Department of Legislative Services

Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 299 (Delegate Love, *et al.*)

Environment and Transportation and Appropriations

Public-Private Partnership Projects - Real Property Acquisition - Prohibition

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This bill prohibits a State agency or its designee from acquiring any residential real property for a public-private partnership (P3) project that includes the addition of toll lanes to I-495 or I-270. **The bill takes effect July 1, 2020.**

Fiscal Summary

State Effect: State operations and finances may be significantly affected, as discussed below. Specifically, the State's current traffic relief plan may be difficult or impossible to implement under the bill.

Local Effect: The bill does not directly affect local government operations or finances.

Small Business Effect: Potential meaningful.

Analysis

Current Law:

Condemnation – Generally

The power to take, or condemn, private property for public use is one of the inherent powers of state government and, through the State, its political subdivisions. Courts have long held that this power, known as "eminent domain," is derived from the sovereignty of the state. Both the federal and State constitutions limit the condemnation authority. Both constitutions establish two requirements for taking property through the power of eminent domain: (1) the property taken must be for a "public use"; and (2) the party whose property is taken must receive "just compensation." In either event, the party whose property is being taken is generally entitled to a judicial proceeding prior to the taking of the property. However, the Maryland Constitution does authorize "quick-take" condemnations in limited circumstances prior to a court proceeding.

Other entities have been given express statutory authority by the State to exercise condemnation powers under specified circumstances, including the major subdivisions of the State, municipalities, and specified utilities such as gas, oil pipeline, railroad, telephone and telegraph, and water companies.

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, the Maryland Department of Transportation (MDOT), the Maryland Transportation Authority (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.

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. In June 2019, BPW voted to designate the I-270 and I-495 projects as eligible for a P3 and approved the proposed competitive solicitation method for selecting a developer for each phase of the program. On January 8, 2020, BPW approved the plan with amendments – the preliminary solicitation schedule for Phase 1 anticipates execution of the P3 agreement in May 2021.

The *Consolidated Transportation Program (CTP)* for fiscal 2020 through 2025 includes $95.8 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. The CTP also includes $25,000 for planning of the MD 295 project.

State Fiscal Effect: MDOT and MDTA are still in the planning stages of the traffic relief plan and, as such, there are no current plans to acquire or condemn property for the project. Even so, the bill’s prohibition against the acquisition of any residential real property for a P3 project that includes the addition of toll lanes to I-495 or I-270 is likely to affect State operations and finances, both in the short term (as the State seeks a partner for the P3) and in future years (depending on if, when, and how the project is ultimately implemented).

For example, the bill's constraints may lead to significantly higher risks for any contractor or partner that works with the State on the project, which could increase the total cost of the project. Moreover, the increased risk may make it impossible to find a private partner for the P3, which may make the project infeasible. MDOT advises that the State does not have the funding available to implement the plan without the private financing and risk transfer afforded by a P3. Accordingly, the State may need to explore other alternatives to address congestion in the Baltimore-Washington Metropolitan area, which could affect State finances.

Small Business Effect: To the extent the bill makes the project infeasible, any small business contractors that otherwise would have been hired to work on the project would be negatively affected.

Additional Information

Prior Introductions: HB 663 of 2019 received a hearing in the House Environment and Transportation Committee, but no further action was taken. Its cross file, SB 781, received a hearing in the Senate Budget and Taxation Committee, but no further action was taken.

Designated Cross File: None.

Information Source(s): Maryland Department of Transportation; Department of General Services; Board of Public Works; Maryland Department of the Environment; Comptroller's Office; Maryland State Treasurer's Office; Department of Legislative Services

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