

# CADWALADER

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March 1, 2021

## VIA HAND DELIVERY

Mr. Jeffrey Folden  
Contracting Officer  
I-495 & I-270 P3 Program  
I-495 & I-270 P3 Office  
707 N. Calvert Street  
P-601  
Baltimore, MD 21202

Re: Protest of Award of Phase 1 of the I-495 and I-270 Public-Private Partnership  
Agreement to Accelerate Maryland Partners, LLC

Dear Mr. Folden:

We write on behalf of Capital Express Mobility Partners, located at 9600 Great Hills Trail, Suite 250E, Austin, TX 78759, to protest the award of Phase 1 of the I-495 and I-270 Public-Private Program Through a Phase Public-Private Partnership Agreement ("Phase P3 Agreement" or the "Project") to Accelerate Maryland Partners, LLC ("Accelerate Maryland Partners"). Throughout the solicitation process and in responding to the Request for Proposals ("RFP"), Capital Express Mobility Partners demonstrated an abiding commitment to partnering with the State of Maryland and the Maryland Department of Transportation ("MDOT") and to the Project itself, endeavoring to show that when permitted to compete fairly with the other Proposers, it would prove to be the best partner. For its part, MDOT communicated its intention to treat all Proposers on a fair and equitable basis to ensure healthy competition such that whichever Proposer ultimately was selected would provide the "best value solution to the State." COMAR § 11.01.17.09(A)(2). Indeed, the Instructions to Providers ("ITP") states that it was MDOT's intent to "create a fair and uniform basis for the evaluation of the Proposals in compliance with all Applicable Laws governing the RFP Process."<sup>1</sup> ITP § 4.1. Unfortunately, Capital Express Mobility Partners believes that MDOT fell short of its stated and required standard.

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<sup>1</sup> All capitalized terms and acronyms used but not defined herein have the respective meanings set forth in the RFP.

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MDOT's acceptance and high scoring of Accelerate Maryland Partners' Financial Proposal is the result of an unfair and unrealistic gaming of the evaluation criteria on the part of Accelerate Maryland Partners. That arbitrary and capricious action, unsupported by any competent evidence or market dynamics—as well as the arbitrary decision to permit Transurban (USA) Operations Inc. ("Transurban") and Macquarie Infrastructure Developments LLC ("Macquarie") to substitute themselves as Lead Contractor in place of Archer Western—greatly jeopardizes the Project's delivery certainty, a fundamental feature of the procurement. This cannot possibly be the best value solution for the State.

The apparent lack of fairness is all the more surprising given the Secretary of Transportation's comments last month, where he indicated that MDOT would place more emphasis on Proposers' "technical expertise than their financial pitches," stating that "We want to find the right partner and then kind of work on those financial pieces."<sup>2</sup> Instead, MDOT appears to have let the financial proposal drive its decision, with the key question of its trade-off analysis being "what technical benefits would we be paying more for." This constituted a violation of the express terms of the ITP which assured that the Predevelopment Work Proposal and Financial Proposal would be given "approximately equal" weight. ITP § 4.10(e). Indeed, Capital Express Mobility Partners received the top technical rating from MDOT but its Financial Proposal was not evaluated by MDOT in a true "apples to apples" fashion with Accelerate Maryland Partners. Given that opportunity, Capital Express Mobility Partners is convinced that the State may secure better value than that presently offered by the second rated technical proposal.

To ensure that Maryland receives the best value solution, Capital Express Mobility Partners requests that (i) Accelerate Maryland Partners be disqualified because it will be unable to timely complete the Project due to its lack of a true Lead Contractor and its unrealistic and low markup percentages, rendering its Financial Proposal not compliant with the RFQ and the ITP; or, in the alternative, (ii) MDOT provide clarification of the Financial Proposal's evaluation criteria and re-open the solicitation to provide all Proposers the opportunity to resubmit their respective Financial Proposals on equal terms (for example, by setting a minimum D&C General Conditions Cost Markup Percentage and Contractor Markup Percentage) as a Best-and-Final Offer AND then perform a proper and equitable trade-off analysis that considers how the

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<sup>2</sup> Katherine Shaver, "Maryland Could Face Millions in Cost Risks if Toll Lane Plan for Beltway, I-270 Stalls," Wash. Post (Jan. 23, 2021), [https://www.washingtonpost.com/local/trafficandcommuting/maryland-beltway-lanes/2021/01/22/c60c2b84-5b85-11eb-b8bd-ee36b1cd18bf\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/maryland-beltway-lanes/2021/01/22/c60c2b84-5b85-11eb-b8bd-ee36b1cd18bf_story.html).

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Proposers' Financial Proposals would affect their ability to deliver on their Predevelopment Work Proposals.

## **FACTUAL BACKGROUND**

On February 7, 2020, MDOT issued a Request for Qualifications ("RFQ") for Phase 1 of the I-495 & I-270 Public Private Partnership (P3) Program (the "Project"). On May 6, 2020, MDOT revised the RFQ through the issuance of Addendum No. 8. Section 14.1 of the revised RFQ states,

Each Respondent Team must include an Equity Member, a Designer, a Lead Contractor, and a Lead Project Developer. Any Equity Member or Major Non-Equity Member may be designated with more than one (1) role within the Respondent Team. The Lead Contractor, the Designer, and the Lead Project Developer are not required to have sufficient capacity or appetite to perform all the Section Work for each section of Phase 1 without forming joint ventures or subcontracting or otherwise teaming with other firms. The Phase P3 Agreement shall permit the Lead Contractor, the Designer, and the Lead Project Developer to form such joint ventures, subcontract, or enter into similar arrangements prior to execution of any Section P3 Agreement, and MDOT does not require such arrangements to be put in place prior to the submission of a SOQ. Any such formation shall be subject to the approval of MDOT and in compliance with Applicable Law.

On July 17, 2020, MDOT issued a list of teams that provided a Statement of Qualifications ("SOQ") in response to the RFQ, and that MDOT evaluated and determined should be shortlisted to respond to a Request for Proposals ("RFP") in connection with the Project.<sup>3</sup> The press release states that four Respondent Teams were named to the shortlist and invited to submit proposals:

- Accelerate Maryland Partners LLC, comprised of a Lead Project Developer (Transurban (USA) Operations Inc. ("Transurban") and Macquarie Infrastructure Developments LLC ("Macquarie")), Designers (Dewberry Engineers Inc. and Stantec Consulting Services Inc.), and a Lead Contractor (Archer Western Construction, LLC) ("Archer Western").

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<sup>3</sup> Maryland Department of Transportation, "Four Private-Sector Teams Named to Shortlist for I-495 & I-270 P3 Program Phase 1" (Jul. 17, 2020), <https://495-270-p3.com/wp-content/uploads/2020/07/7.17.2020-MDOT-SHA-Draft-Shortlist-P3-Program.pdf>.

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- Accelerate Maryland Express Partners LLC, comprised of a Lead Project Developer (Itinera Infrastructure & Concessions, Inc.), Designers Atkins North America, Inc. and Gannett Fleming, Inc., and Lead Contractors Halmar International, LLC and Itinera S.p.A;
- Capital Express Mobility Partners, comprised of a Lead Project Developer (Cintra Global SE, Meridiam Capital Express, LLC, and John Laing Investments Limited),<sup>4</sup> Designers (AECOM Technical Services, Inc), and a Lead Contractor (Ferrovial Agroman US Corp.); and
- Potomac Mobility Group, comprised of a Lead Project Developer (ACS Infrastructure Development, Inc.), Designers (Parsons Transportation Group Inc., Jacobs Engineering Group Inc., and HDR Engineering, Inc.), and Lead Contractor (Dragados USA, Inc.).

Each of the four shortlisted teams included highly qualified Lead Contractors with substantial experience in large-scale road construction projects.

Throughout the Solicitation Process, the Respondent Teams engaged in substantial back-and-forth communications with MDOT through Requests for Clarification (“RFCs”) regarding various drafts of the RFP. Given their importance, many of the RFCs addressed questions regarding how MDOT would consider certain elements of the Financial Proposal. Of particular relevance are RFC MDOT ID #458, #939, #1149, #1408, and #1532.

RFC 458 asked MDOT to

confirm how Proposers should approach [the D&C General Conditions Cost Percentage and Contractor Markup Percentage] evaluation criteria in the Financial Proposal in the context of a competitive design-build procurement? Specifically, would the Proposer bear all the risk in the event the market comes back with percentages which are higher than those submitted as part of the Financial Proposal? In addition, how will the potential for upside be assessed as part of the evaluation criteria given the higher likelihood that a design-build

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<sup>4</sup> On November 19, 2020, Capital Express Mobility Partners submitted for MDOT’s review an amended SOQ in which Meridiam Capital Express, LLC was removed as Equity Member and member of the Lead Project Developer in the Capital Express Mobility Partners consortium. On December 7, 2020, MDOT replied that “the changed Proposer Team is as qualified as the Proposer team being replaced and the change is accepted.”



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procurement process could result in lower percentages than those proposed as part of the Financial Proposal? Will this be upside for the Phase / Section Developer?

MDOT replied on August 28, 2020, in Notice 2 that

the Proposer would bear the risk of D&C general conditions and contractor markup being higher than the amount in the Proposer's Financial Proposal in the context of a competitive D&C contractor procurement. Any cost savings would return to MDOT or be shared with the Phase Developer. The Proposer is being evaluated on this basis as part of the Financial Proposal Evaluation Criteria, so *MDOT expects the Proposer's Financial Proposals to assume risk appropriately.*

(emphasis added).

RFC MDOT ID #939 asked MDOT, "what process will MDOT put in place to ensure that the prior fixed Financial Criteria (D&C General Conditions Cost Percentage and Contractor Markup Percentage) flow down and accurately account for the subcontractors' bids so that the outcome is consistent with what would have been obtained had the Open Book Basis process been used?" MDOT replied on December 16, 2020, in Notice No. 19:

MDOT will review proposals received from a competitive market pricing solicitation for compliance with MDOT's applicable solicitation rules (and any applicable FHWA rules) which compose the "terms and conditions that will apply to the market pricing process" as defined in Exhibit 6 Section 1.20.6. The D&C General Conditions Cost Percentage and Contractor Markup Percentage should flow down to subcontractors' bids in the aggregate. MDOT will be looking for evidence that these flow downs are correctly reflected in the subcontractors' bids.

RFC MDOT ID #1149 asked "[p]lease increase the maximum allowed Contractor Markup Percentage from 19.5% to 25%." MDOT replied on December 16, 2020, in Notice No. 19 that "[n]o increase will be made to the maximum allowed Contractor Markup Percentage."

RFC MDOT ID #1408 stated, "[i]f it [is] discovered that a subcontractor shifted costs to another line-item that should have been properly considered as part of the Contractor Markup or D&C General Conditions Cost, who will bear that risk and extra cost (as between the Phase Developer and MDOT)?" MDOT on December 16, 2020, in Notice No. 19 replied:

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The D&C General Conditions percentage and the Contractor markup Percentage from the Phase Developer's Financial Proposal will be carried forward and used in the Cost Model for the Section Committed Proposal for each Section of Phase I. It will be the Phase Developer's responsibility to ensure that these percentages include all relevant costs for the Contractor and all subcontractors.

In response to RFC MDOT ID #1532, MDOT, also in Notice No. 19, stated

The Phase Developer shall include all D&C Costs for all self-performed and subcontracted work in the D&C Costing Model. The Phase Developer shall carry forward from its proposal and apply the D&C General Conditions Costs Percentage and Contractor Markup Percentage to the D&C Costs in the D&C Costing Model, and the aggregate D&C General Conditions Costs and Contractor Markup Costs included in the D&C Costing Model (whether incurred by the Section Developer or any subcontractor) may not exceed the D&C General Conditions Costs Percentage and Contractor Markup Percentage, respectively. The next version of the RFP Documents will be amended to clarify this in the definition of D&C General Conditions Costs. The Phase Developer shall be responsible for ensuring the percentages, in part or in whole, are properly carried in its D&C Costing Model. Accordingly, all requirements for participation in the Open Book Basis review shall flow down to subcontractors and major suppliers."

On December 18, 2020, MDOT issued the final RFP. Section 1.18(a) of the ITP states,

In order for a Proposer to remain qualified to submit a Proposal after it has been placed on the shortlist, unless otherwise approved in writing by MDOT, the Proposer's organization and Proposer's team as identified in the SOQ must remain intact for the duration of the solicitation process. . . . If a Proposer wishes to make changes in an Equity Member or Major Non-Equity Member identified in its SOQ including, without limitation, additions, deletions, reorganizations, changes in equity ownership interests, or role changes in or of any of the foregoing, the Proposer shall submit to the Solicitation Manager a written request for its approval of the change as soon as possible. . . . If a request is made to change any Equity Member or Major Non-Equity Member identified in its SOQ, the Proposer shall submit such information as may be required by MDOT to

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demonstrate that the changed team is just as or better qualified than the team being replaced, as determined in MDOT's sole judgment.<sup>5</sup>

The ITP asked for submissions of Predevelopment Work Proposals by December 23, 2020, and Financial Proposals by January 8, 2021.

Section 3.2 of the ITP sets forth the Primary Evaluation Criteria MDOT is to use in evaluating each team's Predevelopment Work Proposal. The Primary Evaluation Criteria include Delivery Certainty, Minimize Impacts, Maximizing Value to the State, Opportunity MDOT/Community Benefits, and Congestion Relief. Each of the Primary Evaluation Criteria is broken down into three or more sub-criteria that are further defined and weighted as "critical," "significant", or "important." Section 4.6 of the ITP states that each team's Predevelopment Work Proposal will be given an adjectival rating with respect to each of the Primary Evaluation Criteria, and an overall rating, of Unacceptable, Acceptable, Good, or Exceptional. Section 4.6 states that each adjectival rating may be further differentiated by use of a plus (+) or minus (-).



With respect to the Financial Proposals, section 4.7 of the ITP sets forth mathematical formulae for calculating point values to be included in each team's Financial Proposal Score, including for each of the following Financial Proposal Evaluation Criteria: Proposal Equity IRR, Developer Closing Fee Percentage, Development Rights Fees, Predevelopment Cost Cap, D&C General Conditions Cost Percentage, Contractor Markup Percentage, and Renewal Work General Conditions Cost Percentage.

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<sup>5</sup> This language remained unchanged from the first draft ITP issued in July 2020.

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Below is a table of the values that Capital Express Mobility Partners submitted for each of the Financial Proposal Evaluation Criteria and the resulting point values based on the formulae in Section 4.7 of the ITP:

Financial Proposal Evaluation Criteria	Value in Capital Express Mobility Partners' Financial Proposal	Point Value
Proposal Equity IRR		
Developer Closing Fee Percentage		
Development Rights Fees		
Predevelopment Cost Cap		
D&C General Conditions Cost Percentage		
Contractor Markup Percentage		
Renewal Work General Conditions Cost Percentage		
		<b>665</b>

On a parallel track, the MDOT State Highway Authority ("MDOT SHA") and the Federal Highway Authority ("FHWA") were preparing the Draft Environmental Impact Statement in accordance with NEPA. On January 27, 2021, MDOT SHA presented to the partner agencies MDOT's recommended preferred alternative, Alternative 9, which would include the new American Legion Bridge, HOT lanes, bicycle and pedestrian connections and other features to provide Marylanders new options and opportunities for improved travel in the National Capital Region.

On January 8, 2021, MDOT issued a press release stating that three of the four shortlisted teams submitted final proposals for the Project:<sup>6</sup> Accelerate Maryland Partners, Accelerate Maryland Express Partners, and Capital Express Mobility Partners. In the press release, MDOT

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<sup>6</sup> Maryland Department of Transportation, "Three Teams Submit Final Proposals for P3 Program Phase 1 To Deliver the American Legion Bridge and I-270 to Frederick" (Jan. 8, 2021), <https://mdot.maryland.gov/tso/pages/newsroomdetails.aspx?PageId=38&newsId=529>.



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also revealed that the Lead Contractor for Accelerate Maryland Partners was no longer Archer Western, but rather Transurban and Macquarie. Five days later, Capital Express Mobility Partners sent a letter to Catherine Agostino, Solicitation Manager for the Project, requesting confirmation that Accelerate Maryland Partners continues to comply with the requirements of the ITP and RFQ, following the removal of Archer Western as Lead Contractor. The letter also requested confirmation that the change to the composition of Accelerate Maryland Partners would be taken into account in the evaluation of any of the pending technical and financial proposals. In response, on January 20, 2021, MDOT issued Notice No. 24 to shortlisted proposers, stating, “MDOT would like to clarify to the shortlisted Proposers that the processes and reviews for all submittals and requests by the shortlisted Proposers, including changes to team composition, have been, and will continue to be reviewed in compliance with the solicitation documents.”

Archer Western Construction is a large, national construction firm with extensive experience executing the predevelopment, pre-construction, and development stages of major infrastructure construction projects. Archer Western is part of the Walsh Group, which reported revenues of \$5 billion in 2020 and has been recognized as the 2<sup>nd</sup> largest bridge builder, 3<sup>rd</sup> largest highway contractor, 5<sup>th</sup> largest transportation contractor, and 16<sup>th</sup> largest contractor in the United States.<sup>7</sup> Transurban is a toll road operator with no experience executing major infrastructure construction projects as Lead Contractor. Macquarie is an investment bank with no experience executing major infrastructure construction projects.

On February 18, 2021, MDOT announced the selection of Accelerate Maryland Partners as the developer to oversee predevelopment work on Phase 1 of the Project. MDOT’s press release stated that Maryland’s evaluation committee reviewed and ranked each team’s technical proposals before reviewing the financial proposals. The press release states that Accelerate Maryland Partners “provided the best value to the state by having a strong predevelopment work proposal and a significantly stronger financial proposal.”<sup>8</sup> Accelerate Maryland Partners’ financial proposal received 1,356 points compared to 800 points for Accelerate Maryland Express Partners and 665 points for Capital Express Mobility Partners. The press release stated, “[i]n the financial proposal, Accelerate Maryland Partners offered a \$145 million Development Rights Fee and a \$54.3 million Predevelopment Cost Cap. Accelerate Maryland Partners also

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<sup>7</sup> Forbes, “Walsh Group”, <https://www.forbes.com/companies/walsh-group/?sh=172cb96548ad>; Walsh Group, “Our Company”, <https://www.walshgroup.com/ourcompany.html>.

<sup>8</sup> Maryland Department of Transportation, “MDOT and MDTA Select Developer for the American Legion Bridge I-270 to I-70 Relief Plan” (Feb. 18, 2021), <https://mdot.maryland.gov/tso/pages/newsroomdetails.aspx?newsId=533&PageId=38>.

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showed a long-term commitment to the American Legion Bridge I-270 to I-370 project by proposing a higher rate of return on its equity investment in exchange for taking greater construction cost risk upfront, reducing the state's risk in the project.”

On the basis of information included in MDOT's February 18, 2021 press release, Capital Express Mobility Partners calculates that the Accelerate Maryland Partners' Financial Proposal included the following estimated Financial Proposal Evaluation Criteria values and resulting point values based on the formulae in Section 4.7 of the ITP<sup>9</sup>:

Financial Proposal Evaluation Criteria	Value in Accelerate Maryland Partners' Financial Proposal (* indicates values that have not been disclosed and are assumed)	Point Value
Proposal Equity IRR	12.5 %*	231 *
Developer Closing Fee Percentage	0.5 %*	20*
Development Rights Fees	\$145,000,000	145
Predevelopment Cost Cap	\$54,300,000	46
D&C General Conditions Cost Percentage	4.50%*	885*
Contractor Markup Percentage		
Renewal Work General Conditions Cost Percentage	0 %*	29 *
		<b><u>1,356</u></b>

Accelerate Maryland Partners are estimated to have bid a combined D&C General Conditions Cost Percentage and Contractor Markup Percentage of 4.5%. We estimate that the combined percentage that Accelerate Maryland Partners bid could range from [REDACTED]

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<sup>9</sup> MDOT's press release revealed that Accelerate Maryland Partners bid \$145 million with respect to the Development Rights Fees criteria and \$54,300,000 with respect to the Predevelopment Cost Cap. Capital Mobility Express Partners, as indicated in the table, has estimated the other values.

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to [REDACTED]—a range that is indisputably and unusually below market rate. As an example of market references for these percentages, Maryland has issued Instructions to Bidders for Construction Projects (conventional bid-build projects, with substantially less risk and lower overhead costs than a P3 Project) stating that it expects bids to include construction mark-ups ranging from 15% to 20%.<sup>10</sup>

On February 18, 2021, Capital Express Mobility Partners requested a debriefing from MDOT. A debriefing was held on February 24, 2021. MDOT attendees at the debriefing included Jeff Folden, Deputy Director of the I-495 & I-270 P3 Program Office, MDOT SHA, Bryan Kendro, RSH&H – GEC Advisor to MDOT SHA, and Jason Couch, Assistant Attorney General and Counsel to MDOT SHA. During the debriefing, Mr. Folden stated that Capital Express Mobility Partners' Predevelopment Work Proposal received [REDACTED] the highest overall score—"Good +". Accelerate Maryland Partners' Predevelopment Work Proposal received a score of "Good". [REDACTED]

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<sup>10</sup> State of Maryland, Instructions to Bidders for Construction Projects and General Conditions of the Contract Between Owner and Contractor (Jan. 2016), [https://dnr.maryland.gov/Documents/Engineering-Construction/instructions\\_to\\_bidders.pdf](https://dnr.maryland.gov/Documents/Engineering-Construction/instructions_to_bidders.pdf) ("The mark-up allowable to the Contractor for combined overhead and profit for work performed solely by the Contractor with his own forces shall be a reasonable amount not to exceed fifteen percent (15%) . . . . The mark-up allowable to a SubContractor for overhead and profit for work performed solely with his own forces shall be a reasonable amount not to exceed ten percent (10%) for the SubContractor's overhead and five percent (5%) for the SubContractor's profit . . . . For work performed by a SubContractor solely with his own forces, the Contractor is entitled to a reasonable mark-up for combined overhead and profit, not to exceed five percent (5%) . . . .")

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**BASIS FOR THE PROTEST**

**1. MDOT's Decision to Approve Transurban and Macquarie as Lead Contractors Was Arbitrary, Capricious, and Unsupported by Competent Evidence**

In July 2020, MDOT identified Accelerate Maryland Partners, LLC as one of four qualified respondents to the February 2020 RFQ. At that time, Accelerate Maryland Partners included Transurban and Macquarie as Equity Members of the Phase Developer Team and Archer Western as Lead Contractor. In January 2021, MDOT announced that only three of the four qualified teams submitted Predevelopment Work Proposals. Of those three teams, MDOT indicated that the Lead Contractor of Accelerate Maryland Partners was no longer Archer Western, but rather Transurban and Macquarie. Capital Express Mobility Partners must question whether MDOT conducted any responsibility determination at all given that Transurban and Macquarie—which have no construction experience—were allowed to be named in a subsequent submission presenting an uncertain and unqualified team.

The P3 statute and its implementing regulations make clear that private entities responding to a P3 solicitation must be capable of performing the work that is the basis of the P3 agreement. MDOT's P3 regulations require that "[f]or each private entity that responds to a public notice of solicitation, [MDOT] shall make a responsibility determination in accordance with State Finance and Procurement Article, § 10A-202(c), Annotated Code of Maryland." COMAR 11.01.17.08(A)(2). Section 10A-202(d) of the State Finance and Procurement Article provides that if the private entity "is composed of multiple subentities or partners, the reporting agency shall make a responsibility determination for each subentity or partner owning 20% or more of the entity." *See also* ITP § 1.18(b). Maryland's P3 statute defines "responsibility determination" to mean "the determination by a reporting agency that a private entity that responds to a solicitation for a public-private partnership: (1) has the capacity in all respects to perform fully the requirements of a public-private partnership agreement; and (2) possesses the integrity and reliability that will ensure good faith performance." Md. Code. Ann., State Fin. & Proc. § 10A-101(h).

These statutory and regulatory requirements are reflected in both the RFQ and the ITP. Section 8.1 of the RFQ states that MDOT, "at its sole discretion, may exclude from consideration any Respondent . . . who is deemed not responsible." *See also* RFQ § 8.1(b), "Responsibility" (quoting sections 10A-101(h) and 10A-202(c) of the State Finance & Procurement Article).



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MDOT conducted a second responsibility review as part of the selection of the Proposer. *See* ITP § 4.1 (“The Proposal evaluation process will include the following series of steps: (a) a determination of whether the Proposer is responsible as required by the Act . . . .”); *see also id.* at § 4.2 (describing the same “responsibility review” as conducted in review of the Statement of Qualifications). In evaluating the responsibility of the Respondent (and subsequently, the Proposer), MDOT considered the “capability and relevant experience with respect to design, construction, and construction management” of the Phase Developer Team, including the Major Non-Equity Members, such as the Lead Contractor. RFQ § 8.3(d); *see also* RFQ Appendix 3 (“Major Non-Equity Member” defined to include the Lead Contractor). The capability and experience considered included the project experience the Lead Contractor required by Section 15.1 of the RFQ and the key personnel identified under Section 14.4 of the RFQ. RFQ § 15.1 (requiring identification of project experience of Major Non-Equity Members such as the Lead Contractor on Form D-1 and project experience of key personnel on Form D-2); RFQ § 14.4 (requiring the identification of key personnel, including a construction project manager and design project manager). MDOT made clear that these qualifications of the Phase Developer Team were of “critical” importance, and their construction experience and capability was “important.” *Id.* Indeed, that each of the four shortlisted teams included top tier construction firms as Lead Contractors reflected their belief that this was a fundamental prerequisite for them to have any chance at being shortlisted.

Under the terms of the RFQ, certain Major Non-Equity Members of the Respondent Team were “not required to have sufficient capacity or appetite to perform all the Section Work for each section of Phase 1 without forming joint ventures or subcontracting or otherwise teaming with other firms,” RFQ § 14.1, and the ITP permitted a Proposer to replace any Major Non-Equity Member of the Proposer Team with the approval of MDOT. *See* ITP § 1.18(a). The replacement, however, must be “just as or better qualified than the team being replaced.” *Id.* While this determination is in MDOT’s “sole judgment,” this discretion is not unbounded—agency decisions such as this cannot be arbitrary, capricious, and unsupported by competent evidence. *See* Md. Code Ann., State Gov., §§ 10-222(h)(3)(v), (vii); *cf. C.N. Robinson Lighting Supply Co. v. Bd. of Educ. of Howard Cty.*, 90 Md. App. 515, 523, 602 A.2d 195, 199 (1992) (stating that even where an agency is mandated by statute to select the lowest responsible bidder, its “discretion in selecting is not totally unbridled” and remains “subject to judicial review and reversal if the [agency] acts fraudulently or collusively or in violation of law or so arbitrarily as to have abused its discretion. Any less rigorous standard would permit a governmental agency to ignore with impunity the legislature’s mandate that a contract be awarded to the “lowest responsible bidder.”).

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Once Accelerate Maryland Partners identified Archer Western as Lead Contractor, MDOT was bound by the terms of the ITP to permit replacement only if the new Lead Contractor was “just as or better qualified.” MDOT’s decision to permit Transurban and Macquarie—a toll road operator and an investment bank—to substitute themselves as Lead Contractor on the Project in place of one of the top road infrastructure contractors in the United States—Archer Western—is mind-boggling. Indeed, if Archer Western had not been an original member of the Accelerate Maryland Partners team, it is likely that Accelerate Maryland Partners would not have been shortlisted given the critical role of the Lead Contractor in a project of this nature, complexity, and volume. There simply is no set of facts upon which MDOT could have satisfied itself that two entities with no construction experience could be “just as or better qualified” than Archer Western to undertake the “largest construction project in state history.”<sup>11</sup>

Indeed, Transurban’s most relevant regional experience is with respect to the Commonwealth of Virginia’s I-95 P3 program. Under the terms of that agreement, Transurban operated as a concessionaire, assigning all the design and construction work (and management thereof) to the design-build contractors. Specifically, on Transurban’s Virginia I-95 P3 project (and likely all of its Virginia P3s), the Design-Build Contractor (*i.e.*, “Lead Contractor” for the Project) was responsible for performing practically all the Work (including right of way acquisition) on a lump sum, turn-key fixed price basis.<sup>12</sup> Simply being around the Work is not the same as performing the Work and it should not qualify an entity to serve as a Lead Contractor—the member of the Proposer Team with “*primary responsibility for work related to design and construction, and other technical development work with respect to the Predevelopment Work, including design management.*” ITP, Appendix 1 (Definition of “Lead Contractor”) (emphasis added). Based on how Transurban procured its Virginia projects, Transurban and Macquarie do not have the requisite experience, because they did not actually perform the Design-Build/Lead Contractor work. This lack of experience means that they have no ability to identify and mitigate construction risks until it is too late.

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<sup>11</sup> Bruce DePuyt, “UPDATED: State Selects Four-Lane ‘High Occupancy Toll’ Design for I-495, I-270,” Maryland Matters, <https://www.marylandmatters.org/2021/01/27/state-selects-four-lane-high-occupancy-toll-design-for-i-495-i-270/> (quoting Montgomery County Council President Tom Hucker); see also I-495/I-270 P3 Program, “Program Overview,” <https://495-270-p3.com/program-overview/> (describing the Project as an “historic effort”).

<sup>12</sup> See Turnkey Lump-Sum Design-Build Contract Relating to the I95 HOV/HOT Lanes Project, dated as of July 31, 2012, Art. 2, “Contractor’s DB Work and Other Obligations of Contractor,” available at [http://www.virginiadot.org/projects/resources/NorthernVirginia/Express\\_Lanes\\_Comprehensive\\_Agreement.pdf](http://www.virginiadot.org/projects/resources/NorthernVirginia/Express_Lanes_Comprehensive_Agreement.pdf).

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MDOT's decision to permit non-construction firms to insert themselves as Lead Contractor on the Project is not only arbitrary, capricious, and unsupported by competent evidence, it ensures that the Project's delivery will be delayed or otherwise would never be built—the certainty of which MDOT identified as of “critical” importance in evaluating the proposers' technical proposals. RFQ § 3.2(a). Because neither Transurban nor Macquarie can themselves perform the construction work, they have no choice but to go to market to find a real Lead Contractor. This alone will take time, especially given Accelerate Maryland Partners' unrealistically low margins discussed further below and the need to compete with the Purple Line and the expansion of I-495 among what is already a small number of firms capable of performing this kind of work. The delay will be compounded by the new Lead Contractor's need to learn and understand the Project's needs, and only then be able to contribute to its delivery, thus making it less likely that they will be able to meet the current timeline or Financial Close by October 31, 2022. And, as discussed more fully below, Accelerate Maryland Partners' low margins likely would require any competent contractor to take a significant financial loss on the design and construction portion of the work, perhaps pointing to why Archer Western left the Accelerate Maryland Partners Team and why Transurban and Macquarie were unable to find a suitable replacement. The lack of alignment and integration between Transurban and Macquarie on the one hand and whichever firm they hire to serve as Lead Contractor on the other will be a disaster for the State. Especially given Maryland's previous experience with P3 project delays,<sup>13</sup> it is difficult to see how this decision could possibly “provide[] the best value solution for the State.” COMAR § 11.01.17.09(A)(2). Indeed, because MDOT failed to follow the express language of the ITP, there is no assurance that whomever Transurban and Macquarie ultimately hire will be sufficiently experienced, capable, or competent to perform and complete the work in a timely, quality fashion, thus putting the entire Project at enormous risk.

**2. MDOT's Acceptance of Margins That it Knew Were Commercially Unrealistic and That Violate the Requirements of the ITP was Arbitrary, Capricious, and Unsupported by Competent Evidence.**

MDOT is required by regulation to evaluate submitted information “against the requirements of the solicitation and the evaluation criteria that the Department specifies in the solicitation for the particular public-private partnership opportunity.” COMAR § 11.01.17.09(A)(1). The “objective of this evaluation process is to select the private entity that

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<sup>13</sup> See Katherine Shaver, “Purple Line Project Delays, Cost Overruns Reveal Long-brewing Problems,” *Wash. Post* (July 18, 2020), *available at* [https://www.washingtonpost.com/local/trafficandcommuting/purple-line-project-delays-cost-overruns-reveal-long-brewing-problems/2020/07/18/d3bda6ae-c620-11ea-b037-f9711f89ee46\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/purple-line-project-delays-cost-overruns-reveal-long-brewing-problems/2020/07/18/d3bda6ae-c620-11ea-b037-f9711f89ee46_story.html).



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provides the best value solution for the State.” *Id.* at § 11.01.17.09(A)(2). In conducting this evaluation, MDOT has an implied obligation to verify the reasonableness of any submitted information, as accepting unreasonable or unrealistic proposals cannot provide “best value” to the State.

Among other criteria, MDOT evaluated the financial proposals based on the Design & Contractor (“D&C”) General Contractor Costs Percentage and the Contractor Markup Percentage. According to the ITP, the D&C General Conditions Cost Percentage

will be the maximum percentage that may be applied to the D&C Costs (excluding D&C General Conditions Costs and Contractor Markup Costs) for each section of the Phase on account of D&C General Conditions Costs in the D&C Costing Model required in Section 1.20.2 of the Predevelopment Work Requirements.

The D&C General Conditions Cost Percentage will be assigned a point value [e] for the purposes of the Financial Proposal evaluation according to the following formula:

$$D\&C\ General\ Conditions\ Cost\ Percentage\ Points = (14.5\% - (D\&C\ General\ Conditions\ Cost\ Percentage)) * 3000$$

The Proposal may not include a D&C General Conditions Cost Percentage in an amount greater than 14.5%.

ITP § 4.7(e). The instructions for the financial proposals make clear that when calculating the D&C General Conditions Cost Percentage, the proposers “shall confirm that the D&C General Conditions Cost Percentage shall cover all items outlined within the definition of D&C General Conditions Costs.” *Id.* at Appendix 5, § 2.2(e).

The ITP states that the Contractor Markup Percentage

will be the maximum percentage that may be applied to the D&C Costs (excluding D&C General Conditions Costs and Contractor Markup Costs) for each section of Phase 1 on account of Contractor Markup Costs in the D&C Costing Model required in Section 1.20.2 of the Predevelopment Work Requirements.



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The Contractor Markup Percentage will be assigned a point value [f] for the purposes of the Financial Proposal evaluation according to the following formula:

$$\text{Contractor Markup Percentage Points} = (19.5\% - (\text{Contractor Markup Percentage})) * 3000$$

The Proposal may not include a Contractor Markup Percentage in an amount greater than 19.5%.

*Id.* at § 4.7(f); *see also* Appendix 5, § 2.2(f).

D&C General Conditions Costs are defined as the “direct project overhead costs, without contingencies, incurred for supervision and administration of the D&C work, inclusive of all self-performed and subcontracted D&C work,” and “*for the avoidance of doubt . . . shall include,*” among other items: bonds of all types; non-payroll insurance; mobilization costs; and licenses, permits, and fees. ITP, Appendix 1, “Definitions” (emphasis added). Contractor Markup Costs “means general and administrative indirect overhead costs and profit applied to self-performed and subcontracted D&C work for each section. Contractor Markup Costs shall include all markups applied to all cost categories including labor, equipment, materials, and subcontract costs.” *Id.*

During the solicitation process, multiple Requests for Clarification (“RFCs”) were submitted regarding these terms, primarily to confirm the understanding that 1) the D&C General Conditions Cost Percentage and Contractor Markup Percentage would be inclusive of all these costs and would flow-down to any subcontractors; and 2) that in the case of self-performed or subcontracted works, the percentages that were bid would be the maximum that the Proposer would be able to pay. *See* RFC MDOT ID #939, #1149, #1532. MDOT confirmed that understanding, stating that “MDOT will be looking for evidence that these flow downs are correctly reflected in the subcontractors’ bids.” MDOT Response to RFC MDOT ID #939. During the debriefing, Bryan Kendro reconfirmed, stating that “Whatever that markup number is has to remain on the books throughout the layers.”

Taken together, the requirement that the D&C General Conditions Cost Percentage “shall cover” the D&C General Conditions Cost, and that it and the Contractor Markup Percentage “will be the maximum percentage[s]” applied to the actual D&C Costs means that when a Proposer went to market, those percentages had to be sufficient to cover the D&C General Conditions Cost, and the Proposer would be locked into those numbers. In other words, the percentages had to reflect real market conditions such that the Proposer could solicit work at

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those percentages. When this was put to MDOT at the debriefing, Bryan Kendro replied, “Your understanding is correct.”

Accelerate Maryland Partners’ Financial Proposal, which MDOT characterized as “significantly stronger” than the other two proposals, garnered 1,356 of the 1,791 available points.<sup>14</sup> But to obtain that score, Accelerate Maryland Partners could not have exceeded [REDACTED] for the combined D&C General Conditions Cost Percentage and Contractor Markup Percentage.<sup>15</sup> Indeed, based on the ITP’s financial proposal scoring criteria, the Proposer with the lowest General Conditions Costs Percentage and Contractor Markup Percentage would receive a significantly higher financial proposal score:

As outlined in the Request for Proposals, there were a total of 1,791 possible points in financial proposal evaluation criteria: Equity Internal Rate of Return (457 points), Developer Closing Costs (40 points), Development Rights Payment (145 points), Predevelopment Work Costs (100 points), and **Contractor General Conditions, Costs, and Markup (1049 points)**.<sup>16</sup>

Given the clear language of the ITP, MDOT’s answers to the RFCs, and MDOT’s statements at the debriefing, Accelerate Maryland Partners’ bid was wildly unrealistic and would be impossible to obtain under any real market conditions—bonds, insurance, and mobilization costs alone would consume the margin they bid. Indeed, MDOT’s margin specifications for hard bid projects is 15-20%, much more in-line with real-world conditions.<sup>17</sup> And Transurban’s own

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<sup>14</sup> MDOT Press Release, MDOT and MDTA Selects Developer for the American Legion Bridge I-270 to I-70 Relief Plan, Feb. 18, 2021, available at <https://495-270-p3.com/wp-content/uploads/2021/02/MDOT-Selects-Developer-for-American-Legion-Bridge-I-270-P3-2.18.2021.pdf>.

<sup>15</sup> See *supra*, page 10. Based on the Financial Proposal Score, Accelerate Maryland Partners’ markup percentages were in the range of [REDACTED] for each of those cost percentages. [REDACTED] Transurban’s decision may explain in whole or in part why Archer Western was asked (or chose) to leave the team and why other seasoned design-build contractors did not join Transurban’s team.


<sup>16</sup> MDOT Press Release, MDOT and MDTA Selects Developer for the American Legion Bridge I-270 to I-70 Relief Plan, Feb. 18, 2021, available at <https://495-270-p3.com/wp-content/uploads/2021/02/MDOT-Selects-Developer-for-American-Legion-Bridge-I-270-P3-2.18.2021.pdf> (emphasis added).

<sup>17</sup> See State of Maryland, Instructions to Bidders for Construction Projects and General Conditions of the Contract Between Owner and Contractor (Jan. 2016), [https://dnr.maryland.gov/Documents/Engineering-Construction/instructions\\_to\\_bidders.pdf](https://dnr.maryland.gov/Documents/Engineering-Construction/instructions_to_bidders.pdf). By definition, bid-build work (a/k/a hard-bid work) is less

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experience on the I-95 P3 reflects this reality: its Design-Build Contractor, Fluor-Lane offered this price summary as part of that project:<sup>18</sup>

Attachment I - Price Summary			
Cost Category		Amount	
1.0	Mobilization	\$	30,911,000.00
2.0	Project Indirects	\$	65,029,367.00
3.0	Construction Indirects	\$	70,305,000.00
4.0	Design	\$	56,283,000.00
5.0	Utilities	\$	3,535,000.00
6.0	Maintenance of Traffic	\$	23,797,000.00
7.0	Erosion Control	\$	8,055,000.00
8.0	Earthwork	\$	30,196,000.00
9.0	Drainage	\$	30,023,000.00
10.0	Retaining Walls	\$	32,886,000.00
11.0	Bridges	\$	50,419,000.00
12.0	Roadway	\$	94,792,000.00
13.0	Soundwalls	\$	44,911,000.00
14.0	Tolling & Traffic Management (Construction)	\$	79,400,000.00
15.0	TTMS Design & Startup	\$	70,605,202.00
Total Price		\$	691,147,569.00
			

The percentages by category are illustrated below:

risky because the contractor is responsible only for constructing work using plans provided by MDOT. Additionally, these projects are almost always unit price projects meaning that the contractor does not bear quantity risk, because MDOT pays for work installed at the unit prices bid by the contractor. For the Project, GCs and profit should be no less than prescribed for bid-build work, because the contractor has *more, not less* risk in a design-build project.

<sup>18</sup> Comprehensive Agreement Relating to the I95 HOV/HOT Lanes Project, dated as of July 31, 2012, by and between the Virginia Department of Transportation, An Agency of the Commonwealth of Virginia, and 95 Express Lanes LLC, a Delaware Limited Liability Company, Exhibit B-2, Attachment I, *available at* [http://www.virginiadot.org/projects/resources/NorthernVirginia/Express\\_Lanes\\_Comprehensive\\_Agreement.pdf](http://www.virginiadot.org/projects/resources/NorthernVirginia/Express_Lanes_Comprehensive_Agreement.pdf).

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Attachment I - Price Summary			
<u>Cost Category</u>	<u>Amount</u>	<u>Price</u>	<u>% of Total</u>
1.0 Mobilization		\$ 30,911,000.00	4.47%
2.0 Project Indirects		\$ 65,029,367.00	9.41%
3.0 Construction Indirects		\$ 70,305,000.00	10.17%
4.0 Design		\$ 56,283,000.00	8.14%
5.0 Utilities		\$ 3,535,000.00	0.51%
6.0 Maintenance of Traffic		\$ 23,797,000.00	3.44%
7.0 Erosion Control		\$ 8,055,000.00	1.17%
8.0 Earthwork		\$ 30,196,000.00	4.37%
9.0 Drainage		\$ 30,023,000.00	4.34%
10.0 Retaining Walls		\$ 32,886,000.00	4.76%
11.0 Bridges		\$ 50,419,000.00	7.29%
12.0 Roadway		\$ 94,792,000.00	13.72%
13.0 Soundwalls		\$ 44,911,000.00	6.50%
14.0 Tolling & Traffic Management (Construction)		\$ 79,400,000.00	11.49%
15.0 TTMS Design & Startup		\$ 70,605,202.00	10.22%
Total Price		\$ 691,147,569.00	100.00%

Applying the definitions of D&C General Conditions Cost Percentage and Contractor Markup Percentage in the ITP, the Lead Contractor's cost percentages on Transurban's I-95 P3 project were as illustrated below:

Contractor Markup Percentage: 12.39% for I-95 "Project Indirects"

D&C General Conditions Cost Percentage: 19.28% for I-95 "Mobilization" + "Construction Indirects"

Total: 31.67%

The unrealistic nature of Accelerate Maryland Partners' bid is reinforced by the financial proposal scores announced by MDOT for Accelerate Maryland Express Partners (800 points) and for Capital Express Mobility Partners (665 points). Given the relative weight given to the



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markup percentages in the evaluation criteria, the relatively small gap in scores between the only two other Proposers strongly suggests that they shared a similar interpretation regarding the parameters of those percentages.<sup>19</sup> While it is difficult to believe that the clear language and direction from MDOT could have been misinterpreted—much less by two of the three Proposers—that two apparently did indicates that at the very least, the ITP and subsequent clarifications were much too ambiguous or misleading.

Based on MDOT's responses to RFCs and comments during the debriefing, it is clear that Accelerate Maryland Partners must flow down these markup percentages to any subcontractors it will attempt to retain. But will the market (1) still bid?; (2) reclassify indirect costs as direct costs to work around these restrictions?; (3) apply its customary percentages and pass the higher costs to Accelerate Maryland Partners' Equity Members to absorb?; (4) optimistically use the lower percentages to buy work (with a great risk for Project delivery)?; or (5) adopt other means to try to circumvent the requirement to observe the maximum markup percentages, for example, by making any design-build contractor whole outside the constraints of the contract or by proposing numerous change orders in the future?

Moreover, unrealistically low margins likely permitted Accelerate Maryland Partners to inflate the Equity IRR portion of the Financial Proposal criteria, thereby garnering even more points. But because Accelerate Maryland Partners must flow down the D&C General Conditions Costs and Contractor Markup Costs to any subcontractors they hire to perform the work, they will need to cover any deficiencies through their Equity IRR. As such, the Phase South sections will need to outperform expected revenue targets for any revenue sharing payment being eventually due and payable to MDOT by each Section Developer. In other words, the likely impairment to Accelerate Maryland Partners' Equity IRR (which likely is set at a higher percentage than the other two consortiums) to meet any D&C general costs, indirect costs, and markup over their proposed percentages ultimately will have a material negative impact on the value to the State because the State effectively will be subsidizing Accelerate Maryland Partners.

MDOT's decision to accept Accelerate Maryland Partners' unrealistic bid, therefore, is nothing short of arbitrary and capricious and suggests that the financial proposal evaluation criteria were not intended to reflect real-world assumptions, but rather merely were sliding scales

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<sup>19</sup> Because the financial proposal scoring was heavily dependent upon the D&C General Conditions Cost Percentage and the Contractor Markup Percentage (as well as the Proposal Equity IRR), it is impossible that Accelerate Maryland Express Partners could have had significantly different percentages with their score only being 135 points higher than Capital Express Mobility Partners.

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gameable for higher point totals. Had the other parties been under the impression that the markup percentages did not have to reflect real world conditions, they could have bid 0% and garnered maximum points from that evaluation criteria. It is difficult to see, however, how those entities would be providing “best value for the State” if they had done so. COMAR § 11.01.17.09(A)(2).

**3. MDOT’s Acceptance of Accelerate Maryland Partners’ Unrealistic Margins Will Undermine Delivery Certainty**

After receiving Proposers’ Predevelopment Work Proposals and Financial Proposals, MDOT conducted a trade-off analysis to determine which Proposer’s submittal was “most advantageous to the state.” ITP § 4.10(e). In conducting this analysis, MDOT considered the importance of a Proposer’s Predevelopment Work Proposal and Financial Proposal “approximately equal.” *Id.* During the debriefing, the Contracting Officer indicated that this analysis was done at a high level—that is, balancing a Proposer’s overall Predevelopment Work Proposal against its Financial Proposal—rather than considering the trade-offs involved between subcategories.

Had MDOT conducted analysis looking at the subcategories, it could have considered how Accelerate Maryland Partners’ unrealistic markup percentages—a key driver of its high Financial Proposal score—would affect its Predevelopment Work Proposal, in particular Delivery Certainty. Among the Predevelopment Work Proposal evaluation criteria, MDOT listed Delivery Certainty first and classified it as being of “critical importance.” ITP § 3.2(a). Assuming that Capital Express Mobility Partners is correct that the ITP and MDOT intended for markup percentages to reflect real-world assumptions, Accelerate Maryland Partners likely will have extreme difficulty finding subcontractors willing and able to perform the necessary work to complete the Project at approximately [REDACTED] margins and, even if they do, it will not be the result of healthy competition that provides opportunities to local firms and union labor consistent with Opportunity MDOT. The end result almost certainly will be delay and—in a worst-case scenario—Project failure when the construction companies walk away due to massive cost overruns.<sup>20</sup> MDOT’s selection of a Proposer whose Financial Proposal so significantly undermines the most important sub-criteria of its Predevelopment Work Proposal could not have been the result of a reasoned decision-making process supported by competent evidence.

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<sup>20</sup> Cf. Briana Adhikusuma, “Construction On Purple Line Has Halted, State Official Says,” Bethesda Mag. (Sept. 23, 2020), <https://bethesdamagazine.com/bethesda-beat/transportation/construction-on-purple-line-has-halted-state-official-says/>.

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**4. MDOT's Decision to Downgrade Capital Express Mobility Partners' Predevelopment Work Proposal Scores [REDACTED] Was Arbitrary, Capricious, and Unsupported by Competent Evidence**

MDOT's decision to select Accelerate Maryland Partners even though its Financial Proposal significantly undermines its Predevelopment Work Proposal is all the more surprising given that Accelerate Maryland Partners only received a "Good" score as compared to Capital Express Mobility Partners' "Good +". As was made clear in the debriefing, Capital Express Mobility Partners' score of "Good +" rather than "Excellent" was [REDACTED]

[REDACTED] Accordingly, MDOT's decision to penalize Capital Express Mobility Partners for this decision was arbitrary and capricious. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Capital Express Mobility Partners' decision to [REDACTED]

[REDACTED] MDOT had not selected its preferred alternative for Phase 1 South

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until January 27, 2021, more than a month after Predevelopment Work Proposals were submitted.<sup>21</sup> [REDACTED]

[REDACTED]

[REDACTED]

### RELIEF REQUESTED

Throughout the solicitation process, Capital Mobility Express Partners has made clear its commitment to partnering with the State of Maryland to deliver a high quality Project and providing the best value solution for the State. To ensure that Maryland receives best value, Capital Express Mobility Partners requests that (i) Accelerate Maryland Partners be disqualified because it will be unable to timely complete the Project due to its lack of a true Lead Contractor and its unrealistic and low markup percentage, rendering its Financial Proposal not compliant with the RFQ and the ITP; or, in the alternative, (ii) MDOT provide clarification of the Financial Proposal's evaluation criteria and re-open the solicitation to provide all Proposers the opportunity to resubmit their respective Financial Proposals on equal terms (for example, by setting a minimum D&C General Conditions Cost Markup Percentage and Contractor Markup

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<sup>21</sup> DePuyt, "UPDATED: State Selects Four-Lane 'High Occupancy Toll' Design for I-495, I-270," Maryland Matters."

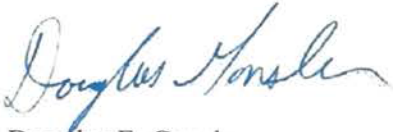


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Percentage) as a Best-and-Final Offer AND then perform a proper and equitable trade-off analysis that considers how the Proposers' Financial Proposals would affect their ability to deliver on their Predevelopment Work Proposals.

Very truly yours,



Douglas F. Gansler  
Counsel  
Capital Express Mobility Partners, LLC



Rebecca Brooks  
Project Director and Authorized Representative  
Capital Express Mobility Partners, LLC