



## P3 Reform: A Balancing Act

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Virginia has been the leader in using public-private partnerships (P3) for the development of transportation projects since its enactment of the Virginia Public-Private Transportation Act in 1995 (VPPTA).<sup>2</sup> Recently, however, Virginia's use of P3 has come under fire thanks to a high-profile project known as the Route 460 Project, which originally contemplated a 55-mile toll road between Petersburg and Suffolk at a proposed cost of \$1.4 billion. After suspending the project in March 2014, the commonwealth terminated the contract in April 2015 without ever breaking ground and despite \$252 million in payments.<sup>3</sup> With so much at stake, strong rhetoric and scathing criticism should not be a surprise.

The criticism of the Route 460 Project as a P3 job may be unfair in that it actually evolved into a design-build project without any private investment.<sup>4</sup> Regardless, the experience of the Route 460 Project spurred reform of the VPPTA by putting in place measures intended to reflect lessons learned while still encouraging private investment in public transportation projects under the right circumstances.

### LEADING THE WAY: THE 1995 VPPTA

The VPPTA established the legislative authority for the commonwealth to use P3 and partner with the private sector to further the development of significant transportation projects in Virginia.<sup>5</sup> By its enactment of the VPPTA, the General Assembly sought to encourage private investment (and shared risk) in the development and operation of transportation facilities in a timelier, more efficient, and less costly manner.<sup>6</sup>

As a result of the VPPTA, private entities in Virginia may propose to develop and/or operate a transportation facility by obtaining approval from the responsible public entity.<sup>7</sup> The proposal must include, among other things, a description of the development plans for the proposed transportation facility and how it will address the public's needs, a cost estimate, and identification of revenue and proposed debt or equity investment. The public needs must be with respect to improving safety, reducing congestion, increasing capacity, [and] enhancing economic efficiency.<sup>8</sup>

Before any P3 project solicited or unsolicited may proceed, the responsible public entity must

determine that the proposed project serves the public purpose as defined in Virginia Code § 33.2-1803(C). Among other things, there must be a public need for the transportation facility, and both the plans and estimated costs must be reasonable. Likewise, the proposal must provide a sufficient benefit to the public through the use of P3 in lieu of other means of procurement.

If the project is approved, the VPPTA authorizes the project to be financed in part by loans and grants, in addition to private equity investment. Similarly, the public entity may dedicate or condemn property for use in the project. The VPPTA also requires specific contract terms that must be included in a P3 agreement to protect the commonwealth, such as requirements for insurance, payment and performance bonds, default, and termination of the agreement.<sup>9</sup> Thus, the VPPTA attempts to move a transportation project forward by equipping private investors while providing financial assistance and protection to the state.

### **IN THE FAST LANE: SUCCEEDING WITH P3**

Imagine you are driving south on Interstate 95 on a hot summer afternoon the Friday before Memorial Day weekend. Your progress toward a relaxing weekend spent with family and friends comes to a screeching halt as you admire the surrounding scenery of pavement and vehicles around you in a dead stop. Inevitably, some motivated automobile enthusiast uses the emergency lane to bypass traffic, leaving in his dust road rage and raised fists. Others fortunate enough to take the High-Occupancy Vehicle lane eventually encounter the inevitable bottleneck that occurs as the HOV lane merges with the rest of I-95.

The I-95 Express Lanes have significantly improved this all-too-frequent occurrence and are the product of a \$950 million project that used P3. The project is a good example of how a P3 project can succeed, as construction began in 2012 and actually finished early. The project was financed in part with \$280 million from private equity. As Gov. Terry McAuliffe commented, "Without the ability to partner with the private sector and leverage their capital and resources, Express Lanes would not have been built."<sup>10</sup>

A clear benefit of P3 is that it provides the option to pursue projects the public needs with private investment that otherwise would have to come from the coffers of the commonwealth or not at all. For example, the Virginia Department of Transportation successfully used P3 to partner with private investors to build the Express Lanes on Interstate 495. This project was delivered on time and on budget and supported 31,000 jobs while reportedly infusing the economy with \$3.5 billion.<sup>11</sup> As these projects demonstrate, P3 can be used successfully to provide a relatively quick delivery of desperately needed transportation projects, with private entities taking on a significant portion of the financial investment and risk.

### **IMPLEMENTING LESSONS LEARNED**

In 2015, and on the heels of lessons learned from the Route 460 Project, the General Assembly revised the VPPTA to more stringently vet potential P3 projects and to make the process more accountable to the public. As revised, the VPPTA now requires that a request for P3 approval must provide a "statement of the risks, liabilities, and responsibilities to be transferred, assigned, or assumed by the private entity for the development and/or operation of the transportation facility, including revenue risk

and operations and maintenance.<sup>12</sup> In addition, a finding of public interest must be made by the responsible public entity, which requires a finding that the transfer of risks, liabilities, and responsibilities to the private entity provide sufficient benefit to the public relative to other available means of procurement.<sup>13</sup> These new measures are designed to make sure that the use of P3 is based upon an informed decision that P3 is the appropriate procurement method for the project and after comparing other means for procuring the work.

Even after a finding of public interest and before entering into a P3 contract, the chief executive officer of the responsible public entity must certify in writing to the governor and the General Assembly that there has not been a material change to the previous finding of public interest.<sup>14</sup> In addition, public comment on any proposed P3 agreement has been expanded to allow comment for 30 days before the issuance of the final request for proposals and the opportunity for a public hearing.<sup>15</sup> These measures give information and voice to not only the government, but also the public, in determining whether P3 is the right choice for any particular project.

### **I-66 AND THE CONTINUING DEBATE**

Many who have driven on Interstate 66 recognize the need to reduce congestion. Even worse, [b]y 2040, peak period congestion in the eastern portion of the corridor is expected to increase to 8-10 hours per day.<sup>16</sup> Recognizing this problem, Gov. McAuliffe announced a plan to improve I-66 by constructing express lanes that, similar to the I-495 Express Lanes, would have tolls parallel to existing lanes with varying prices depending upon traffic levels.

Whether P3 is the proper means for such a project has been the subject of debate. For example, Virginia Transportation Secretary Aubrey Layne suggested that taxpayers could actually save \$1 billion over the next 40 years by funding the \$2.1 billion project itself rather than use P3.<sup>17</sup> In contrast, Del. Terry Austin (19th District) is in favor of using P3 to build express lanes for I-66. In Austin's words, it would be "disproportionate and fiscally irresponsible to direct hundreds of millions of dollars to Northern Virginia to fund one highway project at the expense of other regions in the commonwealth." Instead, Austin believes the "proven success" of P3 should be utilized, thereby allowing the private sector to bear a substantial amount of the risks and costs, rather than the taxpayer,<sup>18</sup> while more equitably distributing transportation dollars for other projects throughout Virginia.

### **THE FUTURE OF P3 IN VIRGINIA**

At least one commentator believes that the reform of VPPTA could have a negative future impact on contractors working in Virginia, noting that the reform "has the potential to stifle private investment and make Virginia less competitive with the 33 other states that have now enacted P3 legislation."<sup>19</sup> In the strictest sense, requiring a finding and certification of public need and expanding opportunity for public scrutiny necessarily would limit the market for P3 projects and, therefore, private investment in Virginia.

These protective measures, however, are necessary to make sure that P3 is used under appropriate circumstances by promoting better decision-making and transparency with respect to when and why to use P3. Undoubtedly, this process will still yield significant projects that serve the transportation needs of the commonwealth and for which P3 proposals will be solicited. In doing so, private investment will

continue to be encouraged to make these projects come to fruition, especially for those projects that present a greater financial challenge and involve more risk.

### Endnotes

1. Paula C. Squires, *Dead End for the New Route 460?*, Virginia Business (June 28, 2014) (<http://www.virginiabusiness.com/news/article/dead-end-for-the-new-route-460>).
2. The VPPTA was amended effective Oct. 1, 2014, which resulted in the recodification of the statute in Title 33.2 of the Virginia Code. The VPPTA was previously codified in Chapter 22 of Title 56 of the Code of Virginia (§§ 56-556 through 56-575).
3. Daniel C. Vock, *Virginia Discovers P3 Projects Might Not Always Save Money*, *Governing* (June 3, 2015) (<http://www.governing.com/topics/fnance/gov-virginia-public-private-partnership-setbacks.html>); Jim Nolan and Michael Martz, *VDOT Severs Ties with Builders Over New U.S. 460*, *Richmond Times-Dispatch* (Apr. 15, 2015) ([http://www.richmond.com/news/local/government-politics/article\\_a2d9a2ed-ae0c-5d02-a39a9513efc5041a.html](http://www.richmond.com/news/local/government-politics/article_a2d9a2ed-ae0c-5d02-a39a9513efc5041a.html)); *Virginia Terminates Route 460 P3*, *The National Council for Public-Private Partnerships* (Apr. 17, 2015) (<http://www.ncppp.org/virginiaterminates-route-460-p3/>); Paula C. Squires, *supra* note 1. *Virginia plans instead to pursue a revised 17-mile project for Route 460*.
4. The Route 460 project evolved into a design-build project without the safeguards normally built into a P3 project.
5. As defined by the VPPTA, transportation facilities include roads, bridges, tunnels, overpasses, ferries, airports, and facilities for mass transit, parking and ports. Transportation facilities do not include a commercial or retail use or enterprise not essential to the transportation of persons or goods. Va. Code Ann. § 33.2-1800 (West 2015).
6. *Id.* § 33.2-1801(A)(3), (C).
7. *Id.* § 33.2-1802.
8. *Id.* § 33.2-1803(A).
9. *Id.* § 33.2-1808(A)(1), (4), (9) & (B).
10. Jim Watts, *Virginia Opens \$950 Million I-95 P3 Lanes*, *The Bond Buyer* (Dec. 17, 2014) (<http://www.bondbuyer.com/news/washington-infrastructure/virginia-opens-950-million-i-95-p3-lanes-1068883-1.html>).
11. See <http://www.p3virginia.org/projects/i-495-express-lanes/>.
12. Va. Code Ann. § 33.2-1803(A)(11).
13. *Id.* § 33.2-1803(C)(5).
14. *Id.* § 33.2-1803(D).
15. *Id.* § 33.2-1820(B)(2).
16. See <http://www.p3virginia.org/on-the-horizon/> (last visited Aug. 31, 2015).

17. Vock, *supra* note 3.

18. Terry Austin, *Why Southwest Virginia Should Care About I-66*, Roanoke Times: Commentary (June 7, 2015)([http://www.roanoke.com/opinion/commentary/austinwhysouthwest-virginia-shouldcare-about-i/article\\_4e698e17-dfc0-5ebe-8357-7aece93c3c32.html](http://www.roanoke.com/opinion/commentary/austinwhysouthwest-virginia-shouldcare-about-i/article_4e698e17-dfc0-5ebe-8357-7aece93c3c32.html)).

19. Amy Elizabeth Garber, *Virginia P3 Law Amendments: Good for the Public, Bad for Business?* JD Supra Business Advisor (June 3, 2015) ([http://www.jdsupra.com/legalnews/virginia-p3-law-amendmentsgood-](http://www.jdsupra.com/legalnews/virginia-p3-law-amendmentsgood-for-the-87125/)

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