AMENDED IN ASSEMBLY APRIL 20, 2009

california legislature—2009–10 regular session

ASSEMBLY BILL No. 878

Introduced by Assembly Member Caballero

February 26, 2009

An act to amend Sections 5956, 5956.1, 5956.2, 5956.3, 5956.4, 5956.5, 5956.6, 5956.7, 5956.8, 5956.9, and 5956.10 of, and to add Section 5956.11 to, the Government Code, relating to infrastructure financing.

legislative counsel's digest

AB 878, as amended, Caballero. Infrastructure financing.

Existing law permits a governmental agency to solicit proposals and enter into agreements with private entities for the design, construction, or reconstruction by, and may lease to, private entities, for specified types of fee-producing infrastructure projects. Existing law permits these agreements to provide for the lease of, or ownership of, infrastructure facilities owned by a governmental entity, but constructed by a private entity, to that private entity for a period of up to 35 years.

This bill would authorize a local governmental agency, as defined, to enter into an agreement with a private entity for financing for specified types of revenue-generating infrastructure projects. The bill would require an agreement entered into under these provisions to include adequate financial resources to perform the agreement, and would permit the agreements to lease, license, or provide other permitted uses by the governmental agency to extend for a term of up to 50 years, after which time the project would revert to the governmental agency.

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

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

SECTION 1. Section 5956 of the Government Code is amended to read:

5956. Local governmental agencies have experienced a significant decrease in available tax revenues to fund necessary infrastructure improvements. If local governmental agencies are going to maintain the quality of life that this infrastructure provides, they must find new funding sources. One source of new money is private sector financing utilized to study, plan, design, develop, finance, construct, maintain, improve, rebuild, repair, operate, or any combination thereof, infrastructure facilities. Private sector financing may be used with public and private financing pursuant to this chapter and projects may be financed by a combination of public and private financing under this chapter. Private sector financing for a project under this section may include, but is not limited to, cash and cash equivalents, loans, debt assumption, letters of credit, capital investment, in-kind contributions of materials or equipment, construction or equipment financing, carrying of costs during construction, and any combination thereof. Unless private sector financing becomes available to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, some local governmental agencies will be unable to replace deteriorating infrastructure. Further, some local governmental agencies will be unable to expand and build new infrastructure facilities to serve the increasing population.

SEC. 2. Section 5956.1 of the Government Code is amended to read:

5956.1. It is the intent of the Legislature that local governmental agencies have the authority and flexibility to utilize private financing or public financing, and any combination thereof, to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities. Without the ability to utilize these sources of financing to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, the Legislature finds that some local governmental agencies will not be able to adequately, competently, or satisfactorily retrofit, reconstruct, repair, or replace existing infrastructure and will not be able to adequately, competently, or satisfactorily design and construct new infrastructure.

SEC. 3. Section 5956.2 of the Government Code is amended to read:

5956.2. It is the intent of the Legislature that this chapter be construed as creating a new and independent authority for local governmental agencies to utilize private sector financing or public financing, *and any combination thereof,* to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities. To that end, this authority is intended to supplement and be independent of any existing authority and does not limit, replace, or detract from existing authority. This chapter may be used by local governmental entities when they deem it appropriate in the exercise of their discretion. It is the intent of the Legislature that this act create no new governmental entities.

SEC. 4. Section 5956.3 of the Government Code is amended to read:

5956.3. (a) For purposes of this chapter, “governmental agency” includes a city, county, city and county, including a charter city or county, school district, community college district, public district, county board of education, joint powers authority, transportation commission or authority, or any other public or municipal corporation.

(b) For purposes of this chapter, “private entity” includes a person, business entity, combination of persons and business entities, or a combination of business entities.

(c) For purposes of this chapter, “fee-producing infrastructure project” or “fee-producing infrastructure facility” means the operation of the infrastructure project or facility will be paid for, in whole or in part, by the persons or entities benefited by or utilizing the project or facility.

SEC. 5. Section 5956.4 of the Government Code is amended to read:

5956.4. A governmental agency may solicit proposals and enter into agreements with private entities for the design, construction, or reconstruction by, and may lease to, private entities ~~for~~ the following types of fee-producing infrastructure projects:

(a) Irrigation.

(b) Drainage and sanitary sewer systems.

(c) Energy or power production.

(d) Water supply, treatment, and distribution.

(e) Flood control.

(f) Inland waterways.

(g) Harbors.

(h) Municipal improvements.

(i) Commuter and light rail.

(j) Highways or bridges.

(k) Tunnels.

(*l*) Airports and runways.

(m) Purification of water.

(n) Sewage treatment, disposal, and water recycling.

(o) Refuse disposal.

(p) Structures or buildings, except structures or buildings that are to be utilized primarily for sporting or entertainment events.

SEC. 6. Section 5956.5 of the Government Code is amended to read:

5956.5. Notwithstanding Chapter 10 (commencing with Section 4525) of Division 5, or Part 2 (commencing with Section 10100) or Part 3 (commencing with Section 20100) of Division 2 of the Public Contract Code, the governmental agency soliciting proposals and entering into agreements with private entities for the studying, planning, design, developing, financing, construction, maintenance, rebuilding, improvement, repair, or operation, or any combination thereof, by private entities for fee-producing infrastructure projects shall ensure that the contractor is selected pursuant to a competitive negotiation process. Projects may be proposed by the private entity and selected by the governmental agency at the discretion of the governmental agency. Projects may be proposed and selected individually or as part of a related or larger project. The competitive negotiation process shall utilize, as a primary selection criteria, the demonstrated competence and qualifications of the private entity to perform the services required under the agreement, including prior experience in performing similar services. The selection criteria shall also ensure that the facility be operated at fair and reasonable prices to the user of the infrastructure facility services. The competitive negotiation process shall not require competitive bidding. The competitive negotiation process shall specifically prohibit practices that may result in unlawful ~~activity~~

"activity," including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit governmental agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract under this section that would subject those employees to the prohibition of Section 87100. Other than these criteria and applicable provisions related to providing security for any required construction and completion of the facility, the governmental agency soliciting proposals is not subject to any other ~~code~~ provisions ~~relating to public~~ *of the Public Contract Code, this code, or other code provisions that relate to public* procurements.

SEC. 7. Section 5956.6 of the Government Code is amended to read:

5956.6. (a) For purposes of facilitating projects, the agreements specified in Section 5956.4 may include provisions for the lease, license, or permissive use of rights-of-way in, and airspace over, property owned by a governmental agency, for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the private ~~entity~~ *facility* to construct, maintain, rebuild, improve, or repair infrastructure facilities supplemental to existing government-owned facilities. Infrastructure constructed by a private entity pursuant to this chapter shall, at all times, be owned by a governmental agency. All public works constructed pursuant to this section shall comply with Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code. The agreement may provide for the lease, license, or other permissive use of those facilities to the private entity for up to 50 years. In consideration therefor, the agreement shall provide for complete reversion of the privately constructed facility to the governmental agency at the expiration of the lease, license, or other permissive use at no charge to the governmental agency. Subsequent to the expiration of the lease, license, or other permissive use period, the governmental agency may continue to charge fees for use of the infrastructure facility. If, after the expiration of the lease, license, or other permissive use period, the governmental agency continues to lease airspace rights to the private entity, it shall do so at fair market value.

(b) The agreement between the governmental agency and the private entity shall include, but need not be limited to, provisions to ensure the following:

(1) Compliance with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code). Neither the act of selecting a proposed project or a private entity, nor the execution of an agreement with a private entity, shall require prior compliance with the act. However, appropriate compliance with the act shall thereafter occur before project development commences.

(2) Security for performance of the agreement and contractual provisions that are necessary to protect the funding and financial terms of the agreement.

(3) Adequate financial resources of the private entity to perform the agreement.

(4) Authority for the governmental agency to impose user fees, in whole or in part, for use of the facility in an amount sufficient to protect the revenue streams necessary for projects or facilities undertaken pursuant to this chapter. User fee revenues, *used* in whole or in part, may be paid to the governmental agency or the private entity and shall be dedicated exclusively to payment of the private entity's and governmental agency's direct and indirect capital outlay costs for the project, direct and indirect costs associated with financing of the facility, including interest, principal, repayment, issuance, and refinancing costs, direct and indirect costs associated with operations, direct and indirect user fee collection costs, direct and indirect costs of administration of the facility~~, reimbursement for the~~ direct and indirect costs of maintenance, other project-related costs, and a reasonable return to the private entity as set forth specifically in the agreement, or included as part of the costs and fees, as negotiated or determined during the procurement process.

(5) As a precondition to the imposition or increase of a user fee, the governmental agency shall conduct at least two public hearings at which public testimony will be received regarding a proposed user fee revenue or increase in user fee revenues. The public hearing shall precede the action by the governmental agency to actually impose a user fee or to increase an existing user fee. The governmental agency shall consider the public testimony prior to imposing a new or increased user fee. The governmental agency

shall provide the following notices and utilize the following procedures:

(A) Notice of the date, time, and place of the meeting, including a general explanation of the matter to be considered, shall be mailed at least 14 days prior to the meeting to any interested party who files a written request with the governmental agency for mailed notice of the meeting on new or increased fees or service charges. Any written request for mailed notices shall be valid for one year from the date on which it is filed unless a renewal request is filed prior to the expiration of the one-year period for which the written request was filed. The legislative body may establish a reasonable annual charge for sending notices based on the estimated cost of providing the service.

(B) At least 10 days prior to the meeting, the governmental agency shall make available to the public data that supports the amount of the fee or the increase in the fee.

(C) (i) At least 10 days prior to the meeting, the governmental agency shall publish a notice in a newspaper of general circulation in that agency's jurisdiction stating the date, time, and place of the meeting, including a general explanation of the matter to be considered.

(ii) Any costs incurred by the governmental agency in conducting the meeting or meetings required by this section may be recovered from fees charged for the services that are the subject of the fee.

(iii) For infrastructure projects authorized by this chapter, at least 10 days prior to the meeting, the governmental agency shall publish for four consecutive times, a notice in the newspaper of general circulation in the affected area stating in no smaller that 10-point type a notice specifying the subject of the hearing, the date, time, and place of the meeting, and in at least 8-point type a general explanation of the matter to be considered.

(D) No ~~local~~ *governmental* agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount that exceeds the estimated ~~amount required to provide the service~~ *cost* for which the ~~fee or service charge is levied and~~ *user fee revenues are dedicated including* a reasonable rate of return on investment, pursuant to paragraph (4). Any action by a ~~local~~ *governmental* agency to levy a new fee or service charge or to approve an increase in an existing fee or service charge pursuant to this chapter shall be taken only by ordinance or resolution. The legislative body of a ~~local~~ *governmental* agency shall not delegate the authority to adopt a new fee or service charge, or to increase a fee or service charge.

(6) Require that if the legislative body of the governmental agency determines that fees or service charges create revenues in excess of the actual cost for which the user fee revenues are dedicated ~~and~~ *including* a reasonable rate of return, pursuant to paragraph (4), those revenues shall either be applied to any indebtedness incurred by the private entity or the governmental agency with respect to the project, be paid into a reserve account in order to offset future operation costs, be paid into the appropriate government account, be used to reduce the user fee or service charge creating the excess, or a combination of these sources.

(7) If the private entity operates the facility, require the private entity to maintain the facility in good operating condition at all times, including the time the facility reverts to the governmental agency.

(8) Preparation by the private entity of an annual audited report accounting for the income received and expenses to operate the facility. The private entity shall make that report available to any member of the public for a cost not to exceed the cost of reproduction of the report.

(9) Provision for a buyout of the private entity's capital investment by the governmental entity in the event of termination or default before the end of the lease term.

(10) Provision for appropriate indemnity promises between the governmental agency and the private entity.

(11) Provision requiring the private entity to maintain insurance with those coverages and in those amounts that the governmental agency deems appropriate.

(12) In the event of a dispute between the governmental agency and the private entity, both parties shall be entitled to all available legal or equitable remedies.

SEC. 8. Section 5956.7 of the Government Code is amended to read:

5956.7. (a) The governmental agency may exercise any power possessed by it with respect to the development and construction of infrastructure projects pursuant to this chapter. Agreements for the maintenance and operation *of* services entered into pursuant to this chapter shall provide for full reimbursement for services rendered by the governmental agency in accordance with the terms and conditions specified in the agreement. The governmental agency may provide services for which it is reimbursed with respect to preliminary planning, environmental certification, and preliminary design of the infrastructure projects. The governmental agency may consult with legal, financial, and other consultants in the negotiation and development of the agreement. To the extent existing public utility infrastructure is necessarily required to be modified, relocated, or removed in order for an infrastructure project authorized by this chapter to be constructed, the cost of modification, relocation, or removal of the existing infrastructure shall be borne by the private entity and included as a recoverable capital cost of the project. This cost shall not be construed to include costs of increasing the capacity, or upgrading, or improving the existing public utility infrastructure.

(b) The private entity's responsibility to modify, relocate, or remove existing public utility infrastructure shall not alter any agreements that may be in place between the governmental agency and any public utility regarding projects funded by the governmental agency.

(c) In the event of a dispute regarding the reimbursement required, a private entity may request an audit of the public utility's costs by a mutually acceptable certified public accountant. The result of the audit shall determine the actual costs. If the audit indicates that the public utility's actual costs were less than 95 percent of the cost claimed, the cost of the audit shall be borne by the public utility. If the audit indicates that the public utility's actual costs were 95 percent or more of the cost claimed, the cost of the audit shall be borne by the private entity.

SEC. 9. Section 5956.8 of the Government Code is amended to read:

5956.8. The plans and specifications for each project constructed pursuant to this chapter shall comply with all applicable governmental design standards for that particular infrastructure project. The private entity performing the agreement shall utilize private sector design and construction firms to design and construct the infrastructure facilities. However, a facility subject to this chapter and leased, licensed, or permitted to a private entity shall, during the term of the lease, *license, or permit* be deemed to be public property for purposes of maintenance, enforcement of laws and for purposes of Division 3.6 (commencing with Section 810). All construction, alteration, demolition, installation, maintenance, and repair work performed pursuant to this chapter shall comply with Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

SEC. 10. Section 5956.9 of the Government Code is amended to read:

5956.9. In order to use the authority conferred by this chapter to the maximum extent, a governmental agency may use private infrastructure financing pursuant to this chapter as the exclusive funding or revenue source or as a supplemental funding *or* revenue source with federal or local funds. The governmental agency involved may be a local governmental agency or a combination of local governmental agencies. The governmental agency may work cooperatively with the California Infrastructure and Economic Development Board with regard to the design, construction, operation, and financing of privately financed facilities, but the projects will not be subject to the review or approval of that board.

SEC. 11. Section 5956.10 of the Government Code is amended to read:

5956.10. Notwithstanding any provision of this chapter, neither the state nor any state agency may directly or indirectly use the authority in this chapter, nor may any governmental agency as defined in Section 5956.3, use the authority in this chapter, to design, construct, finance, or operate a state project. For purposes of this section, a state project includes any of the following:

(a) Toll roads on state highways.

(b) State water projects.

(c) State park and recreation projects.

(d) State-financed projects.

These limitations shall not prohibit the state, any state agency, or any governmental agency as defined in Section 5956.3, from utilizing authorizations contained in other provisions of law.

This section shall not be construed to prohibit a governmental agency, as defined in subdivision (a) of Section 5956.3, from using this chapter to accomplish projects that are not expressly prohibited in this section.

SEC. 12. Section 5956.11 is added to the Government Code, to read:

5956.11. The governmental agency may determine the validity of any permits, authorizations or approvals, contracts and agreements, user fees, and other actions taken pursuant to this chapter, by initiating a validating proceeding, as provided in Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure. The validating action may also be initiated by interested person as provided in Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

SEC. 13. Except as it amends Chapter 14 (commencing with Section 5956) of Division 6 of Title 1 of the Government Code, nothing in this act shall be construed to affect the application of any other law.

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