

## **PUBLIC-PRIVATE PARTNERSHIPS**

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With Texas' focus on inter-city and intra-city transit and rail services, state and federal agencies, including local municipalities and transit authorities, are looking for ways to partner with private developers to build needed infrastructure and facilities and promote growth in the surrounding areas. Likewise, with the current constraints in the capital and lending markets, developers are interested in transit oriented development financed by tapping into available state and local funds. Before entering into a public-private venture, the private developer or investor should first understand the city's or agency's powers and limitations.

### **General Powers**

Each agency of the State of Texas, whether it is a municipal corporation, a county or other type of political subdivision (state agency), has specific powers, and the governing laws, charter, ordinances or other documents that grant and/or limit their powers should be reviewed to insure that the state agency has sufficient authority to undertake the proposed project. For example, Title 2 of the [Texas Statutes Local Government Code](#) categorizes "towns" and "cities" based on size and population. Towns and cities have different powers; generally, the smaller the town or city, the fewer powers it has. Some political subdivisions were created by special laws and have very specific, even enhanced powers. For example, in addition to the broad powers granted for "mass transit" purposes, transit authorities created pursuant to Chapter 451 of the [Texas Statutes Transportation Code](#) have all of the powers granted to cities with populations of 1.2 million or more, allowing transit authorities to be very creative in dealing with developers and investors.

### **Constitutional Prohibitions**

The [Texas Constitution](#) prohibits state agencies from lending money or credit for private purposes (Article III, Section 52). That prohibition precludes state agencies from granting a lien to the underlying real estate and also precludes state agencies and private developers from truly "partnering" with one another. There are a few exceptions, such as the loan or grant of public money for economic development (typically realized through the issuance of tax revenue bonds), toll road development realized through the [Texas Department of Transportation](#), etc. Given this prohibition, a threshold question in each public-private partnership should be whether the proposed project entails a lending or gifting of public money or credit in violation of the Texas Constitution.

### **Contracting with State Agencies**

As mentioned above, though we generically talk about public-private "partnering," true partnering (for example, limited partnerships, joint ventures, etc.) between state agencies and private developers is not permitted. Each public-private venture should be viewed as a contract and it is important to understand that the governmental entity must receive "value" for its investment or the contract could be void or voidable. In other words, unlike in a partnership where an investor often has no guarantee of a return on its investment, the contracting governmental entity must receive value. For example, if the contracting entity is a transit authority and, in addition to the transit facility the entity constructs infrastructure for the developer's adjacent project, the contract must provide for the repayment of the developer's infrastructure costs. Though "repayment" may be achieved creatively through joint use of parking facilities, rent, etc., it must be addressed.

In addition to the above, the regulations of the governmental entity should be reviewed and followed. In many instances, the related rules will be set forth in the enabling legislation or charter. In others, these rules will be set forth in the [Texas Statutes Government Code](#) or Texas Statutes Local Government Code. Depending on the services/work to be performed and which party is responsible, it may be possible to avoid the applicability of many governmental regulations. For example, if a municipality and developer enter into a contract and the developer is the contractor, it may not have to follow a complex set of requirements applicable to municipal contracts, thus saving time and money. On the other hand, the governmental entity may insist on certain protections (for example, minimum bid requirements, bonds, etc.), irrespective of who performs the services/work. An understanding of applicable regulations is important in determining deal structure and may be useful in allocating risks, insuring cost containment and other matters.

Finally, it is important to be aware that some governmental entities (i) have sovereign immunity (for example, may not be sued without the consent of the legislature), (ii) by statute are required to resolve disputes through a formal dispute resolution process that is quite cumbersome and time consuming and (iii) may not contract beyond certain time periods (for example, the current two year legislative appropriation period).



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