

Poor Process and Lack of Transparency in MDOT's P3 Procurement

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Public-Private Partnerships (P3's) are a complicated financial and governance tool that should be used with care. In the final report of the Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships, which led to the 2013 P3 law, a key finding was highlighted on the issue of transparency. The report stated that "The Commission finds that public review of documents is essential to government transparency."¹ The Commission further found that participation and engagement of local and state government, and education of the public, were critical to develop sufficient support to sustain a P3 in the long-term.

Below we outline several key areas where MDOT has failed to provide transparency, or offered contradictory statements or lack of evidence for claims, all of which have served to erode public trust in the process.

Unsubstantiated & Contradictory Public Statements

MDOT asserts it is prioritizing transparency, and public involvement and public trust. On April 2018 Governor Hogan pledged that "a focus on speed cannot and should not ever come at the expense of the full and complete transparency that the taxpayers of Maryland expect and deserve"² and recently on May 22, 2019, he reaffirmed that "We will continue to go above and beyond to ensure transparency through this process".³

The Administration has pointed to public meetings and briefings to local government as evidence that it is meeting this pledge, as well as briefings with county and local governments. At these meetings, and in statements to the press, MDOT and Governor Hogan have made numerous statements and commitments.

However, MDOT failed to substantiate key statements and commitments, and in some cases MDOT has even reversed course, All of which has resulted in a growing and justified distrust of the entire process.

¹ http://www.mdot.maryland.gov/newMDOT/P3/Documents/P3_Commission_Final_Report.pdf, pg 33

² <https://www.baltimoresun.com/business/bs-md-toll-plan-20190603-story.html>

³ <https://www.facebook.com/GovLarryHogan/posts/2524852240892859>

For example, in public workshops in April and May 2019, MDOT claimed that Option 10, its preferred alternative, “reduces delay versus the No Build by 35% in AM peak and 35% in PM peak”. However, MDOT has refused to share even the most basic information about the source of the claim. They have not disclosed what model and data set they used or the assumptions made, such as the toll price.⁴ Furthermore, this statement was made at the same time that MDOT was asserting that it had not finalized any of the project details - including the route and the price of tolls. Without these important details, this percentage is unverifiable and highly questionable.

Statement: The highway expansion will reduce air pollution because vehicles traveling at 50 mph emit less pollution than vehicles stuck in congested traffic going 5 to 15 mph

MDOT has made this claim for quite a while, but it’s support for this claim has changed over time, and the evolving support it has offered is not persuasive.

In the presolicitation report section on the environment, MDOT notes that the DC region is in non-attainment for the Clean Air Act’s ozone standard, and then claims that relieving congestion will reduce pollution, quoting a study entitled,⁵ "Vehicle emissions in congestion: Comparison of work zone, rush hour and free-flow conditions." However, that study actually finds that emissions of nitrogen oxides (NOx) are lower (by 37%) in slower, work-zone congestion traffic than in free-flowing traffic. (NOx is a primary contributor to ground level ozone, and is controlled via authority under the Clean Air Act for any jurisdictions in violation of the ozone standard.) In other words, if anything, this study shows the exact opposite of MDOT’s claim that highway expansion will reduce air pollution.

MDOT has failed to offer any data to back up this claim. When requests have been made to MDOT, they have insisted that a Public Information Act (PIA) request be made. Requiring a PIA request simply to find the source of a claim is hardly the gold standard of transparency.

Statement: No homes will be taken

This past Fall, Governor Hogan and MDOT said that the expansion will be built within the existing right-of-way and that no homes will be taken. MDOT now concedes that up to 34 homes will need to be removed and 1,500 properties will have a portion of their land taken.

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https://495-270-p3.com/wp-content/uploads/2019/04/495270_April-Public-Workshops-Presentation_041119.pdf, pg 10

⁵ https://495-270-p3.com/wp-content/uploads/2018/12/PSR_Final_inc-Cover-Letter-1.pdf

Statement: Maryland needs to rush this plan so as to not delay much-needed congestion relief

This statement is particularly problematic with regard to I-270. In 2017, Governor Hogan and MDOT proposed a \$100 million “Innovative Congestion Management” strategy (ICM) for I-270, arguing that the project would “save drivers up to 30 minutes on their morning commute southbound from Frederick to I-495”⁶. This project is now underway. While MDOT noted this ICM project in its 2018 Request For Information for the current I-270 and I-495 expansion proposal, it has remained unaccountably silent about this ongoing traffic-congestion-reduction effort in its dozens of tweets seeking to promote the current I-270 traffic mega-plan. These tweets argue that this I-270 and I-495 expansion proposal project is required to address traffic but fails to mention the impact of the ICM strategy. Moreover, the construction related to the current I-270 work is likely exacerbating congestion, which wrongly may be used to justify the P3 project, when in fact it is a solution already underway.⁷

More broadly, as shown by the alternative proposals put forward by Montgomery, Prince George’s, and Frederick Counties, there are approaches which would bring more traffic relief more quickly, in a more environmentally sensitive and sensible manner, within the existing footprints of I-270 and the Capital Beltway.

Concerns Raised by the Department of Legislative Services

Pursuant to the 2013 P3 state law, on January 7, 2019 the Department of Legislative Services (DLS) produced a [report](#) for the House Appropriations and Ways & Means Committees, and the Senate Budget and Taxation Committees, concerning the presolicitation report for MDOT’s Traffic Relief Plan.

The report raises several concerns about the presolicitation report for the proposed I-270 and I-495 expansion.

“The first issue is the lack of specificity for what will actually be procured. . . . [T]here are 15 alternatives being considered for the corridor. . . . 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 . . . to two lanes in each direction on both I-495

⁶ <https://www.roads.maryland.gov/Pages/release.aspx?newsId=2821>

⁷ <https://www.facebook.com/LarryHogan/posts/2993269334031543>, Pete Rahn testimony on HB91, Pete Rahn budget briefings for House Appropriations and Senate Budget and Taxation

and I-270. The complexity and capital cost 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.”

Not only is the actual product being procured unclear, but the cost estimate for that unspecified product also has changed. When first announced, the entire project was estimated to cost \$7-\$9 billion. However, the presolicitation report instead estimated the cost at \$9-11 billion. But then the presolicitation report supplement states that the original estimate was “likely too low.”⁸ As DLS notes, this revised and higher estimate is itself uncertain since it remains unclear what specific project the solicitation will be for.

Maryland law requires that a presolicitation report include a reasonable estimate of the cost of a P3. There is a question of whether a “likely too low” estimate counts as a reasonable estimate.

“The second issue with the presolicitation report is the lack of 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 traditional procurement. Without a good understanding of how a conventional procurement would work for a particular project, it is impossible to adequately evaluate if a P3 procurement would be better. The [presolicitation] report does not provide a complete analysis to demonstrate that a P3 is more financially advantageous to the State.”

This concern underscores a fundamental problem with MDOT’s justification for this P3, that there is not enough money to undertake state-funded transportation-improvement projects. Lack of funds is not one of the accepted strategic reasons to pursue a P3 and is contrary to the intent of the P3 legislation. Further, using this as an excuse undermines the entire collaborative budget process, which seeks to arrive at consensus between the Executive and Legislative Branches on transportation funding priorities for Maryland.

Because MDOT is doing the solicitation process simultaneous with the National Environmental Policy Act review, a draft Environmental Impact Statement (EIS) has not been completed. This means that critical program details and details regarding alternatives are unavailable. The only other presolicitation report submitted under Maryland’s P3 law was for the Purple Line. At the time of submission, the draft EIS had been completed months earlier and the final EIS was completed just a month later.

⁸ <https://495-270-p3.com/wp-content/uploads/2019/04/PSR-Supplement.pdf> page 3

Because of its concerns, DLS recommended that the presolicitation report be withdrawn. DLS recommended that the immediate next step should be the completion of a draft Environmental Impact Study, which would provide more clarity on the available alternatives. DLS also recommended that if MDOT then renews its proposal to undertake traffic improvements using a P3, the new presolicitation report should include a detailed comparison of the P3 approach with a procurement using state-financed design-build contracts

Despite claiming that they value transparency, MDOT has not shared any of the data or assumptions upon which its claims are based. MDOT recently alluded to using the Motor Vehicle Emissions System (MOVES) model to back up its claim that adding lanes would result in reduced emissions.

Here are a few of the many questions asked of MDOT

- What model and data set are you using?
- What assumptions were made about the number of lanes? HOT lanes?
- What was the commute route, or is this an average?
- What assumptions were made about toll cost?

Further process concerns have been raised by Montgomery County and Prince George's County, as well as by staff of the Maryland National Capital Parks and Planning Commission, which we assume will be captured by other parties.

Conclusion

In conclusion, the myriad of concerns raised here call into question the justification for the proposed P3 and erode public trust and confidence in the project, thus jeopardizing its viability and increasing risk for taxpayers. These examples provide more than enough justification to end this flawed process and start over. We urge MDOT to truly and authentically embrace transparency and open dialogue with the public and local officials as a means to arrive at the best solution.