

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 1091

(Delegate Solomon, *et al.*)

Environment and Transportation and
Appropriations

Budget and Taxation

Public-Private Partnerships - Reforms

This bill makes changes to the process and conditions for the approval of public-private partnerships (P3s) valued at more than \$500 million, including adding to the required elements of presolicitation reports for those projects and requiring the Legislative Policy Committee (LPC) to review P3 agreements for those projects. The existing prohibition against noncompete clauses for P3 road and bridge projects is expanded so that they cannot impede any road maintenance projects or transit projects *not* funded by the State. **The bill takes effect June 1, 2019.**

Fiscal Summary

State Effect: No direct effect on State finances, but the bill's requirements may delay the approval of future P3 agreements.

Local Effect: No direct effect on local governmental operations or finances.

Small Business Effect: Minimal.

Analysis

Bill Summary: "Budget committees" for review and comment purposes are modified to reflect the standing committees of jurisdiction.

Presolicitation Reports

For P3 projects valued at more than \$500 million, the presolicitation report required by current law must include (1) a presolicitation report for each contract under the P3 and

(2) if the project requires an environmental impact statement (EIS) under the federal National Environmental Policy Act (NEPA), a completed statement that complies with NEPA.

P3 Agreements

For P3 projects valued at more than \$500 million, the agreement must include an independent rating assessment survey for each contract in the partnership. An independent rating assessment survey must include:

- the credit strength of the private entity and private funding source;
- the impact of the proposed agreement on the State’s credit rating;
- the impact of the proposed agreement on any local government’s credit rating; and
- a recommendation of the minimum credit rating to be maintained by the private entity and private funding source (which must be included in the partnership agreement).

A P3 agreement for projects valued at more than \$500 million must be submitted to LPC in addition to other parties in current law. If the review and comment period for a P3 agreement for a project that exceeds \$500 million occurs when the General Assembly is not in session, the Board of Public Works (BPW) may not approve the agreement until LPC has reviewed and commented on the agreement (subject to a new 90-day limit for such projects).

Any P3 agreement must include the minimum credit rating to be maintained by the private entity and private funding source. In addition, if any P3 agreement requires the State or a successor entity to take over operations and maintenance of a project at some future time, the terms must include a requirement that all toll revenue or other charges related to the project be assigned to the State or a successor entity to apply to those costs. Terms of a P3 agreement providing for specified revenue-sharing arrangements must require the reimbursement of the State for advanced project expenses.

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 Department of Legislative Services (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 and Purple Line

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. The combined cost of all three projects is estimated to be between \$9 billion and \$11 billion, with the I-270 and I-495 projects seeking private developers to design, build, finance, operate, and maintain the new (toll) lanes on both roads. The MD 295 project is not expected to involve a P3 but instead would be carried out by the Maryland Transportation Authority (MDTA) following the transfer of ownership of the parkway from the U.S. Department of the Interior to the State.

On December 12, 2018, the Maryland Department of Transportation (MDOT) and MDTA delivered a presolicitation report for the I-495 and I-270 toll lanes that did not include a NEPA study. MDOT advises that the plans for both projects are structured to proceed simultaneously with the environmental and solicitation processes so that any issues identified in the federal approval process can inform the project design. MDOT also advises that federal regulations allow it to work with a developer prior to approval of the NEPA analysis. In a January 7, 2019 letter to the chairs of the budget committees, DLS recommended that:

- the committees request that MDOT/MDTA withdraw the presolicitation report and submit it only after the draft EIS is complete and if it recommends that toll lanes are the preferred alternative;
- the committees further request that any future solicitation report related to the project provide a detailed comparison between the proposed P3 and a more traditional procurement using design build contracts; and
- the General Assembly should amend the P3 statute to prohibit submission of a presolicitation report until a draft EIS is completed for any project that would require an EIS.

On January 17, 2019, the budget committees requested a 15-day extension to complete their review and comment, as allowed under current law. As of April 1, 2019,
HB 1091/ Page 4

MDOT/MDTA have not withdrawn the presolicitation report; the review period (including the extension) for the project has expired.

The Purple Line is a 16.2-mile light rail line that will extend from Bethesda, in Montgomery County, to New Carrollton, in Prince George's County; it is being built under a P3. The Purple Line will operate largely at street level, in a combination of dedicated and semi-exclusive right-of-way, and also includes segments on elevated structures and in tunnels. The alignment for the Purple Line will provide direct connections to the Washington Metropolitan Area Transit Authority at Bethesda, Silver Spring, College Park, and New Carrollton. The project will also connect to all three Maryland Area Regional Commuter rail lines, Amtrak, and local bus routes. The project includes 21 stations, two storage and maintenance facilities, and 25 light rail vehicles. The Purple Line project is currently in the [construction](#) phase, with revenue operations scheduled for December 31, 2022. The estimated project cost is \$2.4 billion.

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 the 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).

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Anne Arundel and Prince George's counties; Maryland Municipal League; 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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