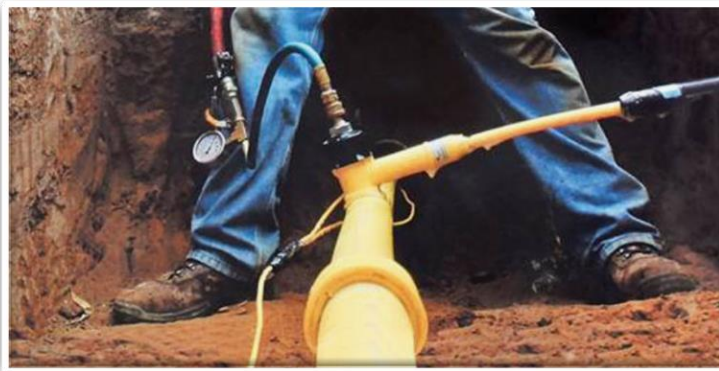




# UTILITY-RELATED RISKS FOR ALTERNATIVE DELIVERY CONTRACTS

February 25, 2019



*Any opinions expressed in this presentation are those of the author and not of the Office of the Attorney General.*



## Areas of Project Risk

- Misidentified Utilities
- Utility-Caused Delays
- Changes In Scope
- Other Potential Risks





## Misidentified Utilities



**Generally:** Misidentified utilities are often treated as differing site conditions. In some states the Owner has statutory responsibility to identify major underground facilities affected by the project.



**Purple Line P3: Relief Event** includes discovery that **Utility Information** for underground facilities (excluding service lines) is **Materially Inaccurate**, unless the Concessionaire had reason to know of the inaccuracy. The responsibility for the **Delay Costs**, if any, depends on whether the Concessionaire should have known. The Concessionaire is required to first mitigate, but is allowed a time extension beyond the **Revenue Service Availability Deadline** if the **Critical Path** is ultimately delayed.



Any opinions expressed in this presentation are those of the author and not of the Office of the Attorney General.





## Utility-Caused Delays

**Generally:** Utility Owners' failure to meet a concessionaire's schedule is a common cause of delay. Master Agreements are a means of mitigating delays and some agencies can pay for relocation work without regard to a prior rights analysis, which helps reduce delays. However, some subsequent delays are still possible.

**Purple Line P3 Agreement:** Concessionaire must give MDOT MTA notice of potential Utility Owner delays within five days of becoming aware of it. The Concessionaire bears the first \$750k of **Incremental Costs** of critical path delays; MDOT MTA and the Concessionaire then split costs up to \$5M; then MTA bears cost over \$5M.



*Any opinions expressed in this presentation are those of the author and not of the Office of the Attorney General.*



## Changes In Scope



**Generally:** Changes in scope occur when facilities are found in a different location and/or found to be a different size or condition than assumed, or found but not previously listed. Changes in design may result in impacts not anticipated. The Utility Owner may decide to perform work that the Concessionaire expected to perform and vice versa.



**Purple Line P3 Agreement:** MDOT MTA is responsible for the cost of **Utility Work** required solely as the result of an **Owner [MDOT MTA] Change** or other Relief Event (with associated time extension for critical path delays plus monetary relief for delays). The Concessionaire is responsible for any other Utility Work associated with design scope changes.



Any opinions expressed in this presentation are those of the author and not of the Office of the Attorney General.

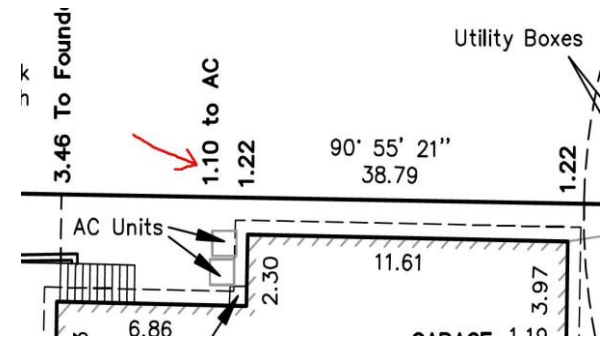


## Other Potential Risks

**Changes in utility standards** – a Utility Owner may change safety or other standards, such as setback rules, construction methodologies, and approval processes.

**Additional real estate** – scope and other changes may result in the need for the acquisition of additional real property rights.

**Betterments** – a Utility Owner may desire to upgrade the facilities to be relocated in conjunction with the design-build work, requiring additional design and impacting the construction schedule.







## Select P3 Agreement Definitions

- **Relief Event:** (1) Owner Changes and (2) any of the following events to the extent that the event materially and adversely affects performance of Concessionaire's obligations under the Contract Documents, in each case subject to the requirements, limitations and deductibles in the Agreement regarding entitlement to relief as well as the duty to prevent occurrences and to mitigate consequences of such events:....
- **Utility Information:** The information regarding Utilities included in the Contract Drawings and Engineering Data. The Utility Information includes survey information and information from record documents regarding existing Utilities potentially impacted by the Project.
- **Delay Costs:** Indirect costs incurred by the Concessionaire due to a delay, including extended overhead, unabsorbed home office overhead, idle labor and equipment costs, additional storage costs, and labor and material cost escalation, but excluding costs relating to the Project Debt.



## Select P3 Agreement Definitions (continued)

- **Revenue Service Availability Deadline:** 2,125 days following the date on the which Financial Close occurs, unless (a) Owner issues an agreed limited NTP [Notice to Proceed] (b) Financial Close occurs prior to June 6, 2016, in which case the RSA Deadline is March 11, 2022, a such deadline may be extended from time to time under the Agreement.
- **Critical Path:** Each path shown on the Baseline Schedule for which there is zero Float.
- **Incremental Costs:** Those costs, if any, which Concessionaire incurs that are directly attributable to a particular circumstance and which Concessionaire would not have incurred but for the circumstance. In determining such costs, one would determine the total cost which the Concessionaire would have incurred (including, reasonable mitigation costs).
- **Utility Work:** The design and construction necessary for a Utility Adjustment. Any Utility Work furnished or performed by Concessionaire is part of the D&C Work; any Utility Work furnished or performed by a Utility Owner is not part of the D&C Work.





## Select P3 Agreement Definitions (continued)

- **Owner [MDOT MTA] Change:** (a) A change in the Work (including changes in the standards applicable to the Work) that Owner has directed Concessionaire to perform...(b) any suspension of Work order issued (or deemed issued) by Owner for its convenience...(c) changes in the Work directly attributable to changes in the requirements of any Owner-Provided Approvals after the Proposal Date...(d) any modification to the terms and conditions of any Third Party Agreement or Utility Agreement approved by Owner in writing after the Setting Date that has a material impact on Concessionaire’s obligations under the Contract Documents during the Design-Build period; (e) any material modification in the Project design or requirement to perform Extra Work directly attributable to (i) Owner’s failure to perform or observe any of its material covenants or obligations under this Agreement or the Contract Documents or to comply with Law or Governmental Approvals or (ii) other projects undertaken by Owner within the Project ROW during the Design-Build Period that are not identified in the Contract Documents; and (f) any other change in the Work that the Contract Documents expressly state shall be treated as an “Owner Change”.
  
- **Other Defined Terms** in this presentation have the meanings ascribed in the P3 Agreement.



# Contact and References

## T. Byron Smith

Assistant Attorney General  
Office of the Attorney General  
Maryland Transit Administration  
Office (direct): 410-767-5833  
Email: bsmith10@mta.maryland.gov



## Links to:

Maryland Purple Line P3 Agreement: <http://www.purplelinemd.com/en/p3>  
Maryland P3 Statute: [http://mgaleg.maryland.gov/2013RS/Chapters\\_noln/CH\\_5\\_nb0560e.pdf](http://mgaleg.maryland.gov/2013RS/Chapters_noln/CH_5_nb0560e.pdf)  
MDOT P3 Regulations: <http://mdrules.elaws.us/comar/11.01.17>

