HB 1469

Department of Legislative Services

Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE

House Bill 1469 (Delegate G. Clagett)
Environmental Matters

Transportation Facilities - Public-Private Partnerships

This bill requires the Maryland Department of Transportation (MDOT) to establish, by regulation, a Public-Private Partnership Program for transportation facilities under the jurisdiction of the Maryland Transportation Authority (MdTA).

Fiscal Summary

State Effect: This bill largely codifies current practice within MdTA; however, certain provisions that expand eligible facilities for public-private partnerships could affect nonbudgeted revenues or expenditures. The net effect of these provisions on nonbudgeted expenditures and revenues is unclear. Transportation Trust Fund (TTF) expenditures could decrease depending on the type and number of public-private partnerships in which the State would participate; however, this effect is likely to be minimal.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The regulations must authorize agreements between private entities and MdTA to acquire, construct, or improve transportation facilities as well as to maintain and operate new, expanded, or purchased transportation facilities. Transportation facilities must be consistent with and eventually incorporated into the Consolidated Transportation Program (CTP) or the Maryland Transportation Plan.

A partnership agreement must: (1) prohibit a private entity from imposing tolls or user fees on an existing interstate highway or a free highway, bridge, tunnel, or overpass unless the highway, bridge, tunnel, or overpass is reconstructed to increase capacity; (2) pay the prevailing wage rate under State law; and (3) comply with all applicable federal, State, and local laws and regulations.

The regulations must establish procedures for the submission, evaluation, and approval of solicited and unsolicited proposals to enter into agreements authorized by the bill. The regulations must prohibit submission of an unsolicited proposal for a highway facility that is not part of a proposed project in the CTP.

To the extent feasible, the regulations must be consistent with the policies and requirements enacted by Virginia under its Public-Private Transportation Act.

Current Law: MdTA has general supervision over all transportation facilities projects, including finance, construction, operation, repair, and maintenance. MdTA, its activities, and projects are exempt from taxation. MdTA has specified powers to carry out its mandate, including, but not limited to:

- acquisition and sale of land;
- establishment and operation of a police force;
- the ability to borrow money and issue revenue bonds;
- the power to fix, revise, charge, and collect rentals, rates, fees, tolls, and other charges and revenues on MdTA projects; and
- the ability to enter into contracts.

Maryland's prevailing wage law applies to any public works contract when State funds are used to finance at least 50% of the construction costs and the project costs $500,000 or more. A contractor under a public works contract is liable to the public body for liquidated damages of $20 for each laborer or other employee who is paid less than the prevailing wage rate.

By definition, prevailing wages are the hourly wage rates paid in the locality in which the construction work is to be performed. If 50% or more of all workers in a trade are paid exactly the same rate, that rate is considered the prevailing wage. If not, then 40% or more of the employees for each work classification must be paid the same rate in order for the rate to qualify as prevailing. If less than 40% receive the same rate, a weighted average is calculated and used as the prevailing wage. Prevailing wages are based on hourly salary levels, as well as employer benefit contributions. Baltimore and Allegany counties have their own prevailing wage laws.

The federal Davis-Bacon Act of 1931, as amended, requires that each federal or District of Columbia contract over $2,000 for the construction, alteration, or repair of public buildings or public works contain a prevailing wage clause. Under the Act, contractors or their subcontractors are to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on similar projects.

Background: Established in 1971 as an independent, nonbudgeted State agency, MdTA is responsible for the operation of the State's seven existing toll facilities. MdTA has assumed an expanded role in financing nontolled transportation facilities since the 1980s. MdTA has provided fund transfers and loans to the TTF and has assumed responsibility for building nontolled facilities that could not be financed through the TTF, MdTA has also served as the conduit through which debt backed by a number of revenue sources has been issued by several MDOT modal administrations.

Public-private partnerships have been used to finance billions of dollars worth of new highway projects in the United States and can take several forms. A 2005 report prepared for MdTA lists billions of dollars for 2004 alone. Virginia has completed three projects: Route 895; the Dulles Greenway – the first private toll highway development in Virginia in 170 years; and Route 288.

A 1996 Attorney General's decision ruled that MdTA has sufficient statutory authority to enter into public-private partnerships. By regulation, MdTA has the authority to enter into public-private partnerships to construct new airport, rail, port, and transit facilities and for major expansion and rehabilitation of such facilities. MdTA has entered into public-private partnerships, but advises that it has only done so in a limited number of cases and always in conjunction with another State agency.

MdTA has undertaken several public-private partnership projects using nontraditional financing mechanisms (sharing financial risk with private partners and providing a return on investment for the private partners) to finance transit-related projects such as port and airport support facilities. MdTA's ability to issue tax-exempt bonds makes it a good vehicle for such nontraditional financing mechanisms.

MdTA is currently using a "design-build" partnership, whereby MdTA does a portion of the design process, and a private entity finishes the design and builds the road, to build the planned express toll lanes on Interstate 95. The State Highway Administration (SHA) has built other highways in Maryland using such an approach. However, MdTA regulations prohibit MdTA from entering into unsolicited public-private partnerships for highway projects.

In some cases, public-private partnerships can supplement shortfalls in State or local budgets for transportation projects and accelerate project completion. In addition, a U.S. Department of Transportation report from 2004 states that such partnerships can save from 6% to 40% of the cost of construction. Such partnerships also contain inherent risks for both parties. For the public entity, those risks can include higher total project cost, adverse project selection, contract management problems, public opposition, and private sector inefficiency. The private partner also faces certain risks, such as public opposition, approval and permit-related setbacks, land acquisition obstacles, and liability.

State Fiscal Effect: Although the bill largely codifies existing practice, nonbudgeted expenditures could increase due to the new requirement that MdTA consider unsolicited proposals. MdTA advises that considering unsolicited proposals for highways could require one additional position. Since the unsolicited proposals must concern projects already in the CTP, the need for additional personnel is unclear.

The Department of Legislative Services observes that prevailing wages already apply to most State transportation projects due to federal law and, therefore, would not affect projects constructed as a result of a partnership between MDOT and a private entity. Although MdTA does not receive federal funds for its projects and is not subject to federal labor requirements, MdTA advises that all of its projects pay the prevailing wage. Therefore, there would be no fiscal effect due to this provision.

The bill also expands the type of facilities for which MdTA can contract with a private entity to include maintenance and operation, as well as existing projects if they are constructed to increase capacity, as opposed to major rehabilitation or expansion of existing facilities. Accordingly, the fiscal effects of a private-partnership agreement would apply to these types of projects to the extent an agreement is used.

Nonbudgeted expenditures could decrease if the expanded types of eligible projects are implemented under public-private partnerships with fewer resources and if fewer bonds need to be issued. If these projects are done in conjunction with MDOT using TTF funds, TTF expenditures could decrease as well. However, as MdTA can already enter into solicited highway partnerships and under the bill cannot accept unsolicited proposals for highway projects not in the CTP, these projects would most likely be for operation and maintenance of facilities. As such, those projects would probably be considered operating programs. MdTA's operating budget is covered by toll revenue, not TT funds. Therefore, any effect on TTF expenditures is likely to be minimal. Foregone nonbudgeted revenues would be experienced to the extent that the private partner receives transportation tolls or fees rather than the State and those fees exceed operational and construction costs.

Additional Information

Prior Introductions: A similar bill, HB 1162, was introduced in the 2003 session, and was heard by the House Environmental Matters Committee, but no action was taken. A similar bill as amended, SB 497, passed the Senate, and was heard by the House Environmental Matters Committee, but no further action was taken.

Cross File: None.

Information Source(s): Maryland Department of Planning, Maryland Department of Transportation, Department of Legislative Services

Fiscal Note History: First Reader - March 10, 2006
ncs/ljm

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