

# Spotlight on Public Finance

BRACEWELL

## Fall 2016 Newsletter

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## FEATURED ARTICLE

### LEVERAGING PRIVATE SECTOR KNOW-HOW FOR SUCCESSFUL PUBLIC PROJECTS

By Blakely Fernandez and Jane Macon

Governmental entities constantly struggle to address the competing demands of growing infrastructure needs, providing quality services and creating more economic growth opportunities, all while dealing with the reality of increased budget constraints. In the past decade, public-private partnerships (P-3s) have become a popular tool, at least in concept, to help governments balance these tensions.

P-3s have been touted as the answer for infrastructure and services that governments don't have the resources to address. But, any budget officer or other public official who has looked closely at the private sector solutions knows that you never get something for nothing. The private sector might be willing to carry risk the public sector doesn't want, or provide capital sooner than the public sector capacity allows, but these benefits come at a cost; and, sometimes, that cost is hard to measure. At the same time, there can be a real benefit for early delivery of a project the public wants to see complete, and creating synergies with private development can build economic momentum, encouraging growth and investment beyond an initial P-3.

How then, does a public entity know when a P-3 is good deal? The first and most important rule of thumb is that you can't measure what you don't understand. And if you can't measure it, you'll never really know if you have a good deal. This article will offer some simple ways that the public sector can leverage what the private sector knows to help better define projects, identify best practices, and develop value guidance and standards in connection with P-3 opportunities.

## ***Define Your Project - The Request for Information***

We recently met with a prospective public client, a small city, with a large tract of very desirable land that the city would like to see developed by the private sector. The meeting was about how to issue procurement under the P-3 guidelines of Chapter 2267, Texas Government Code.

We asked the city manager what he envisioned coming out of the procurement – what was the goal? He said he wanted to see development on that land that would generate new tax dollars for the city. Beyond that, he really wasn't sure what the highest and best use of the land was or what the market interest might look like for the site, and there was no money in the budget for consultants or a masterplan. The city manager knew two things: (1) the city wanted the site developed and (2) the city wasn't the right party to undertake the development. That's a good start; but, it's not enough to help the city make a meaningful analysis of qualifications or proposals from the private sector.

The opportunity for this city, with a clean slate for this project, was to take a step back and, prior to issuing a procurement, to ask the private sector for ideas regarding the best use for the land with a request for information. Anything is possible, within the constraints that might already be known – size of land, lack of available public resources, established entitlements, etc.

The results of a request for information might range from suggestions for a retirement community to a tourist destination to a mixed use urban-style development, or any number of other ideas, all helping to uncover the true potential of the site. From this step, the city can meet with the respondents and other potential private partners, as well as the local stakeholders, to determine what is right for the site and the community. Then, with a better defined project, a set of objectives, and the ability to outline measurements for success, the city will be better prepared to solicit for competing proposals.

## ***Understand Best Practices – The Industry Review***

Alternative delivery projects, procurement structures, value engineering, sequencing, concrete versus asphalt – all of these impact project costs and timelines. Teams of public employees assigned to a project debate the pros and cons of these elements of a project before settling on a pathway and moving forward, often with the budget folks and the public works folks agreeing to disagree.

When these questions are raised on the front end of a project, one opportunity the government can take advantage of is an industry workshop or comment period. We've worked with public entities to share project development structures in advance of procurement in order to hear from the industry about the benefits and consequences of the draft proposal. Similarly, we've shared draft procurements with industry associations to coordinate comments and suggestions in advance of publication. A robust conversation among competitors can be very enlightening!

In holding industry workshops or providing a comment period on draft documents, the governmental entity does not create any obligation to accept specific direction from the private sector. However, the opportunity to hear from the private sector can create a deeper understanding of the project and provide lessons and best practices from other communities and similar efforts. The better your team understands project, and the more decisions that are made deliberately and not by default, the better positioned you will be to define, manage and meet expectations, all of which will help you measure success.

## ***Weigh the Merits – Using Procurement to Create a Market***

A few weeks ago, a local school district elected to proceed with, but not to procure, a P-3 for equipment and services because, in their words, "it's money in, not money out." Their theory was that since the contract in question is revenue sharing, not a "purchase of goods or services," there is no requirement to procure and the district's interests were best served by expediting the process, entering into a contract, and getting closer to the point of revenue sharing.

Even if you can get comfortable in legally bypassing procurement requirements, by failing to create a market, a governmental entity will surely miss opportunities. Thinking of procurement only as a requirement is the wrong perspective. If it's true that you can't measure what you don't understand, how can you measure the success of a contract negotiation with no context as to what the rest of the market might offer?

Contracting for P-3s is all about the details. Sharing revenues sounds great, but how does the contract define revenues? Are there cost caps? What is the scope of services that falls under the cost caps? How are those services guaranteed? These are simple

questions that can be included in procurement so that proposals can be compared side-by-side. Even a proposal that is not selected as the best value is likely to offer insights that will help in the contract negotiations with the selected party.

### ***Creating a better project***

Working with the private sector can create very tangible benefits for governmental entities. It can also carry some very real risks. Public entities should feel comfortable when they enter this arena that there is real potential to create a good deal for the entity and its taxpayers. The best way to do that is to ensure that your team fully understands the project from the legal requirements and logistics, to the goals and expectations. Taking a little time on the front end to solicit ideas, seek out best practices and lessons learned, and create a competitive environment will ultimately not only create a better project and outcome, but will also provide the measurement tools you need to demonstrate the success of the project to your constituents.

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## **PRACTICE FOCUS**

### **ECONOMIC DEVELOPMENT AND PUBLIC PRIVATE PARTNERSHIPS**

Bracewell attorneys are experienced in all aspects of public and private offerings of securities by state and local governments, non-profits and for profit entities, and other public and quasi-public institutions. In addition to serving as bond counsel and underwriters counsel for hundreds of public finance issues, the firm also provides a cross-disciplinary team focusing on municipal finance, project finance, developer's counsel and special issuer's counsel. This experience, combined with our participation in the legislative and regulatory process affecting public finance and related matters in Austin and Washington, D.C., has led to us serving as general counsel and special counsel to many public and quasi-public entities throughout the State of Texas. We have developed a broad practice that involves all areas of public and private offerings of taxable and tax-exempt securities, including developments from federal legislation affecting "tax-advantaged finance." As a result of the depth of our public finance practice, the attorneys are well versed in the full bond issuance process, including economic development and public private partnerships (PPP).

Bracewell attorneys have experience with local and state tax incentives and economic development matters, having represented both public and private sector entities in this area. Our attorneys structure economic development programs to meet specific needs and in negotiating PPPs to achieve development objectives. When necessary we have drafted legislation and ordinances creating or amending state and local economic development programs.

We have facilitated the construction of a number of major public infrastructure projects. Our attorneys also assist clients in the formulation of strategies to produce tax and financing savings for projects. On major infrastructure projects such as convention centers, stadiums, arenas, social infrastructure, and entertainment venues, we also structure naming rights deals and sponsorship agreements. Bracewell attorneys frequently prepare development and lease contracts that include both public and private equity and debt financing.

Our clients include Major League Baseball and National Basketball Association teams, the world's largest rodeo, local governmental entities, private entertainment venue operators, hotel developers, and family offices and foundations. Bracewell has played a major role in the financing, development and leasing of a National Football League stadium, a Major League Baseball field, two NBA Basketball arenas, two live entertainment theatres, a 1,100 room convention hotel, and several mixed-use urban developments and urban parks.

### **Special Districts/ Development**

Our attorneys have been key participants in many of the major public finance developments in Texas. In many cases, we have been instrumental in writing and obtaining passage of necessary enabling legislation, particularly the provisions of the Texas Tax Code, Local Government Code, and special laws regulating the activities of special districts that provide infrastructure and related services.

Bracewell attorneys have a long history of working with various hotels and convention centers, both public and private, to encourage economic development in all regions of the state through the creation and utilization of special districts and tax increment reinvestment zones. Through this practice area, we have created innovative PPPs between local governments and the

private sector to facilitate the development or redevelopment of single and multi-family housing, malls, and mixed-use and transit-oriented developments.

## Legislative and Administrative Experience

Bracewell's public law team offers experience in State legislative and administrative matters related to public finance and PPP. We regularly work with the Office of Attorney General (OAG) on various transactions, and the OAG also consults with many of the firm's public finance attorneys on issues affecting the public and project finance community. One of our partners, Jonathan Frels, served as the Chief of the Public Finance Division at the OAG, where he oversaw the review and approval of all public securities issued by state and local government bodies in Texas. He was subsequently appointed Deputy Attorney General for Legal Counsel where he oversaw the OAG's Public Finance Division, Opinion Committee, Open Records Division and General Counsel Division.

If you are interested in learning more about our economic development and PPP practice, please contact Blakely Fernandez or Clark Lord.

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## ATTORNEYS IN ACTION

### Best Lawyers in America

For its 2017 rankings, *The Best Lawyers in America*, a Woodward/White, Inc. publication named Todd Greenwalt as Lawyer of the Year in Public Finance Law (Houston) and Elizabeth Rippey Bowes as Lawyer of the Year in Public Finance Law (Austin). The publication also recognized 10 other Bracewell attorneys in the area of public finance including Charlie Almond, Ben Brooks, Rob Collins, Jonathan Frels, Steve Gerdes, Jonathan Leatherberry, Paul Maco, Glenn Opel, Barron Wallace, and George Rodriguez.

### Dallas Regional Chamber LEAD YP

Bracewell Associate Abe Benavides, along with twenty-one other young professionals, will graduate from the Dallas Regional Chamber's fourth annual LEAD YP class. The Young Professionals (YP) program develops future leaders by offering a host of professional and leadership development opportunities for its members. LEAD YP provides a selected group of YP members with an additional platform to develop and grow professionally.

### National Society of Compliance Professionals

*October 18, 2016, Washington, DC*

Paul Maco participated on a panel titled "Overview of 2016 SEC/FINRA/MSRB Notices and Guidance" for the National Society of Compliance Professionals National Conference.

### National Association of Bond Lawyers

*October 19-21, Chicago, IL*

Partners Charlie Almond, Bill Avila and Victoria Ozimek each served as panelists on various topics at the Bond Attorneys' Workshop (BAW).

### Equal Pay SA

*October 22, San Antonio, TX*

Blakely Fernandez is participating in a panel discussion on the topic of policy issues in the public and private sectors.

### Texas Women in Public Finance

*January 19-20, San Antonio, TX*

Bracewell is a sponsor of the Texas Women in Public Finance and a group of our attorneys will be attending the 2017 Annual Statewide Conference.

### Association of Water Board Directors

*January 27, Austin, TX*

Bracewell partner Clark Lord will be attending the 2017 Association of Water Board Directors Mid-Winter Conference.

## The Bond Buyer's Texas Public Finance Conference

February 8-10, Austin, TX

Bracewell is a sponsor of the 2017 conference and many of our attorneys will be attending The Bond Buyer's Texas Public Finance Conference.

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## EVENTS

### Breakfast with Bracewell: After MCDC and The Miami Verdict - What Bond Issuers Need to Know

#### Friday, October 28

8:00 am- 9:30 am

Breakfast will be provided.

#### Bracewell LLP

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On August 24, 2016, the SEC announced that it had entered into settlement orders with 71 municipal issuers and other obligated persons for violations of federal securities laws in municipal bond offerings. On September 14, 2016, a jury in a federal trial returned a verdict finding the City of Miami and a former official had violated federal securities laws on multiple counts. The City is considering acceptance of a \$1 million fine. With orders against at least one issuer in each of 45 states, the SEC is sending the message that noncompliance with continuing disclosure obligations has been widespread throughout the industry and that disclosure fraud will be dealt with seriously.

During this discussion, Paul Maco, Barron Wallace and Glenn Opel will provide insight into what the SEC considers to be a material false or misleading statement in an offering document and how governmental entities can prepare themselves.

To register, contact Alisa Tristan at [alisa.tristan@bracewelllaw.com](mailto:alisa.tristan@bracewelllaw.com) or 713.223.1279.

*1.0 hour of CPE credit pending.*

*1.0 hour of MCLE participatory credit pending.*

# ATTORNEY SPOTLIGHT



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## **What are your specialties within public finance?**

I think of myself as a “recovering bond lawyer.” While I started out working in traditional public finance, over the years my practice has evolved to focus on economic development, project development and public private partnerships. It’s really more of a public law practice that focuses on that sweet spot where business and government intersect. I do a lot of procurement work, incentive packages, development agreements, and the like. I also do quite a bit of straight corporate work. What I like best, is to come in to a project early as part of the brainstorming team that then creates and executes the plan to get it done.

## **What do you like best about your practice?**

I love that my practice takes me all over the state. It’s a lot of mileage, but I really do enjoy getting to spend time in the parts of Texas that are experiencing unprecedented growth and momentum; and, it might not be where you think. (Have you been to El Paso lately?!) Whether I am representing government entities or the private sector, I get to work with incredible innovators that are working hard to build their communities.

## **What is your favorite thing about San Antonio?**

The greatest thing about San Antonio at this moment in time is that it is a City of “yes”. If you can dream it, you can make it happen here.

## **What would people be most surprised to learn about you?**

I was elected and served as a trustee for our community college district. I am passionate about education and truly believe community college is the cornerstone of our local economies. While I decided not to run for second term because the time commitment was too difficult to balance with work and my family, I stay very involved with the Alamo Colleges Foundation. And, maybe I’ll run again after I retire!

## DID YOU KNOW?

- Bracewell has a new leader at the helm with Greg Bopp as the firm's newly elected Managing Partner. Bopp succeeded Mark Evans, who will become co-chairman of the firm, along with Patrick C. Oxford. Bopp has held a number of leadership positions at Bracewell including co-chair of the firm's business and regulatory section and the firm's management committee. He has spent his entire legal career at Bracewell, joining the firm in 1995 and becoming a partner in 2001.
  - The Office of the Governor hosts the "official website of Texas economic development" at [www.TexasWideOpenForBusiness.com](http://www.TexasWideOpenForBusiness.com).
  - In 2014, the largest recorded pumpkin in the world weighed in at 2,323-pounds. Now THAT's a great pumpkin, Charlie Brown!
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*Bracewell LLP is a leading law and government relations firm serving the oil and gas, power, financial services, technology and public finance industries throughout the world. Our industry focus enables us to maintain cutting-edge experience and in-depth knowledge of the commercial, legal and regulatory challenges faced by our clients so that we can provide the most effective legal solutions to facilitate transactions and resolve disputes.*