
ANATOMY OF A PUBLIC-PRIVATE PARTNERSHIP

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This article explores the anatomy of a public-private partnership in the context of major real estate projects entered into by a governmental body with a real estate developer or owner. The author has been involved in a number of public/private partnerships involving arenas and stadiums. Those facilities, among others, will serve as examples of how public/private partnerships are put together.

WHAT IS A PUBLIC-PRIVATE PARTNERSHIP?

A public-private “partnership” can be defined as a governmental service or private business venture which is funded or carried out through a “partnership” of a governmental body or bodies and one or more private sector companies. These public-private partnerships are referred to in shorthand as “PPP, P3 or P³.” For purposes of this article we will use the term “P3.”

Why is “partnership” in quotes above? The concept of partnership is really a non sequitur, since the typical agreement which documents a P3 includes specific dis-

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claimers that it is not a partnership or a joint venture. The following is a typical disclaimer section found in a P3 agreement often referred to as a “Development Agreement” or “Disposition and Development Agreement” (usually abbreviated as “DA” or “DDA”).

No Partnership. Neither anything contained in this Agreement nor any acts of the Parties shall be deemed or construed by the Parties, or any of them, or by any third party, to create the relationship of principal and agent, or of partnership, or of joint venture or of any association between any of the Parties to this Agreement.

Normally the private sector party is referred to as an independent contractor and cannot act as an agent for the governmental body, without an express designation in writing. Rarely is such a designation given.

GOVERNMENTAL BODY PRESERVES ITS POLICY POWER AND REGULATORY AUTHORITY

Governmental bodies generally cannot contract away their police or regulatory powers. At the same time, the developer or owner can often secure a contractual commitment that the governmental body will not, through its officials and employees, seek to influence the governmental regulatory bodies to deny to the private sector the benefits of the governmental bodies’ covenants and obligations under the Development Agreement. Similarly, the governmental body will not limit its discretionary or regulatory action with respect to project improvements, including rezoning, variance, environmental clearances, code compliance and the like.

At the same time you can generally secure a covenant from the governmental body that it will work in good faith to facilitate the cooperation of and coordination among the various governmental regulatory bodies. As was done for the Rose Garden Project (to be discussed later), the City of Portland held weekly coordination meetings among the City Bureaus having jurisdiction over the project. This allowed for conflicting issues or requirements between different City Bureaus to be discovered early and resolved on a more timely basis. Negotiating early the need for coordination meetings will be beneficial to a P3 in any municipality.

HOW ARE P3’S FORMED?

In the arena and stadium projects on which the author has worked, the P3 is generally initiated by the private sector party but often a municipality will start the process by the use of an RFQ (Request for Qualifications) or a RFP (Request for Proposals), as the City of Portland has done for the Convention Center Hotel project.

Once the project has been identified, normally there is a public process to secure input from interested parties, often times referred to as “Stake Holders.” In the case of the development of the Rose Garden, the Portland City Council and the Metro

Council appointed influential public, civic and business leaders to the Arena Task Force (“ATF”). The ATF then held a series of public hearings and workshops to receive public input which culminated in a 19-page Memorandum of Understanding between the City and Oregon Arena Corporation which acted as developer and was directly or indirectly owned by Paul Allen, owner of the Portland Trailblazers.

With the development of the Seahawk’s Stadium, now CenturyLink Field, the process started with Paul Allen agreeing to purchase the Seahawks NFL franchise if the public would provide financing for a football stadium to be built on the location of the former Kingdome. This financing was accomplished by legislation passed by the Washington State Legislature. The legislation was then put to a vote of the people. This special referendum cost \$4.5 million and was paid for by Paul Allen. The state-wide referendum passed with 51 percent in favor and 49 percent opposed. The legislation provided \$300 million in public financing and created the State Public Stadium Authority.

NEGOTIATING THE DEVELOPMENT AGREEMENT

Who takes the lead in negotiating on the public side is important. However, just as important is knowing who is calling the shots behind the scenes. In the case of the Rose Garden, the Portland Development Commission (“PDC”) was designated as the party to negotiate on behalf of the City. PDC used two project managers, an outside consultant, outside lawyer, and PDC’s general counsel as the primary negotiators on behalf of the City. Behind the scenes, it became evident that there was an “Executive Cabinet” comprised of various City and PDC department heads and the City’s City Attorney; the Mayor was also a party. All important issues had to be taken back to the Executive Cabinet which slowed down negotiations. The negotiations for the Rose Garden started in the Spring of 1991, and closing occurred on June 24, 1993; although the last six months were devoted to negotiating the financing documents for the private improvements (see Financing section below). Ultimately, approval came from the City Council.

In the Seahawk’s Stadium situation, the known “Executive Cabinet” was the State Public Stadium Authority which met regularly to vet and approve issues as they arose during the negotiation. The Stadium Authority hired an Executive Director who had lead negotiating authority and was accompanied by staff help and outside counsel. The negotiation process for the Seahawks Stadium was quicker. It was about one-year from start to finish, but a year had been spent before then as the needed legislation was being drafted and debated in the State of Washington Legislature. So a two year period in negotiating and drafting the myriad of documents which make up a significant P3 is probably more typical than not. Recent negotiations on the proposed redevelopment of the Veterans Memorial Coliseum were at nearly 18 months when the project was put on hold. The negotiations for the expansion of Portland’s Civic Stadium into JELD-WEN Field took approximately a year.

On the private side, both Oregon Arena Corporation and First & Goal Inc. are entities directly or indirectly owned by Paul Allen. Many of the same negotiators for Allen's companies were involved in both transactions. The author was one of the lead negotiators as outside counsel. The project manager for both projects for the Allen companies was the same which allowed for relatively quick resolution of issues as they arose. The dynamics of decision making on the public side versus the private side are thus much different. It is not unusual to sit in a conference room with your private side client while the public side is off in another conference room debating among themselves on how to resolve a particular issue. There can be a number of competing interests within the public side which will frustrate the private side. Patience is a virtue and the private side must remember that the public side will move more slowly.

Generally, every document being negotiated needs a lead author and one which controls the changes being made. These documents will go through multiple drafts. It is important to set up protocols as to the format of the documents and establishing a clear set of definitions which can be used in all the related documents. Generally, the definitions are set forth in the Development Agreement, although each related document may have its own set of definitions unique to that document. It is also important to set consistent times for negotiation sessions and require everyone to clear their calendars. While it is often the case that comments from the lawyers are directed only to the lawyers on the other side, in the case of P3s it is more typical to include principals on both sides, since it creates a better flow of information. This should be agreed to as one of the up-front protocols. The negotiations of P3s often involve principals at the negotiating table in order to resolve business issues directly and quickly. The problem arises, as noted above, when the true decision makers are not at the negotiating table.

COMPETING GOALS AND OBJECTIVES

There is always some tension between the goals and objectives of the governmental agency and the goals and objectives of the private side. Some of these tensions were highlighted during the public hearing process leading to the Memorandum of Understanding in the case of the Rose Garden and in the hearings on the legislation for the Seahawks Stadium.

These stadium/arena projects or large development projects such as the Convention Center Hotel generate a number of governmental goals and objectives. A few examples are as follows:

- Reduce government's financial contribution.
- Provide a long-term source of revenue to the government through rent or user fees.
- Provide construction opportunities at prevailing wages.

- Provide workforce equity programs, including workforce training (apprenticeships), goals for participation by women and people of color, minority-owned, woman-owned, and emerging small businesses.
- Green requirements, including reduction in energy, water and green-house gases and the development of eco-districts.
- Provide for affordable housing.
- Provide for additional development opportunities through development options.

The private side has its own goals and objectives including the following contributions and assistance from the public side:

- Contribution of land or assistance in land assemblage (including the use of eminent domain).
- Low-cost loans or grants, including use of tax increment funds.
- Property tax freezes.
- Freedom to construct both the public and private portion of the project through an exemption from the normal public building process.
- Protection against environmental liability for publicly owned property transferred to the project.
- Assistance in coordinating necessary governmental approvals.

Many of the public and private goals and objectives may be compatible but many will conflict. The cost of negotiating a resolution of conflicting goals and objectives will be expensive. Legal and consulting fees just for negotiating the documents can run into the high six figures and can run into the millions of dollars.

TIME IS MONEY

Since time is also money, budgeting sufficient lead time is critical. The Rose Garden took over two years to negotiate; the Seahawks Stadium a little over a year but only after the legislation was passed, so that lead time was also two years. The Convention Center Hotel project is on its third attempt in the last 20 years. From inception to completion of these types of projects, a five year window is probably as short a time frame as you can expect with half the time taken up with negotiation, planning, financing and the other half taken up in permitting and actual construction.

FINANCING

Financing of P3 projects are generally complex and require multiple sources of funds. While the Rose Garden project seemed relatively straight forward, the required funds and property were complex. First, the City agreed to ground lease its land to Oregon Arena Corporation for only \$1 per year, on a long-term ground lease; initially 30 years with three, ten year extensions. The City contributed \$34.5 million for infrastructure improvements, including roads, utilities, environmental remedia-

tion and the construction of two parking garages. The City was paid back with a 6 percent user fee on each ticket sold for events within the Rose Quarter. It not only paid off the City's infrastructure bonds but has provided funds for the City's Public Spectator Fund used to expand Civic Stadium into JELD-WEN Field. That 6 percent user fee continues during the initial 30 years and will continue during each ten year extension unless the City elects to require the payment of market rent for the City's ground leased property. It is expected that the 6 percent user fee will generate significantly more rent for the City.

The financing of the private side improvements was done through privately placed mortgage term notes of \$155 million. Paul Allen contributed another \$46 million of equity into the private improvements. There was also secondary financing of \$16 million from the concessionaire for the Rose Garden and \$10.5 million of earned interest from the unexpended proceeds of the privately placed notes. Accordingly, with the City's \$34.5 million, a total of \$262 million was available for the Rose Garden Project. The cost of an arena today would be two to three times that amount. The recently opened Barclays Center in Brooklyn, New York cost close to \$1 billion but the proposed new arena in Seattle is estimated to cost \$490 million.

The Seahawk's Stadium was budgeted to cost \$460 million. Since the Washington State Legislature only authorized \$300 million, the short fall of \$160 million was left to be funded by the private side, First & Goal, Inc. Additionally, as is typical in P3s, the private side was responsible for any cost overruns. Often, the public side will agree to be responsible for cost overruns but only for change orders to the project requested by the public side. The public side may agree to be responsible for environmental remediation costs for any real property it contributes to the project but will seek to cap that liability. The public side is very risk adverse and the private side needs to take that risk adverseness into account when negotiating the P3. The public side tends to signal throughout the negotiations that it only has as a limited amount of funds available, no other funds are available and the general fund of the municipality cannot be put at risk.

MANY SUCCESSES

There have been many successes in the City of Portland and elsewhere using P3s. The Rose Garden, the Pearl District, South Waterfront, the expansion of Civic Stadium, now JELD-WEN Field, and possibly the Convention Center Hotel. In Portland, some of the P3s were initiated by PDC using tax increment funds which are now expiring. The Rose Garden was constructed without the use of tax increment funds so it is possible to finance P3s without that source of funds. The Convention Center Hotel is now working on a financing plan which seeks to reduce the amount of public dollars involved.

P3s are flexible arrangements between the public and private sides. Each P3 will be negotiated and financed based upon the unique circumstances of the project and

the willingness of the public and private side to take on liability and risk. Being involved in a successful P3 is the goal of both sides. When that happens, as it has on many occasions in the City of Portland and elsewhere, many of the public goals and objectives discussed above are achieved and the private side is able to create a project that would not have taken place but for the assistance and contributions of the public side. ■