

August 10, 2021

**VIA ELECTRONIC DELIVERY**

Board of Public Works  
80 Calvert St, Room 117  
Annapolis, Maryland 21401

Re: Phase 1 of the I-495 and I-270 Public-Private Partnership Program

Dear Members of the Board of Public Works:

At its August 11, 2021 meeting, the Board is scheduled to undertake the important task of considering the State Highway Administration contract, *Phase 1 of the I-495 and I-270 Public-Private Partnership Program* (hereinafter, “Phase 1 P3 Agreement”). See Aug. 11, 2021 Agenda (Revised) pp. 70–79 (hereinafter “Agenda”). Capital Express Mobility Partners (“CEMP”), an interested party to the underlying proposal, respectfully submits this statement to encourage the Board to defer approving the Phase 1 P3 Agreement to a later time. The award decision is currently the subject of an ongoing and vigorously litigated bid protest and appeal, and significant overwhelmingly meritorious questions regarding the propriety of the award decision have been raised and have yet to be resolved. While CEMP fully supports the State’s efforts to bring much-needed traffic congestion relief to Marylanders and to replace the aging American Legion Bridge, the selected proposal does not maximize value to the State and does not provide delivery certainty, and thus undermines those goals.

As the Board’s agenda notes, CEMP was a “highly qualified” proposer that responded to the State’s Request for Proposal (“RFP”) for the Phase 1 P3 Agreement. Agenda p. 75. However, CEMP’s proposal—which maximized both value to the State and delivery certainty—was not selected. CEMP timely protested the State’s choice of Accelerate Maryland Partners LLC (“AMP”) as the Selected Proposer because AMP lacked, and continues to lack, a Lead Contractor with meaningful large-scale road construction experience and submitted a proposal that failed to comport to the terms of the RFP, thus jeopardizing delivery certainty. CEMP’s protest and appeal of the State’s decision remain pending and are not subject to final, binding resolution. It is critical for the Board to consider that it is being asked to approve a contract that is the subject of a controversy that may be decided by judicial order. As such, approval at this juncture is woefully premature.

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***Ongoing Resolution Procedures***

MDOT's decision to award the contract to AMP has been under protest since March 1, 2021. Since then, and continuing to the present, there has been no final resolution of the merits of CEMP's protest. Rather, the Contracting Officer's initial decision denied CEMP's protest partly on procedural grounds, and MDOT moved to dismiss CEMP's appeal of that decision on purely procedural grounds. The MDOT official tasked with deciding the protest held a hearing on the motion to dismiss on June 29, 2021; however, *more than one month has passed* without any decision by MDOT on that motion. MDOT is aware that, as soon as it dismisses CEMP's protest, CEMP will file a petition for judicial review in Maryland circuit court. Alternatively, if MDOT does not dismiss CEMP's protest in its entirety, MDOT will be required to entertain the merits of CEMP's protest by producing an agency report, accepting CEMP's comments on that report, and holding a hearing on the merits of the protest. CEMP could then appeal any unfavorable decision from that proceeding to Maryland circuit court. Either way, a Maryland circuit court may be asked to decide the dispute and could render a decision that invalidates the State's award to AMP.

CEMP intends to fully exhaust these administrative and judicial procedures. The Board should defer approving the contract to eliminate the possibility of post-approval judicial intervention.

The MDOT Secretary's attempt to rush the contract to execution "notwithstanding that a decision on the appeal is pending" is untenable. Agenda p. 78. None of the eight purported "State interests" that MDOT identified warrant rushing the contract to execution while CEMP's protest and appeal remain unresolved. Specifically, in response to each:

- (i) *the need to replace the ALB utilizing the progressive P3 for congestion relief funding*

Allowing CEMP's protest and appeal to reach final resolution does not jeopardize the replacement of the American Legion Bridge. Phase 1 South of the project, which includes the American Legion Bridge component, is not expected to reach financial close until October 31, 2022.<sup>1</sup> There is sufficient time to resolve CEMP's protest and appeal—and to allow the Board to vote on a contract that is not the subject of an ongoing legal controversy—without jeopardizing overall progress towards the replacement of the American Legion Bridge. Moreover, as discussed below, AMP lacks a Lead Contractor with experience in large-scale road construction project, whereas CEMP's Lead Contractor—Ferrovia Construction US Corp.—has extensive experience in such projects. Ferrovia has already studied the American Legion

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<sup>1</sup> See MDOT Report to Md. Gen. Assembly at 17 (Jun. 8, 2021), available at <https://495-270-p3.com/wp-content/uploads/2021/06/GA-Phase-P3-Agreement-Report.pdf>.

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Bridge's conditions and construction needs, putting it in position to ensure delivery certainty in a way that a yet-to-be-hired contractor never could.

(ii) *capturing historically low interest rates*

Interest rates have been at or near historic lows for more than a decade, and the Federal Reserve is not expected to raise rates in the near term.<sup>2</sup> Conjecture about future bumps in interest rates does not justify rushing to approve the contract.

(iii) *the impacts of construction inflation*

Similarly, MDOT's attempt to justify a rushed decision by raising the specter of "inflation" is unavailing. Recent pandemic-caused price increases are expected to taper, and general inflationary pressure does not warrant approving a contract that is an overall bad deal for the State. Further, AMP's lack of an experienced Lead Contractor risks construction delays and cost overruns, which could greatly exceed any inflation-caused cost increases.

(iv) *the loss of AMP's best-value proposal validity*

MDOT unashamedly assumes that AMP's proposal provides Marylanders with the "best value," without acknowledging that the best-value inquiry is subject to ongoing protest and litigation. CEMP's protest, when decided on the merits, will demonstrate that CEMP's proposal provides the best value to the State and Marylanders. It is therefore essential that CEMP's protest be resolved *before* the Board approve the award of any contract.

(v) *unnecessary loss of the value of AMP's proposal, including extensive community benefits*

Similarly, MDOT presupposes that AMP's proposal provides the best value and that proposal value will be lost if the Phase 1 P3 Agreement is not approved now. CEMP's protest will conclusively demonstrate that its proposal, not AMP's, provides the best value. Allowing the protest process to reach a final resolution does not jeopardize the value of either CEMP's or AMP's proposal because both proposers have the incentive to keep their proposals open until the contract is executed. Rushing to approve the contract now is not in the State's best interest, since AMP's proposal fails to offer the best value and greatest delivery certainty, and the State would be overlooking the greater advantages offered by CEMP's proposal. CEMP is well-suited

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<sup>2</sup> See THE WALL STREET JOURNAL, Fed Signals Low Rates Likely to Last Several Years (Sept. 16, 2020), available at <https://www.wsj.com/articles/fed-signals-interest-rates-to-stay-near-zero-through-2023-11600279214>; see also THE NEW YORK TIMES, Federal Reserve Officials Project Rate Increases in 2023 (Jun. 17, 2021), available at <https://www.nytimes.com/2021/06/16/business/economy/fed-meeting-inflation.html>.

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to deliver extensive community benefits to all local stakeholders after its protest is resolved and after it is properly awarded the contract.

(vi) *irreparably harming Maryland's reputation for future P3 solicitations*

MDOT fails to recognize that there will be greater harm to Maryland's reputation if it rushes to approve a contract, *during an ongoing bid protest*, that was awarded to a proposer that fails to deliver the best value to the State. Approving the contract now sends the message to future P3 proposers that the State will attempt to short-circuit the solicitation's dispute resolution procedures and rush to contract approval, any ongoing disputes by proposers "notwithstanding." The State should allow the dispute resolution procedures guaranteed by the RFP and Maryland law to play out. Further, awarding the contract to a proposer (AMP) without an experienced Lead Contractor could result in a "Purple Line 2.0," which would be detrimental to the State's reputation and perceived ability to deliver large-scale projects. Moreover, as discussed below with respect to AMP's use of unrealistic markup percentages, Maryland's reputation will be harmed if it approves a contract for which MDOT allowed a proposer to sidestep key RFP requirements and to essentially "game" its financial proposal to maximize its chance of award (and not ultimately to maximize value to the State). Allowing such gaming of proposals will certainly deter qualified P3 proposers and result in proposals that maximize proposer gamesmanship but not value to the State.

(vii) *a loss of cost-savings on predevelopment work conducted by AMP*

MDOT fails to specify what, if any, predevelopment work AMP has undertaken or how AMP offers a cost savings on predevelopment work. The RFP expressly provides that "any costs incurred at any time *before award and execution* of the Phase P3 Agreement, including costs incurred for any interviews, *costs associated with post-selection deliverables*, and costs relating to the Effective Date and finance process, *shall be borne by the Proposer*," except for certain cost reimbursement for proposal work product, limited to \$500,000, which *each proposer* is entitled to receive. RFP § 4.11(e) (emphasis added). The State does not stand to lose any cost savings if contract approval is deferred to an appropriate time. Moreover, any cost savings that AMP stands to offer are likely offset by its lack of an experienced Lead Contractor and use of unrealistic markup percentages in its proposal, which jeopardize delivery of the project. CEMP has already performed extensive predevelopment work with the input of a Lead Contractor with extensive large-scale road construction experience. CEMP is thus better positioned to carry out the predevelopment work, minimize risks, provide delivery certainty, and meet the deadlines required by the Phase 1 P3 Agreement.

(viii) *a loss of significant benefits to Maryland's economy*

This again assumes, without merit, that AMP's proposal provides Maryland the greatest benefit and that rushing to approve the contract is the only option. That is not the case. CEMP's protest

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will demonstrate that its proposal provides the greatest benefits to the State, and allowing the parties to resolve the protest will not delay delivery of the project. CEMP's protest and appeal must be resolved, and the best value inquiry subject to a final resolution, before the Board can assess what benefits actually stand to be gained by the contract.

None of these purported reasons warrant immediate approval of a contested contract award. CEMP respectfully requests that the Board defer its decision until the protest is resolved.

***Merits of CEMP's Protest***

CEMP will not attempt to litigate its protest before the Board—the proper fora for that are MDOT, where the protest is pending, and circuit court, where the protest may be appealed.<sup>3</sup> However, it is important to make the Board aware of CEMP's grounds for protest, as they demonstrate the serious, and meritorious, questions raised regarding whether AMP delivers the best value to the State.

*Lack of a Lead Contractor with Large-Scale Road Construction Experience*

AMP fails to deliver the best value, in part because it lacks a Lead Contractor with substantial experience in large-scale road construction projects necessary to complete a project of this scale and magnitude. On July 17, 2020, MDOT shortlisted four proposer teams—AMP's team included: (a) Transurban (USA) Operations, Inc., (“Transurban”) and Macquarie Infrastructure Developments LLC (“Macquarie”) as *Lead Project Developer*; and (b) Archer Western Construction, LLC (“Archer Western”) as *Lead Contractor*. In January 2021, however, when MDOT announced the final proposals, Archer Western was no longer listed as part of AMP's team. Instead, Transurban and Macquarie assumed the *dual roles* of both Lead Project Developer and Lead Contractor. *See* Agenda p. 76. It became clear following MDOT's selection of AMP that no construction company with equivalent experience in large-scale road construction projects would take Archer Western's place.

MDOT's decision to award the project to AMP, with Transurban and Macquarie as “Lead Contractor,” is beyond reason. AMP's initial team included a well-experienced national construction firm, Archer Western, that possessed extensive experience executing the predevelopment, pre-construction, and development stages of major infrastructure construction projects. On the other hand, Transurban is a toll-road operator with no experience executing major infrastructure construction projects as Lead Contractor. Likewise, Macquarie is an investment bank with no toll-road construction experience. By analogy, the acceptance of Transurban and Macquarie as “Lead Contractor” in the place of Archer Western is like awarding a contract to construct a skyscraper, where the only parties to the contract are the turnstile

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<sup>3</sup> Nothing in this statement should be construed as a waiver of any of CEMP's rights or remedies, bases for protest, or arguments within CEMP's pending protest and appeal.

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operator in the lobby and the investment bank backing the construction, but not the entity that will build the skyscraper itself (and who remains unknown). Quite plainly, the AMP team with Transurban and Macquarie as co-Lead Contractors is not “just as or better qualified” than the AMP team with Archer Western serving in that role, and MDOT’s decision to award them the project violated the terms of the solicitation and its duty to identify the best proposal for the State.<sup>4</sup>

*Unrealistic Cost-Markup Percentage and Contractor-Markup Percentage*

AMP also fails to deliver the best value, and jeopardizes delivery certainty, because it utilized unrealistic markups in its proposal that do not comport with the terms of the RFP. After MDOT announced the award to AMP on February 18, 2021, it became clear to CEMP (through analysis of AMP’s Financial Review score, which was announced as 1,356) that AMP had utilized unrealistically low values for certain cost- and contractor-markup percentages in its proposal. There was no other way to explain how AMP achieved a Financial Review score of 1,356. The unrealistic markup percentages that AMP included in its proposal do not meet the definitions for such markups contained in the RFP and as clarified by MDOT throughout the solicitation process. It appears that they were selected for no purpose other than to “game” AMP’s financial proposal to ensure that it received—by far—the highest Financial Review score. What is worse, the unrealistic markup percentages do not reflect actual market conditions and will thus make it extremely difficult to locate subcontractors willing and able to perform the necessary work for project completion. This is only compounded by the fact that AMP’s proposal lacked the involvement of a contractor with experience in large-scale road construction projects. Cost overruns and delays, eroding delivery certainty, are a significant possibility if AMP’s proposed margins are utilized.

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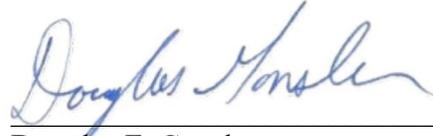
<sup>4</sup> At all points during the solicitation, CEMP’s Lead Contractor has remained Ferrovial Construction US Corp., which is a highly-experienced multinational company that carries out the design and *construction* (among other things) of major transportation infrastructure projects.

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CEMP thanks the Board for its dutiful consideration of the issues. Clearly, it is not in the best interest of the State to rush to approve the Phase 1 P3 Agreement in the midst of an ongoing bid protest and appeal, where significant overwhelmingly meritorious issues regarding the award decision have been raised. We welcome the Board's full consideration of the contract award after CEMP's protest and appeal have been resolved, to ensure that the State's traffic and infrastructure needs are fulfilled.

Sincerely,



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