

## Testimony on Toll Lane P3 Contract

Benjamin Ross

June 29, 2021

The toll lane P3 contract that is before you awards Transurban rights to a toll lane concession in two states, extending from the George Washington Parkway in Virginia along the Beltway and I-270 to I-70 in Frederick, Maryland.

According to the *Washington Post*, and consistent with numerous statements by Transurban to investors, Transurban already had the rights to the Virginia portion of this project before Maryland began its procurement. Yet Maryland held a competition for the entire concession, including the portion in Virginia. A complete explanation of this apparent inconsistency and other discrepancies in the public record is required before the Board of Public Works approves this contract. This must include full public release of all relevant documents and agreements.

On January 29, 2019, Virginia and Transurban amended the contract that governs Transurban's toll lanes on the Virginia Beltway, granting Transurban the right to extend their toll lanes northward. The text of the amendment was kept entirely secret until a heavily redacted version was released this month under FOIA.

After flying to Australia and meeting with Transurban's CEO Scott Charlton, Governor Hogan reached a handshake agreement with Virginia Governor Ralph Northam. The two governors agreed that Maryland and Virginia would, as partners, rebuild the American Legion Bridge and adjoining sections of the Beltway in both states.

This agreement, called the "Capital Beltway Accord," was announced on Nov. 12, 2019. But it was not put in writing.



It would be irresponsible to award control of crucial Maryland transportation infrastructure to a private company without assurance to the General Assembly and the public that the award resulted from fair and open competition.

## 1. Transurban's statements about the Capital Beltway Accord

In early 2020, before the Maryland procurement had begun, Transurban's website and investor communications reveal an understanding that they were assured of winning the entire contract to build toll lanes over the American Legion Bridge. Later in the year, these statements were altered, but they continued to assert that Transurban had won the Virginia portion of the project.

Shortly after the Capital Beltway Accord was announced, a description was added to Transurban's website. The web page from January 24, 2020, is preserved in the Internet Archive. It presents the Accord as a Transurban project "in partnership with the Virginia and Maryland governments" which consists of toll lanes in both directions from the George Washington Parkway in Virginia to River Road in Maryland.

### Capital Beltway Accord Project

Transurban in partnership with the Virginia and Maryland Governments are progressing a project that will extend the 495 Express Lanes in Virginia by approximately 4.8 kilometres (3 miles) north across the Potomac River and into Maryland.

The Capital Beltway Accord project includes the replacement of the existing four general purpose lanes in each direction and the addition of two new Express Lanes in each direction from the George Washington Memorial Parkway in Virginia and to the vicinity of River Road in Maryland.



*Text (emphasis added) and map detail on Transurban website from Jan. 24, 2020 through Aug. 14, 2020.*

On February 10, 2020, Transurban issued its semi-annual financial report. On that day's investor conference call, CEO Scott Charlton described the Capital Beltway Accord as "the express lanes crossing the American Legion Bridge and proceeding into Maryland." He stated that "Transurban would be the developer of that project with the two governments." When later asked specifically whether Transurban had exclusive rights to the project and would not have to compete, Charlton responded "Yes, yes, we're working in partnership with the Maryland government and Virginian [*sic*] government to deliver that."

Later in the call, Charlton supplemented his earlier remarks. "So just one clarification,..." he said, "...even though we're extending into the Maryland side, we're working with Virginia on that. And then Maryland is delivering their side. But it's all part of the Capital Beltway accord." This "clarification" does not directly contradict what Charlton had said earlier.

The web page remained unaltered through August 14, 2020, when it was saved on the Internet Archive. By the next time the web page was saved on the Internet Archive, September 28, 2020, Transurban had deleted the words "and Maryland."

On September 16, 2020, Transurban issued a prospectus for a \$10 billion secured Euro medium term note program. This document is [publicly available](#) on the website of the Singapore Stock Exchange.

*Capital Beltway Accord*

On November 12, 2019 we announced that, in partnership with the Virginia Government, we are progressing a project to extend the 495 Express Lanes by approximately 2.6 miles (4.2 km) north across the Potomac River and into Maryland. The project involves upgrading four general purpose lanes in both directions and replacing and upgrading the ageing American Legion Bridge to add two express lanes, alleviating traffic on the Capital Beltway. We will work to deliver Virginia's project components as part of the bi-state effort. The project will advance as part of phase one of Maryland's Traffic Relief Plan currently in procurement that will see HOT lanes added on I-495 from the George Washington Memorial Parkway in Virginia to I-270 (including the Capital Beltway Accord) and I-270 from I-495 to I-70 in Maryland. See also “—Toll roads—North American assets—Greater Washington Area Network—495 Express Lanes—495 Express Lanes developments”.

*Excerpt from prospectus; highlighting added.*

In regard to the Capital Beltway Accord, the prospectus states on page 154 that:

“...in partnership with the Virginia Government, we are progressing a project to extend the 495 Express Lanes by approximately 2.6 miles (4.2 km) north across the Potomac River and into Maryland.... We will work to deliver Virginia's project components as part of the bi-state effort. The project will advance as part of phase one of Maryland's Traffic Relief Plan currently in procurement...”

## **2. The terms of the Virginia contract amendment**

The January 29, 2019 amendment to the contract governing Transurban's Virginia Beltway toll lanes appears to have been a quid pro quo for Transurban accommodations to Virginia on I-95. As the *Washington Post* [reported](#) at the time, Virginia officials were under heavy pressure to add a southbound free lane to I-95 south of the Occoquan River, an area of severe congestion. A clause in the contract for Transurban's I-95 toll lanes requires the state to compensate the company for lost toll revenues when the free lanes are expanded. (Virginia DOT took the position that no compensation was required for the Occoquan project, but statements by Virginia legislators to the *Post* indicate that Transurban had a strong case.) According to the *Post* report, Virginia agreed to the contract amendment in exchange for Transurban's waiver of the non-compete clause.

The text of the contract amendment was kept entirely secret from the public for two and a half years. On June 4, 2021, USDOT released [a heavily redacted copy](#) of it under the Freedom of Information Act.

**2.1 The *Washington Post* reported that the contract amendment governs Virginia’s participation in the Capital Beltway Accord, and Transurban’s statements are consistent with that report.**

The *Washington Post* [reported](#) when the contract amendment was signed in January 2019 that “Transurban will extend the 495 Express Lanes to the American Legion Bridge.” Transurban and Virginia then launched an effort to extend the toll lanes north to the George Washington Parkway – but not all the way to the Potomac River – known as the “495 Next” project. The section of the Beltway between the Parkway and the bridge is part of the Capital Beltway Accord.

Before and during the competition for the Maryland concession, Transurban indicated clearly in disclosures to investors that it had the rights to the Virginia portion of the Accord. Transurban’s descriptions of the Capital Beltway Accord were consistent with the *Post*’s report of the January 29, 2019 contract amendment, and they remained consistent with that *Post* report after being reworded.

The available text of the 2019 contract amendment also supports the *Post* report. Attachment A lists “Full width extension to river (Partial extension in preliminary phase)” among “Potential deferred items.” Until the full text of the contract amendment is released, the General Assembly and the public cannot be certain of what the redacted text says about the Beltway between the George Washington Parkway and the American Legion Bridge.

**2.2 Virginia funding of the Capital Beltway Accord**

The Maryland Request for Proposals stated in §1.22.2(f)(ii) of Exhibit 6 that “the Commonwealth of Virginia *may* provide funding pursuant to the Capital Beltway Accord” [emphasis added]. The word *may* implies that Virginia may also not provide such funding. The RFP provided no further explanation, and as far as I know the conditions under which the Capital Beltway Accord would provide Virginia funding to the winner of the Maryland procurement have not been revealed to the public elsewhere.

Bidders on the Maryland contract were required to demonstrate that they have the ability to finance the entirety of the new bridge and toll lanes. With the cost of building the project already fully covered by the successful bidder’s commitments to Maryland, Virginia has little reason to provide funding unless it is obligated to do so. Because of the redactions in the 2019 contract amendment, we do not know whether that agreement provides for taxpayer contributions to Transurban’s work on the Capital Beltway Accord analogous to the \$400 million that Virginia contributed to the construction of

Transurban's existing Beltway toll lanes.

The complete terms of the Capital Beltway Accord, written and unwritten, and the full text of the 2019 contract amendment must be made public so that the General Assembly and the public can determine whether Virginia funding was equally available to all bidders for the Maryland toll lane concession.

### **2.3 Ramp to the Dulles Toll Road**

Attachment A of the contract amendment reveals a two-phase plan for building Virginia's "495 Next" project. That project extends the existing Virginia Beltway toll lanes to the George Washington Parkway, where they will connect to the toll lanes that are the subject of the Capital Beltway Accord and the Maryland toll lane procurement. The second phase of 495 Next is the ramp from the toll lanes coming from Maryland to the Dulles Toll Road and an associated auxiliary lane.

The prerequisites for construction of the second phase are redacted as confidential business information. Thus the public and the Maryland General Assembly do not know how much discretion Transurban has in choosing whether or not to build the second phase.

Not building the ramp would deprive any competitor that might win the Maryland concession of a direct connection from the Maryland toll lanes to the Dulles Toll and Access Roads. Because much of the traffic over the American Legion Bridge is headed toward Reston, Herndon, and Dulles Airport, allowing Transurban to decline to build the ramp if someone else controls the toll lanes on the bridge would put other bidders competing for the Maryland contract at a great financial disadvantage.

## **3. The handshake Capital Beltway Accord**

The Capital Beltway Accord was announced on November 12, 2019. Governor Northam's [press release](#) stated that between the George Washington Parkway and River Road, Virginia would "cover" 100% of the northbound lanes and Maryland would "cover" 100% of the southbound lanes. The meaning of "cover" was not explained.

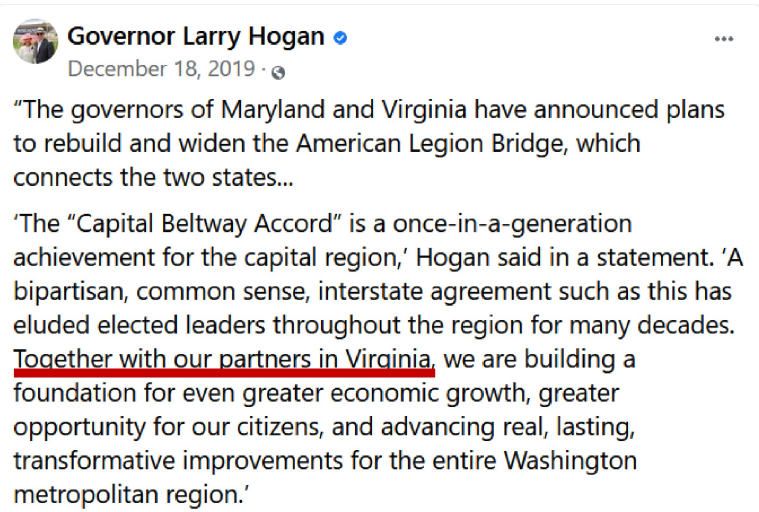
### **3.1 The Capital Beltway Accord, although unwritten, was an integral part of the Maryland procurement**

The entire Capital Beltway Accord, including both northbound and southbound lanes of the Beltway from River Road to the George Washington Parkway, is part of the

Maryland procurement. Governor Hogan said on his Facebook page that the new American Legion Bridge is to be built “together with our partners in Virginia.”

The Phase 1 P3 contract, the document now under legislative review, states in §2.1 of Exhibit 6 that “Portions of the Phase are in Maryland and portions are in Virginia.”

The Board of Public Works [agenda item](#) that revised the Pre-Solicitation Report, approved on January 8, 2020, states on page 127 that the Phase 1 P3 contract solicitation “will include the Bi-state Capital Beltway Accord partnership for the American Legion Bridge.”



The contract itself explicitly references the Capital Beltway Accord. Exhibit 6 defines the term on page A-6 and references it in §1.22.2(f)(ii). Exhibit 18, item (b), refers to “the Bistate Agreement between MDOT and VDOT.”

The RFQ, issued February 7, 2020, referenced the Accord in §5.1. It was there described as “an intention to enter into a bi-state, bipartisan accord.” The RFP, issued on December 18, 2020, again described the Accord as a mere “intention to enter into” an agreement. As far as I know, it still is not written down.

There was a handshake between the two governors on November 12, 2019. Until the public and the General Assembly are fully informed of all commitments made in the handshake agreement, it is impossible to determine whether the procurement was properly conducted.

### 3.2 Transurban’s evolving disclosures to investors

Transurban, as a publicly traded corporation in Australia, makes regular public disclosures to investors. There are semi-annual financial reports and an annual Investor Day. Each is accompanied by a slide presentation with supporting information.

On August 12, 2020, during the competition for the Maryland concession, Transurban released its annual financial report. The presentation included the Capital Beltway Accord in its “North America Market Update” and did not list it among “Potential Market Opportunities” – projects that the company could compete for but had not yet won.

Greater Washington Area

- 395 Express Lanes commenced tolling in November 2019, extending the 95 Express Lanes 13 kilometres north to the Washington D.C. border
- 495 Northern Extension project is progressing with the process to appoint a design-build team underway
- Capital Beltway Accord project announced, set to extend the 495 Express Lanes by 4.2 kilometres into Maryland
- GoToll, Transurban's first mobile product in the US launched during 2H20, providing motorists with increased options and flexibility when using toll roads in Virginia

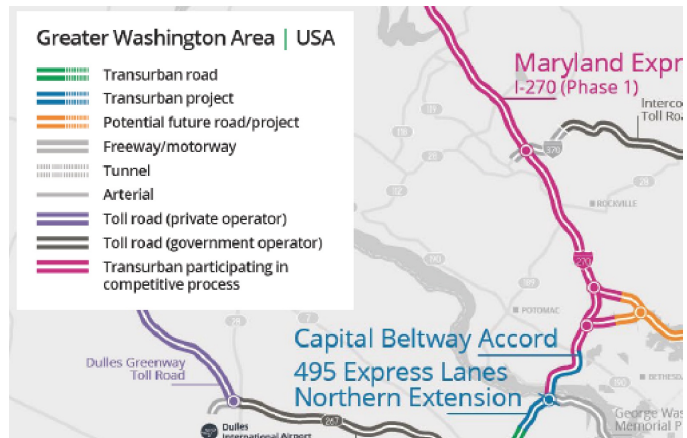
Greater Washington Area

- Design work largely completed on Fredericksburg Extension with major construction works continuing including drainage, earthworks and foundations for ramp structures
- Appointment of design-build team for 495 Express Lanes Northern Extension expected in 2H21
- GoToll mobile tolling app expanded in January to an additional 47 toll roads across North Carolina, Florida and Georgia through a partnership with the North Carolina Turnpike Authority

Transurban “Market Update.” Above: Aug. 12, 2020. Below: Feb. 11, 2021

On February 11, 2021, when the Maryland competition had concluded but the winner had not been announced, Transurban released its semi-annual financial report. The presentation text listed the Capital Beltway Accord neither in its market update nor as a market opportunity. However, the map in the presentation depicted Virginia’s part of the Accord as a “Transurban project.”

May 3, 2021 was Transurban’s Investor Day. The presentation lists the Capital Beltway Accord in its “Opportunity Pipeline” with a footnote stating that “Discussions are underway with the Virginia government to progress to a development framework agreement on the Capital Beltway Accord.”



Map detail from Feb. 11, 2021 presentation

No reason has been disclosed for the need for a new development framework agreement for the Virginia portion of the Capital Beltway Accord. Failure to fully disclose the 2019 contract amendment, in its original form before any subsequent amendments, would impede public understanding of the effect of the 2019 amendment on competition for the Maryland concession.

#### 4. Governor Hogan's trip to Australia

On April 29, 2019, Transurban's North American president Jennifer Aument [announced](#) at Transurban's Investor Day that the company did not plan to bid on the first phase of the Maryland toll lane project because "the project has a complex political and economic road ahead." At the same time, Transurban increased its spending on its Maryland lobbyist from \$12,000 per month to \$27,000 per month.

On September 22, Governor Hogan left for Australia on a "trade mission." Jennifer Aument accompanied him as a member of his official delegation.

On September 24, Governor Hogan toured a Transurban toll road construction project with Transurban CEO Scott Charlton [photo from [Governor's website](#)]. The governor also attended a [Transurban Reception](#) that evening.

On September 30, Governor Hogan [visited Melbourne](#), the location of Transurban's headquarters. The stated purpose of this phase of the trip was "to meet with Australian companies to discuss opportunities for economic partnerships."



No such meetings between the governor and the other two bidders are known to me.

The Capital Beltway Accord was announced on November 12. On November 22, MDOT submitted to the Board of Public Works an amendment to the Pre-Solicitation Report that combined the American Legion Bridge and I-270 into a single procurement.

On December 9, Jennifer Aument [told](#) *Maryland Matters* that Transurban now wanted to bid on the first segment of Maryland toll lanes because "the state's political leaders have recently demonstrated a welcome flexibility."

On January 8, 2020, the BPW approved this change and designated the combined procurement as the first phase of the Beltway-270 toll lane P3.



Combining the Capital Beltway Accord and I-270 in a single procurement leveraged any advantages that Transurban may have gained from its agreement with Virginia to help Transurban win the I-270 concession. The combined procurement is the only part of the larger Maryland P3 project that is scheduled to be put out to bid during the current gubernatorial term or for years afterward.

## **5. Change in role**

On January 10, 2020, Governor Hogan's Director of Intergovernmental Relations, Amanda Allen, left state employment to become Transurban's Maryland Government Affairs Manager. In her state position, Allen had been involved in liaison between the Governor's office and the U.S. Dept. of Transportation.

This was two days after the Board of Public Works approved the PSR amendment that combined the American Legion Bridge and I-270 into a single procurement. On January 24, 2020, Allen registered with the Maryland Ethics Commission as a lobbyist for Transurban.

This change in roles again suggests the importance of full transparency in the relationship between Maryland and Transurban.

## **6. Unusual features of the procurement**

### **6.1 Short time frame for proposal submission**

The final RFP was issued to the bidders late in the day of Friday, December 18, 2020. Technical proposals were due just five days later at 2:00 pm on Wednesday, December 23. This is an extremely short time to write any technical proposal, especially one of such magnitude.

The short time frame, especially as it came during the holiday season, made it extremely difficult for bidders to substantially alter their proposals in response to the final text of the RFP. MDOT has not revealed to the public whether any changes were made between the draft RFP, which was given to the bidders in July 2020 but never made public, and the final RFP. It has also not revealed the extent to which any such changes were disclosed to the bidders during the so-called "innovative dialogue process," which consisted of separate confidential meetings between MDOT and each of the bidders.

## 6.2 **The Transurban proposal lacked a construction contractor**

According to the Request for Qualifications and Request for Proposals, the qualifications and costs of each team's lead construction contractor were to be a core consideration in the evaluation of proposals. In the Transurban team's May 2020 response to the RFQ, the lead contractor was Archer-Western, a large construction firm.

In October, during the period of individual private meetings with MDOT (the "innovative dialogue process") Transurban informed MDOT that it wanted to drop Archer-Western from its team. (See the MDOT contracting officer's [rejection](#) of the Cintra protest, p. 12.) It proposed to list itself and its investment partner Macquarie, neither of which is a construction company, as lead construction contractors. MDOT approved this substitution in November. The other bidders were not informed of this by MDOT until January 8, after they had submitted their technical and financial proposals.

The Transurban proposal relied on the construction contract terms stated in its financial proposal. But with no construction firm on Transurban's team, there could be no guarantee that any capable builder would agree to the terms in Transurban's proposal.

The MDOT proposal evaluation team rated Cintra's technical proposal somewhat superior to Transurban's, but awarded the contract to Transurban on the basis of a better financial proposal.

Full disclosure of all relevant facts is required so that the General Assembly and the public can be assured that there was no impropriety in the solicitation of bidding teams or the award of the contract. The disclosure must include the draft RFP, the redacted portions of the Virginia contract amendment, details of any Virginia funding, and all communications between MDOT and the bidders during the "innovative dialogue process" that relate to Virginia funding.

## 6.3 **Lack of remedies for unresolved disputes between Transurban as 495 Next concessionaire and the winner of the Maryland contract**

The contract text in the RFP, in §§11 and 25, has many provisions covering remedies for failure to resolve various disputes that might arise among the many organizations involved in building toll lanes. But it says nothing about disputes between the Maryland concessionaire building toll lanes over the American Legion Bridge to the George Washington Parkway and the Virginia concessionaire building 495 Next.

In such a large and complex project, differences of opinion among the participants

are inevitable. The placement of on- and off-ramps can shift large amounts of toll revenue. Trucks are banned on toll lanes in Virginia and allowed in Maryland, and the two states have different tolling regimes. Transurban's proposal repeatedly touts their ability to "Leverage our common ownership with I-495 NEXT" as a major advantage of their proposal. (Quotation from pdf page 733 of the contract attachments.)

The absence from the RFP of any remedy for unresolved disputes between the two concessionaires is hard to understand.

#### 6.4 **Cintra protest**

Cintra, one of the two losing bidders, has protested the contract award to Transurban. Cintra's protest, to the extent that it has been made public, alleges additional discrepancies that must be resolved with full transparency before any contract award is approved.