HB 91

Department of Legislative Services

Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 91 (Delegates Carr and Korman)

Environment and Transportation and Appropriations

Public-Private Partnerships - Presolicitation Reports - Environmental Impact Statement Requirement

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This emergency bill prohibits specified agencies from submitting a presolicitation report for a public-private partnership (P3) that requires an environmental impact statement until a draft environmental impact statement that complies with federal requirements is available. It also requires the Maryland Department of Transportation (MDOT) and the Maryland Transportation Authority (MDTA) to withdraw the presolicitation report for the Interstate 495 and Interstate 270 P3 projects (I-495 and I-270) and specifies the conditions under which the report may be resubmitted.

Fiscal Summary

State Effect: Potential delays in nonbudgeted, Transportation Trust Fund, and federal fund expenditures and revenues to the extent that project commencement and completion are delayed. Delays may also cause overall project costs to increase or decrease; the net effect cannot be reliably estimated, as discussed below.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: MDOT and MDTA may not resubmit the presolicitation report for I-495 and I-270 until (1) a Managed Lane Study draft environmental impact statement is adopted and (2) an alternative is selected during the National Environmental Policy

Act (NEPA) process that involves priced managed lanes. A resubmitted report must include a comparison between the proposed P3 and a procurement by MDTA using design-build contracts.

Current Law:

Public-private Partnerships

Chapter 5 of 2013 established a new framework for the approval and oversight of P3s in the State. It defined a "public-private partnership" 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.

Only specified "reporting agencies" may establish a P3. Reporting agencies include the Department of General Services, which oversees building purchases and leases for most of State government, MDOT, MDTA, and State higher education institutions.

Chapter 5 establishes the public policy of the State to utilize P3s, if appropriate, for (1) developing and strengthening the State's public infrastructure assets; (2) apportioning between the public sector and the private sector the risks involved in the development and strengthening of public infrastructure assets; (3) fostering the creation of new jobs; and (4) promoting the State's socioeconomic development and competitiveness. The public policy also asserts that private entities that enter into P3s must comply with the provisions of the Labor and Employment Article and the federal Fair Labor Standards Act.

The Board of Public Works (BPW) must approve all P3 agreements, subject to specified processes; however, BPW may not approve a P3 partnership that results in the State exceeding its capital debt affordability guidelines.

Presolicitation Reports

A reporting agency may not solicit a P3 until a presolicitation report about the project is submitted to the Comptroller, State Treasurer, the budget committees of the Maryland General Assembly, and the Department of Legislative Services. The budget committees have 45 days to review and comment on the report, but if the project is valued at more than $500.0 million, they may request an additional 15 days to review and comment on the report.

The presolicitation report must, among other requirements, (1) state the specific policy, operational, and financial reasons for the P3; (2) identify the anticipated value and environmental implications of the P3; and (3) evaluate the risks and benefits of the P3.

After the period of review has ended, and before the reporting agency issues a public notice of solicitation, BPW must officially designate the proposed asset as a P3 and approve the solicitation method.

Environmental Impact Statements

For major transportation projects, NEPA requires a range of alternatives to be considered and the environmental impacts of each alternative to be analyzed. This type of study is required prior to the commitment of federal funds to any major project or prior to any action taken by a federal agency that might cause a significant impact on the environment. Some of the basic steps in this process include a public scoping process, data collection, analysis of policy alternatives, and preparation of draft and final documents. The process involves numerous federal, state, and local partners; can take several years; and costs millions of dollars.

Background: 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 MDTA following the transfer of ownership of the parkway from the U.S. Department of the Interior to the State.

The draft *Consolidated Transportation Program* for fiscal 2019 through 2024 includes $129.5 million to continue planning for the new lanes on I-270 and I-495. MDOT advises that one of the goals of the I-270 and I-495 project is that there will be no net cost to the State. To that end, MDOT advises that, in time, it will be repaid for these and other project development costs by the P3 partners.

On December 12, 2018, MDOT and MDTA delivered a presolicitation report for the I-495 and I-270 toll lanes that did not include a NEPA study. MDOT advises that the plans for both projects are structured to proceed simultaneously with the environmental and solicitation processes so that any issues identified in the federal approval process can inform the project design. MDOT also advises that federal regulations allow it to work with a developer prior to approval of the NEPA analysis. On January 17, 2019, the budget committees requested a 15-day extension to complete their review and comment, as allowed under current law.

State Fiscal Effect: MDOT advises that withdrawal of the presolicitation report for I-495 and I-270 likely results in at least a one-year delay in the start and completion of those projects. It expects the projects to generate upfront concession payments as well as federal support, so any delay in the projects likely results in a delay in those payments and federal fund revenues as well. Similarly, any State or federal expenditures that are part of the resulting P3 agreement may also be delayed.

As noted by MDOT, delays in the completion of construction projects typically result in higher costs due to inflation and extended payment windows, but several factors may mitigate any such effects. First, pessimistic economic forecasts for the coming year make it uncertain that inflation will cause project costs to increase with a delay; during the previous recession, the cost of construction fell dramatically. Second, the delay does not necessarily increase the length of the construction phase of the project, only its start date. Third, completion of the NEPA process prior to project design may reduce spending on design by eliminating the need for redesigns that must be developed in response to the environmental impact statement under MDOT's proposed plan. Therefore, the net fiscal effect of any delay in project commencement and completion cannot be reliably estimated.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of General Services; Maryland Department of Transportation; Department of Legislative Services

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