Department of Legislative Services

Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 979 (Senator Jones)

Budget and Taxation Appropriations and Ways and Means

Public-Private Partnerships - Oversight

This bill defines a "public-private partnership" (P3) and establishes a framework of P3 reporting requirements and oversight procedures for State entities. The bill establishes a Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships. The Maryland Department of Transportation (MDOT), Department of General Services (DGS), and Department of Legislative Services (DLS) must provide staff support for the commission. The commission must submit a final report by December 1, 2011, providing findings and recommendations to the Governor and the General Assembly.

The bill takes effect June 1, 2010, and provisions concerning the commission terminate June 30, 2012.

Fiscal Summary

State Effect: Given the State's fiscal difficulties, agency budgets have been constrained. Thus, the requirement to develop the various P3 reports and the commission report may not be absorbable within the existing budgeted resources of State agencies. Instead, general, special, and nonbudgeted expenditures may increase minimally in FY 2010 and future years for costs associated with developing the required reports. MDOT, DGS, and DLS can handle the staffing requirement with existing resources; however, limited staff resources may be diverted from other responsibilities. Revenues are not directly affected.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: A "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.

A "public-private partnership" means a sale or lease agreement between a unit of State government or the Maryland Transportation Authority (MDTA) and a private entity under which (1) the private entity assumes control of the operation and maintenance of an existing State facility; or (2) the private entity constructs, reconstructs, finances, or operates a State facility or a facility for State use and will collect fees, charges, rents, or tolls for the use of the facility. A "public-private partnership" does not include (1) a short-term operating space lease entered into in the ordinary course of business by a unit of State government or MDTA and a private entity and approved in accordance with provisions concerning the transfer of State real or personal property in the State Finance and Procurement Article; (2) a procurement governed by specified general procurement provisions in the State Finance and Procurement Article; or (3) P3 agreements entered into by the University System of Maryland (USM), where no State funds are used to fund or finance any portion of a capital project.

A "reporting agency" means DGS, MDOT, USM, Morgan State University, St. Mary's College of Maryland, and the Baltimore City Community College.

The bill establishes several new reporting requirements for State entities involved with P3s.

- Reporting agencies must submit a report concerning a proposed P3 to the State Treasurer and specified legislative committees, for their review and comment, and to DLS at least 45 days prior to issuing a public notice of solicitation for a P3.

- MDTA must submit a report concerning a proposed P3 to specified legislative committees, for their review and comment, and to DLS at least 45 days prior to issuing a public notice of solicitation for a P3.

- By January 1 annually, MDTA and each reporting agency must submit a report concerning each P3 under consideration at that time by MDTA or the reporting agency that has not been previously reviewed or approved by the General Assembly, to specified legislative committees, for their review and comment, and to DLS.

- Also by January 1 annually, MDTA and each reporting agency must submit a status report concerning each existing P3 in which MDTA or the reporting agency is involved, to specified legislative committees, for their review and comment, and to DLS.

- Also by January 1 annually, MDTA and each unit of State government that provides conduit financing for a P3 must submit a report concerning each P3 for which MDTA or the unit is providing conduit financing, to specified legislative committees, for their review and comment, and to DLS.

- MDTA must submit an analysis of the impact of each proposed P3 agreement on MDTA's financing plan to specified legislative committees, for their review and comment, and to DLS at least 30 days prior to entering into a P3 agreement.

The reports provided by DGS must include information concerning all P3s involving units within the Executive Branch, excluding units that are already reporting agencies. The specified legislative committees must have 45 days to review and comment on the reports.

The bill requires the State Treasurer to analyze the impact of each proposed P3 agreement on the State's capital debt affordability limits and submit the analysis within a specified time period to specified legislative committees, for their review and comment, and to DLS. The Board of Public Works (BPW) is prohibited from approving specified P3 agreements until after specified legislative committees have had 30 days to review and comment on the State Treasurer's or MDTA's analysis of the proposed agreement.

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

The bill deletes provisions defining certain terms and requiring MDTA to provide specified information about P3s to legislative committees.

Joint Legislative and Executive Commission on Oversight of Public-private Partnerships

The commission is required to:

- assess the oversight, best practices, and approval processes for P3s in other states, including the Army Enhanced Use Lease Program;

- evaluate the statutory definitions of "public notice of solicitation" and P3 and recommend any amendments to the definitions to enhance their utility and refine their scope;
- make recommendations concerning the appropriate manner of conducting ongoing legislative monitoring and oversight of P3s, including several specified issues; and
- make recommendations concerning broad policy parameters within which P3s should be negotiated, which may include several specified issues.

Members of the commission may not receive compensation but are entitled to reimbursement for expenses under the standard State travel regulations.

Current Law: There is no statutory process in place that requires legislative oversight or review of all proposed P3 projects in the State. All of the contractual components of a P3 require only BPW approval.

Maryland Transportation Authority

Under Chapter 383 of 2007, a P3 arrangement is a lease agreement between MDTA and a private entity where the private entity assumes responsibility for operating and maintaining an existing or future revenue-producing highway, bridge, tunnel, or transit facility.

MDTA must provide a description of the proposed lease agreement and a financing plan to specified legislative committees, for their review and comment, and DLS at least 45 days prior to entering into a P3 arrangement. The information provided must include (1) the length of the proposed lease; (2) the scope of any toll-setting authority to be granted to the private partner; (3) the scope of payments to MDTA; (4) a cost-benefit analysis of the proposed P3 arrangement; and (5) requirements pertaining to the ongoing operation and maintenance of the facility and contract oversight.

At least 45 days prior to issuing a public notice of procurement related to a P3, MDTA must also provide to specified legislative committees, for their review and comment, and DLS a summary of the proposed procurement document to be used to solicit proposals. A public notice of procurement includes a request for proposals issued by MDTA.

State Debt Affordability

Chapter 43 of 1978 created CDAC to recommend an estimate of State debt to the General Assembly and the Governor. CDAC is chaired by the State Treasurer, and other committee voting members are the Comptroller, the Secretaries of Transportation and Budget and Management, and an individual appointed by the Governor. When reviewing State debt, CDAC considers general obligation (GO) bonds, consolidated transportation bonds, stadium authority bonds, bay restoration bonds, Grant Anticipation Revenue Vehicle bonds, and capital leases supported by State revenues. While the Governor and the General Assembly are not bound by CDAC's recommendations, the State has always adhered to CDAC's recommended limits. CDAC recommended a limit of $1.1 billion for new authorizations of GO bonds during the 2010 legislative session.

Background: Across the nation, there is growing interest in utilizing private-sector financing as a means to maintain and expand capital infrastructure investment. In Maryland, P3 agreements have primarily been utilized to finance transportation infrastructure. More recently, however, P3s have also facilitated the proposed multi-year phased redevelopment of the State center complex in Baltimore City and the financing of the Department of Health and Mental Hygiene's (DHMH) new public health laboratory.

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

Many contracts or legal agreements executed in furtherance of a P3 are negotiated and executed by Executive Branch agencies with little or no oversight from the General Assembly. To date, the General Assembly's involvement in projects such as the State center complex, new DHMH public health laboratory, Seagirt Marine Terminal, and MDOT welcome centers has been minimal. However, during the 2009 legislative session, provisions were included in both the capital (Chapter 485 of 2009) and operating (Chapter 484 of 2009) budget bills that sought to establish some P3 reporting requirements and oversight procedures. Chapter 484 of 2009 required DGS, MDOT, MDTA, and USM to submit a report listing all projects for which P3 arrangements are in place or under consideration and expressed intent that a joint legislative and executive P3 workgroup be convened. The required P3 report was submitted; however, members have not been appointed to the P3 workgroup to date. Chapter 485 instituted some legislative oversight procedures for P3 projects under consideration in fiscal 2009 and 2010, excluding the Seagirt Marine Terminal and the State center complex.

Conduit Financing for P3s

The Maryland Economic Development Corporation (MEDCO) is a nonbudgeted entity that allows the State to own or develop property for economic development purposes. MEDCO purchases or develops property that is leased to others under favorable terms. MEDCO also makes direct loans to companies throughout the State to maintain or develop facilities, and it often serves as the conduit for loans administered by the

Department of Business and Economic Development. MEDCO has provided conduit financing for one P3 project to date. In January, MEDCO issued $248.7 million in revenue bonds to help finance the expansion of the Seagirt Marine Terminal. It is anticipated that MEDCO will provide financing for the new DHMH public health laboratory and the State center complex in the future.

Maryland's Transportation P3 Program

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

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

In November 2009, the Maryland Port Administration announced a 50-year lease agreement with Ports America Chesapeake for the 200-acre Seagirt Marine Terminal. In return, Ports America Chesapeake agreed to construct a 50-foot berth for the Port of Baltimore that will accommodate larger vessels and may create new business opportunities. This P3 project is expected to produce 5,700 new jobs and generate $15.7 million per year in new tax revenue. The total investment and revenue to the State may exceed $1.3 billion over the life of the agreement.

Additional Information

Prior Introductions: None.

Cross File: HB 1370 (Delegate Branch, *et al.*) - Appropriations and Ways and Means.

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

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Analysis by: Amanda Mock

Direct Inquiries to:
(410) 946-5510
(301) 970-5510