

## **Summary of Amendment 2 (004441) to HB 321**

*Drafted 2/28/2023 (V1)*

*New amendment language compared to Amendment 1 (003592) in red*

Amendment rewrites HB 321.

Sections 1 and 2 establish the Transportation Modernization Act of 2023, redefines present law regarding “design-build contracts” and adds “performance-based asset maintenance contracts,” authorizing the Tennessee Department of Transportation to solicit proposals and award contracts in accordance thereof. **Specifies that resurfacing and bridge maintenance projects are examples of projects not suitable for performance-based asset maintenance contracts.** Section two also requires written notice be sent to the chairmen of the respective House and Senate committees of jurisdiction prior to the Department awarding any contract and to specifically identify projects in excess of \$100,000,000 in the annual transportation improvement program submitted to the General Assembly.

Section 3 revises present law governing the construction manager/general contractor (CM/GC) method of project delivery and adds “progressive design-build (PDB)” as an authorized delivery method for TDOT.

Section 4 rewrites the definition of a “construction manager/general contractor (CM/GC)” to add joint ventures, in addition to business firms, and stipulates that such entities must be able to construct a project upon agreement from TDOT, in addition to the present requirement that they provide “pre-construction services.”

**Section 5 revises the definition of “guaranteed maximum price (GMP)” to include the total dollar figure at which a progressive design-builder (PDB) commits to completing the final design and construction of a project, in addition to the existing law definition of the total dollar amount at which a CM/GC commits to complete construction of a project.**

Section 6 creates and defines the relevant terms “design-builder,” “progressive design-builder,” and “progressive design-build method” in accordance with the newly added delivery method granted to the Department of Transportation.

Section 7 requires the Department to furnish written notice to the chairmen of the respective House and Senate committees of jurisdiction prior to awarding any contract utilizing a CM/GC or PDB method. It also raises the threshold for specifically identifying any projects utilizing these methods in the annual transportation improvement program from \$70,000,000 to \$100,000,000 and deletes the existing 25% cap on the cumulative costs of CM/GC projects awarded in any fiscal year compared to the total amount of construction awards in the previous fiscal year.

Sections 8 and 9 add references to the progressive design-build process, alongside the existing CM/GC process, relative to the multi-phase proposal selection process by TDOT.

Section 10 rewrites the process for appointing a selection committee pursuant to the first of four phases required for TDOT to select a proposer for a project. For each RFP, the commissioner shall appoint a

selection committee of 5 total members, instead of the previous 8; three of the committee members must be TDOT employees, including a licensed engineer, and the two additional appointees must be non-TDOT employees, one having 10+ years of construction/design experience and the other being a licensed professional engineer in Tennessee.

Section 11 rewrites the scoring and ranking process for selection committee members to identify first-tier proposers. Deletes the requirement that the two members giving the two highest and two lowest scores be omitted from computing an average score for each proposal and instead requires that each proposer's score be aggregated from all committee members and ranked from highest to lowest score. Designates the proposer with the top score, and any other proposer within 5% of that top score, as "first tier proposers." Authorizes the TDOT Commissioner to select any of the first-tier proposers or to reject all first-tier proposals and instead opt for a different method of procurement under law. Provides for written notice to all proposers of the selected awardee or of the rejection of all proposals. **Sets an expiration date for this new scoring and ranking process in June of 2029.**

Section 12 adds "joint ventures" to the proposing private entities that are prohibited from offering/paying contingency fees to help obtain a contract.

Section 13 revises various provisions regarding the final award phase of the TDOT project proposal selection process to include PDB's in addition to CM/GC's. Includes "design and construction," in addition to just "construction," as an option for which TDOT can compile contract plans, prepare cost estimates, and engage third party estimators for purposes of finalizing a contract proposal and setting forth a GMP. Adds various authorities for the TDOT commissioner to pursue alternative options in the event an agreement on a guaranteed maximum price (GMP) cannot be reached with a proposer, including requiring PDB's to surrender ownership of its design work product to TDOT, **and that TDOT must assume ownership and liability for the design work product**, for the commissioner to either employ a design consultant through a low-bid process or proceed with construction through a design-build procurement process.

Section 14 adds references to PDB's in existing state law relative to the protest process for disputing the awarding of CM/GC contracts.

Section 15 establishes the Transportation Modernization Fund on July 1, 2023 as a new and separate state fund and appropriates a total investment of \$3,000,000,000 in equal amounts of \$750,000,000 to each of TDOT's 4 regions for transportation projects. Also appropriates \$300,000,000 in transportation grants to be disbursed to local governments at the TDOT Commissioner's determination. Requires that all monies in the fund must remain in the fund and be dedicated only to strategic transportation initiatives, congestion mitigation, **economic development-rural interstate widening**, transportation improvements "over and above" improvements ordinarily supported by the state highway fund, responding to a transportation system failure or emergency, or another purpose for which state highway dollars may otherwise be used. Requires TDOT to submit an annual report to the House and

Senate speakers and the chairs of the respective House and Senate committees of jurisdiction on the status of projects supported by the fund.

Section 16 deletes references to the Tennessee Tollway Act.

Section 17 establishes the legislative intent of the act to authorize the collection of user fees as “an additional and alternative” method for funding the development of highways and transportation-related facilities and to limit user fee revenues to fund new facilities opened on or after July 1, 2023 or to existing facilities where at least one additional new vehicle traffic lane is added. Requires user fee facility projects to consider alternatives, economic/social/environmental impacts, and an environmental evaluation process, including comments submitted by local metro or rural planning organizations, as well as public hearings prior to developing any project.

Section 18 establishes various definitions related to the act and conforming to the new amendatory language proposed for Title 54, Chapter 3.

Section 19 deletes existing law authorizing TDOT to develop tollway projects and instead authorizes, subject to the approval of the transportation modernization board, the Department of Transportation to develop and operate user fee facility projects using funds from the user fee fund, the transportation modernization fund, ~~the state highway fund~~, and other applicable federal or other governmental grants, funds, and loans. Specifies that user fee projects must apply to new projects and facilities on or after July 1<sup>st</sup>, 2023 that have at least one non-user-fee lane available for use, or to existing transportation facilities, provided that the existing number of general-purpose lanes that do not require payment of a user fee is not reduced. Requires TDOT to propose any such plans for user fee facilities to the board, including the proposed use of franchise agreements, concession agreements, or any combination thereof to design, build, finance and/or operate a user fee facility. Further authorizes the department, with the approval of the board and subject to resolutions or indentures authorizing state bond financing, to set user fees or methods for designating variable user fees to provide for all costs of development and operation of a user fee facility project and to pay all bonds, interest, obligations, and other indebtedness incurred, including reasonable reserves, by the state for which payment has been pledged from user fee revenue. Requires the Department to report annually on July 1<sup>st</sup> to the chairs of the respective House and Senate committees of jurisdiction.

Sections 20 and 21 make various language revisions to existing law relative to the Tennessee Tollway Act to conform to the language and defined terminology of the Transportation Modernization Act.

Section 22 deletes existing law requiring the Department to only enter into contracts with U.S. citizens or U.S.-owned corporations. Relative to user fee facility development agreements, authorizes TDOT to enter into contracts with private entities, the federal government, or other governmental agencies to develop user fee facilities and projects, including contractual project delivery agreements authorized under law, service agreements, and franchise agreements and/or concession agreements, including the permissive consideration of both solicited and unsolicited proposals. Permits user fee development

agreements to lease highway lanes to private entities, but prohibits the ownership thereof. Establishes confidentiality conditions for solicited and unsolicited proposals. Expressly prohibits any contract or agreement with any person or entity under sanction by the U.S. Treasury or OFAC.

Section 23 deletes the present authorization for TDOT rules promulgation relative to tollways under existing law and instead authorizes the TDOT commissioner, with board approval, to establish and enforce user fees, vehicle restrictions and other fees and restrictions relative to user fee facilities.

Section 24 deletes existing law relative to tollway traffic enforcement, including municipal traffic laws, and nonpayment of tollway fees. Applies existing state traffic laws, including applicable municipal traffic laws, to govern the usage of user fee facilities and authorizes state and local law enforcement to enforce traffic laws and use restrictions therein. Exempts emergency vehicles, public transit authority vehicles, and, in certain instances, authorized high-occupancy vehicles from paying user fees. Permits the department, subject to board approval, to prohibit certain classes of vehicles from operating in user fee facilities under certain conditions and establishes a Class C misdemeanor offense for nonpayment of user fees after 90 days of receiving notice of nonpayment or the operation of a prohibited vehicle on a user fee facility.

Sections 25-27 make various language revisions to existing law relative to the Tennessee Tollway Act to conform to the language and defined terminology of the Transportation Modernization Act.

Section 28 deletes the existing authorization for a tollway pilot program. Establishes the Transportation Modernization Board consisting of five voting members, including one appointee each from the governor, the speaker of the house of representatives, and the speaker of the senate, in addition to the *ex officio* membership of governor and the commissioner of transportation or their designee(s). For the initial term, the governor's appointee shall serve for six years, the house speaker's appointee for five years, and the senate speaker's appointee for four years, after which the terms for each appointee who does not serve in an *ex officio* capacity is set at four years. Each non-*ex officio* board member is limited to two full terms of service. Further establishes a quorum for the board of three members and designates the commissioner of transportation, or his designee, to serve as chair with the administrative support of the Department.

Section 29 makes various additions to state law relative to enforcement of nonpayment of user fees. Requires signage for notifying motorists of the user fee facility and establishes a ~~civil violation~~ **Class C misdemeanor offence** for operating a vehicle in a user fee facility without payment. Assigns liability for payment of user fees and, in the event of nonpayment while utilizing a user fee facility, any applicable administrative fees, to the registered owner of the vehicle that was operated on a user fee facility without payment, granting exceptions for leased, stolen, or recently owner-transferred vehicles under certain conditions. Authorizes a contractor of the Department to utilize an open road user fee system to monitor and collect payment. Establishes habitual violator status for a motorist with three (3) or more nonpayment offenses within a 12-month time period and authorizes the department of revenue to suspend or non-renew a habitual violator's vehicle registration, subject to an established notice and

hearing process for the violator, **which must include an explanation for how the habitual violator can avoid suspension or non-renewal of vehicle registration.** Authorizes reciprocity agreements with other government entities for enforcement for non-Tennessee residents.

Section **30** adds various provisions to state law relative to the confidentiality and exclusion from open records laws of proprietary records related to the act. Establishes that personal information or highly restricted personal information obtained in connection with a vehicle record and due to the enforcement of a user fee by the department or department's contractor must remain confidential and is not open to public inspection. Exempts financial information, transaction history, and other information generated by an open road user fee system related to collecting motorists' user fees from open records laws and closes such records to public inspection. Authorizes the Department or its contractor to use account information only for collecting and enforcing user fees, excepting an account-holder from examining his/her own account information. Requires a lawful court order for any third party to inspect confidential account information. Additionally, this section further designates as confidential and excludes from open records laws proposals for franchise or concession agreements and any information related to the design, construction, financing, operation or maintenance of user fee facilities, including any documents used by the Department and related thereto, until after a proposal has been selected and a contract awarded. Establishes commercial or financial information used by private entities and contained in a proposal for an agreement, whether solicited or unsolicited, as proprietary information, exempt from open records laws, and closed to public inspection at any time.

**Section 31 establishes a new part under 54-1-601 that defines the term "alternative delivery contracts" according to the definitions of design-build contracts, CM/GC methods, and PDB methods created under this act. Sets a limitation that TDOT shall not procure more than 28 of these alternative delivery contracts per fiscal year from the state highway fund, but exempts the transportation modernization fund, discretionary funds, and federal grant programs from such limitation.**

Section **32** delete existing law relative to additional registration fees on electric vehicles and create a new revenue structure for both electric and hybrid vehicles. Starting in 2024 **through 2026**, establishes an enhanced annual registration fee of ~~\$274~~ **\$200** for an "all-electric vehicle." **Starting in 2026**, that fee increases to **\$274**, and for each year thereafter, it is adjusted based off of the annual rate of inflation/deflation according to the chained consumer price index for all urban consumers rate, so long as that rate does not exceed a 3% annual cap. Also provides for the deduction from these new additional state registration fees on all-electric vehicles of any applicable new federal taxes or fees that may be levied under U.S. Code on similar all-electric vehicles starting in 2026 and thereafter, so long as the total amount of aggregated federal and state annual registration fees (plus the adjustment for inflation) on all-electric vehicles does not fall below **\$200**. Also provides for an automatic increase in these additional all-electric vehicle registration fees equal to the amount of any potential future decrease in federal taxes or fees on all-electric vehicles, should such a future decrease occur.

Additionally, Sections **32** and **33** establish a **\$100** annual fee for a "hybrid electric vehicle" and a "plug-in hybrid electric vehicle." **Starting in 2025**, requires the Department of Revenue to subsequently **adjust**

such registration fees for hybrid and plug-in hybrid vehicles annually based on the chained consumer price index for all urban consumers in the same manner as for all-electric vehicles. Dedicates the revenues from the enhanced vehicle registration fees on electric and hybrid vehicles to the state highway fund (63%), municipalities (11.8%), counties (22%) and the general fund (2.8%).

Section 34 deletes existing laws relative to the operation of high occupancy vehicles, inherently low-emission vehicles (ILEVs), and low-emission and energy efficient vehicles (LEEEVs) in HOV lanes. Establishes a Class C misdemeanor offence for the operation of any vehicle that is not an emergency vehicle or high-occupancy vehicle, defined as public transit vehicles, busses, motorcycles, and private passenger vehicles carrying no fewer than two occupants, in an HOV lane, including ILEVs and LEEEVs.

Section 35 raises from \$75,000 to \$250,000 the threshold fair market value for any property acquired by the Department of Transportation that can be declared as “surplus” by the commissioner (or, with the approval of the state building commission, in excess of \$250,000) for purposes of selling the surplus property to an adjoining property owner, former owner of that property, or to a legal governmental body for a public use purpose.

Section 36, in determining the fair market value of surplus right-of-way property for sale to a purchaser, raises the threshold from \$10,000 to \$25,000 for the Department’s preliminary estimate of a surplus right-of-way property’s value requiring an independent appraiser, rather than the staff of the Department of Transportation, to appraise the property, the costs for which are assessed to the purchaser.

Section 37 establishes a sunset for the Transportation Modernization Board of June 30, 2025.

Section 39 establishes severability, and Section 40 enacts the legislation with immediate effect upon becoming law.

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