
Texas Seeks Private Development Partners

by Laura E. Hannusch and James S. Lloyd

Effective September 1, 2011, the Texas Legislature enacted the Public and Private Facilities and Infrastructure Act (the Act) for the purpose of enabling private investment in public facilities and infrastructure. The Texas Facilities Commission (the Commission) recently adopted Public-Private Partnership Guidelines (the Guidelines) setting forth the application requirements for qualifying projects and the review criteria and processes by which applications will be evaluated. The Guidelines are intended to provide certainty to the process of proposing and negotiating public-private partnerships (PPPs), which in turn should result in additional development opportunities to private parties while better utilizing and developing the State of Texas' (the State) real estate assets and providing the State with non-tax revenue sources.

In the past, use of PPPs in Texas has been limited primarily to the development of research and teaching facilities at state universities and construction of professional sports stadiums, such as the new Dallas Cowboys stadium constructed in 2009. Passage of the Act presents a new approach by the State to optimize and monetize public real estate assets by tapping into the creativity and experience of the private sector. With the passage of the Act and the issuance of the Guidelines, companies, especially those with prior PPP experience, have a new opportunity to partner with the State either by responding to requests for submissions or by identifying better uses of public real estate assets and proposing their ideas directly to the Commission for consideration.

Qualifying Projects Under the Guidelines

To achieve its goals of encouraging redevelopment of underdeveloped and underutilized properties, sharing risk and expense, and participating in cash-flow performance through private investment, the Commission will not only solicit proposals and issue requests for proposals (RFPs) for specific projects, but also will allow submission of unsolicited bids for projects consistent with the Act and the Guidelines. Projects may be structured by any method, and the Guidelines specifically identify as possible transaction structures build-own-operate, build-operate-transfer, build-transfer-operate, buy-build-operate, operations and

maintenance, enhanced use leasing, lease-purchase and developer financing. While all proposals must meet the definition of a “qualifying project” to be considered by the Commission, a “qualifying project” is defined broadly under the Act and the Guidelines and includes, among others, facilities for mass transit, water supply or power generation, oil or gas pipelines, hospitals, schools, medical or nursing care facilities, or any similar facility available or to be made available to a governmental entity for public use. Private financing is encouraged, and proposals also may include in-kind consideration, so long as is not less than the fair market value of the real property interest.

Proposal Submission

The submission process for all proposals is largely identical and consists of two parts, a conceptual stage (Part 1) and a detailed stage (Part 2). The conceptual stage is intended to provide the Commission with specific information regarding the experience and capacity of the proposed development team, its financial qualifications, the quality and character of the qualifying project (including conceptual designs or plans, as appropriate), the proposed business structure, and the financial and implementation strategies for successful completion of the qualifying project. Project analysis (location and site analysis, marketing and competitive analysis, financial analysis and political and legal analysis) and community impact analysis also are required to be included. The conceptual stage proposal must include a preliminary review fee of \$5,000 payable to the State.

Procedure for Evaluation of Proposals

The evaluation process requires confirmation on multiple levels within the Commission and comment and consideration by other governmental entities. While the procedure for evaluating proposals may seem complex, the Guidelines provide a clear framework for the consideration and approval of proposals, and this clarity, which previously did not exist, should provide companies with certainty as to the requirements and process by which the State will consider proposals.

Upon receipt of a proposal, the Commission’s Planning and Asset Management Division (the PAMD) undertakes an initial thirty (30) day evaluation of the proposal and determines whether to recommend continuing the evaluation process. If the PAMD rejects the proposal during this preliminary review period, the review fee is returned. If the PAMD recommends that a conceptual evaluation of the proposal be undertaken, the Commission’s Executive Director then considers whether to confirm the recommendation and submit it to a vote by the Commissioners. If the Executive Director does not confirm the recommendation or if the Commissioners do not vote to continue with a conceptual evaluation of the proposal, the proposal will be terminated and the review fee returned. If the conceptual evaluation is approved, the process continues and the review fee becomes non-refundable. Additionally, if a proposal approved by the Commissioners is unsolicited, the Commission must then post a public notice of the qualifying project for forty-five (45) days to encourage other competing proposals.

If the conceptual evaluation proceeds, the Commission reviews the proposal based either on the Commission’s standard procurement procedures or standards set forth in the Guidelines, as determined by the Commission. The Guidelines also allow competing proposals to be considered at the same time, provided each of the competing proposals meets the requirements set forth in the Guidelines. Upon completing its evaluation, the Commission can terminate consideration of all proposals, proceed to a detailed evaluation (Part 2) of a single proposal, or proceed to a detailed evaluation (Part 2) of multiple proposals. If the Commission decides to proceed with a detailed evaluation, the project proponent then must provide additional information about the proposal as set forth in the Guidelines, including lifecycle cost analysis

and a detailed analysis of the financial feasibility of the qualifying project, as well as any specific information requested by the Commission.

If, following a detailed evaluation, the Commission accepts a proposal, it must post public notice of the proposal within ten (10) days of acceptance. At that point, the parties will commence negotiations of either an interim agreement or comprehensive agreement, depending on the nature of the qualifying project, what preliminary work must be completed before development or operation of the qualifying project, as well as the terms and scope of the proposal. The Guidelines set forth minimum terms and provisions for both interim and comprehensive agreements. The PAMD is responsible for negotiating any agreements with the private developer, with oversight by a committee consisting of PAMD members and independent attorneys, advisors and/or consultants. The timeline for finalizing an agreement is not specified in the Guidelines and will depend on the scope of the qualifying project, but the Commission may reject a proposal at any time prior to execution of an agreement. At this point in the process, the Commission also submits copies of the detailed proposal to the Partnership Advisory Commission for review and comment. At least thirty (30) days prior to executing any interim or comprehensive agreement, a public hearing must be held on the proposal.

A party submitting a proposal to the Commission also must work with local jurisdictions in which the qualifying project is located. The Guidelines require that any private entity requesting approval of a proposal must deliver a copy of the proposal to affected jurisdictions within three (3) business days after the Commission accepts the proposal, and the affected jurisdictions then have sixty (60) days to submit comments to the Commission regarding the project and whether it is compatible with any local government plan, local infrastructure development plan, capital improvements budget or other governmental spending plan.

Summary

The Act and Guidelines present a significant shift in perspective in Texas regarding participation of the private sector in the development of public real estate. While the submission requirements and evaluation process set forth in the Act and the Guidelines are extensive and detailed, the Act and Guidelines provide a uniform and consistent format and process to facilitate PPPs in a wide variety of contexts. Reduced revenue and budget shortfalls for the state and local governments, coupled with an increasing need to develop new education and medical facilities, technology and public infrastructure and governmental facilities, present tremendous development opportunities in Texas. Private parties are encouraged under the Guidelines to identify and propose innovative projects to better utilize and develop public real estate assets.

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