

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 1287 (Delegate Niemann)
Environmental Matters

Public-Private Partnerships - Appeals Jurisdiction and Time Requirements

This bill establishes the jurisdiction of the Court of Special Appeals to hear immediate appeals related to the validity of a public-private partnership (P3) entered into by the State. It also establishes an expedited appeals process for the Court of Appeals to review a decision of the Court of Special Appeals under the expedited appeals process established in the bill.

The bill takes effect July 1, 2013, and applies only prospectively and may not be applied or have any effect on or application to any motion made or order issued before the effective date.

Fiscal Summary

State Effect: The Court of Appeals and the Court of Special Appeals can expedite their adjudication of future P3-related appeals with existing budgeted resources, but it may result in delays for the resolution of cases not subject to expedited processing.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: Parties in an appeal of a motion to dismiss, motion for summary judgment that disposes of the entire action, or final order of a circuit court related to a P3 have 60 days to file briefings. The Court of Special Appeals must issue a decision within 90 days after the filing of the appeal. If a decision is further appealed to the Court of

Appeals, the court must act expeditiously to consider the petition for a *writ of certiorari* and, if granted, establish an expeditious briefing schedule and issue a decision as expeditiously as possible.

Current Law: Chapters 640 and 641 of 2010 (SB 979/HB 1370) were the State’s first attempt at a comprehensive statutory framework for both transportation and nontransportation 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. They also established six reporting agencies authorized to enter into and report on P3s, which were the Department of General Services (DGS), the Maryland Department of Transportation, the University System of Maryland (USM), St. Mary’s College of Maryland, Morgan State University, and Baltimore City Community College. DGS was designated as the reporting agency for P3 projects entered into by all State agencies that are not themselves reporting agencies.

Chapters 640 and 641 defined a “public-private partnership” as 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 USM where no State funds are used to fund or finance any portion of a capital project.

Chapters 640 and 641 established several new reporting requirements for State entities involved with P3s, including:

- By January 1 annually, each reporting agency must submit (1) a report concerning each P3 under consideration at that time that has not been previously reviewed or approved by the General Assembly to specified legislative committees and (2) a status report concerning each existing P3 in which the reporting agency is involved to specified legislative committees.

- Also by January 1 annually, MDTA and each unit of State government (including the Maryland Economic Development Corporation) 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.
- Reporting agencies must submit a presolicitation report concerning a proposed P3 to the State Treasurer and specified legislative committees, for their review and comment, and to the Department of Legislative Services (DLS) 45 days prior to issuing a public notice of solicitation for a P3. Reports on P3s involving transportation facilities projects, as defined in Section 4-101 of the Transportation Article only need to be submitted to specified legislative committees and DLS.
- The State Treasurer has to analyze the impact of each proposed P3 agreement, except for those P3s involving transportation facilities projects, as defined in Section 4-101 of the Transportation Article, 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 and the Treasurer have had 30 days to review and comment on the proposed agreement.
- The Capital Debt Affordability Committee 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.

Background: The State Center P3, which is currently inactive after a Baltimore City Circuit Court ruling voided its contracts, proposed a major multi-phase redevelopment of several State office buildings and surface parking lots in Baltimore City into a mixed-use transit-oriented development including retail, housing, and office space. The buildings themselves have not been properly maintained and are near the end of their useful life. The total cost of the project was originally estimated to be \$1.5 billion, and it was to be funded with a variety of private debt and equity, tax credits, tax increment financing, and State support. The State was to be the major anchor tenant for the office space and fund construction of a \$35 million parking garage. In 2009, the State executed a master development agreement with State Center LLC, a consortium of private entities headed by Ekistics LLC, and in 2010, BPW approved the ground and occupancy leases for the first phase of the development.

In December 2010, several downtown property owners filed a lawsuit alleging that the State did not comply with competitive bidding requirements and procedures. Since that lawsuit was filed, work on State Center largely came to a halt pending the outcome of the litigation. In January 2013, the Baltimore City Circuit Court ruled for the plaintiffs, agreeing with their claim that the State did not follow relevant State procurement law in soliciting the project. The court's ruling voided the State Center contracts. In February 2013, the State filed an appeal, seeking an expedited decision. As the circuit court's decision related to State Center predates the effective date of this bill, it is not subject to the bill's expedited appeals process.

Additional Comments: The Administrative Office of the Courts notes that appeals briefs are submitted sequentially. To meet the 60-day deadline for the appeals, the appellant's brief must be submitted substantially before that deadline to allow all three sets of briefs to be submitted in time.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Board of Public Works, Judiciary (Administrative Office of the Courts), Department of Legislative Services

Fiscal Note History: First Reader - February 14, 2013
ncs/rhh

Analysis by: Michael C. Rubenstein

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