Status of Public Private Partnerships in Texas
By Nathan V. Graham

In recent years, the state of Texas jumped headlong into public-private partnerships in a variety of different arenas. Often called PPP, 3P or P3, this delivery method has rapidly become the go-to avenue for delivering projects that a governmental authority does not have either the funding or expertise to complete on its own. In Texas, the first public-private partnership projects to gain widespread notoriety were in the transportation infrastructure space. Specifically, the first big projects were concession agreements with private companies to finance, design, build, operate and maintain public roads, such as the LBJ Express and North Tarrant Express projects. These projects were not without controversy, but have largely been successful. Through the construction phase, the concessionaires and their design-build contractors have successfully delivered massive projects ahead of schedule and within budget.

The Texas Department of Transportation accomplishes these projects through Comprehensive Development Agreements that regulate everything from financing, revenue sharing, construction standards and preliminary plans detailing the scope of the project. As of the date of this post, the Texas Department of Transportation is a party to 16 Comprehensive Development Agreements. Of those 16, four are concession agreements that contemplate private management of state roadways and some form of toll revenue sharing.

Once the path was paved (pun intended) by large scale infrastructure projects, the availability and use of public-private partnerships as a delivery method exploded. For example: the Texas Rangers baseball team is part of a partnership with the City of Arlington to build a new stadium; Texas A&M University and Servitas are constructing a $368 million, 50-acre student housing project; and several local school districts are using P3 to raise funds for new facilities in exchange for naming rights.

The proliferation and increasing popularity of public-private partnerships has necessitated legislation across the country to govern their use, implementation and particularly procurement. At this point, many states have public-private partnership legislation of some kind, although the breadth of the legislation varies widely. In Texas, there are specific P3 enabling statutes that deal with highway and toll road projects (see Texas Transportation Code Chapters 222-23, 228, 362, and 370-71), and a more general enabling statute (see Texas Government Code Chapters 2267 and 2268) for most other types of government projects. In some cases, there have been statutes enacted authorizing specific projects, such as a biotechnology park (see Texas Government Code § 488.006). These statutes provide the legal and regulatory framework that govern the public-private partnership procurement and administration process and must be carefully considered when contemplating a new project, whether you are on the government side or the private side of the deal. If you are on the private side, but are not the developer, then one must examine the statutory and contractual framework to determine whether you have lien rights, surety bond requirements (“little Miller Act”), and other rights or obligations that are often considered “routine” on public projects.