
February 17, 2021

The Honorable Paul G. Pinsky
Chair, Education, Health, and Environmental Affairs Committee
2 West, Miller Senate Office Building
Annapolis MD 21401

Re: *Letter of Opposition – Senate Bill 361 – Public-Private Partnerships – Process and Oversight*

Dear Chairman Pinsky and Committee Members:

The Maryland Department of Transportation (MDOT) respectfully opposes Senate Bill 361, as this legislation represents a significant departure from the State’s carefully considered public-private partnership (P3) law, which could serve to irreparably damage the P3 market in the State of Maryland.

Senate Bill 361 would fundamentally alter the framework under which P3 agreements are undertaken. Maryland has a model statutory framework for P3 agreements, which was developed in 2013 in accordance with the recommendations of a multi-year Joint Legislative and Executive Oversight Commission on Public-Private Partnerships. The P3 law in place was passed with overwhelming majorities in both the House and Senate just eight years ago.

Senate Bill 361 will cause a negative ripple effect to the P3 market in Maryland by creating project delays and uncertainty, limiting innovation and competition, and creating financial challenges for Maryland P3 projects seeking financing through multiple means.

First, the legislation requires a Final Environmental Impact Statement that complies with the National Environmental Policy Act to be submitted with the Pre-Solicitation Report to the P3 Oversight Review Board. Today, the environmental review and the solicitation processes can happen concurrently. This change would greatly limit MDOT’s ability to identify the best solutions in partnership with the concessionaire, which could result in costly redesign and reevaluation in response to design changes. This would also delay the project schedule, resulting in increased project costs and reduction of value to the State.

Second, this bill creates a seven-member Public-Private Partnership Oversight Review Board to review the Presolicitation Report and make recommendations regarding the P3 designation. For P3 projects of \$500 million or more, the newly established Oversight Review Board would have sixty days to review the Presolicitation Report and provide their recommendation to the legislature. Thereafter, the legislature would have another 60 days to review the P3 Review Board’s recommendations. The P3 Review Board, composed of two members of the House of Delegates, two members of the Senate, and three appointees of the Governor, increases project cost and uncertainty and reduces value to Maryland citizens.

As noted in the report from the 2013 P3 Commission, “the private sector is less likely to make substantial upfront investments if they believe that a political debate will derail a P3 project.” The proposed Review Board creates uncertainty for private developers - developers equate uncertainty to risk and risk costs money. P3 developers cite political risk as one of the most critical, and potentially most costly, project risks in the P3 market that they are unable to price.

Also, the inclusion of either the Baltimore and Washington Council of Governments (COG) or their associated Metropolitan Planning Organizations (MPO) as staff of the proposed Review Board could prove to be problematic in the future. As the planning bodies responsible for developing and carrying out a continuing, cooperative, and comprehensive transportation planning process, they consist of elected and local officials as well as transportation and transit agencies. MPOs approve plans for an entire region, and there is a potential risk for conflicts of interest, depending on who the COG or MPO staff would be. Staffing the Oversight Review Board and project-level approvals is ultimately not the MPO or COG role.

Third, the legislation requires all revenues to be assigned to the State or a successor entity to apply to the operations and maintenance of the project if the P3 partner goes bankrupt. This provision will make P3 projects in Maryland unbankable, meaning that projects will not be able to obtain financing with this provision. To issue debt to fund projects, an issuer must provide protections for the bondholders to get repaid. While bond holders accept the risk that project revenues may be insufficient for them to be repaid, they will not accept a provision in law that reassigns the revenues that are supposed to provide for debt repayment to another party. Reassigning all of these revenues to another party would also result in a financial windfall for that entity, because they would be receiving all project revenues while not having paid anything for project construction. Additionally, this provision would prohibit the State from receiving any financial benefit from the reassignment.

Fourth, Senate Bill 361 would prohibit the Board of Public Works from approving a P3 agreement until a risk analysis is completed by a financial advisory firm selected by the State Treasurer and an independent assessment is completed by all credit rating agencies the rate the State’s debt. It will be difficult for either of these actions to occur within the 30 days allotted for legislative review of a P3 agreement. Additionally, these efforts would be duplicative of other efforts. A complete project risk analysis is routinely completed by the project team. The State Treasurer is already required to provide an analysis of the P3’s impact on State debt. Credit rating agencies will be unwilling to provide the type of analysis required in this bill because it then could create a liability for them if something goes wrong with the private partner or funding source. A credit rating does not guarantee against a company going bankrupt or facing other financial challenges; it merely quantifies the risk of that happening. Every credit rating report includes lengthy disclaimers that the rating report should not be relied upon to make investment decisions.

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Finally, Senate Bill 361 requires that if an agency receives an unsolicited proposal, it must notify and consult with the P3 Review Board about the unsolicited proposal. This provision will likely deter the private sector from submitting any unsolicited proposals. Unsolicited proposals may contain key business information – an idea that an entity has about how it can do something better, faster, or cheaper than the State. To require that these unsolicited proposals be reviewed by the Board, which would have to be a public body and subject to PIA and open meetings, would likely discourage any potential unsolicited proposals.

The Maryland Department of Transportation respectfully requests the Committee consider this information when deliberating Senate Bill 361 and issue an unfavorable report.

Respectfully submitted,

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