

Department of Legislative Services  
Maryland General Assembly  
2012 Session

FISCAL AND POLICY NOTE

Senate Bill 358

(The President, *et al.*) (By Request - Administration)

Budget and Taxation

Environmental Matters and Appropriations

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Public-Private Partnerships

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This Administration bill establishes a State policy on the use of public-private partnerships (P3s), and expressly authorizes specified State agencies to enter into P3s. The bill establishes a process and associated reporting requirements for State oversight of P3s and institutes a process for both solicited and unsolicited P3 proposals that must be followed before the Board of Public Works may approve a P3 agreement.

The bill takes effect July 1, 2012, and applies only to P3s established on or after that date.

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Fiscal Summary

**State Effect:** No direct effect on State revenues or expenditures, as all the affected reporting and oversight agencies can implement the bill's provisions with existing budgeted resources. The consolidated and enhanced reporting and oversight provisions of the bill should help facilitate P3 projects that are in the best financial and economic interest of the State.

**Local Effect:** The local effect of P3s is project-specific based on the local jurisdiction in which a P3 is located and may increase local tax revenues and provide economic revitalization impacts that are difficult to quantify. Any increased tax revenues may be offset by any tax credits or tax increment financing that local jurisdictions provide to a project.

**Small Business Effect:** The Administration has determined that this bill has minimal or no impact on small business (attached). Legislative Services concurs with this assessment.

## Analysis

**Bill Summary:** The bill explicitly excludes P3s from general State procurement law and instead establishes specific processes and reporting for P3s. A “public-private partnership” is defined as:

- (1) a method for delivering assets using a long-term, performance-based agreement between certain State “reporting” agencies and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contract partners; and
- (2) an agreement in which (a) a private entity performs functions normally undertaken by the government but the reporting agency remains ultimately accountable for the asset and its public function; and (b) the State may retain ownership in the asset and the private entity may be given additional decisionmaking rights in determining how the asset is financed, developed, constructed, operated, and maintained over its lifecycle.

Reporting agencies include the Department of General Services (DGS), which oversees building purchases and leases for most of State government, the Maryland Department of Transportation (MDOT) (including the Maryland Transportation Authority (MDTA)), and public higher education institutions. However, in addition to existing exclusions, P3s subject to the bill do not include agreements entered into by St. Mary’s College of Maryland (SMCM), Morgan State University (MSU), and Baltimore City Community College (BCCC) in which State funds are not used to fund or finance any portion of the project.

The bill establishes the public policy of the State to utilize P3s for infrastructure initiatives for (1) furthering the development and maintenance of infrastructure assets; (2) apportioning between the public sector and the private sector the risks involved in the development, operation, or maintenance of infrastructure assets; (3) fostering the creation of jobs; and (4) promoting the socioeconomic development and competitiveness of Maryland.

### *Reporting Agencies*

The bill explicitly states that reporting agencies may establish P3s in connection with any function, service, or asset for which they are responsible and allows reporting agencies to create a specific function dedicated to P3s within the agency. The bill further requires reporting agencies to adopt regulations and establish processes for P3s, which must allow for a 45-day review of the regulations by specified legislative committees.

The bill clarifies that all MDOT modes, including MDTA, are authorized to enter into P3s, with MDOT serving as their reporting agency. Reporting and oversight requirements for transportation-related P3s are maintained, but incorporated into the requirements for all P3s.

### *Procurement and Oversight of Solicited P3s*

The bill makes the following additional changes to existing procurement, reporting, and oversight requirements related to solicited P3s:

- changes the definition of a “public notice of solicitation” for P3s to include a request for qualifications, and to exclude a memorandum of understanding, an interim development agreement, a letter of intent, or a preliminary development plan;
- requires public reporting agencies to determine, for each private entity that responds to a solicitation, whether the entity (1) has the capability in all respects to perform fully the requirements of the P3; and (2) possesses the integrity and reliability that will ensure good faith performance;
- adds the State Comptroller to the list of entities who receive copies of pre-solicitation reports, specifies what information must be included in those reports, and requires that they be posted online and in the *Maryland Register*; and
- requires concurrent, instead of sequential, 30-day reviews of P3 agreements by the State Treasurer (for their impact on the State’s capital debt affordability limits) and specified legislative committees of the General Assembly (the Comptroller is added to the review process).

See **Appendix 1** for a summary of the bill’s proposed review process.

### *Unsolicited Proposals*

The bill establishes procedures and requirements for reporting agencies to consider unsolicited proposals for P3s. In particular, reporting agencies:

- may require proposal fees for unsolicited agreements, including higher fees for proposals that do not address a project already in the State’s *Capital Improvement Program* or *Consolidated Transportation Program*;

- are required to conduct a competitive procurement if they determine that an unsolicited proposal meets a need or is advantageous to the agency; and
- may allow private entities that submit an unsolicited proposal to participate in the resulting competitive procurement, exempting them from statutory ethics provisions that would otherwise prevent them from participating.

### *P3 Agreements*

The bill lists a number of contract provisions that must be included in all P3 agreements, including establishing a method for future increases in tolls, fees, and other charges related to the asset; minimum quality standards; oversight and remedies for default; and allowing for State inspection of facilities and audits.

The bill prohibits P3 agreements from extending beyond 50 years unless the reporting agency provides justification and receives BPW approval of an exemption.

The bill prohibits the use of noncompete agreements for P3 projects involving road, highway, or bridge assets, but it allows noncompete agreements for other types of projects. Compensation may be provided to the private entity if there is a documented revenue loss from a project that the State undertakes. However, compensation may not be provided for projects already in the State's planning documents at the time the agreement was executed, safety initiatives, infrastructure improvements with minimal capacity increases, or those involving a different mode of transportation.

**Current Law:** Chapters 640 and 641 of 2010 were the State's first attempt at a comprehensive statutory framework for both transportation and nontransportation P3s. Chapters 640 and 641 slightly modified the definition of P3s, created separate titles in the State Finance and Procurement and Transportation articles for P3s, created additional notification requirements for all State agencies, required an analysis of the project's impact on State debt, and established the Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships. They also established six reporting agencies authorized to enter into and report on P3s, which were DGS, MDOT, USM, SMCM, MSU, and BCCC. DGS was designated as the reporting agency for P3 projects entered into by all State agencies that are not themselves reporting agencies.

Chapters 640 and 641 defined a "public-private partnership" as a sale or lease agreement between a unit of State government or MDTA and a private entity under which (1) the private entity assumes control of the operation and maintenance of an existing State facility; or (2) the private entity constructs, reconstructs, finances, or operates a State facility or a facility for State use and will collect fees, charges, rents, or tolls for the use of the facility. A "public-private partnership" does not include (1) a short-term operating

space lease entered into in the ordinary course of business by a unit of State government or MDTA and a private entity and approved in accordance with provisions concerning the transfer of State real or personal property in the State Finance and Procurement Article; (2) a procurement governed by specified general procurement provisions in the State Finance and Procurement Article; or (3) P3 agreements entered into by USM where no State funds are used to fund or finance any portion of a capital project.

Chapters 640 and 641 established several new reporting requirements for State entities involved with P3s, including:

- By January 1 annually, each reporting agency must submit (1) a report concerning each P3 under consideration at that time that has not been previously reviewed or approved by the General Assembly to specified legislative committees; and (2) a status report concerning each existing P3 in which the reporting agency is involved to specified legislative committees.
- Also by January 1 annually, MDTA and each unit of State government (including the Maryland Economic Development Corporation (MEDCO)) that provides conduit financing for a P3 must submit a report concerning each P3 for which MDTA or the unit is providing conduit financing to specified legislative committees for their review and comment, and to the Department of Legislative Services (DLS).
- Reporting agencies must submit a pre-solicitation report concerning a proposed P3 to the State Treasurer and specified legislative committees, for their review and comment, and to DLS 45 days prior to issuing a public notice of solicitation for a P3. Reports on P3s involving transportation facilities projects, as defined in Section 4-101 of the Transportation Article only need to be submitted to specified legislative committees and DLS.
- The State Treasurer has to analyze the impact of each proposed P3 agreement, except for those P3s involving transportation facilities projects, as defined in Section 4-101 of the Transportation Article, on the State's capital debt affordability limits and submit the analysis within a specified time period to specified legislative committees for their review and comment and to DLS. The Board of Public Works (BPW) is prohibited from approving specified P3 agreements until after specified legislative committees and the Treasurer have had 30 days to review and comment on the proposed agreement.

- The Capital Debt Affordability Committee (CDAC) is required to include in its annual report an analysis of the aggregate impact of P3 agreements on the total amount of new State debt that prudently may be authorized for the next fiscal year.

**Background:** Across the nation, there is growing interest in utilizing private-sector financing as a means to maintain and expand capital infrastructure investment. In Maryland, P3 agreements have primarily been utilized to finance transportation infrastructure. More recently, however, P3s have also facilitated the proposed multi-year phased redevelopment of the State Center complex in Baltimore City.

P3s offer opportunities to share resources and project risks with the private sector and access private-sector financial markets. However, P3s also involve significant fiscal considerations, including but not limited to (1) the disposition of State assets; (2) assignment of future revenues to private-sector entities that would otherwise accrue to the State; and (3) the execution of capital and operating leases that obligate the State to long-term general and special fund budget commitments.

#### *P3s in Maryland*

Over the last several years, numerous attempts have been made in Maryland to provide sufficient legislative oversight of P3s. A 1996 opinion by the Attorney General determined that the statutory authority that created MDTA also granted it the authority to enter into P3s for toll highways. In 1997, MDTA established by regulation a Transportation Public-Private Partnership Program for nonhighway projects, under the statutory authority of sections 4-205 and 4-312 of the Transportation Article.

Chapter 430 of 2004 implicitly acknowledged the legitimacy of MDTA's authority to enter into transportation P3s by addressing oversight and reporting requirements for contracts to acquire or construct new transportation facilities projects (Section 4-406 of the Transportation Article). Chapter 430 also required MDTA to provide 45-day notice to certain legislative committees before entering into any contract or agreement to acquire or construct a revenue-producing transportation facility. Chapters 471 and 472 of 2005 slightly modified the information that MDTA must provide before entering into a contract to include additional information on revenues and bond financing.

Chapter 383 of 2007 addressed P3s more directly and created a statutory definition of transportation P3s as a "lease agreement between MDTA and a private entity for the operation and maintenance of an existing or future toll or transit facility." Chapter 383 also created notification requirements for transportation P3s to include 45-day review and comment by certain legislative committees before issuing a solicitation for a P3 project and before entering into a P3. Information required to be submitted included a

description of the proposed lease agreement and finance plan, including information on toll-setting authority, a cost-benefit analysis for the project, and provisions relating to contract oversight.

In 2008, when MDOT announced that it was considering a P3 for Seagirt Marine Terminal, DLS determined that the then-current definition and oversight of P3s excluded port projects, and, therefore, no legislative notification of the project was required. To address this, the legislature adopted several notification provisions specific to the Seagirt project through its annual budget process. Although MDOT had flexibility to pursue and negotiate the project on its own, periodic briefings to the budget committees were required as well as reports at key points in the process. Additionally, the draft agreement was provided to the budget committees for review and comment prior to its signing. Similarly, throughout 2008 and 2009, when DGS was developing the State Center agreement, there was no statutory requirement for legislative notice or oversight of the process. Therefore, the legislature addressed this through various provisions in the operating and capital budget bills to provide notification for the State Center project.

### *P3 Commission*

To address some of these issues, including the definition of a P3, the review process for P3 projects, and the lack of legislative oversight for nontransportation projects, Chapters 640 and 641 of 2010 were enacted, creating the first statewide statutory framework for P3s and creating the Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships to evaluate the State's framework and oversight of P3s. The commission's charge included assessing the oversight, best practices, and approval processes for P3s in other states; evaluating the statutory definitions of "public-private partnership" and "public notice of solicitation"; making recommendations concerning the appropriate manner of conducting legislative monitoring and oversight of P3s; and making recommendations concerning broad policy parameters within which P3s should be negotiated.

The commission submitted its final report in January 2012. It recommended revising several statutory definitions, creating a statement of public policy for the use of P3s, streamlining the legislative oversight process, and clarifying legislative oversight reporting requirements. It also recommended a number of contract provisions that should be included in all P3 agreements, and establishing a set of parameters within which P3s must be negotiated. This bill is primarily based on the findings of the commission. The commission's final report may be found at: <http://mlis.state.md.us/other/Public-PrivatePartnerships/FinalReport.pdf>.

### *Conduit Financing for P3s*

MEDCO is a nonbudgeted entity that allows the State to own or develop property for economic development purposes. MEDCO purchases or develops property that is leased to others under favorable terms. MEDCO also makes direct loans to companies throughout the State to maintain or develop facilities, and it often serves as the conduit for loans administered by the Department of Business and Economic Development. MEDCO has provided conduit financing for one P3 project to date. In January, MEDCO issued \$248.7 million in revenue bonds to help finance the expansion of the Seagirt Marine Terminal.

### *Maryland's Transportation P3 Program*

Maryland's Transportation P3 program was established in 1997. The P3 program focuses on nonhighway facilities – such as transit-oriented development projects, airport, and port facilities – and allows qualified private entities to submit unsolicited proposals to acquire, finance, construct, and/or operate new transportation facilities or undertake major rehabilitation of existing transportation facilities.

MDTA has undertaken several P3 projects using nontraditional financing mechanisms (sharing financial risk with private partners and providing a return on investment for the private partners) to finance projects, including port and airport support facilities. MDTA has traditionally focused on using design-build partnerships, whereby MDTA initiates the design process and a private entity completes design and construction. This approach is being used to build the express toll lanes on Interstate 95 and the InterCounty Connector.

In January 2010, the Maryland Port Administration executed a 50-year lease agreement with Ports America Chesapeake for the 200-acre Seagirt Marine Terminal. In return, Ports America Chesapeake agreed to construct a 50-foot berth for the Port of Baltimore that will accommodate larger vessels and may create new business opportunities. This P3 project is expected to produce 5,700 new jobs and generate \$15.7 million per year in new tax revenue. The total investment and revenue to the State may exceed \$1.3 billion over the life of the agreement.

In February 2012, MDTA provided notice to the legislature that it had reached agreement with Areas USA to finance, redevelop, operate, and maintain the two travel plazas that MDTA owns along Interstate 95. In return for the demolition and reconstruction of the two travel plazas, at an estimated cost of \$56 million, Areas USA will lease, operate, and maintain the facilities for the next 35 years. A revenue-sharing contract provides annual payments to MDTA over the life of the agreement. The revenue-sharing agreement provides MDTA a greater percentage of gross sales as sales increase as well as a



\$3 million upfront payment. The total investment and revenue to the State may exceed \$600 million over the life of the agreement. This agreement will not be subject to the bill's requirements since it was reached prior to July 1, 2012.

### *State Center*

The State Center P3 involves a major multi-phase redevelopment of several State office buildings and surface parking lots in Baltimore City into a mixed-use transit-oriented development including retail, housing, and office space. The buildings themselves have not been properly maintained and are near the end of their useful life. The total cost of the project is \$1.5 billion, and it will be funded with a variety of private debt and equity, tax credits, tax increment financing, and State support. The State will be the major anchor tenant for the office space and will fund construction of a \$35 million parking garage. In 2009, the State executed a master development agreement with State Center LLC, a consortium of private entities headed by Ekistics LLC, and in 2010, BPW approved the ground and occupancy leases for the first phase of the development.

The State Center project has faced controversy. In 2009, four members of the legislature and a representative from the Maryland Stadium Authority were added to the State Center Executive Committee (composed of several Cabinet secretaries) to address concerns about lack of legislative oversight of the project. In December 2010, several downtown property owners filed a lawsuit alleging that the State did not comply with competitive bidding requirements and procedures. Since that lawsuit was filed, work on State Center has largely come to a halt pending the outcome of that litigation.

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## **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 576 (The Speaker, *et al.*) (By Request - Administration) - Environmental Matters and Appropriations.

**Information Source(s):** Baltimore City Community College, Board of Public Works, Department of Budget and Management, Department of General Services, Morgan State University, Secretary of State, Maryland Department of Transportation, Maryland State University System of Maryland, Department of Legislative Services

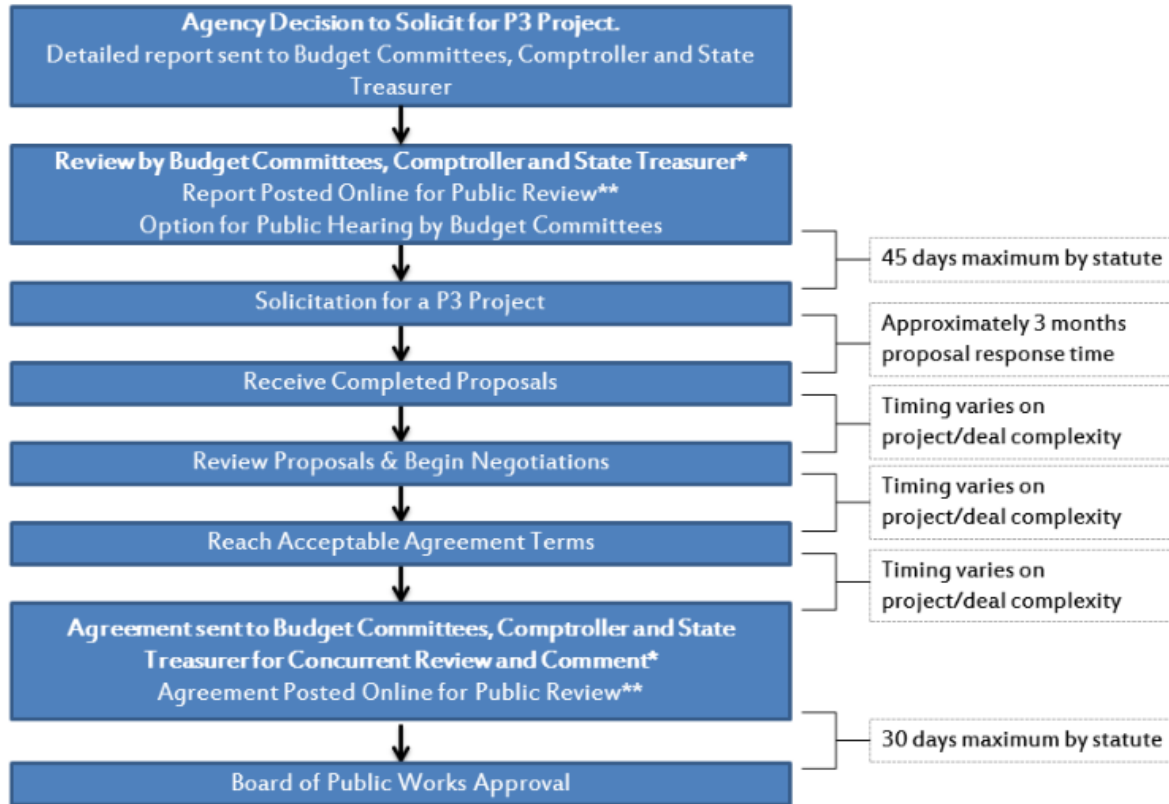
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## Appendix 1 SB 358/HB 576 P3 Review Process



\* Comptroller and State Treasurer review/analysis steps not required for Maryland Transportation Authority projects.

\*\* Proprietary information can be withheld

## ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Public-Private Partnerships

BILL NUMBER: SB 358/ HB 576

PREPARED BY: Lt. Governor Office

### PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

  X   WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND  
SMALL BUSINESS

OR

       WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND  
SMALL BUSINESSES

### PART B. ECONOMIC IMPACT ANALYSIS

The proposed legislation will have no impact on small business in Maryland.