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Application of Governmental Law Requirements to Public-Private Partnership Projects

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Public-private partnership are often encouraged by statutes and policy-makers, but there is no hard and fast structure that such partnerships must take. Most such partnerships will involve local governmental entities, but state agencies engage in them as well. In the case of state agencies there is a statutory framework that will apply to many partnerships. *See* TEX. GOV'T CODE, §§ 2267.001, *et seq.* Partnerships where the public entity is a local government, however, are not covered by this framework unless the local governmental body specifically elects to operate under the terms of chapter 2267. TEX. GOV'T CODE, § 2267.001(5)(B).

While most partnerships will be at the local rather than the state level, there are some provisions of chapter 2267 that impose government-like responsibilities on the private entity contracting with a state agency. For example, employees of the governmental body and their relatives may not accept money, a financial benefit, or other consideration from the private partner. TEX. GOV'T CODE, §§ 2267.005.[1] The chapter also includes a revolving door provision and a prohibition on dual employment situations where a governmental employee would also work for the private entity. TEX. GOV'T CODE, §§ 2267.0051, 2267.0052.[2] While the chapter may subject the private entity to some additional restrictions, the statute expressly provides that it does not assign any of the sovereign powers of the government to the private party. TEX. GOV'T CODE, § 2267.057 (providing the private entity has the power already granted by law to that kind of governmental entity as well as the power to develop the project and to collect lease and user fees).

[1] Similar restrictions will apply in the case of public-private partnerships not covered by chapter 2267. *See e.g.,* TEX. PENAL CODE §§ 36.08-36.10 (prohibiting gifts to public servants).
[2] TEX. GOV'T CODE, § 176.001, et seq., imposes disclosure and abstention requirements when local governments contract with private entities.

While public-private partnerships may take various forms, especially at the local level, they will not operate to transfer the government's sovereignty to the private entity. They will, however, result in the imposition of constraints and responsibilities normally associated only with public entities. In particular, a private partner in a public-private partnership will be required to be more transparent.

Transparency

Private participants in a public-private partnership are likely to be required to be much more transparent than they wish to be or are used to being. Public entities are required to be relatively open in their dealings, especially in their financial dealings, and, in any type of joint enterprise involving both private and public participants, that requirement of public openness may extend to the participating private companies as well. This can be a major paradigm shift for a private company unused to intense public scrutiny.

I. Public records are open

The public participants in a public-private partnership will almost certainly be covered by the Texas Public Information Act, TEX. GOV'T CODE, §§ 552.001, *et seq.* Thus, records held by the participating governmental entity will be subject to public disclosure unless the specific information at issue falls within one of the exceptions to disclosure set out in the Act. For example, the contract between the public and private entities likely will be subject to public disclosure as well as any documents produced by the partnership or by the private entity that are in the files of the public body. As a result, financial and other records that a private entity would normally keep private may well be subject to disclosure when copies are directed to the public partner. As an example, in one of the early decisions under what was then known as the Texas Open Records Act, the Associated Press sought minutes from meetings of the Southwest Conference. There was

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