



**Joint Legislative and Executive
Commission on Oversight of Public-
Private Partnerships**

**Final Report to the Governor and General Assembly
January 6, 2012**

**The Honorable Anthony G. Brown
Lieutenant Governor, State of Maryland
Chair**

Staffed by:
The Office of the Lieutenant Governor
The Maryland Department of Legislative Services
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Executive Summary

Building and expanding public infrastructure is critical to improving Maryland's economy, strengthening its social and environmental well-being and creating jobs. Public infrastructure, including roads, rail, water, sewers, and public buildings, such as schools, courthouses and health facilities, typically requires large upfront capital investments to construct and significant long-term costs to operate and maintain.

Public-private partnerships (P3) are one of many initiatives that can help address infrastructure needs. Initial estimates by Maryland departments overseeing capital projects have found that additional P3s could contribute between 6 and 10% of Maryland's \$3.1 billion annual capital budget while creating as many as 4,000 jobs.

Maryland Infrastructure Needs

Maryland and the nation face a growing backlog of repairing, replacing, and expanding public infrastructure. The 2009 *American Society of Civil Engineers Report Card* gave the nation's infrastructure a grade of "D" and estimated that \$2.2 trillion is needed from government and the private sector over the next five years to address the nation's infrastructure needs. Maryland's infrastructure needs mirror that of the nation.

- The 2011 *Maryland Blue Ribbon Commission on Transportation Funding* finds that the State needs an additional \$870 million annually in new transportation revenues just to address current needs;
- The 2011 *American Society of Civil Engineers Report Card* gives Maryland an overall grade of "C-" for its infrastructure;
- Maryland's *Interagency Committee on School Construction* estimates that K-12 institutions will need \$3.0 billion between fiscal 2013 through 2017 for infrastructure; and
- The 2011 *Urban Mobility Report* by the Texas Transportation Institute ranks the Washington, D.C. region, including the Maryland suburbs, as the nation's most congested region for auto commuters.

To put things in perspective, the cost to build the number one transportation priority in all 23 counties and Baltimore City is more than \$12 billion. This is six times the current \$2 billion in annual transportation capital expenditures.

These needs, combined with budgetary challenges caused by the worst economic downturn since the Great Depression, require the State to utilize innovative and alternative ways to finance and implement large scale infrastructure improvements. As this report illustrates, P3s are one way that states are looking at to address their infrastructure needs.

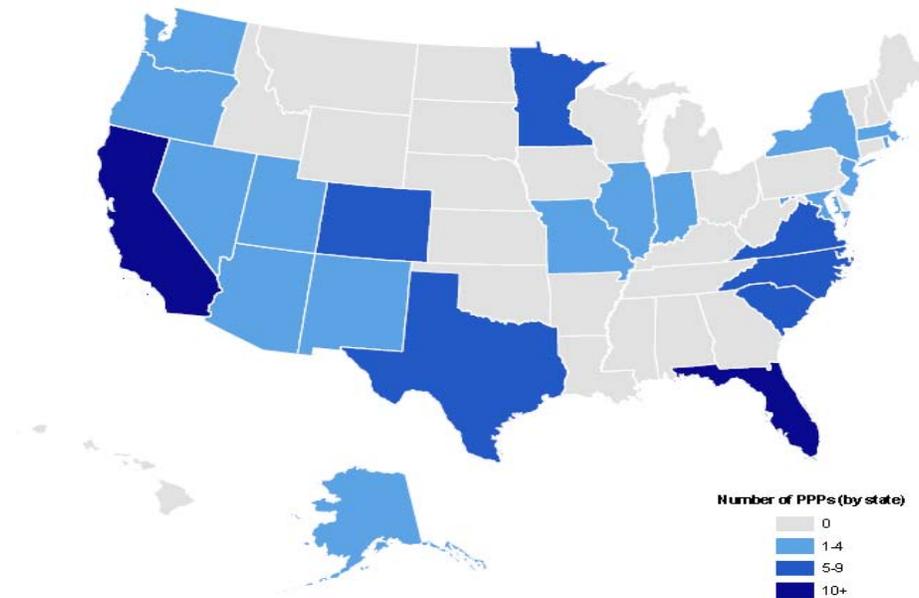
Public-Private Partnerships

P3s are typically long-term agreements involving State assets that can provide benefits by allocating responsibilities and risks to the party – either public or private – that is best positioned to undertake the activity and does so most efficiently and cost-effectively. P3s have the potential to provide a wide array of benefits beyond risk sharing, including faster project delivery, application of advanced construction techniques, operational efficiencies, and access to an expanded set of financing resources.

P3s, however, are not funding sources in and of themselves, but rather one of many delivery methods. They nearly always require underlying or additional revenue sources, either conventional State and Federal resources or alternative resources such as tolls, fares, rents, user fees or availability payments. As such, all P3s require careful and comprehensive evaluations of the fiscal, management and policy implications.

P3s have been used globally for several decades. P3s are used across all sectors, with a heavy emphasis in transportation, schools and utility projects. Despite their use in many countries, the United States is a relative newcomer to P3s and the list of P3 projects in the United States is relatively small. Only two states, California and Florida, have completed more than 10 P3 projects.

Transportation Public-Private Partnerships in the United States



Note: Includes design-build projects.

Source: *Moving Forward on Public-Private Partnerships: U.S. and International Experience with PPP Units*, December 2011, The Brookings Institution.

The Commission

Established by Chapters 640 and 641 of 2010, the *Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships* was tasked with reviewing Maryland's current process for P3s, studying the best practices and lessons learned from other states and countries, evaluating the statutory definition of P3s and making recommendations on broad policy parameters to improve how Maryland analyzes, oversees, and approves future partnerships.

Members of the Commission

- Chair, Lt. Governor Anthony G. Brown
- Senator Richard F. Colburn
- Senator James E. DeGrange, Sr.
- Delegate Tawanna P. Gaines
- Delegate Stephen W. Lafferty
- State Treasurer Nancy K. Kopp
- Secretary Alvin Collins, Maryland Department of General Services
- Secretary Beverley K. Swaim-Staley, Maryland Department of Transportation
- Jim Sansbury, Associate Vice Chancellor, University System of Maryland
- Carolane Williams, Ph.D., President, Baltimore City Community College
- David Wilson, Ed.D., President, Morgan State University
- Dr. Thomas Botzman, St. Mary's College of Maryland
- Robert Brams, Patton Boggs, Private Sector Representative
- Robert C. Brennan, Executive Director, Maryland Economic Development Corporation
- Michael J. Frenz, Executive Director, Maryland Stadium Authority

Chaired by Lt. Governor Anthony G. Brown, the Commission held six public meetings between August and December 2011. The first four meetings were devoted to specific topic areas regarding P3s: overview and financing; transportation infrastructure; utilities and social infrastructure; labor; public interest and experiences of other states. In total, the Commission heard from over 30 experts who have worked extensively on P3s. In addition, on Friday, November 4, 2011, the Commission held a day long public forum at Baltimore City Community College. Attended by more than 200 individuals, including representatives from labor, business, finance, public service and higher education, the forum provided stakeholders from across Maryland with an opportunity to comment on the Commission's process and its responsibilities.

Key Issues

The Commission was asked to review over 30 issues ranging from the definition of a P3 to police jurisdiction. A complete list of the issues and the Commission's final recommendations begins on page 47. A summary of the key issues and the Commission's recommendations are as follows:

- Definition of Public-Private Partnership – The Commission recommends a more robust definition focused on partnership and the delivery of assets.

- Process for Identifying and Evaluating Potential Public-Private Partnerships – The Commission recommends that the Executive agencies establish a formal process for reviewing and evaluating P3s and revise its regulations to reflect the Commission’s recommendations. The process and revised regulations should be reviewed by the Budget Committees and approved by the Joint Committee on Administrative, Executive and Legislative Review.
- Process for Legislative Oversight of Public-Private Partnerships – The Commission recommends that the legislative oversight process consist of two phases. *Phase One* requires Executive agencies to submit a detailed report on a potential P3 and allots 45 days for the Budget Committees, Department of Legislative Services, the Comptroller and Treasurer to review and comment. *Phase Two* allots 30 days for the Budget Committees, Department of Legislative Services, the Comptroller and Treasurer to concurrently review and comment on the proposed public-private partnership agreement. During both phases, the report and proposed agreement must be made available for public review while proprietary information should be protected.
- Workforce and Public-Private Partnerships – The Commission recommends that the Federal Fair Labor Standards Act and State requirements for prevailing wage, living wage, and protections for State employees in the procurement of services at State-operated facilities apply to P3s. The Commission finds that minority inclusion is an important State policy and supports its use. In addition, the Commission encourages Executive agencies to consider community benefit agreements for all P3s.
- Role of State Financing, Use of Proceeds and Revenue-Sharing – The Commission recommends that the State retain flexibility in the use of State and other sources of financing for P3s. It recommends that any proceeds derived from a P3 be returned to the corresponding fund, i.e. proceeds from transportation P3s must be used for transportation. Finally, the Commission recommends that the State utilize revenue-sharing to ensure that it receives adequate and fair compensation from any proceeds derived from a P3.

Moving Forward

During its deliberations, the Commission clearly stated that Maryland’s pursuit of P3s should be focused on *physical infrastructure and the delivery of assets rather than privatization or the contracting out of existing services*. It maintained that for P3s to be successful, the State must retain ultimate control of its assets, and create a process that combines the strengths of the private sector – flexible financing, advanced construction techniques, project development and operational efficiencies – with those of the public sector – accountability, transparency and the delivery of public services.

The Commission recognizes that P3s are only part of the solution, but that expanding their use can help Maryland jumpstart priority projects that otherwise might not be built, increase private investment in public infrastructure and create more jobs throughout the State.

Introduction

Maryland Infrastructure Needs

High quality public infrastructure and related services are vital to support Maryland's economic, social, and environmental well-being. Public infrastructure, encompassing everything from roads, rail, water, sewers, and public buildings, typically requires large upfront investments to construct and significant long-term costs to operate and maintain.

Modernizing our State's infrastructure is critical. Maryland infrastructure received a "C-" from the American Society of Civil Engineers' 2011 Report Card, just slightly above the national average of "D." Our nation has been neglecting its infrastructure for too long – it needs attention now. American infrastructure spending is at the same level now in real dollars as it was in 1968. In 2005, the World Economic Forum's *Global Competitiveness Report* ranked the United States' infrastructure as number one for economic competitiveness, but in just five years, its ranking slipped to 15th behind countries such as Singapore, Canada, and the United Arab Emirates. With the American Jobs Act, President Barack Obama has put forward a plan that would help address these issues and create thousands of jobs, but we cannot wait for Congress to act.

In the area of transportation, a new report from the Texas Transportation Institute ranks the Washington, D.C. region, including Maryland suburbs, as the nation's most congested region for auto commuters. It found that among areas between 1 and 3 million people, Baltimore ranks number one in annual hours wasted per auto commuter. According to the final report from the Maryland Blue Ribbon Commission on Transportation Funding, Maryland needs an additional \$870 million annually in new transportation revenues just to address current needs. To put things in perspective, just the number one priority transportation projects from each of the 23 counties and Baltimore City totals more than \$12 billion in costs – more than current revenues of \$2 billion a year can possibly support.

The 2011 Report Card for Maryland gives the State a "D" for its stormwater infrastructure, a "C-" for drinking water in the Baltimore Metropolitan area, and a "C" for wastewater infrastructure in the Baltimore Metropolitan area. The Society estimates that Maryland has \$5.4 billion in wastewater infrastructure needs and that the State's drinking water infrastructure needs an investment of \$4.0 billion over the next 20 years.

Maryland school infrastructure faces similar obstacles. If current annual funding levels are maintained, there will be \$1.3 billion available for school construction in fiscal 2013 through 2017; however, current estimates show over \$3.0 billion in needs over that same time period.

As governments face the growing backlog of repairing, replacing, and expanding infrastructure, they face some of the most daunting budgetary challenges since the Great Depression. Since 2008, government revenues have declined significantly due largely to

the recent economic downturn. Despite several rounds of federal stimulus, budget cutting, and in some cases tax and fee increases, the overall economic picture remains challenging and significant risk continues for the foreseeable future. These challenges, combined with the current need to repair and expand the State's infrastructure, create jobs and spur economic development, require the State to utilize innovative and alternative ways to finance and implement large scale infrastructure improvements. As this report illustrates, public-private partnerships are one way that states are looking at to address their infrastructure needs.

Background

What Is a Public-Private Partnership?

There is no single, globally-accepted definition for public-private partnerships (P3). Governments of all levels, private corporations and non-government organizations have generally developed their own definitions based on specific needs, context and policy goals. However, after examining and comparing numerous existing definitions, a number of common elements emerge, including:

- A private entity performs a variety of functions normally undertaken by the public sector;
- Cost-effective allocation of risks and benefits between the private and public sectors;
- A relationship defined by a long-term, performance-based contract; and
- Government retains ownership and accountability for the asset and its ultimate service to the public.

Some examples of frequently cited P3 definitions are cited below.

The National Council for Public-Private Partnerships defines P3s as:

“A contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.”

The United States Department of Transportation (USDOT) defines P3s as:

“A contractual agreement formed between public and private sector partners, which allows more private sector participation than is traditional. The agreements usually involve a government agency contracting with a private company to renovate, construct, operate, maintain, and/or manage a facility or system. While the public sector usually retains ownership in the facility or system, the private party will be given additional decision rights in determining how the project or task will be completed.”

The National Conference of State Legislatures (NCSL) has expanded on the USDOT definition by indicating that P3s cover as many as a dozen types of innovative

contracting, project delivery and financing arrangements between public and private sector partners. In P3s, the private sector performs functions normally undertaken by the government, but the public sector remains ultimately accountable for the facility and the overall service to the public.

In its recently enacted P3 legislation, the Commonwealth of Puerto Rico defines a P3 as:

“An entity that couples the resources and efforts of the public sector with resources of the private sector by means of a joint investment that results in the benefit of both parties. Such partnerships are sought with the purpose of providing a service for citizens, as well as building or operating a facility or project that is held in high priority by the government. These partnerships shall be vested in high public interest, that is, the Commonwealth is neither relinquishing its responsibility of protecting such interest, nor waiving its rights to receive an efficient service, nor renouncing ownership of the public assets included in the Partnership Contract.”

Partnerships British Columbia views P3s as:

“A form of procurement that uses a long-term, performance-based contract where appropriate risks associated with a project can be transferred cost effectively to a private sector partner. These risks can include: construction, schedule, functionality of design, financing, and the long-term performance of the asset through the optimal allocation of responsibility for operations, maintenance and rehabilitation. Projects are considered to be P3 structures as they can be structured to require some degree of private financing, are longer term, can include responsibility for operations and life cycle performance of the asset, and are enforceable with a performance-based payment mechanism for the duration of the contract term.”

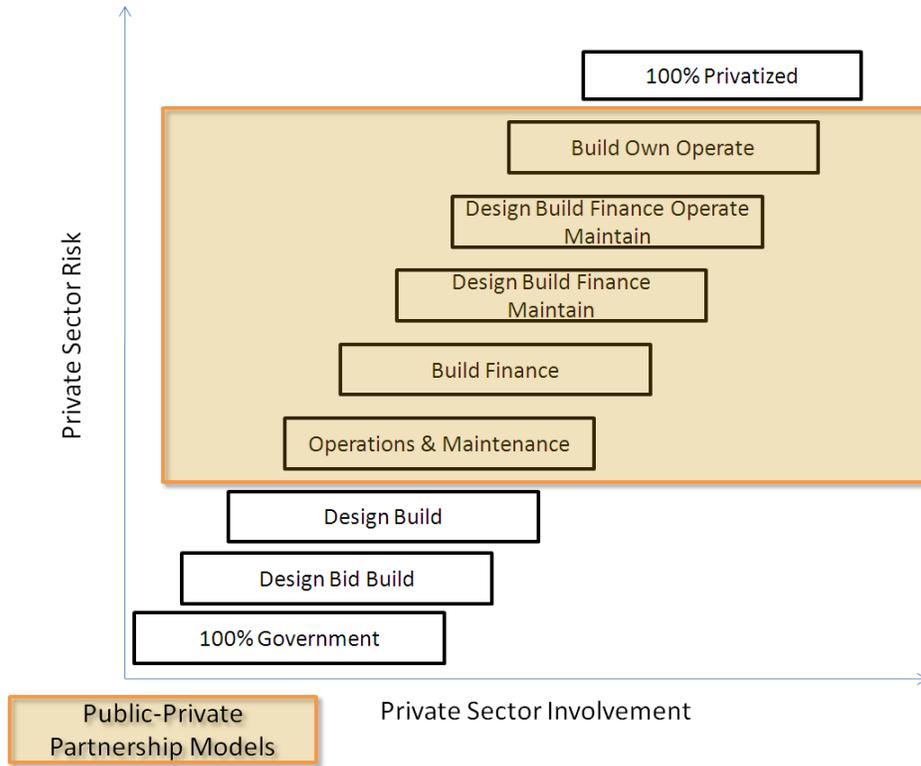
When considering the variety of P3 definitions, it is important to remember that most have been developed assuming specific policy objectives. For most public entities, these include but are not limited to:

- Enhancing the provision of sufficient quality public infrastructure on a timely basis;
- Apportioning between the public and private sector the risk involved in the development, operation and maintenance of infrastructure assets;
- Promoting socio-economic development and competitiveness; and
- Fostering the creation of jobs.

The Public-Private Partnership Spectrum

A wide range of functions can be performed by the private sector using a P3 delivery approach. **Exhibit 1** below provides an overview of how these functions can be combined into various delivery models.

EXHIBIT 1: PUBLIC-PRIVATE PARTNERSHIPS PROJECT DELIVERY MODELS



To date, the public sector in Maryland has been primarily responsible for most aspects of public infrastructure, including but not limited to financing, developing, constructing, operating, and maintaining facilities. Under the conventional method of procuring a project, the public sector may contract with the private sector to provide discrete functions divided and procured through separate contracts. These separate functions may be for project design, construction, operation or maintenance. Public-private partnerships contemplate a single entity being responsible and financially liable for performing all or a significant number of these functions.

Benefits and Challenges of Public-Private Partnerships

Public-private partnerships can provide benefits by allocating responsibilities and risks to the party – either public or private – that is best positioned to undertake the activity in a manner that produces the desired result and does so most efficiently and cost-effectively. Under the right conditions, P3s have the potential to provide a wide array of benefits beyond risk sharing, including application of advanced construction techniques, faster project delivery, operational efficiencies, and access to an expanded set of financing resources.

Public-private partnerships do not, however, provide a reliable and consistent revenue source on their own. P3s are not a funding source, but rather one of many delivery methods. P3s nearly always require underlying or additional revenue sources, either conventional state and federal resources or alternative resources such as tolls, fares, rents, user fees, or availability payments. It is also important to remember that the private sector's higher costs of capital and the need to achieve a return on investment may result in higher upfront project costs. P3s are typically long-term agreements involving State assets that may impact the State's budget and debt affordability or impose fees and user charges on citizens. As such, each proposed P3 requires careful and comprehensive evaluations of the fiscal, management and policy implications.

Public-Private Partnerships Globally and Nationally

Public-private partnerships have been used globally for several decades. For example, toll road concessions started in Spain in the 1960s; however, P3 arrangements increased dramatically in the past 25 years. The movement to P3s internationally can be partially attributed to a broader expansion of privatization in the early 1990s, and recognition that the public sector could either not afford or could not deliver the necessary infrastructure in a timely manner. The presence of P3s is strong in Europe, particularly in England where in the early 1990s the government went through an effort to privatize government operations to create efficiencies for taxpayers. Globally, P3s are used across all sectors, with a heavy emphasis in transportation, schools, and utility projects.

Despite their use in many countries, the extent to which P3s are used as a percentage of all infrastructure development is still limited. As shown in **Exhibit 2**, only two European countries have more than 20% of their public investment provided through P3s.

EXHIBIT 2: USE OF PUBLIC-PRIVATE PARTNERSHIPS IN EUROPEAN COUNTRIES AS A PERCENTAGE OF TOTAL PUBLIC INVESTMENT

| EUROPEAN COUNTRIES WITH THE MOST P3 INVESTMENT | P3S AS A PERCENTAGE OF PUBLIC INVESTMENT (2001-2006) |
|--|--|
| 1. UNITED KINGDOM | 32.5 |
| 2. PORTUGAL | 22.8 |
| 3. HUNGARY | 7.3 |
| 4. SPAIN | 6.9 |
| 5. GREECE | 5.9 |
| 6. BELGIUM | 3.5 |
| 7. ITALY | 2.5 |
| 8. NETHERLANDS | 2.2 |
| 9. GERMANY | 1.5 |
| 10. FRANCE | 1.3 |

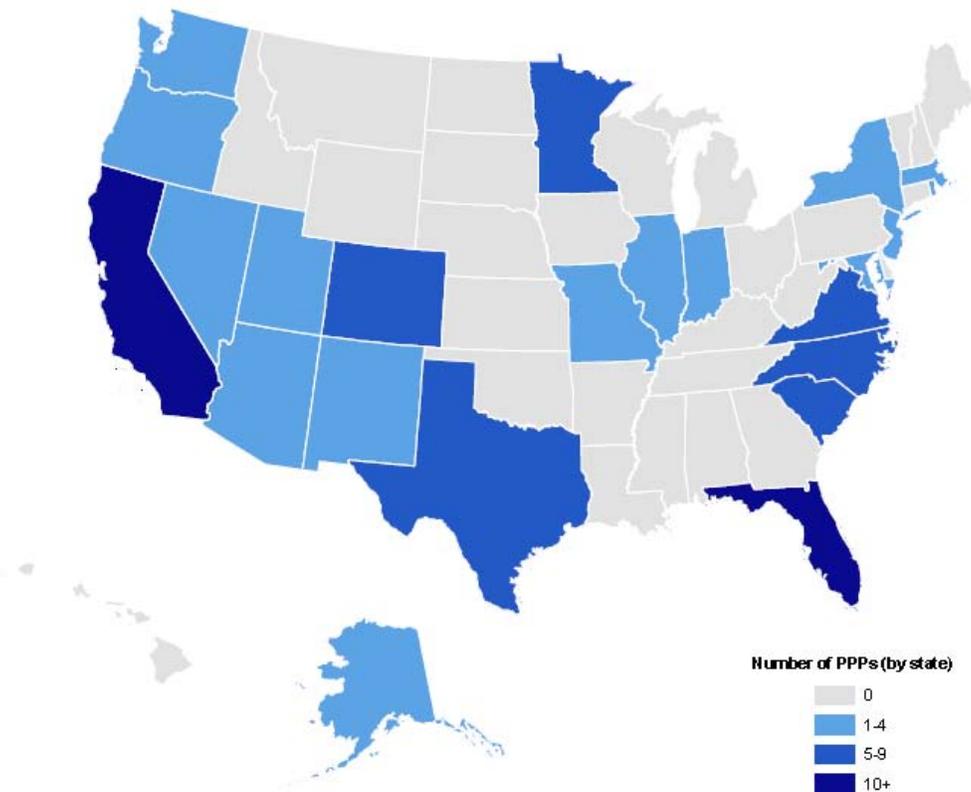
Source: Public-Private Partnerships to Revamp U.S. Infrastructure, Eduardo Engel, Ronald Fischer, and Alexander Galetovic, The Hamilton Project.

The United States is a relative newcomer to P3s. Even though there is an old 19th century tradition of privately constructed and operated toll roads and bridges, following World War II, responsibility to construct and operate public infrastructure in the United States fell almost exclusively to federal, state, and local governments. However, as states struggle to fund necessary projects to maintain and expand its infrastructure, they are increasingly turning to the private sector to assist in the financing, construction and operation of public infrastructure.

July 1989 marked the first major transportation P3 in the United States, when the E-470 toll road was constructed outside of Denver, Colorado, using a design-build contract and private financing. Using a broad definition of P3s that include design-build projects, since 1989, 24 states and the District of Columbia have used a P3 process to help finance and build at least 96 transportation projects worth a total of \$54 billion. The vast majority of these projects have occurred in eight states – Texas, California, Florida, Colorado, Virginia, Minnesota, North Carolina and South Carolina. Most of these projects involved design-build or design-build-operate-maintain contracts, which did not include private financing. To date, only 11 of these projects have involved some type of private financing component.

The nature of P3s in the United States changed dramatically in 2005 when the City of Chicago implemented a 99-year lease of the Chicago Skyway in exchange for an upfront payment of \$1.8 billion. Shortly after, the Indiana Finance Authority completed a 75-year lease of the Indiana Toll Road in exchange for a \$3.8 billion upfront payment. However, seven years after these landmark deals, the list of P3 projects in the United States is still relatively small. **Exhibit 3** on the following page shows the number of P3 projects by state, including design-build projects. Only two states, California and Florida, have completed more than 10 P3 projects.

EXHIBIT 3: TRANSPORTATION PUBLIC-PRIVATE PARTNERSHIPS IN THE UNITED STATES



Note: Includes design-build projects.

Source: *Moving Forward on Public-Private Partnerships: U.S. and International Experience with PPP Units*, December 2011, The Brookings Institution

The tolls, rents, fares or other user fees associated with specific P3 assets and projects often generate sufficient revenues to fully cover the costs of asset development, operations, and maintenance. However, this is not always the case, and other methods have been developed to meet the funding needs of projects that generate little or no direct user-fee revenues. One option successfully employed elsewhere, both globally and nationally, has been the availability payment-based P3 structure. An availability payment is a payment based on the private partner's performance in making the asset available for use to the required standards and at the required times. Examples of availability payment-based P3 structures in the United States include the RTD Eagle P3 transit project in Colorado and the Port of Miami Tunnel project in Florida. While availability payments have not yet been applied in the Maryland context, future projects may require consideration of this approach.

Public-Private Partnerships in Maryland

The history of P3s completed in Maryland depends on how one defines a “P3”. For example, although design-build contracts are sometimes included in the larger P3 category, they are generally accepted in Maryland as just an alternative contracting method. For example, the InterCounty Connector, under construction in Montgomery and Prince George’s counties, is composed of four design-build contracts, and few in Maryland would view it as a P3. The issue of how a P3 is defined in Maryland was a specific responsibility of the Commission and is addressed in greater detail later in this report.

On page 8, a list of generally accepted key elements of a P3 were outlined to include: a private entity performing a variety of functions normally undertaken by the public sector; cost-effective allocation of risks and benefits between the private and public sectors; a relationship defined by a long-term, performance-based contract; and government retaining ownership and accountability for the asset and its ultimate service to the public. To date, only three projects in Maryland, either completed or in-progress, include a significant number of these key elements. These include the recently completed Seagirt Marine Terminal; the planned redevelopment and long-term lease for two travel plazas along Interstate 95 owned by the Maryland Transportation Authority (MDTA); and the planned redevelopment of State Center.

Seagirt Marine Terminal: In 2009, the Maryland Port Administration (MPA) secured a 50-year lease of Seagirt Marine Terminal to Ports America Chesapeake (PAC). The existing terminal at Seagirt, which opened in 1990, required a deeper (50 foot) berth to handle the larger ships expected following the 2014 completion of the Panama Canal widening. The long-term contract assigned responsibility for this new berth construction to PAC, as well as operations and maintenance of the facility for the duration of the lease period. According to the terms of the deal, \$140 million that was originally used to construct Seagirt was returned to MDTA. Additionally, PAC will make annual payments of \$3.2 million to MPA, which grows based on inflation starting in year five, along with payments of \$15 per container for each container in excess of 500,000. While Seagirt remains under MPA ownership, many of the day-to-day risks of development, operations, and maintenance have been transferred to the private sector. Since its approval, the Seagirt project has already created 1,350 jobs with another 2,700 permanent positions expected.

I-95 Travel Plazas: The public-private partnership proposed for the I-95 travel plazas involves the financing, redevelopment, operation, and long-term maintenance of Maryland House and Chesapeake House, the two travel plazas that MDTA owns in the median of I-95. Both sites are located along the most heavily traveled interstate on the East Coast and serve more than 5 million patrons a year. Built in 1963 and 1975, respectively, both structures are reaching the end of their useful lives. A request for proposals for the travel plazas was issued in June 2011, and proposals were received in November 2011 and are currently under review. In pursuing this public-private partnership, MDTA has three specific goals:

- Obtain new or like-new facilities to replace the current Chesapeake and Maryland Houses;
- Ensure that the facility design and operation provide a positive customer experience; and
- Provide a fair return to the State, and provide for transfer of the facilities in satisfactory condition at the end of the term.

Redevelopment of State Center: The State Center project involves the redevelopment of several State office buildings in Baltimore City into a mixed-use, transit-oriented development with residential, office and retail space. The project has been under consideration since at least 2004, and involves several phases of construction that will not be complete for more than a decade. The original State Center office campus has fallen into severe disrepair, with functionally obsolete buildings, and a single-use environment that is largely inactive in the evenings and on weekends. The site is located directly on the State Center Metro Station, across from the Cultural Center Light Rail Station, offering an unparalleled transit location, yet the current development layout does not optimize these assets. The new development seeks to create a 24/7 live-work-play community linked seamlessly with the existing transit infrastructure. While the private sector is primarily responsible for the multi-phase development program, the State will remain the owner of the underlying property and has committed to remain a long-term office tenant of the completed facility. For these reasons, Phase I of State Center is generally recognized as a P3. However, future phases may not be considered P3s since project delivery may be limited to a more traditional joint development, a ground lease, or sale of State real estate for private development.

Other projects in Maryland that may fall under the larger P3 umbrella but may not contain all of the key elements of a P3 include:

- ***Student Housing Projects:*** Thirteen student housing projects with a total value of more than \$415 million have been completed at seven State universities since 1998, providing more than 7,600 beds for students. These projects were developed, constructed and are operated and maintained by a private sector partner under a contract with the Maryland Economic Development Corporation (MEDCO). The facilities are owned by MEDCO and were financed through the issuance of tax exempt bonds by MEDCO;
- ***Public Health Lab:*** The State's current public health laboratory is more than 35 years old and is inadequate in many ways, including its capacity, design, and structure. Although originally envisioned as a State project funded by general obligation bonds, concerns about the State's debt capacity and a desire to deliver the project faster have led to changes in the financing and development of the project. The project will be developed, constructed, maintained and operated by a private developer under contract with MEDCO.

MEDCO will own the facility and issue revenue bonds for the project. The State will enter into a capital lease with MEDCO and the lease payments will service the revenue bonds; and

- ***Certain Transit-Oriented Development Projects:*** The Maryland Department of Transportation (MDOT) is working on several transit-oriented development (TOD) projects across the State. TODs are not P3s by definition, but may include P3 arrangements in some cases, such as Phase 1 of State Center. TODs generally mean real estate development projects within walking distance of a transit station that are designed to increase transit ridership through the use of dense developments that include a mix of commercial, retail and housing uses. TODs may take place on public or private land. TODs on State land may simply involve either a sale or ground lease to a developer, in which case they are just standard forms of joint development and not typically considered a P3. These standard arrangements fall under existing State laws affecting property dispositions, as well as Board of Public Works policies. In 2008, MDOT entered into an administrative agreement with the Department of Legislative Services to provide regular reporting on designated TODs, including joint development projects.

Legislative History of Public-Private Partnerships in Maryland

Maryland does not currently have a single, centralized enabling statute expressly authorizing P3s. Instead, a collection of overlapping laws, regulations, and opinions currently guides the implementation of P3s in Maryland. Most legislative efforts to date have focused on P3s for transportation projects.

Legislative History of Transportation Public-Private Partnerships

In 1996, an 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 non-highway 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 established through the Attorney General's opinion and regulations 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-days 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 days of review and comment by the budget committees and House Ways and Means Committee 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.

House Bill 1238 of 2008 (failed), House Bill 1176 of 2009 (failed), and House Bill 271 of 2010 (failed) would have expanded the definition of P3s to include a sale or long-term lease of an existing facility or an agreement for the private entity to construct, reconstruct, finance or operate a toll facility and would have included additional information that must be submitted to the legislature for review and comment prior to the implementation of a P3.

In 2008, when MDOT announced that it was considering a P3 for Seagirt Marine Terminal, legislative staff 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 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.

To address some of these issues, including the definition of a P3 and the review process for P3 projects, Chapters 640 and 641 of 2010 were enacted, creating the first statewide statutory framework for P3s. Chapters 640 and 641 also created the Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships to analyze these issues further and report to the Governor and General Assembly.

Legislative History for Non-Transportation Public-Private Partnerships

Outside of transportation, few statutory references are made to P3s. Chapters 306 and 307 of 2004 (the Public School Facilities Act of 2004), established P3s as an acceptable form of alternative financing method for the construction of public schools. It requires that provisions in current procurement law relating to public school construction, including prevailing wage and minority business enterprise requirements, must also apply to alternative financing arrangements. (Chapter 581 of 2010 added preferences for State and local business entities to the procurement provisions that must be met when utilizing alternative financing.) In regulations developed by the Board of Public Works (as required by Chapters 306 and 307), local education agencies utilizing alternative financing like P3s must provide to the Interagency Committee on School Construction:

- Justification for use of the alternative financing method, including the advantages that method will provide;
- A description of the alternative financing method;
- A description of the proposed procurement method;
- The estimated project cost; and
- Approval from the county to utilize the alternative financing method.

Prior to the implementation of Chapters 640 and 641, no legislative notification was required for P3s undertaken by higher education; therefore, all of the University System of Maryland's projects for student housing were implemented *without* legislative approval; however, the projects were approved by the University System of Maryland's

Board of Regents and the ground leases with MEDCO were approved by the Board of Public Works.

Current Legislative Framework of Public-Private Partnerships in Maryland

Chapters 640 and 641 of 2010 are the State's first attempt at a comprehensive statutory framework for both transportation and non-transportation 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. **Appendix 1**, page 55, provides the full text of Chapter 640 of 2010. Chapter 641 contains identical text and is not included here.

As mentioned earlier, there is no one universal definition of a P3. Every state must decide what level of private participation in public projects should be defined as a P3 and what, if any, additional approvals, reviews, or oversight of those projects may be necessary. P3s exist along a spectrum of public and private relationships with varying degrees of risk, reward, and responsibility by each sector. The definition should be inclusive enough to include the many possible variations of projects across all sectors of government, yet be exclusive enough to prevent the capture of routine contracts with the private sector for everyday tasks such as maintenance.

Chapters 640 and 641 defined a P3 as:

“A sale or lease agreement between a unit of State government and a private entity under which the private entity assumes control of the operation and maintenance of an existing State facility; or 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.”

The statute also contains three exclusions. It states that a P3 does not include:

“A short-term operating space lease entered into in the ordinary course of business by a unit of state government and a private entity and approved under Section 4–321 of [the State Finance and Procurement] article; a procurement governed by Division II of [the State Finance and Procurement] article; or public–private partnership agreements entered into by the University System of Maryland, where no State funds are used to fund or finance any portion of a capital project.”

The P3 legislative notification process established by Chapters 640 and 641 was intended as a short-term solution until the Commission was able to undertake a

comprehensive review of current statute, including the role of legislative oversight and parameters within which P3s should be allowed.

Overall, the Commission was established to evaluate the State's framework and oversight of P3s. As required by statute, the Commission is to assess the oversight, best practices, and approval processes for P3s in other states; evaluate the statutory definitions of "public-private partnership" and "public notice of solicitation"; make recommendations concerning the appropriate manner of conducting legislative monitoring and oversight of P3s; and make recommendations concerning broad policy parameters within which P3s should be negotiated.

Lt. Governor Anthony G. Brown serves as chair of the 15-member Commission which includes four members of the General Assembly, a member of the private sector, representatives of higher education, MEDCO, the Stadium Authority, the Treasurer, and the secretaries of Transportation and General Services. **Appendix 2**, page 67, contains a roster of Commission members.

The Commission's Process

Public Meetings

The Commission held six public meetings and one public forum. The Commission held four meetings during the months of August, September and October 2011 and heard from nearly 30 experts, whose expertise included labor, finance and project delivery. The experts briefed the Commission on experiences from other states and nations, best practices, and the issues associated with public-private partnerships. The meetings were held in the Joint Hearing Room in the Legislative Services Building. During the first four meetings, expert panelists presented testimony on various aspects of P3s and Commission members had the opportunity to pose questions and discuss. At the final two meetings, the Commission discussed its recommendations and final report.

Summary of Public Meetings

The following contains a brief summary of each meeting. A full summary of each meeting is contained in **Appendix 3**, page 68. All of the materials presented to the Commission can be found on the Commission's website, available at <http://mlis.state.md.us/other/Public-PrivatePartnerships/index.htm>.

- The first meeting, held on August 30, provided a general overview of P3s, including their history and financing, and reviewed the Commission's responsibilities;
- The second meeting, held on September 14, focused on P3s in the transportation sector. Six expert panelists presented various aspects of transportation P3 projects, including issues, negotiations and lessons learned;
- The third meeting, held on September 28, focused on P3s in the utilities and social infrastructure sectors. It was divided into three distinct sub-panels: utilities (water, energy, etc), general social infrastructure (hospitals, court houses, etc), and education facilities (higher education and K-12);
- The fourth meeting, held on October 12, focused on how other states have created a process for P3s and on labor and public interests;
- At the fifth meeting, held on November 16, the Commission turned its focus to its recommendations. The Commission discussed its potential recommendations and identified topics where more discussion was needed; and
- At the sixth meeting, held on December 14, the Commission reviewed the comments received from various stakeholders about the tentative recommendations it had discussed at its previous meeting. These comments are included in **Appendix 4**, page 75. The Commission then reviewed and approved its final recommendations to the Governor and General Assembly.

Maryland Forward Forum: Public-Private Partnerships and Investments in Public Infrastructure

On November 4, the Commission hosted a public forum in partnership with Baltimore City Community College to solicit ideas from the public and other interested parties on how to improve Maryland's process for oversight of public-private partnerships. Over 200 participants attended and had the opportunity to provide input into how Maryland can more effectively utilize P3s to maintain, improve and expand the State's infrastructure and engage in discussions about the appropriate level of review and approval by the State. The handouts provided to participants are contained in **Appendix 5**, page 83.

The full day event consisted of three parts – opening session, a breakout session and a discussion with Lt. Governor Brown on how to improve the process for P3s and develop an effective statutory framework in Maryland. During the opening session, Sandy Apgar presented the keynote address and provided attendees with his insight and experience on P3s. Mr. Apgar, an international authority on housing, infrastructure, and real estate indicated that he supports P3s and summarized his position as follows, *“I believe that business is the main engine for growth and wealth-creation in our market economy, that government has an essential role in ensuring individual opportunity and fairness, and that P3s are potent vehicles for bringing the best of both sectors – public and private – to bear on the most challenging problems of our times. Infrastructure is at the top of the list.”*

After the keynote address, attendees participated in one of five breakout sessions, affording them an opportunity to provide input on many of the key issues that the Commission was tasked with studying. Each session was moderated by one private or non-profit sector representative and one State of Maryland employee familiar with P3s. All moderators were given the same set of general questions to aid their group's discussions. Breakout sessions included two groups focused on transportation, two groups focused on social infrastructure (schools, prisons, hospitals), and one group focused on utilities (water and energy).

Following the breakout sessions, all attendees reconvened to engage in a discussion with Lt. Governor Brown, the secretaries of Transportation and General Services, and one moderator from each of the five breakout sessions. Each moderator provided a summary of the issues and themes discussed in their breakout session and Lt. Governor Brown asked questions and fielded questions and comments from the audience.

Forum Findings

The following provides a brief summary of findings from the public forum. A summary of discussions from the breakout groups is included in **Appendix 6**, page 85.

Q: What are some of the benefits, challenges and unique needs of P3 projects in this (transportation, utility, social infrastructure) sector?

The efficiencies of the private sector along with the transference of risk during a P3 project have the potential for unlocking the value of the public sector's assets and maximizing the strengths of both sectors.

Q: What criteria do you think is important for choosing to do a project as a P3 rather than a traditional State capital project?

A Value For Money analysis should be used (look to Canada or Virginia for examples). There should be a transparent process that aims to protect the public interest. The needs and justifications for P3 projects should be identified, articulated and supported up front with the objective of evaluating risk versus public benefit. The project must have a public benefit.

Q: What is the best way to balance P3 projects need for an expedited and sometimes confidential review and approval process with the State's need for transparency, accountability, and oversight?

It is important for the P3 process to have a clear command structure for making decisions, open participation early in the process, then a clear path to the endpoint. It is important to remember that P3 projects can cost the private sector millions of dollars to structure, while trying to manage all possible risks during the proposal process. The State must be mindful that politics is a major and extremely unpredictable risk that the private sector cannot mitigate.

The private sector is less likely to make substantial upfront investments if they believe that a political debate will derail a P3 project. States that have the most success with P3s often have well-defined processes and roles for each stakeholder. If Maryland wants to have the most bidders at the table for its P3 projects, it is important to make the process clear and predictable.

Q: How should the State manage P3 projects?

The key word in determining a management structure for P3s is "partnership." In the past, standard development projects have been guided simply by a contract between the public and private sectors. However, P3s are much more partnership driven in which there is a mutual recognition of needs. In order for the full benefits of the partnership to be realized, the State needs to relinquish a certain degree of day-to-day control, while maintaining measurable performance oversight and overall control of the asset.

Q: What is the role of union and labor interests in P3 projects?

There were many different opinions on this question. Labor interests want to ensure that P3 projects contain provisions that address certified training programs for construction contracts, employee transfer and community benefit and bargaining agreements. Labor also felt strongly that it should be included in the beginning of the process. Business interests voiced the need to make sure that labor requirements do not tip or make the playing field unlevel and burdensome.

Q: What role should the State play in financing P3 projects?

The State may play a role in financing P3 projects, but any financing should be fully evaluated to ensure that the public sector involvement is fully woven into the fabric of the agreement (cost and allocation of reward). If the public sector has a financing role, then there should be some benefits that accrue to the public sector, either in lower project costs, favorable lease terms or revenue-sharing.

Findings and Recommendations

After hearing from nearly 30 industry and finance experts, representatives from other states, labor and public interest groups, and the two hundred participants that attended the public forum, the Commission focused its attention on its findings and recommendations. To aid in this discussion, committee staff developed a chart comparing how other states handle each of the provisions that were included in the Commission's charge. The states chosen for comparison purposes: Arizona, California, Colorado, Connecticut, Florida, Illinois, Minnesota, Puerto Rico, Texas, and Virginia, had either already completed a P3 project or had recently enacted their own P3 legislation. **Appendix 7**, page 96, provides the comparison chart used to aid the Commission's discussion.

Chapters 640 and 641 of 2010 enumerated a long list of specific issues for the Commission to consider and report on to the Governor and General Assembly. **The Commission's complete set of recommendations are contained in Table 1 beginning on page 47. The following discussion is a summary of recommendations only.** This section will discuss each of the issues assigned, even if the Commission chose to make no recommendation. This section also contains recommendations on issues that may not have been included in Chapters 640 and 641 but are being recommended by the Commission based on its comprehensive review of P3s.

Definition of a Public-Private Partnership and Public Notice of Solicitation

The Commission was charged with evaluating both the statutory definitions of "public-private partnership" and "public notice of solicitation." Chapters 640 and 641 created the following definition of a P3:

"A sale or lease agreement between a unit of State government and a private entity under which the private entity assumes control of the operation and maintenance of an existing State facility; or 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. Public-private Partnership does not include a short-term operating space lease entered into in the ordinary course of business by a unit of state government and a private entity and approved under Section 4-321 of [the State Finance and Procurement] article; a procurement governed by Division II of [the State Finance and Procurement] article; or public-private partnership agreements entered into by the University System of Maryland, where no State funds are used to fund or finance any portion of a capital project."

While this definition is reasonable and provides a very functional definition of P3s, other states employ definitions that are more general and focus more on the

partnership and the collaborative relationship between the public and private sectors and less on the mechanics of how these agreements are structured. The introduction to this report contained a number of definitions of P3s from the National Council for Public-Private Partnerships, USDOT, NCSL, the Commonwealth of Puerto Rico, and Partnerships British Columbia. Additionally, Appendix 7, page 96, provides the statutory definitions that other states use for P3s.

The Commission recommends a definition that encompasses many of the key themes of what a P3 is and focuses the definition less on functionality and more on policy. The Commission recommends the following statutory definition of P3s:

“A public-private partnership is a method for delivering assets using a long-term, performance-based contract between a reporting agency and a private entity where appropriate risks and benefits can be allocated cost effectively between the contractual partners. The private entity performs functions normally undertaken by the government, but the reporting agency remains ultimately accountable for the asset and its public function. The government usually retains ownership in the asset and the private party will be given additional decision rights in determining how the asset is developed, constructed, operated and/or maintained over its lifecycle.”

The Commission reviewed the exceptions currently included in statute for short-term operating space leases, routine procurements already governed by Division II of the State Finance and Procurement article, and P3s entered into by the University System of Maryland (USM) where no State funds are used. The Commission supports all of the exclusions currently in statute, though some changes are recommended.

The Commission had some discussions about energy performance contracts, which are agreements to design, install, finance, maintain, and manage energy systems or equipment to improve the energy efficiency of a building or facility in return for a portion of the energy savings. The Commission finds that energy performance contracts are excluded from the P3 review and approval requirements currently in statute because they are regulated in Division II of the State Finance and Procurement article, which already has a blanket exception. The Commission supports the exclusion of energy performance contracts from P3 review and approval requirements and recommends that this exclusion remain.

The Commission also discussed the use of ground leases, which may include a long-term lease of State-owned land to a private entity that occupies and develops the land during the lease period. Although P3 agreements may include a ground lease, not all ground leases are P3s. The Commission finds that the proposed definition of P3s, which focuses on the delivery of assets, adequately precludes routine ground leases that the State may enter into where a ground lease is entered into but the State is not involved in the development of the project on that land. Only if the ground lease involves a private

entity delivering a public asset on that land, whether it be a building or otherwise, would the project be subject to the P3 statute.

Currently, an exemption is provided for procurements governed by Division II of the State Finance and Procurement Article. This exemption clarifies that procurements for goods and services, like contracts for operation or maintenance, are not included in the definition of a P3. The Commission finds that this exemption is prudent; however, it does not capture procurements entered into by USM, Morgan State University (MSU) and St. Mary's College of Maryland (SMCM). These three higher education institutions are all exempt from Division II of the State Finance and Procurement Article. Instead, sections of the Education Article require these institutions to develop their own policies and procedures for procurement. Therefore, to provide a similar exemption for procurements to the higher education institutions, the Commission recommends that procurements governed by policies and procedures developed by: the University System of Maryland in accordance with Section 12-112 of the Education Article; Morgan State University in accordance with Section 14-109 of the Education Article; or St. Mary's College of Maryland in accordance with Section 14-405(f) of the Education Article also be exempt from the P3 statute.

The Commission recommends that all of the State's higher education institutions be treated the same in the P3 statute. Therefore, it recommends that the exclusion for USM P3 projects where no State funds are used be expanded to include Morgan State University, St. Mary's College of Maryland and Baltimore City Community College. The Commission finds that although these projects should be exempt from the P3 statute, it is still important for the projects to follow a well-defined process. Therefore, the Commission recommends that the higher education institutions develop a set of guidelines and regulations that establishes a process for P3s exempted from the State P3 statute.

The Commission's charge also requires a review of the current statutory definition of a public notice of solicitation. A "public notice of solicitation" is defined as including "*a request for expressions of interest, a request for proposals, a memorandum of understanding, an interim development agreement, a letter of intent, or a preliminary development plan.*" The Commission finds that the current definition of public notice of solicitation is adequate; however, it recommends that a request for qualifications, another type of solicitation document, also be included in the definition.

Policy Statements and Goals

Many states include in their P3 statute broad policy statements that recognize funding challenges in infrastructure repair, maintenance, and construction; encourage private investment in state projects; and support the use of P3s and other types of collaboration between the public and private sectors as warranted. Maryland does not currently have such a policy statement or goals included in its statute. The Commission finds that these types of statements can be useful in explicitly stating the State's

willingness to work with the private sector on certain infrastructure projects. The Commission recommends the following policy statement be included in the State's P3 statute:

“The public policy of the State of Maryland is to utilize public-private partnerships where applicable for infrastructure initiatives for purposes, including but not limited to, furthering the development and maintenance of infrastructure assets; apportioning between the public and private sector the risk involved in the development, operation and maintenance of such assets; fostering the creation of jobs; and promoting the socio-economic development and the competitiveness of Maryland.”

During its deliberations, the Commission clearly stated that Maryland's pursuit of P3s should be focused on physical infrastructure and the delivery of assets rather than privatization or the contracting out of existing services. It maintained that for P3s to be successful, the State must retain ultimate control of its assets, and create a process that combines the strengths of the private sector with those of the public sector.

Process for Identifying, Evaluating, Implementing and Overseeing Public-Private Partnerships

Implementing a P3 project from start to finish requires a multitude of different stages, considerations, reviews, approvals, oversight and management. These stages can generally be divided into categories: one requiring higher levels of review, perhaps by the Governor or General Assembly, and the other encompassing the more day-to-day nuts and bolts processes and administrative functions. This section, Process for Identifying, Evaluating, Implementing and Overseeing P3s, will focus on the more administrative functions and how those processes are structured. The next section, Process for Legislative Oversight of P3 Projects, will focus on the higher level review and approvals of projects.

Generally, the Executive Branch is responsible for identifying potential P3 projects, requesting and reviewing P3 proposals, negotiating P3 contracts, and monitoring contract compliance. These functions can either be handled centrally by a State's P3 office or other coordinating body or by whichever agency is pursuing a P3 project. Since many states tend to focus solely on transportation P3s, state P3 offices are typically housed within the state's department of transportation. Arizona, California, Colorado, Florida and Virginia all utilize this model. Puerto Rico created a centralized P3 Authority responsible for P3 projects across all state agencies.

Currently in Maryland, the day-to-day regulation of P3 activities is managed at the agency level. Projects-to-date have been managed either by MDOT, the Department of General Services (DGS), or USM. The Commission heard from several experts about the potential benefits of having a central State P3 office or one located within MDOT. Benefits of a P3 office may include a centralized point of contact and information for private sector partners, an ability to coordinate and streamline processes, and the ability

to build a repository of best practices and institutionalize knowledge of P3s. While the Commission recognizes these benefits and has some interest in creating a P3 office, given the current budgetary and economic challenges, there is some concern about whether creating a new P3 office is fiscally prudent.

With or without a P3 office, the Commission finds that having an established P3 process makes it easier for everyone involved with a P3 project. It provides potential private partners with an assurance that a fair and predictable process will be followed and it provides State agencies and elected officials a roadmap for how P3 projects will be undertaken. The Commission wants to ensure that the proper process, policies and procedures are developed, but wants to leave the Executive Branch the flexibility to develop a process that fits its needs. Therefore, the Commission recommends that after the 2012 legislative session, the Executive Branch should establish via Executive Order a process to improve the management and coordination of future P3 projects. The Executive Order should:

- Establish a process to coordinate the State's P3 activities within the Executive Branch;
- Establish a center for excellence or a repository of information on best practices and the State's knowledge and experience with P3s;
- Determine which executive agencies should participate in the formation and review of pre-solicitation P3 proposals and the process for such review;
- Establish a process, in coordination with the Treasurer and Comptroller, to determine whether a project will impact debt affordability;
- Create a mechanism to evaluate and identify which planned infrastructure needs could be considered as P3s;
- Identify resources needed to improve the P3 process (legal, procurement, accounting, etc.);
- Establish the process to conduct periodic reviews of the P3 statutory framework;
- Include how executive agencies can share knowledge of their P3 expertise;
- Explore the possible use of availability payments and their applicability in Maryland;
- Provide a process and timeline for MDOT and DGS to draft or revise their P3 regulations (to include a process for solicited and unsolicited proposals);
- Encourage executive agencies to consider community benefit agreements; and

- Provide an opportunity for the legislative budget committees to review and comment on the Executive Branch process for managing P3s.

Furthermore, the Commission recommends that the processes and procedures established by the Executive Order should be promulgated as regulations to institutionalize these processes. The legislative budget committees should have an opportunity to review and comment on the regulations concurrent with the Joint Committee on Administrative, Executive and Legislative Review's review and approval of the regulations.

Process for Legislative Oversight of Public-Private Partnerships

As noted above, the process for handling the day-to-day administrative functions of a P3 project is often handled at the agency level or by some type of P3 office, while P3 project reviews and approvals are conducted at a higher level. State statutes regarding the oversight and legislative review of P3 projects vary greatly. Each state has different requirements as to what documents must be submitted and when; what type of analysis must be conducted; who has the authority to review, comment, approve and veto projects; what is subject to approval; when approval is required; and the length of time allowed for review and approval.

The Commission's research into other state's review and approval practices found the following:

- Connecticut, Florida, and Puerto Rico require P3s to be approved by the Governor. In Illinois, P3s involving new toll highways must also be approved by the Governor;
- California, Connecticut, Texas, and non-transportation P3s in Virginia require legislative review, but not approval;
- Florida and Illinois require that P3 projects receive pre-authorization by the legislature;
- Colorado, Connecticut, Illinois, and Puerto Rico require annual reports to the legislature for all P3s;
- Colorado requires approval by metropolitan planning organizations for transportation P3s;
- Minnesota allows local jurisdictions to veto projects;

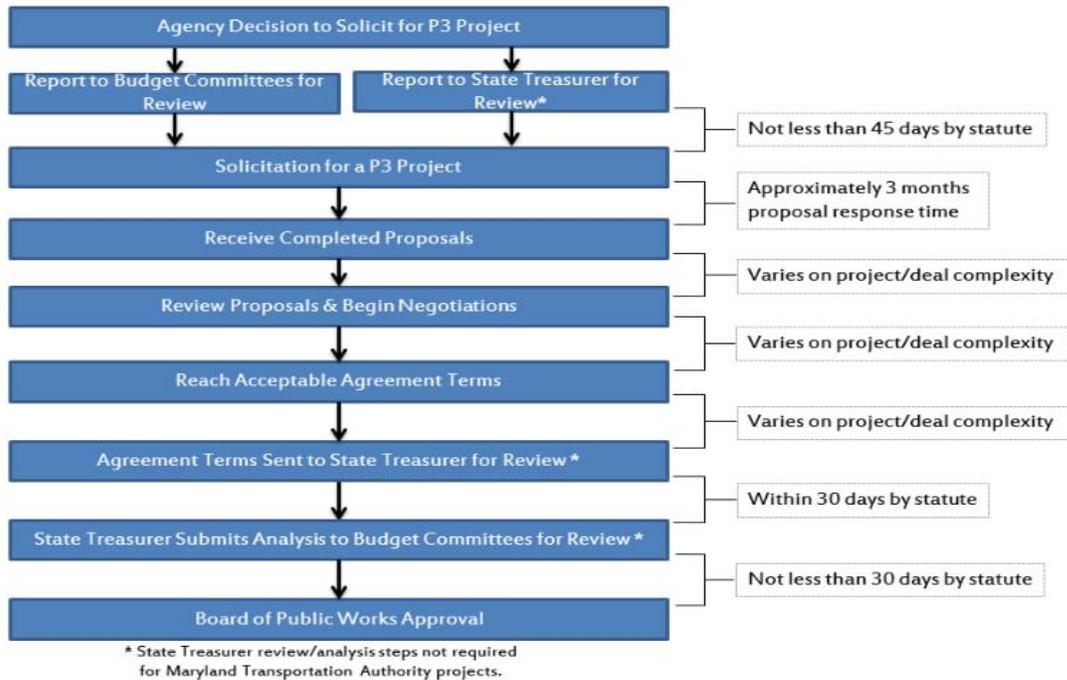
- Connecticut, Florida, Puerto Rico, and Texas require submission of certain documents to aid the review process, including cost-benefit analyses, risk assessments, traffic and revenue studies or other types of analyses; and
- The periods for review and approval range from 30 days in Minnesota and Texas and for non-transportation P3s in Virginia to 60 days in California and for transportation P3s in Virginia.

The Commission heard from many experts in the private sector about the need to minimize the amount of review and approvals required after an agreement has been reached but before it is executed. The possibility of a project veto after an agreement has been reached can have a chilling effect on the willingness of the private sector to pursue P3 projects in that state. Because the private sector typically spends 3 to 5% of the project cost just to bid on a P3 project, they prefer a process that indicates if chosen, the project will move forward. Lengthy review periods can also be a deterrent to P3 projects. The Commission finds that there is an inherent dichotomy in the need of the public sector to be deliberative and transparent and the need of the private sector to act quickly and, in some cases, confidentially. The review and approval process, therefore, requires a delicate balance between these needs.

As shown in **Exhibit 4** on the following page, currently, Chapters 640 and 641 require two phases of review.

- At least 45 days before issuing a public notice of solicitation, a report must be submitted to the legislative budget committees and the State Treasurer, and the budget committees may review and comment on the report; and
- At least 60 days before seeking Board of Public Works approval of a P3 agreement, the proposed P3 agreement must be submitted to the legislative budget committees and the State Treasurer. The State Treasurer then has 30 days to assess the impact of the proposed agreement on the State's debt affordability limits and to submit this analysis to the budget committees. The budget committees then have 30 days to review and comment on the proposed agreement and the Treasurer's assessment of the agreement's impact on State debt.

EXHIBIT 4: CURRENT P3 REVIEW PROCESS



Additionally, annual reports to the budget committees are required concerning any P3 projects currently under consideration and a status report of any P3 projects already entered into.

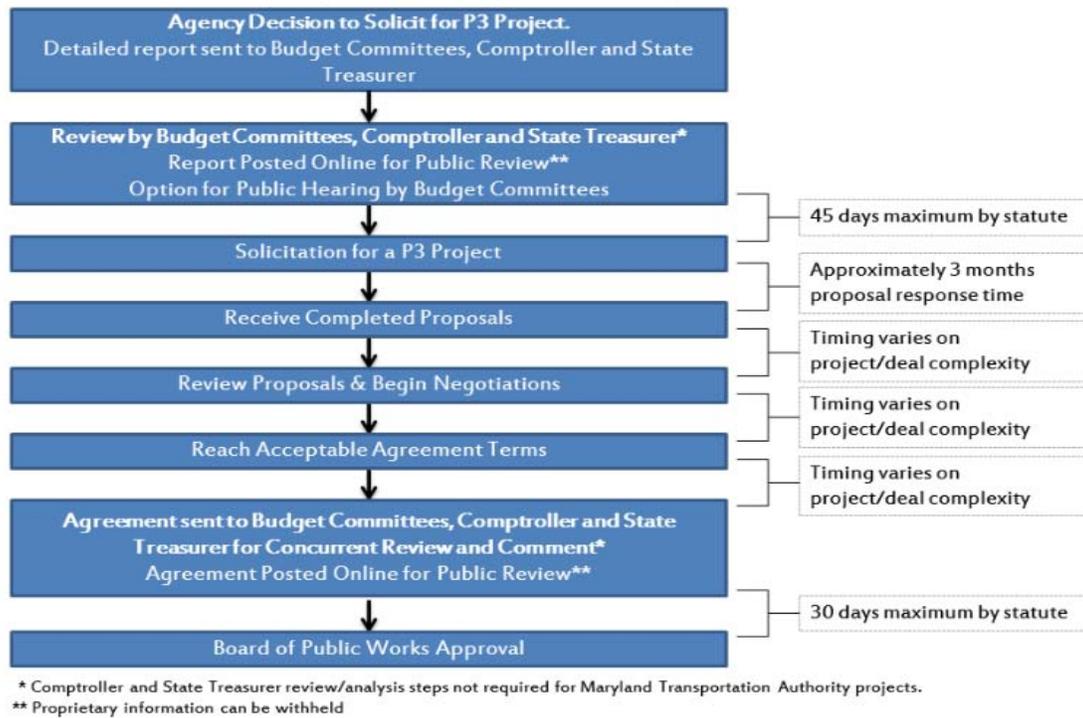
The Commission finds that this basic two-phase legislative review and comment structure is adequate; however, some changes are recommended. The Commission recommends that all reports be submitted to the legislative budget committees, the State Treasurer, the Comptroller, and the Department of Legislative Services. The budget committees should have sufficient time to review and comment on each report.

In Phase 1, the report submitted prior to the public notice of solicitation, the Commission recommends clarification on what the report should provide. Currently, the statute is silent on the report contents. The Commission recommends that the report include the specific policy, operational, and financial reasons for pursuing the project as a P3; the possible risks and anticipated benefits of the project; and any potential workforce, economic development, or environmental implications. Anticipated benefits may include but are not limited to expedited asset delivery, cost savings, risk transfer, net new revenue, state-of-the-art techniques for asset development or operations, efficiency of operations and maintenance via innovative management techniques, or expertise in accessing and organizing the widest range of financial resources.

In Phase 2, thirty (30) days prior to an agreement being executed, the Commission recommends that a report be submitted that provides updated information on everything included in the pre-solicitation report as well as a copy of the proposed agreement.

During these 30 days, the Comptroller and Treasurer should determine whether a project impacts State debt affordability limits, and if so, what impact the project has. The budget committees should concurrently review and comment on the report. **Exhibit 5** provides a flowchart showing the recommended review process.

EXHIBIT 5: COMMISSION’S RECOMMENDED P3 REVIEW PROCESS



The Commission spent a lot of time considering the review and approval process for P3 projects and formed a subcommittee to look at this issue in depth. The Commission finds that the legislature’s ability to expedite its review of projects is highly dependent on an agency’s ability to provide information early and often to the legislature. While each P3 project is unique and legislating communication can be difficult, informal updates to the legislature on the status of P3 projects can be invaluable. For example, during the Seagirt P3 project, MDOT provided periodic updates to the legislature to keep it apprised of the project as it moved forward. This collaboration allowed the legislature to provide an expedited review of the proposed agreement before it was executed. This level of communication should serve as a model for other P3 projects.

The Commission recommends that agencies undertaking a P3 project should help expedite the legislative review process by providing information to the legislature throughout the project development process. To the extent that information is provided early and often, this allows the legislature to provide an expedited review of projects. The legislature may facilitate faster review periods by sending a letter to the agency supporting a project moving forward before the review period expires. The legislature should take sufficient time to thoroughly review the project, but recognize that timely review is critical.

The Commission finds that public review of documents is essential to government transparency. Therefore, the Commission recommends that the pre-solicitation report and the proposed agreement be posted online either on the contracting agency's website or on the project's website, if one has been established. Additionally, brief synopses of reports should be available on the Maryland Register, along with a link to the full report. Proprietary information can be withheld as necessary throughout the process and post-award.

Broad Policy Parameters

Chapters 640 and 641 charged the Commission with making recommendations concerning broad policy parameters within which P3s should be negotiated and enumerated a long list of potential parameters that the Commission should consider. The Commission reviewed each of these parameters and how other states have chosen to deal with these issues. The following will discuss each of these parameters and include relevant observations from other states. In some cases, the Commission chose not to make a recommendation on a particular issue.

Term Lengths

The term lengths of P3 projects can vary greatly and often depend on the amount of time it takes for the private sector to achieve its desired rate of return. In 2004, a joint venture of Cintra-Macquarie leased the Chicago Skyway for a 99-year lease. The following year, the same joint venture leased the Indiana Toll Road for 75 years. These lease terms are generally on the long end of the spectrum. In Maryland, the Seagirt P3 provides for a 50-year lease of the terminal and the travel plazas P3 is being advertised as a 35-year lease.

Some states cap the maximum term length of P3 agreements, while others do not. Of those who have a maximum term length, term lengths typically range from 50 to 99 years. Some states have a maximum term length in statute but allow for longer agreements in some cases. For example, in Florida, term lengths are generally limited to 50 years, but the secretary of the department of transportation can authorize a term of up to 75 years, and the legislature may approve terms longer than 75 years. Similarly, in Puerto Rico, term lengths are limited to 50 years, but the legislature can grant extensions of up to 25 years.

Contracts that extend 75 or 99 years into the future can be difficult to construct because significant changes can occur over that period of time. Long contracts are also challenging to properly evaluate the asset's value and to create a contract that addresses change and innovation. The Commission finds that a maximum term length should be established; however, they recognize that there needs to be flexibility for certain projects that are not financially viable within that maximum term length. The Commission recommends establishing a 50 year maximum term length for P3 projects; however, a

process should be established through the Board of Public Works that allows for the waiver of this cap if the agency provides justification of why a longer term is warranted. This waiver process should be allowed at any point prior to contract execution, including prior to solicitation, during the review of proposals, or as part of the contract negotiation process.

Non-Compete Clauses

Non-compete clauses are contract provisions that may prohibit the public sector from building or maintaining facilities that are comparable to facilities that the private sector is operating under a P3. Non-compete clauses are most typically seen in transportation and may prohibit the State from building a free road parallel or near a road tolled under a P3 project. Non-compete clauses give some protection to the private sector partner that revenues for their project will not be adversely affected by the public sector offering an alternative facility at a lower or no cost. When improperly executed, a non-compete clause can hinder the public sector's ability to build and maintain its assets. In California, a P3 for State Route 91 became controversial when the department of transportation was prohibited from making any improvements, including widening the non-tolled portions of the highway that ran alongside the tolled express lanes or building mass transit nearby, despite population growth and congestion on the non-tolled highway.

To prevent similar problems, states have addressed non-compete clauses in several different ways. Some states, like Connecticut, Florida and Illinois expressly prohibit all non-compete clauses. Arizona and Colorado permit non-compete clauses, but stipulate that the clauses do not apply to projects already in the State's capital planning documents. Other states prohibit non-compete clauses, but allow for compensation to the private sector partner if improvements made by the public sector adversely affect P3 project revenues. Combining many of these different variations into one provision, California and Texas prohibit non-compete clauses but allow compensation to be provided for adverse affects on revenue, but not for projects that were already planned, involve safety, do not increase capacity, are for high occupancy vehicles, or are non-highway projects.

The Commission finds that an outright ban on non-compete clauses is not prudent, because in some cases a non-compete clause can provide the private partner an assurance that their revenue stream will not be adversely affected without having any detrimental impact on the State. For example, the Seagirt P3 contained a non-compete clause that prohibits the operation of a container terminal at Dundalk Marine Terminal for 16 years or on any land owned, leased or operated by MDOT or MDTA for 15 years. This clause was very important to the private partner and the State felt comfortable in granting this limited term non-compete clause since it has no intention to develop another container facility in this time period.

The Commission supports the comprehensive clauses developed by California and Texas and believes that a similar clause in Maryland can protect the interests of both the public and private sectors. Furthermore, since non-compete clauses are primarily an

issue related to highway P3 projects, the Commission recommends that only these projects be addressed in statute as to allow maximum flexibility for other types of projects. The Commission recommends that for road, highway and bridge projects only, non-compete agreements should be prohibited; however, compensation may be provided for projects that result in a documented revenue loss for the P3 project. Compensation may not be provided for projects already in the State's planning documents (i.e. the *Capital Improvement Program* or *Consolidated Transportation Program*), safety projects, improvement projects with minimal capacity increases, or projects involving other transportation modes (i.e. transit).

Public Involvement

As noted above, there is an inherent dichotomy in P3s in the need of the public sector to be deliberative and transparent and the need of the private sector to act quickly and, in some cases, confidentially. One of the often-heard concerns raised about P3s is that they lack transparency. To combat this, most states include in their P3 enabling statutes some type of provision for public notice, hearings, or comment periods. Public involvement can take place at any stage of the process, but most typically occurs before the final approval of the agreement. Given the low-cost and high-accessibility of the internet, some states allow public notification to take place on state websites, while others still require newspaper advertisements.

The Commission finds that public involvement in P3 projects is important and should be similar to what is available for other types of capital projects and expenditures. The Commission recommends that public notification be held concurrent with the two-phase legislative review periods. Hence, during the 45-day review of a notice of solicitation being issued and 30 days prior to the execution of an agreement, reports and proposed agreements provided to the legislature should also be available for review by the public on the contracting agency's website or on the project's website, if one has been established. Similarly, a brief synopsis of these reports, along with a link to the full documents, should be available on the Maryland Register. Following the execution of an agreement, the agreement should be available upon request. During Phase 1 of the legislative review, the legislative budget committees may hold public hearings on the project at their discretion. During the public review periods, the Commission finds that proprietary information may be withheld as necessary.

Role of State Financing

P3s typically include some form of private sector financing, such as debt or equity. The public sector partner may or may not participate in funding a P3 project. In the Seagirt P3, the private partner utilized tax-exempt revenue bonds through MEDCO and the State did not contribute any money to the project. The revenue bonds will be repaid through revenues collected from port customers. Conversely, in the State Center P3, the State, the private developer, and Baltimore City will share in the costs of the project. The Commission heard from several experts that the private sector needs to have

“skin in the game” – or some financial stake in the outcome of the project, otherwise the private partner may have little reason to operate efficiently or innovate.

Some states set limits on the maximum amount of state and/or public participation in funding P3s. Some states place limits on state funding by project, like Connecticut, which prohibits the state from funding more than 25% of the total project cost. Other states limit the total amount of state funding that can be used on all P3 projects. Florida law stipulates that no more than 15% of total federal and state funding in the Florida Transportation Trust Fund in any given year can be collectively obligated to P3s. Similarly, Texas law stipulates that total state funding in any federal fiscal year may not exceed 40% of the state’s federal obligation authority. Many states do not set any limits and instead expressly provide that any combination of federal, state and local funding may be used.

The Commission recognizes the importance of the private sector having “skin in the game”; however, realizing that every P3 project is unique and that some infrastructure projects are not traditionally revenue-generating (such as transit), the Commission was hesitant to set limits on how P3 projects may be funded. The Commission recommends that no limits be placed on State financing and that any combination of federal, State, and local funds, grants, loans or debts may be used for P3 projects.

Setting and Increasing Tolls, Fees, Rents and Other Charges

One of the often-heard concerns of toll road P3s is that they result in much higher toll rates for citizens than if the project had been built via a traditional funding mechanism. This may be partially true in the fact that the public sector is often reluctant to implement unpopular toll increases until necessary, while the private sector is willing to increase tolls each year to combat inflation and satisfy investors.

To combat taxpayer concerns, many of the P3s entered into in the United States include contract provisions that set the timing and rate of increases, limit the amount of rate increases to the consumer price index or some other inflationary measure, or require the public and private sector to agree on rate increases. Reviewing other states’ enabling P3 statutes, most states do not set limits on rate increases in law; however, they do require that the P3 contract address how rate increases will be determined. The Commission finds that rate increases should be governed in some way; however, it is difficult to set these requirements in law since P3 projects can vary so greatly. The Commission recommends that P3 contracts should always contain provisions addressing methods for rate increases; however, statute should not govern the content of these provisions.

Use of Proceeds

P3s may involve leases for revenue-producing facilities that the State currently owns and operates, such as toll roads or port facilities. In exchange for a long-term lease of these facilities, the public sector may receive a large upfront payment or annual payments from the private sector. Large upfront payments can create budgeting challenges to ensure that revenues that would have been received in the future to pay for future expenses will still be available. Similarly, since many P3 projects involve transportation, there is a concern that these proceeds may be used for non-transportation purposes, thus redirecting what would have been transportation revenues to non-transportation purposes. Several states, including Colorado, Florida, Illinois, Texas and Virginia, require that revenues from transportation P3s must be used for transportation purposes.

In Maryland, the use of transportation dollars for non-transportation purposes is often a concern raised when an increase in transportation revenues is being considered. There have been instances of funds from the State's Transportation Trust Fund being used to fund expenditures in the State's general fund, though these funds are later repaid. Several bills have been introduced in the legislature to prohibit such transfers from the transportation fund to the general fund, but all have been unsuccessful. The Commission recommends that all proceeds from P3 projects accrue to whichever fund would have otherwise received the revenues. Thus, revenues from transportation P3s would be dedicated to transportation projects. The Commission also recommends that there should be a provision that allows a portion of P3 proceeds or other sources to fund an account from which predevelopment costs or payments to unsuccessful bidders can be made.

Revenue-Sharing

It can be difficult to properly assess an asset's value, especially its growth in value many years into the future. Concession deals that involve a long-term lease of an asset to the private sector in exchange for an upfront payment to the public sector can be especially difficult to establish a value that is fair to both parties. In 2008, Chicago announced a 75-year lease of the city's downtown parking meters in exchange for a \$1.15 billion upfront payment. The following year, the city's Office of the Inspector General issued a report saying that the city did not properly estimate the value of its parking meters and should have gotten at least \$2.13 billion in the transaction. Much of the difference in estimates was based on different assumptions of future operating and capital costs and the level of risk inherent in operating parking meters over the next 75 years.

To prevent similar problems, many experts agree that revenue-sharing over the life of the contract can provide better financial outcomes for both the public and private sector than upfront payments. Revenue-sharing can mitigate some of the risk of trying to assess the present value of an asset over the life of a long-term contract. Many state P3 enabling statutes are silent on revenue-sharing. Some states say that revenue-sharing may be utilized, but do not require it, while Puerto Rico requires that the use of excess revenue be addressed in the contract. Florida law requires that toll road P3s utilize

revenue-sharing, while California requires that excess revenues be used to pay down debt, improve the facility, or provide revenue-sharing.

In Maryland, both the Seagirt and travel plazas P3s utilize some type of revenue-sharing. The Commission finds that revenue-sharing is desirable; however, it may not be appropriate in all types of P3s. Therefore, the Commission recommends that whenever applicable, revenue-sharing should be utilized.

Workforce Issues

During its October 12th meeting, the Commission heard from several representatives of labor and the public interest, including the American Federation of State, County and Municipal Employees, the Mid-Atlantic Laborers Employers Cooperation Education Trust and the American Federation of Teachers. These experts expressed concerns about the short- and long-term effect of P3s on existing protections for State employees and workers, promoted and encouraged the use of project labor and community benefit agreements, and advocated for the need for independent oversight of P3 projects.

To address these issues, several states, including Connecticut and Illinois, explicitly state in their P3 statutes that other state laws, such as prevailing wage laws and minority inclusion laws, apply to P3s as well. Connecticut and Puerto Rico include additional protections for state employees in their P3 laws, such as requiring preferential hiring for displaced state employees with the private sector partner, providing job training assistance, and allowing for job transfers within state government. In regard to project labor agreements, Connecticut requires the use of prevailing wage requirements or project labor agreements, while Illinois requires the use of project labor agreements for all transportation projects. The remaining seven comparison states that the Commission looked at did not have specific provisions regarding workforce issues in their P3 statutes.

The Commission recommends that current State workforce policies apply to P3 projects as well. These State policies include:

- ***Living Wage:*** In 2007, Maryland became the first state in the nation to adopt a statewide living wage law. The living wage law requires certain contractors and subcontractors to pay established living wage rates to employees working under certain State services contracts, like maintenance contracts;
- ***Prevailing Wage:*** The prevailing wage law applies to contractors and subcontractors when the total value of the project exceeds \$500,000 and the State's financial participation must be 50% or more;
- ***Minority Inclusion:*** The State's minority business enterprise (MBE) program and federal disadvantaged business enterprise program encourage non-discrimination in the procurement process. The State's MBE program establishes a goal that at least 25% of the total dollar value of each agency's procurement

contracts is awarded to eligible MBEs, including 7% to African American-owned businesses and 10% to women-owned businesses. MBE firms must be at least 51% owned and controlled by African Americans, Hispanic Americans, Asian Americans, Native Americans, or women;

- ***Preference for State Employees in State-Operated Facilities:*** Subtitle 4 of Title 13 of the State Personnel and Pensions Article provides protections for State employees in the procurement of services exceeding \$100,000 by the Executive Branch performed within a *State-operated* facility. It provides that it is the policy of the State to use State employees to perform all State functions in all State-operated facilities in preference to contracting with the private sector; and
- ***Federal Fair Labor Standards Act:*** This federal law establishes basic minimum wage, overtime, recordkeeping, and youth employment standards affecting full- and part-time workers in the private sector and in federal, state, and local governments.

Representatives of labor and the public interest spoke to the Commission about the importance of community benefits agreements. Community benefits agreements are agreements between community groups and real estate developers that set forth the benefits that the community will receive from the development or project. Common benefits can include living wages, local hiring, use of hiring halls, training programs, affordable housing, environmental remediation and funds for community groups. The Commission finds that community benefits agreements can be a valuable tool in ensuring that communities most affected by a particular project or development receive benefits from that project. The Commission recommends that the use of community benefits agreements be encouraged.

In addition, the Commission recommends that all P3 contracts assess how to ensure a high quality workforce and consider workforce impacts.

Green Building Requirements

As noted above under the “Workforce Issues” section, the Commission recommends that it is important to explicitly state that certain State policies apply to P3s. This includes State laws and regulations on prevailing wages, living wages, minority inclusion, environmental regulations, and protections for State employees. This should also include the State’s green building requirements. Maryland’s High Performance Buildings Act (Chapter 124 of 2008) requires that most new or renovated State buildings and new school buildings meet or exceed either the United States Green Building Council’s Leadership in Energy and Environmental Design (LEED) criteria for a Silver rating or a comparable rating according to a nationally recognized, accepted, and appropriate standard approved by the Department of Budget and Management and DGS. Chapters 527 and 528 of 2010 expand this requirement to include community college capital projects that receive State funds.

Unsolicited Proposals

Many of the experts that came to speak to the Commission commented on the value of allowing for unsolicited P3 proposals. Allowing for unsolicited proposals enables the private sector to submit bids for P3 projects where the State has not issued a solicitation. Unsolicited proposals may be useful if the private sector estimates it can bring cost savings to the government either through operational efficiencies or innovative practices. Most states that the Commission looked at allow unsolicited proposals under certain conditions. Only Connecticut and Puerto Rico prohibit unsolicited proposals. Arizona, California, Colorado, Florida and Texas allow unsolicited proposals but require that a competitive bidding process must follow. Colorado and Florida require certain conditions regarding potential cost savings be met. Arizona, Florida and Virginia require proposal fees for unsolicited proposals.

In Maryland, regulations developed by MDTA allow unsolicited proposals for non-highway transportation projects only. Current law and regulations do not address unsolicited proposals for non-transportation projects. The Commission finds that sometimes the private sector may have practices or innovations that allow them to construct projects or perform services more efficiently or at a lower cost; thus, there is value in allowing unsolicited proposals. The Commission recommends that unsolicited proposals for all types of projects be allowed. This includes removing the current prohibition in regulations on unsolicited proposals for highway projects. The Commission further recommends that unsolicited proposals should aid the agency in implementing its functions in a manner consistent with State policies and that a competitive bidding process should follow if the proposal has merit. Agencies may charge proposal fees for submitting unsolicited proposals, and these fees can be higher for proposals that do not address projects already in the State's planning documents like the *Capital Improvement Program* or *Consolidated Transportation Program*.

Identifying Potential Projects

The Commission's charge required it to consider whether broad policy parameters should be established regarding identifying potential P3 projects. Several experts stressed the importance of having a pipeline of potential P3 projects that the market can review and bid on at the appropriate time. Other states handle the identification of projects in many different ways. California and Puerto Rico assign the identification of projects to certain entities. In California, it is the Public Infrastructure Advisory Commission, located within the state's Business, Transportation and Housing Agency, and in Puerto Rico, it is the Puerto Rico P3 Authority, a stand-alone P3 office. Florida and Texas require that P3 projects be included in the state's transportation capital program in order to be eligible. Other states set limits on the types of P3 projects allowed or on the number of projects permitted. The Commission finds that the identification of potential P3 projects is best handled by the agencies. Therefore, the Commission recommends that a process for identifying projects be established through the Executive Order recommended in the "Process for Identifying, Evaluating, Implementing and Overseeing P3s" section (page 28-29).

Foreign Ownership

The Commission's charge required it to consider whether policy parameters should be established for P3s regarding foreign ownership of State assets. This provision references the controversy that arose in 2006 when Dubai Ports World acquired P&O Ports, a company providing port management and stevedoring services at six ports in the United States, including the Port of Baltimore. Concerns arose over port and national security because Dubai Ports World was a state-owned company of Dubai, in the United Arab Emirates. In reviewing the P3 enabling statutes of selected comparison states, only Arizona has any provisions regarding foreign companies. Arizona law requires that foreign corporations apply for authority to do business in the state. The Commission finds that P3s typically involve the lease, not sale, of State assets and that the P3 market is dominated by foreign-based companies. Therefore, the Commission recommends that no provision is necessary in regard to foreign ownership.

Land Appraisals

The Commission's charge required it to consider whether broad policy parameters should be established for P3s that require one or more appraisals to take place as part of the process for soliciting or executing a P3. In its review of other states, the Commission did not find any that had provisions in statute regarding land appraisals. Furthermore, the Commission finds that existing State procurement law already requires appraisals for certain land dispositions and that this existing law is sufficient for P3s as well. Therefore, the Commission recommends that no provision is necessary in regard to land appraisals.

Applicability of Certain State Laws to Public-Private Partnership Projects

P3 projects often blur the line between the public and private sector. Legal challenges could arise with facilities developed, financed, operated and maintained by the private sector about whether or not these are still public facilities. Therefore, explicitly stating that certain State laws, rules and procedures also apply to P3 projects may provide an important legal protection for the State.

Eminent Domain

Current State law allows for the use of eminent domain, or the acquisition by condemnation of private property for public use, in certain circumstances. To avoid possible litigation about whether or not P3 projects constitute a public use, many P3 enabling statutes expressly state that eminent domain may be used by the public sector for P3 projects. The Commission finds that this provision provides an important legal protection to the State. The Commission recommends that Maryland's P3 law allow contracting agencies to use eminent domain for P3 projects when necessary and when completed in accordance with existing State law procedures.

Police Jurisdiction

Many state P3 enabling statutes declare that all state and local laws apply for P3 projects as they would for traditional state projects and that law enforcement has the same duties and responsibilities on P3 projects that they have in their respective jurisdictions. The Commission recommends that Maryland's P3 law require contract provisions stating that all State and local criminal laws apply at P3 facilities and that police retain the same powers and authorities that they have within their respective jurisdictions. Furthermore, State law enforcement agencies should be allowed to provide law enforcement services to the private sector for a fee that includes both direct and indirect expenses.

Competitive Solicitations

The nature of P3 contracts can be quite different from routine procurements by the State. Procurement laws often focus on the purchase of goods and services and may not always be robust enough to include revenue-generating contracts or long-term leases of facilities. Additionally, the review of P3 proposals may require alternative evaluation criteria and review processes not allowed by existing procurement laws, such as the use of best and final offers, negotiation with bidders, the shortlisting of bidders, or selection based on qualifications or best value. Most P3 enabling statutes specify the procurement or solicitation processes and evaluation criteria that may be used for P3s so that no legal questions arise about whether State procurement laws apply.

In addition, the labor community raised concerns about the selection criteria used for developers and contractors involved in P3 projects. Representatives who testified before the Commission recommended that the State establish selection criteria that could include past performance, cost and quality, timeliness, local hiring history, and training opportunities. The Commission finds that allowing State agencies to select a bidder based on best value allows some flexibility in the selection criteria as long as those criteria are enumerated in the solicitation document. Additionally, existing State requirements for responsibility determinations as laid out in Title 21 of the *Code of Maryland Regulations* ensure that certain basic criteria are met.

The Commission recommends that Maryland's P3 law clearly establish the authority for all agencies to enter into P3s and create a process for the solicitation of projects. This process should be similar to existing procurement law. It should:

- Allow for the use of request of proposals, request for qualifications, and requests for information;
- Allow for the pre-qualification of bidders, short-listing of bidders, negotiation with bidders, and best and final offers;
- Permit the use of alternative evaluation criteria, such as selection based on best value or qualifications;

- Require the use of performance bonds;
- Require agencies to conduct responsibility determinations of the private partner or if the private entity is a consortium, any partner owning 20% or more of the consortium;
- Require that any changes in the private sector partner require a responsibility determination, notice to the budget committees and approval by the Board of Public Works; and
- Allow unsuccessful bidders to be paid for the right to use work products from their proposals.

Standard Contract Terms

The Commission's charge included several items that the Commission found are standard contract terms that should be included in any P3 project. For many of these contract terms, the Commission recommends that State law should not dictate *how* these matters are handled in the contract, but only require that the contract address these matters. This recommendation recognizes that P3 projects can take many different forms, making it difficult to be prescriptive about how certain matters are addressed in P3 contracts.

Maintenance Requirements

P3 contracts may involve turning over the daily operations and/or maintenance of a facility to the private sector. Whether the facility is publicly- or privately-managed, certain minimum standards and expectations should apply. To ensure these are being met, many states require that public sector standards apply to P3 projects as well. P3 enabling statutes may allow public agencies to provide services, like maintenance or snow removal, for the private contractor if costs are reimbursed.

The Commission recognizes that regardless of whether a P3 facility is operated and maintained by the private or public sector, Maryland citizens will still look to the public sector for resolution should problems arise. The ultimate responsibility for ensuring that facilities operate safely and functionally must, therefore, rest with the public sector. The Commission finds that the inclusion of minimum maintenance standards in P3 contracts ensures that the facility is maintained in an acceptable manner and that the facility returned to the public sector at the end of the contract term has been properly maintained. The Commission recommends that all P3 contracts contain provisions that:

- Include operations and maintenance standards;
- Allow the State to inspect the facility at any time during the contract term; and

- Allow the State to provide services to the private sector for a fee that includes both direct and indirect expenses.

Performance Measures

Contracts involving the delivery of services often contain performance measures so that the contracting agency's standards and expectations are clearly conveyed to the contractor. This can be true of routine maintenance contracts or P3 contracts. Several states, including California and Connecticut, require P3 contracts to include performance standards, criteria, and/or incentives and disincentives. The P3 enabling statutes of other states, like Arizona, Florida, Puerto Rico, and Virginia state that performance measures, payments based on service, and/or inspection by the contracting public agency may be included in the agreement but do not require it.

Performance measures are a way of life for Maryland agencies. In 1996, Maryland implemented its Managing for Results (MFR) program, which requires agencies to submit with their annual budget requests the missions, visions, key goals, and performance measures that guide the agency and each of the programs within the agency. The results are used to measure results, enhance accountability and efficiency, guide the deployment of resources and make budgeting decisions. In 2007, Governor Martin O'Malley implemented StateStat, a performance measurement and management tool that provides real-time review of agency performance and identification of opportunities to improve coordination throughout the year and not just during the budget process like with the MFR program.

Due to the importance of performance measurement in Maryland, the Commission recommends that Maryland's P3 statute requires contracts to include minimum quality standards, performance criteria, and performance incentives and disincentives.

Contract Oversight and Remedies for Default

As important as it is for contracts to clearly define expectations for both parties, it is equally important for contracts to contain provisions for ensuring that these expectations are met and provide a process for recourse if they are not met. P3 enabling statutes often contain provisions for contract oversight and default. These include allowing or requiring P3 agreements to contain provisions regarding:

- Inspection of the facilities by the public sector;
- Rights, remedies, and penalties for contract default or termination; and/or
- Independent audits or audits or inspections by the public sector.

In Maryland, all State agencies are subject to fiscal and compliance audits by the Office of Legislative Audits (OLA) at least once every three years. These audits examine

the agency's financial transactions, records and internal controls to evaluate its compliance with generally accepted accounting principles and all State laws, rules, and regulations. The Commission finds that OLA plays a valuable role in providing independent audits of government units. Therefore, the Commission recommends that P3 projects also be subject to audit by OLA. Additionally, the Commission recommends that all P3 contracts contain provisions for contract oversight and remedies and penalties for default. The contracting agency should be responsible for providing contract oversight.

Reassignments of Lease or Sub-leasing

Not all private entities that pursue P3s plan to hold the lease over the entire term of the contract. Some entities are interested in the capital construction portion of the project only and sub-lease the operations and maintenance to another entity. Other entities seek to increase the value of the asset and then reassign or sub-lease the asset to another entity so that their money is not tied up in the asset over a longer term. In essence, this allows the original private entity to "cash out" of the lease before the contract term is complete. None of the P3 enabling statutes that the Commission looked at contained provisions regarding the reassignment of leases or sub-leasing. However, in Maryland, the Seagirt P3 contract included a provision on this that may serve as a model for other contracts. The Commission recommends that all P3 contracts contain a provision that allows the State the right of first refusal and approval over any reassignments of the lease or sub-leasing. Additionally, the legislative budget committees should receive notification of these events.

Handback Provisions

P3 enabling statutes typically contain provisions regarding the condition or process for the return of assets to the State at the expiration or termination of the P3 lease. As mentioned above in the "Maintenance Requirements" section, the Commission finds that the inclusion of minimum maintenance standards in P3 contracts ensures that the facility is maintained in an acceptable manner and that the facility returned to the private sector at the end of the contract term has been properly maintained. The Commission recommends that all P3 contracts contain a provision that facilities must be returned to the State at the expiration or termination of a lease in an acceptable condition. This prevents the private sector from failing to properly maintain the facility as the contract nears an end and ensures that the public sector will not have to invest significant sums of money in the project when it reverts to the State.

**TABLE 1: MARYLAND JOINT LEGISLATIVE AND EXECUTIVE COMMISSION ON OVERSIGHT OF PUBLIC-PRIVATE PARTNERSHIPS
RECOMMENDATIONS**

DEFINITION OF A PUBLIC-PRIVATE PARTNERSHIP AND PUBLIC NOTICE OF SOLICITATION

| | |
|---------------------------|---|
| <p>Current</p> | <p>Public-Private Partnership (P3) is a sale or lease agreement between a unit of State government and a private entity under which the private entity assumes control of the operation and maintenance of an existing State facility; or 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. 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 and a private entity and approved under Section 4–321 of [the State Finance and Procurement] Article; 2) a procurement governed by Division II of [the State Finance and Procurement] Article; or 3) public-private partnership agreements entered into by the University System of Maryland, where no State funds are used to fund or finance any portion of a capital project.</p> <p>Public Notice of Solicitation includes a request for expressions of interest, a request for proposals, a memorandum of understanding, an interim development agreement, a letter of intent, or a preliminary development plan.</p> |
| <p>Recommended</p> | <p>Public-Private Partnership: There are a number of key themes that, based on a review of other definitions, better represent the policy essence and intention of a P3. These key themes should appear in any new legislative definition of P3s. This definition attempts to include them all:</p> <p><i>“A public-private partnership is a method for delivering assets using a long-term, performance-based contract between a reporting agency and a private entity where appropriate risks and benefits can be allocated cost effectively between the contractual partners. The private entity performs functions normally undertaken by the government, but the reporting agency remains ultimately accountable for the asset and its public function. The government usually retains ownership in the asset and the private party will be given additional decision rights in determining how the asset is developed, constructed, operated and/or maintained over its lifecycle.”</i></p> <p>Exclusions: Continue the three exclusions in the existing legislation but make the following changes:</p> <p>1) Expand the exemption for procurements governed by Division II of the State Finance and Procurement Article to include procurements governed by the policies and procedures developed by: the University System of Maryland in accordance with Section 12-112 of the Education Article; Morgan State University in accordance with Section 14-109 of the Education Article; or St. Mary’s College of Maryland in accordance with Section 14-405(f) of the Education Article.</p> <p>2) Expand the exemption for University System of Maryland P3s where no State funds are used to include Morgan State University, St. Mary’s College of Maryland and Baltimore City Community College. In order to enter into P3s where no State funds are used, higher education institutions should promulgate regulations establishing a process for these P3s.</p> <p>Public Notice of Solicitation: Add a request for qualifications.</p> |

POLICY STATEMENT AND GOALS OF A P3 PROGRAM

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|--------------------|--|
| Current | None stated. |
| Recommended | The public policy of the State of Maryland is to utilize public-private partnerships where applicable for infrastructure initiatives for purposes, including but not limited to, furthering the development and maintenance of infrastructure assets; apportioning between the public and private sector the risk involved in the development, operation and maintenance of such assets; fostering the creation of jobs; and promoting the socio-economic development and the competitiveness of Maryland. |

PROCESS FOR IDENTIFYING, EVALUATING, IMPLEMENTING AND OVERSEEING PUBLIC-PRIVATE PARTNERSHIPS

| | |
|--------------------|---|
| Current | None. |
| Recommended | <p>The Commission does not recommend the creation of a P3 office.</p> <p>After the 2012 legislative session, the Executive Branch should establish via Executive Order a process to improve the management and coordination of future public-private partnership projects. The Executive Order should include the following:</p> <ul style="list-style-type: none"> ○ A process to coordinate the State’s P3 activities within the Executive Branch; ○ Establish a center for excellence and/or a repository of information on best practices for the State’s knowledge and experience with P3s; ○ Determine which executive agencies should participate in the formation and review of pre-solicitation P3 proposals and the process for such review; ○ A process, in coordination with the Treasurer and Comptroller, to determine whether a project will impact debt affordability; ○ A mechanism to evaluate and identify which planned infrastructure needs could be considered as P3s; ○ Identify resources needed to improve the P3 process (legal, procurement, accounting, etc.); ○ The process to conduct periodic reviews of the P3 statutory framework; ○ How executive agencies can share knowledge of their P3 expertise; ○ Explore the possible use of availability payments and their applicability in Maryland; ○ Encourage executive agencies to consider community benefit agreements; ○ A process and timeline for the Maryland Department of Transportation and the Department of General Services to draft or revise their P3 regulations (to include a process for solicited and unsolicited proposals); and ○ An opportunity for the legislative budget committees to review and comment on the Executive Branch process for managing P3s. <p>The processes and procedures established by the Executive Order should be promulgated as regulations to institutionalize these processes. The budget committees should have an opportunity to review and comment on the regulations concurrent with the Joint Committee on Administrative, Executive and Legislative Review’s review and approval of the regulations.</p> |

PROCESS FOR LEGISLATIVE OVERSIGHT

| | |
|--------------------|--|
| Current | <p>Not less than 45 days before issuing a notice of solicitation, a report must be submitted to the State Treasurer and legislative budget committees. Prior to approval of an agreement by the Board of Public Works (BPW), the State Treasurer has 30 days to analyze the impact on debt affordability limits and the legislature then has 30 days to review the Treasurer's findings. Annual reports to legislative budget committees are required containing any P3s under consideration, status reports of projects underway, and information on projects utilizing conduit financing.</p> |
| Recommended | <p>Phase 1 – Before issuing a public notice of solicitation for a public-private partnership, a reporting agency shall submit to the Comptroller, the State Treasurer, the budget committees and the Department of Legislative Services a report that should state the specific policy, operational, and financial reasons for pursuing a public-private partnership and clearly identify the anticipated risks and benefits to the State and any potential workforce, economic development or environmental implications.</p> <p>There should be criteria established for evaluating the risks and benefits. Possible benefits could include but are not limited to expedited asset delivery, cost savings, risk transfer, net new revenue, state-of-the-art techniques for asset development or operations, efficiency of operations and maintenance via innovative management techniques, or expertise in accessing and organizing the widest range of financial resources. The report should include, if relevant and to the extent possible, a preliminary analysis on debt affordability.</p> <p>The Comptroller, the State Treasurer, the budget committees and the Department of Legislative Services shall have a maximum of 45 days to review and comment on this report. The pre-solicitation report shall be posted online during the 45 day review. The online location of the pre-solicitation report will be either the reporting agency website or the specific project website, if one has been established. A brief synopsis and a link to the pre-solicitation report should also be included in the Maryland Register. At their discretion, the budget committees can hold a public hearing on the report.</p> <p>Phase 2 – Thirty (30) days prior to agreement execution, the reporting agency must submit to the Comptroller, the State Treasurer, the budget committees and the Department of Legislative Services copies of the proposed agreement, including an update on the information included in the pre-solicitation report. The proposed agreement shall be posted online during the 30 day review. The online location of the proposed agreement will be either the reporting agency website or the specific project website, if one has been established. A brief synopsis and a link to the posted proposed agreement should also be included in the Maryland Register.</p> <p>The Comptroller’s Office, the Treasurer’s office, the budget committees and the Department of Legislative Services have no more than 30 days to assess the impact of the proposed agreement on debt affordability, review the proposed agreement and submit any comments to the Board of Public Works. These reviews shall be concurrent.</p> <p>Reporting agencies should help expedite the legislative review process by providing information to the legislature throughout the project development process. The budget committees may facilitate faster review periods by sending a letter to the reporting agency supporting a project moving forward in advance of expiration of the 30 day review period. The legislature should take sufficient time to thoroughly review the project but recognize that timely review is critical.</p> <p>Proprietary information can be withheld as necessary throughout the process and post-award.</p> |

BROAD POLICY PARAMETERS

TERM LENGTHS

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | Agreements should not exceed 50 years including all renewals and extensions, unless the reporting agency seeks and receives an exemption from BPW. Sufficient reasons must be provided for granting this exemption. This exemption can be granted at any point during the pre-solicitation, proposal review, or contract negotiations process. |

NON-COMPETE CLAUSES

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | For road/highway/bridge projects only, non-compete agreements are prohibited; however, compensation may be provided for projects that result in a documented revenue loss for the P3 project. Compensation may not be provided for projects already in the State's planning documents (<i>Capital Improvement Program (CIP)</i> or <i>Consolidated Transportation Program (CTP)</i>), safety projects, improvement projects with minimal capacity increases, or projects involving other transportation modes (i.e. if the P3 project is a highway project, no compensation for transit projects). |

PUBLIC INVOLVEMENT

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | <p>In Phase 1 of legislative review, the pre-solicitation report shall be posted online for public comment for 45 days and the budget committees have the discretion to hold a public hearing. The online location of the pre-solicitation report will be either the agency website or the specific project website, if one has been established. A brief synopsis and a link to the posted pre-solicitation report can be included in the Maryland Register.</p> <p>In Phase 2 of legislative review, the proposed agreement shall be posted online during the 30 day review by the Comptroller, Treasurer, the budget committees and the Department of Legislative Services. The online location of the proposed agreement will be either the reporting agency website or the specific project website, if one has been established. A brief synopsis and a link to the posted proposed agreement should also be included in the Maryland Register.</p> <p>Proprietary information can be withheld as necessary throughout the process and post-award.</p> |

ROLE OF STATE FINANCING

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | Any combination of federal, State, and local funds, grants, loans or debt may be used towards a public-private partnership project. |

SETTING AND INCREASING TOLLS, FEES AND OTHER CHARGES

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | Provisions addressing methods for increases must be included in the P3 agreement. |

USE OF PROCEEDS

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | Proceeds from P3s should accrue to whatever fund would have normally received those funds i.e. proceeds from transportation P3s must be used for transportation. If deemed necessary, a portion of proceeds from P3 revenues or other sources may fund an account out of which predevelopment costs and fees to unsuccessful bidders may be paid. |

REVENUE-SHARING

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | General guidance for contracts: Whenever applicable, revenue-sharing should be utilized. |

WORKFORCE ISSUES

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | <p>The Federal Fair Labor Standards Act and State requirements for prevailing wage, living wage, and protections for State employees in the procurement of services at State-operated facilities¹ apply to P3s. Minority inclusion is an important State policy and its use should be encouraged for all projects. The use of community benefits agreements should be encouraged.</p> <p>The Commission recommends that as “General Guidance for Contracts” all projects must assess how to ensure a high quality workforce and consider workforce impacts.</p> |

MINORITY INCLUSION

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | Minority Inclusion is an important State policy and its use should be encouraged for all projects. |

¹ Title 13, Subtitle 4 of the State Personnel and Pensions Article provides protections for State employees in the procurement of services exceeding \$100,000 by the

GREEN BUILDING REQUIREMENTS

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | State requirements for green buildings shall apply to P3 projects. |

UNSOLICITED PROPOSALS FOR P3 PROJECTS

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | Reporting agencies are authorized to accept any unsolicited proposals that will assist the agency in implementing its functions in a manner consistent with State policy. Agencies may establish an application fee for submitting unsolicited proposals. For unsolicited proposals that don't address a project already in the State's planning documents (CIP or CTP), a higher proposal fee can be required. A competitive bidding process must follow if the unsolicited proposal has merit. |

IDENTIFICATION OF PROJECTS

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | See Process for Identifying, Evaluating, Implementing and Overseeing Public-Private Partnerships (See recommended Executive Order on page 48.). |

FOREIGN OWNERSHIP

| | |
|--------------------|---------------------------------|
| Current | No express statutory provision. |
| Recommended | No express statutory provision. |

LAND APPRAISALS

| | |
|--------------------|---------------------------------|
| Current | No express statutory provision. |
| Recommended | No express statutory provision. |

EMINENT DOMAIN

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | General guidance for contracts: Contracting agency may use eminent domain for the project in accordance with State law procedures. |

POLICE JURISDICTION

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | General guidance for contracts: All State and local criminal laws apply. Police retain same powers and authorities as within their respective jurisdictions. State law enforcement agencies may provide law enforcement services for a fee sufficient to cover both direct and indirect costs. |

COMPETITIVE SOLICITATIONS

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | Clearly establish authority for all agencies to enter into P3s and create a process for the solicitation of projects. This process should allow for RFPs, RFQs, RFIs, pre-qualification, short-listing of bidders, negotiation with bidders, best and final offers, best value selection, and alternative evaluation criteria. Performance bonds apply. Responsibility determinations are required of the private partner. If the partner is a consortium, any partner owning 20% or more must undergo their own responsibility determination. Any changes in partners require a responsibility determination, 45-days notice to the budget committees and approval by BPW. Unsuccessful bidders may be paid for the right to use work products from their proposals. |

MAINTENANCE REQUIREMENTS

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | General guidance for contracts: Agreements should include operations and maintenance standards and allow for inspection by the State. Agency may provide services for a fee sufficient to cover both direct and indirect costs. |

PERFORMANCE MEASURES

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | General guidance for contracts: Contract shall include minimum quality standards, performance criteria, incentives and disincentives. |

CONTRACT OVERSIGHT AND REMEDIES FOR DEFAULT

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | General guidance for contracts: Contract shall include provisions for contract oversight and remedies for default. The agency originating the project shall be responsible for ongoing oversight. Agreements, financials and performance are subject to audit by the Office of Legislative Audits no more than every 3 years. |

REASSIGNMENT OF LEASE OR SUBLEASING

| | |
|--------------------|--|
| Current | No express statutory provision. |
| Recommended | General guidance for contracts: State gets right of first refusal and approval over any reassignments of lease, subleasing, or sale. The agency overseeing the contract must notify the budget committees. |

HANDBACK PROVISIONS (TRANSITION/PROCESS FOR RETURN OF ASSETS)

| | |
|--------------------|---|
| Current | No express statutory provision. |
| Recommended | General guidance for contracts: Facility shall be returned to the State at the expiration or termination of the lease in an acceptable condition. |

Appendix 1 Chapter 640 of 2010

AN ACT concerning

Public-Private Partnerships – Oversight

FOR the purpose of requiring certain State agencies to submit a report concerning a proposed public-private partnership to the State Treasurer and certain committees of the General Assembly at a certain time prior to issuing a public notice of solicitation for the public-private partnership; requiring certain State agencies to submit an annual report concerning public-private partnerships that are under consideration to certain committees of the General Assembly; requiring certain State agencies to submit an annual report concerning existing public-private partnerships to certain committees of the General Assembly; requiring certain units of State government to submit an annual report concerning public-private partnerships for which the unit is providing conduit financing to certain committees of the General Assembly; requiring the State Treasurer to analyze the impact of a proposed public-private partnership ~~operating lease~~ agreement on the State's capital debt affordability limits; requiring the State Treasurer to submit each analysis of a public-private partnership ~~operating lease~~ agreement to certain committees of the General Assembly within a certain time; prohibiting the Board of Public Works from approving a public-private partnership ~~operating lease~~ agreement until certain committees of the General Assembly have ~~commented~~ had a certain period of time to review and comment on the State Treasurer's analysis of the ~~lease~~ agreement; requiring that the annual report of the Capital Debt Affordability Committee include certain information concerning the impact of public-private partnership ~~operating leases~~ agreements; requiring the Maryland Transportation Authority to submit a certain analysis of a proposed public-private partnership agreement to certain committees of the General Assembly within a certain period of time before entering into the agreement; prohibiting the Board of Public Works from approving a public-private partnership agreement that the Authority proposes to enter into until certain committees of the General Assembly have had a certain period of time to review and comment on the Authority's analysis of the agreement; establishing a Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships; specifying the membership of the Commission; providing for the chair and staffing of the Commission; prohibiting a member of the Commission from receiving certain compensation but authorizing a member of the Commission to receive certain reimbursements; requiring the Commission to study and make recommendations regarding certain issues; requiring the Commission to report its findings and recommendations to the Governor and the General Assembly on or before a certain date; repealing certain provisions of law requiring the ~~Maryland Transportation~~ Authority to provide certain information to certain committees of the General Assembly concerning

public-private partnerships; providing that certain committees of the General Assembly have a certain period of time to review and comment on reports submitted under this Act; defining certain terms; providing for the termination of certain provisions of this Act; and generally relating to oversight of public-private partnerships.

BY adding to

Article – State Finance and Procurement
Section 10A-101 and 10A-102 to be under the new title “Title 10A.
Public-Private Partnerships”
Annotated Code of Maryland
(2009 Replacement Volume)

BY repealing and reenacting, with amendments,

Article – Transportation
Section 4-205(c)
Annotated Code of Maryland
(2008 Replacement Volume and 2009 Supplement)

BY adding to

Article – Transportation
Section 4-406
Annotated Code of Maryland
(2008 Replacement Volume and 2009 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – State Finance and Procurement

TITLE 10A. PUBLIC-PRIVATE PARTNERSHIPS.

10A-101.

(A) (1) IN THIS TITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(2) “BUDGET COMMITTEES” MEANS THE SENATE BUDGET AND TAXATION COMMITTEE, THE HOUSE COMMITTEE ON WAYS AND MEANS, AND THE HOUSE APPROPRIATIONS COMMITTEE.

(3) “PRIVATE ENTITY” MEANS AN INDIVIDUAL, A CORPORATION, A GENERAL OR LIMITED PARTNERSHIP, A LIMITED LIABILITY COMPANY, A JOINT VENTURE, A BUSINESS TRUST, A PUBLIC BENEFIT CORPORATION, A NONPROFIT ENTITY, OR ANOTHER BUSINESS ENTITY.

(4) “PUBLIC NOTICE OF SOLICITATION” INCLUDES A REQUEST FOR EXPRESSIONS OF INTEREST, A REQUEST FOR PROPOSALS, A MEMORANDUM OF UNDERSTANDING, AN INTERIM DEVELOPMENT AGREEMENT, A LETTER OF INTENT, OR A PRELIMINARY DEVELOPMENT PLAN.

(5) (I) “PUBLIC-PRIVATE PARTNERSHIP” MEANS A SALE OR ~~LONG-TERM LEASE AGREEMENT BETWEEN A CONTRACTING AGENCY UNIT OF STATE GOVERNMENT~~ 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 ~~AND IS AUTHORIZED TO COLLECT~~ OR A FACILITY FOR STATE USE AND WILL COLLECT FEES, CHARGES, RENTS, OR TOLLS FOR THE USE OF THE FACILITY.

(II) “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 AND A PRIVATE ENTITY ~~IF~~ AND APPROVED UNDER § 10-305 OF THIS ARTICLE; ~~OR~~

2. A PROCUREMENT GOVERNED BY DIVISION II OF THIS ARTICLE; OR

3. PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS ENTERED INTO BY THE UNIVERSITY SYSTEM OF MARYLAND, WHERE NO STATE FUNDS ARE USED TO FUND OR FINANCE ANY PORTION OF A CAPITAL PROJECT.

(6) “REPORTING AGENCY” MEANS:

(I) THE DEPARTMENT OF GENERAL SERVICES;

(II) THE MARYLAND DEPARTMENT OF TRANSPORTATION;

(III) THE UNIVERSITY SYSTEM OF MARYLAND;

(IV) MORGAN STATE UNIVERSITY;

(v) ST. MARY'S COLLEGE OF MARYLAND; AND

(vi) THE BALTIMORE CITY COMMUNITY COLLEGE.

(B) THE REQUIREMENTS OF THIS TITLE DO NOT APPLY TO THE MARYLAND TRANSPORTATION AUTHORITY OR TO A PUBLIC-PRIVATE PARTNERSHIP PROPOSED OR ENTERED INTO BY THE MARYLAND TRANSPORTATION AUTHORITY.

~~(B)~~ (C) (1) THE REPORTS PROVIDED BY THE DEPARTMENT OF GENERAL SERVICES UNDER THIS SECTION SHALL INCLUDE INFORMATION CONCERNING ALL PUBLIC-PRIVATE PARTNERSHIPS INVOLVING UNITS WITHIN THE EXECUTIVE BRANCH OF STATE GOVERNMENT, EXCEPT FOR THOSE UNITS THAT ARE ALSO REPORTING AGENCIES.

(2) FOLLOWING THE SUBMISSION OF EACH OF THE REPORTS REQUIRED UNDER THIS SECTION, THE BUDGET COMMITTEES SHALL HAVE 45 DAYS TO REVIEW AND COMMENT ON THE REPORTS.

~~(C)~~ (D) (1) NOT LESS THAN 45 DAYS BEFORE ISSUING A PUBLIC NOTICE OF SOLICITATION FOR A PUBLIC-PRIVATE PARTNERSHIP, A REPORTING AGENCY SHALL SUBMIT TO THE STATE TREASURER AND THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, A REPORT CONCERNING THE PROPOSED PUBLIC-PRIVATE PARTNERSHIP.

(2) BY ~~JULY~~ JANUARY 1 OF EACH YEAR, EACH REPORTING AGENCY SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, A REPORT CONCERNING EACH PUBLIC-PRIVATE PARTNERSHIP UNDER CONSIDERATION AT THAT TIME BY THE REPORTING AGENCY THAT HAS NOT BEEN REVIEWED OR APPROVED PREVIOUSLY BY THE GENERAL ASSEMBLY.

(3) BY JANUARY 1 OF EACH YEAR, EACH REPORTING AGENCY SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, A STATUS REPORT CONCERNING EACH EXISTING PUBLIC-PRIVATE PARTNERSHIP IN WHICH THE REPORTING AGENCY IS INVOLVED.

~~(D)~~ (E) BY ~~JULY~~ JANUARY 1 OF EACH YEAR, A UNIT OF STATE GOVERNMENT THAT PROVIDES CONDUIT FINANCING FOR A PUBLIC-PRIVATE PARTNERSHIP SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, A REPORT

CONCERNING EACH PUBLIC-PRIVATE PARTNERSHIP FOR WHICH THE UNIT IS PROVIDING CONDUIT FINANCING.

10A-102.

(A) THE STATE TREASURER SHALL ANALYZE THE IMPACT OF EACH PUBLIC-PRIVATE PARTNERSHIP ~~OPERATING LEASE ENTERED INTO~~ AGREEMENT PROPOSED BY A UNIT OF STATE GOVERNMENT ON THE STATE'S CAPITAL DEBT AFFORDABILITY LIMITS.

(B) ~~(1)~~ THE STATE TREASURER SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, EACH ANALYSIS REQUIRED UNDER SUBSECTION (A) OF THIS SECTION WITHIN 30 DAYS AFTER THE STATE TREASURER RECEIVES A PROPOSED PUBLIC-PRIVATE PARTNERSHIP AGREEMENT FROM A UNIT OF STATE GOVERNMENT.

~~(2) FOLLOWING THE SUBMISSION OF EACH ANALYSIS, THE BUDGET COMMITTEES SHALL HAVE 45 DAYS TO REVIEW AND COMMENT ON THE ANALYSIS.~~

(C) THE BOARD OF PUBLIC WORKS MAY NOT APPROVE A PUBLIC-PRIVATE PARTNERSHIP ~~OPERATING LEASE UNDER~~ AGREEMENT UNDER § 10-305 OR § 12-204 OF THIS ARTICLE UNTIL THE BUDGET COMMITTEES HAVE COMMENTED HAD 30 DAYS TO REVIEW AND COMMENT ON THE STATE TREASURER'S ANALYSIS OF THE LEASE AGREEMENT REQUIRED UNDER SUBSECTION (A) OF THIS SECTION.

(D) THE ANNUAL REPORT OF THE CAPITAL DEBT AFFORDABILITY COMMITTEE REQUIRED UNDER § 8-112 OF THIS ARTICLE SHALL INCLUDE AN ANALYSIS OF THE AGGREGATE IMPACT OF PUBLIC-PRIVATE PARTNERSHIP ~~OPERATING LEASES~~ AGREEMENTS ON THE TOTAL AMOUNT OF NEW STATE DEBT THAT PRUDENTLY MAY BE AUTHORIZED FOR THE NEXT FISCAL YEAR.

Article - Transportation

4-205.

(c) (1) Subject to the limitations described in [paragraphs (2) and (3)] **PARAGRAPH (2)** of this subsection, the Authority may make any contracts and agreements necessary or incidental to the exercise of its powers and performance of its duties.

(2) Not less than 45 days before entering into any contract or agreement to acquire or construct a revenue-producing transportation facilities project, subject to § 2-1246 of the State Government Article, the Authority shall provide, to the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee, for review and comment, and to the Department of Legislative Services, a description of the proposed project, a summary of the contract or agreement, and a financing plan that details:

(i) The estimated annual revenue from the issuance of bonds to finance the project; and

(ii) The estimated impact of the issuance of bonds to finance the project on the bonding capacity of the Authority.

[(3) (i) 1. In this paragraph the following words have the meanings indicated.

2. “Public notice of procurement” includes a request for proposals issued by the Authority.

3. “Public-private partnership arrangement” means a lease agreement between the Authority and a private entity under which the private entity assumes control of the operation and maintenance of an existing or future revenue-producing highway, bridge, tunnel, or transit facility.

(ii) Not less than 45 days before issuing a public notice of procurement related to a public-private partnership arrangement, subject to § 2-1246 of the State Government Article, the Authority shall provide, to the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee, for review and comment, and to the Department of Legislative Services, a summary of the proposed procurement document to be used for solicitation of the public-private partnership arrangement.

(iii) Not less than 45 days before entering into any public-private partnership arrangement, subject to § 2-1246 of the State Government Article, the Authority shall provide, to the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee, for review and comment, and to the Department of Legislative Services, a description of the proposed lease agreement and a financing plan, including:

1. The length of the proposed lease;

2. The scope of any toll-setting authority to be granted to the private entity;

3. The scope of payments to the Authority from the proposed public-private partnership arrangement;

4. A cost-benefit analysis of the proposed public-private partnership arrangement; and

5. Requirements pertaining to the ongoing operation and maintenance of the facility and contract oversight.]

4-406.

(A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(2) “BUDGET COMMITTEES” MEANS THE SENATE BUDGET AND TAXATION COMMITTEE, THE HOUSE COMMITTEE ON WAYS AND MEANS, AND THE HOUSE APPROPRIATIONS COMMITTEE.

(3) “PRIVATE ENTITY” MEANS AN INDIVIDUAL, A CORPORATION, A GENERAL OR LIMITED PARTNERSHIP, A LIMITED LIABILITY COMPANY, A JOINT VENTURE, A BUSINESS TRUST, A PUBLIC BENEFIT CORPORATION, A NONPROFIT ENTITY, OR ANOTHER BUSINESS ENTITY.

(4) “PUBLIC NOTICE OF SOLICITATION” INCLUDES A REQUEST FOR EXPRESSIONS OF INTEREST, A REQUEST FOR PROPOSALS, A MEMORANDUM OF UNDERSTANDING, AN INTERIM DEVELOPMENT AGREEMENT, A LETTER OF INTENT, OR A PRELIMINARY DEVELOPMENT PLAN.

(5) (I) “PUBLIC-PRIVATE PARTNERSHIP” MEANS A SALE OR ~~LONG TERM~~ LEASE AGREEMENT BETWEEN THE AUTHORITY 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 ~~AND IS AUTHORIZED TO COLLECT~~ OR A FACILITY FOR STATE USE AND WILL COLLECT FEES, CHARGES, RENTS, OR TOLLS FOR THE USE OF THE FACILITY.

(II) “PUBLIC-PRIVATE PARTNERSHIP” DOES NOT INCLUDE:

1. A SHORT-TERM OPERATING SPACE LEASE ENTERED INTO IN THE ORDINARY COURSE OF BUSINESS BY THE AUTHORITY

AND A PRIVATE ENTITY ~~IF~~ AND APPROVED UNDER § 10-305 OF THE STATE FINANCE AND PROCUREMENT ARTICLE; OR

2. A PROCUREMENT GOVERNED BY DIVISION II OF THE STATE FINANCE AND PROCUREMENT ARTICLE.

(B) FOLLOWING THE SUBMISSION OF EACH OF THE REPORTS REQUIRED UNDER THIS SECTION, THE BUDGET COMMITTEES SHALL HAVE 45 DAYS TO REVIEW AND COMMENT ON THE REPORTS.

(C) (1) NOT LESS THAN 45 DAYS BEFORE ISSUING A PUBLIC NOTICE OF SOLICITATION FOR A PUBLIC-PRIVATE PARTNERSHIP, THE AUTHORITY SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, A REPORT CONCERNING THE PROPOSED PUBLIC-PRIVATE PARTNERSHIP.

(2) BY ~~JULY~~ JANUARY 1 OF EACH YEAR, THE AUTHORITY SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, A REPORT CONCERNING EACH PUBLIC-PRIVATE PARTNERSHIP UNDER CONSIDERATION AT THAT TIME BY THE AUTHORITY THAT HAS NOT BEEN REVIEWED OR APPROVED PREVIOUSLY BY THE GENERAL ASSEMBLY.

(3) BY JANUARY 1 OF EACH YEAR, THE AUTHORITY SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, A STATUS REPORT CONCERNING EACH EXISTING PUBLIC-PRIVATE PARTNERSHIP IN WHICH THE AUTHORITY IS INVOLVED.

(D) BY ~~JULY~~ JANUARY 1 OF EACH YEAR, THE AUTHORITY SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, A REPORT CONCERNING EACH PUBLIC-PRIVATE PARTNERSHIP FOR WHICH THE AUTHORITY IS PROVIDING CONDUIT FINANCING.

(E) NOT LESS THAN 30 DAYS BEFORE ENTERING INTO A PUBLIC-PRIVATE PARTNERSHIP AGREEMENT, THE AUTHORITY SHALL SUBMIT TO THE BUDGET COMMITTEES, IN ACCORDANCE WITH § 2-1246 OF THE STATE GOVERNMENT ARTICLE, AN ANALYSIS OF THE IMPACT OF THE PROPOSED PUBLIC-PRIVATE PARTNERSHIP AGREEMENT ON THE AUTHORITY'S FINANCING PLAN, INCLUDING THE AUTHORITY'S OPERATING AND CAPITAL BUDGETS AND DEBT CAPACITY.

(F) THE BOARD OF PUBLIC WORKS MAY NOT APPROVE A PUBLIC-PRIVATE PARTNERSHIP AGREEMENT UNDER § 10-305 OR § 12-204 OF THE STATE FINANCE AND PROCUREMENT ARTICLE THAT THE AUTHORITY PROPOSES TO ENTER INTO UNTIL THE BUDGET COMMITTEES HAVE HAD 30 DAYS TO REVIEW AND COMMENT ON THE AUTHORITY'S ANALYSIS OF THE AGREEMENT REQUIRED UNDER SUBSECTION (E) OF THIS SECTION.

SECTION 2. AND BE IT FURTHER ENACTED, That:

(a) There is a Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships.

(b) The Commission consists of the following members:

(1) two members of the Senate of Maryland, appointed by the President of the Senate;

(2) two members of the House of Delegates, appointed by the Speaker of the House;

(3) the Secretary of Budget and Management, or the Secretary's designee;

(4) the Secretary of General Services, or the Secretary's designee;

(5) the Secretary of Transportation, or the Secretary's designee;

(6) the Chancellor of the University System of Maryland, or the Chancellor's designee;

(7) the State Treasurer, or the State Treasurer's designee;

(8) the Executive Director of the Maryland Stadium Authority, or the Executive Director's designee;

(9) the Executive Director of the Maryland Economic Development Corporation, or the Executive Director's designee;

(10) the President of the Baltimore City Community College, or the President's designee;

(11) the President of Morgan State University, or the President's designee;

(12) the President of St. Mary's College of Maryland, or the President's designee; and

(13) a representative of the private sector who has experience and expertise in developing public-private partnerships, appointed by the Governor in consultation with the President of the Senate and the Speaker of the House.

(c) The Governor shall designate the chair of the Commission.

(d) The Department of ~~Budget and Management~~ Transportation, Department of General Services, and the Department of Legislative Services shall provide staff for the Commission.

(e) A member of the Commission:

(1) may not receive compensation as a member of the Commission;
but

(2) is entitled to reimbursement for expenses under the Standard State Travel Regulations, as provided in the State budget.

(f) The Commission shall:

(1) assess the oversight, best practices, and approval processes for public-private partnerships in other states, including the Army Enhanced Use Lease Program;

(2) evaluate the statutory ~~definition of~~ definitions of "public notice of solicitation" and "public-private partnership", as enacted by Section 1 of this Act, and recommend any amendments to the ~~definition~~ definitions to enhance ~~its~~ their utility and refine ~~its~~ their scope;

(3) make recommendations concerning the appropriate manner of conducting ongoing legislative monitoring and oversight of public-private partnerships, including the following issues:

(i) the appropriate time for submission for legislative review of a proposed conceptual plan, a letter of intent, an interim development agreement, a master development agreement, and an operating lease for a public-private partnership;

(ii) the need for a State agency to state its justifications for seeking a public-private partnership before issuing a request for proposals or any other solicitation;

(iii) the appropriate way to assess the effects of a public–private partnership on the State budget, including the aggregate effect on spending by fund source and revenues;

(iv) the need for disclosure of all public–private partnership revenue and expenditure data and assumptions;

(v) the need for disclosure of all public–private partnership financing assumptions, including projected return on investment and a cost–benefit analysis; and

(vi) the appropriate periods for legislative review and comment; and

(4) make recommendations concerning broad policy parameters within which public–private partnerships should be negotiated, which may include the following issues:

(i) the processes for reviewing and approving a letter of intent, an interim development agreement, a master development agreement, an operating lease, and a request for qualifications;

(ii) the length of a public–private partnership agreement, including ground rent, operating leases, and renewal terms;

(iii) noncompete clauses and adverse action clauses;

(iv) revenue–sharing;

(v) limits on the timing and size of rent, toll, or other revenue source increases;

(vi) the use of proceeds from concession agreements;

(vii) guidelines on minority business enterprise involvement and goals;

(viii) performance measures that are linked to State payments;

(ix) the number and timing of appraisals of land and structures;

(x) green building requirements;

(xi) structuring public–private partnerships in a manner that preserves and promotes important State policy objectives;

(xii) contract oversight and remedies for default;

(xiii) police jurisdiction;

(xiv) eminent domain;

(xv) maintenance requirements;

(xvi) solicitation of public comment regarding proposed public-private partnerships and proposed toll rates or user rates;

(xvii) methods for developing competitive solicitations for public-private partnerships, including the advisability of establishing a special fund to reimburse a private entity for predevelopment expenses;

(xviii) the role of the Maryland Economic Development Corporation or other State entities in the issuance of tax increment financing bonds, tax-exempt financing, or other conduit financing;

(xix) the effect on the State workforce of requiring a private entity to give a hiring preference to State employees;

(xx) a policy on foreign ownership of State assets and requirements to meet conditions of the Committee on Foreign Investment in the United States;

(xxi) the transition and process for the return of assets to State control at the conclusion of a public-private partnership agreement;

(xxii) the time period for assignment of a lease or sale of facilities without requiring State consent or providing the State the right of first refusal; and

(xxiii) the advisability of considering unsolicited public-private partnership proposals.

(g) On or before December 1, 2011, the Commission shall report its findings and legislative recommendations concerning the issues outlined in subsection (f) of this section for consideration during the 2012 regular session of the General Assembly to the Governor and, in accordance with § 2-1246 of the State Government Article, the General Assembly.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2010. Section 2 of this Act shall remain effective for a period of 2 years and 1 month and, at the end of ~~May 31, 2012~~ June 30, 2012, with no further action required by the General Assembly, Section 2 of this Act shall be abrogated and of no further force and effect.

Appendix 2
Members of the Joint Legislative and Executive Commission
on Public-Private Partnerships

Lt. Governor Anthony G. Brown, Chair

1. Mr. Robert Brams, Partner, Patton Boggs
2. Mr. Robert Brennan, Executive Director, Maryland Economic Development Corporation
3. Senator Richard Colburn, Senate of Maryland, District 37
4. Secretary Alvin Collins, Secretary, Department of General Services
5. Senator James DeGrange, Senate of Maryland, District 32
6. Mr. Michael Frenz, Executive Director, Maryland Stadium Authority
7. Delegate Tawanna Gaines, House of Delegates, District 22
8. Treasurer Nancy Kopp, State Treasurer
9. Delegate Stephen Lafferty, House of Delegates, District 42
10. Mr. Jim Sansbury, Associate Vice Chancellor for Financial Affairs, University System of Maryland
11. Secretary Beverley Swaim-Staley, Secretary, Maryland Department of Transportation
12. Dr. Joseph Urgo, President, St. Mary's College of Maryland
13. Dr. Carolane Williams, President, Baltimore City Community College
14. Dr. David Wilson, President, Morgan State University

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Maryland Department of Transportation

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Fred Rappe

Maryland Department of General Services

Michael Gaines
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Maryland Department of Budget and Management

Becky Burner
Chad Clapsaddle

Appendix 3

Meeting Summaries

During the months of August, September and October 2011, the Commission held four meetings, all of which were open to the public. These meetings were held in the Joint Hearing Room in the Legislative Services Building in Annapolis. During each of these initial meetings, expert panelists presented testimony on various aspects of public-private partnerships (P3) and Commission members had the opportunity to pose questions and discuss. Commission staff summaries of the testimony provided at the first four Commission meetings are provided below. Panelists' full testimony and presentations can be found on the Commission's website at <http://mlis.state.md.us/other/Public-PrivatePartnerships/index.htm>.

In November and December, the Commission held two additional public meetings, both of which were focused on distilling the knowledge gained from previous meetings and crafting the recommendations contained in this report.

Meeting #1: August 30, 2011, 10AM-Noon

The first meeting focused on general overview issues, the Commission's charge and financial background information. Chairman Lt. Governor Anthony Brown started the meeting with a series of introductory statements and set the tone for Commission discussions.

Ms. Jaclyn Hartman, from the Department of Legislative Services, presented an overview that covered P3 project benefits and risks, P3 projects in Maryland, the history of the P3 process, and current oversight processes. She also explained the Commission charge as outlined in legislation. Finally, she presented the Commission's proposed schedule and indicated that the Commission's report is due to the Governor and legislature prior to the start of the 2012 legislative session.

Mr. Richard Norment, Executive Director of the National Council for Public-Private Partnerships, discussed the various elements of a successful P3 framework. He emphasized that the secret to a successful P3 is to balance the strengths of both the public and private sectors. He also indicated that successful P3s generally require a supportive statutory and political environment, an organized management structure, a detailed business plan, a guaranteed revenue stream, strong stakeholder support, and a careful consideration of potential partners.

Mr. Jim Reed, Director of the Environment, Energy and Transportation Group at the National Conference of State Legislatures (NCSL), provided an overview of transportation P3 legislative activity and decision-making across the United States. Based on their research of P3 experience in other states, NCSL has developed a set of nine principles for state decision-makers to follow when considering P3 initiatives:

- Be informed;
- Separate the debates;
- Consider the public interest for all stakeholders;

- Involve and educate the stakeholders;
- Take a long-term perspective;
- Let the state's transportation program drive P3 projects;
- Support comprehensive project analysis;
- Be clear and transparent about the financial issues; and
- Set good ground rules for bidding and negotiations.

Mr. Tom Osborne, Managing Director and Head of Americas Infrastructure Group at UBS Investment Bank, provided an overview of recent market trends and the infrastructure investor landscape. He discussed the key criteria that make certain infrastructure assets suitable for P3s, both from the private perspective (long-term nature, stable or predictable cash flows, high barriers to entry, and service delivery driven) and the public perspective (public retention of long-term ownership, ability to generate cash proceeds, protection of public interest, and shifting of key risks to the private sector).

Finally, Mr. David Utz, Vice President, Investment Banking Division, Goldman Sachs, presented a perspective on infrastructure P3s, including key considerations when engaging the public. When framing the issue, it is important to present the P3 concept as a solution to a clearly-defined, existing problem. It is also important to emphasize the continuing government role and the expected economic development benefits and to highlight successes at key stages in the process.

Meeting #2: September 14, 2011, 10AM-Noon

The second meeting focused on P3 negotiations and projects in the transportation sector. Six expert panelists were invited to discuss various aspects of transportation P3s during this meeting.

Mr. Chris Bertram, Assistant Secretary for Budget and Programs and Chief Financial Officer at the United States Department of Transportation, presented the federal perspective on transportation P3s and discussed various federal programs designed to support P3 development. These include the Transportation Infrastructure Finance and Innovation Act (TIFIA), private activity bonds, railroad rehabilitation and improvement financing, and Transportation Investments Generating Economic Recovery grants. He pointed out that assistance through the TIFIA program has been part of the financing packages for all of the major new construction transportation P3s over the last five years.

Mr. Donald Fry, President and CEO of the Greater Baltimore Committee, presented as a representative of the Blue Ribbon Commission on Transportation Funding. The Blue Ribbon Commission was established in 2010 to review, evaluate and make recommendations concerning current State funding sources; short- and long-term transportation funding needs; options for transportation P3s; the ability of regional transportation authorities to meet State transportation needs; the impact of economic development and smart growth on transportation funding; and options for sustainable long-term revenue sources for transportation. The Blue Ribbon

Commission made several recommendations for transportation P3s including the establishment of centralized enabling legislation to clearly promote a balanced approach to transportation P3s throughout the State and to serve as the primary reference for transportation P3 statutory requirements.

Ms. Michele Whelley, President and CEO of the Central Maryland Transportation Alliance, presented the Transportation Alliance's mission and goals. The Transportation Alliance is focused on the creation of a multi-modal system of interconnected highways, rail and other modes of public transportation that connects residents to employment, housing, education, services and life-style amenities throughout the Central Maryland region.

Mr. Ronald Hartman, Executive Vice President of Veolia Transportation's Rail Division, discussed the application of P3s to public transit. He noted that a typical P3 contract for transit would include a comprehensive, long-term role for the private sector including operations; maintenance; marketing; planning; analysis; integration of modes; supply, finance, and/or ownership of equipment; fare risk; and an extensive incentive/penalty regime. He noted that it is important for the public partner to allow for creativity and the potential for things to be done differently; to take sufficient time to evaluate and plan the process upfront; to ensure that public and private sector goals and incentives are fully aligned; to be prepared to make decisions quickly once the negotiations and contracting process begins; and to constantly seek to ensure both mutual accountability and mutual respect for the roles of all parties.

Mr. Mark Montgomery, CEO of Ports America Chesapeake, and Ms. Beverley Swaim-Staley, Secretary of the Maryland Department of Transportation, jointly presented an overview of the Seagirt Marine Terminal P3 transaction. Based on their experience, they found that a successful P3 requires well-defined objectives and evaluation criteria issued at the beginning of the process; reasonable expectations by both public and private sectors; a willingness by all parties to work together; commitment by the government and the private sector to the success of the project; a concession agreement that is clearly a win-win for both sectors; creativity in structuring the agreement's financial considerations; meaningful economic benefit to the broader community; consideration for all stakeholders; and a well-coordinated approvals process that enables a quick deal closing.

Meeting #3: September 28, 2011, 10AM-Noon

The third meeting focused on various issues related to P3s in the utilities and social infrastructure sectors. It was divided into three distinct sub-panels: utilities (water, energy, etc.), general social infrastructure (hospitals, court houses, etc.), and education facilities (higher education and K-12). Three panelists addressed utility issues, four panelists addressed general social infrastructure issues, and three panelists addressed education facility issues.

Mr. David Choate, Vice President with American Water's, discussed the application of P3s within the water utility industry. He explained the various P3 contract structures that tend to be more typical in the water industry and highlighted a couple of relevant case studies. He indicated that transparency and consistency of cost/benefit assumptions are critical; ambiguity in procurement and negotiation processes can create unnecessary costs; and the establishment of a reimbursement fund for P3 proposers could help ensure adequate participation in solicitations.

Mr. Michael Peck, Principal with MAPA Group, discussed examples of P3s in the energy industry. He used various examples from other states to illustrate the potential for P3s in energy and highlight key lessons for the Maryland context.

Mr. Jacob Gallun, Assistant Director for Enhanced Use Lease (EUL) with the Army Corps of Engineers, discussed the unique structure of EUL arrangements. He pointed out that, while EULs are not P3s, they do have potential lessons that could be applied to P3 arrangements. He defined an EUL as a lease of non-excess property under control of the Secretary, providing a means to leverage under-utilized Army assets in the real estate market. Uses considered for EULs include general office space, utility plants, testing facilities, research and development centers, intermodal distribution centers, and recreational facilities. Based on experiences with EULs, potential crossover lessons for P3s include:

- Improved project preparation, screening, and selection should happen well in advance;
- A dedicated review process and personnel should be established;
- Documentation and evaluations should be standardized; and
- The post-award monitoring and administration should be sufficiently robust.

Mr. John M. Furman, East Region Vice President with Heery International Inc., and Mr. Mike Lloyd, Vice President with Balfour Beatty Capital, discussed social infrastructure P3s largely from the investor perspective. Mr. Lloyd pointed out that P3s are not a replacement mechanism for traditional financing approaches and they should not be expected to result in cheaper financing costs. Instead, governments have increasingly considered P3s because of the potential for better value for money created through improved delivery performance, overall lower lifecycle costing, and other efficiencies. They recommended that each P3 needs to be planned thoroughly in advance and it is important to remember that every deal is different.

Mr. Declan McManus, Principal with KPMG Corporate Finance, and Mr. Ted Hamer, Director with KPMG Corporate Finance, provided an overview of the non-transportation applications of P3s, with a specific focus on social infrastructure. They explained that, because social infrastructure projects generally do not pay for themselves, a social infrastructure P3 typically requires a payment mechanism such as availability payments, user fees, or real estate based revenues. Based on their experience, social infrastructure projects that have worked in the past were those with clearly defined project need and upfront capital expenditure requirements; transparent P3 solicitation guidelines; competitive tension; and political and funding support.

Mr. James Sansbury, Associate Vice-Chancellor for Financial Affairs for the University System of Maryland (USM), discussed the P3 process in the context of the typical higher education campus development project. Based on the USM experience, key broadly applicable lessons were identified: the need for an oversight process, the need for early involvement by key parties, the need for a reasonable review period, and the need for flexibility in the process.

Mr. Richard F. Sliwoski, Director of the Department of General Services for the Commonwealth of Virginia, provided an overview of Virginia's social infrastructure P3 legislation and process. In Virginia, the guidelines and processes established for social

infrastructure are different from those established for transportation infrastructure. For social infrastructure projects, a public-private partnership advisory commission, comprised of eight legislative and three executive members, was established to review proposals and contracts.

Dr. David Lever, Executive Director of the Maryland Interagency Committee on School Construction (IAC), discussed the application of P3s to public school construction in Maryland. He explained that the Public Schools Facilities Act of 2004 enabled alternative financing for school construction, as well as alternative procurement and project delivery. IAC has looked to experiences elsewhere, particularly in the United Kingdom and in Canada, for lessons that could be applied in the Maryland context. IAC identified certain situations when alternative funding and financing could make sense for public school construction, including when there is a massive but short-term building task; when the local board has an asset that can be leveraged; when a critical project is needed, but the normal capital improvement priorities cannot be disturbed; when a specific opportunity presents itself; or when the overall task is greater than the available and anticipated resources.

Meeting #4: October 12, 2011, 10AM-12:30PM

The fourth meeting focused on both creating a process for P3s and on labor and public interests. Five panelists spoke on creating a P3 process and five panelists represented labor and the public interest.

Ms. Samara Barend, Vice President and Strategic Development Director for P3s with AECOM, spoke about key process issues, based on her experiences in both the public and private sectors. She noted that the appropriate degree of legislative oversight depends on the State's broad policy goals, but completion of all legislative oversight steps as early as possible in the P3 process is best for attracting serious bidders. Ms. Barend recommends the creation of a State entity wholly focused on P3 projects, as long as that entity has adequate resources to establish a core of full-time staff and retain necessary advisors. She suggested that Maryland look to Canadian entities such as Infrastructure Ontario or Partnerships British Columbia for examples of successful P3 governmental units. She suggested a two-step process for P3 project screening, including both a high level, qualitative analysis followed by a more detailed, quantitatively-based Value for Money analysis.

Ms. Laurie Mahon, an independent P3 consultant, spoke about Maryland's P3 process based on her recent experience with Maryland Port Administration's completed Seagirt P3 and Maryland Transportation Authority's in-progress travel plazas P3. She recommended that any P3 process recognize the existing separation and balance of responsibilities between the Legislative and Executive branches. The legislature can develop the broad framework for P3 review, but the day-to-day implementation of a P3 program should remain the responsibility of the Executive Branch, including the sector-specific agencies. The process must be predictable, efficient, and clearly understood by potential private partners. In many ways, a P3 is just another infrastructure delivery method that requires many of the same sector-specific evaluations and analyses as any other project. It is for this reason that each State agency must be able to foster an internal culture that regards P3 as an additional item in the infrastructure development toolbox. By fully incorporating P3s into the day-to-day thinking of agency decision-makers, it is more likely that a comprehensive, thoughtful consideration of its potential for a broad range of projects will occur.

Ms. Margie W. Ray, Program Manager with the Commonwealth of Virginia's Office of Transportation Public-Private Partnerships, presented the structure of and policy approach embedded in Virginia's Transportation P3 program. While Virginia has had transportation P3 legislation since 1995, subsequent efforts have served to clarify and enhance Virginia's approach to transportation P3s. In 2010, the separate multi-modal P3 office was established, along with a dedicated funding source for operations of that office. Based on the Virginia experience, Ms. Ray recommended that Maryland set clear policy goals with an eye to the big picture; establish a business process; provide adequate resources for staff; thoroughly assess projects and make sure the concepts are fully mature before taking them to the market; and seek to provide outreach opportunities on projects to promote transparency.

Mr. Christopher D. Lloyd, of McGuireWoods Consulting, LLC, spoke about broad guidelines for P3 program best practices. He emphasized that it is important to strike a balance in outlining the oversight process. He recommended that strict controls over accountability, transparency and conflicts of interest should be maintained in the Executive Branch, and that legislative involvement should relate to consultation and identification of issues that could impact long-term State commitments. Mr. Lloyd pointed out that the legislature already retains a strong degree of control through the existing appropriations process. He suggested that the establishment of a P3 governmental entity could help level the playing field in negotiations, as long as it is truly perceived by the private sector as an "equal" in negotiations.

Mr. Warren Deschenaux, Director of the Office of Policy Analysis at Maryland's Department of Legislative Services, spoke about Maryland's mixed success thus far with P3s and potential improvements to the State's P3 process. He noted that the Seagirt P3 has gone well thus far, though it is still in its infancy; the travel plazas request for proposals had to be rebid when the original document became too unwieldy; and the State Center P3 has faced questions and legal challenges for several years. He suggested possible improvements to the State's P3 process:

- Requiring "less love and more analysis," or requiring development of a business case for P3 projects;
- Further professionalize the project development and procurement process for P3s;
- Create a comprehensive statutory framework;
- Utilize appropriate staff or contractors when necessary;
- Require more private sector "skin in the game"; and
- Do not use P3s just to avoid State debt limits or capacity issues.

Mr. Dennis Houlihan, Labor Economist for AFSCME International, discussed the labor community's perspective of P3s. He suggested that there should be significant efforts to protect the public interest including a comparison of public and private options and an open process. He also suggested the adoption of policies and provisions addressing risk vs. return; user fee levels; revenue-sharing; access to services; public control and flexibility; dedicated funding for oversight and reporting; and staffing and employment standards.

Ms. Nancy Van Meter, Deputy Director, Research Department for the American Federation of Teachers, continued the discussion of the labor perspective. Ms. Meter pointed out some of the key potential risks and challenges associated with P3s, illustrated by examples from elsewhere in the United States where P3s did not meet their intended goals or did not equally distribute the projects' benefits.

Mr. Gerald Waites, Partner at O'Donoghue & O'Donoghue LLP, spoke on behalf of Laborers-Employers Cooperation and Education Trust. He suggested that Virginia's Guidelines for P3 projects could serve as a good model for any future Maryland P3 guidelines. Mr. Waites emphasized the need for Maryland to utilize community benefit and project labor agreements for future P3s and he provided supporting information regarding labor relations and community benefit provisions.

Ms. Sonia Axter, Managing Director Infrastructure Investments for The Union Labor Life Insurance Company Investment Company (Ullico), discussed her company's function, how it relates to P3 investments, and the overall labor perspective. In recent years, Ullico has been working to create an investment product, primarily raised from multi-employer pension funds, to invest equity in infrastructure businesses across the United States and Canada. Based on this experience with infrastructure investment, she indicated that it would be best for Maryland to establish a programmatic approach to P3 development and to avoid late stage legislative approvals in its process. She did see a role for P3s in supporting more social infrastructure projects, with the ability to do availability-based payment structures. She cited both Ontario and British Columbia as places that had good models for P3 offices.

Ms. Ellen Dannin, a Fannie Weiss Distinguished Faculty Scholar and Professor of Law at Penn State's Dickinson School of Law, discussed the key findings from her research into selected infrastructure P3 contracts and their effects on state and local governments. Her research focused on three provisions that are commonly found in infrastructure contracts: compensation events, non-compete provisions, and contractor objection to or compensation for governmental actions. Professor Dannin also emphasized the need for transparency during and after P3 projects. She highlighted the need for the public to be able to access the final agreements associated with P3 projects.

Appendix 4

Comments Received from Stakeholders Regarding Draft Recommendations

Comments from Commission Members

Robert Brams

Mr. Brams is interested in creating different approval processes for projects based on their monetary value.

St. Mary's College of Maryland (Thomas Botzman)

I am forwarding the following comments regarding the recommendations to be proposed by the State of Maryland's Public Private Partnership (P3) Commission.

The staff recommendations notes that the three exclusions in the existing legislation should be continued. As noted at the meeting with the Lieutenant Governor on November 16, item (II) (3) typically includes all agencies with capital or bonding authority. We suggest the following revised language:

“Public-Private partnership agreements entered into by the University System of Maryland, Morgan State University, St. Mary's College of Maryland, or Baltimore City Community College, where no State funds are used to fund or finance any portion of a capital project.”

Thank you for providing St. Mary's College of Maryland with the opportunity to participate in the State of Maryland's P3 Commission.

Regards,
Thomas Botzman, Ph.D. Vice President for Business and Finance

University System of Maryland (Jim Sansbury)

Definition of P3 – We are concerned that the definition is too ambiguous and could include unintended contracts. We suggest using the attached definition prepared by OAG real estate attorneys.

USM Suggestion for P3 Definition

Definitions:

“Asset” means improvements on State Property. Asset includes public infrastructure projects such as roads, bridges, piers, water and sewer systems, prisons, State hospitals, and buildings that are used by a State agency or unit as offices for its employees and/or to provide services to the public.

“Contract” means a contract or lease including a ground lease.

“Long-term” means a term of 20 years or more.

[“Private entity” has the meaning defined in the current statute §10A-101(a)(3)].

“State Property” means improved or unimproved real property either owned by the State or controlled by the State under a lease.

A public-private partnership is a long-term contract between a State agency or unit and a private entity pursuant to which the private entity assumes control over State Property and which includes *all* of the following components:

1. The private entity agrees to develop, re-develop, construct or reconstruct an Asset on State Property using its own or borrowed funds, *and* to thereafter operate and maintain the Asset;
2. The State receives a benefit from the contract either in the form of fees or rents paid to it, occupancy of the Asset, or other quantifiable benefit;
3. The private entity performs a traditional governmental function using the Asset and charges the public or other users of the Asset fees, tolls, rents or other charges that would have been collected by the State had the State owned or controlled the Asset;
4. The State agency or unit remains ultimately accountable for the Asset and its governmental function; and
5. The State retains the right to re-gain control over the Asset at the end of the term of the contract, or upon default of the private entity.

P3 Office – A P3 Office can be very beneficial as long as it is used to nurture P3s by creating a forum to share information, ideas, and best practices as well as prepare agencies for Phase 1 and Phase 2 legislative reviews. However, we need to be careful that the Office adds value and is not viewed as an “extra step” in the process. Perhaps the Executive Order could state that an agency should involve the P3 Office in any P3 transaction from initial discussions or as early as practical?

Legislative Review Phase 2 – We are concerned that the process is too long and places an uncertainty on project approval after negotiations are complete even though the process is “review and comment” only. We believe that the requirement for review after contract negotiations are completed will discourage private investment in P3s. Instead, review and comment on a “term sheet” that includes the essential elements of the deal could occur while the agency and private entity complete the details of the agreement and could streamline the process. Also, the Seagirt Terminal is an excellent example of effective communication to the budget committees and the Treasurer’s Office so that issues or concerns are resolved early in order to expedite the “review and comment” period without any problems. Can this communication process be put in legislation or regulation?

Role of State Financing – Agree with other Commission members that there should be no cap on State funding.

Police Jurisdiction – As written, the staff recommendation could subject State projects to local zoning and subdivision laws from which they are now exempt based on principles of sovereign immunity. To avoid this, we suggest clarification to state that “all State and local criminal laws apply.”

Comments from Outside Stakeholders

Mid-Atlantic Laborers-Employers Cooperation & Education Trust

Developing Fair Labor & Contracting Provisions for Maryland’s New P3 Legislation

Protecting Local Wage Standards Ensuring Skilled Local Craft Labor Effective P3 Solicitation Procedures

Prepared by: Gerard M. Waites, Esq., O’Donoghue & O’Donoghue, LLP

RECOMMENDED LEGISLATIVE PROVISIONS

1. Application of Maryland’s Prevailing Wage Law

All construction associated with P3 projects, including demolition, renovation, alteration and remodeling work, shall be subject to MD. CODE ANN., STATE FIN. & PROC. §§ 17-201 to -226.

2. Use of Craft Labor Agreements in Project Construction

An offeror selected as the lead firm responsible for an approved P3 project shall execute a local labor agreement (LLA) with the building trades unions in the vicinity of the project location, which have the capability to staff the project with skilled, trained craft labor personnel needed for the project. Such an agreement shall be pre-hire collective bargaining agreements developed and executed in compliance with applicable federal law, 29 U.S.C. 158(f). An LLA subject to this section shall require that:

- (a) all contractors and subcontractors on the project execute and be bound by the LLA applicable to the project; through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;
- (b) all contractors and subcontractors be permitted to compete for and perform work on contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;
- (c) all craft labor personnel used on the project be hired through the local hiring halls and referral systems of the local labor organizations signatory to the LLA;
- (d) contain guarantees against strikes, lockouts, and similar job disruptions;
- (e) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

- (f) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and
- (g) fully conform to all statutes, regulations, and Executive Orders.

3. Requiring Effective Solicitation Procedures for P3 Projects

- (a) Adequate and Timely Public Notice of P3 Solicitations
- (b) Open and Fair Competition for P3 Developers/Offerors
- (c) Open and Fair Competition for P3 Contractors and Subcontractors
- (d) Detailed Disclosures of Developer/Offeror Past Performance Track Records and Present Performance Capabilities
- (e) Detailed Disclosures of Contractor/Subcontractor Past Performance Track Records and Present Performance Capabilities
- (f) Effective Best Value Evaluation and Selection Criteria for P3 Projects
- (g) Essential State Oversight of P3 Evaluation and Selection Procedures
- (h) Required Reporting of P3 Results After Project Completion

Service Employees International Union (SEIU)

Lieutenant Governor Anthony Brown,

The State Council applauds your leadership on the Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships and the work the Commission has done in thoughtfully examining the costs and benefits of P3s.

With over 2.2 million members, the Service Employees International Union is the largest and fastest growing union in North America. We are focused on uniting workers to improve their lives and the services they provide. In Maryland and DC, the seven SEIU locals that make up the State Council represent over 40,000 Health Care, Property Service, and Public Service Workers.

We would like to highlight a few principles which were included in our letter dated November 4, 2011, and reaffirm our belief that Maryland's citizens are best served if the Commission explicitly includes the following principles in the Final Report:

* Partnerships must advance the public interest by creating and protecting family sustaining jobs. Any partnerships should maintain or improve standards of living within our communities by including prevailing wage standards, project labor agreements and labor peace agreements.

* Ensure that collective bargaining rights enjoyed by current workers are not diminished if the asset is handled by a private entity in the future.

* The final report should recommend that any legislation would require the State to seriously examine the length of the agreement and consider possible limitations on very long-term agreements and not close off the ability to re-negotiate the terms of risk-taking if the project extends for many years. The agreements must include performance measures and benchmarks to ensure that the public receives the maximum benefit from the asset.

* Protect taxpayers by ensuring private entities are not entitled to “windfall profits” and place limitations on private equity management fees.

Thank you and we are confident that the principles outlined above will be fully considered for inclusion in the final Commission Report.



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November 4, 2011

As Maryland looks to meet ever growing infrastructure demands, it is important to explore a variety of funding options to ensure we have sufficient investment in our public structures. This includes public-private partnerships, or P3s. P3s can be a valuable tool as the State looks to do more with less but they are not a "silver bullet" and carry significant risk.

With over 2.2 million members, the Service Employees International Union is the largest and fastest growing union in North America. We are focused on uniting workers to improve their lives and the services they provide. In Maryland and DC, the seven SEIU locals that make up the State Council represent over 40,000 Health Care, Property Service, and Public Service Workers.

The State Council applauds the *Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships* for the work it has done in examining the costs and benefits of P3s and encourages the Commission to continue its thoughtful and inclusive process as the final report is drafted.

The State Council recommends the Commission embrace the following principles:

1. **Partnerships must advance the public interest creating and protecting quality jobs.**
 - The public interest is best protected through an open and transparent process that brings all interested parties together before a project is approved.
 - Programs should stimulate the economy while protecting and creating quality jobs. The state should ensure that existing public sector collective bargaining agreements are not impaired.
 - Partnerships should protect good jobs by creating and improving assets that support local businesses and improve standards of living within our communities by including *prevailing wage standards and labor peace agreements*.
2. **Any legislation should include the creation of an independent entity that monitors, evaluates, and approves P3 projects.**
 - Experience from Canada, Australia and Europe shows that these boards work best when they are impartial bodies that provide advice based on the public interest.
 - The entity would provide research, expertise, and analysis of a partnership's suitability and best practices.
 - The entity should take an unbiased approach for determining the best method for a particular projects financing. Whether the project is best suited for a P3 arrangement or more traditional financing methods.

(Over)

- The entity should be made up of business, labor, civic and community leaders, elected officials, and planners.
 - There needs to be ongoing monitoring of the operating, environmental, health and safety, and maintenance standards of the asset. The agreement between the private entity and the state must detail performance and operational standards, and penalties for non-compliance.
 - As the Commission has heard, the more vetting done at a beginning of a P3 project the better the outcome in the long run. This includes conducting an Economic Impact Analysis that provides decision makers with a real comprehensive analysis before a proposal is finalized.
- 3. The Bidding Process must be Transparent.**
- A well-run bidding process can produce the best possible bids that further the state's interests.
 - The process should be standardized and take into consideration:
 - Cost
 - Impact on the environment
 - Impact on taxpayers (present and future)
 - Benefits to the public
 - Long-term viability of the project
 - Community participation
 - Minority business participation
 - Small business participation
 - Local hire opportunities
 - Health and safety implications
 - Key documents and contracts must be made available to the public
 - The process should promote the use of responsible contracting, by scoring contractors on their employment standards.
- 4. Partnership agreements must be results-driven and protect taxpayers through risk sharing, reasonable profit sharing, and performance pay.**
- Many P3s are long term projects. The public interest in the asset does not go away after an agreement is reached. Therefore, the state should seriously examine the length of the agreement and consider possible limitations on very long term agreements and not close off the ability to re-negotiate the terms of risk-taking if the project extends for many years.
 - The private entity should not be entitled to "windfall profits" from a P3; the recommendations should include capping of private entity profits at a reasonable rate of return and placing limitations on private equity management fees.
 - Project risk should be shared by the public and private sector commensurate with return expectations. The Commission should include in its recommendations that the legislation require each proposal to discuss in detail how the risk is to be shared (prior to project approval), and should seek to minimize the burden on present and future taxpayers.

American Federation of State, County and Municipal Employees (AFSCME)

AFSCME MARYLAND

190 W. OSTEND ST., SUITE 102, BALTIMORE, MARYLAND 21239
410.587.1515, FAX 410.827.5436, 800.492.1996



December 5, 2010

Mr. Anthony G. Brown
Lt. Governor
State of Maryland
State House
Annapolis, MD 21401

Re: Recommendations on Public Private
Partnerships

Dear Lt. Governor Brown:

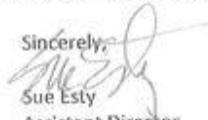
Thank you for the opportunity to discuss suggestions on the recommendations regarding Public Private Partnerships with you and Ben Stutz. Our Director, Patrick Moran and I appreciate your willingness to include the following concepts:

1. To provide employee protections that reflects those in Personnel and Pensions Section 13-402. We would recommend using language used there but substitute P3's so that it would read as follows:

The policy of the State is to use State employees to perform all State functions in State facilities when utilizing a Public Private Partnership in preference to contracting with the private sector to perform these functions.

2. To provide public access to P3 proposals before and after they become final. To be effective, it will be important to do in a way that provides enough time for meaningful public review and input.
3. To include some specific criteria that can be the basis for evaluating whether a specific project is appropriate for a P3. Attached is a list of types of questions that could be incorporated, at least by using the major categories: efficiency, workforce implications, budgetary implications, environmental implications, economic impact, risk, and whether there are more appropriate alternatives.

I hope this information proves to be helpful. Thank you for your interest in our comments.

Sincerely,

Sue Esty
Assistant Director

cc. Ben Stutz, Policy Director, Office of the Lt. Governor

www.afscmemd.org

We make Maryland happen.

Appendix 5 Handout from the Public Forum



Forum on Public-Private Partnerships and Investments in Public Infrastructure

Message from the Chair



As Chair of the Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships, I thank you for attending today's Maryland Forward forum on Investments in Public Infrastructure. Today is an opportunity for you to tell us how Maryland can better utilize public-private partnerships to maintain, improve and expand our State's infrastructure.

Infrastructure of all types – roads, transit, ports, hospitals, courthouses, water and sewer, and education – is critical to our State's economy, productivity, environment and quality of life. Governor O'Malley and I recognize that a robust infrastructure plan will strengthen Maryland and help create jobs.

While public-private partnerships are not the only solution, expanding their use can help us jumpstart projects that otherwise might not be built, increase private investment in public infrastructure and put our construction industry back to work.

Sincerely,

A handwritten signature in black ink that reads 'Anthony G. Brown'.

Anthony G. Brown

Today's Agenda

- 8:30 a.m. Registration
- 9:30 a.m. Welcome
*Dr. Carolane Williams
President, BCCC*
- 9:35 a.m. Opening remarks
Lt. Governor Brown
- 9:45 a.m. Keynote Address
*Sandy Apgar
Principal, Apgar & Company*
- 10:15 a.m. Overview of Public-Private Partnership Commission,
Jaclyn Hartman, Department of Legislative Services
- 10:30 a.m. Moderated breakout sessions
(Lunch provided)
- 12:30 p.m. Break
- 12:45 p.m. Discussion with Lt. Governor and moderators on how to maximize public-private partnerships and develop a statutory framework for review and approval
- 2:00 p.m. Q&A with audience
- 2:30 p.m. Conclude

Keynote Speaker: Sandy Apgar

Mahlon (Sandy) Apgar, IV, advises senior leaders of business and government organizations on strategic and organizational issues. He has served more than 150 companies and governments in the US and abroad, including icons such as American Express, AT&T, Ford and IBM. He recently co-led the business transformation initiative for a major local authority and advised the Treasury's task force on GM's restructuring. In the Clinton Administration, Apgar designed and launched the Army's award-winning public-private partnerships to improve soldiers' quality of life and produce substantial savings. As a McKinsey partner, he led the national urban management team for Saudi Arabia and developed urban guidelines for the UK government. He has authored numerous articles, including seven in the Harvard Business Review, and has taught at Harvard, Oxford, Princeton and Yale. Apgar earned an AB from Dartmouth College, an MBA from the Harvard Business School, and was a graduate research scholar at Oxford University.

About the Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships

Members of the Commission

- Lt. Governor Anthony Brown, Commission Chair
- Senator Richard F. Colburn
- Senator James E. DeGrange, Sr.
- Delegate Tawanna P. Gaines
- Delegate Stephen W. Lafferty
- State Treasurer Nancy K. Kopp
- Secretary Alvin Collins, Department of General Services
- Secretary Beverley K. Swaim-Staley, Department Of Transportation
- Jim Sansbury, Associate Vice Chancellor for Financial Affairs, University System of Maryland
- President Carolane Williams, Ph.D., Baltimore City Community College
- President David Wilson, Ed.D., Morgan State University
- Dr. Thomas Botzman, St. Mary's College of Maryland
- Robert Brams, Patton Boggs, Private Sector Representative
- Robert C. Brennan, Executive Director, Maryland Economic Development Corporation
- Michael J. Frenz, Executive Director, Maryland Stadium Authority

Commission's Responsibilities:

The commission is tasked with:

- assessing the oversight, best practices, and approval processes for P3s in other states;
- evaluating the statutory definition of P3s and recommending amendments as necessary;
- making recommendations for a process of legislative monitoring and oversight of P3s; and
- making recommendations on broad policy parameters within which P3s should be negotiated.

Commission Timeline

| Meeting Date | Subject |
|--|--|
| August 30th | Overview of P3's |
| September 14th | Transportation Infrastructure |
| September 28th | Utilities and Social Infrastructure |
| October 12 | Labor, Public Interest and Experts from other States |
| November 4 | Public Forum |
| November 16 - 1pm to 3pm — Annapolis | Review of Recommendations |
| December 14 - 10am to 12pm — Annapolis | Review of Final Report |
| Early January 2012 | Report to Governor and General Assembly |

For more information please visit the Commission's website at: <http://mlis.state.md.us/other/Public-PrivatePartnerships>



Appendix 6

Summary of Discussions from the Public Forum

Utilities Breakout Session

Moderators:

- Non-Maryland: Richard Norment, Executive Director, National Council for Public-Private Partnerships
- Maryland: Malcolm Woolf, Director, Maryland Energy Administration

Key Comments:

What are some of the benefits, challenges and unique needs of P3 projects in this sector?

- There are many opportunities for P3s for stormwater improvements and bay restoration projects that the State is not taking advantage of.
- The current Maryland legislative framework is seen as unfriendly for water P3s because of its narrow scope and because there have been few projects in Maryland thus far. The law should be as inclusive as possible and should allow for a full range of project types and procurement methods.
- The Virginia model is good because it is broad in scope and allows for unsolicited proposals.
- Utilizing P3s for water operations may result in higher costs to the consumers, but this could be due to the private sector spending more on maintaining, improving and upgrading the facilities than the public sector does.
- Life-cycle costs for P3 projects in water and utilities may appear higher for the private sector, but it is often an unfair comparison because the public sector routinely defers maintenance that the private sector does on time.
- Allowing for the use of request for qualifications may result in a more robust and competitive project than using a request for proposals.
- Requests for information and requests for expressions of interest can also be useful tools for collecting ideas and gauging private sector interest.
- For water and utilities, local jurisdictions in Maryland often play a larger role than the State. Local jurisdictions' knowledge and process for P3s vary greatly. The State's *Watershed Implementation Plan* could be used as a tool to encourage municipalities and counties to look at capital needs.
- Maryland should look to inventory its excess and underutilized land for possible P3 opportunities.

What criteria do you think is important for choosing to do a project as a P3 rather than a traditional State capital project?

- P3s can be useful on addressing the shortage of public sector capital.
- Even when private sector capital is used, the public sector will still have responsibility in the public's eyes.
- P3 projects for water and utilities directly affect citizens through rates.
- Projects of all sizes work, but projects larger than \$100 million typically attract the larger capital and equity firms.

What is the best way to balance P3 projects need for an expedited and sometimes confidential review and approval process with the State's need for transparency, accountability, and oversight?

- There needs to be a streamlined process with well-defined steps.
- There is a need to educate the public about the need for the project, the impact on operations and rates, controls that will be in place, and the effect on jobs.
- The process should include a clearly-defined regulatory process with a clear end date for raising objections or concerns for the project.

How should the State manage P3 projects?

- Customer service is important for private entities anyway, so performance contracting/measures are not a concern.
- The public sector needs to retain some control authority to protect the public interest.
- When federal money is used, additional requirements often apply.
- Transparency creates trust.
- Contracts should include independent audits (when applicable) or other oversight methods.
- Current State regulatory processes may be sufficient and can be included in P3 contracts.

What is the role of union and labor interests in P3 projects?

- Requirements relating to minority inclusion do not pose a problem for the private sector.

What role should the State play in financing P3 projects?

- Federal/State credit support may play a role in some projects-risk sharing

Final Comments:

- The Governor's recent Executive Order on streamlining regulatory processes is a useful tool to encourage input from all stakeholders.

Transportation Breakout Session

Moderators:

Group A:

- Non-Maryland: Joung Lee, Associate Director for Finance and Business Development, American Association of State Highway and Transportation Officials
- Maryland: Bruce Gartner, Director of Policy and Governmental Affairs, Maryland Department of Transportation

Group B:

- Non-Maryland: Laurie Mahon, CEO, Laurie Mahon Inc.
- Maryland: Heather Murphy, Deputy Director of Planning and Capital Development, Maryland Department of Transportation

What are some of the benefits, challenges and unique needs of P3 projects in this sector?

- A P3 is a partnership between the public and private sectors, bound by contract for a relatively long duration and requiring that both parties share in the risk. This could take many forms along a spectrum of potential public-private relationships, including the structure that characterized Seagirt Marine Terminals.
- All P3s require some sort of revenue stream, which is often a struggle for projects that are not typically revenue-generating. It is in these cases, such as for mass transit, that an availability payment structure may be appropriate.
- It is important to identify projects that could be a P3 on a revenue-producing basis, which in turn could help free public funding for other worthy public infrastructure projects.
- A P3 can bring many advantages to the table, only some of which are monetary in nature. A P3 also brings an opportunity for risk transfer, innovation and enhancement of expertise. With a long-term contract, private bidders can come up with more innovative project delivery approaches that consider the full lifecycle of an asset.
- By delivering the full lifecycle cost of an asset at the lowest public subsidy, the private sector can help contribute to good stewardship of the public dollar.

- One of the benefits of a P3 approach is that the private entity takes on the challenge of maintaining the asset over its entire lifecycle. Upfront capital investment is typically only about 10% of total asset cost and the rest is in the outlays over the entire asset lifecycle. So, while the upfront cost associated with a P3 may be higher than a more traditional delivery method, it represents the tradeoff required for achieving cashflow stability and reliability over a period of time. A P3 contract typically dictates the long-term payment stream required in exchange for long-term asset responsibility, often resulting in greater discipline in long-term public budgeting.
- A P3 may help reduce public contributions – federal, state, or local – required for a particular project.
- Most P3s, such as the Denver RTD project, involve a creative and diverse mix of public and private funding sources.
- The public sector is sometimes not as good at achieving its intentions as the private sector.
- Legislative Policies to address:
 - Do current statewide policies apply to P3s?
 - With the federal National Environmental Policy Act process and Alternatives Analysis process, when do we define a project as a P3?
 - Parallel approval process, separate legislative process will inhibit private sector ability to bid for project.
 - Size of deal could influence types of approval process.
 - The need to establish goals up front, not at the end; provide information to legislature upfront.
 - Legislative approval is a risk on larger projects and may reduce competition.
 - Is the current structure backwards? One option would be to have agency, Board of Public Works, and Treasurer approvals before solicitation.
 - Need to get term sheet approved upfront and then issue solicitation document.

What criteria do you think is important for choosing to do a project as a P3 rather than a traditional State capital project?

- P3 projects should be selected and evaluated with specific policy considerations in mind, including the potential economic impacts and development associated with the project. Seagirt as an example of this, since job creation was consistently viewed as one of the benefits of that project.
- P3 projects should clearly create value for the taxpayer.
- It is beneficial to identify projects with extensive and sustained economic multiplier potential.
- Projects that encourage competition between private sector bidders can help create greater value for the public sector. This can happen when multiple private entities are

ving to be the partner in a specific P3 venture, thus driving all participants to identify the most efficient, streamlined, cost-effective solution.

- If a state focuses on creating a diverse pipeline of P3 projects, with varying size and complexity, it can create a space where smaller businesses can actively participate in the P3 process, either as part of a larger team or as prime of its own team.
- Whenever possible, provisions like small business set-asides, etc. should remain for major P3 projects.
- The State has a vested interest in ensuring strong wage policies and well paid workers are part of any project deals.
- The State can still dictate general hiring terms in the contract. However, based on experience with the Seagirt project, there may be legislative measures that help to better ensure the State's ability to include hiring goals contractually, such as for minority business participation.
- One of the labor-related benefits of a P3 approach is that the process usually rewards the best value proposal, and not the lowest bid proposal. When working from a best value perspective, taking into account the full lifecycle cost, it is often easier to incorporate mutually beneficial labor arrangements.
- Another labor-related benefit of P3s is the possibility for labor to invest directly in these projects. While existing laws make this difficult, certain states, such as Texas, are looking for ways to enable and encourage labor fund investments in infrastructure projects.
- If we are really prepared to regard these relationships as true partnerships, we need to leave these types of decisions about oversight and control to individual negotiations.
- It will be harmful to try to establish too many parameters before negotiations, since all negotiating parties – both public and private – need to have access to as many negotiation tools as possible.

What is the best way to balance P3 projects need for an expedited and sometimes confidential review and approval process with the State's need for transparency, accountability, and oversight?

- It is important for the P3 process to have a clear command structure for making decisions, open participation early in the process, then a clear path to the endpoint.
- The private sector is much less likely to make such massive upfront investments if they believe that a political debate will derail the project entirely.
- The states that have the most success with P3s often have very well defined process roles for each stakeholder.

- It is important to make the process clear. The State needs to develop guidelines within which the process can smoothly occur.
- The State needs to define acceptable terms upfront. The key decision-making cannot be handed to a legislative committee midway through a bidding process. It will be much more difficult to get the right people at the negotiations table if inefficient review procedures are retained.

How should the State manage P3 projects?

- The key word is “partnership.” In the past, standard development projects have been guided simply by a contract between the public and private sectors. However, with a P3, it is more like a partnership in which there must be mutual recognition of needs. In order for the full benefits of the partnership to be realized, the State needs to give up a certain degree of day-to-day control, while maintaining measurable performance oversight.
- It would be helpful to have a P3 oversight group, comprised of independent civic, legislative, and Executive Branch representatives that would be responsible for monitoring projects on a long-term basis.
- It was agreed that an independent evaluation or audit of agency process/oversight could be beneficial.

What is the role of union and labor interests in P3 projects?

- It is important to maintain prevailing wage protections. While this obviously benefits workers directly, it is also in the interest of the contractors that work with the unions on other projects.
- The entire benefits package offered to labor on a P3 project should be comparable to packages already enjoyed by that industry’s labor.
- The legality of such provisions should be examined further before making definite recommendations for benefits packages.

What role should the State play in financing P3 projects?

- The private partner should be required to come to the table with both the required debt and equity.
- There is a need to be creative in using multiple funding sources.
- The use of tax-exempt financing through the Maryland Economic Development Corporation may enhance a potential P3 project. The Seagirt deal incorporated the use of tax-exempt debt, although it is still the responsibility of the private sector to repay.

- Financing decisions should be made on a project by project basis, but on the whole, the transfer of risk/maintenance tends to be worth the cost. The State cannot just be concerned with the mix of upfront costs.
- If the State is investing a significant amount of upfront funding along with the private partner, should the State also expect a specific financial return on investment?
- Pension funds need to be reinvested back in State with certain provisions.
- The State needs a strong negotiations team. If return on investment is possible, a strong State negotiations representative should be able to make it happen.

Final Comments:

- Should exclusivity and non-compete clauses be incorporated into the P3 negotiations process? Seagirt, which included a non-compete clause for only the first part of the 50-year concession is a good example.
- The competitive situation differs by location. For example, Mexico requires a free alternative to all toll roads, thus altering the private sector's calculation of revenues.
- The possibility of competition should just be another part of the private sector's risk management equation.
- We may not be able to get the private sector to the negotiation table if there are strict constraints on revenue potential.

Social Infrastructure Breakout Session

Moderators:

Group A :

- Non-Maryland: Sue Gander, Director of the Environment, Energy and Transportation Division, National Governors Association
- Maryland: Michael Gaines, Assistant Secretary of Real Estate, Maryland Department of General Services

Group B:

- Non-Maryland: Alina Gorokhovskiy: Chief Strategy Officer, McKenna Long & Aldridge
- Maryland: Scott Walchak, Principal Counsel, Maryland Department of General Services

What are some of the benefits, challenges and unique needs of P3 projects in this sector?

- Social Infrastructure is any non-transportation facility that serves a public function or supports the community needs or operation mission of a public entity. This may include K-12 or higher education facilities, public housing, courthouses, etc. The building of such a facility would require a public asset (appropriation or other financing or use of existing asset like land) and would not likely take place absent public action including articulated need and funding.
- P3s may be useful when there is no revenue stream sufficient to finance the project independent of other public support or consideration of private involvement as a funding/financing partner.
- P3 projects should not be used simply to circumvent other review requirements established for the financing of other State projects (i.e. the existing process that the Department of Budget and Management uses for identifying and funding capital requests).
- Benefits of P3s include an influx of money from the private sector, utilizing the expertise and ingenuity of the private sector, cost savings that may result from private sector input, and opportunities for utilizing under-utilized assets.
- The State needs to protect the public interest, determine how to balance needs when available resources are insufficient, and ensure the delivery of services to citizens.
- The State also needs to establish goals; establish a planning process to prioritize projects; evaluate balance sheets; perform risk analyses; evaluate all costs, including both tangible and non-tangible costs; and perform an outcome assessment.
- Challenges of P3s include determining how to make deals attractive to the private sector, looking at the project from a long-term prospective, remaining competitive, and determining how to assess goals at completion and learn from the experience.

What criteria do you think is important for choosing to do a project as a P3 rather than a traditional State capital project?

- Projects should be thoroughly analyzed. A value for money analysis should be used. The analysis should include the cost of doing a project with and without private involvement and a full evaluation of incremental tax benefits and costs. State credit or debt affordability analysis should be required. The emphasis should be on identifying long-term value. Depreciating an asset should be factored into the analysis and overall term length of a deal.
- There should be a transparent process that aims to protect the public interest. Needs and justifications for projects should be identified and articulated and supported by the project upfront with the objective of evaluating risk versus public benefit (must have a public benefit).

- Contracts should contain contingences if the private partner should go bankrupt, provisions on when and in what condition the asset is returned to the public sector, on-time and on-budget clauses; questions about who has control of the asset should be clearly defined (during and after completion);
- The need for full review and evaluation of projects may be cost prohibitive for projects under \$100 million in total project costs and could dampen and limit P3 applicability for small or medium size projects that may have merit.
- Any and all key State policy objectives should be required for any P3. Any contracts or agreements should clearly articulate key State goals and require their furtherance. The P3 statute should not attempt to redefine key State policy objectives but should just say “as defined by current statute or regulatory requirements.” Key policy objectives should be very clearly communicated (i.e. included in the basic definition section of all request for proposals and contracts) so that the private sector is well aware and can incorporate those stipulations/requirements in their review when considering involvement in a P3.
- Performance requirements are important and should be monitored. Each project should have clearly articulated performance criteria defined with allowable and invokable provisions that govern non-compliance and other claw back options.
- Audits should be required and/or random. Audits should include both self-reporting and an opportunity for independent verification by the public sector (i.e. Office of Legislative Audits).
- Non-compete provisions should be expected as the private sector will wish to ensure the viability of the project from its financial perspective/analysis.

What is the best way to balance P3 projects need for an expedited and sometimes confidential review and approval process with the State’s need for transparency, accountability, and oversight?

- Legislative review is an important component to any review and evaluation process and should be included at each and every stage of reporting (early procurement and project justification, financial analysis and cost comparison, contract review). Final approval should still fall to the Board of Public Works.
- There was no general consensus that the legislature should have the singular ability to disapprove a project. If allowed, this veto power, especially if late in the process, could hinder private involvement.
- Some small to mid-sized projects might not be cost effective or invite private interest if full review and oversight criteria apply.

How should the State manage P3 projects?

- There should be general oversight of P3s. One entity in the State should serve as a centralized “center of expertise.” The Virginia model is a good source for duplication by Maryland.
- State agencies should play a part in the review of proposals but there should still be an overall centralized entity responsible for reviewing all P3s.
- Since transportation is likely to produce many more P3 opportunities, there should be adequate internal capacity within MDOT as well as sufficient representation in the “center”.
- The public sector needs to have adequate representation at the table throughout all stages of the process, even if that means retaining consultants to ensure the public sector has adequate capability to have its own financial analysis or at least the ability to adequately review the analysis put forth by the private sector.
- Last second project vetoes can have a deterrent effect on the private sector, the number of proposals received and the success of future projects.

What is the role of union and labor interests in P3 projects?

- Representatives from labor want to ensure that provisions in P3 projects address certified training programs for construction contracts, employee transfer and bargaining agreements. Business interests in the room voiced the need to make sure that public requirements do not tip or make the playing field un-level and burdensome.

What role should the State play in financing P3 projects?

- The State should play a role in financing P3 projects but any financing should be fully evaluated to ensure that the public sector involvement is fully woven into the fabric of the agreement. If the public sector has a financing role there should be some benefit that accrues to the public sector either in lower project costs that result in favorable lease terms or revenue-sharing opportunities.
- There is a need to determine how to make the deal attractive without giving up public interest.

Final Comments:

- Do not recreate the wheel. There is plenty of best-practice literature and established processes that Maryland should look to replicate.
- Don’t be too concerned in the beginning. Look to learn. Build on early successes and move forward from there.

- P3s should be another tool. They are not an end all solution.
- Managing the process is critical in bringing partners to the table.
- The State should use the power of its credit rating more to its advantage.

Appendix 7
Comparison of Selected States on Certain Public-Private Partnership
Provisions

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DEFINITION OF PUBLIC-PRIVATE PARTNERSHIP

| | |
|---|--|
| <p>Maryland (Current)</p> | <p>A sale or lease agreement between a unit of State government and a private entity under which the private entity assumes control of the operation and maintenance of an existing State facility; or 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.</p> |
| <p>Arizona (Transportation P3s only.)</p> | <p>The development or operation of any transportation facility using a variety of project delivery methods and forms of agreement, which may include predevelopment agreements; agreements or concessions to design, build, finance, operate or maintain an eligible facility; and any other method or agreement that will serve the public interest.</p> |
| <p>California (Transportation P3s only. Separate statute addresses design-build for all State projects.)</p> | <p>A comprehensive development agreement with DOT and a private entity for the planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation or maintenance of highway, public street, rail or related facilities supplemental to existing facilities currently owned and operated by DOT.</p> |
| <p>Colorado (Transportation P3s only.)</p> | <p>A nontraditional arrangement between DOT and one or more private or public entities that provides for: acceptance of a private contribution to a transportation system project or service in exchange for a public benefit concerning that project or service other than only a money payment; sharing of resources and the means of providing transportation system projects or services; or cooperation in researching, developing, and implementing transportation system projects or services.</p> |
| <p>Colorado (All other P3s)</p> | <p>A nontraditional arrangement between an agency and one or more nonprofit entities that provides for acceptance of a nonprofit contribution to an agency project or service in exchange for a public benefit concerning the project or service other than only a money payment; sharing of resources and the means of providing projects or services; or cooperation in researching, developing, and implementing projects or services.</p> |
| <p>Connecticut (Addresses all types of P3 projects.)</p> | <p>The contractual relationship between a state agency and a private entity to design, develop, finance, construct, operate or maintain one or more state facilities where the agency has estimated that the revenue generated by such facilities, in combination with other funding sources, including appropriated funds, will be sufficient to fund the cost to develop, maintain and operate such facility. A partnership agreement may not be established for the operation and maintenance of a facility unless there is also a financing and development component.</p> |
| <p>Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.)</p> | <p>Transportation P3s are defined as agreements with private entities, or consortia thereof, for the building, operation, ownership, or financing of transportation facilities.</p> |
| <p>Illinois (Applicable to transportation only.)</p> | <p>The agreement between the contractor and the transportation agency (DOT or Illinois State Toll Highway Authority) relating to one or more of the development, financing, or operation of a new or existing road, highway, bridge, tunnel, intermodal facility, intercity or high-speed passenger rail, or other transportation infrastructure, excluding airports.</p> |

DEFINITION OF PUBLIC-PRIVATE PARTNERSHIP CONTINUED

| | |
|---|--|
| <p>Minnesota (Applicability limited to toll facilities.)</p> | <p>Development agreement is a written agreement between a road authority and a private operator that provides for the development, financing, design, construction, improvement, rehabilitation, ownership, and operation of a toll facility.</p> |
| <p>Puerto Rico (Legislation covers all types of P3s.)</p> | <p>Any agreement between a government entity and one or more persons to delegate operations, functions, services, or responsibilities of any government entity, as well as to design, develop, finance, maintain or operate one or more facilities, or any combination thereof.</p> |
| <p>Texas (Transportation P3s only.)</p> | <p>CDAs are agreements that provide for design and construction, rehabilitation, expansion, or improvement and may also provide for the financing, acquisition, maintenance, or operation of a toll project; facilities on the Trans-Texas Corridor; a project that includes both tolled and non-tolled lanes; a project in which the private entity has an interest in the project; or a project financed wholly or partly with private activity bonds.</p> |
| <p>Virginia (Transportation P3s only.)</p> | <p>An agreement between a public entity and a private entity to develop, finance, construct, operate or maintain any road, bridge, tunnel, overpass, ferry airport, mass transit facility, parking facility, port facility or similar commercial facility used for transportation purposes.</p> |
| <p>Virginia (All other P3s.)</p> | <p>An agreement between a public entity and a private entity to develop, finance, construct, operate or maintain any education facility, any building or facility that meets a public purpose and is developed or operated by a public entity, any improvements or equipment to enhance public safety, utilities, broadband, telecommunications and other communications and technology infrastructure, recreational facilities, improvements to unimproved state or local land, or solid waste management facilities.</p> |

POLICY STATEMENTS AND GOALS OF A P3 PROGRAM

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| Maryland (Current) | None stated. |
| Arizona (Transportation P3s only.) | None stated. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | None stated. |
| Colorado (Transportation P3s only.) | The general assembly hereby finds and declares that DOT is in need of funds to invest in new infrastructure projects, including turnpikes, within the state transportation system, and P3s can provide the state with a new source of capital for such projects. Privately-developed transportation projects can result in time and cost savings, risk reduction, and new tax revenues to the state. P3s can be utilized by the state for the development of new turnpikes and the modernization and improvement of existing turnpikes. |
| Colorado (All other P3s) | The general assembly hereby finds and declares that state government should deliver public services in the most cost-effective and efficient manner, that nonprofit entities that contract for public services leverage the use of public funds with private donations, and that increasing opportunities for nonprofit entities to contract with state agencies will further the cost-effective and efficient delivery of public services. |
| Connecticut (Addresses all types of P3 projects.) | P3 projects must result in job creation and economic growth. P3 projects may not be selected based solely on the amount of potential revenue generated by the project. Agreements for operation and maintenance must also provide for the financing and development of the facility. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Yes. "The Legislature finds and declares that there is a public need for the rapid construction of safe and efficient transportation facilities for the purpose of traveling within the state, and that it is in the public's interest to provide for the construction of additional safe, convenient, and economical transportation facilities." |
| Illinois (Applicable to transportation only.) | It is the intent of this Act to promote P3s for transportation by authorizing transportation agencies to enter into P3 agreements related to the development, operation and financing of transportation facilities. |
| Minnesota (Applicability limited to toll facilities.) | None stated. |

POLICY STATEMENTS AND GOALS OF A P3 PROGRAM CONTINUED

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| <p>Puerto Rico (Legislation covers all types of P3s.)</p> | <p>The public policy is to favor and promote the establishment of P3s for the creation of priority projects to further the development and maintenance of infrastructure facilities, to apportion risk, to improve the services rendered and the functions of the government, to foster the creation of jobs, and to promote the socio-economic development and the competitiveness of Puerto Rico.</p> |
| <p>Texas (Transportation P3s only.)</p> | <p>None stated.</p> |
| <p>Virginia (Transportation P3s only.)</p> | <p>To encourage investment in the Commonwealth by private entities that facilitates the development and/or operation of transportation facilities. Accordingly, public and private entities may have the greatest possible flexibility in contracting with each other for the provision of the public services.</p> |
| <p>Virginia (All other P3s.)</p> | <p>To encourage investment in the Commonwealth by private entities and facilitate financing mechanisms, private capital and other funding sources that support the development or operation of projects; expand and accelerate projects to improve and add to the convenience of the public; and allow public and private entities the greatest possible flexibility in contracting with each other for the provision of the public services.</p> |

PROCESS FOR IDENTIFYING, EVALUATING, IMPLEMENTING AND OVERSEEING PUBLIC-PRIVATE PARTNERSHIPS

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| Maryland (Current) | None. |
| Arizona (Transportation P3s only.) | Not created by statute; however, there is a Office of P3 Initiatives within DOT. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | Yes. The Public Infrastructure Advisory Commission (PIAC) advises DOT on developing transportation projects through P3s. |
| Colorado (Transportation P3s only.) | Yes. The High Performance Transportation Enterprise (HPTE) operates as a business within DOT. It pursues P3s and other innovative and efficient means of completing transportation projects. |
| Colorado (All other P3s) | None. |
| Connecticut (Addresses all types of P3 projects.) | None. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | There is a Project Finance Office that deals primarily with P3s within the DOT. It was not created by statute. |
| Illinois (Applicable to transportation only.) | None. |
| Minnesota (Applicability limited to toll facilities.) | None. |
| Puerto Rico (Legislation covers all types of P3s.) | The Public-private Partnerships Authority identifies projects, requests proposals, selects the private partner, and monitors contract compliance. |
| Texas (Transportation P3s only.) | None. |
| Virginia (Transportation P3s only.) | Yes, but not created in statute. Housed within DOT. |
| Virginia (All other P3s.) | None. |

PROCESS FOR LEGISLATIVE OVERSIGHT

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| <p>Maryland (Current)</p> | <p>Not less than 45 days before issuing a notice of solicitation, a report must be submitted to the State Treasurer and legislative budget committees. Prior to approval of an agreement by the Board of Public Works, the State Treasurer has 30 days to analyze impact on debt affordability limits and the legislature then has 30 days to review the Treasurer's findings. Annual reports to legislative budget committees are required containing any P3s under consideration, status reports of projects underway, and information on projects utilizing conduit financing.</p> |
| <p>Arizona (Transportation P3s only.)</p> | <p>No express statutory provision.</p> |
| <p>California (Transportation P3s only. Separate statute addresses design-build for all State projects.)</p> | <p>At least 60 days before approving an agreement, it must be submitted to the legislature and PIAC for review, along with the results of the public hearing. The chairman of the legislative fiscal or policy committees for transportation may provide comments during this period. Annually, a report on the progress of the project and operation of the facility, including performance standards, a financial analysis, recommendations for changes in the P3 program, must be submitted.</p> |
| <p>Colorado (Transportation P3s only.)</p> | <p>HPTE submits an annual report to the transportation committees of the house and senate including a summary of activities and financial data, the status of current projects and recommendations for statutory changes. Local and regional transportation plans must be considered when looking at projects. MPOs must approve the project. If tolls are implemented on a road that was previously free, each local jurisdiction affected by the change must approve it.</p> |
| <p>Colorado (All other P3s)</p> | <p>Agencies must submit an annual report to the joint legislative budget committee on any P3s entered into, including a description of the purpose and terms of the agreement the amount of State money required, and the identity of the private partner.</p> |
| <p>Connecticut (Addresses all types of P3 projects.)</p> | <p>P3s must be submitted to the Governor for approval and to the appropriate legislative budget committees for review. Before submission, agencies must consult with various cabinet secretaries and must conduct an analysis of the feasibility, desirability, and convenience to the public of the project. Provisions of analysis are enumerated in statute and include a cost-benefit analysis, a risk assessment, an analysis of public versus private financing and the advantages and disadvantages of using a P3 rather than traditional State methods. The Governor must submit annual reports to the legislature on the status of each P3 project.</p> |
| <p>Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.)</p> | <p>Projects must be included in DOT's 5 year capital program and receive legislative approval through that manner. To lease an existing toll facility, an independent analysis of the proposed P3 must be submitted to the joint Legislative Budget Commission prior to soliciting bids and prior to awarding contract. Private entity must submit a traffic and revenue study and a finance plan that includes project cost, revenues, financing, assumptions, internal rate of return on private investments, the need for State funds, and a cash flow analysis through the contract term.</p> |

PROCESS FOR LEGISLATIVE OVERSIGHT CONTINUED

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| <p>Illinois (Applicable to transportation only.)</p> | <p>Any new toll highways must be approved by the Governor and authorized by the legislature. Transportation agency must submit annual report of potential projects to the legislature and each county, municipality and MPO of projects within its jurisdiction. Prior to issuing a RFQ/RFP, the legislature must authorize the procurement process. Once a proposal is selected, public notice and a hearing is held and Governor approves selection. For projects over \$50 million, the private entity may be required to pay for an independent audit of its traffic and cost estimates and all public costs and potential liabilities.</p> |
| <p>Minnesota (Applicability limited to toll facilities.)</p> | <p>The final agreement must be approved by the Commissioner of Transportation. The governing body of a local jurisdiction that the project passes through may veto the project within 30 days of approval by the Commissioner.</p> |
| <p>Puerto Rico (Legislation covers all types of P3s.)</p> | <p>Various committees expedite the permitting process, approve procurement documents, evaluate bids, and negotiate the contract. A desirability and convenience study must be completed. The partnering agency and the Governor must approve the contract. An annual report to the legislature lists all projects currently under development and contract compliance for existing projects. A joint legislative committee recommends projects, recommends the use of public funds for projects, protects the public interest, and reviews the statutory framework.</p> |
| <p>Texas (Transportation P3s only.)</p> | <p>Legislative Budget Board receives list of qualified or shortlisted bidders and 30 days review of proposed agreement and financial forecast. 30 days before entering into a CDA, a traffic and revenue report must be provided to the State Auditor to review and comment on the report and its methodology. The Attorney General must also review the CDA for legal sufficiency.</p> |
| <p>Virginia (Transportation P3s only.)</p> | <p>No tolls may be imposed on existing Interstate 81 without legislative approval. Affected local jurisdictions are given 60 days to comment on the project. For projects over \$50 million, the private entity may be required to pay for an independent audit of its traffic and cost estimates and all public costs and potential liabilities. Joint legislative audit committee may also review contract.</p> |
| <p>Virginia (All other P3s.)</p> | <p>Legislative P3 Advisory Commission has 45 days to review proposals and 30 days to review the proposed agreement. If the agreement creates tax-supported debt, requires additional appropriations, or reduces the Commonwealth's discretion to change funding or service levels, it must also go to legislative budget committees. Affected local jurisdictions are given 60 days to comment. Projects with a cost of less than \$3 million and projects that cost between \$3 and 50 million and have already been appropriated do not need further approval. Joint legislative audit committee may also review contract.</p> |

TERM LENGTHS

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | 50 years, but agreements may be extended. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | 99 years. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | 50 years. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | May not exceed 50 years. Secretary of DOT may authorize a term of up to 75 years. The legislature may approve terms longer than 75 years. |
| Illinois (Applicable to transportation only.) | 99 years. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | 50 years, but an extension of up to 25 years may be granted by the legislature. |
| Texas (Transportation P3s only.) | 52 years. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

NON-COMPETE CLAUSES

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Non-compete agreements do not apply to planned projects. Compensation may be provided for unplanned facilities |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | Prohibited. Compensation may be provided for adverse effects on revenue, but not for planned projects, safety projects, improvement projects with minimal capacity increases, HOV lanes, or projects outside the P3 boundaries. |
| Colorado (Transportation P3s only.) | Non-compete agreements do not apply to projects already in regional or statewide transportation plans. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | Prohibited. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Prohibited. DOT and private entity must be able to add capacity to the proposed project and other facilities serving similar origins and destinations. |
| Illinois (Applicable to transportation only.) | Non-compete clauses and penalty clauses are prohibited. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | Prohibited; however, compensation may be provided if a road constructed within 4 miles results in revenue loss. No compensation for projects already planned; involving safety, operational or maintenance improvements; HOV lanes; or non-highway projects. If construction increases revenue, revenues must be shared. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

PUBLIC INVOLVEMENT

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Only an executive summary of the proposal is available for public review. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | At least one public hearing must be held more than 60 days prior to lease approval and before additional toll/fee increases. Public comments are submitted to the legislature and PIAC. |
| Colorado (Transportation P3s only.) | The HPTE's annual report to the legislature must be made public and must be available on its website. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | The legislative committee with the appropriate jurisdiction for the P3 shall hold public hearings. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No express statutory provision for P3s. However, P3s must be included in capital program, which undergoes a public comment period and public hearings. |
| Illinois (Applicable to transportation only.) | Public notice and a hearing for public comment must be held prior to Governor's approval. The executed agreement must be posted on website and in newspaper. |
| Minnesota (Applicability limited to toll facilities.) | The Commissioner of Transportation must hold a public hearing in any jurisdiction that the project runs through prior to making a decision. |
| Puerto Rico (Legislation covers all types of P3s.) | The list of potential projects, all desirability and convenience studies, a report on the procurement process, and key contract terms must be posted online. |
| Texas (Transportation P3s only.) | At least 30 days before a CDA is entered into, certain information must be published in the newspaper. At least 10 days before a CDA is entered into, a public hearing must be held. |
| Virginia (Transportation P3s only.) | Within 10 days of accepting a conceptual proposal, the proposal must be posted online. A public comment period of at least 30 days must be held prior to approving agreement. |
| Virginia (All other P3s.) | Within 10 days of accepting a conceptual proposal, the proposal must be posted on the state's website. At least 30 days before an agreement is entered into, a public hearing must be held. |

ROLE OF STATE FINANCING

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Any combination of federal, state and local grants, loans or debt may be used for the project. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | DOT can grant a "public benefit" which includes a payment for services or any other benefit specifically authorized by law. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | State support of a P3 shall not exceed 25% of the cost of the project. The agreement must identify funding sources to fully fund all aspects of the project. Any federal, state or local funds may be used. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No more than 15% of total federal and State funding in the Transportation Trust Fund in any given year shall be collectively obligated for all P3s. |
| Illinois (Applicable to transportation only.) | Any combination of federal, State, local and private dollars may be used. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | Any combination of federal, State, and private dollars may be used. |
| Texas (Transportation P3s only.) | Funds disbursed from the state highway fund and the Texas mobility fund during a federal fiscal year may not exceed 40% of the state's federal obligation authority that year. |
| Virginia (Transportation P3s only.) | Any combination of federal, state and local grants, loans or debt may be used for the project. |
| Virginia (All other P3s.) | Any combination of federal, state and local grants, loans or debt may be used for the project. |

SETTING AND INCREASING TOLLS, FEES AND OTHER CHARGES

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Agreements may include provisions regulating the private partner's return on investment or a formula for adjusting tolls, fees, rents or other charges. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | A reasonable return on investment is allowed. Agreement sets specific toll or user fee rates. Additional increases subject to DOT approval and at least one public hearing. |
| Colorado (Transportation P3s only.) | The private entity has the power to set toll rates in agreement with HPTE. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | The P3 agreement shall include provisions for the extent to which and the terms under which the private entity may charge fees to individuals and entities. No tolls may be charged without legislative approval. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Regulations governing revenue increases must be included in the agreement. Tolls may be indexed to CPI or similar inflation indicators, but adjustments for inflation cannot be made more than once a year or less than every five years. Tolls may be increased above those limits as dictated by bond documents, covenants, of governing body authorization. |
| Illinois (Applicable to transportation only.) | P3 agreement may provide for a maximum rate of return on investment, return on equity, or a combination of the two. DOT or Authority may fix and revise the user fees that can be charged, may set provisions for maximum increases, and may tie increases to inflationary or other measures. |
| Minnesota (Applicability limited to toll facilities.) | The development agreement must establish a reasonable rate of return on investment and capital for the life of the agreement. No express statutory provisions for setting or modifying toll rates. |
| Puerto Rico (Legislation covers all types of P3s.) | The agreement must include provisions relating to the setting of tolls, fees or other charges. The agreement may include a formula for increases. Increases may be decided by the private entity or the public agency. |
| Texas (Transportation P3s only.) | Agreement shall include toll rates and responsibility for the setting of tolls. If the private participant collects tolls the methodology for setting and increasing tolls; toll collection methods; and proposed changes to methodology must be pre-approved. |
| Virginia (Transportation P3s only.) | The agreement may provide for a maximum rate of return on investment. |
| Virginia (All other P3s.) | No express statutory provision. |

USE OF PROCEEDS

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | Proceeds from transportation projects must be used for transportation purposes. |
| Colorado (All other P3s) | Agency may retain a portion of any cost-savings through the State's incentive for budget savings program. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Revenues from transportation P3s go into the Transportation Trust Fund. |
| Illinois (Applicable to transportation only.) | Transportation revenues are dedicated to transportation purposes. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | Revenues from transportation projects must be used for transportation or air quality projects. |
| Virginia (Transportation P3s only.) | Revenues from transportation P3s will be used for transportation purposes. |
| Virginia (All other P3s.) | No express statutory provision. |

REVENUE-SHARING

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Agreements may allow for revenue-sharing. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | Excess revenue shall be applied to paying down debt, improvements to the project, or revenue-sharing. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | P3 for toll roads should include revenue-sharing over the life of the contract. P3s for existing highways should include an upfront payment as well. |
| Illinois (Applicable to transportation only.) | P3 agreement may provide for revenue-sharing when the DOT or Authority finds it appropriate. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | The agreement shall address the sharing of income in excess of projected income. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | Earnings in excess of the maximum rate of return may be shared among parties. |
| Virginia (All other P3s.) | No express statutory provision. |

WORKFORCE ISSUES

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | P3s are subject to State prevailing wage requirements or a project labor agreement. State's privatization requirements applies. State employees must be allowed submit a competing bid. Reemployment and retraining assistance required. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No express statutory provision. |
| Illinois (Applicable to transportation only.) | Construction of a new transportation facility requires use of a project labor agreement, adherence to MBE goals, prevailing wage laws, and local hiring preferences. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | Public employees have several rights, including job transfers, preferential hiring, continued participation in the public retirement system, and job retraining. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

MINORITY INCLUSION

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | Requirements of the set aside program for small contractors, MBEs, individuals with disabilities and nonprofit corporations apply. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No express statutory provision. |
| Illinois (Applicable to transportation only.) | Requirements and goals for participation by disadvantaged business enterprises apply. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

GREEN BUILDING REQUIREMENTS

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No express statutory provision. |
| Illinois (Applicable to transportation only.) | No express statutory provision. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

OTHER STATE POLICY OBJECTIVES

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | All federal, state, and local laws; state, regional, and local comprehensive plans; and department rules, policies, procedures, and standards apply. |
| Illinois (Applicable to transportation only.) | No express statutory provision. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

UNSOLICITED PROPOSALS FOR P3 PROJECTS

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Permitted, but a competitive procurement must then take place if DOT determines the unsolicited proposal has merit. Proposal fees may be required. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | Unsolicited proposals are allowed but must be followed by competitive bidding. |
| Colorado (Transportation P3s only.) | Unsolicited proposals may be accepted if it is innovative and unique and certain other criteria are met. Competitive bidding required for projects that will cost the State more than \$50,000 per year. DOT may offer a competitive bid. |
| Colorado (All other P3s) | Unsolicited proposals may be accepted if the proposal will assist the agency in carrying out its duties in a cost-effective and efficient manner without replacing existing state employees and certain other criteria are met. Competitive bidding required for projects that will cost the State more than \$50,000 per year. |
| Connecticut (Addresses all types of P3 projects.) | Statute allows only for solicited proposals. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Yes, but project must meet certain criteria. After receiving unsolicited proposal, competitive bidding must follow. DOT set fee through regulation of \$50,000 for unsolicited proposals. |
| Illinois (Applicable to transportation only.) | No express statutory provision. |
| Minnesota (Applicability limited to toll facilities.) | Unsolicited proposals are allowed. |
| Puerto Rico (Legislation covers all types of P3s.) | Prohibited. |
| Texas (Transportation P3s only.) | Unsolicited proposals are accepted, but a competitive process allowing for competitive proposals must take place if DOT authorizes the further evaluation of the unsolicited proposal. |
| Virginia (Transportation P3s only.) | Allowed. Proposal review fees may be required. |
| Virginia (All other P3s.) | Allowed. Proposal review fees may be required. |

IDENTIFICATION OF PROJECTS

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|--|---|
| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | PIAC identifies potential P3 transportation projects. The Transportation Commission approves the selection of projects. |
| Colorado (Transportation P3s only.) | Statute does not reference how to identify projects, though it does mention congestion on Interstate 70. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | P3s may be used for early childcare, educational, health or housing facilities; transportation systems; and any other facility designated by the legislature. No more than 5 projects may be implemented before January 1, 2015. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Projects must be included in DOT's 5 year capital program or be a project increasing capacity, having a cost of more than \$500 million, and included in the state's 10 year capital plan. |
| Illinois (Applicable to transportation only.) | Authority may enter into P3s for new projects only, not for lease of an existing facility nor reconstruction or adding capacity to existing facilities. |
| Minnesota (Applicability limited to toll facilities.) | For toll facilities only; however, concession agreements of existing roadways are prohibited. Only new capacity allowed. |
| Puerto Rico (Legislation covers all types of P3s.) | The Authority identifies and prioritizes projects and must maintain a list on its website. Agencies may submit recommendations, but they are not binding. |
| Texas (Transportation P3s only.) | Projects must be identified in DOT's transportation program or located on a transportation corridor identified in the transportation plan. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | Public entities must develop guidelines for advertising, reviewing and considering proposals; timelines and criteria for review; establishment of an oversight committee; financial review and analysis procedures; and public involvement. |

FOREIGN OWNERSHIP

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Foreign corporations must apply for authority to conduct business in the state. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No express statutory provision. |
| Illinois (Applicable to transportation only.) | No express statutory provision. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

LAND APPRAISALS

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No express statutory provision. |
| Illinois (Applicable to transportation only.) | No express statutory provision. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

EMINENT DOMAIN

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | The public entity may use eminent domain for the project. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | DOT may use eminent domain for projects open to the public and in the state transportation plan. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | DOT may use eminent domain for the development and construction of P3 projects on the state highway system. |
| Illinois (Applicable to transportation only.) | The DOT or Authority may use eminent domain for the project. |
| Minnesota (Applicability limited to toll facilities.) | A public entity may use eminent domain and can then sell, lease, or donate the property to the private entity. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | The public entity may use eminent domain for the project. The private entity must pay these property costs. |
| Virginia (All other P3s.) | The public entity may use eminent domain for the project. The private entity must pay these property costs. |

POLICE JURISDICTION

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Agreements may provide for law enforcement on public facilities. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | The traffic laws of the state and municipality apply. DOT can provide law enforcement if reimbursed. |
| Colorado (Transportation P3s only.) | The traffic laws of the state and municipality apply. State law enforcement may provide services if reimbursed. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | DOT may provide law enforcement but must be reimbursed. |
| Illinois (Applicable to transportation only.) | All state and local laws apply and law enforcement has the same powers as within their jurisdictions. State Police may provide law enforcement for a fee. |
| Minnesota (Applicability limited to toll facilities.) | All state and local laws apply and law enforcement has the same powers as within their jurisdictions. Law enforcement has free access to the facility. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | DOT shall negotiate acceptable safety and policing standards as part of agreement. |
| Virginia (Transportation P3s only.) | All state and local laws apply. State and local law enforcement have the same powers and authorities as within their respective jurisdictions. |
| Virginia (All other P3s.) | All state and local laws apply on the facility and state and local law enforcement have the same powers and authorities as within their respective jurisdictions. |

COMPETITIVE SOLICITATIONS

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Agency may use RFPs, RFQs, shortlisting of bidders, negotiations, best and final offers, best value selection and use of alternative selection criteria. Unsuccessful bidders may be paid for the right to use work products contained in the proposal. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | DOT may use RFPs; RFQs; prequalification; shortlisting of bidders; alternative valuation criteria such as qualifications or best value; and negotiations. |
| Colorado (Transportation P3s only.) | The normal process for competitive sealed proposals received in response to a RFP should be followed. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | Prequalification may be used and an application fee for prequalification may be charged. Competitive bidding or competitive negotiations may be used. Requests for information may be utilized. 30 days public notice required before issuing a solicitation. Unsuccessful bidders may be paid an amount stipulated in the bid documents for the right to use work products contained in the proposal. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Normal procurement methods may be followed, provided that minimum qualifications are met. Proposals shall be ranked in order of preference, and ranking may consider alternative criteria listed in statute. Negotiations may be terminated at any time for any reason. |
| Illinois (Applicable to transportation only.) | A competitive sealed bidding or proposal process or a design-build process may be used and is clearly outlined in statute. Pre-qualification required. Competing bids from public agencies may be submitted. Alternative evaluation criteria may be used. Negotiations with bidders and best and final offers are permitted when using competitive sealed proposals. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | An RFP based on qualifications or best value must be used except in certain limited circumstances. If it is not used, notice must be given to the joint legislative committee on P3s. Regulations for the procurement process must be established. Alternative evaluation criteria may be used. |
| Texas (Transportation P3s only.) | A competitive procurement process that provides the best value should be used. DOT may interview bidders; shortlist proposals; and negotiate with bidder whose proposal offers the apparent best value. Unsuccessful bidders may be paid an amount stipulated in the RFP for the right to use work products contained in the proposal. |
| Virginia (Transportation P3s only.) | Normal procurement laws do not apply. Guidelines establishing the process for review and acceptance of bids must be developed. Competitive sealed bidding or negotiation may be used and alternative evaluation criteria are allowed. |

COMPETITIVE SOLICITATIONS CONTINUED

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| Virginia (All other P3s.) | Normal procurement laws do not apply. Guidelines for advertising, reviewing and considering proposals; timelines and criteria for review; establishment of an oversight committee; financial review and analysis procedures; and public involvement must be developed. Competitive sealed bidding or negotiation may be used. Evaluation criteria are not limited to cost alone. |
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MAINTENANCE REQUIREMENTS

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | DOT standards apply. DOT can provide services if reimbursed. |
| Colorado (Transportation P3s only.) | Statute states that all toll roads must be kept in good repair. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | Agreement shall include the terms for the maintenance of the facility. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | DOT standards for operation and maintenance must be met. DOT may provide maintenance, but costs must be reimbursed. |
| Illinois (Applicable to transportation only.) | P3 agreement may provide for monitoring of maintenance practices and standards. DOT or Authority may provide services if reimbursed. |
| Minnesota (Applicability limited to toll facilities.) | Terms and conditions of maintenance and snow removal included in agreement. The road authority must provide services. DOT standards apply. |
| Puerto Rico (Legislation covers all types of P3s.) | Standards for maintenance and the means to assure compliance should be included in the contract. Inspections by the public agency may be required. |
| Texas (Transportation P3s only.) | DOT shall negotiate maintenance standards, expenses, and costs as part of agreement. |
| Virginia (Transportation P3s only.) | DOT standards apply. DOT may provide services if reimbursed. The agreement may provide for inspection and monitoring by DOT. |
| Virginia (All other P3s.) | State standards for operation and maintenance apply. The agreement may provide for inspection and monitoring by the public entity. |

PERFORMANCE MEASURES

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Agreements may establish performance criteria or incentives or damages for nonperformance. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | Statute requires the agreement to include performance standards, including congestion levels. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | The P3 agreement shall include minimum quality standards, performance criteria, incentives, and disincentives. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Agreements providing annual payments based on the availability of service or the facility being open to traffic or based on the level of traffic are permitted. |
| Illinois (Applicable to transportation only.) | No express statutory provision. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | Whenever applicable, the agreement shall include quality standards for service and the means to assure compliance. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

CONTRACT OVERSIGHT AND REMEDIES FOR DEFAULT

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Agreements may establish record keeping, accounting and auditing standards. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | DOT may initiate process to take over the facility upon default. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | Annual independent audit required. The agreement must provide the rights and remedies for a breach of contract or default. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | Chief Inspector General advises P3s, conducts audits, investigates fraud, monitors contract compliance, and has access to any records necessary to fulfill duties. |
| Illinois (Applicable to transportation only.) | P3 agreement may provide for termination of the lease, penalties for termination, and provision in the event of default. |
| Minnesota (Applicability limited to toll facilities.) | The facility is subject to regular inspections by DOT. |
| Puerto Rico (Legislation covers all types of P3s.) | A compliance audit must be conducted every 5 years and submitted to the legislature. The agreement must include reasons and penalties for termination and breach of contract. |
| Texas (Transportation P3s only.) | Agreement should include a termination for convenience clause and a method for determining penalties. |
| Virginia (Transportation P3s only.) | The agreement may provide for inspection and monitoring by DOT. Clauses for termination and remedies for default may be included in the agreement. |
| Virginia (All other P3s.) | The agreement may provide for inspection and monitoring by the public entity. Clauses for termination and remedies for default may be included in the agreement. |

REASSIGNMENT OF LEASE OR SUBLEASING

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | No express statutory provision. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | No express statutory provision. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | No express statutory provision. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No express statutory provision. |
| Illinois (Applicable to transportation only.) | No express statutory provision. |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | No express statutory provision. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |

HANDBACK PROVISIONS (TRANSITION/PROCESS FOR RETURN OF ASSETS)

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| Maryland (Current) | No express statutory provision. |
| Arizona (Transportation P3s only.) | Agreement may address responsibility for reconstruction or renovations required for the facility to meet government standards upon reversion to the state. |
| California (Transportation P3s only. Separate statute addresses design-build for all State projects.) | Facility must be reverted with no encumbrances in a condition that meets DOT performance and maintenance standards. |
| Colorado (Transportation P3s only.) | No express statutory provision. |
| Colorado (All other P3s) | No express statutory provision. |
| Connecticut (Addresses all types of P3 projects.) | The project reverts to the State at the expiration or termination of the agreement. |
| Florida (Analysis covers transportation P3 statute only. Separate statute governs public-private land development.) | No express statutory provision for process, but DOT standards for operation and maintenance must be met. |
| Illinois (Applicable to transportation only.) | Grants DOT or Authority the right to takeover the facility upon expiration or termination of the P3 agreement |
| Minnesota (Applicability limited to toll facilities.) | No express statutory provision. |
| Puerto Rico (Legislation covers all types of P3s.) | No express statutory provision. |
| Texas (Transportation P3s only.) | No express statutory provision for process, but the facility must be returned in satisfactory condition at no further cost. |
| Virginia (Transportation P3s only.) | No express statutory provision. |
| Virginia (All other P3s.) | No express statutory provision. |