

Department of Legislative Services  
Maryland General Assembly  
2020 Session

FISCAL AND POLICY NOTE  
Third Reader - Revised

House Bill 1424 (Delegate Solomon, *et al.*)  
Environment and Transportation and  
Appropriations

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Public-Private Partnerships - Process and Oversight

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This bill establishes the Public-Private Partnership Oversight Review Board, alters the review and approval process for public-private partnerships (P3s) valued at more than \$500 million and expands the requirements for all P3 agreements. It also specifies that P3 agreements for roads or bridges may not include a noncompete clause that would inhibit *any* transit or road maintenance projects (instead of only State-funded transit projects). **The bill takes effect June 1, 2020; provisions related to specified existing transportation facilities projects terminate March 1, 2021.**

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Fiscal Summary

**State Effect:** Likely no effect in FY 2020. General fund expenditures increase, potentially significantly, beginning in FY 2021 to staff the board and, potentially beginning in FY 2022, to conduct independent credit assessments and risk analyses, as needed and discussed below. The bill may negatively affect the viability and financing of P3 projects by delaying their approval. No effect on revenues.

**Local Effect:** None.

**Small Business Effect:** Minimal.

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## Analysis

### Bill Summary:

#### *P3 Oversight Review Board*

The board is staffed by (1) the Baltimore Metropolitan Council, the Metropolitan Washington Council, or other similar entity and (2) the Department of Legislative Services (DLS). The bill expresses legislative intent that the metropolitan council that provides staffing support to the board be compensated for its work. The board is required to:

- review P3 presolicitation reports;
- make recommendations regarding the designation of a public infrastructure asset as a P3;
- consult with a reporting agency in reviewing an unsolicited P3 proposal (which a reporting agency must submit to the board for its review);
- review best practices regarding P3s; and
- monitor the implementation and operation of existing P3s.

The board may request technical assistance from the Treasurer, the Comptroller, or other appropriate agency.

By January 15, 2021, the board must study and report its findings and recommendations to the General Assembly regarding the transfer by sale, lease, or other agreement of the full or partial ownership, operation, or management of an existing transportation facilities project to a private entity and using the proceeds to pay for building or maintaining other infrastructure.

#### *Approval Process for P3s Valued at More Than \$500 Million*

The procedures described below apply only to P3 projects (or proposed projects) with a value that exceeds \$500 million.

A reporting agency must submit a presolicitation report for a transportation facilities P3 project to the P3 Oversight Review Board. The required presolicitation report to the board must include a presolicitation report for each contract under the P3 and, if required, a final environmental impact statement that complies with the National Environmental Policy Act (NEPA). Within 60 days of receiving the report, the P3 Oversight Review Board must report and make recommendations to the Board of Public Works (BPW) and the budget committees of the General Assembly. (For purposes of P3s, “budget committees” is redefined to include the House Environment and Transportation Committee rather than

the House Committee on Ways and Means.) The budget committees, in consultation with the appropriate policy committees, have 60 days to review and comment on the board's report and recommendations before BPW may designate the project as a P3.

A copy of a proposed P3 agreement must be submitted to the Legislative Policy Committee (LPC) in addition to other entities in current law. BPW may not approve the agreement until (1) either the budget committees or LPC, depending on the timing, have reviewed and commented on the agreement; (2) independent assessments of the impact on the State's credit rating are completed for each contract in the agreement by all credit rating agencies that rate the State's general obligation bonds; and (3) a risk analysis with specified items is completed for each contract by a financial advisory firm chosen by the State Treasurer.

The proposed P3 agreement must include financial information regarding each contractor and any subcontractor that will provide products or services under the agreement.

#### *Requirements for All P3 Agreements*

For projects that require the State or a successor agency to take over operations and maintenance of the project at a future date, the terms must specify that all toll revenue or other charges be assigned to the State or a successor agency. In addition, the terms of the P3 must require the reimbursement of the State for advanced project expenses, as specified.

#### *Existing Transportation Facilities Projects*

For purposes of uncodified language, an "existing transportation facilities project" includes the Thomas J. Hatem Bridge (across the Susquehanna River) and does not include I-495 or I-270 P3 projects.

Until March 1, 2021, a reporting agency may not:

- transfer by sale, lease, or other agreement the full or partial ownership, operation, or management of an existing transportation facilities project to a private entity; or
- issue a public notice of solicitation for a P3 for an existing transportation facilities project.

**Current Law:** Chapter 5 of 2013 established a new framework for the approval and oversight of P3s. Chapter 5 defined a P3 as a method for delivering public infrastructure assets using a long-term, performance-based agreement between specified State "reporting" agencies and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contract partners, in which:

- a private entity performs functions normally undertaken by the government, but the reporting agency remains ultimately accountable for the public infrastructure asset and its public function; and
- the State may retain ownership of the public infrastructure asset and the private entity may be given additional decision making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle.

A “public infrastructure asset” is a capital facility or structure, including systems and equipment related to the facility or structure intended for public use.

Chapter 5 establishes the public policy of the State to utilize P3s, if appropriate, for (1) developing and strengthening the State’s public infrastructure assets; (2) apportioning between the public sector and the private sector the risks involved in the development and strengthening of public infrastructure assets; (3) fostering the creation of new jobs; and (4) promoting the State’s socioeconomic development and competitiveness. The public policy also asserts that private entities that enter into P3s must comply with the provisions of the Labor and Employment Article and the federal Fair Labor Standards Act.

BPW must approve all P3 agreements, but a reporting agency may not issue a public notice of solicitation or request that BPW designate a project as a P3 until the Comptroller, Treasurer, budget committees, and DLS have had at least 45 days to review and comment on a presolicitation report that contains specified information (for transportation facilities projects, the presolicitation report is submitted only to the budget committees and DLS).

Once a P3 agreement is formed, BPW may not approve the agreement until (1) a copy of the agreement is submitted simultaneously to the Comptroller, Treasurer, budget committees, and DLS; (2) the Treasurer, with the Comptroller, analyzes the agreement’s effect on the State’s capital debt affordability limits and submits the analysis to the budget committees and DLS; and (3) the budget committees have reviewed and commented on the agreement within 30 days.

Reporting agencies may establish P3s in connection with any public infrastructure asset for which they are responsible, and they may establish specific functions within their agencies dedicated to P3s. P3 agreements may include provisions that are necessary to develop and strengthen a public infrastructure asset.

P3 agreements involving road, highway, or bridge assets may not include a noncompete clause that inhibits the planning, construction, or implementation of State-funded transit projects.

## *Environmental Impact Statements*

For major transportation projects, NEPA requires a range of alternatives to be considered and the environmental impacts of each alternative to be analyzed. This type of study is required prior to the commitment of federal funds to any major project or prior to any action taken by a federal agency that might cause a significant impact on the environment. Some of the basic steps in this process include a public scoping process, data collection, analysis of policy alternatives, and preparation of draft and final documents. The process involves numerous federal, state, and local partners; can take several years; and costs millions of dollars.

### **Background:**

#### *Governor's Traffic Relief Plan*

In September 2017, the Governor announced plans to add four new lanes to I-270 in Montgomery County, the Capital Beltway (I-495), and the Baltimore-Washington Parkway (MD 295), with the first two projects expected to be completed using P3s. In June 2019, BPW voted to designate the I-270 and I-495 projects as eligible for a P3 and approved the proposed competitive solicitation method for selecting a developer for each phase of the plan. On January 8, 2020, BPW approved the plan with amendments – the preliminary solicitation schedule for Phase 1 anticipates execution of the P3 agreement in May 2021. The *Consolidated Transportation Program* (CTP) for fiscal 2020 through 2025 includes \$95.8 million to continue planning for the new lanes on I-270 and I-495. The Maryland Department of Transportation (MDOT) advises that one of the goals of the I-270 and I-495 project is that there will be no net cost to the State. To that end, MDOT advises that, in time, it will be repaid for these and other project development costs by the P3 partners. The CTP also includes \$25,000 for planning of the MD 295 project.

#### *Noncompete Clauses*

Noncompete clauses prohibit the public sector from building or maintaining facilities that are comparable to facilities that the private sector is operating under a P3 agreement. They are most typically seen in transportation projects, and they may prohibit the State from building a free road parallel to or near a P3 toll road. The noncompete clauses give some protection to the private-sector partner that revenues for their project will not be adversely affected by the public sector offering a comparable facility or service at lower or no cost.

The Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships, which issued its final report and recommendations in January 2012, considered the issue of noncompete clauses and concluded that they should not be banned outright. It also concluded that, since noncompete clauses are an issue that pertains largely

to highway P3 projects, only those projects be addressed in statute to allow maximum flexibility for other types of projects. Its final recommendations on the topic, which were incorporated into Chapter 5, were that:

- for road, highway, and bridge projects only, noncompete clauses should be prohibited, but that compensation may be provided for projects that result in a documented revenue loss for the P3 project; and
- compensation may not be provided for (1) State projects already in the planning phase; (2) safety projects; (3) improvement projects with minimal capacity increases; or (4) projects involving *other* transportation modes (*i.e.*, transit).

Chapter 830 of 2018 clarified that the ban on noncompete clauses for road and bridge projects applied only to those that inhibit State-funded transit projects. Under this bill, the ban applies to a noncompete clause that may impede *any* transit project (*i.e.*, including other P3 transit projects) or road maintenance projects. With this change, a P3 agreement to build toll lanes on I-495 cannot include a noncompete clause that might inhibit the completion of the Purple Line (a P3 transit project).

### **State Expenditures:**

#### *P3 Oversight Review Board*

DLS can likely staff the oversight board with existing resources; however, if staffing is necessary during a legislative session to review a proposed P3 project, general fund expenditures may increase for temporary staffing assistance as DLS staff are fully subscribed during the session. A reliable estimate of staffing costs for a metropolitan council are not feasible but may be substantial, beginning in fiscal 2021, to complete the required study and carry out other ongoing work for the oversight board. This analysis assumes that DLS compensates the council for its staff work.

#### *Independent Credit Rating Assessments and Risk Analyses*

The bill requires the State Treasurer to select a financial advisory firm to conduct specified risk analyses, so it is assumed that the State Treasurer, rather than a reporting agency or a private partner, must also pay for the analyses to be done. The State Treasurer's Office (STO) indicates that the cost of a single such analysis likely ranges from \$79,000 to \$195,000. No expenditures are anticipated to be needed in fiscal 2021, and a reliable estimate for future years is not feasible.

STO also advises that the 30-day timeframe (in current law) for completion of an independent assessment likely limits the depth and scope of any such review.

### *P3 Project Delays*

Several provisions in the bill have the likely effect of delaying or extending the approval process for P3 projects. The most significant provision in this regard is the requirement that a NEPA study be completed and included with a presolicitation report. Currently, MDOT conducts NEPA studies concurrently with the submission of presolicitation reports in anticipation of them being completed by the time project agreements are subject to approval. Additional reviews by the oversight board also extend the timeline for proposed projects. To the extent that project delays increase the costs associated with major construction projects, those provisions may negatively affect the financing of P3 projects.

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### **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** None.

**Information Source(s):** Comptroller's Office; Maryland State Treasurer's Office; Department of General Services; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

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