

TRANSPORTATION – PUBLIC-PRIVATE AGREEMENTS

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House Bill 4961

Sponsor: Rep. Lee Gonzales

Committee: Transportation

Complete to 8-28-09

A REVISED SUMMARY OF HOUSE BILL 4961 AS INTRODUCED 5-19-09

Public Act 286 of 1964 provides for the organization, powers, and duties of the State Transportation Commission and the State Transportation Department, and provides for the appointment, powers and duties of the State Transportation Director. Public Act 286 was initially enacted shortly after the adoption of the 1963 Michigan Constitution to reflect the provisions of Article V, Section 28 of the Constitution regarding the State *Highway* Commission, the State *Highway* Director, and the State *Highway* Department. Public Act 286 was amended in 1978 to reflect a 1978 amendment to the Constitution (Proposal M) that abolished the State Highway Commission, established the State *Transportation* Commission, and redefined the powers and duties of the Commission, the State *Transportation* Director, and the State *Transportation* Department.

House Bill 4961 would amend Public Act 286 of 1964 to provide for *public-private transportation facilities* and to authorize *public-private agreements* related to "*researching, planning, studying, designing, developing, financing, acquiring, constructing, tolling, operating, or maintaining a public-private transportation facility, or any combination of those activities...*" The bill is specific to the Michigan Department of Transportation.

The bill also makes some technical or stylistic changes to the act, particularly in Section 10 of the act.

The bill appears to reflect the recommendations of the Transportation Funding Task Force (TF2), regarding public-private partnerships.¹

¹ The TF2 was a committee established in Public Act 221 of 2007. The TF2 was directed to "*review the adequacy of surface transportation and aeronautics service provision and finance*" [in Michigan]. Public Act 221 required the Task Force to report on "*identified capital and maintenance needs, transportation investment and maintenance priorities, funding for state trunk line roads and bridges, local road agencies, and public transit agencies, relative use of transportation systems, responsibilities for the identified needs including alternative transportation funding options, historical transportation financing patterns as they relate to total statewide fiscal resources, and strategies for maximizing the returns on transportation investments, review strategies for maximizing return on transportation investment, and evaluate the potential of alternative strategies to replace or supplement transportation taxes and fees.*" The TF2 report was issued November 10, 2008. A copy of the full report is available on the Michigan Department of Transportation website at http://www.michigan.gov/mdot/0,1607,7-151-9623_31969-202856--,00.html

Note that while Public Private Partnership (PPP) is a commonly used term, the bill, with the exception of a single reference in Section 7f, subsection (4), refers to public-private *agreements*.

The term PPP can be used to describe a number of procurement methods in which a private entity assumes a larger role in the planning, financing, design, construction, operation, and maintenance of a transportation facility as compared to traditional procurement methods. The department already has authority to use certain PPP procurements methods, including design-build and design-build-finance type contracts. Of the various PPP procurement methods, the department appears to lack only the statutory authority to enter into a long-term lease using a pledge of toll revenues or certain kinds of design-build-finance contracts involving the pledge of toll revenues. A department presentation on PPPs indicated that "enabling legislation [is] required to move to broader concession-type leases."

A number of sections that would be added by the bill deal with long-term lease agreements and related toll-financing arrangements.

The bill would amend five sections currently in the act: Sections 1, 6a, 7, 7a, and 10. The bill would also add six new sections: Sections 7b, 7c, 7d, 7e, 7f, and 7g. The new sections contain provisions specific to public-private agreements. A number of the provisions mirror model or sample provisions described in the publication: *Overview of Key Elements and Sample Provisions, State PPP Enabling Legislation for Highway Projects*, published October 2005. The publication was developed by Nossaman Guthner Knox & Elliott LLP, an Arlington, Virginia law firm. The document, which includes a discussion of the rationale for the model provisions, is available on a Federal Highway Administration (FHWA) website:

http://www.fhwa.dot.gov/PPP/tools_state_legis_statues.htm

BACKGROUND INFORMATION:

Background on Public Private Partnerships Generally

Public Private Partnerships (PPPs) are broadly defined as "contractual agreements formed between a public agency and a private sector entity that allow for greater private sector participation in the delivery and financing of transportation projects." This definition, and additional information on PPPs, can be found on an FHWA website: <http://www.fhwa.dot.gov/PPP/index.htm>

The FHWA document contrasts PPPs with traditional procurement practices:

"Traditionally, private sector participation has been limited to separate planning, design or construction contracts on a fee for service basis – based on the public agency's specifications." The website further notes that the term public-private partnership is applicable to *"any scenario under which the private sector assumes a greater role in the planning, financing, design, construction, operation, and maintenance of a transportation facility compared to traditional procurement methods."*

The FHWA website identifies several PPP options for the construction or reconstruction of transportation facilities.²

Design-Build – a project delivery method that combines two, usually separate services into a single contract. With design-build procurements, owners execute a single, fixed-fee contract for both architectural/engineering services and construction. The design-build entity may be a single firm, a consortium, joint venture, or other organization assembled for a particular project.³

Design-Build-Operate (Maintain) – an integrated partnership that combines the design and construction responsibilities of design-build procurements with operations and maintenance. These project components are procured from the private sector in a single contract with financing secured by the public sector.

Design-Build-Finance-Operate (DBFO) – a procurement method in which the responsibilities for designing, building, financing and operating are bundled together and transferred to private sector partners. One commonality that cuts across all DBFO projects is that they are either partly or wholly financed by debt leveraging revenue streams dedicated to the project. Direct user fees (tolls) are the most common revenue source. However, others range from lease payments to shadow tolls and vehicle registration fees. Future revenues are leveraged to issue bonds or other debt that provide funds for capital and project development costs. They are also often supplemented by public sector grants in the form of money or contributions in kind, such as right-of-way. In certain cases, private partners may be required to make equity investments as well.⁴

² The descriptions of types of PPPs on pages 3 and 4 were taken from the FHWA PPP website, with minor changes by the HFA analyst to improve readability.

³ The Minnesota Department of Transportation used a design-build procurement for the replacement of the I-35W Bridge over the Mississippi River in Minneapolis. For a description of this project, see "Minneapolis Speedway" from the March 2009 issue of Governing Magazine. <http://www.governing.com/article/minneapolis-speedway>

⁴ The Confederation Bridge linking Prince Edward Island and New Brunswick Canada was constructed using a DBFO procurement. See http://en.wikipedia.org/wiki/Confederation_Bridge

In addition to the above examples which are primarily associated with the construction or reconstruction activity, PPPs can also involve the transfer of operating and maintenance functions of an existing facility to a contractor. The FHWA website discusses two such PPPs:

Operations and Maintenance Concessions – in which public operating agencies utilize operations and maintenance (O&M) concessions to transfer responsibility for asset operation and management to the private sector. Contractors can be paid either on a fixed fee basis or on an incentive basis, where they receive premiums for meeting specified service levels or performance targets.

Operations and maintenance concessions may be used as a means to transfer responsibilities for a single highway facility or a series of facilities. These contracts transfer responsibility for ongoing activities such as snow removal and grass mowing, as well as maintenance and major repairs.

Long-Term Lease – This PPP model involves the long term lease of existing, publicly-financed toll facilities to a private sector concessionaire for a prescribed concession period during which the concessionaire has the right to collect tolls on the facility. In exchange, the private partner must operate and maintain the facility and in some cases make improvements to it. The private partner must also pay an upfront concession fee.⁵

Transfer of Risk

All PPPs share a common feature: As compared to traditional procurement methods all PPPs transfer risk from the public owner of a transportation facility to the contractor. For the construction or reconstruction of a transportation facility using traditional procurement methods, the owner determines what needs to be done, and then develops design plans and project specifications which largely define how the project is to be accomplished. The owner awards a contract to the lowest qualified bidder. To the extent that the contractor completes the project according to the design plans and specifications, the contractor's liability is generally limited; the contractor's *contract* liability is generally limited to materials and workmanship.

In a traditional construction procurement (sometimes described as design-bid-build), the contractor is not liable for design errors made by the owner. In a design-build contract, risks of design error are transferred, at least in part, to the contractor. In PPP contracts involving private financing or leveraged financing using tolling, additional financial risks are transferred to the contractor.

⁵ Two widely publicized PPP contracts involved the long-term lease of public facilities to private concessionaires in return for concession fee payments. The first was the October 2004 agreement between the city of Chicago and the Skyway Concession Company (SCC) involving a 99-year lease of the 7.8 mile Chicago Skyway. The SCC made an upfront concession payment to the city of \$1.83 billion. The SCC took responsibility for all operating and maintenance costs of the facility in exchange for the right to all toll and concession revenue over the life of the lease. A 2006 contract between the state of Indiana and a private investment group involved a 75- year lease of the 167 mile Indiana Tollway. The contract included a concession fee payment to the state of \$3.85 billion. A more detailed discussion of these agreements is found on the FHWA website: http://www.fhwa.dot.gov/PPP/case_studies.htm

Background Related to TF2 Report

The TF2 report made two recommendations related to PPPs. These recommendations were focused on long-term lease agreements and related toll-financing arrangements:

From the TF2 Final Report:

ALTERNATIVE: Enable Public-Private Partnerships (P3s) for toll-financed reconstruction, expansion or new construction of freeways or other transportation systems. Major projects may be procured from consortia of private firms who finance, design, build, operate, and maintain the roads or transit systems for decades into the future. Tolls and fares might cover much or all of life-cycle costs now paid for from user fees and taxes, and private debt or equity might replace public funds. Enabling P3s could preclude the need for several billion dollars worth of expenditure from MDOT's user fee funded program. A new act would be needed to establish clear authority for procurement through agreement with public-private partners. This would be in addition to the amendment needed to enable tolls.

ALTERNATIVE: Enable toll-financed reconstruction, expansion, or new construction of freeways. Michigan needs to reconstruct aging urban freeways and add lanes to commuter and intercity routes. This will require multiple projects costing over \$1 billion each. The possibility of paying for these projects with existing revenues does not exist. Conversion of some freeway segments to toll roads can make these projects affordable by dedicating a stream of user fees to the roads on which the fees are collected. The additional option of dynamic pricing can price traffic jams out of existence by offering discounted travel in offpeak hours. Toll finance requires an amendment to Michigan highway law enabling MDOT to collect tolls, and to Act 51 crediting tolls to a fund for roads. Amendments to the Vehicle Code enforcing tolls are also needed.

CONTENT OF THE BILL:

Definitions:

The bill would amend Section 1 of the act to add the following definitions:

"Instrumentality of government" would mean a legal public entity created or empowered to carry out functions commonly carried out by units of government.

"Operator" would mean a private entity that has entered into a public-private agreement under Section 7b.

"Private entity" would mean any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other nongovernmental business entity.

"Public-private agreement" would mean an agreement between a private entity and the department or the department and 1 or more governmental entities that relates to researching, planning, studying, designing, developing, financing, acquiring, constructing, tolling, operating, or maintaining a transportation facility, or any combination of those activities.

"Transportation facility" would mean any new or existing highway, road, bridge, tunnel, overpass, ramp, interchange, ferry, airport, vehicle parking facility, vehicle transportation

facility, port facility, locks facility, rail facility, intermodal or other public transit facility, or any other equipment, rolling stock, site, or facility used in the transportation of persons, goods, substances, vehicles, information, or matter of any kind, and any building, structure, parking area, appurtenance, or other property necessary or desirable for the facility.

Authority of the Department Director

The bill would amend Section 6a of the act which currently provides for the powers and duties of the director of the state Department of Transportation, subject to the provisions of Article V, Section 28 of the 1963 Constitution.

- The act currently provides for the director to supervise the work of department employees; the bill would add the words "**and agents.**"
- The act currently indicates that the director may employ personnel necessary to carry out the duties of the director and the responsibilities of the department "subject to laws governing state employment." The bill would append the words "**and contracts**" –apparently to mean that the employment of personnel is subject to both laws and contract terms.
- The act currently allows the director, subject to commission approval, to delegate powers. The bill would not allow the director to delegate the power to enter into public-private agreements.
- The act currently provides for the director to establish a program of current and long-range planning for the *transportation systems* under the department's jurisdiction. The bill would add "**transportation facilities**" to the planning requirement.
- The act currently authorizes the director to purchase "materials, supplies, and equipment as necessary and proper to carry out the duties of the department..." The bill would amend the subsection to include the purchase of "**services.**"
- The bill would allow the director to enter into public-private agreements with the approval of the commission.

State Transportation Commission Powers and Duties

The bill would amend Section 7 of the act which currently provides for the powers and duties of the state transportation commission, subject to the provisions of Article V, Section 28 of the 1963 Constitution.

The bill would add to the powers and duties of the state transportation commission the "approval or disapproval of public-private agreements entered into by the department." The bill would prohibit the director from delegating the authority to enter into public-private agreements.

Provisions Regarding Construction Contracts

Section 7a of the act currently provides for periodic partial payment to construction contractors and authorizes the department to establish specifications regarding the retainage of a portion of the amount earned under construction contracts. The bill would amend this section to indicate that the definition of "construction contract" does not include public-private agreements.

[Note: This amendment would appear to exclude public-private agreements from the partial payment and retainage provisions of Section 7a. However, the broad definition of "public-private agreement" would appear to encompass all contracts concurrently considered "construction contracts." In effect, as defined by the bill, all department construction contracts would be considered "public-private agreements" and public-private agreements would not be "construction contracts" as defined by Section 7a.]

In defining the word "project" in this same section, the act currently contains what appears to be a stylistic solecism: "*Project* means the specific section 9 [sic] of the highway construction to be performed under the construction contract." The bill would amend this sentence to read: "*Project* means the portion of a transportation facility to be performed under the construction contract." The original and amended language are similarly inscrutable.

Provisions Regarding Public-Private Agreements

The bill adds a new section, Section 7b, which would allow the department to enter into a public-private agreement with a private entity, or a private entity and one or more instrumentality of government, to provide to the "researching, planning, studying, designing, developing, financing, acquiring, constructing, tolling, operating, or maintaining a public-private transportation facility, or any combination of those activities."

The new section is broadly permissive; the section requires that the agreement include terms designed to protect the public interest and assure accountability of an operator to the department, and permits the inclusion of terms and conditions that the department may determine or negotiate to facilitate authorized activities in the public interest.

Subsections 7b(2) through 7b(9) of the bill require or authorize specific provisions in public-private agreements, as described further below:

Terms of Use of Transportation Facilities

The bill would require that a public-private agreement provide for the "term of use and operation of the transportation facility by an operator for a period determined necessary for the economic viability of the arrangement."

The bill would allow the agreement for an initial term and one or more optional terms.

The bill would require that the agreement provide that the ownership of a transportation facility within this state shall be vested in an instrumentality of government and that title to the transportation facility shall not be encumbered.

The bill would prohibit a public-private agreement from depriving the public of the use and benefit of a transportation facility except as necessary to implement tolls or other charges authorized by the section, or to regulate the level or character of permissible uses of the transportation facility.

The bill would require that a public-private agreement provide for the termination of the agreement.

Tolling

The bill would permit a public-private agreement to provide for the charging and collection of reasonable tolls and other charges for the use of a transportation facility, including, but not limited to, tolls for managed lanes or congestion-pricing-based tolls.

The bill indicates that a toll may be imposed on a highway "only if imposed for the use of new highways, or the use of expanded highway capacity beyond highway capacity in place on the effective date of the amendatory act that added this section." The bill also states that "nothing in this section shall be construed to allow the conversion of any nontoll or nonuser-fee lanes existing on the effective date of the amendatory act that added this section into tolled or user-fee lanes with the exception of a high-occupancy vehicle lane that may be operated as a high-occupancy toll lane for vehicles not otherwise meeting the requirements for use of that lane."

The bill indicates that tolls and other charges imposed for the use of a transportation facility are not subject to regulation by any other governmental agency.

Use of Tolls and Other Charges

The bill indicates that compensation paid to the department in connection with a public-private agreement, and tolls and charges imposed for use of a transportation facility, may be used for the costs of researching, planning, studying, designing, developing, financing, acquiring, constructing, tolling, governing, operating, or maintaining the facility, or other transportation facilities, including the repayment of bonds sold for those purposes. The bill also authorizes, as provided by the terms of a public-private agreement, the allotment of a portion of the revenue to the operator.

Department Oversight of Operator

The bill would require the department, in accordance with the terms of a public-private agreement, to oversee the activities of an operator carrying out the terms of a public-private agreement. The bill would authorize a public-private agreement to provide for the use of arbitration, mediation, or other alternative dispute resolution mechanism for the resolution of disputes between the department and an operator.

Immunity

The bill would allow a public-private agreement to provide that an operator, when performing functions on behalf of the department or other instrumentality of government under the agreement, be "cloaked with the same immunity from tort liability as the department or instrumentality of government."

The bill also authorizes a public-private agreement to provide for the department or other instrumentality of government to be relieved of any liability for the acts or omissions of the operator or other party to the agreement.

Use of Transportation Facility for Commercial Activities

The bill would allow a public-private agreement to permit the conduct of commercial activities at a transportation facility if the activities are related to the transportation purposes of the facility and to the extent not restricted by applicable law.

Letter of Credit

The bill indicates that "The construction and operation of a transportation facility authorized by this section shall be in conformity with all laws applicable to a transportation facility constructed or operated by this state under direct contract with the department using state or federal funds."

The bill also permits a public-private agreement to authorize an operator or a contractor for a transportation facility authorized by a public-private agreement to provide a letter of credit in lieu of a payment or performance bond.

General Authority

The bill permits the department to make and enter into all contracts and agreements and take any other action necessary or incidental to the performance of its duties and the execution of its powers under the act and a public-private agreement.

Provisions Regarding the Selection of Public-Private Agreement Contractors

The bill adds a new section, Section 7c, regarding the selection of public-private agreement contractors:

General Authority

The bill would allow the department to solicit proposals or receive unsolicited proposals for a public-private agreement, and to charge and use fees to offset the administrative costs of receiving and evaluating proposals.

Reimbursement of Cost of Proposals

The bill indicates that prior to receiving a submission, the department may agree to reimburse a private entity for designated costs incurred in the preparation and presentation of a proposal in return for the right to use any work product contained in the proposal, including, but not limited to, the technologies, methods, processes, and information contained in the material submitted in connection with the proposal.

Unsolicited Proposals

The bill would grant to the department sole discretion as to whether, and to what extent, to consider an unsolicited proposal. The bill requires the department to solicit competing proposals, using the criteria in subsection (4), before entering into an public-private agreement for a transportation facility proposed by an unsolicited proposal.

Procurement Methods

In soliciting or selecting a private entity with which to enter into a public-private agreement, the bill authorizes the department to use 1 or more of the following procurement approaches:

Sealed bidding.

Selection of proposals, with or without negotiations, based on qualifications, development proposals, technical proposals, financial proposals, best value, or any combination of them.

Any competitive selection process that the department determines to be appropriate or reasonable.

The bill would require the department to select a private entity or entities for participation in a public-private agreement "using a competitive selection process when [sic] to the extent practicable."

Optional Selection Criteria

The bill authorizes the department to consider 1 or more of the following factors in evaluating and selecting a bid or proposal to enter into a public-private agreement with a private entity:

The ability of the transportation facility to improve safety or operations, reduce congestion, reduce travel times, increase capacity, enhance environmental quality, promote economic development, or any combination of those or similar factors.

The proposed cost of and financial plan for the transportation facility.

The general reputation, qualifications, industry experience, and financial capacity of the private entity.

The proposed design, operation, and feasibility of the transportation facility.

Comments from affected residents and instrumentalities of government.

Benefits to the public.

The safety record of the private entity.

Ability to increase federal or other nonstate revenue to this state.

Any other criteria that the department considers necessary or appropriate in the best interests of this state or the people of this state.

Multiple Entities

The bill also authorizes the department to select multiple private entities with which to enter into public-private agreements for a transportation facility if it is determined by the department to be in the public interest to do so.

Confidentiality

The bill allows the department to promise to keep trade secrets or proprietary commercial or financial information provided by a private entity confidential only for purposes of seeking or entering into a public-private agreement. The bill indicates that upon receipt of a sufficiently detailed request by a private entity, the department must provide a description of the information to which its promise of confidentiality will extend. The bill exempts information submitted under a promise of confidentiality from disclosure under the Freedom of Information Act.

The bill indicates that submission of a solicited or unsolicited proposal constitutes consent for the department to use the information and ideas provided by a private entity for a transportation facility or for purposes of seeking or entering into a public-private agreement, including to solicit competing proposals unless the department agrees otherwise in a writing executed by the department before the submission.

The bill indicates that "No action shall lie against the department for its use of ideas and information provided by a private entity for purposes of seeking or entering into a public-private agreement."

Provisions Regarding Taxation, Scope of Agreements, and Disposition of Revenues

The bill adds a new section, Section 7d, which adds provisions regarding public-private agreements, including provisions dealing with ad valorem property taxes, motor fuel taxes, authority to establish and set the scope of agreements, and disposition of revenue.

Not Subject to Ad Valorem Property Taxes

The bill indicates that, "whether used by the department, another instrumentality of government, or a private entity under a public-private agreement, a transportation facility, including, but not limited to, tangible personal property used exclusively with a transportation facility, that is owned by the department or another instrumentality of government is exempt from all ad valorem property taxes and all assessments levied against property by the state or any political subdivision of the state."

Subject to Motor Fuel Taxes

The bill indicates that a person using motor fuel within the limits of a transportation facility authorized by a public-private agreement is not exempt from or eligible for a refund of a motor fuel tax imposed by this state or a political subdivision of this state.

Authority to Establish and Determine the Scope of Public-Private Agreements

The bill indicates that subject to approval from the commission and compliance with applicable federal laws, the department has exclusive authority to determine where and whether to establish a transportation facility authorized by a public-private agreement and the scope and nature of the facility.

Disposition of Revenue

The bill indicates that revenue attributable to a transportation facility authorized by a public-private agreement that is payable to the department shall be deposited in the State Trunkline Fund, the Comprehensive Transportation Fund, or the State Aeronautics Fund, as indicated by the nature of the transportation facility and provided in the public-private agreement.

Provisions Regarding Bonding

The bill adds a new section, Section 7e, which adds provisions regarding the department's authority to issue bonds or notes to facilitate a public-private agreement.

Authority to Issue Bonds

The bill authorizes the department to issue and sell bonds or notes for the purpose of providing funds to carry out the provisions of this act with respect to the development, acquisition, construction, financing, maintenance, or operation of a transportation facility

provided for by a public-private agreement or the refunding of any bonds or notes, together with any costs associated with the transaction.

Not Full Faith and Credit Bonds

The bill indicates that any bond or note issued under subsection (1) is not a pledge of the faith and credit or indebtedness of this state or any political subdivision of this state.

Source of Debt Service Payments

The bill indicates that a bond or note issued under subsection (1) is payable solely as to both principal and interest from revenues generated from use of the transportation facility authorized by the public-private agreement, the proceeds of bonds or notes sold to finance the refunding of the outstanding bonds or notes, if any, or investment earnings on the proceeds of the bonds or notes.

Use of Bond Counsel and Consultants

The bill authorizes the department to retain such services and enter into such contracts as may be necessary or useful for the issuance and sale of bonds, notes, or other financial instruments authorized under the section.

Use of Private Activity Bonds or Other Financial Instruments

The bill indicates that for the purpose of financing a transportation facility, the department, another instrumentality of government, or the operator may apply for, obtain, issue, and use private activity bonds or other financial instruments available under any state or federal law or program. The bill indicates that an instrumentality of government may act as a conduit issuer and transfer the proceeds of private activity bonds or similar financial instruments to an operator if authorized by a public-private agreement.

The bill indicates that private activity bonds or other financial instruments are not a pledge of the full faith and credit of the state or any political subdivision of this state and are not be a debt of this state or any political subdivision of this state.

No Limitation on Bonding from Other Sources

The bill indicates that the section does not limit a governmental entity's authority to issue bonds or other financial instruments for transportation projects under other laws or from financing a transportation facility with funds provided or raised under other laws, including, but not limited to, laws authorizing the sale of bonds.⁶

⁶ The department and local road agencies are currently authorized in 1951 PA 51 to issue bonds or notes by pledging constitutionally restricted transportation revenue. See HFA paper *State Transportation Borrowing and Debt Service* May 5, 2008.

Provisions Regarding Other Sources of Financing

The bill adds a new section, Section 7f, which adds provisions regarding the department's authority to accept other fund sources to facilitate a public-private agreement.

Federal Infrastructure Bank

The bill authorizes the department to accept from the United States or any of its agencies, including, but not limited to, a federal infrastructure bank, funds that are available to the department for carrying out a public-private agreement, whether the funds are made available by grant, loan, line of credit, loan guarantee, or other financial assistance.

Acceptance of Federal Requirements

The bill authorizes the department to assent to any federal requirements, conditions, or terms of any federal funding accepted under the section other than a pledge of the faith and credit of this state or any political subdivision of this state or another requirement, condition, or term prohibited by the 1963 Constitution..

Agreements with Federal Agencies

The bill would allow the department to enter into agreements or other arrangements with the United States or any of its agencies as may be necessary for implementing a public-private agreement.

Acceptance of Other Sources of Financing

The bill authorizes the department to accept from any source, and use for supporting a transportation facility authorized by a public-private *partnership* [sic], any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other item of value.

The bill specifically indicates that a transportation facility authorized by a public-private agreement may be financed in whole or in part by contribution of any funds or property made by any person or entity, and that the department may combine federal, state, local, and private funds to finance a transportation facility authorized by a public-private agreement.

Provisions Regarding Authority of Law Enforcement

The bill adds a new section, Section 7g, which governs jurisdictional authority of law enforcement on public-private transportation facilities.

Authority of Law Enforcement

The bill indicates law enforcement officers of the state and local units of government in which all or part of a transportation facility authorized by a public-private agreement is located have the same powers and jurisdiction within the limits of the transportation facility as they have in their respective areas of jurisdiction to enforce traffic and motor vehicle laws. The bill provides that public safety, fire, and emergency response

personnel are afforded access to a transportation facility while in the performance of an official duty without the payment of a toll or other charge.

Authority of Michigan Vehicle Code and Local Traffic Ordinances

The bill indicates that punishment for violations of traffic and motor vehicle laws within the limits of a transportation facility authorized by a public-private agreement shall be as generally prescribed by law.

Penalties for Failure to Pay a Toll

The bill indicates that a person who fails to pay a toll imposed for use of a transportation facility authorized by a public-private agreement is liable for three times the amount of the toll to account for the costs of administration and collection. The bill provides that if the required sum remains unpaid for 180 days after the person's use of the transportation facility, the department, or a private entity authorized to do so by the department, may bring a civil action against the person to collect the unpaid charges in a court having jurisdiction, and that if the civil action results in a judgment for unpaid charges, the defendant would also be required to reimburse the plaintiff for all filing fees incurred by the plaintiff plus \$500.00 in compensation for the costs of bringing the civil action.

The bill provides additional penalties for failure to pay a toll imposed for use of a transportation facility more than 3 times in a 12-month period, and further indicates that a person who owes charges, fees, and costs may be barred from using the transportation facility.

The bill contains standards for proving that a particular vehicle used a transportation facility without payment of the applicable toll, and addresses the question of whether liability falls on a motor vehicle lessee or the leased vehicle owner. The bill also allows a vehicle owner the affirmative defense that at the time a vehicle was alleged to have used the transportation facility without paying a toll, the vehicle was in the unauthorized possession of another person.

DETAILED ANALYSIS

Scope of the Bill

Definition of PPP – The bill would define public-private agreements as "an agreement between a private entity and the department or the department and 1 or more governmental entities that relates to researching, planning, studying, designing, developing, financing, acquiring, constructing, tolling, operating, or maintaining a transportation facility, or any combination of those activities." This definition would appear to encompass most of the department's current activities other than those currently carried out entirely by state forces.

The department's road and bridge capital construction/reconstruction program is currently carried out almost exclusively by private construction contractors, with total construction contract bid lettings averaging over \$860 million per year during the last ten years. Total bids awarded from state trunkline construction contracts peaked at \$1.0 billion in 2007. In addition, a substantial portion of the department's design and field engineering work is

performed by private engineering consultants under contract with the department. Over the last five years, department disbursements for personal service contracts, including engineering consultants, have averaged over \$130 million per year. The department also contracts with a number county road commissions and cities to perform maintenance of state trunkline highways. All of these contracted activities would appear to fall under the bill's definition of public-private agreement.

Current Contract Authority – The department already appears to have authority to procure some construction contract services thorough certain PPP procurement methods. One of the department's first paving design-build contracts was a 1997 contract for the rehabilitation of US-23 from Milan Road in Monroe County to Bemis Road in Washtenaw County.

The department has identified several projects which it has or intends to let as design-build contracts, including the contract for the replacement of the 9-Mile Road Bridge over I-75 in Oakland County. The department has also identified two projects which it has or intends to let as design-build-finance contracts: one for the reconstruction of I-69 in Lapeer and St Clair counties; and one for the replacement of the M-21 bridge over I-75 in Genesee County.

Of the various PPP procurement methods, the department appears to lack only the statutory authority to enter into a long-term lease using a pledge of toll revenues or certain kinds of design-build-finance contracts involving the pledge of toll revenues. A department presentation on PPPs indicated that "enabling legislation [is] required to move to broader concession-type leases."

Authority to Toll – There are currently three publicly-owned toll facilities in the state: the Mackinac Bridge, the International Bridge, and the Blue Water Bridge. Each was established under special enabling legislation that authorized the used of tolling. With the exception of those three facilities, the department does not currently have general authority to establish toll roads or bridges.

The bill would not allow the department to convert current non-tolled facilities into tolled or user-fee lanes. The bill would allow the department to impose tolls only for new facilities or for highway capacity expansion projects, including tolls for managed lanes or congestion-pricing-based tolls. Note that the bill would not grant the department general authority to establish tolled facilities. The authority to toll would only be for new facilities, or for capacity expansion, and could only be exercised through a PPP.

Specifically, the bill states that "*nothing in this section shall be construed to allow the conversion of any nontoll or nonuser-fee lanes existing on the effective date of the amendatory act that added this section into tolled or user-fee lanes with the exception of a high-occupancy vehicle lane that may be operated as a high-occupancy toll lane for vehicles not otherwise meeting the requirements for use of that lane.*"

Other Statutory Requirements

The department's current contracting authority is established and defined in several state statutes:

Public Act 286 of 1964 (which would be amended by House Bill 4961) provides for the organization, powers, and duties of the State Transportation Commission and the State Transportation Department, and provides for the appointment, powers and duties of the State Transportation Director.

Public Act 17 of 1925 provides for the construction, improvement and maintenance of state trunkline highways.

Public Act 170 of 1933 regulates the practice of taking bids and awarding contracts on public works construction.

Section 11c of Public Act 51 of 1951 requires that construction and preservation projects whose cost exceeds \$100,000 be performed by contract awarded by competitive bidding. Unless the department affirmatively finds another method to be in the public interest. The section requires the department to such findings to the state transportation commission 90 days before work is commenced and promptly in writing to the House and Senate appropriations committees.

Section 1h of Public Act 51 of 1951 requires the department to develop and implement a life-cycle cost analysis for each project for which total pavement costs exceed \$1,000,000.00 funded in whole, or in part, with state funds.

Authority of the Department Director and State Transportation Commission

The bill would add to the powers and duties of the state transportation commission the "*approval or disapproval of public-private agreements entered into by the department.*" The bill would prohibit the director from delegating the authority to enter into public-private agreements.

Attorney General Opinion No 5547 issued August 16, 1979 indicated that the power granted to the State Transportation Commission by PA 484 of 1978 (which amended PA 286 of 1964) regarding the awarding of contracts, and selling, leasing, or other disposition of real and personal property, impinged on the constitutional authority of the department director. See <http://www.ag.state.mi.us/opinion/datafiles/1970s/op05547.htm>

Despite the AG opinion, the department has continued to submit contracts and property transactions to the State Transportation Commission for review and approval. Nonetheless, it would appear that the bill's provisions regarding approval of public-private agreements are not legally enforceable.

FISCAL IMPACT

The bill is specific to the Michigan Department of Transportation and has no direct impact on other state agencies. The bill would have no direct fiscal impact on the department; it would authorize and define certain types of public-private agreements not currently authorized in

law. The department has indicated that public-private agreements are another procurement option for delivering its transportation program.

The bill would authorize the department to enter into public-private agreements with a private entity "and one or more other instrumentalities of government." However, the bill would not have a direct fiscal impact on local units of government.

To the extent that the bill would allow tolling of transportation facilities through a public-private agreement, under the conditions described in the body of this analysis, the bill could result in additional state transportation revenue – in particular for new facility or expanded-capacity projects. Certain types of public-private agreements could provide the department with additional financing options for delivery of its transportation program.

This analysis offers no conclusion as to whether public-private agreements are, as a rule, more or less costly to the public owner than traditional procurement methods. As noted in the body of this analysis, there are a number of different types of public-private agreements. It appears that the most efficient procurement method is a function of a number of project-specific factors. In addition to efficiency considerations, a PPP procurement option may be selected for reasons of program effectiveness – a PPP procurement method, such as design-build, or design-build-finance, may deliver a specific transportation facility faster than a traditional design-bid-build procurement, giving the public the economic use of a new facility months or years sooner than a traditional procurement method.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.