Department of Legislative Services
Office of Policy Analysis
Maryland General Assembly

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The Honorable Edward J. Kasemeyer
Chair, Senate Budget and Taxation Committee
3 West Miller Senate Building
Annapolis, Maryland 21401-1991

The Honorable Maggie McIntosh
Chair, House Appropriations Committee
121 House Office Building
Annapolis, Maryland 21401

The Honorable Anne R. Kaiser
Chair, House Ways and Means Committee
131 House Office Building
Annapolis, Maryland 21401-1991

Dear Chairmen:

By letter dated December 11, 2018, and received on December 12, 2018, the Maryland Department of Transportation (MDOT), together with the Maryland Transportation Authority (MDTA), submitted a presolicitation report providing their justification to conduct a series of public-private partnership (P3) procurements to add managed toll lanes to the Maryland portion of the Capital Beltway (I-495) and to I-270 extending from I-495 to Frederick (I-495 and I-270 P3 Program). This is the second P3 project submitted for review under the procedures established by P3 legislation passed during the 2013 session (Chapter 5). Pursuant to this legislation, § 10A-201 of the State Finance and Procurement Article requires the submission of a presolicitation report to the budget committees (defined as the Senate Budget and Taxation Committee, the House Appropriations Committee, and the House Ways and Means Committee), the Comptroller, the State Treasurer, and the Department of Legislative Services (DLS). The budget committees have no more than 45 days to review and comment on the presolicitation report unless the value of the proposed P3 exceeds $500 million, in which case the committees may request an additional 15 days. The initial review period ends on January 26, 2019. Since the estimated cost of the proposed P3 program exceeds $500 million, were the additional 15 days to be requested, the review period would extend to February 10, 2019.

P3 Legislation Overview

Chapter 5 established a State policy on the use of P3s in Maryland. In order to ensure adequate State oversight, this legislation also established a notification and review process, including legislative review at multiple stages that must be followed before the Board of Public Works (BPW) may approve a P3 agreement. As described in more detail in **Appendix 1**, this process involves the following steps:

- a presolicitation report explaining and justifying the decision to procure a project using a P3 is submitted to the budget committees, the Comptroller, the State Treasurer, and DLS for review and comment;

- after the review and comment period, the reporting agency obtains an official designation from BPW that the project will be procured as a P3;

- the reporting agency follows a process that it has established by regulation to select a P3 partner and negotiate an agreement for project delivery;

- the reporting agency submits the P3 agreement simultaneously to the budget committees, the Comptroller, the State Treasurer, and DLS for review and comment;

- the Treasurer is required, in coordination with the Comptroller, to analyze the impact on the State's capital debt affordability limits of the proposed P3 agreement and to submit that analysis to the budget committees and to DLS;

- the review period is limited to 30 days from the date that the agreement is submitted; and

- following the 30-day review and comment period, BPW may approve or disapprove the P3 agreement.

I-495 and I-270 P3 Program

On September 21, 2017, the Governor Lawrence J. Hogan, Jr. Administration announced its plan to add four new toll lanes (two in each direction) to the Maryland portion of I-495 and to I-270 while maintaining existing lanes as non-tolled. Carrying out this plan, however, is contingent on development of an environmental impact statement (EIS) through the National Environmental Policy Act (NEPA) process for which the toll lanes, as proposed, are the selected alternative because federal funding (grants and/or loans) is expected to support the project.

On March 16, 2018, the Federal Highway Administration issued a Notice of Intent to prepare the I-495 and I-270 Managed Lane Study (MLS) EIS. The MLS limits, however, do not encompass the entirety of the road network to which adding toll lanes is being proposed; the MLS study limits extend on I-495 from just south of the George Washington Memorial Parkway in Virginia on the western side of the Capital Beltway to just west of MD 5 on the eastern side of the Capital Beltway and on I-270 (including the spurs) from I-495 to just north of I-370. MDOT anticipates subsequent environmental studies under the P3 program to begin in 2019 and to extend along I-270 from I-370 to I-70 and on I-495 from just west of MD 5 to the Woodrow Wilson Bridge. The I-495 studies will be coordinated with and carried out in conjunction with the Virginia Department of Transportation.

Currently, the MLS has 15 identified alternatives under consideration (3 of which have multiple iterations), many of which do not include toll lanes and 4 of which include conversion of one or both of the existing high occupancy vehicle (HOV) lanes on I-270. **Exhibit 1** summarizes the MLS alternatives under consideration. MDOT/MDTA indicate that, should an alternative be selected in the NEPA process that does not involve priced managed lanes, the P3 solicitation would not proceed.

Exhibit 1

Managed Lanes Study Alternatives

Alternative/Description	Involves Priced Managed Lanes	Involves I-270 HOV Lane Conversion
#1 No Build (Existing): All projects in Constrained Long-Range Plan (CLRP)(including I-270 Innovative Congestion Management (ICM) improvements)		
#2 Transportation Systems Management (TSM)/Travel Demand Management (TMD): Solutions along 1-495 and I-270: restriping within existing pavement, peak period shoulder use, ramp metering and Active Traffic Management (ATM) strategies		
#3 Add 1-General Purpose (GP) Lane: Add one general purpose lane in each direction on I-495 and I-270		
#4 1-Lane, High-occupancy Vehicle (HOV) Managed Lane Network: Add one HOV lane in each direction on I-495 and retain existing HOV lane in each direction on I-270		
#5 1-Lane, Priced Managed Lane Network: Add one priced managed lane in each direction on I-495 and convert one existing HOV lane in each direction to a priced managed lane on I-270	✓	✓
#6 Add 2 General Purpose Lanes: Add two general purpose lanes in each direction on I-495 and I-270		

Alternative/Description	Involves Priced Managed Lanes	Involves I-270 HOV Lane Conversion
#7 2-Lane, High-occupancy Vehicle Managed Lane Network: Add two HOV managed lanes in each direction on I-495 and retain one existing HOV lane and add one HOV managed lane in each direction on I-270	✓	
#8 2-Lane, Priced Managed Lanes Network on I-495, 1-Lane Priced Managed Lane and 1-Lane HOV on I-270: Add two priced managed lanes in each direction on I-495 and add one priced managed lane and retain one HOV lane in each direction on I-270	✓	
#9 2-Lane, Priced Managed Network: Add two priced managed lanes in each direction on I-495 and convert one existing HOV lane to a priced managed lane and add one priced managed lane in each direction on I-270	✓	✓
#10 2-Lane, Priced Managed Lane Network and 1-Lane HOV Managed Lane Network on I-270 Only: Add two priced managed lanes in each direction on I-495 and on I-270 and retain one existing HOV lane in each direction on I-270 only	✓	
#11 Collector/Distributor on I-495: Physically separate traffic using collector-distributor (C-D) lanes, adding two GP lanes in each direction on I-495; retain existing lanes on I-270		
#12A Contraflow on I-495: Convert existing general purpose lane on I-495 to contraflow lane during peak periods		
#12B Contraflow on I-270: Convert existing HOV lane on I-270 to contraflow lane during peak periods while maintaining GP lanes		✓
#13A Priced Managed, Reversible Lane Network on I-495: Add two priced managed reversible lanes on I-495	✓	
#13B Priced Managed, Reversible Lane Network on I-270: Convert existing HOV lanes to two priced managed reversible lanes on I-270 while maintaining GP lanes	✓	✓
#14A Heavy Rail: Construct heavy rail transit parallel to the existing I-495 and/or I-270 corridors		
#14B Light Rail: Construct light rail transit parallel to the existing I-495 and/or I-270 corridors, such as the Purple Line currently under construction		

Alternative/Description	Involves Priced Managed Lanes	Involves I-270 HOV Lane Conversion
#14C Fixed Guideway Bus Rapid Transit (Off Alignment): Construct fixed guideway bus rapid transit (BRT) along a new alignment parallel to the existing I-495 and/or I-270 corridors		
#15 Dedicated Bus Managed Lane on I-495 and I-270: Add one bus lane in each direction on I-495 and I-270		

Source: I-495 and I-270 P3 Program website

Proposed P3 Structure

MDOT/MDTA are proposing to enter into a series of revenue-risk Design-Build-Finance-Operate-Maintain agreements with private developers (concessionaires) to construct, operate, and maintain priced managed lanes along segments of the interstate system within the I-495 and I-270 P3 Program boundaries. Priced managed lanes are toll lanes that utilize variable tolling to optimize traffic flow. Concessionaires would be entitled to toll revenue generated by the facility, net of debt service on MDTA bonds if issued for the project, over the term of the agreements that are expected to be 50 years. Concessionaires will retain the risk that toll revenues will be sufficient to cover their costs and provide a return on their investments. Concessionaires may finance their construction responsibilities through equity and debt that has no recourse to MDOT/MDTA nor to the State of Maryland. Such debt may include a combination of federal Transportation Infrastructure Finance and Innovation Act loans, taxable debt (bank or private placement) or private activity bonds. MDOT/MDTA indicate that the number of segments/concessions into which the program will be divided has not yet been determined but that preliminary analysis suggests five segments may optimize competition by keeping project sizes manageable for more construction firms. Agreements would include technical and performance requirements dictating the work to be performed and the condition of the facility at the end of the term (known as hand-back conditions). The State of Maryland would own the facilities over the life of the agreement, and MDTA would set and collect tolls under its statutory authority and provide net toll revenue to the concessionaires after deducting revenue sufficient to cover its costs and to pay debt service on any bonds that it issues to fund associated public infrastructure in the corridor. The construction value of the I-495 and I-270 P3 Program is identified in the presolicitation report at $9 billion to $11 billion (in 2017 dollars).

Agency Presolicitation Proposal

State Finance and Procurement Article § 10A-201 prohibits a reporting agency (in this case MDOT/MDTA) from issuing a public notice of solicitation for a P3 until a presolicitation report is submitted that:

- states the specific policy, operational, and financial reasons for pursuing a P3;
- identifies the anticipated value of the proposed P3; risks and benefits to the State; and any potential workforce, economic development, or environmental implications;
- evaluates, if relevant and to the extent necessary, the risks and benefits of a P3 including benefits such as expedited asset delivery, cost savings, risk transfer, net new revenue, state-of-the-art techniques for asset development or operations, efficiency of operations, maintenance via innovative management techniques, and expertise in accessing and organizing the widest range of financial resources; and
- includes, if relevant and to the extent possible, information prepared in consultation with the Department of Budget and Management (DBM) related to debt affordability, the proposed solicitation process, and a statement of intent to use the exemption from the requirements of Division II of the State Finance and Procurement Article as set forth in § 11-203.

Each of the required elements are discussed below.

Policy, Operational, and Financial Justification for Pursuing a P3

The presolicitation report indicates that the fundamental value of a P3 delivery, in this instance, is that it will enable the construction of toll lanes, (and thereby reduce traffic congestion in the program corridor) for which no public plans for funding or financing exist. MDOT/MDTA indicate that there is no capacity to fund these projects within either agency's capital program. The use of Consolidated Transportation Bonds would cause a breach of MDOT's debt cap and would reduce debt capacity for other State tax-supported debt such as schools and other State facilities, and insufficient capacity exists under MDTA's statutory debt cap. MDOT/MDTA also cite the transfer of toll revenue risk to the concessionaires as a benefit of using a P3 delivery method.

Value; Risks and Benefits; and Potential Workforce, Economic Development, and Environmental Implications

Value

The value of the proposed P3 program identified by MDOT/MDTA is a construction investment in transportation infrastructure of between $9 billion and $11 billion (in 2017 dollars) that will provide traffic relief within the program corridor. Additionally, the cost of operations and maintenance is estimated at $80 million per year in current dollars, which equates to $4 billion over the 50-year concession. These costs will be transferred to private developers whose project related debt will be non-recourse to the State of Maryland.

Risks and Benefits

The presolicitation report identifies several risks associated with the I-495 and I-270 P3 Program along with actions planned to mitigate these risks. **Exhibit 2** provides a summary of identified risks and mitigation actions.

Exhibit 2
I-495 and I-270 P3 Program Risks and Planned Mitigation

Risk	Planned Mitigation
Priced managed lanes construction is not funded, and congestion relief to the region is not provided	P3 agreements enable the State to deploy private capital to build, operate, and maintain the facilities.
Facilities perform poorly in operations	Reporting agencies will require adherence to performance-based technical specifications throughout the term of the agreements and will enforce provisions by applying damages against the developer as necessary.
Financial close is not achieved	The solicitation process will ensure qualified developers with experience financing complex transactions will be shortlisted and that contractors will have adequate performance and payment security capacity.
Traffic and revenue are lower than expected	Credit rating agencies will rely on independent technical and traffic advisors to review each proposers' cost and revenue projections and their project management and delivery plans.

P3: public-private partnership

Source: Maryland Department of Transportation and Maryland Transportation Authority, *Presolicitation Report: I-495 and I-270 P3 Program*, December 2018.

Major benefits identified in the presolicitation report are:

- program feasibility and accelerated delivery – as mentioned earlier, there are no plans to procure these facilities with public funding and financing;

- whole lifecycle planning and cost optimization – the concessionaires will be responsible for constructing, operating, and maintaining the facilities according to performance specifications for the 50-year term of the agreements; and

- risk transfer – the concessionaires will assume responsibility for financing, constructing, operating, and maintaining the facilities, and all financing is non-recourse to the State.

Potential Workforce, Economic Development, and Environmental Implications

The presolicitation notes that the I-495 and I-270 P3 Program will create local employment opportunities during construction with an estimated $9 billion to $11 billion in capital costs (in 2017 dollars) and cites a study by the Council of Economic Advisors that calculates that each $1 billion in construction expenditures creates 13,000 job years including direct, indirect, and induced employment. The reporting agencies intend to include a requirement in the solicitations for the identification, training, and mentoring of new workers by concessionaires and note that the agreements will require compliance with State and federal fair labor practices and wages and will include goals for minority, disadvantaged, and/or small business participation.

With respect to economic development, the presolicitation report notes that the significant amount of construction expenditures will have a positive impact on the region's economy and that the resulting traffic congestion relief will reduce commute times and thereby improve general worker productivity and reduce freight travel times, thereby allowing for more efficiency and the potential for increased economic output.

MDOT/MDTA indicate that the MLS will identify potential impacts to natural, cultural, and socioeconomic resources of the selected alternative and that the facilities will be designed to completely avoid, minimize to the extent feasible, or mitigate impacts (if complete avoidance is not possible). The reporting agencies will be required to follow through on all commitments outlined in the Final Environmental Impact Statement/Record of Decision, and these commitments will be included in any P3 agreement. MDOT/MDTA note that roadway congestion has been shown to lead to higher concentrations of harmful air pollutants near the roadway, and the proposed program should reduce such concentrations by reducing congestion.

Debt Affordability

Given the proposed structure of the P3 with all financing provided by the concessionaires and any debt of the concessionaires to be non-recourse to the State, MDOT/MDTA indicate that it is anticipated that the P3 Program will have no impact on the State's debt capacity. MDOT/MDTA consulted with DBM and indicate that it agreed with this assessment. MDTA is expected to issue bonds within its statutory bonding authority. However, these bonds will be repayable solely from tolls generated from the new facilities and will not impact the debt coverage of MDTA's outstanding bonds. These bonds will be subject to MDTA's statutory debt cap, but sufficient capacity exists for the estimated bond issuance levels.

Proposed Solicitation Process and Statement of Intent to Use Exemption from Requirements of Division II of the State Finance and Procurement Article

In the presolicitation report, MDOT/MDTA provide notification that they intend to use the exemption from Division II procurement requirements allowed by § 11-203 of the State Finance and Procurement Article and will instead follow the competitive solicitation process for P3s contained in their respective P3 regulations. **Exhibit 3** shows the anticipated P3 Program milestone schedule for the initial solicitation. Subsequent solicitations are projected to reach financial close within 12 to 18 months of the prior P3 agreement. The estimated date by which the entire program would be fully operational is 2029 or 2030.

Exhibit 3
Estimated Procurement Milestones for the Initial P3 Solicitation

Milestone	Date
Industry forum held for potential teaming partners	December 2018
BPW approval of P3 designation	February 2019
Request for Qualifications released to industry	April 2019
Shortlist of qualified teams announced	Q2 of 2019
Draft RFP released to shortlisted teams	Q3 of 2019
Final RFP released to shortlisted teams	Q1 2020
Technical/financial proposals due	Q3 2020
Selection of preferred bidder	Q3 2020
BPW approval of P3 agreement(s)	Q4 2020
P3 agreement(s) executed	Q4 2020
Financial close	Q4 2020

BPW: Board of Public Works
P3: public-private partnership
RFP: Request for Proposals

Source: Maryland Department of Transportation and Maryland Transportation Authority, *Presolicitation Report: I-495 and I-270 P3 Program*, December 2018.

Issues

There are two main issues raised by submission of the presolicitation report for the I-495 and I-270 Program. The first issue is the lack of specificity for what will actually be procured. As discussed above, there are 15 alternatives being considered for the corridor, 7 of which involve priced managed lanes that would be procured as a P3 if selected. Within the subset of alternatives involving priced managed lanes, the number of lanes that would be constructed vary from one in each direction on I-495 only (with conversion of the I-270 HOV lanes, one in each direction, to priced managed lanes) to two lanes in each direction on both I-495 and I-270. The complexity and capital costs of constructing two lanes in each direction on both roadways would be considerably higher than the construction of a single lane in each direction on I-495 and conversion of the HOV lanes on I-270. This difference could lead to different conclusions on the costs and benefits of using a P3 procurement.

The second issue with the presolicitation report is the lack of a rigorous effort to evaluate the possibility of MDTA constructing any toll lanes chosen as the preferred alternative. The purpose of a presolicitation report is to justify the use of a P3 in lieu of a conventional procurement. Without a good understanding of how a conventional procurement would work for a particular project, it is impossible to adequately evaluate whether a P3 procurement would be better. The presolicitation report notes that MDTA has insufficient room under its debt cap; however, the cap could be increased or a separate, project-specific, debt cap could be established through legislation. The presolicitation report indicates that use of a P3 will shift funding responsibility to the developer. This, however, is a mischaracterization since the only source of funding is user tolls. Any equity investment provided by a concessionaire will be recouped with interest from toll revenue. If toll revenues are sufficient to cover a concessionaire's debt service, operating and maintenance costs, and return on investment, they should be sufficient to allow MDTA to procure the project using one or more design build contracts. The report does not provide a complete analysis to demonstrate that a P3 is more financially advantageous to the State.

Recommendations

The budget committees should request the reporting agencies to withdraw this presolicitation report and resubmit it only after the MLS draft EIS has been adopted and only if priced managed lanes are part of the selected locally preferred alternative. The committees should further request that any future presolicitation report related to this project provide a detailed comparison between the proposed P3 and procurement by MDTA using design build contracts. In addition, the General Assembly should amend the P3 statute to prohibit the submission of a presolicitation report prior to the availability of a draft EIS for any project that would require development of an EIS.

If you need any additional information, please contact Steven D. McCulloch at (410) 946-5530.

Sincerely,

Ryan Bishop

Ryan Bishop
Director

RB/SDM/km

Enclosure

cc: President Thomas V. Mike Miller, Jr.
Speaker Michael E. Busch
Senator Nancy J. King
Members, Senate Budget and Taxation Committee
Members, House Appropriations Committee
Members, House Ways and Means Committee
Secretary David R. Brinkley
Secretary Pete K. Rahn
Ms. Victoria Gruber

Appendix 1

Public-private Partnerships Process as Required by Chapter 5 of 2013

Action	**Requirements**
Reporting agency submits a presolicitation report to the Comptroller, State Treasurer, budget committees, and the Department of Legislative Services (DLS).	Generally, a presolicitation report shall include: • the specific policy, operational, and financial reasons for pursuing a public-private partnership (P3); • the anticipated value of the proposed partnership, including the risk and benefits to the State, and any potential workforce, economic development, or environmental implications; and • to the extent possible, a preliminary summary of the proposed solicitation process and a preliminary analysis on debt affordability. ***Review and Comment Period*** • Following the submission of a presolicitation report, the budget committees have 45 days to review and comment on the report. • If the value of the proposed P3 exceeds $500 million, the budget committees may request a total of 60 days to examine the report.
Reporting agency seeks an official designation by the Board of Public Works (BPW) of the public infrastructure asset as a P3 and approval of the solicitation method.	The request for official designation and approval must: • include a copy of the presolicitation report and a preliminary solicitation schedule; • describe the process for soliciting, evaluating, selecting, and awarding the P3; • outline the organization and contents of the public notice of solicitation; and • provide a summary of the key terms of the proposed P3 agreement and any other information determined to be relevant by the reporting agency. ***Review and Comment Period:*** While there is no specific timeframe for BPW action, the request for official designation and approval takes place after the review and comment period on the presolicitation report has elapsed and before issuing a public notice of solicitation.

Action	**Requirements**
Reporting agency issues a Public Notice of Solicitation for a P3.	At this step, the reporting agency reviews the responses of qualified bidders, makes certain responsibility determinations, and ultimately selects and negotiates the terms of the proposed agreement with the winning bidder.
Reporting agency submits a copy of the proposed agreement simultaneously to the Comptroller, the Treasurer, the budget committees, and DLS.	BPW may not approve a P3 agreement until: • an analysis is conducted by the State Treasurer, in coordination with the Comptroller's Office, on the impact of the P3 on the State's capital debt affordability; • the aforementioned analysis is submitted to the budget committees and DLS; • the budget committees have reviewed and commented on the analysis; and • the reporting agency, in consultation with the Governor's Office of Small, Minority, and Women Business Affairs, the Office of the Attorney General, and the private entity, establishes reasonable and appropriate minority business enterprise participation goals and procedures for the project. ***Review and Comment Period:*** The period for review, analysis, and comment may not exceed 30 days from the date that the proposed P3 agreement was submitted simultaneously to the Comptroller, the Treasurer, the budget committees, and DLS.

Source: Department of Legislative Services