

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulations
Department of Transportation**
(DLS Control No. 15-152)

Overview and Legal and Fiscal Impact

These regulations repeal the existing Transportation Public-Private Partnership Program regulations and adopt new regulations establishing and implementing the Maryland Transportation Authority Public-Private Partnership Program in accordance with Chapter 5 of 2013.

The regulations present no legal issue of concern.

There is a potential fiscal impact on the nonbudgeted revenues and expenditures of the Maryland Transportation Authority.

Regulations of COMAR Affected

Department of Transportation:

Maryland Transportation Authority: Transportation Public-Private Partnership Program:
COMAR 11.07.06.01-.14

Legal Analysis

Background

Public-private partnerships are a method used to deliver public infrastructure assets through a long-term, performance-based agreement between reporting agencies and a private entity. The agreement allocates appropriate risks and benefits in a cost-effective manner between the contract partners. The private entity performs functions normally undertaken by the government, but the reporting agency remains ultimately accountable for the public infrastructure asset and its public function. Under a public-private partnership, the State may retain ownership of the public infrastructure asset, and the private entity may be given additional decision-making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle.

Chapters 640 and 641 of 2010 set up a statutory framework for transportation and nontransportation public-private partnerships. Chapter 5 of 2013 expanded that framework, establishing a State policy on the use of public-private partnerships and expressly authorizing specified State “reporting” agencies to enter into the agreements. Chapter 5 also establishes a process and associated reporting requirements for State oversight of public-private partnerships and institutes a process for both solicited and unsolicited public-private partnership proposals

that must be followed before the Board of Public Works may approve a public-private partnership agreement.

Summary of Regulations

The regulations repeal the existing Transportation Public-Private Partnership Program regulations and adopt new regulations establishing and implementing the Maryland Transportation Authority Public-Private Partnership Program. More specifically, the regulations, among other things:

- identify the Maryland Transportation Authority as a reporting agency that may establish public-private partnerships and execute specified public-private partnership agreements;
- require the executive director of the authority to be responsible for administering the program;
- establish a steering committee to advise the chairman and members of the authority on the structure and implementation of the program and complete specified activities related to the program;
- establish the public-private partnership candidate concept application process and submission requirements;
- establish submission and content requirements for an unsolicited proposal;
- require a nonrefundable fee for each unsolicited proposal;
- establish a two-phase screening methodology to assist the authority in determining the appropriateness, viability, and effectiveness of delivering a public infrastructure asset for which it is responsible using a public-private partnership;
- require the authority to arrange a meeting between the executive director and representatives of an affected bargaining unit if it is determined that the proposed public-private partnership will impact existing State employees;
- describe the solicitation process for concepts described in unsolicited proposals;
- describe the multistep solicitation process and guidelines for each step that the authority may use when soliciting for a public-private partnership;
- authorize the authority to reimburse a private entity in accordance with specified statutory provisions and specify terms and conditions of reimbursement and maximum reimbursement amounts;
- specify the process for evaluating requests for qualifications and proposals;

- specify the process for entering into negotiations with a private entity or initiating negotiations with a private entity other than the apparent best value entity;
- require the negotiation committee, after completion of successful negotiations, to recommend a best value private entity to the chairman and members of the authority for review and approval; and
- specify steps that the authority must take after the chairman and authority approve a best value private entity, including preparing the public-private partnership agreement for execution and commencing the final agreement review process.

Legal Issue

The regulations present no legal issues of concern.

Statutory Authority and Legislative Intent

The department cites §§ 10A-101 through 10A-105, 10A-201 through 10A-204, 10A-301, 10A-401 through 10A-403, and 11-203(h) of the State Finance and Procurement Article as statutory authority for the regulations. Title 10A details the parameters for the State to enter into private-public partnerships, including requirements and guidelines for solicited proposals, unsolicited proposals, and private-partnership agreements.

More specifically, § 10A-101(g)(3) defines “reporting agency” to include the authority. Section 10A-103(a) authorizes a reporting agency to establish a public-private partnership and execute an agreement in connection with any public infrastructure asset for which the reporting agency is responsible. Section 10A-103(b) requires a reporting agency to adopt regulations and establish processes for the development, solicitation, evaluation, award, and delivery of public-private partnerships, but prohibits a reporting agency from adopting the regulations until (1) the regulation has gone through the regulatory process established under the Administrative Procedure Act, and (2) the budget committees review and comment on the regulations. Section 10A-202(f)(1) authorizes a reporting agency to reimburse a private entity for the portion of the entity’s costs incurred in response to the solicitation of a public-private partnership. Sections 10A-202(f)(2) and (3) require the reporting agency to adopt regulations that establish the process for reimbursing a private entity. Section 10A-301(b) requires a reporting agency to establish a process for determining whether an unsolicited proposal meets a need of the reporting agency or is otherwise advantageous to the reporting agency. Section 10A-301(c) authorizes a reporting agency to (1) establish by regulation an application fee for submitting an unsolicited proposal and (2) require a higher application fee for an unsolicited proposal that does not address a project already in the State’s Capital Improvement Program or Consolidated Transportation Program planning documents.

This authority is correct and complete. The regulations comply with the legislative intent of the law.

Technical Corrections and Special Notes

Please note that the authority has submitted a copy of the regulations to the Senate Budget and Taxation Committee, House Appropriations Committee, and House Committee on Ways and Means as required under § 10A-103(b)(2)(ii) of the State Finance and Procurement Article.

Fiscal Analysis

There is a potential fiscal impact on the nonbudgeted revenues and expenditures of the Maryland Transportation Authority.

Agency Estimate of Projected Fiscal Impact

The regulations implement provisions of Chapter 5 of 2013, are procedural in nature, and generally have no effect on State or local government finances. The Department of Legislative Services (DLS) concurs that the regulations implement provisions of statute but advises that some of those provisions, which are authorizing in nature, were not accounted for in the fiscal analysis prepared for the legislation. Thus, certain provisions may result in additional nonbudgeted revenues and expenditures for the Maryland Transportation Authority. Specifically, the establishment of fees for the submission of unsolicited proposals may result in additional nonbudgeted revenues to the Authority, but a reliable estimate is not feasible because DLS cannot anticipate the number or timing of unsolicited proposals that will be submitted. In addition, DLS has learned that the Authority is (or will be) using the statutory authorization granted to it (and reflected in the regulations) to reimburse some private entities for costs incurred in developing transit-oriented public-private partnerships, up to \$3 million per proposal. This has the potential to add to project costs for these initiatives, but a reliable estimate is not available and will likely vary by project.

Impact on Budget

There is no impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

The Authority advises that the regulations have minimal or no economic impact on small businesses in the State. The Department of Legislative Services concurs.

Contact Information

Legal Analysis: Matthew Bennett – (410) 946/(301) 970-5350

Fiscal Analysis: Michael C. Rubenstein – (410) 946/(301) 970-5510