

## **Testimony of the Associated Pennsylvania Constructors**

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**Before**

**House Transportation Committee  
Public Hearing on House Transportation Task Force's Legislative  
Package**

**Room 140, Main Capitol  
Harrisburg, Pa.  
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Chairman Hennessey, Chairman Carroll, Taskforce Chairwomen White, and members of House Transportation Committee, thank you for the opportunity to testify and comment on the 10-bill legislative package introduced after the release of the House Republican Infrastructure Task Force report last fall.

The Associated Pennsylvania Constructors (APC) is a trade association that unites more than 400 members including prime and subcontractors, consulting engineers, material suppliers, manufacturers, and others with an interest in Pennsylvania's road and bridge construction industry. The association has been serving the industry for over 90 years and represents the majority of actively bidding contractors in the Commonwealth's \$2.4-billion highway industry.

### **Funding our Commonwealth's Infrastructure Network**

APC works diligently to facilitate the work of its members in their efforts to improve the Commonwealth's road and bridge network. The health, vitality, and sustainability of the Motor License Fund is of paramount importance not only to our association, but to the Commonwealth's economy.

One of the bills in the package, House Bill 2061, proposes to accelerate the shifting of funds from the Motor License Fund to the General Fund for the operations of the PA State Police. Under current law, this shift occurs approximately to the tune of \$32 million per year until it reaches a cap at

\$500 million annually in FY 2027-28. The bill would accelerate this rate and reach the \$500 million cap in the FY 2024-25 fiscal year.

The Commonwealth's Motor License Fund was created to receive revenue from state taxes on liquid fuels, vehicle license and registration fees, and some fines. By authority of the Pennsylvania Constitution, that revenue is required to be used only for highway purposes, including highway safety.

The State Police performs a variety of law enforcement services. Its website lists the following: major case team, patrol services, forensic services, collision analysis and reconstruction, vehicle fraud investigators, Pennsylvania Criminal Intelligence Center, Amber Alert activations, liquor control enforcement, polygraph, Fire Marshal, K-9 unit, aviation patrol, drug recognition services, the Special Emergency Response Team, Clandestine Lab Response Team, hazardous device and explosives, equestrian detail and computer crime unit.

APC does not take issue with using Motor License Fund revenue to pay for highway safety patrol operations. However, the current state budget diverts \$737 million from the Motor License Fund to a total State Police budget of about \$1.2 billion. That would be 61 percent of the State Police budget. We do not believe that 61 percent of State Police resources are devoted to patrolling highways. In essence, we are pitting safe roads against public safety, which we believe is bad policy.

In the years following the passage of Act 89, the MLF line item for the State Police skyrocketed to a high of \$802 million in 2015 (See page 10). The General Assembly did take action to begin to decrease at a rate of 4% per year over a ten-year period with passing language included in the 2016-17 Fiscal Code. However, the amount diverted since the passage of Act 89 alone has been an alarming \$4.5 billion thus far.

Last year, APC proposed a 10-year plan to reduce the amount of MLF funds to the State Police at a rate of \$65 million per year (approximately equivalent to 1 penny of gasoline tax) until the amount reached zero in FY 2029-30 (See page 11). APC applauds the introduction of House Bill 2061 recognizing the need to preserve our highway funds in an environment where those funds are sorely needed. We would renew our call for a complete phase out and would like to work with the members of the committee, House, and Senate to reach that end.

This proposal would have the support of the public. Our research shows that 64% of Pennsylvanians oppose diverting transportation funds for non-transportation uses and 73% support restoring transportation funds for transportation uses more quickly than the current schedule as outlined in the Fiscal Code.

We want to be clear, this is not about whether State Police operations need to be funded. And this issue is not about whether the total level of State Police funding is appropriate. It's up to the General Assembly and administration to make that determination.

This is about how much Motor License Fund revenue should support State Police activities, given the State Constitution. Again, we are pitting safe roads against public safety, which we believe is bad policy.

In the end, we recognize any reduced State Police funding from the MLF would likely need to be augmented from another revenue source, most likely from the state's General Fund. This would open up all the current revenue streams into the General Fund as potential options you have for funding the full needs of the State Police.

Another bill in the package, House Bill 2361, would take the similar approach and phase down the payments made by the Pennsylvania Turnpike Commission to the Commonwealth for the state's public transportation systems. While this wouldn't directly impact the highway construction industry, we do support the fiscal stabilization of the PA Turnpike by helping their long-term debt structure.

The Turnpike is a vital and essential corridor within our Commonwealth. It's importance to the economy of the state and nation cannot be understated. It would be wise and prudent to deal with the debt load of the PA Turnpike Commission and we join in support of efforts to keep the Turnpike in good fiscal shape for the betterment of all Pennsylvanians.

### **Industry Efforts on Design-Build Contracting (House Bill 2063)**

In 2018, the construction industry along with PennDOT, PA Turnpike Commission, and ACEC-PA agreed to undertaking a Total Quality Initiative (TQI) Procurement Process Team effort to explore Alternative Procurement

Options for Pennsylvania. We will outline our joint efforts in greater detail below.

We commend Representative Fritz, the sponsor of House Bill 2063, for recognizing that design-build contracting does have appropriate application in some situations in regards to public roadway construction. However, there are several provisions of the proposed legislation that we view are problematic which we would submit to you for thoughtful consideration.

#### *Limitations on Commonwealth Contracting*

PennDOT currently has an injunction against it based on the *Brayman decision (Brayman Construction Corp. v PennDOT, 30 A.3d 650 (PA Cwlth 2011), on remand from Brayman v. PennDOT, 608 Pa. 584(2011))* which permanently prohibits PennDOT from using a two-step design bid best value process, shortlisting, or any other innovative contracting method.

#### *Construction Contractors Overall Concerns*

The biggest concern that bidders face when moving towards more “subjective” means of bidder evaluation is that the integrity of the bid process is almost always questioned, more protests are filed, and the bid process becomes more politicized. Smaller contractors would also argue that the more subjective factors used in evaluating bids will effectively shut them out of the market, which could result in an overall increase in pricing.

#### *Gaining Industry Insight*

APC hosted an industry workshop with representation from APC and ACEC/PA. This workshop was to get the perspective of designers and contractors on a potential framework for qualification-based selection and project delivery in the Pennsylvania transportation market that could be potentially acceptable to the industry.

Below are some of the basic facets of a Best Value procurement system identified by private industry:

- *Contracting Methods* – Initial deployment of qualification-base selection should be the two-step design-build (DB) model (see bullet at bottom related to the Short-Listing process for two-step). Construction Manager/General Contractor (CM/GC) or Construction Manager-At-Risk (CMAR) should be considered after successful implementation of 2-step design-build is more achieved and accepted by the industry, Pennsylvania Department of Transportation (Department), and the Pennsylvania Turnpike Commission (Commission).
- *Pilot Program* – Enabling legislation for a limited period (~8 years) with a maximum number of projects or contract value (~10 projects/year) was initially discussed. Ultimately, it was agreed that the program would operate under Section 513 of the Chapter 62 Procurement Code and this would preclude the need to revise Procurement Code to allow Best Value procurement.
- *Department/Commission DB Documents* – The PennDOT/Commission standards, design manuals, specifications, etc. should be reviewed and appropriately modified for the DB contracting method. The revisions and DB design guidance should focus on providing the clarity and flexibility necessary for successful design and construction by the design-build teams (DBT). Although it would not be feasible to have separate design manuals and policies for every design element, it is recognized that policies better defining what will be required and permitted in the design process will be needed to facilitate the use of adjusted bid design build and achieve the benefits of innovation.
- *DB versus Public Private Partnerships (P3)* – There was consensus that there needs to be a clear delineation between the P3 and DB contracting methods. P3 can utilize a DB delivery, but the two contracting methods are distinct and require different administration for success.
- *Dedicated Staff for Administration* – DB delivery and administration from the Department should be done by a dedicated staff of multiple personnel reporting to the engineering leadership within Central Office to provide consistency between Districts. The DB staff should be separate from any P3 staff and should be involved on every DB project from scoping to delivery.
- *Short-Listing* – The key outcome from the workshop was the proposed short-listing process should be modeled off the Florida DOT (FDOT)

Adjusted Score Design-Build (ASDB) Process. The key differentiator in the FDOT ASDB process is in the first step of the two-step process, which involves evaluation of letters of interest (LOI) and assigning a score which is carried forward to the final selection. The two highest non-selected firms are paid a stipend based on contract value as outlined in their policy. The other firms not receiving the stipend may still pursue the project but are responsible for their own procurement costs. LOI scores are publicly available for all teams and each team must determine whether they proceed from the LOI stage (typically within a few days of scores announced). This makes the short-listing process a business decision for each team based on their LOI score and procurement costs, which may avoid a contest from a borderline team which is not short-listed.

#### *Creation of a Technical Subcommittee*

The task force is working to develop clarification of how an "Alternative Delivery – Design Build" group would be involved in the project development process, e.g. engaged at project selection, SOI scoring, etc. In order to provide more consistency with how the program is implemented across districts.

The TQI Group (including the legal representatives from PennDOT, PTC and APC) will review a design-build project development outline/flow chart developed by PennDOT, based in part on Maryland SHA flow chart below. A Technical Subcommittee will be formed to provide the more detailed policy behind the outline/flow chart.

The Technical Subcommittee will be a smaller group that will produce the policy/procedures that the large TQI Procurement Process Team will then review. The subcommittee will be made up of at most two representatives from PennDOT, the PTC, APC, and ACEC/PA and will be tasked with:

- a) Policy/Procedure for design-build/competitive sealed proposal procurement under section 513
- b) Once buy-in is received from the larger TQI Procurement Process Team for this procedure/policy the following will also need to occur:

- (1) Develop appropriate design and construction manuals for the delivery of the program.
- (2) Develop ECMS and PPCC enhancements to support the alternate delivery process.

### *Pennsylvania Alternative Project Delivery Forum*

As a way to ensure the process continues in a fair and efficient manner, the Pennsylvania Department of Transportation (PennDOT), the Pennsylvania Turnpike Commission (PTC), the American Council of Engineering Companies of Pennsylvania (ACEC/PA), and the Associated Pennsylvania Constructors (APC), will form a working group to discuss issues related to PennDOT and the PTC Alternative Project Delivery procurements known as the Pennsylvania Alternative Project Delivery Forum (Forum). The Pennsylvania Alternative Project Delivery Forum will operate under the collective authority and oversight of PennDOT, the PTC, ACEC/PA, and APC under the auspices of the Transportation Quality Initiative (TQI).

The purpose is to create a forum for open communication between PennDOT, the PTC, and the Industry with respect to their mutual interest in improving and enhancing alternative project delivery in Pennsylvania.

The Forum will include members from each of the four organizations representing their respective organizations and with expertise consistent with the goals of the Forum. The membership of the forum shall include equal representation of each organization whenever practical.

In consideration of the membership of the Forum it is understood that the PennDOT and the PTC representation is key to the Forum's ability to effectively improve and enhance alternative project delivery in Pennsylvania. It is anticipated that this Forum will include active participation by key Owners staff members involved in design-build procurement and development PennDOT and the PTC will each identify three representatives to be members of the Forum.

### **Additional Comments on Task Force Package**

There are other pieces of legislation in the package we believe do have merit and are worth pursuing.

Specifically, House Bill 2064 (encouraging counties to develop infrastructure banks) and House Bill 2066 (allocating ticket revenue generated from State Police enforcement to help pay for the State Police) should be pursued.

House Bill 2068 (County Referendums for Transportation Funding) would enable counties and municipalities to raise revenues needed for public transportation and specific infrastructure projects through voter referendum. While we believe there are many taxing options available to accomplish these goals, we would encourage policy makers to ensure that any revenue derived from highway user fees are used exclusively for highway construction, reconstruction or maintenance projects. APC's position is that highway user fees should not be diverted or used for other purposes outside of highway infrastructure no matter how laudable they may be.

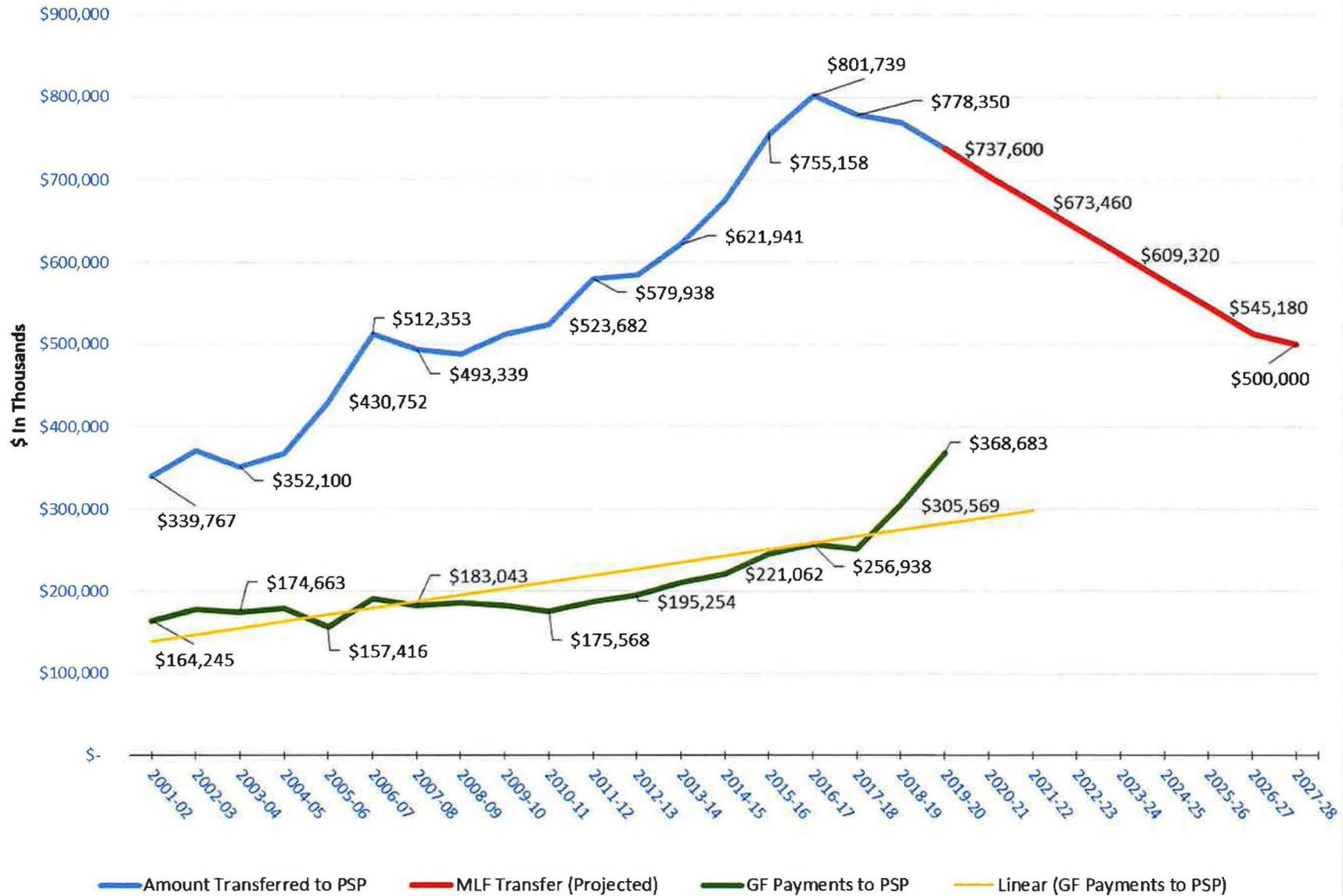
Finally, APC is not opposed to the language in House Bill 2069 (consolidating the permitting process for large projects) but would like an opportunity to engage Rep. Ecker and the committee more before it's advanced in the General Assembly. We believe PennDOT already has some of these tools available to them so we would like to establish a working group with our organization and PennDOT in order to improve upon the draft and develop a clear use of such bundling practices to accomplish the sponsor's intent.

### **Summary**

The Associated Pennsylvania Constructors (APC) would like to commend and thank the committee members, task force members, and staff for your willingness to look for ways to address the Commonwealth's transportation and infrastructure challenges. Our organization stands by and pledges our support to work with you in developing meaningful legislation in the weeks and months ahead. Thank you for this opportunity to provide testimony.

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### History of MLF and GF Payments to the PA State Police



## PSP Phase Down/Out Plan Options (From MLF)

*\*Amounts in millions*

*Updated: 3/9/2020*

<b>Fiscal Year</b>	<b>Current Fiscal Code Language (4%)</b>	<b>APC Plan (\$65 mill/year)</b>	<b>SB 858</b>	<b>HB 2061</b>
<i>BASE</i>	\$ 801.74	\$ 801.74	\$ 801.74	\$ 801.74
2018-19	\$ 769.67			
2019-20	\$ 737.60	\$ 704.67		
2020-21	\$ 705.53	\$ 639.67	\$ 673.46	\$ 673.46
2021-22	\$ 673.46	\$ 574.67	\$ 609.32	\$ 609.32
2022-23	\$ 641.39	\$ 509.67	\$ 545.18	\$ 545.18
2023-24	\$ 609.32	\$ 444.67	\$ 481.04	\$ 481.04
2024-25	\$ 577.25	\$ 379.67	\$ 500.00	\$ 500.00
2025-26	\$ 545.18	\$ 314.67		
2026-27	\$ 513.11	\$ 249.67		
2027-28	\$ 500.00	\$ 184.67		
2028-29	\$ 500.00	\$ 119.67		
2029-30	\$ 500.00	\$ 54.67		
2030-31	\$ 500.00	\$ -		



**FIGURE I-1 DESIGN-BUILD PROJECT DEVELOPMENT**

