ed., 2001) (interpreting the results of the 2000 decennial population census to determine changes since the 1990 census). “[T]he patterns of change in Texas . . . departed substantially from that in many other parts of the nation” in that the state’s “largest places (i.e., cities and towns) continued to show substantial population growth in the 1990s.” *Id.* at 287. All of Texas’s largest cities grew in population, including Houston (19.3%), Dallas (18.0%), San Antonio (19.3%), and Austin (39.1%). *Id.* “[P]opulation growth in Texas . . . in the 1990s . . . was most rapid along the . . . central corridor of the state from Dallas-Forth Worth to San Antonio, and in the Houston-Galveston area.” *Id.* These growth areas correspond neatly to those marked out as high priorities for TxDOT. See, e.g., Press Release, Tex. Dep’t of Transp., New Master Development Plan for TTC-35 Unveiled (Sep. 28, 2006), <http://ttc.keeptexasmoving.com/publications/files/NR-TTC-35DevPlan0906.pdf> (quoting Texas Transportation Commission Chairman Ric Williamson, “breaking the gridlock on Interstate 35 is critical to the success of our plan and to the well[-]being of all Texans”). Interstate Highway 35 connects the Mexican border with San Antonio, Austin, and Dallas-Fort Worth, the areas where population growth was “most rapid” in the 1990s. *Id.* “Forty-five percent of all Texans live within 50 miles of I-35 and by 2030, more than 15 million people will live within the corridor.” *Id.*

27. CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, Introduction (Jan. 2001), available at <http://www.window.state.tx.us/txdot/txdot100.html>.

28. See Keep Texas Moving: TxDOT Why Are We Doing It?, [http://www.keeptexasmoving.org/index.php/why\\_are\\_we\\_doing\\_it](http://www.keeptexasmoving.org/index.php/why_are_we_doing_it) (last visited Dec. 17, 2007) (citing reasons why the Trans-Texas corridor is necessary).

Texas which was to be styled the “Trans-Texas Corridor.”<sup>29</sup> In June of that same year, TxDOT released a report and action plan on the Trans-Texas Corridor “which set[] forth a basic design for a 4,000 mile multi-use transportation system.”<sup>30</sup> In early 2003, the 78th Texas Legislature responded with House Bill 3588 (H.B. 3588) which amended the Texas Transportation Code to lay much of the statutory framework for the Trans-Texas Corridor.<sup>31</sup> After spending a contentious two months in debate and amendment in the house of representatives and senate, H.B. 3588 was signed into law by Governor Perry in June 2003.<sup>32</sup>

By its September 2003 submission deadline, TxDOT received three responses to a request for competing proposals and qualifications to design and build portions of the Trans-Texas Corridor along the course of Interstate Highway 35 from Mexico to Oklahoma.<sup>33</sup> TxDOT spent the first two months of 2004

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29. TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007) (compiling a timeline of Trans-Texas Corridor events, from its earliest proposition by Texas Governor Rick Perry up to the most recent information and summarizing Governor Perry’s three-page letter of Jan. 30, 2002 to Texas Transportation Commissioner John W. Johnson).

30. TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007).

31. Transportation Act, 78th Leg., R.S., ch. 1325, § 1.01, 2003 Tex. Gen. Laws 4884 (codified at TEX. TRANSP. CODE ANN. § 227.001–.083 (Vernon Supp. 2006)) (establishing the general provisions for the Trans-Texas Corridor). House Bill 3588 was styled: “A[n act] relating to the construction, acquisition, financing, maintenance, management, operation, ownership, and control of transportation facilities and the progress, improvement, policing, and safety of transportation in the state . . .” *Id.*

32. *See* H.J. of Tex., 78th Leg., R.S. 6673 (2003) (indicating H.B. 3588 was entered into the House Journal on June 22, 2003); *see also* TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007) (memorializing the June 19, 2003 signing into law of H.B. 3588). At a signing ceremony at the Texas Transportation Institute, housed in Texas A&M University’s Gibb Gilchrist Building, Governor Rick Perry summed up the implications of H.B. 3588 when he stated: “This mobility package . . . gives the Texas Department of Transportation new oversight authority, new planning and development tools, and innovative financing options to build the Trans-Texas Corridor more efficiently and at a lower cost.” TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007).

33. *See* TEX. DEPT’ OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: INDUSTRY WORKSHOP 8 (2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf) (recounting the proposal timeline for the TTC-35 project). TxDOT outlined the procurement process it will follow (when contracting through a comprehensive development agreement (CDA)) as being essentially a two-stage process. *Id.* at 52. The first stage is a qualifications stage, whereby competing entities will submit what amounts to *curricula vitae* of the companies’ projects and business dealings to date, along with a general proposal for the project; based on these

conducting the requisite public hearings prior to taking any action on the proposal to build TTC-35,<sup>34</sup> eventually holding public comment sessions in all 254 Texas counties.<sup>35</sup> In December 2004, the Texas Transportation Commission selected from the three proposals submitted that of Cintra-Zachry, a Spanish-Texan business consortium.<sup>36</sup> This detailed proposal was developed in

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submissions, companies may be selected to proceed to the second stage. *Id.* at 52–54. The three initial competing proposals and qualifications were submitted by Fluor Enterprises, Inc., Trans-Texas Express, L.L.C., and Cintra-Zachry; “all three advance[d] to the [second stage].” *Id.* at 8. The second stage consists of a request for detailed proposals that are to be submitted by the short-listed “proposer[s],” which are individually evaluated to determine which detailed proposal will provide the “best value.” *Id.* at 54. TxDOT based its final selection of a design and construction firm upon these detailed proposals. *See, e.g.*, Press Release, Cintra Concesiones de Infraestructuras de Transporte, S.A., Cintra-Zachry Team Submits Proposal for TTC-35 High Priority Trans-Texas Corridor (Aug. 23, 2004), <http://www.corridorwatch.org/ttc/ttc35/02%204.1.2%20Proposal%20Overview.pdf> (summarizing basic elements of a detailed proposal submitted by Cintra-Zachry, the ultimately successful proposer).

34. *See* National Environmental Policy Act (NEPA) of 1969 § 102, 42 U.S.C. § 4332(C)–(D) (2000) (requiring all agencies of the federal government to prepare environmental reports for major federal actions). State agencies, unless statutorily exempted, must also follow NEPA procedures. *Id.* The Texas Transportation Code specifically provides that, for projects exempted from NEPA review, TxDOT still must provide its own rules relating to environmental review. *See* TEX. TRANSP. CODE ANN. § 201.604(a)(1)–(4) (Vernon 1999) (requiring, among other things, public comment hearings, “evaluation of direct and indirect effects” of projects and project alternatives, and the completion of a written report including any mitigation measures required by TxDOT). “An environmental review of a project must be conducted before the location or alignment of the project has been adopted.” *Id.* § 201.604(b). Receipt of federal funding on a project qualifies it for NEPA review; where federal contractual relationships with a state department of transportation and funding for a state highway project are terminated and the state returns all federal funds, the state agency is exempted from the applicable provisions of NEPA. *See* Named Individ. Members of San Antonio Conservation Soc’y v. Tex. Highway Dep’t., 496 F.2d 1017, 1022–23 (5th Cir. 1974) (recognizing Congress’s intent to eliminate NEPA applicability to the Texas Highway Department’s construction of the San Antonio North Expressway (that would bisect portions of Olmos Park)).

35. TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007). TxDOT held its first citizen input hearing in Palmer County on January 30, 2004, and conducted a spate of such hearings lasting until February 26, 2004. *Id.* “Public involvement is a critical part of the development process.” TEX. DEP’T OF TRANSP., PROJECT SELECTION PROCESS 9 (2003). “During this process, numerous public hearings and meetings give citizens many opportunities to offer input and be involved in decision-making.” *Id.*

36. TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007) (recounting selection of Cintra-Zachry’s second, more detailed proposal); *see* Press Release, Cintra Concesiones de Infraestructuras de Transporte, S.A., Cintra-Zachry Team Submits Proposal for TTC-35 High Priority Trans-Texas Corridor (Aug. 23, 2004), <http://www.corridorwatch.org/ttc/ttc35/02%204.1.2%20Proposal%20Overview.pdf>

anticipation of entering into a “comprehensive development agreement” with TxDOT.<sup>37</sup> Discussed at length below, comprehensive development agreements (CDAs) are a recent creative solution to the planning and completion of major public works in which TxDOT may contract “with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand” transportation projects such as the Trans-Texas Corridor.<sup>38</sup>

In June 2005, addressing citizens’ concerns with certain provisions of H.B. 3588, Governor Perry signed into law House Bill 2702<sup>39</sup> (H.B. 2702) to “provide greater clarity and significant protections for property owners and ensure that they are treated fairly when the state must build new roads.”<sup>40</sup> House Bill 2702 revised several sections of H.B. 3588 dealing with CDAs and extended their coverage to include the financing and completion of the rail facilities Governor Perry indicated were integral to his

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20Proposal%20Overview.pdf (outlining details of the proposal and identifying parties involved in the design, construction, financing, and planning of the Trans-Texas Corridor project). The appellation “Cintra-Zachry” derives from two of the main entities involved in the development of the IH-35 Corridor project: Cintra Concesiones de Infraestructuras de Transporte, S.A., is a Spanish construction and civil engineering firm; Zachry Construction Corporation is a construction firm based in San Antonio, Texas. *Id.* See generally TEX. TRANSP. CODE ANN. § 223.203 (Vernon Supp. 2006) (providing procedures for entering into a CDA). TxDOT “shall pay an unsuccessful private entity that submits a responsive proposal in response to a request for detailed proposals . . . a stipulated amount in exchange for the work product contained in that proposal.” *Id.* § 223.203(m). After payment of this amount, TxDOT becomes joint owner “of any work product contained in[] the proposal” along with the unsuccessful proposer. *Id.* Here, Fluor Enterprises, Inc. and Trans-Texas Express, L.L.C. were unsuccessful proposers. TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007).

37. See CINTRA, PROPOSAL FOR TTC-35 HIGH PRIORITY TRANS-TEXAS CORRIDOR PROJECT COMPREHENSIVE DEVELOPMENT AGREEMENT 1 (2004), <http://www.corridorwatch.org/ttc/ttc35/01%20Proposal%20for%20TTC-35%20High%20Priority%20Trans-Texas%20Corridor%20P.pdf> (condensing a one hundred-plus page proposal into an executive summary). The executive summary of the proposal anticipates entering into a CDA for fifty years, *id.* at 5, the maximum term permitted by law. See TEX. TRANSP. CODE ANN. § 223.208(h) (Vernon Supp. 2006) (providing that CDAs between the state and a private participant “may be for a term not longer than 50 years”).

38. See TEX. TRANSP. CODE ANN. § 223.201(a), (b) (Vernon Supp. 2006) (authorizing TxDOT to enter into CDAs).

39. Act of May 30, 2005, 79th Leg., R.S., ch. 281, §§ 1.01–6.06, 2005 Tex. Gen. Laws 778, 778–839 (amending the Texas Transportation Code).

40. Press Release, Texas Governor’s Office, Governor Perry Signs Transportation Bill into Law (June 14, 2005) (addressing “vagueness in current law governing the Corridor”).

plan for ensuring expeditious travel and transportation in Texas.<sup>41</sup>

Yet Texans were not entirely satisfied in 2005. After convening in Austin in January 2007, this became apparent when the assembled legislators sought to soothe constituents' still-unresolved concerns by mounting an offensive against the Governor's Trans-Texas Corridor plan they had voted into law in the previous two sessions.<sup>42</sup> Two identical bills were introduced by opponents of the plan, one in the house<sup>43</sup> and one in the senate.<sup>44</sup> The goal of each was nothing short of a two-year moratorium on TxDOT's authority to enter into the CDAs that had been envisioned as the hallmark feature of the Trans-Texas Corridor plan.

The house's version, House Bill 1892 (H.B. 1892), introduced in February, shot out of the house with a 123-17 vote in favor of the two-year moratorium.<sup>45</sup> After a month-long pit stop in the Senate Transportation and Homeland Security Committee, H.B. 1892—with several amendments that would decrease the state's CDA authority—was given a full senate vote, where it again received overwhelming support, 27-4.<sup>46</sup> Going back to the house for a final vote on May 2, 2007, H.B. 1892 sped toward the finish line with a near unanimous house in favor of the two-year moratorium.<sup>47</sup>

41. See Act of May 30, 2005, 79th Leg., R.S., ch. 281, § 2.21, 2005 Tex. Gen. Laws 778, 790–95 (codified as amended at TEX. TRANSP. CODE ANN. §§ 223.201–.209 (Vernon Supp. 2006)) (augmenting the Texas Transportation Code provisions relating to comprehensive development agreements).

42. See, e.g., H.J. of Tex., 80th Leg., R.S. 1681 (2007) (relating remarks of Representative Mike Krusee, chair of the Transportation Committee, to the house after they had debated and resolved upon a vote favoring the two-year moratorium on CDAs). Rep. Krusee, who had led the futile opposition to any sort of moratoria, addressed the house in disappointment:

Thank you, Mr. Speaker. Thank you, members. You've been real patient. This has been a long day. And I know you've been very frustrated with TxDOT and you've certainly expressed that today. But look, after we passed our bills in 2003 and 2005, a lot of you since then have said, "I didn't really understand what we were doing at the time." So let me just, very quickly, explain exactly what we're doing [by voting to place a moratorium on the Trans-Texas Corridor projects].

*Id.* Rep. Krusee proceeded to explain the expected adverse effects of the two-year moratorium. *Id.*

43. Tex. H.B. 1892, 80th Leg., R.S. (2007).

44. Tex. S.B. 792, 80th Leg., R.S. (2007).

45. See H.J. of Tex., 80th Leg., R.S. 1682 (2007) (reporting floor votes).

46. See S.J. of Tex., 80th Leg., R.S. 1400 (2007) (reporting floor votes).

47. See H.J. of Tex., 80th Leg., R.S. 2849 (2007) (reporting a floor vote of 139-1 in favor).

However, on May 18, within sight of the checkered flag, Governor Perry vetoed the bill.<sup>48</sup>

Challengers to the Trans-Texas Corridor were not finished, however. Rather than attempting the difficult process of overturning the Governor's veto,<sup>49</sup> pro-moratoria legislators simply turned their attention to Senate Bill 792 (S.B. 792), a bill identical to H.B. 1892.<sup>50</sup> The senate's version of the moratorium was largely overlooked while the house bill consumed media and constituent focus; as such, it spent much of February and March of 2007 in a committee until it was calendared in late April.<sup>51</sup> It finally received action from the senate on May 14, 2007, when several amendments were added and the bill passed 31-0.<sup>52</sup> Senate Bill 792 moved on to the house, where it was again amended to impose, among other things, a two-year moratorium on entering into a CDA and a moratorium on work on all facilities under a CDA—this would include all Trans-Texas Corridor projects—entered into after May 1, 2007.<sup>53</sup> It passed the house overwhelmingly, 143-2, on May 17.<sup>54</sup> The senate voted to accept the Committee Report on S.B. 792<sup>55</sup>—though the language did not expressly halt the TTC-35 segment of the Trans-Texas Corridor plan<sup>56</sup>—at which point it returned to the house, where it

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48. See Veto Message of Governor Perry, Tex. H.B. 1892, H.J. of Tex., 80th Leg., R.S. 4893 (2007) (reporting veto of H.B. 1892). It was never to be resurrected again, as attention shifted to its companion bill in the Texas Senate.

49. See TEX. CONST. art. IV, § 14 (detailing procedures required to overrule a gubernatorial veto). The house would have had to muster a two-thirds vote, as would the senate, at which point the bill would have become law. *Id.*

50. See S.J. of Tex., 80th Leg., R.S. 1389 (2007) (considering H.B. 1892 in lieu of S.B. 792 as per TEX. S. RULE 7.14, which permits calendaring any house bill touching on the same subject).

51. See, e.g., S.J. of Tex., 80th Leg., R.S. 410 (2007) (reporting referral to Transportation and Homeland Security Committee in early March); *id.* at 685 (reporting that the committee considered the bill in late March).

52. See S.J. of Tex., 80th Leg., R.S. 2044 (2007) (reporting floor votes).

53. See H.J. of Tex., 80th Leg., R.S. 4466 (2007) (amending S.B. 792 to apply more strictly to ongoing CDA projects, including TTC-35, to prevent TxDOT from using a loophole in H.B. 1892); *id.* at 4467 (forbidding government financial advisors who develop market valuation for a project from also advising the private company who will complete the project).

54. See H.J. of Tex., 80th Leg., R.S. 4477 (2007) (reporting floor votes).

55. See S.J. of Tex., 80th Leg., R.S. 4551 (2007) (reporting floor votes).

56. See H.J. of Tex., 80th Leg., R.S. 6472 (2007) (reporting remarks of Representative Lois Kolkhorst, who had initially amended S.B. 792 in the house expressly to impose a moratorium on any further TTC-35 facilities agreements). Rep. Kolkhorst went on the

passed 127-19.<sup>57</sup> Senate Bill 792 was signed into law by the Governor on June 11, 2007.<sup>58</sup>

When read together as codified in the Texas Transportation Code, 2003's H.B. 3588, 2005's H.B. 2702, and 2007's S.B. 792 have wrought substantial changes upon the transportation project development process as Texas historically has known it.<sup>59</sup> Those changes—viewed in light of contemporary developments elsewhere in the law—are the focus of this Comment. The planning, development, and completion of ambitious, large-scale transportation works such as the Trans-Texas Corridor are not undertaken without the implication of significant competing interests. In this Comment, Part II surveys the traditional contractual award practice for highway improvement in Texas, as it historically existed, and does exist, under present statutes. Part II then assesses the tremendous change in these contracting practices as brought about by the spate of recent legislation, providing an overview of the most drastic of the changes. At this point, the Comment grapples with questions raised by an analysis

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record, with the bill's sponsor, Representative Wayne Smith, to make a "Statement of Legislative Intent":

In the end, SB 792 does not provide for an express moratorium on facility agreements. However, it is my understanding, Mr. Smith, and I want to confirm that it is your understanding as well for this body, the [G]overnor's representatives advised you, me, and other conferees that under SB 792, *no segment of TTC-35 . . . would be constructed during the moratorium.* That is, through August 31, 2009. Further, those representatives told us that they expected that *during such a period, or through August 31, 2009, no facilities agreements would be entered into with respect to TTC-35.*

. . . Mr. Smith, for the official record of the house, was your understanding of our conversation with the [G]overnor's representatives on this subject the same as mine?

W. SMITH: Yes, they were.

*Id.* (emphasis added).

57. See H.J. of Tex., 80th Leg., R.S. 6475 (2007) (reporting floor votes).

58. S.J. of Tex., 80th Leg., R.S. 5324 (2007).

59. See TEX. DEP'T OF TRANSP., PROJECT SELECTION PROCESS 10–11 (2003) (touting as "The Future of Project Development" the drastic legislative changes surrounding the Trans-Texas Corridor); see also Press Release, Texas Governor's Office, Governor Perry Signs Transportation Bill into Law (June 14, 2005) (commenting upon occasion of signing H.B. 2702 into law). "Today we are not only improving upon the Trans Texas Corridor plan by adding new protections, but by expanding the state's ability to tackle complex transportation problems faster and cheaper . . ." Press Release, Texas Governor's Office, Governor Perry Signs Transportation Bill into Law (June 14, 2005). It is this expansion of TxDOT's capabilities that is the focus of this Comment.

of Texas's new comprehensive development agreement laws, and tries to determine how the new statutes mesh—or conflict—with traditional construction contract practices. Lastly, Part III posits practical and statutory suggestions that should be implemented by the legislature upon recommendations by the legislative study committee<sup>60</sup> to ease the confusion incident to the transition from Texas's traditional method of contracting and project delivery to its newer, more comprehensive approach. This Comment does not attempt a thorough inquiry into every issue raised by CDAs as they relate to the future of highway development; that exceeds the scope of a dozen such comments. It assays primarily that lingering issue of how CDAs relate to, and how lawyers and construction professionals are to view, Texas's still-mandatory competitive bidding laws. Are CDAs to be but an exception—or have they swallowed the rule?

## II. ANALYSIS

Perhaps the most sweeping of the recent amendments to the Transportation Code involves the grant of permission to TxDOT to “enter into a comprehensive development agreement with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand” nearly any state highway project.<sup>61</sup> While CDAs are neither a groundbreaking nor new form of contractual arrangement,<sup>62</sup> they do represent a significant

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60. See generally Act of May 26, 2007, 80th Leg., R.S., S.B. 792, § 3.01(2)(m)–(p) (to be codified at TEX. TRANSP. CODE § 223.210) (creating the legislative study committee and detailing its composition and duties).

61. TEX. TRANSP. CODE ANN. § 223.201(a) (Vernon Supp. 2006).

62. See TIMOTHY R. TWOMEY, UNDERSTANDING THE LEGAL ASPECTS OF DESIGN/BUILD 3–5 (Jill Farinelli & Dwayne Lehigh eds., 1989) (relating historical sources of the design-build process as well as the “traditional method of project delivery”). There may be seen in comprehensive development agreements an allusion to the “master builder” of yore; that is, one man skilled in the art of building design and construction techniques who directed craftsmen and laborers in the completion of a plan that might be “little more than an image in [his] mind.” *Id.* at 3. As projects became more complex during the Renaissance, “[t]he term *master builder* was applied less frequently to those who acted as design/builder, and was more often associated solely with the *builder*”; the designer began to be referred to as the project’s “*architect . . .*” *Id.* at 4 (emphasis added). Curiously, the modern resurgence in design-build methodology and consequent reunified role of the builder and designer has been fueled in part by the pursuit of the same type of huge, complex projects—such as the Trans-Texas Corridor—that drove the professional divergence between builder and architect initially.



shift from TxDOT's traditional methods of project development and delivery.

#### A. *Traditional Highway Project Development: Design-Bid-Build*

The Texas Department of Transportation has outlined its traditional highway project selection and development process in five steps.<sup>63</sup> First, the need for some project is recognized by citizens or local authorities and is brought to the attention of TxDOT or one of its twenty-five regional district offices.<sup>64</sup> Second, planners at TxDOT evaluate the project in light of material and environmental cost estimates and consider the availability of state and federal funding for the project.<sup>65</sup> Third, if the project is recommended for advancement locally and by TxDOT engineers, it then competes for funding with other proposed projects before the Texas Transportation Commission, with whom funding authority largely resides.<sup>66</sup> Fourth, in a process that often takes several years, the now-funded project is developed: here, it undergoes advanced transportation planning; in-depth engineering, design, and environmental studies are performed; and right-of-way is acquired.<sup>67</sup> Fifth, and finally, the competitive bidding process begins, whereby construction contracts are awarded to the lowest responsive bidders, and construction of the project begins.<sup>68</sup>

This traditional process—whereby a state department of

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63. See TEX. DEPT. OF TRANSP., PROJECT SELECTION PROCESS 7–9 (2003) (presenting the five steps for the traditional highway project selection and development process).

64. *Id.*

65. *Id.* at 7–9.

66. *Id.* at 9.

67. *Id.* “After consultations with [TxDOT], the designer prepares a preliminary design, . . . [or] ‘schematics.’ Then he does design development, fleshing out the design. Ultimately he does a detailed design that is sufficient to be put out to bid or to negotiate[,] . . . [a step that] can take quite a lot of time.” JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 84 (1997).

68. TEX. DEP'T OF TRANSP., PROJECT SELECTION PROCESS 9 (2003). Once there is a “completely prepared design, you need a contractor to execute the design. After the prospective contractor has been selected, he examines the final, complete design and gives a price” he will charge to complete the project as designed. JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 84 (1997). “If this is acceptable, or is the low bid, the contract is made with the contractor—the second contract, following the one with the design professional.” *Id.* at 84–85.

transportation first plans and designs a project and prepares a bid contract, which is then awarded to and built by the lowest bidder—has been referred to within the highway construction industry as the “design-bid-build” process.<sup>69</sup> As the primary designer of projects and the assembler of bid packages, TxDOT retains a great deal of control within the design-bid-build project development process, going so far as to “detail exactly what is built, how it is built, the materials to be used, [and] how traffic is maintained during construction . . . .”<sup>70</sup> A 2001 TxDOT audit by the Texas Comptroller of Public Accounts revealed that “[t]he most frequently stated potential disadvantages of [the] design-bid-build [process] focus on the higher commitment of time and oversight by [TxDOT], less input from the contractor into design, more time needed to complete projects, and the possibility of an adversarial relationship between [TxDOT] and the contractor.”<sup>71</sup> Nor does

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69. Donn E. Hancher, *Contracting Methods for Highway Construction*, TR NEWS (Transp. Research Bd., Wash., D.C.), Nov.–Dec. 1999, at 10–14 (describing the design-bid-build process and referring to it as “[t]he traditional approach to contracting for highway construction projects”); see also JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 84 (1997) (labeling as the “*traditional*” process what he refers to as the design-award-build system); TIMOTHY R. TWOMEY, UNDERSTANDING THE LEGAL ASPECTS OF DESIGN/BUILD 4 (Jill Farinelli & Dwayne Lehigh eds., 1989) (discussing historical development of traditional process). “In the traditional method of project delivery, both the design professional and the contractor are retained separately by the client. Each construction professional maintains a separate contract with the client.” TIMOTHY R. TWOMEY, UNDERSTANDING THE LEGAL ASPECTS OF DESIGN/BUILD 4 (Jill Farinelli & Dwayne Lehigh eds., 1989). The traditional design-bid-build method of project delivery “continues today to represent the single most often used method.” *Id.*

70. CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html>. TxDOT has produced an indexed book, released in 1993 and most recently in 2004, which—in just over one thousand pages—details TxDOT’s standards for nearly any conceivable issue related to the construction of a highway, from the strength and spacing of steel to the initial contract to the final payment. See generally TEX. DEP’T OF TRANSP., STANDARD SPECIFICATIONS FOR CONSTRUCTION AND MAINTENANCE OF HIGHWAYS, STREETS, AND BRIDGES (2004) (specifying TxDOT’s requirements). When TxDOT enlists independent design professionals, those professionals have a handy reference guide to consult when designing and planning a Texas highway. It has been suggested that “the TxDOT Construction Division spends approximately 6,000 to 10,000 man-hours per year researching, writing, and modifying these specifications.” CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html>.

71. CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch.

the design-bid-build process “favor a life-cycle cost approach to projects[,]” as TxDOT must necessarily balance the allocation of scarce funding between the immediate alleviation of traffic congestion and future highway maintenance costs.<sup>72</sup>

The Comptroller's report recommended TxDOT consider experimentation with contractual processes other than design-bid-build for the construction of state highways.<sup>73</sup> Among several others, one frequently-mentioned alternative was the use of “design-build” delivery methods, whereby “the highway department contracts with a single entity to provide [both] design and construction services” for a highway project.<sup>74</sup> Traditionally, TxDOT engineers have designed projects within the agency itself or have solicited designs from external design professionals, which only at that point are submitted to potential builders in a competitive bidding process.<sup>75</sup> Design-build has been touted for reductions in project delivery time and for promoting early interaction between design professionals and builders, allowing for improved design and a streamlined approach to the completion of

4.2 (Jan. 2001). *available at* <http://www.window.state.tx.us/txdot/index.html>. On the issue of time needed to complete projects, one commentator has acknowledged that the traditional project delivery system might “seem like slow motion[, in that e]ach phase takes time, and the next can't begin until the prior one is finished.” JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 86 (1997).

72. Donn E. Hancher, *Contracting Methods for Highway Construction*, TR NEWS (Transp. Research Bd., Wash., D.C.), Nov.–Dec. 1999, at 10–14.

73. *See, e.g.*, CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), *available at* <http://www.window.state.tx.us/txdot/index.html> (advocating use of design-build contracts).

74. CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), *available at* <http://www.window.state.tx.us/txdot/index.html>. “One of the difficulties with the traditional system was the potential division of responsibility between [the] prime contractor and the architect.” JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 94 (1997). Project owners such as TxDOT might have cause to wonder why they should hire two people—who are only going to point fingers at each other should a problem arise with the project—when hiring “one person to design and build the project . . . [would] centralize responsibility.” *Id.*

75. *See* TEX. DEP'T OF TRANSP., PROJECT SELECTION PROCESS 9 (2003) (enumerating steps involved in design-bid-build process); *see also* CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), *available at* <http://www.window.state.tx.us/txdot/index.html> (“[The] traditional process has been for the owner (normally the state DOT) to fully complete the design and then prepare a bid package that is awarded to the low bidder.”).

complex construction projects.<sup>76</sup> However, though alternative contractual methods to design-bid-build have long existed and been in use in other sectors of the construction industry, either the strictures of Texas law or institutional stodginess on the part of TxDOT have precluded their implementation in the realm of highways.<sup>77</sup>

From its earliest days, TxDOT has been required by law to “submit for competitive bids each contract for . . . the improvement of a highway that is part of the state highway system.”<sup>78</sup> In the past, TxDOT has followed statutory mandate and, upon acceptance of the aspiring contractors’ competitive bids, has awarded highway construction contracts only to the “lowest bidder.”<sup>79</sup> The practical purpose of competitive bidding policies is

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76. See Donn E. Hancher, *Contracting Methods for Highway Construction*, TR NEWS (Transp. Research Bd., Wash., D.C.), Nov.–Dec. 1999, at 10–14 (listing and commenting upon the benefits of maintenance warranties, multiparameter—“A+B” or cost plus time—bidding, constructibility review, and several other novel approaches to construction contracting); see also Philip L. Bruner & Patrick J. O’Connor, Jr., 2 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 6:22 (2007) (compiling recent comparative statistical analyses of time, cost, and quality of project completion under design-bid-build, design-build, and “construction management at risk” delivery systems).

77. See CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html> (criticizing Texas’s then-existing statutes as limiting TxDOT only to traditional design-bid-build contractual practices); see also Donn E. Hancher, *Contracting Methods for Highway Construction*, TR NEWS (Transp. Research Bd., Wash., D.C.), Nov.–Dec. 1999, at 10–14 (relating how “[t]he highway sector is perhaps the most conservative segment of the construction industry[,]” and therefore the most resistant to innovative contracting); Philip L. Bruner & Patrick J. O’Connor, Jr., 2 BRUNER & O’CONNOR ON CONSTRUCTION LAW § 6:22 (2007) (concluding that while “governmental entities have traditionally been more hesitant to embrace the design-build delivery method, there have been signs of growth”). While design-build has long been “useful in private work[, this method is] only slowly coming to the public sector” because of the legal problems often associated with it. See JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 94 (1997) (identifying among these legal problems the fact that design-build “doesn’t accommodate itself well to competitive bidding” requirements that exist under Texas law).

78. TEX. TRANSP. CODE ANN. § 223.001 (Vernon 1999); accord Vincent E. McGeary & Michael G. Pellegrino, *Project Agreements and Competitive Bidding: Monitoring the Back Room Deal*, 19 SETON HALL LEGIS. J. 423, 427–429 (1995) (reviewing the law of competitive bidding generally, but especially as reflected in New Jersey statutes and cases). Some commentators suggest that “it is a fear of cronyism and corruption” that drives the requirements for competitive bidding. JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 104 (1997).

79. See TEX. TRANSP. CODE ANN. § 223.0041 (Vernon Supp. 2006) (“[I]f the bids are accepted, the commission shall award the contract to the lowest bidder.”); see also *id.* § 223.005 (requiring acceptance of lowest bid even in those contracts involving less than

to assure taxpayers that their money is being spent only upon those highway projects which have undergone the economic scrutiny engendered by the bidding process.<sup>80</sup> As noted, this public competitive bidding obligation has precluded TxDOT's utilization of design-build methodology in the construction of state highway projects.<sup>81</sup> Stated simply: where TxDOT does not design a Texas highway project, there exists no design package to be

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\$300,000). *But see* *Holt & Co. v. Wheeler County*, 235 S.W. 226, 229 (Tex. Civ. App.—Amarillo 1922, writ *dism'd w.o.j.*) (permitting a discretionary rejection of a “lowest responsible bidder” because the “provision in the statute . . . requiring the award to be made to the lowest bidder was for the benefit of the *public* and not for the contractor” of a highway bridge (emphasis added)). *See generally* Vincent E. Mcgeary & Michael G. Pellegrino, *Project Agreements and Competitive Bidding: Monitoring the Back Room Deal*, 19 SETON HALL LEGIS. J. 423, 429 (1995) (reporting on some public bodies' circumventive use of “responsible bidder” clauses, which “allow public agencies to create a window through which they can reject the lowest bidder and instead choose a different contractor on the somewhat subjective basis of ‘responsibility’”). Note that when public agencies do make discretionary “exceptions to the competitive bidding requirement, [this] often trigger[s] a lawsuit from those excluded” bidders who would have been lowest without such an exception. JUSTIN SWEET, *SWEET ON CONSTRUCTION LAW* 103–04 (1997).

80. *Cf.* *Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex.*, 600 S.W.2d 264, 270 (Tex. 1980) (construing the lowest bidder award provision in Texas Constitution to protect citizens by mandating the state to award its printing contract to the lowest printer bid). “The purpose of the provision was to guard against favoritism, corruption, and extravagance in State government, to encourage administrative economy, and to secure the advantages of competitive bidding . . .” *Id.* An illustrative parallel exists between the state's printing needs in the case aforementioned and the state's extensive transportation needs as outlined in this Comment. The Texas Supreme Court has noted:

The purpose and intent of competitive bidding ordinances and statutes are well stated in *Sterrett v. Bell* . . . :

“Competitive bidding” . . . contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing. It requires that all bidders be placed upon the same plane of equality and that they each bid upon the same terms and conditions involved in all the items and parts of the contract, and that the proposal specify as to all bids the same, or substantially similar specifications. Its purpose is to stimulate competition, prevent favoritism and secure the best work and materials at the lowest practicable price, for the best interests and benefit of the taxpayers and property owners.

*Tex. Highway Comm'n v. Tex. Ass'n of Steel Imps., Inc.*, 372 S.W.2d 525, 527 (Tex. 1963) (quoting *Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951, no writ)); *see also* *Folkers v. Butzer*, 13 N.E.2d 624, 626 (Ill. App. Ct. 1938) (noting that “[t]he purpose of statutes requiring public letting and competitive bidding . . . is for the protection of those who will be called upon to pay for the work.” i.e., taxpayers).

81. CAROLE KEETON RYLANDER, *TEX. COMPROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION*, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html> (suggesting that chapters 223 and 361 of the Texas Transportation Code are impediments to the use of design-build in Texas highway construction projects).

submitted to competitive bidding by contractors, and any subsequent contract award takes place in contravention of the Transportation Code's requirements.<sup>82</sup>

## B. *Comprehensive Development Agreements*

### 1. The Future of Highway Project Delivery: Design-Build

Attempting to provide TxDOT with more latitude in developing highway projects, in 2005 the Texas Legislature extended statutory permission for TxDOT to “enter into a comprehensive development agreement with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand a: (1) toll project; (2) facility or a combination of facilities on the Trans-Texas Corridor” and other assorted state highway improvement projects.<sup>83</sup> According to TxDOT, “CDAs accelerate needed highway improvements by allowing the state to hire one entity to do all the work on a project—much of it simultaneously—rather than the traditional process in which the state divides project development into separate phases.”<sup>84</sup> These “comprehensive development agreements” are merely broad, understandable terms that describe the design-build process and variations of the design-build process.<sup>85</sup>

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82. See TEX. TRANSP. CODE ANN. § 223.001 (Vernon 1999) (mandating submission of highway projects to competitive bidding process). One commentator aptly explained this dilemma:

Some states found that the [design-build] method just didn't fit into their public laws for competitive bidding. Usually in a competitive bidding system, you compare the same product. “Tell me, Mr. Bidder, what you would charge to execute *this* design?” Everyone's supposed to be doing the same thing under the same terms. When you get their prices, you can pick the cheapest price, because you know everybody has agreed to do the same thing.

In [design-build], when the bidder does the design, each design will be different. . . . To use [design-build, then,] may require a special statute providing for the use of the [design-build] system.

JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 97 (1997).

83. Compare TEX. TRANSP. CODE ANN. § 223.201(a)(1)–(5) (Vernon Supp. 2006) (allowing TxDOT to enter comprehensive development agreements for specified state highway projects), with *id.* § 223.201 (requiring that “the department shall” practice competitive bidding for improvement, construction, or maintenance of state highways).

84. TEX. DEP'T OF TRANSP., PROJECT SELECTION PROCESS 10 (2003).

85. See TEX. TRANSP. CODE ANN. § 223.203(e)(1)–(2) (Vernon Supp. 2006) (authorizing TxDOT to “enter into a design-build contract”). Even had the Texas

The advantages TxDOT hopes to realize in utilizing a design-build CDA are many.<sup>86</sup> Under the traditional project delivery method, no construction could begin until TxDOT completed design, engineering, and environmental specifications;<sup>87</sup> under a CDA, construction on any segment of a project may begin as soon as that portion is designed.<sup>88</sup> Traditional contracting practices saw TxDOT litigating countless nonconformities with its strict design and contractual specifications against an army of contractors and subcontractors;<sup>89</sup> under a CDA, if any part of a highway's design

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Legislature not so specified "design-build" by name, its use of the broad terms "design and construction, rehabilitation, expansion, or improvement," as well as allowing the "financing, acquisition, maintenance, or operation of a project," necessarily encompasses design-build methodology. *Id.* § 223.201(b) (emphasis added). The use of the conjunctive *and* means essentially that the process known as design-build is permitted whether an entity is designing and constructing; designing and rehabilitating; designing and expanding; or designing and improving a highway project. *Id.* "[T]he term *design/build* refers to a method of project delivery in which a single entity provides to the client all of the services necessary to both design and construct all or a portion of the project." TIMOTHY R. TWOMEY, UNDERSTANDING THE LEGAL ASPECTS OF DESIGN/BUILD 3 (Jill Farinelli & Dwayne Lehigh eds., 1989).

86. See PHILLIP L. BRUNER & PATRICK J. O'CONNOR, JR., 2 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 6:22 (2006) (providing statistical research to support "the perception that the design-build delivery method results in projects that are faster to develop and cheaper to build" when compared to traditional methods). See generally Stephen Wichern, *Protecting Design-Build Owners Through Design Liability Coverage, Independent Construction Managers, and Quality Control Procedures*, 32 TRANSP. L.J. 35, 36 (2004) (discussing the benefits of a design-build system at length as well as recommending three methods by which state transportation agencies may protect themselves against several perceived shortcomings of that system). However, it is important to note that "what one party perceives as an advantage or an opportunity may be viewed as a disadvantage by another." TIMOTHY R. TWOMEY, UNDERSTANDING THE LEGAL ASPECTS OF DESIGN/BUILD 35 (Jill Farinelli & Dwayne Lehigh eds., 1989).

87. See, e.g., *W. Ala. Quality of Life Coal. v. U.S. Fed. Highway Admin.*, 302 F. Supp. 2d 672, 674-77 (S.D. Tex. 2004) (recounting facts of a Houston highway project's tedious planning and development in the mid-1980s, and eventual construction commencing in the late 1990s under TxDOT).

88. See Stephen Wichern, *Protecting Design-Build Owners Through Design Liability Coverage, Independent Construction Managers, and Quality Control Producers*, 32 TRANSP. L.J. 35, 37 (explaining that design-build allows multiple phases of a project to occur at the same time).

89. See JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 85 (1997) (explaining the often confused entanglement of parties and contracts "when you have two separate entities"). A common example is illustrated below:

I decided to add a deck to my house. I hired an architect. I picked a contractor to build the deck. My architect did the design. The contractor did the work, which included a sliding door that opened into the dining room.

The first rainy season came. The water poured through the door and into the dining room. I called the contractor and I said, "Henry, what's going on here?"

or construction is insufficient or problematic, TxDOT has only one responsible party to pursue: the development consortium.<sup>90</sup> Furthermore, there traditionally existed an adversarial relationship between the entity charged with designing a project and the entity charged with building it, “as the contractor [was] seeking the maximum profit, while the [designer was] seeking the best final product possible”;<sup>91</sup> in a CDA, where the designer and builder are one entity, the joint venture will benefit the most from a harmonious, efficient partnership.<sup>92</sup> Finally, TxDOT no longer needs to serve as an intermediary between the design firm and the construction firm throughout the life of enormous projects; in a CDA the design and construction units of the entity must necessarily cooperate and communicate, ostensibly enabling TxDOT to trim administrative costs.<sup>93</sup>

There are, though, some disadvantages associated with TxDOT’s utilization of design-build contracts under a comprehensive development agreement.<sup>94</sup> In the traditional design-bid-

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“Well,” he said, “it’s badly designed. They didn’t specify the right kind of material and waterproofing.” I went to my architect. He said, “Oh, those guys, they didn’t do it right.” I was whipsawed between the two. Each pointed to the other and said, “It’s his fault.”

It even goes farther down. The contractor said, “Well, it was the glass man who did it.” I said, “Wait a second, you engaged the glass man. You are responsible for what he did.”

*Id.*

90. See Stephen Wichern, *Protecting Design-Build Owners Through Design Liability Coverage, Independent Construction Managers, and Quality Control Producers*, 32 *TRANSP. L.J.* 35, 36 (2004) (describing the concept of single-point responsibility, wherein only a single party is held responsible for all aspects of a project).

91. *Wise v. State Bd. for Examination, Qualification, & Registration of Architects*, 274 S.E.2d 544, 546 (Ga. 1981), *overruled by Innovative Clinical & Consulting Servs. v. First Nat’l Bank of Ames*, 620 S.E.2d 352, 355 (Ga. 2005) (overruling *Wise* on different grounds).

92. See JUSTIN SWEET, *SWEET ON CONSTRUCTION LAW* 94–95 (1997) (relating statements made by a design-build contractor). Contractors depend largely upon their reputation in being selected by a project owner under a design-build contract. *Id.* To quote one such contractor’s statements as they would apply to TxDOT, “[TxDOT] knows that we’re not going to try to cheat them. [They] know[] that we will engage good designers, either independent designers or designers on our staff.” *Id.* at 95 (illustrating the necessity of reputation among contractors).

93. See TIMOTHY R. TWOMEY, *UNDERSTANDING THE LEGAL ASPECTS OF DESIGN/BUILD* 43 (Jill Farinelli & Dwayne Lehigh eds., 1989) (suggesting that where a design-build firm conducts “all required design and construction services in-house,” intra-organizational communications “may be more efficient”).

94. See, e.g., *id.* (surveying advantages and disadvantages of several arrangements of



build process, TxDOT could rely on the project's designer to be an independent consultant who "contracted . . . to design and supervise construction [and] identify contractor work that was not in compliance with the plans and specifications for a project."<sup>95</sup> Under a CDA, however, "the single greatest disadvantage" to TxDOT is the loss of this fiduciary advisor, as "the design professional cannot represent the [agency] fairly if he or she has a financial interest in the project" as a stakeholder in the joint venture.<sup>96</sup>

TxDOT traditionally designed highway projects itself or hired an outside firm to follow minutely detailed specifications—and, by law, no construction bids were entered until a project was fully designed<sup>97</sup>—which meant that TxDOT, as the project's owner, could oversee the integrity of a highway project throughout the entire design process. Within a CDA, however, because building theoretically may begin before a full design is completed, substantial construction could have taken place before TxDOT is even apprised of a project's design.<sup>98</sup> The structure of CDAs

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design-build contracts from the perspective of the three parties: the client/owner; the contractor; and the design professional); *see also* Stephen Wichern, *Protecting Design-Build Owners Through Design Liability Coverage, Independent Construction Managers, and Quality Control Procedures*, 32 TRANSP. L.J. 35, 40 (2004) (discussing the benefits of a design-build system at length, as well as recommending three methods by which state transportation agencies may protect themselves against several perceived shortcomings of that system).

95. Charlotte J. Robinson, *Design-Build Contracts for Colorado Highway Construction: New Contractual Issues—Part II*, 29 COLO. LAW. 53, 53 (Mar. 2000) (addressing legal issues surrounding the Colorado Department of Transportation's 1999 statutory authorization to use design-build contracts); *see also* Stephen Wichern, *Protecting Design-Build Owners Through Design Liability Coverage, Independent Construction Managers, and Quality Control Procedures*, 32 TRANSP. L.J. 35, 40 (2004) (noting restrictions on the role of a designer as a "watchdog" under design-build when compared to the traditional method of contracting).

96. TIMOTHY R. TWOMEY, UNDERSTANDING THE LEGAL ASPECTS OF DESIGN/BUILD 44-45 (Jill Farinelli & Dwayne Lehigh eds., 1989) (noting this fiduciary duty traditionally owed to clients by design professionals and recounting legal battles involving professional designers' associations to make it "legally and ethically permissible . . . to form contractual working relationships with contractors to share the financial rewards of a completed project"). "Clients who feel that they need an independent advisor to assist them in designing and monitoring the construction of the project, and to make decisions on their behalf, are urged to consider methods of project delivery other than design/build." *Id.* at 45-46.

97. *See* TEX. TRANSP. CODE ANN. § 223.001 (Vernon 1999) (mandating submission of designed highway projects to competitive bidding).

98. *See* Stephen Wichern, *Protecting Design-Build Owners Through Design Liability*

inherently subject design to the whim of the builder, who, unencumbered by an independent designer accountable directly to TxDOT, may modify a highway's design as construction proceeds in order to gain time or save construction or material costs.<sup>99</sup> Under its traditional method of issuing contracts, TxDOT often dealt with what might be several different parties, which could cause difficulties when making cohesive, unilateral decisions on a large project; this problem is likely to be compounded in projects developed through CDAs unless TxDOT makes an effort to ensure that the entity with which it contracts "is structured internally to 'speak with one voice' on administrative and management issues."<sup>100</sup>

Section 223.201 of the Transportation Code defines a CDA as "an agreement that, at a minimum, provides for the design *and* construction, rehabilitation, expansion, or improvement of a project . . . and may also provide for the financing, acquisition, maintenance, or operation of a project."<sup>101</sup> The broad number of roles that may be undertaken by a private entity in a CDA easily encompasses the design-build process; Texas now authorizes the process by name and the Transportation Code enshrines the use of a "design-build contract."<sup>102</sup> Texas has not, however, repealed or

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*Coverage, Independent Construction Managers, and Quality Control Procedures*, 32 TRANSP. L.J. 35, 44 (2004) ("[O]wners in traditional projects have the luxury of reviewing and modifying the project design before choosing a contractor."). Prior review "allows the owner to gain familiarity with the design and plan quality control measures. The design-build method does not afford the owner such luxury." *Id.*

99. *See, e.g., id.* at 39 (providing a scenario where the Colorado Department of Transportation (CDOT) curbed build time and costs by utilizing the design-build approach).

100. TIMOTHY R. TWOMEY, UNDERSTANDING THE LEGAL ASPECTS OF DESIGN/BUILD 48 (Jill Farinelli & Dwayne Lehigh eds., 1989). The traditional problems associated with dealing with a "fractured management structure" is likely to be compounded in design-build relationships because TxDOT no longer has the traditionally independent designer serving in a representative capacity to handle construction problems. *See id.* (noting that a project owner in this situation often must assume this role themselves, with varying degrees of success).

101. TEX. TRANSP. CODE ANN. § 223.201(b) (Vernon Supp. 2006) (emphasis added).

102. *See id.* § 223.203(e)(1)–(2) (authorizing TxDOT to "prequalify a private entity to submit a detailed proposal to provide services under a design-build contract" and to "enter into a design-build contract"). This is precisely the process TxDOT followed that ultimately led up to a CDA contract—for development of the IH-35 segment of the Trans-Texas Corridor—being awarded to Cintra-Zachry. *See* TEX. DEP'T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 9 (Jan. 2006), [http://www.dot.state.tx.us/publications/government\\_](http://www.dot.state.tx.us/publications/government_)

amended the “lowest bidder” award statutes<sup>103</sup> which have been shown to preclude the use of design-build in highway contracts.<sup>104</sup>

Perhaps in an attempt to reconcile these lowest bidder requirements with the CDA statutes’ permissive use of design-build, the Texas Legislature requires that if the Texas Department of Transportation does “enter[] into a [CDA], the department shall use a *competitive* procurement process that provides the *best value* for the department.”<sup>105</sup> Under this process, “competing consortiums [of designers, engineers, and construction contractors] submit proposals and TxDOT selects the one offering the best long-term value for the state.”<sup>106</sup> The apparent contradictions of the objective “lowest bidder” statutes and the newer, more subjective “best value” statutes loom in confusing opposition to one another.

### C. Questions About Comprehensive Development Agreements

#### 1. May the “Best Value” Trump the “Lowest Bidder”?

Under current Texas law, TxDOT “shall” submit highway project contracts for competitive bidding,<sup>107</sup> and, subject to its authority to “accept or reject the bids,” TxDOT “*shall* award the contract to the *lowest bidder*.”<sup>108</sup> However, current Texas law also provides that, if TxDOT utilizes a comprehensive development agreement for a highway project, TxDOT “*shall* use a competitive procurement process that provides for the *best value*

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business\_enterprises/CDA\_program.pdf (describing the process by which TxDOT awarded a CDA contract to Cintra-Zachry, one of three bidders).

103. TEX. TRANSP. CODE ANN. §§ 223.001, .005 (Vernon 1999), § 223.0041 (Vernon Supp. 2006).

104. CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), *available at* <http://www.window.state.tx.us/txdot/index.html> (suggesting that chapters 223 and 361 are impediments to the use of design-build in Texas highway construction projects).

105. TEX. TRANSP. CODE ANN. § 223.203 (Vernon Supp. 2006) (emphasis added). *Contra id.* § 223.0041 (requiring “*lowest bidder*” to be awarded the contract (emphasis added)).

106. TEX. DEP’T OF TRANSP., PROJECT SELECTION PROCESS 10 (2003).

107. TEX. TRANSP. CODE ANN. § 223.001 (Vernon 1999).

108. TEX. TRANSP. CODE ANN. § 223.0041(b) (Vernon Supp. 2006) (emphasis added).

for the department.”<sup>109</sup> These concurrent statutes conflict with one another in that the lowest bidder statute imposes an obligation to submit highway contracts to competitive bidding and to award them to the objectively quantifiable “lowest bidder,” while the best value statute appears to allow TxDOT to circumvent the lowest bidder statute at will to secure a subjective, discretionary “best value.”<sup>110</sup> The purpose of a lowest competitive bidder requirement “is to stimulate competition, prevent favoritism and secure the best work and materials at the *lowest* practicable price, for the best interests and benefit of the taxpayers and property owners.”<sup>111</sup> It is unlikely that historic purposes and general

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109. *Id.* § 223.203(a) (emphasis added).

110. *See id.* §§ 223.201, .202 (identifying factors that limit TxDOT’s ability to enter into CDAs).

111. *Tex. Highway Comm’n v. Tex. Ass’n of Steel Imps., Inc.*, 372 S.W.2d 525, 527 (Tex. 1963) (quoting *Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951, no writ) (emphasis added). *But see* CAROLE KEETON RYLANDER, *TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION*, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html> (advocating less reliance upon low bid procurement practices). “[T]his traditional competitive bidding system has served the public well over the past century. Low bid methods are believed by many in the industry to produce the lowest *initial* cost. The highway contracting community is very comfortable with the low bid approach.” *Id.* Whether the same benefits would inhere after a design-build contract was let, however, cannot be determined. Certainly market factors would lead the private entity selected as the best value by TxDOT, in turn, to seek out best value in selecting contractors and subcontractors; this could be an important consideration in determining the statutory compatibility of best value and the low-bid requirements. *See Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951, no writ) (holding a proposed contract to rebuild Belt Line Road to be violative of “the test of competitive bidding”). Specifically, the court in *Sterrett* spoke of certain situations where the contract as proposed might have passed statutory muster, even if the contract were awarded to one other than a low bidder. In this case, the proposed contract did not provide for making “a lump sum competitive bid on the cost of all materials, labor, etc., going into the work, and no provision for competitive bidding on such items severally or in groups.” *Id.* Those items simply were “to be contracted for and purchased by the [winner of the proposed contract], who [was] to be reimbursed in full for the amounts paid therefor.” *Id.* The court noted, but did not decide, that this open-ended purchasing power granted to the winning bidder might have been acceptable if only there had been some “provision in the contract that the contractor himself must buy the materials only upon contract, *after competitive bidding thereon.*” *Id.* (emphasis added). The proposed contract deemed unacceptable in *Sterrett* bears certain similarities to a design-build contract when viewed in light of competitive bidding requirements. Put another way, the initial design-build contract is not awarded pursuant to low bid laws, but in pursuance of best value, apparently violating the competitive bidding requirement. If, however, there were some provision in the design-build contract similar to that suggested in *Sterrett*, that the design-build developer only let subsequent subcontracts *after competitive bidding thereon*, the purposes of competitive bidding might

taxpayer considerations no longer remain a Texas objective.

While the Texas Legislature has not expressly defined best value as it pertains to using CDAs for highway projects,<sup>112</sup> it has provided that if TxDOT does pursue a project idea, the agency is at least required to “issue a request for detailed proposals from all private entities” interested in the award of a CDA.<sup>113</sup> TxDOT may, but need not, require that a request for proposals include information regarding: “(1) the private entity’s qualifications and demonstrated technical competence; (2) the feasibility of developing the project as proposed; (3) engineering or architectural designs; (4) the private entity’s ability to meet schedules; (5) a financial plan, including costing methodology and cost proposals; or (6) any other information [TxDOT] considers relevant.”<sup>114</sup> Based on its evaluation of these criteria, TxDOT shall “select the private entity whose proposal offers the *apparent* best value to the department.”<sup>115</sup> While these factors do address considerations

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yet be satisfied under the design-build contract.

112. *But see* TEX. TRANSP. CODE ANN. § 391.091 (Vernon Supp. 2006) (permitting use of best value procurement process “to erect and maintain specific information logo signs and major shopping area guide signs” near highways). In addition to giving TxDOT authority to “enter into a contract under this section by the method that the department determines is the most practical or most advantageous for the state,” this section enumerates certain factors to be considered by TxDOT in providing for these signs, including “the quality of services offered” and “the contractor’s financial resources and ability to perform.” *Id.* Cf. COLO. REV. STAT. ANN. § 43-1-1402 (2006) (“Best value” means the overall maximum value of a proposal to the department after considering . . . the time needed for performance of the contract, innovative design approaches, the scope and quality of the work, work management, aesthetics, project control, and the total cost of the transportation project.”); ME. REV. STAT. ANN. tit. 23, § 753-A(1)(A) (Supp. 2006) (defining best value as “the highest overall value to the *State*, considering quality and cost” (emphasis added)). Colorado and Maine provide helpful definitions of best value specifically as it applies to the construction of state highways, whereas Texas does not.

113. TEX. TRANSP. CODE ANN. § 223.203(f) (Vernon Supp. 2006).

114. *Id.*

115. *Id.* § 223.203(h) (emphasis added) (using the phrase “apparent best value” to underscore the hypothetical character any such inquiry will assume). Private entities are submitting a proposal that says, essentially, “We possess capabilities to build X project for Y dollars in Z amount of time, *if* we should design X project according to specifications A, B, and C.” TxDOT, in evaluating this proposal according to the six criteria outlined in Section 223.203(f), risks the failure of any one of these assertions on the part of the proposing entity. It is to be noted, however, that a similar inquiry is undertaken under lowest bidder procurement processes, where agencies often will reserve the right to “accept or reject the bids,” TEX. TRANSP. CODE ANN. § 223.0041(b) (Vernon Supp. 2006), and award the contract to the bidder who, in the agency’s discretion, represents the “lowest *responsible* bidder.” *See Holt & Co. v. Wheeler County*, 235 S.W. 226, 228 (Tex. Civ. App.—Amarillo 1922, writ *dism’d* w.o.j.) (emphasis added) (construing competitive

germane to the policy issues that underlie Texas's lowest bidder award requirements, their inherently subjective and largely hypothetical nature cannot guarantee the same degree of protection afforded by TxDOT's concurrent statutory obligation to award highway contracts to the lowest bidder after public competitive bidding.<sup>116</sup> While the new laws do not specifically name projects that are suitable for a CDA, the legislature does attempt to outline some limitations, albeit broad ones, to TxDOT's authority to enter into a CDA.<sup>117</sup>

## 2. Are There Limits to Their Use?

TxDOT faces a series of limitations regarding project type, total percentage of expenditures, and time, which affect the circum-

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bidding laws). Here, the court permitted a county commissioner's court to "deem[] [a] bid the lowest and the bidder satisfactory[,] and adjudg[e] the acceptance thereof to be for the best interests of the county." *Id.* In the present situation, the only difference is in the inherently objective quality of a numerically low bid on a project whose design is already complete under the design-bid-build process mandated by the lowest bidder award provisions. Design-build CDA proposals, on the other hand, are essentially bids on an entirely undesigned or incompletely designed project, making the attachment of any objective cost or time figures an exercise in conjecture. *See, e.g.,* JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 388 (4th ed. 1989) (noting owners' distaste for entering into cost-plus design-build contracts and contractors' similar dislike for giving a fixed price on design-build contracts). "[T]he owner will prefer a fixed price while the contractor would like an open-ended, cost-type contract." *Id.*

116. *See* CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html> (discussing current TxDOT system of awarding contracts based on the lowest responsible bidder). As opposed to TxDOT's selection of best value under the new laws, "[c]alculation of the lowest responsive bid follows a complex set of regulations designed to eliminate uncertainties." *Id.* *But cf.* JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 387-89 (4th ed. 1989) (discussing advantages and weaknesses of design-build contracting). While quicker project completion under design-build projects might substitute for the lack of protection and inability to eliminate uncertainties that inhere in a non-competitive procurement process, the use of design-build over the traditional process is ultimately a trade off: faster project delivery versus "contracting practices [that] are tightly controlled and monitored to assure fairness and minimize risk." CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html>.

117. *See generally* TEX. TRANSP. CODE ANN. § 223.201 (Vernon Supp. 2006) (outlining several project types in which CDAs are appropriate).

stances under which it may enter into a CDA. First, TxDOT is limited by the type of project selected to five scenarios, retaining discretionary authority only to:

- [E]nter into a [CDA] with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand a:
- (1) toll project;
  - (2) facility or a combination of facilities on the Trans-Texas Corridor;
  - (3) state highway improvement project that includes both tolled and nontolled lanes . . . ;
  - (4) state highway improvement project in which the private entity has an interest in the project; or
  - (5) state highway improvement project financed wholly or partly with the proceeds of private activity bonds.<sup>118</sup>

Presumably, TxDOT may not enter into a CDA with a private entity where at least one of the five scenarios above does not exist. However, these categories are quite broad, especially when one considers that over 4,000 highway miles crisscrossing the entire state are eventually planned for Trans-Texas Corridor projects, implicating subsection two;<sup>119</sup> the ease with which tolled lanes may be added to any existing highway, implicating subsection three;<sup>120</sup> the virtually limitless exception created by subsection four, in which the private entity need only have some indefinite interest in the project;<sup>121</sup> and the state's increasing reliance on private activity bonds to finance highways, implicating subsection

118. *Id.* § 223.201(a).

119. *See generally* TEX. DEP'T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: INDUSTRY WORKSHOP, at 8, 23 (Jan. 2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf) (discussing two projects already forming part of the Trans-Texas Corridor: the TTC-35 project, roughly paralleling Interstate 35, which will be roughly 800 miles long; and the TTC-69 project, still in its planning phase, slated to run the roughly 650 miles from Texarkana southwest to the Rio Grande Valley).

120. *See* TEX. DEP'T OF TRANSP., PROJECT SELECTION PROCESS 11 (2003) (describing conversion of portions of the IH-10 Katy Freeway in west Houston to a toll road). As planned by TxDOT, "commuters . . . have the choice of using one of eight free, general-purpose lanes or paying a toll to use one of four toll lanes." *Id.* Begun in July of 2003, completion of the project is expected in early 2009. *See* Katy Freeway, <http://www.katyfreeway.org/contracts.html> (last visited Dec. 17, 2007) (estimating project completion times and providing information on contracts for the separate segments).

121. *See* BLACK'S LAW DICTIONARY 816 (7th ed. 1999) (defining "interest" broadly). From a definitional standpoint, an interest may be held proprietarily, monetarily, or otherwise. *Id.*

five.<sup>122</sup> Virtually any highway project TxDOT initiates will easily trigger at least one of the five subsections, rendering this project-type limitation ineffective as a check on the use of CDAs by TxDOT.

Second, TxDOT is limited in its ability to utilize a CDA because costs expended under CDAs “may not exceed 40 percent of the obligation authority under the federal-aid highway program that is distributed to this state for that fiscal year.”<sup>123</sup> Formerly, federal law only permitted states the use of design-build delivery for projects whose “total costs [were] estimated to exceed . . . \$50,000,000,”<sup>124</sup> an amount which checked certain projects’

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122. See TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007) (listing TxDOT construction project history and discussing development in project financing programs). On September 13, 2003, “[v]oters overwhelmingly approve[d] Proposition 14, a constitutional amendment making possible the bonding authority contained in HB 3588. For the first time in its history, TxDOT has the authority to enter the bond market to finance projects.” *Id.*; see TEX. CONST. art. III, § 49-m (enabling legislative authorization for TxDOT “to issue notes or borrow money from any source,” though such notes or loans “may not have a term of more than two years”).

123. TEX. TRANSP. CODE ANN. § 223.202 (Vernon Supp. 2006). Most funding for transportation projects comes from the Highway Trust Fund, financed by federal taxation of gasoline. See Ben Patrick & Christopher D. Montez, *The Recently Enacted Transportation and Energy Bills and Other Federal Legislation Updates*, 26 CONSTR. LAWYER 38, 38 (2006) (explaining the process by which the Highway Trust Fund is financed and how funds therein are allocated to states). “Historically, Texas has received approximately \$2 billion each year from the federal Highway Trust Fund, which is a return of about 86 cents for each dollar Texas contributes.” TEX. DEPT OF TRANSP., PROJECT SELECTION PROCESS 9 (2003). Texas is thereby a donor state, in that it contributes more to the fund by way of gas taxes than it receives. *Id.* Texas delegates to Congress had long sought after “a higher rate of return on its gas tax dollars, [and the ability to] streamline the delivery of large projects and allow states the authority to establish tolls for portions of the interstate system.” *Id.* Texas appears to be making some headway in this arena. “Arguments over the distribution of Highway Trust Fund money were at the core of the almost two-year debate over [the August 10, 2005 federal legislation]” that altered the formula by which highway funds are allocated between donor and recipient states. Ben Patrick & Christopher D. Montez, *The Recently Enacted Transportation and Energy Bills and Other Federal Legislation Updates*, 26 CONSTR. LAWYER 38, 38 (2006). Donor states, such as Texas, are now “guaranteed a return of at least 90.5 percent of all taxes paid,” a number which is expected to increase “so that by 2008 donor states will be guaranteed a return of at least 92 percent.” *Id.* Texas’s hard-fought campaign to get back more of its taxpayers’ contributions to the fund will come, however, “at the expense of several [recipient] states that will see their rate of return decrease.” *Id.*

124. 23 U.S.C. § 112(b)(3)(C) (2000), *amended by* 23 U.S.C. § 112(b)(3)(C) (2005). Under the former federal statute, design-build contracts were permitted only for installation of intelligent transportation systems estimated to cost over five million dollars, or for any other project estimated to cost over fifty million dollars. *Id.*



qualification for a CDA. After the 2005 amendments, however, a state transportation agency may now enter into a design-build contract to complete any highway project the Secretary of Transportation deems qualified.<sup>125</sup> When one considers that Texas—under the ponderously titled Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), signed by President George W. Bush in August 2005,<sup>126</sup>—will receive \$14.47 billion in gross federal highway expenditures,<sup>127</sup> the Texas Legislature's 40% rule ensures that a great deal of money may yet be put out by TxDOT in design-build contracts under CDAs.

Third, and presumably to emphasize the experimental nature of TxDOT's recently legislated authorization for design-build contracts under a CDA, TxDOT faces a limitation in regards to the length of time it has to enter into a CDA. Formerly, “[TxDOT's] authority to enter into [a] comprehensive development agreement . . . expire[d] August 31, 2011.”<sup>128</sup> Senate Bill 792 amended the statute in 2007 to read “August 31, 2009.”<sup>129</sup> This does not mean all contractual obligations under the CDA must be fulfilled by 2009, but rather that TxDOT has until that date to enter into and commence the design-build arrangement. When one considers that TxDOT's contracts with private entities affecting portions of the Trans-Texas Corridor may last up to, but

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125. See 23 U.S.C. § 112(b)(3)(C) (Supp. 2007) (redefining a “qualified project” broadly as one “for which the Secretary [of Transportation] has approved the use of design-build contracting”); see also CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html> (“The traditional approach to contracting highway construction projects is dictated in large part by the Federal Highway Administration (FHWA), although recent [statutory] changes now allow more innovative methods.”).

126. See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109–59, 119 Stat. 1144 (codified as amended at 23 U.S.C. §§ 101–118 (2006)).

127. See Ben Patrick & Christopher D. Montez, *The Recently Enacted Transportation and Energy Bills and Other Federal Legislation Updates*, 26 CONSTR. LAWYER 38, 39 n.7 (2006) (noting that this high level of relative spending “[c]ontinu[es] a long-standing trend” for Texas); TEX. DEP'T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 17 (2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf) (“SAFETEA-LU authorized the use of up to \$15 billion for surface transportation purposes.”).

128. TEX. TRANSP. CODE ANN. § 223.201(f) (Vernon Supp. 2006).

129. Act of May 26, 2007, 80th Leg., R.S., S.B. 792, § 5.01 (to be codified as TEX. TRANSP. CODE § 227.005) (amending the Transportation Code at section 223.201(f)).

not longer than, fifty years,<sup>130</sup> the 2009 termination of CDA authority is somewhat illusory.

In short, while H.B. 2702 “provides TxDOT with tremendous flexibility,”<sup>131</sup> there appear to be some limits that TxDOT will face when considering whether to enter into a CDA on a particular project.<sup>132</sup> Although they are broad limitations, the type of project, the funding for the project, and the timetable for the project all must meet legislative standards to qualify for CDA authority. While they are only available in these certain situations, CDAs offer the parties thereto a significant degree of protection and confidentiality unavailable under traditional competitive bidding laws.

### 3. What Are the Implications of Their Confidentiality?

The essential policy underlying competitive bidding procurement as required by Texas law is that such bidding benefits the public;<sup>133</sup> one of its chief effects is that the bidding becomes public before any contracts are made between TxDOT and a developer.<sup>134</sup> The public and open nature of Texas’s lowest

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130. TEX. TRANSP. CODE ANN. § 227.023(f) (Vernon Supp. 2006) (“A contract with a private entity that includes the collection by the private entity of a fee for the use of a facility may not be for a term longer than 50 years.”). See TEX. DEP’T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 12 (2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf) (identifying “tremendous flexibility” and “[s]ignificant contract term[s]” as benefits provided by H.B. 2702). TxDOT has assembled a “Master Schedule” of projects it has identified as meeting criteria for a CDA. *Id.* at 21–29. Currently, several projects are on their way to final negotiations and execution of a CDA; in addition to the TTC-35 and TTC-69 corridors, TxDOT has mentioned SH 121, IH-635, the US 281 and Loop 1604 interchange, and sections of the IH-820 and SH 183 confluence. *Id.*

131. TEX. DEP’T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 12 (2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf).

132. *Id.* at 13 (referring to the process of deciding whether to use a CDA as screening).

133. See *Tex. Highway Comm’n v. Tex. Ass’n of Steel Imps., Inc.*, 372 S.W.2d 525, 529–30 (Tex. 1963) (quoting favorably from *McChesney v. People ex rel. Raymond*, 65 N.E. 626 (Ill. 1902)). The court approved of the statement that “any [competitive bidding] provision tending to increase the cost, and make the bids *less favorable to the public* and the property owners, is against public policy, illegal, and void.” *Id.* (emphasis added).

134. See *Tex. Highway Comm’n v. Tex. Ass’n of Steel Imps., Inc.*, 372 S.W.2d 525, 527 (Tex. 1963) (noting purposes and policies behind statutory competitive bidding requirements). Competitive bidding “requires that all bidders be placed upon the same

bidder award procedures contrasts with the nature of contracting procedures under a CDA. Under section 223.204 of the Transportation Code as amended by H.B. 2702 in 2005, entitled "Confidentiality of Information," a private entity's CDA proposal "is not subject to disclosure, inspection, or copying" under the open records provisions of the Government Code,<sup>135</sup> nor is it "subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release *until a final contract for a proposed project is entered into.*"<sup>136</sup>

Texas has already been down this road under TxDOT's CDA with Cintra-Zachry; no resort to hypothesizing is necessary. In March of 2005, several newspapers filed public information requests with TxDOT to obtain Cintra-Zachry's detailed proposal that it submitted to TxDOT on August 23, 2004.<sup>137</sup> Based on

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plane of equality and that they each bid upon the same terms and conditions involved in all the items and parts of the contract, and that the proposal specify as to all bids the same, or substantially similar specifications." *Id.* The sequence in traditional contracting practices roughly requires that "creation of the design [be] followed by contract award [by competitive procurement] and execution." JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 375 (4th ed. 1989). Because a project is already designed before notice is given that bids will be accepted, the public, if it is so inclined, may know the details of a project. Design occurs prior to any bids being made—notice of which bidding process is required to be published "in the county in which the improvement is to be made once a week for at least two weeks before the time set for awarding the contract and in two other newspapers that [TxDOT] may designate." TEX. TRANSP. CODE ANN. § 223.002 (Vernon 1999). For a fee, interested parties may also subscribe to a contract notice mailing list. *Id.* § 223.003. While this is a sealed bidding process, to prevent disclosure and last-minute underbidding, all bids "shall be opened at a *public meeting,*" thereby becoming public long before any bids are accepted or rejected. *Id.* § 223.004 (emphasis added) (prescribing procedures for filing, opening, and rejecting bids).

135. TEX. TRANSP. CODE ANN. § 223.204 (Vernon Supp. 2006). *But cf.* TEX. GOV'T CODE ANN. § 552.104 (Vernon 2004) (excepting from disclosure only that competitive bidding information that "would give advantage to a competitor or bidder"). Nearly any other item of information related to competitive bids is discoverable under Texas Government Code section 552.021 as public information. *See id.* § 552.021 (making available any public information "during the normal business hours of the governmental body").

136. TEX. TRANSP. CODE ANN. § 223.204 (Vernon Supp. 2006) (emphasis added). This is to be contrasted with the competitive bidding procedures outlined above, where a project's specifications are plain for the public to see before bidding even begins. *See generally* TEX. TRANSP. CODE ANN. §§ 223.001–.004 (Vernon 1999) (mandating competitive bidding). Under a CDA, there is no indication of a project's specifications until after a design proposal is accepted and a contract entered into. *Cf. id.* (allowing the public to learn who submitted bids and their qualifications, but not the design details).

137. *See* Tex. Att'y Gen. ORD-4699 (2005) (noting that TxDOT received two

these requests, the Office of the Attorney General issued an open records decision on May 31, 2005, denying TxDOT and Cintra-Zachry's assertions of privileged trade secret information.<sup>138</sup> Although most portions of the plans were released willingly,<sup>139</sup> both TxDOT and Cintra-Zachry appealed the ruling and sued the Attorney General to prevent disclosure of certain sections of the proposal that, in their opinion, could aid competitors.<sup>140</sup> The

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requests regarding public information). "The first [sought] 'all documents and exhibits composing the 'Conceptual Development Plan' and 'Conceptual Financial Plan' for the [CDA] entered into between TxDOT and [Cintra-Zachry]." *Id.* The second request was for "the entire CDA, including 'all exhibits/attachments to the Agreement.'" *Id.*; see also Gordon Dickson, *Lawsuit Filed to Keep Documents Private*, FT. WORTH STAR-TELEGRAM, June 25, 2005, at B5 (reporting that the Houston Chronicle, Ft. Worth Star-Telegram, and an unnamed Houston law firm all made open records requests).

138. See Tex. Att'y Gen. ORD-4699 (2005) (denying TxDOT's "claim that the submitted information [in Cintra-Zachry's proposal] is excepted from disclosure under sections 552.101 and 552.104 of the Government Code"). Section 223.204 of the Texas Transportation Code did not go into effect until June 14, 2005, two weeks after the attorney general's open records division made its ruling. TEX. TRANSP. CODE ANN. § 223.204 (Vernon Supp. 2006). It is unlikely, however, that the ruling would have been any different, see *id.* (permitting exercise of privilege only "until a final contract for a proposed project is entered into"), because a similar statute, Section 361.3023, added by H.B. 3588 in 2003, existed in the Transportation Code at that time. Just as quickly as it was added, it was repealed, rewritten, and recodified by H.B. 2702 in 2005. See Transportation Act, 78th Leg., R.S., ch. 1325, § 15.58, 2003 Tex. Gen. Laws 4971, *repealed by* Transportation Act, 79th Leg., R.S., ch. 281, § 2.101(13), 2005 Tex. Gen. Laws 833 (noting repeal of Section 361.3023).

139. See TEX. TRANSP. CODE ANN. § 223.204 (Vernon Supp. 2006) (preventing disclosure "unless the private entity consents to the disclosure of the information"). "Cintra-Zachry was awarded a \$3.5 million planning contract, *most* of which was made public, minus the conceptual development and financial information. The company, which still must compete for the construction contract, claims the information could help competitors." Chuck Lindell, *Lawsuits Can Keep Records Shrouded*, AUSTIN AMERICAN-STATESMAN, Mar. 16, 2006, at A1 (emphasis added).

140. See Chuck Lindell, Governments, *Lawsuits Can Keep Records Shrouded*, AUSTIN AMERICAN-STATESMAN, Mar. 16, 2006, at A1 (noting historical fact and procedural details of suit). "[B]ecause another state agency [TxDOT] is involved, the attorney general's office is working both sides of the Cintra[-]Zachry lawsuit. While [the] open records litigation section, comprising two lawyers and one part-time lawyer, represents [Attorney General] Abbott, the agency's financial litigation division represents [TxDOT]." *Id.*; see also Tex. Att'y Gen. ORD-4699 (2005) (recounting at length those procedures necessary to challenge the adverse ruling by appeal). Because the attorney general may not reconsider its ruling, TEX. GOV'T CODE ANN. § 552.301(f) (Vernon 2004), TxDOT's only recourse to avoid the ruling was to file suit in a Travis County district court within thirty days. TEX. GOV'T CODE ANN. § 552.324(b) (Vernon 2004). TxDOT and Cintra-Zachry appealed the ruling by filing suit on Friday, June 23, 2005. Gordon Dickson, *Lawsuit Filed to Keep Documents Private*, FT. WORTH STAR-TELEGRAM, June 25, 2005, at B5.

attorney general's decision found dispositive the fact that "the contract at issue ha[d] already been entered into," and that release of the information would not affect "any particular, on-going competitive situation."<sup>141</sup> The decision addressed several important points that could prove helpful in interpreting the confidentiality statutes in the Transportation Code as they pertain to future CDAs between TxDOT and a private entity.<sup>142</sup>

The ruling specifically disagreed with Cintra-Zachry's assertion that the statutory language "until a final contract for a proposed project is entered into" only pertains to requests for disclosure made pursuant to legal compulsion,<sup>143</sup> and not requests made under chapter 552 of the Government Code.<sup>144</sup> It should be understood then, that upon formation of a final contract, requests under either method—Chapter 552 *or* through legal compulsion—must be honored and the heretofore privileged information disclosed.<sup>145</sup> The open records decision also foreclosed Cintra-Zachry's argument that "the contract at issue here is not final because the conceptual development plan and conceptual financial plan are only preliminary and will be replaced once final plans have been adopted."<sup>146</sup> This issue is important where the argument may easily be made that, because CDAs are intrinsically amorphous and indefinite, at least in their early phases when potential designs and concepts are still being mulled, there is never

141. Tex. Att'y Gen. ORD-4699 (2005). The decision begins with what "is potentially the broadest exception to disclosure," section 552.004 of the Government Code, relating to privileged information that will allow other bidders or competitors an advantage over the holder of the privilege. *Id.* (applying TEX. GOV'T CODE ANN. § 552.104 (Vernon 2004)). "Generally, section 552.104 does not except bids from public disclosure after bidding is completed and a contract has been entered into." *Id.*

142. *But see id.* (concluding that its "ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances").

143. *See id.* (referring to legal compulsion as that effected via "discovery, subpoena, or other means").

144. *See* Tex. Att'y Gen. ORD-4699 (2005) (referring to requests for "disclosure, inspection, or copying" made in pursuance of Texas Government Code section 552.021. The decision rejected Cintra-Zachry's position that disclosure could *never* be had via Chapter 552, whether or not a final contract had been formed. *Id.*

145. *Id.* "[W]e conclude that the confidentiality afforded by [statute] ceases once a final contract is entered into, regardless of the form of request for such information may take." *Id.*

146. *Id.*

a final contract for the purpose of determining confidentiality. The attorney general ruling, in response to this argument, noted that Texas case law permits parties to “leave provisions for later negotiation, yet still create a contract.”<sup>147</sup>

While the ruling was challenged in a Travis County district court,<sup>148</sup> and ultimately dropped,<sup>149</sup> the statutory interpretation undertaken in the course of the decision may serve as a guide in future challenges to the confidentiality of CDAs. Meanwhile, it appears that the Open Records Act’s presumption in favor of the requestor of public information<sup>150</sup> stands as a significant check to the confidentiality of CDAs. The Texas Legislature itself seems to have recognized this when, during the most recent legislative session—Texas’s eightieth since 1846—it enacted several amendments to chapter 227 of the Transportation Code by way of S.B. 792, which purports to liberalize public access to Trans-Texas Corridor information through Texas’s open records laws.<sup>151</sup>

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147. See Tex. Att’y Gen. ORD-4699 (2005) (citing and approving of *Foreca, S.A. v. GRD Dev. Co.*, 758 S.W.2d 744, 746 (Tex. 1988) and *Scott v. Ingle Bros. Pac.*, 489 S.W.2d 554, 555 (Tex. 1972)). The attorney general ruled that “flexibility with regard to certain details” does not preclude final contract formation for confidentiality purposes. *Id.* It will remain to be determined at a later date whether a court could decide that the CDA itself is the contract for purposes of finality, or whether each separate contract—e.g., design, construction, maintenance, etc.—will start anew the protections granted to a proposer under section 223.004 of the Transportation Code.

148. See Gordon Dickson, *Lawsuit Filed to Keep Documents Private*, FT. WORTH STAR-TELEGRAM, June 25, 2005, at B5 (reporting TxDOT and Cintra-Zachry’s appeal of the attorney general ruling).

149. See Kelley Shannon, *Perry Unveils Cintra Contract*, KILGORE NEWS HERALD, Sep. 29, 2006, at 1 (noting TxDOT’s decision to release the information and drop the suit pending in Travis County district court).

150. See TEX. GOV’T CODE ANN. § 552.001(b) (Vernon 2004) (mandating that the Open Records Act “shall be liberally construed in favor of granting a request for information”). “[T]he fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people” requires that “it [be] the policy of [Texas] that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.” *Id.* § 552.001(a).

151. See Act of May 26, 2007, 80th Leg., R.S., S.B. 792, § 5.01 (to be codified as TEX. TRANSP. CODE § 227.005) (encouraging increased public access to information related to the Trans-Texas Corridor). It is to be seen, however, if this amendment will provide any objective oversight of best value contract procurement under CDAs. “The department [TxDOT] shall: (1) seek to achieve transparency in the department’s functions related to the Trans-Texas Corridor by providing, to the greatest extent possible under the public information law (Chapter 552, Government Code) and other statutes governing the access to records, public access to information collected, assembled, or maintained by the

### III. SUGGESTIONS

House Bill 2702's statutory authorization of CDAs raises several questions in light of TxDOT's obligations under Texas's competitive bidding laws. In an attempt to reconcile these provisions that conflict in language and purpose, as well as to clear up lingering doubts as to how, exactly, CDAs are best to be understood, sections of the Texas Transportation Code ought to be amended when the 81st Texas Legislature convenes in Austin in January 2009. The legislature also should address the unnecessarily long period that proposals submitted for a CDA remain confidential by terminating the privilege immediately after the deadline for responding to a request for proposals has passed.

Fortunately, Texas may learn from other jurisdictions that have made a similar leap into creative contracting practices.<sup>152</sup> To get the most out of the new laws, TxDOT has already implemented a departmental and organizational program for the provision of "greater efficiency and consistency in [CDA] procurement," one of the goals of which is to "[i]ncorporate lessons learned" along the way.<sup>153</sup> This reinforces the conceptual and practical novelty that CDAs hold for TxDOT. Even more fortunately, one of the major changes to emerge from the 80th legislative session in 2007 was the creation of a legislative study committee,<sup>154</sup> whose purpose is to conduct a thorough "study [of] the public policy implications" of using a CDA to permit private entities to collect

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department relating to the Trans-Texas Corridor . . ." *Id.* The amendment also calls for the "mak[ing] public in a timely manner all documents, plans, and contracts related to the Trans-Texas Corridor." *Id.* Language such as "to the greatest extent possible" and "timely" leave too great discretion with TxDOT and private developers.

152. *See, e.g.,* Charlotte R. Robinson, *Design-Build Contracts for Colorado Highway Construction: New Contractual Issues—Part I*, 29 COLO. LAW. 49 (Feb. 2000) (surveying changes in Colorado law permitting eschewal of competitive low-bidding in favor of utilization of design-build). Reacting to the 1999 Colorado statutory amendments, the author noted that they "will significantly change the way the Colorado Department of Transportation ("CDOT") conducts business." *Id.* No less a change has been effected in Texas transportation law.

153. TEX. DEP'T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 14 (2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf).

154. Act of May 26, 2007, 80th Leg., R.S., S.B. 792, § 3.01(m) (to be codified at TEX. TRANSP. CODE § 223.210). The committee is a panel of nine members: three selected by the lieutenant governor, three by the speaker of the house, and three by the governor. *Id.*

revenue from toll projects and, “[no] later than December 1, 2008 . . . prepare a written report summarizing . . . the committee’s recommendations for safeguards and protections of the public’s interest when a contract for the sale of a toll project to a private entity is entered into . . . .”<sup>155</sup> This committee report may propose legislation, and, as such, it is perhaps they who would best be suited to incorporate the suggested changes below.

#### A. *Specify How “Best Value” Relates to “Competitive Bidding”*

No bright-line provision exists in Texas law that decides whether TxDOT must submit highway projects to lowest bidder or best value procurement. Texas law does not readily allow a statute to be overruled by implication simply because a later statute addresses similar subjects; it is doubtful, then, that TxDOT is now free to eschew competitive low bid requirements in favor of a subjective “best value.”<sup>156</sup> Rather it is to be understood that, at most, the Texas Legislature intended TxDOT to be able to use best value procurement only for some highway projects while maintaining its prior competitive bidding practices for all other highway projects.<sup>157</sup> Stated another way, best value practices

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155. Act of May 26, 2007, 80th Leg., R.S., S.B. 792, § 3.01(2)(n)–(o) (to be codified at TEX. TRANSP. CODE § 223.210).

156. See *Gordon v. Lake*, 163 Tex. 392, 394, 356 S.W.2d 138, 139 (1962) (construing an older statute in light of a more recent one). “Where a later enactment is intended to embrace all the law upon the subject with which it deals, it repeals all former laws relating to the same subject.” *Id.* Given the fact that the Texas Transportation Code mandates submission of all highway contracts to competitive bidding, see TEX. TRANSP. CODE ANN. § 223.001 (Vernon 1999) (mandating compliance through language such as “[t]he department shall”), it is unlikely that the merely permissive language in the statute allowing the use of CDAs, see TEX. TRANSP. CODE ANN. § 223.201(a) (Vernon Supp. 2006) (using “the department may”), will be considered to “embrace all the law upon the subject” of highway construction and repair contracts. *Gordon*, 356 S.W.2d at 139. “Repeals by implication are not favored, however, and laws relating to the same subject should be considered as though incorporated in the same act. If they can be harmonized and effect given to each when so considered, there is no repeal by implication.” *Id.* “In such instances both laws are permitted to stand, and the general law is applicable to all cases not embraced in the specific act. Stated in another way, the particular act is construed as the exception to the general law.” *Flowers v. Pecos River R.R. Co.*, 138 Tex. 18, 25, 156 S.W.2d 260, 263 (1941). The more recent Texas law, then, permitting the selective use of CDAs, should be seen, at most, as an exception to the more general, mandatory requirement that all highway contracts be submitted to competitive bidding.

157. See *Flowers v. Pecos River R.R. Co.*, 138 Tex. 18, 25, 156 S.W.2d 260, 263 (1941) (construing a newer, particular law as being an exception to the older, general law rather



within a CDA stand as a specific, implied exception to the general requirement of competitive low bidding.<sup>158</sup>

Yet, because best value procurement is a powerful tool in the hands of TxDOT, and because the Texas Transportation Code does not indicate a preference for best value or low bid procurement practices, statutory clarification is needed. At one extreme, a statute could mandate the award of all highway contracts pursuant to competitive low bidding; at the other end, a statute could permit the award of all highway contracts in pursuance of best value. The former method of highway project contracting and delivery is admittedly slower and more cumbersome;<sup>159</sup> yet it serves to permit greater scrutiny of the award of potentially billions of tax dollars in contracts.<sup>160</sup> The latter method assertedly allows quicker delivery of highway projects<sup>161</sup> for which taxpayers are not initially responsible,<sup>162</sup> but provides virtually no oversight as

than one impliedly repealing the latter).

158. *See id.* (“[T]he particular act is construed as the exception to the general law.”).

159. *See* CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001), available at <http://www.window.state.tx.us/txdot/index.html> (acknowledging that “more time [is] needed to complete projects” submitted to competitive bidding in the traditional design-bid-build practice followed by TxDOT).

160. *See id.* (recalling how “this traditional competitive bidding system has served the public well over the past century” because it is “tightly controlled and monitored”). The historic public policy interests served by competitive low bidding have been noted throughout this Comment. The comptroller’s report also calculated that “[f]or fiscal [year] 2000, projected contract letting (construction) is \$2.9 billion, including contracted preventive maintenance.” *Id.* “Over the last five years, the average TxDOT construction contract was \$2.2 million, rising to about \$2.7 million in 1999. The department has about 2,600 active contracts, averaging 126 days each, at any one time.” *Id.* The averages may mislead, however, because “large projects” which tend to exaggerate the arithmetic mean—projects defined as those “in excess of \$50 million”—numbered five from 1995–1998 and nine in 1999 alone. *See id.* (compiling TxDOT’s contracts in the years immediately prior to 2001 and reporting that nearly 90% of its contracts were for less than the average of \$2 million). The contract for the State Highway 130 bypass, from Georgetown to southeast Travis County, “[a]t \$1.5 billion . . . is the largest single highway construction project in Texas history and the largest active highway contract in the nation.” TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007).

161. CAROLE KEETON RYLANDER, TEX. COMPTROLLER OF PUB. ACCOUNTS, PAVING THE WAY: A REVIEW OF THE TEXAS DEPARTMENT OF TRANSPORTATION, ch. 4.2 (Jan. 2001). “The foremost objective for using design-build is saving time.” *Id.* “The principal advantage of [design-build] . . . is speed.” JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 387 (4th ed. 1989).

162. *See* Press Release, Texas Governor’s Office, Governor Perry Signs Transportation Bill into Law (June 14, 2005) (“Private investors have already agreed to

to the award of a contract to a proposer offering the elusive “best value.”<sup>163</sup> In between must lay the optimum, a *via media*, whereby sufficient public oversight and satisfactory project completion time coalesce agreeably.

Two recent laws model this desired coalescence. The aforementioned 2005 federal transportation legislation contained in SAFETEA-LU contains a provision for the letting of federal highway contracts under either traditional competitive low bidding or design-build methods.<sup>164</sup> In 2000, Colorado enacted similar legislation in an attempt to integrate design-build into its traditional highway contracting practices.<sup>165</sup> Federal law requires that construction of federal-aid highways generally “shall be performed by [a] contract awarded by competitive bidding, unless

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pay \$7.2 billion to build the first segments of the Corridor stretching from San Antonio to Dallas without any upfront costs to taxpayers for construction.”). *But see* Tony Hartzel, *Project Seeking Public Money: Trans-Texas Corridor Developer Had Touted Use of Private Funds*, DALLAS MORNING NEWS, June 23, 2005, at A1 (reporting that although “state officials have touted the Trans-Texas Corridor as a way to get 316 miles of needed toll roads and rail lines built from North Texas to San Antonio *without* the use of public funds,” the Cintra-Zachry consortium “filed a letter with the Federal Highway Administration stating its interest in applying for a \$320 million low-interest loan” (emphasis added)). The article also notes that when TxDOT entered into the CDA with Cintra-Zachry, Governor Perry “issued a news release saying that the construction would be done ‘at no cost to taxpayers.’” *Id.* A spokeswoman for TxDOT, however, clarified that these statements only pertained to *state* tax dollars, “drawing a distinction between federal and state money.” *Id.* While this move by the private consortium has been criticized, it is to be noted that: “A loan is a loan. It’s not a grant, and it will be paid back with interest.” *Id.*

163. *See* TEX. TRANSP. CODE ANN. § 223.204(a) (Vernon Supp. 2006) (privileging from disclosure “all or part of a proposal that is submitted by a private entity for a comprehensive development agreement”). Such privilege exists “until a final contract for a proposed project is entered into.” *Id.*

164. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, sec. 1503, § 112(b)(3)(C), 119 Stat. 1238 (2005) (codified as amended at 23 U.S.C. § 112(b)(3)(C) (2005)) (redefining projects that qualify for design-build contracting as those “for which the Secretary has approved the use of design-build contracting under criteria specified in regulations issued by the Secretary”).

165. *See* 2000 Colo. Sess. Laws 256 (codified at COLO. REV. STAT. § 43-1-1401 (2006)) (proposing that use of “[a] design-build selection and procurement process will provide the department of transportation with: A savings of time, cost, and administrative burden”). The Colorado laws were written with the “inten[t] that the department’s use of [the] . . . design-build contract process shall not prohibit use of the low bid process currently used by the department” of transportation as required elsewhere by Colorado law. *Id.* The Texas design-build statutes, on the other hand, do not specify how they relate to the Transportation Code’s requirement of competitive low bidding for highway projects.

the State transportation department demonstrates, to the satisfaction of the Secretary [of Transportation], that some other method is more cost effective or that an emergency exists.”<sup>166</sup> The Secretary of Transportation may, under the 2005 changes, qualify a design-build project as “more cost effective” and, as such, create an exception to the general requirement of contract award pursuant to competitive bidding.<sup>167</sup> Still, the federal statutes differ from those of Texas in an important way. Within the same section of code, the federal law permits the issuance of design-build contracts as a specific exception to its general requirement of competitive bidding.<sup>168</sup> The Texas Legislature’s recent grant of design-build authority to TxDOT under CDAs, however, fails to indicate its relation to the Transportation Code’s command to submit all projects for highway improvement to competitive bidding.<sup>169</sup>

Colorado’s embrace of design-build methodology may offer a more complete picture of what is faced by TxDOT and the Texas Legislature. In 2000, confronted with the familiar stimuli of “increased population growth and economic activity within the state,” Colorado’s legislators gave the Colorado Department of

166. 23 U.S.C. § 112(b)(1) (2005).

167. See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, sec. 1503, § 112(b)(3)(C), 119 Stat. 1238 (2005) (codified as amended at 23 U.S.C. § 112(b)(3)(C) (2005)) (permitting the Secretary of Transportation broad discretion in qualifying a federal-aid highway project for design-build). Under the former § 112(b)(3)(C), a project could only qualify for design-build if it exceeded \$50 million. *Id.*; Ben Patrick & Christopher D. Montez, *The Recently Enacted Transportation and Energy Bills and Other Federal Legislation Updates*, 26 CONSTR. LAWYER 38, 38 (2006) (stating there has been speculation that this liberalization of the use of design-build, especially the elimination of the \$50 million requirement, “should open design-build work to smaller contractors”).

168. See 23 U.S.C. § 112(b)(1) (2005) (requiring submission of federal-aid highway contracts to competitive bidding with such exceptions as the Secretary of Transportation shall make); see also Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, sec. 1503, § 112(b)(3)(C), 119 Stat. 1238 (2005) (codified as amended at 23 U.S.C. § 112(b)(3)(C) (2005)) (permitting the Secretary of Transportation wide discretion in qualifying projects for design-build contracts).

169. See generally Act of May 30, 2005, 79th Leg., R.S., ch. 281, § 2.21, 2005 Tex. Gen. Laws 778, 790 (amending chapter 223 of the Texas Transportation Code to permit the use of CDAs). While the statutes use the phrase “[TxDOT] shall use a *competitive procurement process*” in entering into a CDA, TEX. TRANSP. CODE ANN. § 223.203(a) (Vernon Supp. 2006) (emphasis added), the nature of design-build necessarily means that this phrase cannot be understood to refer to the same competitive low bidding required by Section 223.001. If this had been intended by the legislature, they easily could have qualified the grant of design-build authority as an exception to Section 223.001.

Transportation, or CDOT, “the use of a faster, more efficient, and more cost-effective contractor selection and procurement process to design and construct transportation projects.”<sup>170</sup> CDOT “may use a design-build contract for a transportation project if the design work for such project must be performed before a potential bidder can develop a price or cost proposal . . . and if the chief engineer . . . determines that using a design-build contract is appropriate.”<sup>171</sup> CDOT possesses design-build contract authority

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170. See 2000 Colo. Sess. Laws 256 (codified at COLO. REV. STAT. § 43-1-1401 (2006)) (declaring general intent and purpose of the general assembly in authorizing design-build contracting).

171. COLO. REV. STAT. § 43-1-1404 (2006). CDOT and its engineers make this determination based on factors similar to those TxDOT must consider when deciding to use design-build and enter into what only Texas refers to as comprehensive development agreements (Colorado terming this arrangement a “design-build contract”). *Compare id.* (requiring the chief engineer to consider: whether the project’s requirements are sufficiently defined; time frame within which project must be completed; whether the various design-build firms are capable and experienced; whether a project is suitable for design-build contracting; and whether CDOT is able “to manage the design-build contract”), *with* TEX. TRANSP. CODE ANN. § 223.203(f) (Vernon Supp. 2006) (suggesting, but *not* requiring, that TxDOT consider: whether the firms are qualified and demonstrate technical competence; whether project is feasible “as proposed”; sufficiency of engineering or architectural designs; “a financial plan, including costing methodology and cost proposals; *or* any other information the department considers relevant or necessary” (emphasis added)). The only real difference is in the mandatory nature of the factors Colorado’s CDOT must consider. For Texas, the only factor TxDOT *must* consider in evaluating a proposal is “information regarding the private entity’s qualifications, experience, technical competence, and capability to develop the project.” See TEX. TRANSP. CODE ANN. § 223.203(d) (Vernon Supp. 2006) (stating that any “proposal submitted in response to a request [for proposals] must contain, at a minimum,” the proposer’s experience and competence). One commentator provides a practical anecdote that suggests the reason for this statutory requirement. See JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 94–95 (1997) (containing an interview with a “representative of a big contracting company” who spoke to students in a construction law class). “I asked how his company was selected [for a design-build construction contract]. He said, ‘The owner knows us from our reputation . . . . He knows we’ve done this sort of work before. He goes out and looks at our work.’” *Id.* TxDOT has adopted a similar, two-stage procurement process in its evaluation of CDA proposals. TEX. DEP’T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 35 (2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf). The first stage is a qualifications stage, where a developer submits what amounts to a résumé in response to a request for qualifications. *Id.*; see also TEX. TRANSP. CODE ANN. § 223.203(c) (Vernon Supp. 2006) (detailing procedures for issuing requests for proposals and qualifications). The second stage is where requests for detailed proposals are issued. TEX. DEP’T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 35 (2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf); see also TEX. TRANSP. CODE ANN. § 223.203(f) (Vernon Supp. 2006)

“[n]otwithstanding any other provision of law to the contrary.”<sup>172</sup> Colorado, unlike Texas, has indicated how the design-build authority fits in with its existing competitive bidding statutes.

Colorado's General Assembly went the extra mile in an attempt to cement the use of design-build contracting in all state public projects in 2006 with Colorado Senate Bill 06-234, the “Best Value Construction Contracting Act.”<sup>173</sup> This bill would have amended existing Colorado procurement statutes to read that “[a]ll construction contracts for public projects shall be awarded by *either* competitive sealed bidding . . . *or* by means of the competitive sealed best value proposals process.”<sup>174</sup> While the bill was ultimately vetoed, it offers some helpful language.<sup>175</sup> For example, as pertaining to conflicts between best value and lowest competitive bidder procurement, the Colorado bill would have introduced a preference for the best value provisions to control.<sup>176</sup> The Texas Legislature has indicated no such preference—nor should it—until TxDOT gains greater familiarity and experience with design-build contracting. Also, the Colorado bill would have required that “[t]he contract file maintained by the state . . . contain the basis on which the award determination was made.”<sup>177</sup> Texas's CDA award provisions do not expressly require TxDOT

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(detailing the procedure for issuing and evaluating requests for detailed proposals).

172. COLO. REV. STAT. § 43-1-1403 (2006). *Contra* TEX. TRANSP. CODE ANN. § 223.203(d) (Vernon Supp. 2006) (lacking any indication of how it relates to existing statutes other than those within its own subchapter).

173. Colo. S.B. 06-234, 65th Gen. Assem., 2d Reg. Sess. (2006). The bill noted that “the inherent complexities and unique demands of construction contracting” justified the statement that “it is often not possible to obtain best value results by awarding contracts solely on the basis of the lowest bid because of the need to carefully consider and evaluate certain non-price qualification factors affecting project performance, including contractor experience, past performance,” and others. *Id.* § 24-93-102(b).

174. *Id.* § 24-92-103 (2006) (emphasis added) (proposing an amendment to the Colorado Revised Statutes).

175. Letter from Bill Owens, Colorado Governor, to the Colorado State Senate, June 2, 2006, *available at* <http://www.colorado.gov/governor/press/june06/sb234.html>. Colorado Governor Bill Owens set forth his rationale for vetoing the bill. “[Senate Bill] 234 is an unnecessary bill that could exclude many contractors and subcontractors, as well as create significant costs to the state.” *Id.* “Moreover, this bill would create a duplicative bidding process, and increase the size of government.” *Id.*

176. Colo. S.B. 06-234, 65th Gen. Assem., 2d Reg. Sess. (2006). “A request for . . . best value proposals . . . shall otherwise comply with the [competitive bidding laws] to the extent that such requirements do not conflict with . . . the provisions” relating to best value, which “shall control.” *Id.* § 24-93-106.

177. *Id.* § 24-93-105.

to keep a record of why they choose one private entity's proposal over another.<sup>178</sup> If TxDOT were required to create and maintain such records, that could pose implications for the confidentiality aspects of CDAs under Texas law.<sup>179</sup>

### B. *Shorten the Period That Proposals Remain Confidential*

Under Texas's traditional contracting practices, sealed competitive bidding laws allow an aspiring contractor's bid to remain confidential until all bids are opened at a public meeting.<sup>180</sup> As previously noted, "[t]o encourage private entities to submit proposals," proposals submitted to enter into a CDA are not subject to disclosure under the Government Code or by legal compulsion "until a final contract for a proposed project is entered into . . . ."<sup>181</sup> Under the traditional method of bidding, all proposers submit bids to build the exact same highway project located in the exact same place using the exact same materials;<sup>182</sup> this arrangement, with so many control factors, lends itself well to the awarding of contracts based on the objectively verifiable lowest bid TxDOT receives.<sup>183</sup> Evaluating bid proposals for design-build contracts such as CDAs, however, becomes difficult when several proposals may be received, each of which proposes to build a slightly differently designed highway project in a slightly

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178. *But see* TEX. TRANSP. CODE ANN. § 223.204(b) (Vernon Supp. 2006) (providing that, upon completion of "final ranking of proposals" in determination of best value, "the final rankings of each proposal under each of the published criteria are not confidential").

179. *See id.* § 223.204(a) (allowing certain aspects of proposals for a CDA to remain confidential). It would be plausible to argue that a TxDOT record in its contract files commenting as to why one proposal was selected over another would not remain confidential under an open records request; it would not inhibit competition in the same way as other information. *But see id.* § 223.204(a)(3) (privileging "information created or collected by the department or its agent during consideration of a proposal for a [CDA]").

180. *Id.* § 223.004. Obviously, this procedure serves to prevent the last-minute undercutting of bids by the unscrupulous.

181. *Id.* § 223.204(a).

182. *See, e.g.,* Tex. Highway Comm'n v. Tex. Ass'n of Steel Imps., Inc., 372 S.W.2d 525, 527 (Tex. 1963) (acknowledging that competitive bidding "contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing").

183. *See generally* JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 396–423 (4th ed. 1989) (surveying the theories, practical reality, and legal pitfalls surrounding competitive bidding). "[C]ompetitive bidding assumes that goods or services requested can be objectively evaluated or compared, preferably before award, or at least after." *Id.* at 396.

different area using slightly different materials.<sup>184</sup> Because of the great time and expense proposers invest in preparing these proposals, certain aspects necessarily must remain confidential; certainly they should enjoy the same protections from last-minute underbidding by the unscrupulous as do participants in the lowest competitive bidding process. But the statutes as currently written provide a period of confidentiality that is longer than necessary and should be amended.<sup>185</sup>

Private entities' proposals need only be confidential until the deadline for submitting responses to a request for proposals. After this point, there can be no last-minute underbidding. This is the same degree of protection afforded bidders by the competitive lowest bidder laws, whose bids are private only until they are opened for evaluation at a public meeting, although proposers for a CDA have one major, added protection. In the event their proposal is not selected as providing the best value, the rights to the work product therein are purchased by TxDOT, with whom they share joint ownership;<sup>186</sup> the unsuccessful proposer may even reuse the work product.<sup>187</sup> Under lowest competitive bidding statutes, however, the unsuccessful bidders are simply out of luck.<sup>188</sup> The public interest in open government cannot remain equally satisfied when proposals remain confidential until after a

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184. See TEX. TRANSP. CODE ANN. § 223.203(m) (Vernon Supp. 2006) (noting that TxDOT “shall pay an unsuccessful private entity that submits a responsive proposal . . . a stipulated amount in exchange for the work product contained in that proposal”). This allows TxDOT and the successful proposer to incorporate as many ideas as possible into their ultimate solution to Texas’s transportation crises as they arise.

185. *But see* Kelley Shannon, *Perry Unveils Cintra Contract*, KILGORE NEWS HERALD, Sep. 29, 2006, at 1 (reporting comments of Governor Rick Perry in response to criticism after Cintra-Zachry and TxDOT refused to release details of Cintra-Zachry’s proposal). “Perry . . . said secrecy surrounding the toll road contract was necessary during active negotiations. He compared it with asking that competitors bidding on a house divulge their offers.” *Id.* The Governor’s metaphor fails to capture the essence of design-build proposals. Competitors are not just bidding what price they will pay for an existing house; rather, competitors for a CDA on the Trans-Texas Corridor might be proposing to build a house with one, two, or three stories, in which neighborhood they would build it, what color it will be, and how much rent they will charge tenants for their fifty-year lease. There are more variables than price at stake.

186. TEX. TRANSP. CODE ANN. § 223.203(m)(1) (Vernon Supp. 2006).

187. *Id.* § 223.203(m)(2).

188. See JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 108 (1997) (surveying the legal and practical aspects of competitive bidding processes). In the words of one bidder, “If our price is used, we want to get the job. It costs us a lot of money to make a bid. If you don’t use us, the money is out the window.” *Id.*

contract is entered into under best value procurement while bid proposals become public upon being unsealed at a public meeting. The mechanics of the procurement process may not be altered for the convenience of proposers when it comes at the expense of the public interest.<sup>189</sup>

This is confused somewhat by the fact that Texas law now allows for “*unsolicited* proposals for a proposed project” to be completed under a CDA.<sup>190</sup> Traditionally, TxDOT’s project selection process begins at the local level, where citizens or local government representatives identify the need for a transportation project.<sup>191</sup> The identification of a need triggers a long process of analyzing the usefulness and feasibility of a particular highway idea, assessing whether there is enough public support, and whether funding exists.<sup>192</sup> If a private entity may submit a proposal to build a highway where a need has not been sufficiently identified, the fact that such a project was even being considered would remain confidential from local citizenry until a contract had been entered into, and would circumvent the political process formerly relied upon to advance highway projects. Fortunately, the Texas Legislature recognized this danger and enacted provisions limiting the confidentiality of unsolicited proposals for a CDA.<sup>193</sup> The legislature’s willingness to cut back some of the confidentiality of unsolicited proposals for projects underscores

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189. *See Holt & Co. v. Wheeler County*, 235 S.W. 226, 229 (Tex. Civ. App.—Amarillo 1921, writ dismissed w.o.j.) (holding that “the statute . . . requiring the award to be made to the lowest bidder was for the benefit of the *public* and not for the contractor” of a highway bridge (emphasis added)). The mechanics of government procurement processes may often be necessarily irksome for all but the public for whose benefit and protection they are instituted.

190. TEX. TRANSP. CODE ANN. § 223.203(a) (Vernon Supp. 2006) (emphasis added) (permitting TxDOT to “accept unsolicited proposals for a proposed project or solicit proposals” on its own). These unsolicited proposals do not, however, benefit from the requirement that TxDOT purchase the work product if their proposal is not ultimately accepted. *See id.* (containing no such protections as solicited proposals enjoy).

191. TEX. DEPT’ OF TRANSP., PROJECT SELECTION PROCESS 7 (2003) (detailing TxDOT’s traditional method of choosing which highway projects to pursue).

192. *Id.* at 7–11.

193. *See* TEX. TRANSP. CODE ANN. § 223.204(a) (Vernon Supp. 2006) (encouraging private entities to submit proposals by privileging the contents of those proposals until after a contract is entered into). The statute excludes from this privilege the unsolicited proposal’s “information regarding the proposed project location, scope, and limits[, as well as] information regarding the private entity’s qualifications, experience, technical competence, and capability to develop the project.” *Id.* § 223.203(b)(1)–(2).



the feasibility of shortening the period of confidentiality for *all* proposals.<sup>194</sup> Because the mechanics of the procurement process exist for the benefit of the public, the confidentiality of a project should not be wholly contingent upon whether proposals for that project were or were not solicited by TxDOT.

#### IV. CONCLUSION

As one of the sponsors of 2005's H.B. 2702 commented in an editorial after its passage, "[i]n previous generations, the farm-to-market road and federal interstate highway systems sparked stiff and emotional opposition. Today, the Trans-Texas Corridor is generating significant controversy—some justified, some not."<sup>195</sup> Among the controversial subjects that are bound to come up at the slightest mention of Trans-Texas Corridor,<sup>196</sup> justified or not, perhaps none hold such long-lasting potential for highway project development in Texas as comprehensive development agreements. Charges of excessive secrecy and conspiracy may abound, but CDAs appear to be the legislatively sanctioned, preferred means

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194. See TxDOT History: Present to 2001, [http://www.dot.state.tx.us/about\\_us/present\\_2001.htm](http://www.dot.state.tx.us/about_us/present_2001.htm) (last visited Dec. 17, 2007) (relating fact that Fluor Enterprises, long before any official request for proposals, "submit[ted] an unsolicited proposal to build an element of the Trans-Texas Corridor from Denison to the Rio Grande Valley"). Had a few other enterprising entities such as Fluor been convinced of the public need for such a project, would not the public see a benefit from the ensuing competition to design and build the best product for the best value? Any adverse impact a lack of proposal confidentiality may have on proposers should not deter the legislature from reaffirming the historic purpose of contract procurement: benefiting the public.

195. Sen. Todd Staples, Op-Ed, *Balancing Needed Roads, Public Safety and Property Rights*, WISE COUNTY MESSENGER ONLINE, June 30, 2005, <http://www.wcmessenger.com/opinion/columns/EEkppVukppXplOhFsi.php>. Chairman of the Committee on Transportation and Homeland Security, Senator Staples sponsored H.B. 2702 in the senate. *Id.*

196. See generally CorridorWatch.org, <http://www.corridorwatch.org/ttc/index.htm> (last visited Dec. 17, 2007) (amassing a litany of concerns with the legislation and planning behind the Trans-Texas Corridor). Among the most frequently aired of the criticisms are: 1) the vast amount of mostly rural land that must be acquired to build the Corridor, which most estimate will average 1200 feet in width; 2) the wisdom of concentrating a large amount of transportation (vehicle and rail) and utility (petroleum, water, and communications) resources in a largely indefensible target in a post-9/11 world; 3) the interruption of roads intersected by a 1200-foot wide Corridor and the infeasibility of building interchanges and overpasses, seriously inconveniencing or possibly even choking off areas where such interchanges are not built; 4) the negative effect on the broader economy of imports and exports that this "NAFTA Superhighway" will have; and 5) anything having to do with tolled roads, a contentious subject in their own right. *Id.*

of constructing the various elements of the Trans-Texas Corridor.

But the developmental shift of highway contract procurement from the traditional design-bid-build methodology to the increasingly popular design-build CDAs will not proceed without its share of speed-bumps if existing laws are not amended. Certainly, TxDOT possesses limited ability to enter into a CDA with a private entity in that only specific types of projects qualify for CDAs;<sup>197</sup> budgetary ceilings cap the percentage of money that can be tied up in CDAs;<sup>198</sup> and the authority to enter into CDAs, though not necessarily finalize their terms, will sunset in 2009.<sup>199</sup> These limitations, though not terribly imposing, provide helpful markers to gauge the degree to which CDAs can and will be relied upon by TxDOT and private entities to contract for the design and construction of high-priority segments of the Trans-Texas Corridor.

In the next two years the legislative study committee will research public policy implications—during the moratorium called for by S.B. 792. During this time, the Texas Legislature could aid this process immensely by amending the Transportation Code's contract procurement provisions to indicate how Texas's competitive bidding requirements are to be read in light of the recent changes in support of best value contracting. Allowing TxDOT and private entities' proposals to define the limits of CDA applicability will only fuel critiques, conspiracy theories, and political rabble-rousing. However, a little moderation and understanding in this regard would abate some of the naysaying. For now, the only reasonable construction the conflicting statutes can be given under Texas law is that the general preference is for lowest competitive bidding procurement with an exception when best value can otherwise be had.<sup>200</sup> Without immediate legislative

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197. TEX. TRANSP. CODE ANN. § 223.201(a) (Vernon Supp. 2006).

198. *Id.* § 223.202.

199. *Id.* § 223.201(f), *amended by* Act of May 26, 2007, 80th Leg., R.S., S.B. 792, § 4.01 (to be codified at TEX. TRANSP. CODE § 223.201) (moving the sunset date to 2009).

200. *See Flowers v. Pecos River R.R. Co.*, 138 Tex. 18, 25, 156 S.W.2d 260, 263 (1941) (construing a newer, particular law as being an exception to the older, general law rather than one impliedly repealing the latter). Texas law does not favor repeal by implication. *Gordon v. Lake*, 163 Tex. 392, 356 S.W.2d 138, 139 (Tex. 1962) (orig. proceeding). TxDOT has not completely forsaken traditional project delivery (with its attendant submission of contracts to competitive bidding); for example, it has indicated that within the Cintra-Zachry CDA to develop TTC-35, "projects will be implemented in a number of ways," including the traditional method of preparing a bid package and opening sealed

clarification—or better-defined limitations—the exception could swallow the rule. For example, the legislature could specify that while a CDA could be awarded based on apparent best value, all subcontracts within that CDA must be submitted to sealed competitive bidding and awarded to the lowest competitive bidder;<sup>201</sup> or, the legislature could simply include a clause stating that TxDOT, in its discretion, may let highway improvement contracts pursuant to either lowest competitive bidding or best value contract procurement.<sup>202</sup>

The legislature could also take the opportunity to silence vocal critics of what is ultimately an unnecessarily long period of confidentiality for proposals submitted for a CDA.<sup>203</sup> As the law

bidding on it. TEX. DEP'T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 13 (Jan. 2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf).

201. See *Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951, no writ) (holding a proposed contract to rebuild Belt Line Road to be violative of “the test of competitive bidding”). Specifically, the court in *Sterrett* spoke of certain situations where the contract as proposed might have passed statutory muster, even if the contract were awarded to one other than a low bidder. In this case, the proposed contract did not provide for making “a lump sum competitive bid on the cost of all materials, labor, etc., going into the work, and no provision for competitive bidding on such items severally or in groups.” *Id.* Those items simply were “to be contracted for and purchased by the [winner of the proposed contract], who [was] to be reimbursed in full for the amounts paid therefor.” *Id.* The court noted, but did not decide, that this open-ended purchasing power granted to the winning bidder might have been acceptable if only there had been some “provision in the contract that the contractor himself must buy the materials only upon contract, *after competitive bidding thereon.*” *Id.* (emphasis added). The proposed contract deemed unacceptable in *Sterrett* bears certain similarities to a design-build contract when viewed in light of competitive bidding requirements. Put another way, the initial design-build contract is not awarded pursuant to low bid laws, but in pursuance of “best value,” apparently violating the competitive bidding requirement. If, however, there were some provision in the design-build contract similar to that suggested in *Sterrett*, that the design-build developer only let subsequent subcontracts “after competitive bidding thereon,” the purposes of competitive bidding might yet be satisfied under the design-build contract.

202. Cf. Colo. S.B. 06-234, 65th Gen. Assemb., 2d Reg. Sess. (2006) (proposing to amend Colorado procurement laws to allow the state to pursue either competitive sealed bidding or best value procurement). This ultimately vetoed bill is an example of one attempt to reconcile what Colorado recognized—and Texas should recognize—as conflicting and contradictory procurement statutes.

203. See, e.g., CorridorWatch.org, *Myth vs. PR: TxDOT's “Myth Versus Reality” Press Release Misses the Mark*, <http://www.corridorwatch.org/ttc/cw-txdot-myths.htm> (last visited Dec. 17, 2007) (responding to a TxDOT press release in defense of various criticisms of the Trans-Texas Corridor). In responding to “Mysterious TxDOT Myth Number 14,” which suggests that “[t]he Cintra[-]Zachry contract is a big secret and no details have been made available to the public,” TxDOT suggests that even though “no business owner wants to share his financial investments with his competitors, [and]

currently stands, information submitted in a proposal remains privileged from disclosure “until a final contract for a proposed project is entered into.”<sup>204</sup> The legislature does not extend this same protection to unsolicited proposals however; only those that are submitted in response to a request for proposals may remain confidential.<sup>205</sup> This provision does not exist to discourage unsolicited proposals under a CDA; rather, “[u]nsolicited proposals are encouraged” so long as they are “substantive” and “submitted in the required format.”<sup>206</sup> If the legislature is not concerned that such a lack of confidentiality will deter unsolicited proposals, it must therefore not concern itself with alleged adverse impacts suffered by private entities responding to a request for proposals upon shortening the period of confidentiality.<sup>207</sup> The Texas Legislature should amend section 223.204 of the Transportation Code to prevent disclosure of the information contained in proposals submitted in response to a request for proposals *only* up until the deadline for submitting responsive

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potential TTC developers do not want to share theirs,” the CDA “is a public document and is available online.” *Id.* CorridorWatch.org disputes this claim, in suggesting that some 200 pages of the contract were, at least at that time, unavailable to the public anywhere (TxDOT has since released the entire CDA, as discussed elsewhere). *Id.*

As a result Texans don’t know what they are buying or what they are paying for it. This is a public project and the public has the right to know all of the details that will impact their lives and that of several future generations. The public interest should always be put above that of a private business.

*Id.*; accord *Holt & Co. v. Wheeler County*, 235 S.W. 226, 229 (Tex. Civ. App.—Amarillo 1921, writ dismissed w.o.j.) (holding that “the statute . . . requiring the award to be made to the lowest bidder was for the benefit of the *public* and not for the contractor” of a highway bridge (emphasis added)). The public interest does not change simply because another method of contract procurement is used.

204. TEX. TRANSP. CODE ANN. § 223.204(a) (Vernon Supp. 2006).

205. *See id.* (excluding details of unsolicited proposals from the protections of nondisclosure).

206. TEX. DEP’T OF TRANSP., LAUNCHING THE NEXT GENERATION OF CDA PROJECTS: JAN. 17, 2006 INDUSTRY WORKSHOP, at 20 (Jan. 2006), [http://www.dot.state.tx.us/publications/government\\_business\\_enterprises/CDA\\_program.pdf](http://www.dot.state.tx.us/publications/government_business_enterprises/CDA_program.pdf). TxDOT subjects unsolicited proposals to the same screening process as other proposals. *Id.* “The CDA screening criteria effectively define the information requirements for CDA project candidates.” *Id.* “The programwide schedule will be adjusted to accommodate an unsolicited proposal as appropriate.” *Id.*

207. *See* Gordon Dickson, *Lawsuit Filed to Keep Documents Private*, FT. WORTH STAR-TELEGRAM, June 25, 2005, at A1 (noting that the lawsuit filed to prevent disclosure of portions of the CDA argued that “Cintra-Zachry and other contractors would be more reluctant to compete for state construction projects if they knew that such information would be released”).

proposals has passed. After that point, the proposals are essentially frozen, and no last-minute undercutting or pilfering of work product by other proposers may occur. There is no reason to extend this privilege all the way until final contract formation. Bidders in the lowest competitive bidder method are not given the luxury of almost perpetual confidentiality; it need not be enjoyed by those aiming at providing best value.

In the end, Texas taxpayers must answer for themselves whether the rapid design, construction, and maintenance of highway projects by private entities is worth sacrificing some of the historic protections of issuing highway contracts to the lowest bidder in the competitive bidding process. Design-build CDAs do offer some serious advantages, as advocates of “best value” procurement have long realized. Detractors and apologists aside, and assuming that the incredibly ambitious Trans-Texas Corridor Plan is a worthy destination to seek, CDAs—with a few adjustments under the hood along the way—could very well be the best route to get Texans from here to there.