

***Public Private  
Partnerships --  
“Strategies &  
Models for Capital  
Project Financing”***

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## Overview

- Current Market Activity
- Primary Reasons for Utilizing PPPs
- What can be shifted to PPP Structure?
- Procurement Processes
- Essential Elements in a Successful PPP
- Types of PPP Structures
- Repayment Structures
- PPP Risk Allocation
- Team Members
- Project Issues to Address

## *Current Market Activity*

### ■ Greenfield Infrastructure Development

- Transportation
  - Ports
  - Toll Roads
  - Subways
- Schools
- Hospitals
- Energy Sector (Electricity and Oil/Gas)

### ■ Active Regions

- USA
- Canada
- Mexico
- Central America
- Caribbean

- Primary Reasons for Utilizing PPPs
  - Accelerating the implementation of high priority projects
  - Accessing new technology from the private sector
  - Accessing the financial resources of private sector
    - Fast tracking financing
    - Less cumbersome
  - Benefiting from private sector management of projects (helps agencies reallocate resources internally)
  - Leveraging scarce public resources
    - Personnel
    - Monetary resources

Private sector has incentive to **maximize** Performance (Returns)

- Aspects of Project which Private Sector can undertake
  - Design
  - Financing
  - Construction
  - Operation
  - Maintenance
  - Management
  - Revenue/Toll Collection

- Traditional Process
  - Low Bid Tender (Low Cost Contractor)
  
  - SHORTFALLS
    - No focus on life-cycle costs
    - No incentive for private sector to incorporate new technology
    - “Low Ball” bids to eliminate competition and then **Change Orders** to restore profitability
    - No concern for maintenance costs
  
- PPP Procurement Process
  - Quality Based Awards
  - Life-Cycle Costs Awards
  - Service Benchmarked Awards

- Clear Project Definition
- Competitive Private Sector Market
- Value for Public
- Proper Risk Allocation
- Transparent Procurement Process
- Well Structured Project Agreements
- Proper Contract Administration and Oversight

- Clear Project Definition (most important element)
  - Project Goals must be clearly defined
  - Performance parameters must be objective and “realistic”
  - Project parameters must be flexible to ensure innovation by private sector participants
  - Think “**Outside the Box**”
  
- Competitive Private Sector Market
  - Private sector participation must be robust (ensures competitive pricing)
  - Encourage as many bidders as possible (look to traditional local players and international market)
    - Cast a WIDE net
  
- Value for Public
  - General public must see benefit of project
  - Public perception is critical
  - Maintain public well informed and clearly articulate benefits in costs savings and resource allocation
  
- Proper Risk Allocation
  - Project Finance Principles must be adhered to
  - Each risk must be assigned to the party **best able to manage risk**

- **Transparent Procurement Process**
  - Given high costs of bid preparation, private sector participants must view selection process as fair and objective (no black box selection process)
  - Define objective selection criteria **upfront**
  
- **Well Structured Project Agreements**
  - Clearly define deliverables, time tables, performance standards and incentives/penalties
  - “Project Finance 101”
  
- **Proper Contract Administration and Oversight**
  - A well designed project may turn out poorly if not properly administered
  - Important to keep all participants **accountable**

- Types of PPP Structures (partial list)
  - Maintenance and Operation Fee Service Contracts
  - Program Management Fee Service Contracts
  - Design-Build (DB)
  - Build-Operate-Transfer (BOT)
  - Design-Build-Operate-Maintain (DBOM)
  - Design-Build-Finance-Operate-Transfer (DBAFT)
  - Build-Own-Operate (BOO)

- Real Toll Structure
  - Private Sector Participant “Designs-Builds-Operates” and **collects tolls/fees from users**
  
- Shadow Toll Structure
  - Ex. Private Sector Participant “Designs-Builds-Operates” a “toll-free” roadway and **collects a fee from public agency based on service quality, usage and/or availability**

## *PPP Risk Allocation*

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### Risk Type

### Allocation

### Mitigation

1. Technology

Private

Warranties

2. Market Revenues

Private/Public

Reserves

Toll Adjustment

Non-compete protections

3. Completion Risk

Private (Contractor)

Liquidated Damages

Fixed Cost/Turnkey Contract

4. O&M Costs

Private (O&M Provider)

Fixed Pricing

Performance Guarantees

Warranties

Incentives/Penalties

5. Political Risk

Public

Public Agency Involvement

### ■ Project Team

#### ■ Consortium Members

- Look for Synergies (Local / Industrial Partners)
- Need to have a well defined joint venture agreement
  - Consider competing tax interests within group
    - » Foreign vs. domestic (tiering issues for tax treatment)
  - Voting
    - » Majority Issues / Veto Rights / Unanimous Issues
    - » Buy Down / Buy Out Provisions
  - Capital Calls
    - » Dilution of Interests
    - » Shareholder Loans
  - Dispute Resolution
  - Assignments to Third Parties
    - » Right of First Offer (Partners presented deal 1st)
    - » Right of First Refusal (Partners have right to match offer)
    - » Due diligence costs for 3<sup>rd</sup> Parties is a consideration

- Project Team

- Legal Advisors

- Past Deal experience is **CRUCIAL** for success
    - Need to know the process already rather than “learn as you go”
    - Experience fast tracks development and financing timelines
    - Local counsel selection is KEY

- Market Volatility
  - Close Deal and Financing QUICKLY
  
- Increasing Environmental Concerns relating to Infrastructure Projects
  - Consider Funding Sources
  - Controlling Public Relations is KEY
  - Evolving Environmental Consciousness
    - Keep future requirements in mind

- Force Majeure
  - Crucial to Specifically List Covered Events (“Don’t rely on general concept”)
    - All Project Documents need to “dove tail” each other
  
- Site
  - Indigenous rights
  - Archeology
  - Environment Impact Study
  
- Economic Conditions
  - Changed Economic Conditions (Unexpected / Drastic)
  - Price Reopeners
    - Consider Deadbands
  - Inflation Considerations



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**Dino T. Barajas** is a partner in the Corporate Practice Group of Morgan, Lewis & Bockius LLP. Resident in the Firm's New York and Los Angeles offices, Mr. Barajas has extensive experience representing lenders, investors and developers in a wide range of domestic and international project financings in the energy, power, infrastructure and commercial sectors, as well as traditional banking, structured finance, mergers and acquisitions, asset finance and joint ventures. His clients include commercial lenders, institutional investors, investment funds, project sponsors and public and private companies. Mr. Barajas has represented clients and worked on transactions throughout the United States of America, Latin America, the Caribbean, Asia and the Middle East.

Mr. Barajas was recognized by *California Lawyer Magazine* as "**Attorney of the Year (Energy)**" in 2004 and was also recognized in *Hispanic Business Magazine's* "**100 Most Influential Hispanics (2008)**". Transactions for which Mr. Barajas was lead counsel have been recognized by: *Project Finance Magazine* as "**Latin American Renewable Energy Deal of the Year 2007**", "**Latin American Deal of the Year (Power) 2004**" and "**Latin American Deal of the Year (Power) 2002**"; *Latin Finance Magazine* as "**Latin American Energy/Power Deal of the Year 2007**"; and *The Bank Magazine* and *The Financial Times Group* as "**Deal of the Year (Costa Rica) 2007**".

He was recognized by *Chambers & Partners USA* as a "**Leader in the Field of Project Finance**" in 2006, 2007, 2008 and 2009, *Chambers & Partners Global* as a "**Leader in the Fields of Banking and Finance and Mergers & Acquisitions**" in 2009 and *Chambers & Partners Latin America* as a "**Leader in the Field of Mergers & Acquisitions**" in 2009 and 2010 and as a "**Leader in the Fields of Banking and Finance**" and "**Leader in the Field of Project Finance**" in 2010. Mr. Barajas was also recognized in The International Who's Who of Project Finance Lawyers, 2005, 2007 and 2009 for his accomplishments.

He received his J.D. from Harvard Law School and his BA in Communication Studies and the Business Emphasis Program from UCLA. Mr. Barajas is fluent in Spanish.