



## **MEMORANDUM**

### *Law Department*

**TO:** Mayor Lee Leffingwell and City Council

**CC:** Marc A. Ott, City Manager

**FROM:** Leela Fireside, Assistant City Attorney

**DATE:** December 9, 2013

**SUBJECT:** Public Private Partnership Legislation

City Council Resolution No. 20130822-085 directed the City Manager to:

1. review and analyze recently enacted State laws relating to Public-Private Partnership proposals and provide a publicly-accessible memorandum analyzing the impact of the new state legislation; and
2. identify any needed changes in City policies and procedures relating to the proposals including routine requests for a "development plan" from the State, reviewing proposals to meet new state law deadlines for cities reviewing zoning and land use compliance of proposed projects, and to report back to Council in 90 days.

This memorandum responds to that resolution. This memorandum is divided into three parts. The first part discusses what the City can do to enter into public private partnerships without changing our processes. The second part discusses what the impact on the City processes would be if the City chooses to invoke the process set out in the new State statutes. The third part discusses the impact on the City when other government entities, such as the State, use the new State processes for public private partnerships that would occur within the City limits.

## **What Austin Can Do Without Invoking the State Public Private Partnership Statute:**

To give this review some context, before the State adopted the Chapter 2267 of the Texas Government Code that applies to public private partnerships (the P3 Statute), Austin, like other cities, has legal authority and the ability to enter into public private partnerships. Existing law gives the City the right to enter into public-private partnerships as long as they are negotiated and executed in a manner consistent with applicable law including the requirement that the partnership have a municipal public purpose.

The applicable law includes: the State Constitution, state law regarding procurement for public works, various State laws regarding economic development, the city charter and city code, and council resolutions.

Examples of public-private partnerships that Austin has done under this existing law include the Triangle, Gables, Long Center, Mueller, and Zach Scott Theatre, Seaholm, and Green Water Treatment Plant, as well as many contracts with Austin Energy, Austin Water Utility, and the City's Airport.

### **P 3 Statute – What is the Framework if Austin Adopted the Process?**

Texas adopted the P3 Statute in 2011. The P3 Statute authorizes, but does not require, local governments to adopt a formalized process contained in that statute to review proposed public private partnerships. If Austin adopts the process, we would be required to use it for all qualifying projects.

- The process starts with Austin adopting a resolution invoking the statute's requirements.
- After adopting a resolution, the City would adopt Guidelines for review of projects (the requirements for these Guidelines are set out in the statute), and use the process for "qualifying projects."
- The definition of qualifying projects is broad and would include many routine contracts that the City enters into regularly (for example, mass transit, vehicle parking, public work, waste treatment facility, recreational facility, public building, or other similar facility).
- For projects that would cost more than \$5 million, the City would be required to engage outside experts to review the proposals.
- The City would be required to make a best value determination in evaluating the proposals received and consider the total project cost as one factor in evaluating proposals. There are 13 factors in the P3 Statute that *may* be used to evaluate a proposal.
- Additionally, there are required hearings, required posting of proposal provisions, and requirements that must be in the agreements between the contracting person and the responsible government entity – these requirements are all contained in the P3 Statute.

- The 2013 legislation regarding public private partnerships did not substantially impact the requirements for the City if the City invokes the P3 process set out in the P3 Statute.

## **2013 P3-related Legislation – What is the Impact on State Projects in the City Limits?**

The state legislature passed numerous laws during the 2013 legislative session related to public private partnerships. Many of the requirements apply to state facilities and agencies only. Some apply to public colleges. The requirements that impact Austin largely relate to the process that state entities must follow when proposing projects within the City limits.

### **SB 211:**

This bill was the sunset bill for the Texas Facilities Commission, but it also amended the P3 Statute. Many of the amendments specifically add requirements to projects that are proposed by the State. These changes have a positive impact on Austin because they improve citizen and local government input into proposed projects.

**Hearings, Notice, and Development Plan Requirements for Proposed Projects on State Land:** The revisions to the P3 Statute codify the requirement that projects have a stated public purpose. There are also requirements for public hearings, and opportunities for public comment. If a city requests it, a state agency that wants to develop and operate a P3 project in the city limits of Austin must prepare a “development plan” to conserve and enhance the value of the real property, taking into consideration the preservation of the health, safety, and general welfare of the community in which the property is located.

**Land Use Laws:** The P3 Statute now requires a project proposed by the State – including those proposed by the Texas Facilities Commission - to address local land use planning ordinances, and comply with existing rules, regulations, orders, or ordinances “to the extent ... not detrimental to the interests of the state....” In the event of disagreement between the local government and the state, a board of review would be convened consisting of the land commissioner, the mayor, the county judge, the executive director of the state entity proposing the project, and a member appointed by the governor.

**Projects in the Capitol Complex:** The Texas Facilities Commission is now required to conduct Master Planning for projects in the Capitol Complex. The Texas Facilities Commission may develop or operate qualifying projects in the Capitol Complex, but only if the legislature specifically authorizes the project by general law, and there is specific authorization for the project as set out in

2268.058 of the Government Code (establishing the Partnership Advisory Commission – the entity with review authority over State P3 projects).

**SB 1871: Projects on property between Bull Creek Road and Shoal Creek:**

This statute allows the State Cemetery Committee to vacate the cemetery designation on land between Bull Creek Road and Shoal Creek. The Committee must make affirmative findings before it can release this land. These findings include that concerns expressed by residents in the nearby neighborhoods have been considered and efforts made to address those concerns. This bill potentially opens this land for development.

**Impact of Legislation on City Processes:** At this time, the City has not identified any processes that would need to be changed to enable the City to review proposals that come from the State. The City can make requests to the State agencies located within the City and request development plans for any properties on which the State agencies intend to develop or operate a “qualifying project.” The Manager has previously assembled a team to address a P3 proposal that came to the City, and could do this again if and when the City receives more of these proposals. The public hearings and notices for proposals on State properties will help provide an avenue for City and community input regarding any proposals that emanate from the State.

**Conclusion:**

The P3 Statute provides another option for the City to use to evaluate public private partnership opportunities if the City chooses to invoke its process. The process could potentially impact many projects within the City by adding requirements such as compliance with the Guidelines and a need to hire outside consultants to evaluate projects that currently are evaluated by staff within the City.

The revisions to the P3 process that the State must use for public private partnerships within the City limits are beneficial to the City because the State must conduct public hearings, consider zoning and land use planning, and there is an opportunity for a review by a panel that includes the mayor.