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**Re: MDOT I-495 and I-270 Traffic Relief Projects**

Dear Mr. Folden:

I am pleased to respond to the Request for Information as posted on [www.MDtrafficreliefP3.com](http://www.MDtrafficreliefP3.com). I have copied your questions below, with my response in blue. In my response, I am assuming that MDOT goes through a traditional procurement process even though the 2013 Concession Law allows for sole source procurement.

a. General

1. Please describe your firm, its experience in relation to P3 projects, and its potential interest in relation to these potential congestion relief improvements.

**Spinnaker Expertise in Relation to Toll Roads and P3's**

Spinnaker is a Maryland based firm that advises on infrastructure financing and P3's. It is founded by Christopher H. Lee who led the private sector investment in the Seagirt Marine Terminal P3 in the Port of Baltimore. Mr. Lee is a pioneer and innovator in the infrastructure asset class, with particular expertise in public private partnerships (P3's) – starting with the Second Stage Expressway public private partnership in Bangkok, Thailand in 1989. Mr. Lee has worked on toll road project finance and P3's in Colorado (E-470), Chile, Mexico, Indonesia and Thailand. Mr. Lee introduced the Build-Operate-Transfer project financing concept in the United States during the E-470 project in Colorado in 1990-91.

Mr. Lee was the Founder and Managing Partner of Highstar Capital (Highstar), a private equity manager he formed in 1998 with AIG to make value added investments in infrastructure, including in the energy, transportation, logistics, water and wastewater and waste management and environmental sectors. Under Mr. Lee's leadership, Highstar raised four private equity funds, which invested \$7.8 billion in 28 investments on behalf of their limited partners and co-investors.

Currently, he is a Senior Advisor to Oaktree Infrastructure, and Digital Alpha Advisors, a firm he founded with Rick Shrotri – formerly Head of Business of Acceleration at Cisco Systems Inc., – to invest in the rapidly growing digital infrastructure space, including telco spin-outs, next generation networks and smart cities.



Christopher Lee at the ground breaking for the Seagirt Post Panamax P3, in between MPA Executive Director Jim White and former Maryland Governor Martin O'Malley. Other participants (left to right): Helen Bentley, former National Maritime Commission Chair, former Baltimore Mayor Stephanie Rawlings Blake, and former International Longshoreman President Richie Hughes.

Highstar transactions led or co-led by Mr. Lee include Southern Star Central – the first investment by a financial investor in a US interstate natural gas pipeline – and the acquisitions of power generation businesses globally from El Paso, Shell and Bechtel. Mr. Lee made Highstar into a leader in US P3's including the Seagirt P3 in the Port of Baltimore, and the Luis Munoz airport P3 in San Juan – the first major airport privatization in the United States.

In 2009 AIG exited its interest, and Highstar became an independent owner operated firm under Mr. Lee's leadership, until it was acquired by Oaktree Capital on August 1<sup>st</sup>, 2014, and renamed Oaktree Infrastructure. Mr. Lee was the sole Managing Partner of Highstar from its formation until its acquisition by Oaktree.

Prior to founding Highstar, Mr. Lee had an over 20-year career in finance, including as a project finance and M&A banker with the Chase Manhattan Bank and Lehman Brothers, with

assignments in New York, Hong Kong, Manila, Bangkok and Seoul. Mr. Lee left Lehman Brothers in 1992 to become CFO of Grupo Tribasa, NYSE listed infrastructure development and construction company based in Mexico City.

**Potential interest in relation to these potential congestion relief improvements**

Spinnaker is interested in working with our major institutional infrastructure investor relationships globally to form a consortium to pursue the congestion relief P3's in Maryland.

2. What would be the benefits and risks to MDOT entering a P3 agreement for congestion relief improvements? What risks do you believe would best be retained by MDOT and what risks would be best transferred to the private sector? Please explain your reasoning.

The principal benefits to Maryland are as follows:

- Access significant capital available to finance P3's on a non-recourse basis to the State or its credit rating
- Utilize private sector led process management through a design-build process
- Attract international investment to invest in MD infrastructure to create jobs and promote economic development

### Principal risks to MD:

- Political fallout from too high tolls, e.g., Chicago parking meters, I-495MDOT
- Possible project bankruptcy, e.g., Indiana Turnpike
- Perceived 'foreign ownership' from overseas infrastructure and sovereign wealth funds
- Mismanagement of the Design Build process
- Underfunding of maintenance and operating reserves
- Over leveraging, e.g., Chicago toll way
- The foregoing risks can all be successfully mitigated by a proper project structure, framework, governance and alignment of interest. For example, a rigorous set of design standards and effective supervision by the Independent Engineer will mitigate the risk of mismanagement of the Design Build process. Similarly, the State should pre-qualify firms that are eligible to be hired by private sector concessionaires as prime contractors, including for design-build and O&M. Overleveraging can be avoided by minimum levels of specified equity contribution. There is a long body of experience in highway P3's and the mitigation process is well established with ample precedent. MDOT should engage legal and financial advisors with significant real world and global P3 experience, not traditional US highway financing expertise. Above all else MDOT should award the Project(s) to a concessionaire(s) who is credible, capable of executing a Project of this scale, and has a sufficient track record of successfully completing and operating P3's in the US.

### Risks Retained by the State

- Right of way procurement
- Force Majeure
- Changes in law and tax
- Change orders directed by the State
- State should consider absorbing cost overruns and delays beyond a certain point as described below

### Risks Allocated to the Private Sector

- Design and construction
- Traffic volumes and revenue
- Operating and maintenance costs
- Financing

There are certain risks which the private sector is simply not prepared to take. Force Majeure and failure by the State to waive sovereign immunity are among them. The private sector would prefer that the State undertake the design and construction risk as well and the Project could be so structured – with the private sector principally taking traffic volume/diversion risk. This approach, however, may not allow the Project to benefit from private sector construction and operating efficiencies and advantages.

One option the State should consider is providing a 'not to exceed' guarantee on cost and time to complete, effectively absorbing the construction risk, while gaining the benefit of private sector control over – and management of – the construction works.

3. What, if any, advantages will MDOT potentially gain by entering an

agreement in which operations and maintenance and lifecycle responsibility and/or traffic and revenue risk are transferred to the private section? How do you assess the likely magnitude of such advantages? What are the potential offsetting disadvantages?

At a minimum, traffic and revenue risk need to be transferred to the private sector, otherwise there is no point in a P3, as the State is getting no benefit at all and taking all of the risk. For the reason stated above O&M responsibility should also be transferred to the private sector concessionaire. Because there are no existing tolls attributable to the Project, the State is not giving up any future revenue, so there is no financial disadvantage to the State. Arguably, one can argue that the State has a lower cost of capital than the private sector – translating into potentially lower tolls. However, this is offset by several factors: (i) this Project may be eligible for tax exempt financing as it is an improvement, as was the case in the Seagirt financing (ii) the private sector may be able to affect the Works at a lower all-in cost, and (iii) there is an opportunity cost inherent in using the State credit as it is a scarce resource.

4. Would it be advantageous for MDOT to transfer the operations and maintenance and lifecycle responsibility for the entire freeway or just the added congestion relief improvements? What would be the advantages and disadvantages of transferring the operations and maintenance and lifecycle responsibility for the entire freeway?

I am puzzled as to how you would split the control and management of operations on one facility – logistically, operationally and financially. It seems to me that there should be one operator for the entire road, with an integrated O&M budget, both minor and major, including the joint funding of reserves. If you attempt to split the operations, you may run into: (i) cost allocation disputes, (ii) potential failure of interdependency; and (iii) the potential for operational confusion. If the O&M is to be under the control of one entity – which I consider highly desirable – it will likely need to be the Concessionaire in a P3.

5. Would it be feasible to have a single solicitation for both corridors? If not, would you recommend any specific phasing for the solicitations including the corridor(s) and limits and why? What would your recommendation be for staggering multiple solicitations and why?

**One Concessionaire for the two corridors:**

**Advantages:** Better financing terms as the lenders and investors will benefit from the combined cashflows of both projects. All interested parties will bid on the entire package de-facto. Avoids the State ending up negotiating two separate ‘deals’ one of which may be perceived to be less advantageous to the State by critics.

**Disadvantages:** This is a major undertaking and only a limited number of P3 investors will be able to arrange a deal of this magnitude. Managing the implementation of two large scale construction projects by one entity will be challenging.

**One Concessionaire for each corridor:**

Advantages and disadvantages are the obverse of the above.

On balance I would incline to one solicitation for I-470, with a follow on for I-270 two years later. The question is whether or not the I-470 concessionaire could compete for the second concession, and I would think not. The State could even consider breaking I-470 into two concessions as well, effectively one for the Prince Georges section and one for the Montgomery portion. If there is phasing, I would lead with the most attractive concession first.

b. Project Development

1. Do you believe your firm would be interested in submitting a detailed proposal for the development of any of the congestion relief improvements?

Are there any particular concerns that may prevent your firm from getting engaged in the project development? How might these concerns be resolved?

My firm would be interested in forming a consortium to submit a detailed proposal for the development of any of the congestion relief improvements.

2. At what stage of the NEPA and project development process would it be most beneficial to issue a RFQ: after establishment of the purpose and need, after determination of alternatives retained for detailed study, after selection of an MDOT preferred alternative, or after approval of the environmental document? At what stage would it be most beneficial to issue a RFP? Please discuss your reasoning.

MDOT needs to have a period during which potential bidders can offer alternative proposals in addition to the limited P3 scope described by MDOT to date. Once MDOT has finalized the project scope, secured necessary approvals (including legal, environmental and ROW, to proceed) a Terms of Reference should be drafted in conjunction with MDOT's legal, financial and technical advisors and made available, followed by an RFQ, and shortly thereafter an RFP. It should be noted that the RFQ needs to cover two types of firms: (i) eligible firms, either acting alone, or in consortia, to fulfill the requirements of being a BOT concessionaire in a P3 project of this nature – this would include prior experience of the firm's principals, financial capability and track record; and (ii) eligible firms that would fulfill the requirements to respectively design, build and operate the facilities under consideration.

3. What are the critical path items for the solicitation for these improvements and why?

**Critical Path Items for a Binding Bid**

1. Final Project scope

2. All legal, regulatory and permitting approvals to issue a Notice to Proceed
3. Draft Concession agreement
4. Sufficient design for bidders to procure binding design build commitments
5. Commitment for ROW, easements, utilities etc.
6. MDOT historical traffic data and MDOT commissioned traffic forecasts from a nationally recognized traffic forecasting firm with base, upside and downside scenarios

4. What is the minimum amount of time that your firm would require to develop and submit a response after the issuance of a potential RFQ?

15-30 days

5. What is the minimum amount of time that your firm would require to develop and submit a detailed proposal after the issuance of a potential RFP?

Provided the RFP contained the critical path items: 90-120 days

6. What information would your firm need in order to prepare a response to a potential RFP? What information should MDOT, the offeror, or others provide?

This list is a summary only and is not intended to be complete. It also relates to a consortium of which my firm would be affiliated with.

1. Routing and design sufficient to procure a binding design build commitment
2. Operating and maintenance standards and specifications
3. List of required permits and approvals
4. Environmental impact and other required reports and studies
5. Legal basis for MDOT to enter into the concession on the terms specified in the Terms of Reference
6. Draft concession agreement<sup>1</sup>, including terms, governance and regulatory, dispute resolution
7. Historic traffic data and traffic forecasts prepared for MDOT
8. Award and selection criteria and scoring

7. What would you consider a reasonable stipend payment for unsuccessful proposers responding to a potential RFP? Please discuss how the stage of project development (purpose and need, alternatives retained for detailed study, preferred alternative, final environmental document, etc.) completed

prior to RFP issuance would impact the stipend payment amount. Only final qualified bidders who submit binding bids per the RFP should be eligible for reimbursement in the case of an unsuccessful bid. This should be limited to actual expenses and out-of-pocket incurred by third party advisors, e.g., legal, traffic forecasting and design with a not to exceed amount of \$2 million per bidder/consortium.

8. Would it be more beneficial for right-of-way acquisition activities to be

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<sup>1</sup> Note: this would be MDOT's draft, which each bidder would mark up as appropriate

transferred to the developer or should MDOT retain that risk? Please discuss

your reasoning. MDOT needs to procure the ROW/easements/utilities, etc. in advance of the works commencing or otherwise take appropriate measures to insure such availability in accordance with the pre-agreed schedule for the Works. This is because the State has eminent domain.

c. Technical Challenges – *I have not responded to this section as Spinnaker is not a design or engineering firm.*

1. Based on your experience in the development of similar projects and characteristics of the I-495/I-95 and I-270 corridors, please explain the technical challenges, including minimization of right-of-way impacts, to providing congestion relief improvements. Please provide any recommendations for mitigating or overcoming those challenges that you would be willing to share.

2. Are there recommendations that you may be willing to share concerning the project scope or development strategies to reduce the upfront capital costs and/or the lifecycle costs of potential corridor congestion relief improvements?

3. Please explain any technical solutions that you may be willing to share that may enhance the development of the potential congestion relief improvements. Identify risks associated with the solutions and, if possible, discuss estimated cost of the solutions.

d. Contract Structure

1. What is your recommended approach for financing the capital cost of potential congestion relief improvements? *The Concessionaire should provide the financing, both debt and equity with no reliance on State credit or financial resources other than in respect of any State risk sharing in the Works and Force Majeure underwriting. The State needs to structure the revenue payment mechanism so as to minimize the adverse tax implications to a concessionaire, e.g., FIRPTA.*

2. Should MDOT set a concession term or allow proposers to establish a concession term as part of the response to a potential RFP? If MDOT were to set the concession term, what is a reasonable concession term and why? *MDOT should set the Concession Term – 30 years after the commencement of operations because that will optimize the terms of the financing.*

3. Are there any contract terms you would recommend, such as Alternative Technical Concepts, Alternative Financial Concepts, contract balancing, predevelopment

agreements or progressive agreements, etc. to minimize risk to proposers, maximize opportunities for innovation, maximize a concession payment to MDOT, or are key to obtaining competition? Please discuss the benefit and risks of the recommended contract terms.

MDOT should very definitely seek ideas on alternatives as described above prior to formalizing the Terms of Reference. Once the RFP is issued, only Conforming Bids should be accepted. Otherwise, there will be criticism of the process if a non-conforming bid is accepted. This makes the award standards and criteria very important and there needs to be sufficient flexibility to award based on capacity, capability and the greater likelihood of success from bidder A over bidder B in the view of the selection committee. A P3 is definitely not a low-cost bid kind of decision. This is a multi-decade partnership and requires great care and thought as to who the State's partner(s) should be.

e. Miscellaneous

1. Are there any particular concerns with the information provided in this RFI?

Please explain any concerns and provide any proposed solutions or mitigation to address those concerns. NA

2. Please provide any suggestion or comments on how MDOT can encourage participation by Minority Business Enterprise/Disadvantaged Business Enterprise firms and local workforce in the development of the congestion relief improvements. NA

3. What opportunities would you like to see for industry outreach related to these potential P3 opportunities? NA

4. Please provide any additional comments or questions you may have related to the information in this RFI. NA

Thank you for giving me the opportunity to respond. If I may be of further assistance, please do not hesitate to contact me.

With best regards, I am

Sincerely,

A handwritten signature in blue ink, appearing to be 'C. A. H.', with a long horizontal flourish extending to the right.