Department of Legislative Services

Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 781 (Senator Waldstreicher)
Budget and Taxation

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, 2019.**

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: None.

Small Business Effect: Minimal.

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.

Environmental Impact Statements

For major transportation projects, the National Environmental Policy Act (NEPA) requires a range of alternatives to be considered and the environmental impacts of each alternative to be analyzed. This type of study is required prior to the commitment of federal funds to any major project or prior to any action taken by a federal agency that might cause a significant impact on the environment. Some of the basic steps in this process include a public scoping process, data collection, analysis of policy alternatives, and preparation of draft and final documents. The process involves numerous federal, state, and local partners; can take several years; and costs millions of dollars.

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. The combined cost of all three projects is estimated to be $9 billion, with the I-270 and I-495 projects seeking private developers to design, build, finance, operate, and maintain the new (toll) lanes on both roads. The MD 295 project is not expected to involve a P3 but instead would be carried out by MDTA following the transfer of ownership of the parkway from the U.S. Department of the Interior to the State.

The *Consolidated Transportation Program* for fiscal 2019 through 2024 includes $129.5 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.

On December 12, 2018, MDOT and MDTA delivered a presolicitation report for the I-495 and I-270 toll lanes that did not include a NEPA study. MDOT advises that the plans for both projects are structured to proceed simultaneously with the environmental and solicitation processes so that any issues identified in the federal approval process can inform the project design. MDOT also advises that federal regulations allow it to work with a developer prior to approval of the NEPA analysis. On January 17, 2019, the budget committees requested a 15-day extension to complete their review and comment, as allowed under current law. On January 18, 2019, the budget committees officially requested that MDOT and MDTA withdraw the presolicitation report and resubmit it only after the draft environmental impact statement of the NEPA study has been completed.

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 expenditures and be less effective in reducing congestion.

Additional Information

Prior Introductions: None.

Cross File: HB 663 (Delegate Love, *et al.*) - Environment and Transportation and Appropriations.

Information Source(s): Department of General Services; Board of Public Works; Maryland Department of the Environment; Maryland Department of Transportation; Prince George's County; Department of Legislative Services

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