Department of Legislative Services

Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1201 (Delegate Solomon)

Environment and Transportation and Appropriations

Public-Private Partnerships

This bill establishes the Public-Private Partnership Oversight Review Board to provide specified oversight of proposed public-private partnerships (P3s). It alters the review and approval process for P3s valued at more than $500 million and for unsolicited proposals for P3 agreements and expands the requirements for all P3 agreements. Finally, the bill specifies that P3 agreements for roads or bridges may not include a noncompete clause that would inhibit any transit or road maintenance projects (instead of only State-funded transit projects). **The bill takes effect July 1, 2023.**

Fiscal Summary

State Effect: General fund expenditures increase by $240,500 in FY 2024 to staff the board; out-years reflect ongoing staffing costs. General fund expenditures by the Treasurer's Office increase further beginning as early as FY 2024 to conduct independent credit assessments and risk analyses, as needed. The bill may negatively affect the viability and financing of P3 projects by delaying their approval and redirecting revenues away from bondholders. However, it may facilitate transit and road maintenance projects paid for with non-State funds.

(in dollars)	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
Revenues	$0	$0	$0	$0	$0
GF Expenditure	240,500	258,900	263,700	268,700	275,000
Net Effect	($240,500)	($258,900)	($263,700)	($268,700)	($275,000)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

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

Small Business Effect: Minimal.

Analysis

Bill Summary:

Public-Private Partnership Oversight Review Board

The board is required to:

- review P3 presolicitation reports;
- make recommendations regarding the designation of a public infrastructure asset as a P3;
- consult with a reporting agency in reviewing an unsolicited P3 proposal (which a reporting agency must submit to the board for its review);
- review best practices regarding P3s; and
- monitor the implementation and operation of existing P3s.

The board is staffed by the Department of Legislative Services (DLS) and may request technical assistance from the Treasurer, the Comptroller, or other appropriate agency.

Approval Process for Public-private Partnerships Valued at More Than $500 Million

The procedures described below apply only to P3 projects (or proposed projects) with a value that exceeds $500 million. For the purpose of determining the total value of a project that will be developed in phases, the total value is equal to the sum of the total value of each phase of the project.

A reporting agency must submit a presolicitation report for a transportation facilities P3 project to the P3 Oversight Review Board, including separate reports for each contract under the P3. Within 60 days of receiving a report, the P3 Oversight Review Board must report and make recommendations to the Board of Public Works (BPW) and the budget committees of the General Assembly. (For purposes of P3s, "budget committees" is redefined to include the House Environment and Transportation Committee rather than the House Committee on Ways and Means.) The budget committees, in consultation with the appropriate policy committees, have 60 days to review and comment on the board's report and recommendations before BPW may designate the project as a P3.

A copy of a proposed P3 agreement must be submitted to the Legislative Policy Committee (LPC) and the P3 Oversight Review Board in addition to other entities in current law. BPW may not approve the agreement until (1) either the budget committees or LPC, depending on the timing, have reviewed and commented on the agreement; (2) independent assessments of the impact on the State's credit rating are completed for each contract in the agreement by a financial advisor chosen by the State Treasurer; and (3) a risk analysis with specified items is completed for each contract by a financial advisor chosen by the State Treasurer.

Requirements for Public-private Partnership Agreements Valued at More Than $1.0 Billion

A P3 agreement with a total value that exceeds $1.0 billion requires an affirmative vote of the General Assembly before BPW may act to approve the agreement. The vote must occur after completion of the period of review, analysis, and comment required above.

Unsolicited Proposals

A reporting agency must (1) notify LPC upon receiving an unsolicited proposal for a P3 and (2) consult with the P3 Oversight Review Board in reviewing the unsolicited proposal.

Requirements for All Public-private Partnership Agreements

If a reporting agency has determined that a P3 project will be developed in separate phases, it must submit for approval separate presolicitation reports for each phase of the project.

A proposed P3 agreement must include financial information regarding each contractor and any subcontractor that will provide products or services under the agreement.

Any P3 agreement that includes a negotiated guaranteed rate of return for the private entity must include the terms establishing the guaranteed return. In addition, if a P3 agreement requires the State or a successor agency to take over operations and maintenance of the project at a future date, the terms must specify that all toll revenue or other charges be assigned to the State or a successor agency. In addition, the terms of the P3 must require the reimbursement of the State for advanced project expenses, as specified.

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.

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.

BPW must approve all P3 agreements, but a reporting agency may not issue a public notice of solicitation or request that BPW designate a project as a P3 until the Comptroller, Treasurer, budget committees, and DLS have had at least 45 days to review and comment on a presolicitation report that contains specified information (for transportation facilities projects, the presolicitation report is submitted only to the budget committees and DLS).

Once a P3 agreement is formed, BPW may not approve the agreement until (1) a copy of the agreement is submitted simultaneously to the Comptroller, Treasurer, budget committees, and DLS; (2) the Treasurer, with the Comptroller, analyzes the agreement’s effect on the State’s capital debt affordability limits and submits the analysis to the budget committees and DLS; and (3) the budget committees have reviewed and commented on the agreement within 30 days.

Reporting agencies may establish P3s in connection with any public infrastructure asset for which they are responsible, and they may establish specific functions within their agencies dedicated to P3s. P3 agreements may include provisions that are necessary to develop and strengthen a public infrastructure asset.

P3 agreements involving road, highway, or bridge assets may not include a noncompete clause that inhibits the planning, construction, or implementation of State-funded transit projects.

State Fiscal Effect:

Public-Private Partnership Oversight Review Board

There is currently one major P3 project being carried out (the Purple Line) and another in the solicitation/procurement process (the expansion of I-495/I-270, including the American Legion Bridge). Each project is extremely complex in design and operation and expected to cost billions of dollars. As the bill requires the P3 Oversight Review Board to monitor the implementation and operation of existing P3 projects on an ongoing basis, and board activities may often overlap with the legislative session when DLS staff are fully committed, DLS requires additional staff and consulting support to staff the board.

Therefore, general fund expenditures increase by $240,455 in fiscal 2024, which accounts for a 90-day start-up delay from the bill's July 1, 2023 effective date. This estimate reflects the cost of hiring one analyst to staff the board on a full-time basis and contracting with a consultant with expertise in the operation and financing of P3 projects. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses, including consulting fees.

Position	1.0
Salary and Fringe Benefits	$83,046
Consulting Fees	150,000
Operating Expenses	7,409
Total FY 2024 DLS Expenditures	**$240,455**

Future year expenditures reflect a salary with annual increases and employee turnover and ongoing operating expenses.

Independent Credit Rating Assessments and Risk Analyses

The bill requires the State Treasurer to select a financial advisor to conduct specified risk and credit analyses, so it is assumed that the State Treasurer, rather than a reporting agency or a private partner, must also pay for the analyses to be done. The State Treasurer's Office indicates that the cost of a single such analysis likely ranges from $5,000 to $10,000. DLS cannot reliably estimate the timing or frequency of these analyses, as they depend on the frequency and complexity of P3 projects in the State.

Public-private Partnership Project Viability and Delays

Several provisions in the bill have the likely effect of delaying or extending the approval process for future P3 projects and/or making them less viable. Additional reviews by the oversight board likely extend the timeline for proposed projects. Also, the provision that requires, when the State or a successor agency takes over a project, that revenues be assigned to the State or the successor agency may dissuade investors in P3 projects to the extent that they view that provision as potentially denying them a return on their investment. To the extent that project delays or reduced investor interest in a P3 increase the costs associated with major construction projects, those provisions may negatively affect the financing of P3 projects.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See HB 485 of 2021 and HB 1424 of 2020.

Designated Cross File: None.

Information Source(s): Comptroller's Office; Maryland State Treasurer's Office; Public School Construction Program; Department of Budget and Management; Department of General Services; Board of Public Works; Legislative Services; Department of Legislative Services

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