LANDING THE LARGE ECONOMIC DEVELOPMENT PROJECT - EXPERIENCES FROM THE TOYOTA/SAN ANTONIO SITE SELECTION PROJECT



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Introduction

The purpose of this paper is to share some of the insight we gained in representing the City of San Antonio in the recent Toyota site selection project that resulted in San Antonio being chosen by Toyota as the site for their new light-truck assembly plant. The lessons we learned in that project are relevant primarily (and perhaps even exclusively) to very large economic development projects (such as motor vehicle assembly plants). They are far less relevant to smaller economic development projects. This paper will focus on a few "pointers" that will give guidance on how to effectively represent a city (or other governmental entity for that matter) in a large site selection project where the city has made the "short list" for the site selection.

Background

In September of 2002, our law firm, Cox Smith Matthews Incorporated (formerly Cox & Smith Incorporated) was approached by the City of San Antonio to represent the City in the possible location of a Toyota motor vehicle manufacturing plant in the San Antonio area. Our role in the project was to be twofold. First, we were to lead the legal team in negotiating the Project Agreement for the project on behalf of the City, and second we were to lead efforts relating to the real estate involved in the project (e.g., acquisition, financing, lease terminations, due diligence, land-use issues, etc.).

Lesson Number 1 -- Thoughtfully Formulate an Effective Approach to Negotiations

Our primary role in the Toyota project was the negotiation of the Project Agreement on behalf of the City. In light of the importance of the Toyota project to the City and the community, the first thing we did was to make sure that we were well prepared for negotiations with Toyota. Although it may seem obvious, this is perhaps the single most important lesson from our experience on this project. We learned that historically when a participant makes the "short list" for a major site selection for the first time, the legal team frequently makes critical mistakes in the course of the selection process, which often results in the participant being eliminated from consideration. We have spoken with numerous individuals representing manufacturers in the site selection industry, and they all have stories about ill-prepared legal teams being responsible for important economic development projects being lost by communities.[1] The Toyota project was the City of San Antonio's first time on the "short list" for

[1] One individual who represented a motor vehicle manufacturer in a site selection project told us about a "post mortem" that a state had asked him to do after that state was eliminated from consideration and a site in another state was selected. He explained to them that the single largest factor in eliminating the state from consideration was the negotiating approach employed by the lead lawyer on the state's legal team for the project (who was with the state's AG's office). The lawyer was devastated upon hearing this, being nearly brought to tears in the meeting over this revelation . After all, he was just doing his job the same way he had always done it successfully in the past -- by zealously and aggressively advocating his client's position. That approach, which is the same approach typically employed by the vast majority attorneys negotiating deals, cost that state a billion dollar plus project.

a project of this magnitude in recent memory, and we were determined to find a way to avoid this costly learning curve. We decided that the best approach was to engage a consultant with extensive experience representing *manufacturers* in major site selection projects. We believed that this would give us the appropriate perspective for formulating a successful negotiation strategy. We retained such a consultant to formulate an appropriate approach.

Lesson Number 2 -- Elements of an Effective Approach to Negotiations

The strategy we developed focused on (i) working closely with the other governmental units involved (i.e., the State and the County) to present a cohesive and unified front, (ii) being very responsive to Toyota (e.g., quickly providing information requested by Toyota, making sure that all key members of the City's working group were available on short notice to meet with Toyota, consistently meeting Toyota's numerous deadlines, etc.), (iii) projecting to Toyota a cooperative rather than adversarial attitude, and (iv) actively seeking suitable alternatives to achieving Toyota's goals in those situations where the City was unable to say "yes" to a request by Toyota (rather than simply telling Toyota "no"). This approach was, of course, atypical for an arms-length negotiation, and ran counter to our training and experience and that of the City representatives negotiating with Toyota. We were convinced, however, that if we did not follow this strategy we would not be successful in bringing Toyota to San Antonio.

Lesson Number 3 -- Communicate and Implement the Strategy

Once our strategy was formulated, we discussed that strategy extensively with all of the members of the City's working group as well as with the County and State working groups to achieve the appropriate level of "buy in" for the approach. From that point on, we did our best to adhere closely to this strategy in all aspects of the project.

Successfully implementing our strategy was not always easy, however, particularly when it came to the goal of working closely with all the participants in meeting all of Toyota's deadlines. As an example, the City, the County and the State had at one point all been asked by Toyota to provide a written response to a draft of the Project Agreement by a certain deadline. A Toyota official was planning a visit, and it was important to Toyota to have the written responses in time for that visit. Late in the afternoon of the day the response was due, we were talking with the State’s attorneys to coordinate our respective portions of the response when we found out that, due to a different interpretation of the deadline requirement, the State was not planning on delivering the State's response that day. Upon learning this, we initiated a series of phone calls to discuss the importance of the deadline. In one of those calls, Toyota's representatives confirmed that San Antonio would be removed from consideration if the deadline was not met. Given the brief time remaining to formulate the State's portion of the response to the draft to meet the deadline (which was by that time only a few hours away), Governor Perry was contacted by cell phone to help accelerate the pace of the State's response. He assured Toyota representatives that the written response would be timely delivered even if he had to go to the capitol and type it himself. (Governor Perry in fact remained personally involved in getting the response out all the way through its delivery to Toyota.) Although it was difficult, the strategy was followed and the deadline was met. Governor Perry's personal involvement in meeting this deadline also served to impress upon Toyota the group's commitment to responsiveness and to meeting Toyota's timeline for the project, thus turning a potential disaster into a "plus."

Lesson Number 4 -- Tie Down the Real Estate

There have been a number of large site selection projects where the land became the final hurdle that just couldn't be cleared. The problem, of course, is that this aspect of a site selection processes requires the cooperation of 100% of a group of third parties, namely the owners of the site.[2] Each situation is different, but the tract involved is almost most certainly to be very large with several landowners involved, each with its own agenda and set of expectations. To make matters worse, the manufacturer typically expects the city to commit very early on in the process to being able to deliver the land free, clear and "clean," and expects the city to be completely responsible (including damages for breaching the project agreement, which could potentially be enormous) in the event the land cannot be acquired for any reason. This can be problematic because of the unknowns involved (e.g., there is a risk that a seller will simply refuse to close when the time comes).

In the San Antonio/Toyota project, the City agreed to provide Toyota a tract of land on the Medina River covering over four square miles that was owned by eleven different individuals and entities. Given the size of the project site and the number of owners involved, meeting Toyota's land acquisition deadlines was one of the most critical and challenging parts of the project. As an example of these challenges, we were faced early on in the project with a deadline imposed by Toyota for getting all of the separate tracts comprising the project site under contract. The rail access track was still outstanding as that deadline quickly approached, and we were informed by Toyota's representatives that San Antonio would be removed from consideration if the deadline was not met. The real estate broker who was trying to obtain a contract on that tract had not been successful, and there were less than 48 hours left before the deadline. At that point, our firm was asked to take over the lead in securing the contract. One of our lawyers (Pete Broderick) happened to be a personal friend of a member of the family that owned the rail access tract, and through a series of phone calls and meetings with the owners, he was able to impress upon them the urgency of our having the tract under contract. The contract was executed less than an hour before the deadline. As we were working on the rail access tract, we discovered from the title company that there was an undivided interest holder on one of the other tracts that had not signed a relevant contract, so we had to scramble to get a contract from that person as well in time to meet that same deadline. In the end, we were fortunate as we were able to obtain the needed signatures on the contracts in time. It could very easily have turned out otherwise.

Although there is no easy "fix" to the land acquisition problems, they can be ameliorated somewhat by swift action and diligence. With the help of a good title company, title to the land should be examined as part of the contract process (which is different than the general practice of having the title company start its work only when it has received a fully signed contract). In this regard, a title company should be carefully selected and made part of the project team very early in the process. This way, you have a better chance of knowing about and perhaps correcting title problems before the city is committed to delivering good title to the land.

[2] It may be tempting to simply pursue condemnation (based on economic development as the public purpose), but manufacturers typically shun the negative publicity associated with taking someone's land (usually farm/ranch land owned by a "salt-of-the-earth" farmer/rancher) for the plant.

Another possible approach would be for the city to purchase the land (presumably using an industrial development corporation or some other similar vehicle) with non-recourse seller financing prior to entering into the agreement with manufacturer. This would eliminate one of the biggest risks related to the land -- namely, the risk that one of the sellers, even though under contract, might refuse to close or might otherwise undermine title or some other aspect of the land prior to closing (which is a very real risk). We did not pursue this in the Toyota project, but if we had it to do over again, we probably would give this approach very serious consideration.

Lesson Number 5 -- Develop a Detailed Plan for Acquiring/Financing the Real Estate

The land for the project must, of course, be paid for and state law regarding the acquisition and disposition of land by municipal entities must be followed. Originally, our plan was to have an industrial development corporation created for the project issue bonds and to then use the funds to purchase the real estate. We proceeded on this basis until we realized (fairly late in the process) that it was highly problematic to issue the bonds before we were virtually 100% sure that we would have a closing to buy all the land. As mentioned above, there was a risk that one or more third party sellers would not close, and this risk was too great to allow us to first issue the bonds. Consequently, the land acquisitions had to be completed using extensive bridge financing that was arranged in very short order through a syndicate of cooperative local banks.

The instructive point here is that it is important to have a complete game plan mapped out well in advance with input with the project team members responsible for the bond financing that addresses each step of the land acquisition process taking into consideration (i) state law limitations on the acquisition and disposition of property by municipal entities, (ii) how the necessary financing will fit into the plan, and (iii) timing.

Conclusion

It is said that experience is the cruelest teacher because the lesson always comes after the test. In the Toyota project, we were able to anticipate some of the most important lessons and avoid much of that cruelty. We had to learn the other lessons the hard way though, but the obstacles presented were surmounted and the deal was struck. Toyota has now begun the massive plant construction process for the first phase of the facility on which it plans on spending some $800 million (which will itself provide significant economic stimulus to the San Antonio area). Once completed, this first phase will bring thousands of high paying assembly plant jobs with good benefits to San Antonio.

For the future, the hope is that Toyota will continue to expand its North American production capacity. If that occurs, San Antonio will be well positioned to compete for such expansions given the immense size of the Medina River project site, which can accommodate multiple phases of expansion. Thus, we expect this project will continue to provide San Antonio with new quality jobs for many years to come.