# An Examination of the Virginia Public-Private Transportation Act of 1995

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# Executive Summary

Evidence suggests that Virginia's Public-Private Transportation Act (PPTA) process has evolved and grown substantially beyond the General Assembly's original intent to supplement the traditional transportation improvements process. The PPTA is now the major method for constructing large new transportation projects. The PPTA has evolved into a process in which large private-sector construction consortiums propose design/build/operate projects funded using as much state/federal funding and taxpayer-subsidized debt as can be negotiated with the state, coupled with toll revenues that are as secure and protected as possible. The consortiums understandably negotiate to reduce their risk, with as high a return as possible, over as long a time period as possible. This evolution in the use of the PPTA should not be surprising given the private sector's motivation to maximize return within a low risk environment. The question is whether the PPTA process is good at producing *public* benefits with as low a price as possible, that is fair to the travelling public, that adequately considers external factors such as the environmental impacts, and that is consistent with Virginia's long-term transportation goals.

Over the last ten years, formula-driven state construction dollars have dried up. There has been no state funding by formula since FY 2009 for urban, secondary, or primary system construction. What major state construction funding remains is provided from borrowed funds and from federal dollars. This situation has led to greater centralization of transportation decision-making and increased the role of the PPTA in the use of these limited available construction dollars. As traditional funding sources for transportation construction decline and formula allocations to systems and regions dry up, transportation decision-making authority is shifting away from a more diffuse system of local, regional Metropolitan Planning Organizations (MPOs), and Commonwealth Transportation Board (CTB) decision-making, to the PPTA proposer and Governor's administrative agencies in charge of soliciting, screening and procuring PPTA projects. In effect, the Governor created the Office of Transportation Public-Private Partnerships (OTP3) in 2011 to facilitate this centralization of decision-making. As the PPTA role in transportation financing large projects has grown, the Governor's power to control the transportation agencies and oversight boards has become more important to the decision process.

The increasing centralization of transportation decision-making through the PPTA makes it more important than ever for the public and their representatives in the General Assembly to be kept adequately informed throughout the PPTA decision process. The General Assembly should play a larger role in this process. For example, in Illinois public-private partnership (P3) projects under consideration must be approved by their legislature before an RFP for procurement can be issued.[1] The Virginia General Assembly has no formal role in the PPTA process. Appointed oversight boards such as the Commonwealth Transportation Board should also be given a larger

[1] 630 ILCS 5/15.d

role in approving PPTA projects and a greater degree of independence from the Governor once appointed, to help ensure that state subsidies for PPTA projects are properly prioritized and fit into the long-range transportation plans of the Commonwealth.

Many of the purported benefits of the PPTA, such as increased innovation and efficiency, are supposed to accrue as a result of private sector competition. However, in some cases, such as the Downtown Tunnel/Midtown Tunnel/Martin Luther King Extension project, there was only one detailed bidder on a project. Without multiple bidders, it is difficult for the Commonwealth to evaluate and negotiate long-term concessions versus a more traditional private sector build-public sector financing/operate approach. As a result, the Commonwealth should consider treating some PPTA projects as regulated utilities. This would eliminate the need for complicated long-term contracts that try to anticipate the impact of future unknown events. This approach could reduce the risk and therefore project price to better ensure fairness to the traveling public.

In summary, this examination finds that the use of public-private arrangements can complement the traditional system of transportation delivery, despite the higher cost of capital for PPTA projects, *if* adequate safeguards are in place to ensure that public interests are protected. These safeguards include a more transparent process to the public, independent reviews of project development and procurement decisions, and better rules for managing risk and deciding public subsidy levels.

## Summary of Findings

- ✓ As state transportation construction revenues decline and formula distributions to the primary, secondary, and urban systems have ended, remaining state and federal subsidies for PPTA projects have increased in importance.

- ✓ The lack of formula construction distributions and the PPTA process itself have concentrated more transportation decision-making into fewer people—and, ultimately, the Governor. The CTB and other transportation-related governing boards serve at the pleasure of the Governor.

- ✓ It is unclear how PPTA project development occurs in relation to the National Environmental Policy Act (NEPA) alternatives review process. The conclusion of the NEPA process should ideally be the starting point for the PPTA process.

- ✓ The CTB and other transportation-related governing boards have no *statutory* role in the PPTA process, and are only referred to as "oversight boards" in the PPTA implementation guidelines.

- ✓ The detailed assumptions (such as risk premiums) and findings in the risk-adjusted cost benefit analysis ("Value for Money") conducted by the state Office of Transportation Public-Private Partnerships (OTP3) during PPTA project development—and used to determine the best procurement method—are not publicly disclosed before a Comprehensive Agreement is signed and the public is not given clear evidence of why it is better to use a PPTA process with a higher cost of capital than traditional approaches to building or procuring projects.

- ✓ It does not appear that the public has always been adequately informed of all major business points as required by §56-573.1.B of the Code of Virginia and the PPTA Implementation Guidelines before a *final* Comprehensive Agreement is signed. (Case in point: the state is potentially liable for "damages" to concessionaire if a competitor facility to the Midtown Tunnel is built).

- ✓ Even though the PPTA Implementation Guidelines emphasize the need for "competition among a small list of qualified proposers to create value for the Commonwealth", the Downtown/Midtown Tunnel/MLK project only had one detailed project proposer.

- ✓ There is no transparent process for determining the level of state subsidy to PPTA projects based on project priority—particularly for priorities within a MPO. (Case in point: the Downtown/Midtown Tunnel/MLK project is the number one transportation priority of the Hampton Roads region, but is receiving substantially less state subsidy to reduce tolls and is using tolls for long-term operation and maintenance, in contrast to the proposal to build a new Route 460).

- ✓ Substantial policy differences are reflected in the PPTA agreements that have been negotiated for different projects. The I-495 project increases transportation capacity while leaving existing free transportation choices in place for the public. The I-495 contract contains no "non-compete" or similar clauses. The private partner is taking on true demand risk in return for its investment. In contrast, the Downtown/Midtown Tunnel/MLK project expands an existing free facility already once paid for and currently maintained by the state, but with no viable travel alternative for the public. There is little rationale for the amount of state subsidy provided, and the contract allows for automatic toll escalation and penalties for creating competing transportation alternatives.

## Summary of Recommendations

- Strengthen the independence of the Commonwealth Transportation Board (CTB) by: 1) having some members appointed by the General Assembly; and/or 2) allowing CTB members to serve their full four year appointment without threat of dismissal by the Governor.

- Require a completed NEPA alternatives study *before* PPTA project procurement studies/evaluations are initiated.

- Require at least two bidders who have provided a detailed response to an RFP before selecting a successful bidder and moved to the final risk-adjusted cost-benefit (Value for Money) analysis stage of PPTA procurement.

- Require that state subsidies for a PPTA project be included in the state six-year plan (SYIP) prior to finalizing PPTA procurement decisions.

- Make Value for Money assumptions and conclusions made by the OTP3 available to the public and to legislators in a report to the General Assembly prior to moving to PPTA procurement. The General Assembly should also have a role in approving both state subsidy levels (particularly debt), and whether toll facilities should be used to finance a project.

- Give a direct approval role to the CTB, and other oversight boards, prior to signing any Comprehensive Agreement with a PPTA proposer.

- Require a public hearing after all major business points have been disclosed and at least 30 days prior to the signing of a PPTA comprehensive agreement.

- Provide statutory guidance on the use of "non-compete" or similar clauses in any PPTA agreement.

- Consider expanding the scope of the OTP3 or "responsible public entity" to include regulating rates of return for concession projects, instead of up-front negotiated financial models. This could potentially preclude non-compete clauses, built-in toll escalators, and shared risk schemes concerning potential unknowns.

- Add fairness considerations to the PPTA and Implementation Guidelines that include conditions for: 1) prioritizing state PPTA subsidies; and 2) conditions for assuming state responsibility for operation and maintenance of a PPTA facility.

# Introduction

There has been a dramatic increase in Virginia's use of the Public Private Transportation Act of 1995 (PPTA) for large new projects as traditional sources of state funding have declined. Although only three PPTA projects have been completed (Route 288, Route 199, Route 895 Pocahontas Parkway), another 18 projects are partially completed or currently under construction, under contract, or under consideration (see Appendix for list of PPTA projects). Virginia is considered a national leader in implementation of public-private transportation projects, yet there has been limited analysis of the performance of the PPTA.

The author's 2004 report, *An Analysis of the Evolution of the Public-Private Transportation Act of 1995*,[2] detailed the uses of the PPTA in building transportation projects in Virginia. As the 2004 report noted, the PPTA "can be a useful tool." The earlier report documented the uses of the PPTA for selected completed and proposed projects at that time, including the Pocahontas Parkway (Route 895), Route 288, Route 28 Interchanges, Dulles Metro-Rail Extension, I-495 HOT Lanes, I-81 widening, and a Western Transportation Corridor. While the I-81 project and the Western Transportation Corridor are no longer under active consideration as PPTA projects,[3] the other reviewed projects are either completed or well along in the process. Decision-makers have debated the right approach to many of the issues discussed in the 2004 report, and the PPTA process has continued to evolve in both statute and through "implementation guidelines" discussed later in the report.

This latest report examines additional issues, and highlights two recent PPTA projects for in-depth analysis—the I-495 Express Lanes in Northern Virginia and the Downtown Tunnel/Midtown Tunnel/MLK Extension in Hampton Roads. It also re-examines the recommendations offered in the 2004 report, and makes further recommendations.

The PPTA authorizes private entities to acquire, construct, maintain and/or operate "qualifying transportation facilities" under agreement with a "responsible public entity".[4] The original intent of the PPTA was to supplement public funding with private sources of money and encourage creative, timely and less costly transportation projects. Virginia's hope was that private sector funding and ingenuity would leverage state dollars and speed the development of projects. Supporters of the PPTA believe the law offers a number of important benefits:

1) **Timely delivery and efficient construction of a project**. PPTA proponents assert that by taking advantage of private sector financing, governments can build the infrastructure that it needs, avoid (or at least significantly reduce) up-front capital costs, and pay for infrastructure only when it is ready to be used. Proponents also contend that greater speed of project

[2] http://www.southernenvironment.org/uploads/publications/va_ppta_report_jan05.pdf
[3] The NOVA North-South Corridor project OTP3 currently lists as a candidate project could, however, include at least a portion of the route previously considered for the Western Transportation Corridor.
[4] See §56-556 et seq. Code of Virginia.

development and efficiency can be achieved by using the private sector to manage the entire construction process from obtaining financing and providing preliminary engineering and design services, to managing construction, and even to operating and maintaining the facility.

2) **Risk transfer to the private sector**. Proponents also argue that in conventional government construction projects, contractors regularly pass along cost increases from schedule delays and overruns on materials and labor. Government must also pay to repair problems and to cover ongoing operations and maintenance. Under public private-partnerships—especially those in which the private sector commits to operate a new facility for a fixed period—the contractor, not government, is liable for those cost risks.

3) **Greater incentive to innovate**. Private companies that are fully responsible for overruns have an incentive to innovate at every stage: through design, financing, construction, and in operations and maintenance. That innovation, it is argued, can provide overall savings to government and results in better products and services.

4) **Leveraging public funds with private capital**. PPTA projects in Virginia, such as the I-495 Express Lanes and Downtown/Midtown/MLK project, are now incorporating some private sector risk capital and debt into their financing arrangements, along with state funds and publicly subsidized debt. In addition, PPTA project debt is generally not backed by the full faith and credit of the Commonwealth, preserving state debt capacity and credit ratings.

This report will discuss whether the purported benefits of the PPTA are being achieved, and whether these benefits offset potential shortcomings of this transportation delivery method. Potential PPTA shortcomings include greater consolidation of transportation decision-making authority into line agencies of the executive branch of the state; a generally higher cost of capital for PPTA projects; more limited disclosure of information and public participation; limitations on consideration of alternatives to the project; limitations that may be imposed on the state's ability to build or improve other competing facilities; whether the tolls imposed for certain projects are fair to the travelling public that must pay them; and whether the PPTA process is compatible with and effectively incorporates long-range transportation planning.

## PPTA History and Process

In 1988, Virginia adopted the Highway Corporation Act, which was the Commonwealth's first attempt to authorize private sector participation in the submission of transportation proposals. The Dulles Greenway was built under the authority of this act.

In 1993, the General Assembly adopted Senate Joint Resolution No. 241 establishing the Joint Subcommittee Studying Privatization of Certain State Government Functions. The 1994 General Assembly continued the study with Senate Joint Resolution No. 17. It also passed the Qualifying Transportation Facilities Act, which was the pre-cursor to the 1995 PPTA. The 1995 PPTA was a recommendation of the Joint Subcommittee to modify the 1994 Act. Notable statutory amendments since 1995 included a 2002 amendment to conform with changes made to public procurement laws; and a 2008 amendment for projects that have an estimated construction cost in excess of $50 million that required the proposer to pay the costs for an independent audit of any and all traffic and cost estimates associated with the proposal, as well as a review of all public costs and potential liabilities to which taxpayers could be exposed. This audit must be conducted by an independent consultant selected by the responsible public entity, and all information from the review must be fully disclosed.

The PPTA authorizes private entities to acquire, construct, improve, or operate qualifying facilities, as long as the "responsible public entity" approves. The responsible public entity is defined as "a public entity that has the power to acquire, construct, improve, maintain and/or operate the applicable transportation facility." The responsible public entity for state projects is the Department of Transportation for highways and the Department of Rail and Public Transportation for rail and transit projects. The responsible public entity may also be a local government. This was a major change from the Highway Corporation Act of 1988 where the State Corporation Commission was the responsible regulatory body, even though it had little expertise in highway matters.

The PPTA also requires a private entity's proposal to be compatible with state and local transportation plans (§56-558A.1 and §56-560.C.2 of the Code of Virginia). Affected local governments must be notified for comment on compatibility with local comprehensive plans. The law states that the operator's financing must be reasonable and construction must be timely. If a state agency is the responsible public entity, the Secretary of Transportation must approve a comprehensive agreement before it is signed (§56-573.1.2). The PPTA statute does not give the Commonwealth Transportation Board (CTB) a central role in the PPTA process even though the CTB is responsible by statute in §33.1-12 for "let[ting] all contracts for the construction, maintenance, and improvement of the roads comprising systems of state highways and for all activities related to passenger and freight rail and public transportation in excess of $5 million." While the PPTA requirement for state and local transportation plan compatibility would seem to *de facto* include the CTB in the PPTA process, the PPTA Implementation Guidelines clearly

indicate that projects can and have been initiated *before* being included in the six-year transportation improvement plan the CTB approves. [5]

An important determinant of how the PPTA operates in practice is the use of Implementation Guidelines authorized by §56-560D of the Code of Virginia. While these procedural guidelines do not have the force of law, they fill in many of the gaps in the statute and set forth much of the process used to implement the PPTA. The guidelines have been updated in 2001, 2005, 2008, 2010, and most recently in May 2012. In June 2011, the McDonnell Administration created the Office of Transportation Public-Private Partnerships (OTP3). Many of the 2012 changes in the implementation guidelines were made to reflect the creation of the OTP3 to oversee PPTA project development. The current implementation guidelines state that the "primary objective of the OTP3 is to accomplish the timely delivery of PPTA projects that address priority transportation needs. The OTP3 will serve as the champion to bring PPTA projects to fruition, be the primary point of contact for PPTA projects serving all modes of transportation, and be a resource to public sector agencies, private entities and other stakeholders working to advance PPTA projects."

Several notable objectives of the PPTA are also articulated in the current guidelines, including:

- Develop multimodal and intermodal solutions that are consistent with state, regional, and local transportation policies, plans, and programs;
- Encourage competition for innovation and private sector investment to create the best cost-benefit with lowest risk (Value for Money) for the Commonwealth;
- "Achieve lifecycle cost efficiencies through appropriate risk transfer." In other words, save costs to the public sector by transferring more project risk to the private sector.

[5] PPTA Implementation Manual and Guidelines, May 21, 2012, page 16.

## Highlights of the Current PPTA Implementation Guidelines Process

- **Project Identification.** OTP3 and agency planning divisions and metropolitan planning organizations are responsible for managing the project identification process from both solicited and unsolicited proposals. Solicited projects can result from priorities of the governor, the state six-year improvement plan (SYIP), legislative mandates, the state long-range transportation plan (VTRANS 2035), agency master plans, the Statewide Surface Transportation Program (STIP), or MPO Long-Range Plans.

- **PPTA Project Screening and Prioritization.** OTP3 leads high-level and detailed project screening. Project screening culminates in making a recommendation to the PPTA Steering Committee. This committee is chaired by the Commonwealth Transportation Commissioner, and is comprised of the Deputy Secretary of Transportation, the Deputy Commissioner, Chief Engineer, Chief of Planning and Programming, and CFO of VDOT, and one representative each from DRPT, Department of Aviation, Virginia Port Authority, Virginia Commercial Space Flight Authority, and DMV. The PPTA Screening Committee determines which projects move forward as a short, medium, or long-term priority. The Steering Committee also makes recommendations on unsolicited proposals.

- **Oversight Boards.** According to the guidelines, "PPTA projects rely on direction from various oversight boards". This would include the Commonwealth Transportation Board (CTB), Virginia Aviation Board, Virginia Port Authority Board, and Commercial Space Flight Authority Board. This is the extent of the Oversight Boards *official* involvement in the process according to both the PPTA statute and the Implementation Guidelines.

- **Project Development.** Once projects have been screened and prioritized, the OTP3 and the responsible public entity will advance a project to the development phase. Steps in the development phase include the overseeing/conducting studies required by the federal National Environmental Policy Act (NEPA), conducting public involvement processes, conducting Value for Money (VfM) analysis, and decision points on procurement strategy including whether using the PPTA is the preferred procurement strategy. VfM is used to determine whether a project provides benefits to its users and the Commonwealth when delivered through the PPTA process.

- **PPTA Procurement Process.** The guidelines list a two stage procurement process: 1) issuing a request for qualifications to "define a pool of qualified, potential Proposers"; and 2) issuing a request for proposals (RFP). The PPTA Steering Committee approves the OTP3 list of qualified respondents. Responses to the RFP from qualified respondents follow. According to the guidelines this "creates competition among a small list of qualified proposers to create value for the commonwealth." Proposals are then evaluated by OTP3 and the responsible public entity on both technical and financial merit, a preferred proposer is selected, and a Comprehensive Agreement is negotiated and signed.

# PPTA Project Case Studies

This report section will focus on two recent PPTA projects: the I-495 Express Lanes in Northern Virginia and the Downtown Tunnel/Midtown Tunnel/MLK Extension in Hampton Roads to help determine whether modifications to the PPTA process are needed. This analysis is guided by a model developed by Michael Garvin of Virginia Tech, who suggests that a balance of social, state, industry and market interests are required for a successful public-private partnership.[6] As Garvin has noted, "the state and society should demand more than an economic premium for granting the private sector the right to develop and/or operate facilities that are generally public goods. Indeed, the private players in this arena have the expertise, the agility, and the incentive to provide more – higher quality of service, reasonable price for the service, faster availability of the service, and net contributions to the environment. If not, their expertise is for all intents and purposes wasted. Moreover, the risks of transferring these responsibilities to the private sector could be too great."[7]

## I-495 Express Lanes

I-495 Express Lanes are 14 miles of two new managed tolled lanes in each direction that are being added to the Capital Beltway from the Springfield Interchange to just north of the Dulles Toll Road. Toll rates for the 495 Express Lanes will change according to traffic conditions in order to regulate demand for the lanes. These lanes will be high-occupancy toll (HOT) lanes. When completed in late 2012, buses, carpools and vanpools with three or more people, and motorcycles can ride in the new lanes for free. Vehicles carrying one or two people can either travel for free in the regular lanes, or pay a toll to ride in the new lanes. To ensure that there is no disincentive for carpool and transit use on the HOT lanes, the Commonwealth will make partial payments to the concessionaire in the event that high occupancy vehicle (HOV-3) use exceeds mutually agreed upon numbers. These new lanes will allow the Beltway to offer HOV-3 connections with I-95/395, I-66 and the Dulles Toll Road. The project will also replace more than 50 aging bridges and overpasses, upgrade 10 interchanges and provide new bike and pedestrian access.

VDOT conducted a formal solicitation for competing proposals and an independent review process before moving this project forward. According to OTP3, the private partners have competitively bid 60 percent of the construction work to subcontractors. In addition, VDOT commissioned an independent consulting firm to verify all construction cost estimates.

[6] See Michael J. Garvin, Doran Bosso, "Assessing the Effectiveness of Infrastructure Public-Private Partnership Programs and Projects," Public Works Management and Policy, October 2008.
[7] Ibid., page 164.

This project is a public-private partnership between the Virginia Department of Transportation and Fluor-Transurban. Fluor-Transurban is financing, designing and building the project with environmental review and oversight from VDOT. Project construction began in July 2008 and is expected to be completed in late 2012. Fluor-Transurban has a 75 year concession to operate and maintain the facility. VDOT retains ownership and oversight rights to ensure the project is constructed, operated and maintained in accordance with agreed-upon standards. At the end of the term, the HOT lanes must be handed back to the Commonwealth at an agreed-upon level of quality. VDOT has the right to terminate the contract if terms and standards are not met. The Commonwealth is *not* prevented from building any other transportation capacity that might compete with the Express Lanes, but the private partner will have the first right to fund and build additional toll lanes on the Beltway if congestion warrants.

The $1.9 billion project, including financing costs ($1.34 billion in design-build construction cost), is funded from the following sources:

- State subsidy - $409 million (plus additional funding for VDOT-directed changes in project scope);
- State issued private activity bonds - $589 million;
- Federal Highway Administration Transportation Infrastructure Finance and Innovation Act (TIFIA) program 40 year loan - $589 million;
- Private Equity contribution - $349 million.

Fluor-Transurban is solely responsible for project debt repayment. The Commonwealth is not responsible for any debt repayment for the life of the project.

The I-495 Express Lanes contract adopts a risk-reward financial scheme for the concessionaire. The concessionaire is taking the risk that enough non-HOV vehicles will pay to use the lanes, with the caveat that the lanes must remain free flowing. The state is reducing the concessionaire's risk by providing a payment equal to 70% of the applicable toll to the concessionaire if HOV users exceed 24% of the total traffic flow during an agreed-upon set of conditions[8]. Whether this proves to be a future disincentive to HOV use and additional cost to the Commonwealth remains to be seen.

For the above-described risks, the concessionaire is allowed the *possibility* of making a high rate of return off the pricing of those lanes. The toll pricing is constrained only by the free-flowing elasticity of demand for the lanes. While the Commonwealth can take a small portion of profit above an 8% rate of return (maximizing at 30 percent of the profit above 8.966%), the concessionaire still gets to keep 70 percent of the profit above a 9% rate of return. In other words, even with the state receiving a small piece of the profit, the concessionaire will still want

[8] http://www.vamegaprojects.com/tasks/sites/default/assets/File/pdf/ARCA_with_ExhibitA-Defintions.pdf, pg 85.

to find the right balance of free-flowing non-HOV vehicles, using the highest variable toll rate those vehicles are willing to pay, to earn the highest profit possible.

Are the I-495 Express Lanes a reasonable use of the PPTA to construct new transportation capacity, as opposed to a traditional design-build approach? Under the PPTA process, the I-495 Express Fluor-Transurban consortium was able to add capacity to a heavily traveled corridor, while arguably minimizing impacts to existing homes and businesses (VDOT staff argued they were required to operate under different safety design constraints that precluded them from advancing the same solutions). Construction, operating, and financial risk is partially borne by the concessionaire. The project is not limiting any existing or future transportation options through non-compete clauses, but rather the concessionaire is being given the right of first refusal in providing any additional needed capacity. The public has limited its risk in the project to a set commitment of public dollars and subsidized debt (and potential HOV use payments). Regional HOV connectivity is being enhanced—which is one of Northern Virginia's major priorities. The project is reasonably fair to the traveling public in that HOV users have free use of the new facility and a new choice of travel is being provided. However, it is unknown whether cost sharing between the concessionaire and the state—if greater free HOV use than projected occurs—will cause future disincentives to be placed on increasing HOV use.

Basically, the elasticity of demand will be the only brake put on the level of tolls required for non-HOV users. Put another way, the concessionaire will want to find the optimum toll rates and vehicle use that provide the highest amount of revenue. Toll rates by definition will preclude the use of the lanes for some travelers.

Profit potential was the major concession required to induce Fluor-Transurban to take on project risk. It is important to note in terms of assessing future projects and their cost risks, that the final construction price tag for the project exceeded the 2003 Advisory Panel planning estimate by $500 million (the $850 million cost estimate in 2003 increased to a final contract price of $1.34 billion). It will be interesting to see how the final costs compare to the current estimate for other projects, such as the currently estimated $1.4 billion new Route 460 project and the $1.0 billion I-95 Express Lanes project.

## Downtown Tunnel/Midtown Tunnel/ MLK Extension

The Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway (MLK) Extension is located in the cities of Norfolk and Portsmouth. The project consists of a new two-lane tunnel under the Elizabeth River parallel to the existing Midtown Tunnel; maintenance and safety improvements to the existing Midtown Tunnel; minor modifications to the interchange at Brambleton Avenue/Hampton Boulevard in Norfolk; maintenance and safety improvements to

the existing Downtown Tunnel; and extending the MLK from London Boulevard to Interstate 264 (I-264), with an interchange at High Street.

The three components of the project (Downtown Tunnel, Midtown Tunnel, and Martin Luther King Freeway Extension) have independent utility and were individually reviewed previously under the National Environmental Policy Act (NEPA).[9] The projects have consistently been rated a top priority for Hampton Roads by all relevant transportation authorities.[10] The three projects are now being bundled as a single PPTA project for construction purposes with Elizabeth River Crossings (ERC) as the concessionaire under the Comprehensive Agreement signed on December 5, 2011.

Federal authorization was given to toll the facilities under the Value Pricing Pilot Program, subject to certain conditions. The tolling system will utilize time-of-day congestion pricing that promotes congestion relief at peak periods, while also providing a revenue source to support the financing and long term operation and maintenance of the project. Currently, it is expected that these facilities will be tolled prior to project completion. Under the Comprehensive Agreement, tolling was originally to start in the summer of 2012—before construction even began. The starting date for tolls was pushed back until January 2014 as a result of an injection of an additional $112.5 million in state bond funding in response to public protests and objections to the fairness of beginning toll collection prior to completion of the project from Hampton Roads members of the General Assembly during the 2012 legislative session. Toll collection will start at $1.59 for cars and $4.77 for trucks off-peak and $1.84 for cars and $7.36 for trucks during peak hours. The Comprehensive Agreement has a toll escalation clause to account for predicted increases in costs for operations and maintenance. The company is entitled to an annual increase of 3.5 percent a year, or the rise in the consumer price index, whichever is higher. Peak-hour tolls could reach $2.90 for cars in 2027, assuming a 3.5 percent escalation rate starting in 2016. At the end of the 58 year agreement, tolls could be around $14 for cars and nearly $55 for trucks.

Total project costs, including financing, are approximately $2.1 billion. The state invested $308 million at financial close to lower toll levels, plus the additional $112.5 million to delay the beginning of toll collection from the third quarter of 2012 to January 2014. ERC will be responsible for debt service on $422 million in federal TIFIA loans and $664 million in state private activity bonds. The remainder of the project costs will be raised through private equity of up to $272 million.[11] VDOT and ERC closed financing of the project in April 2012.

VDOT negotiated a fixed price of about $1.45 billion for design and construction. Costs include construction of the new Midtown Tunnel ($1.164 billion); rehabilitation of the Midtown and

[9] http://midtowntunnel.org/documents/DT-MT-MLK_EA_March24_2011.pdf
[10] http://www.ctb.virginia.gov/resources/2012/april/pres/Presentation_Agenda_Item_9_CTB_20120418.pdf
[11] http://www.nossaman.com/8418

Downtown tunnels ($94 million); and extension of the Martin Luther King Freeway ($192 million). ERC will also provide $2 million annually for transit between Norfolk and Portsmouth.

In exchange for its $1.3 billion investment and financing risk it is assuming, ERC wants to achieve a private sector market rate of return. ERC is taking the risk that revenues and costs will be consistent with a negotiated base-case financial model. Under the Comprehensive Agreement, the contract will run for 58 years, with no maximum rate of return specified for the concessionaire. ERC also negotiated the ability to receive damages from the state if an "Alternative Facility" is built that provides drivers with an option to using the tolled facilities, as long as ERC can prove that the alternative facility is causing it lost profits. This lessens their risk from any future competing facilities, but it also limits the ability of the state to make transportation improvements. In return for the risk it does take, ERC is guaranteed an annual increase in toll rates of 3.5% or the increase in the CPI, whichever is greater. The agreement will provide for up to 60% revenue-sharing with VDOT if the project exceeds specified thresholds above the base-case financial model, such as a gain from refinancing debt.

The Downtown/Midtown Tunnel/MLK project differs from the I-495 project in that the travelling public has few, if any, alternatives to the use of the tolled facilities. I-495 vehicles have the option of using the existing lanes on the Capital Beltway, or travelling in car pools in the new Express Lanes to avoid tolls. There is no viable alternative to paying the tolls for existing Midtown or Downtown Tunnel users travelling from Norfolk to Portsmouth, except using public transit.

## Review and Update of Recommendations from the 2004 Report

The 2004 report identified a number of significant policy issues with the increasing use of the PPTA. A summary and examination of the status of these issues is appropriate here, particularly since most of these issues have not been adequately addressed.

**Consistency with NEPA Alternatives Analysis.** The 2004 report asked how the PPTA process fits with the alternatives review required by the National Environmental Policy Act (NEPA) and whether a PPTA identified alternative can be fairly evaluated against other alternatives in the NEPA process. As the earlier report noted, the ideal decision process is one we already theoretically have. As applied to a highway project, this process would basically consist of the following steps: 1) state and local governments build consensus on the need for a project; 2) the NEPA process identifies viable alternatives; 3) the Commonwealth Transportation Board deliberates on the alternatives, makes a recommendation to FHWA, and includes project planning funds in its six-year improvement program; and 4) the public is able to participate in both the NEPA and the six-year planning process. Once the CTB has included project planning funds in its six-year program, the PPTA could then be a tool to find the best financing and construction alternatives. However, in today's PPTA process, unsolicited and even solicited transportation infrastructure proposals in some cases are encouraged before consensus for a project has been achieved or the NEPA process even started. In this environment it is difficult to have an unbiased NEPA alternatives review. This remains a serious issue. The conclusion of the NEPA process should ideally be the starting point for the PPTA process. They should generally not be concurrent processes.

**Altering Transportation Decision-Making Authority.** As the scale of PPTA projects has increased and this process has become more integral to Virginia's transportation system, a major issue is who is now driving and deciding transportation policy in Virginia. Section 33.1-12 of the Code of Virginia defines the general powers and duties of the Commonwealth Transportation Board. The CTB is generally responsible for the location, decision-making and financing of transportation projects in Virginia. However, under the PPTA, the CTB has a very limited role in deciding whether a project is approved. The PPTA statute requires no CTB approval for a project. The current guidelines for the PPTA process only give the CTB a limited oversight role over the responsible public entity. As the primary public entity responsible for transportation *policy* in Virginia, the role of an *independent* CTB should be strengthened in the PPTA process. This was recommended in the 2004 report and remains a recommendation today. Enhancing the role of the CTB in the PPTA process will be further elaborated on in the next section of this report.

**Private Equity and Incentives.** A primary purpose of the PPTA is to attract and leverage private capital for transportation projects. In 2004, very little private sector equity or debt was being put into PPTA projects. The earlier report noted that without any private risk capital, it was often unclear why the PPTA was used versus a traditional design-build approach. Some

recent PPTA projects *have* leveraged state funding with significant private capital and debt. Significant private risk capital and debt is now being put into several of the PPTA projects by the proposers—including the Downtown/Midtown Tunnel/MLK and I-495 projects reviewed here. In projects utilizing private equity, the issue becomes whether the higher private cost of capital (and other negotiated incentives such as "non-compete" clauses and automatic toll escalators) brings a greater amount of other benefits when compared to traditional transportation financing.

However, in a May 16, 2012 briefing on the proposed Route 460 Corridor project to the CTB, the OTP3 proposed "a different approach" using "Design-Build-Finance" rather than the Concession Model (Downtown/Midtown Tunnel or I-495) approach. The OTP3 stated that it was "looking for the least expensive method to build a full scope project." The OTP3 also noted it was exploring using a combination of public subsidy and tax exempt debt through a "63-20" corporation, no private equity, and VDOT taking on long-term operation of the facility.[12] In this case, higher cost private equity is not being proposed. In this Route 460 financing scenario, it is not clear why the PPTA process is even being used, versus a traditional procurement process.

**Design-Build Issues and Leapfrogging Other Projects.** The 2004 report questioned the need for the PPTA as an alternative to the use of traditional design-build contracts. It still appears that the real incentive for using the PPTA is often to jumpstart transportation projects outside the normal approval and financing process of the six-year transportation plan, and/or bypassing the use of VDOT design and construction management. This can undermine sound transportation planning by advancing projects that are not high priorities for the public and making a claim on state revenues at the expense of other projects. Even when a project is a high priority, it still seems appropriate to ask whether a PPTA is the right approach, and to ask more broadly whether a PPTA process would even be necessary if the state had sufficient traditional revenues.

**Competition and Non-Compete Clauses.** As the 2004 report stated, "every effort should be made to institutionalize competition in the PPTA process." With only one detailed bidder for the Downtown Tunnel/Midtown Tunnel/MLK Extension, the proposer negotiated a clause in the comprehensive agreement that requires additional state payments if improvements to other roads or transportation modes reduce the concessionaire's revenue compared to a base case financial model. This is essentially the same as a non-compete clause and also highlights the existing tunnels' value and lack of travel alternatives in the region. While understandable from the *proposer's* viewpoint, the future ability of the state to improve its transportation infrastructure in as cost effective a manner as possible should never be compromised. For example, if the state decides to build the proposed "Patriots Crossing" that has been identified as a high priority for Hampton Roads, the public should not have to pay ERC a "damages" fee in addition to the cost

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http://www.ctb.virginia.gov/resources/2012/may/pres/live/Presentation_Agenda_Item_2_460_CTB_Briefing_Final_Draft_12May16.pdf

of building the new facility. The General Assembly and CTB should provide clear guidance on the use of non-compete or similar-type clauses in any PPTA comprehensive agreement. The "right of first refusal" for building alternative facilities in the I-495 agreement may be a potential example of what is acceptable.

**Public Input.** The lack on adequate public input was also highlighted in the 2004 report and remains an issue in the PPTA process. The public should have time to respond to major business elements of a final negotiated comprehensive agreement *before* it is signed. There was no adequate, timely disclosure to the public or to affected local governments of the previously described Downtown/Midtown Tunnel "non-compete" clause—or final details of the tolling provisions such as commencement before construction even begins—before the final comprehensive agreement was signed.

**Incentives for Sprawl.** The PPTA should be a tool to accomplish the transportation goals of the Commonwealth—including limitations on contributing to suburban sprawl and increasing the efficiency of the transportation system. PPTA projects should fit into the comprehensive transportation plans of the state and of regional metropolitan planning organizations. If the goal of a region is HOV interconnectivity, for example, then a PPTA project should help accomplish that goal. If it is a policy to avoid suburban sprawl, then PPTA projects should not contribute to suburban sprawl.

**Optimism Bias.** Optimism bias was flagged as an issue in the 2004 report, particularly with regard to toll-road traffic forecasting by a proposer. The 2008 amendments to the PPTA statute now require an independent assessment of all traffic and project cost estimates—to be conducted by a third party hired by the responsible public entity but paid by the proposer.[13] This 2008 statutory change is helpful in reducing traffic and cost estimate bias. It is also likely that the traffic and financial experience of the Pocahontas Parkway has made proposers more realistic in their assumptions.[14]

[13] http://lis.virginia.gov/cgi-bin/legp604.exe?081+ful+CHAP0296
[14] http://www2.timesdispatch.com/business/2012/jun/20/tdbiz01-operator-of-pocahontas-parkway-writes-down-ar-1999836/

# Additional PPTA Issues Identified Since 2004 Report

## Need for Independent Review of PPTA Projects

The 2004 report recommended giving the Commonwealth Transportation Board (CTB) a direct statutory role in the PPTA process in order to provide an official oversight independent review of the PPTA projects. The statute still does not give an official role to the CTB or any other oversight board in PPTA selection or procurement. The statute only requires PPTA project approval by a "responsible public entity" as specifically set out in guidelines.

However, even a greater role for the CTB in the PPTA process may not provide the independent evaluation that is needed. It is clear from the current PPTA guidelines that candidate projects can come from a wide variety of sources, including projects that are a priority of the Governor.[15] It is difficult to secure a truly independent project review from the OTP3, transportation agency, or oversight board that serve purely at the pleasure of the Governor, when that project is a priority of the Governor. In addition, the OTP3 may be biased in favor of PPTA procurement rather than design-build since the reason for this agency's existence is to promote and advance PPTA projects.

The Downtown/Midtown Tunnel project is a good example of the need for a truly independent review of whether the PPTA is the proper tool for a project. Clearly there is a need for the project, which has been a high priority for the region. However, there has never been a clear statement to the public as to why a traditional design-build approach would not have been able to deliver the project at a lower cost to the public. The OTP3 "Value for Money" cost-benefit analysis (discussed more in the next section) should have been publicly presented and defended comparing a PPTA long-term concessionaire financed design/build/operate approach versus other procurement methods, such as the traditional VDOT approach financed through revenue bonds from either a state-created authority or a non-profit corporation that can issue tax exempt debt (created pursuant to IRS rule 63-20).[16]

While the CTB may be the proper forum for an independent evaluation of transportation projects in Virginia, the Governor has sole discretion over appointing (subject to General Assembly confirmation) and dismissing members of the Board.[17] Given the far-reaching power of the

[15] http://www.vappta.org/resources/PPTA%20Implementation%20Manual_May_21_2012.pdf
[16] See the current proposal for Route 460 improvements cited earlier.
[17] § 33.1-1 Code of Virginia: The Board shall consist of seventeen members: the Secretary of Transportation, the Commissioner of Highways, the Director of the Department of Rail and Public Transportation, and fourteen citizen members. The citizen members shall be (i) appointed by the Governor as provided in § 33.1-2, (ii) subject to confirmation by the General Assembly, and (iii) removable from office during their respective terms by the Governor at his pleasure.

PPTA law, the General Assembly should consider amending the appointment power to the CTB to either include members appointed by the General Assembly, or to prevent the removal of Board members during their full four year term (absent exceptional circumstances). This would provide greater independence to the CTB in reviewing whether the PPTA is the best mechanism for building a project, as well as a more independent evaluation of the amount of public dollars devoted to such projects, the timing and level of any tolls to be imposed, and other terms of any agreement.

## Adequacy and Disclosure of PPTA Project Evaluations

One of the major decision points in the PPTA project development process as described in the implementation guidelines are the findings from the Value for Money (VfM) analysis. The VfM analysis is conducted by OTP3, and "tests the value of a project delivered through the PPTA in comparison to the most likely alternative delivery method".[18] At its heart, the VfM is a cost-benefit and risk analysis. For example, a VfM analysis would assess and compare a low bid design build alternative for a particular project against private sector assumption of risk through experience with previous similar projects. An initial VfM analysis should support the PPTA Steering Committee's decision regarding the optimal procurement method. The Office of Transportation Public-Private Partnerships "will update this initial VfM study with inputs that accompany the submission of Proposals by private entities during the competitive procurement process to ensure that the project continues to provide VfM thorough the procurement process."[19]

There is ample reason for concern that a VfM analysis be properly conducted and thoroughly vetted. A recent study of 28 Ontario public-private partnership projects worth more than $7-billion reported on by Toronto newspaper *Globe and Mail*, found that these P3 projects "cost an average of 16 per cent more than conventional tendered contracts. That's mainly because private borrowers typically pay higher interest rates than governments. Transaction costs for lawyers and consultants also add about 3 per cent to the final bill."[20] The study found that Ontario factors in a risk premium for P3 projects compared with doing procurement the conventional way. The premium reflects the risk shouldered by the private partner, including construction delays, cost overruns, design flaws and fluctuating future revenues. However, the study found that "no empirical evidence is provided to substantiate the risk allocations, making it difficult to assess their accuracy and validity."

[18] PPTA Implementation Manual and Guidelines, page 28.
[19] Ibid.
[20] http://www.theglobeandmail.com/report-on-business/economy/the-hidden-price-of-public-private-partnerships/article4611798/

There is a need for reporting and possible independent evaluation of the risk premiums used in the VfM analysis conducted by Virginia's OTP3. In the case of Downtown/Midtown/MLK, the General Assembly could have created a transportation authority similar to the Chesapeake Bay Bridge and Tunnel District (CBBTD). In 1995, for example, the CBBTD awarded a $197 million construction contract to a three firm consortium to build a second span parallel and adjacent to the original Bridge-Tunnel. The project, which expanded the two-lane facility into four lanes, included expansion of toll plazas, trestles, bridges and roadways, and maintenance and repair of the original span. The project was financed through the sale of revenue bonds backed by the CBBTD. No local, state or federal tax monies or debt capacity was utilized for the construction costs.[21] The PPTA process needs to include a step where the public is provided with clear evidence as to why using a PPTA process with a higher cost of capital is a better approach than a traditional method with a lower cost of capital.

At a minimum, a report on the VfM findings should be provided to the General Assembly Money Committees prior to initiating a PPTA procurement process. This would help to ensure that the assumptions contained in the VfM analysis can stand up to public scrutiny.

Another adequacy issue arises when only one bidder replies to a project RFP solicitation, *especially* if the proposal submitted by the bidder includes long-term operation and maintenance of the project. The state had expected three bids for the Downtown/Midtown/MLK Project due to initial interest, but only received one detailed project proposal. Elizabeth River Crossings Corp. (ERC) submitted a conceptual proposal on September 29, 2008, in response to VDOT's solicitation. Evaluating near term construction costs are difficult enough, as evidenced by the large increase in estimated to final costs experienced by the I-495 Express Lanes project. It is even more difficult to evaluate the reasonableness of a 58 year proposal for operation and maintenance of a facility, such as the Midtown Tunnel. There is effectively no baseline data, so large contingencies for risks are required under the current negotiated contract model.

Without at least two detailed PPTA proposals, it is difficult to conduct a VfM analysis of a private proposal versus a traditional design-build approach. The essence of a market approach requires competition. Without at least two proposals, the PPTA evaluation process should lean heavily towards selecting a traditional design-build approach. The General Assembly should even consider requiring that the PPTA process have at least two detailed independent proposals before proceeding with procurement. Without at least two proposals, the law could assume there is no functioning private market for that particular project and proceed with a traditional design-build approach. As noted earlier, the implementation guidelines refer to the need to "create competition among a small list of qualified proposers to create value for the commonwealth."[22] The implementation guidelines concerning competition do not appear to have been followed in the Midtown/Downtown/MLK project procurement process.

[21] http://www.cbbt.com/history.html
[22] Ibid.

## Regulated PPTA Rates of Return

Both the I-495 Express Lanes and Downtown/Midtown/MLK projects have no maximum allowable rate of return for the concessionaires. While there is a maximum increase allowed for toll rates on the Downtown/Midtown/MLK, the concessionaire is allowed to earn as high a rate of return as the escalating toll rates will allow. Increases in users or greater future efficiencies that increase the concessionaire rate of return will not require a reduction in toll rates. The I-495 project is touted as a variable toll, congestion-free facility. However, the road still required public funding and taxpayer-subsidized debt. In return for what may be minimal risk, the concessionaire can earn essentially an unlimited rate of return.

This begs the question of whether PPTA roadways—which are still public property—should be treated like public utilities with a regulated rate of return. It is no coincidence that the PPTA is placed in the section of the Code of Virginia entitled "Public Service Corporations". Public service corporations are often treated as regulated utilities when they have monopolistic pricing power. Given the lack of transportation alternatives for projects such as the Midtown Tunnel, treating them as regulated utilities may be a better approach. The OTP3 or the "responsible public entity" could be staffed to serve as the regulating entity and the statute could require that a regulated rate of return be part of any Comprehensive Agreement. This could eliminate the need to negotiate upfront over toll rates far into the future and also lessen the risk for the project proposer. The private entity would be *guaranteed* to earn a reasonable rate of return, but no more. Performance incentive clauses could be negotiated that boost the concessionaire's regulated returns to ensure efficiency and effectiveness. Concerns over construction risk could be dealt with as they are in any design-build contract. The public would have greater assurance that toll rates would remain fair through the life of the concession.

## Guidelines Concerning Fairness to the Travelling Public

The review and implementation of a PPTA proposal that includes tolls as an element of the financing package should consider whether citizens who are also paying regular state transportation taxes are being asked to contribute a disproportionate share. Adding capacity to I-495 while allowing HOV users free access to the new lanes is very different than expanding and tolling the *existing* Midtown Tunnel infrastructure that has no viable vehicle alternative. The existing tunnels are currently maintained by the state after a previous 40 year round of tolls paid for the construction costs. Is it fair that local residents must pay tolls to re-build (albeit expanded to four lanes), operate and maintain the tunnels for 58 more years? This issue carries even more weight in the case of the Downtown/Midtown Tunnel deal since it is also less likely that any competing facility will be built due to the "damages" provisions in the comprehensive agreement concerning new facilities. This arrangement will likely mean that local residents will be paying

tolls to maintain and operate a facility for over 100 years from its original construction with little chance of a transportation alternative. Tolling is even scheduled to still be implemented several years *before* the improvement project is even completed.

Fairness to users needs to be considered when imposing tolls for long-term maintenance and operation expenses. With a traditional design-build construction process, the state would continue to maintain the facility as it has done since the 1980s.

There is also a fairness issue concerning the allocation of public funds to PPTA projects. With the lack of state construction dollars that used to be provided by formula for secondary, urban, and primary system classified roadways, it is not clear to the public how decisions are made in allocating the remaining limited state funding to PPTA projects. VDOT has acknowledged that $750-930 million from the state and an additional $250 million from the Port Authority are committed to the new Route 460 project.[23] In addition, the Route 460 proposal currently has VDOT retaining responsibilities for long-term operations and maintenance.[24] The Downtown/Midtown Tunnel/MLK project is a higher priority for the Hampton Roads region.[25] Why weren't additional state subsidies and VDOT responsibility for operations and maintenance provided to further "buy down" the tunnel tolls? How was the decision arrived at concerning the allocation of state funds between the tunnel projects and the new Route 460? Each additional $50 million up front state subsidy would reduce the required tolls on the Midtown Tunnel by 10 cents.[26] Given the size of the state subsidy of the two similar cost projects, the state appears to be giving a higher financial priority to the lower transportation priority Route 460 project.

[23] http://www.route460ppta.org/documents/NEW460factsheet_04.2012.pdf
[24] http://www.ctb.virginia.gov/resources/2012/april/pres/Presentation_Agenda_Item_9_CTB_20120418.pdf
[25] Ibid.
[26] July 20, 2011 CTB workshop audio of presentation by Tony Kinn, OTP3 Director.

## Summary of Findings

- ✓ As state transportation construction revenues decline and formula distributions to the primary, secondary, and urban systems have ended, remaining state and federal subsidies for PPTA projects have increased in importance.

- ✓ The lack of formula construction distributions and the PPTA process itself have concentrated more transportation decision-making into fewer people—and, ultimately, the Governor. The CTB and other transportation-related governing boards serve at the pleasure of the Governor.

- ✓ It is unclear how PPTA project development occurs in relation to the National Environmental Policy Act (NEPA) alternatives review process. The conclusion of the NEPA process should ideally be the starting point for the PPTA process.

- ✓ The CTB and other transportation-related governing boards have no *statutory* role in the PPTA process, and are only referred to as "oversight boards" in the PPTA implementation guidelines.

- ✓ The detailed assumptions (such as risk premiums) and findings in the risk-adjusted cost benefit analysis ("Value for Money") conducted by the state Office of Transportation Public-Private Partnerships (OTP3) during PPTA project development—and used to determine the best procurement method—are not publicly disclosed before a Comprehensive Agreement is signed and the public is not given clear evidence of why it is better to use a PPTA process with a higher cost of capital than traditional approaches to building or procuring projects.

- ✓ It does not appear that the public has always been adequately informed of all major business points as required by §56-573.1.B of the Code of Virginia and the PPTA Implementation Guidelines before a *final* Comprehensive Agreement is signed. (Case in point: the state is potentially liable for "damages" to concessionaire if a competitor facility to the Midtown Tunnel is built).

- ✓ Even though the PPTA Implementation Guidelines emphasize the need for "competition among a small list of qualified proposers to create value for the Commonwealth", the Downtown/Midtown Tunnel/MLK project only had one detailed project proposer.

- ✓ There is no transparent process for determining the level of state subsidy to PPTA projects based on project priority—particularly for priorities within a MPO. (Case in point: the Downtown/Midtown Tunnel/MLK project is the number one transportation priority of the Hampton Roads region, but is receiving substantially less state subsidy to reduce tolls and is using tolls for long-term operation and maintenance, in contrast to the proposal to build a new Route 460).

- ✓ Substantial policy differences are reflected in the PPTA agreements that have been negotiated for different projects. The I-495 project increases transportation capacity while leaving existing free transportation choices in place for the public. The I-495 contract contains no “non-compete” or similar clauses. The private partner is taking on true demand risk in return for its investment. In contrast, the Downtown/Midtown Tunnel/MLK project expands an existing free facility already once paid for and currently maintained by the state, but with no viable travel alternative for the public. There is little rationale for the amount of state subsidy provided, and the contract allows for automatic toll escalation and penalties for creating competing transportation alternatives.

## Summary of Recommendations

- Strengthen the independence of the Commonwealth Transportation Board (CTB) by: 1) having some members appointed by the General Assembly; and/or 2) allowing CTB members to serve their full four year appointment without threat of dismissal by the Governor.

- Require a completed NEPA alternatives study *before* PPTA project procurement studies/evaluations are initiated.

- Require at least two bidders who have provided a detailed response to an RFP before selecting a successful bidder and moved to the final risk-adjusted cost-benefit (Value for Money) analysis stage of PPTA procurement.

- Require that state subsidies for a PPTA project be included in the state six-year plan (SYIP) prior to finalizing PPTA procurement decisions.

- Make Value for Money assumptions and conclusions made by the OTP3 available to the public and to legislators in a report to the General Assembly prior to moving to PPTA procurement. The General Assembly should also have a role in approving both state subsidy levels (particularly debt), and whether toll facilities should be used to finance a project.

- Give a direct approval role to the CTB, and other oversight boards, prior to signing any Comprehensive Agreement with a PPTA proposer.

- Require a public hearing after all major business points have been disclosed and at least 30 days prior to the signing of a PPTA comprehensive agreement.

- Provide statutory guidance on the use of "non-compete" or similar clauses in any PPTA agreement.

- Consider expanding the scope of the OTP3 or "responsible public entity" to include regulating rates of return for concession projects, instead of up-front negotiated financial models. This could potentially preclude non-compete clauses, built-in toll escalators, and shared risk schemes concerning potential unknowns.

- Add fairness considerations to the PPTA and Implementation Guidelines that include conditions for: 1) prioritizing state PPTA subsidies; and 2) conditions for assuming state responsibility for operation and maintenance of a PPTA facility.

# Appendix

## PPTA Project List
## Office of Transportation Public-Private Partnerships
## (November 2012)

### Projects Completed

Route 288
Route 895 Pocahontas Parkway
Route 199

### Projects Under Construction

Midtown/Downtown Tunnel/MLK Extension
I-495 Capital Beltway Express Lanes
I-95 Express Lanes
Route 58
Route 28
Coalfields Expressway
Dulles Rail

### Projects Under Procurement

Port of Virginia
Route 460 Corridor
Hampton Roads Bridge Tunnel

### Projects Under Consideration

Air Rights Development
I-95 Corridor Improvements
I-64 HOV to HOT Conversion
I-64 Peninsula Corridor
Hampton Roads Crossing Improvements
I-66 Corridor Improvements
NoVa North-South Corridor
Southeastern Parkway
Patriots Crossing