

Department of Legislative Services  
Maryland General Assembly  
2018 Session

FISCAL AND POLICY NOTE  
Third Reader - Revised

House Bill 816

(Delegate Lierman, *et al.*)

Environment and Transportation

Budget and Taxation

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Public-Private Partnership Agreements - Compensation Provisions and  
Noncompete Clauses - Alterations

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This bill clarifies the circumstances under which the State may provide compensation to a private entity that is a party to a public-private partnership (P3) if another project results in a documented revenue loss for the private entity. It further clarifies that a P3 agreement for a project involving road, highway, or bridge assets may not include a noncompete clause that would inhibit the planning, construction, or implementation of State-funded transit projects. **The bill takes effect July 1, 2018.**

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Fiscal Summary

**State Effect:** None. The bill is clarifying in nature and is consistent with current practice.

**Local Effect:** None.

**Small Business Effect:** None.

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Analysis

**Bill Summary:** The State may not provide compensation to a private entity that is a party to a P3 agreement for transit projects or transit service improvements for other transportation modes that are not the subject of the P3 agreement, even if those projects result in a documented revenue loss for the private entity.

**Current Law:** Chapter 5 of 2013 established a new framework for the approval and oversight of P3s. Chapter 5 defined a P3 as a method for delivering public infrastructure assets using a long-term, performance-based agreement between specified State

“reporting” agencies and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contract partners, in which:

- a 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; and
- 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.

A “public infrastructure asset” is a capital facility or structure, including systems and equipment related to the facility or structure intended for public use.

In general, a P3 agreement may include a provision that requires the State to compensate a private entity that is party to the agreement for competing infrastructure developments that directly result in a documented revenue loss for the private entity. However, compensation may not be provided for State infrastructure developments already in the State’s *Capital Improvement Program* or *Consolidated Transportation Program* planning documents at the time the P3 agreement is executed. Compensation also may not be provided for safety initiatives, infrastructure improvements with minimal capacity increases, or infrastructure for other transportation modes that are not the subject of the P3 agreement.

P3 agreements involving road, highway, or bridge assets may not include a noncompete clause.

## **Background:**

### *Noncompete clauses*

Noncompete clauses prohibit the public sector from building or maintaining facilities that are comparable to facilities that the private sector is operating under a P3 agreement. They are most typically seen in transportation projects, and they may prohibit the State from building a free road parallel to or near a P3 toll road. The noncompete clauses give some protection to the private-sector partner that revenues for their project will not be adversely affected by the public sector offering a comparable facility or service at lower or no cost.

The Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships, which issued its final report and recommendations in January 2012, considered the issue of noncompete clauses and concluded that they should not be banned outright. It also concluded that, since noncompete clauses are an issue that pertains largely to highway P3 projects, only those projects be addressed in statute to allow maximum

flexibility for other types of projects. Its final recommendations on the topic, which were incorporated into Chapter 5 of 2013, were that:

- for road, highway, and bridge projects only, noncompete clauses should be prohibited, but that compensation may be provided for projects that result in a documented revenue loss for the P3 project; and
- compensation may not be provided for (1) State projects already in the planning phase; (2) safety projects; (3) improvement projects with minimal capacity increases; or (4) projects involving *other* transportation modes (*i.e., transit*) (emphasis added).

Thus, the bill's addition of transit projects and transit service improvements to other transportation modes that are not the subject of the P3 agreement are consistent with legislative intent and current practice. Similarly, the bill's clarification that P3 agreements for road, highway, or bridge assets may not include provisions that inhibit the development of State-funded transit projects is also consistent with legislative intent and current practice.

#### *Governor's Traffic Relief Plan*

In September 2017, the Governor announced plans to add four new lanes to I-270 in Montgomery County, the Capital Beltway (I-495), and the Baltimore-Washington Parkway (MD 295), with the first two projects expected to be completed using P3s. The combined cost of all three projects is estimated to be \$9 billion, with the I-270 and I-495 projects seeking private developers to design, build, finance, operate, and maintain the new (toll) lanes on both roads. The MD 295 project is not expected to involve a P3, but instead would be carried out by the Maryland Transportation Authority following the transfer of ownership of the parkway from the U.S. Department of the Interior to the State.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Department of Budget and Management; Department of General Services; Maryland Department of Transportation; Department of Legislative Services

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