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BILL ANALYSIS



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Senate Bill 97 (as passed by the Senate)
Sponsor: Senator Mike Kowall
Committee: Commerce

Date Completed: 8-14-17

RATIONALE

A well-developed and maintained infrastructure system is considered a critical element of commercial success, public health, and recreation. Michigan's infrastructure is aging and many believe that, without significant investment and maintenance, the State will experience severe infrastructure failures over the next few years and decades. In Executive Order 2016-5, Governor Snyder established the 21st Century Infrastructure Commission to investigate new technologies and funding solutions for the establishment and maintenance of future infrastructure projects, including roadways and bridges.

Commonly, a governmental agency uses a "project delivery system" for the development and construction of a facility or other type of public project. The agency will contract the design of a project to architects and engineers, bid the designed project out to general contractors, and have the winning bidder construct the project. At the conclusion of construction, the agency has a project that it must run and maintain. Generally, this approach is useful when an agency can raise sufficient capital on its own to build the project, and serves to keep start-up costs relatively low. In its recent report, the Commission identified other methods of project delivery that could be useful for developing large-scale infrastructure projects. These include the use of public-private partnerships, which, some claim, allow for more capital to be raised up-front and enable better long-term project cost controls. Accordingly, it has been suggested that the State and its departments be allowed to enter into public-private partnership agreements for certain infrastructure projects.

CONTENT

The bill would create the "Michigan Alternative Project Delivery Act" to do the following:

- **Allow a public authority (the State, a State department, or a State agency) to enter into public-private agreements to develop eligible projects, enter into ancillary agreements to public-private agreements, and exercise eminent domain to acquire property necessary for an eligible project (a transportation project or a health care or laboratory facility).**
- **Require a public authority to consider and compare various methods for developing a project and identify the proposed delivery method.**
- **Allow any lawful source of public and private funding to be used for the development of an eligible project under the proposed Act.**
- **Allow a public authority to impose or increase and collect fees, including user fees (which would not include tolls charged on a transportation project).**
- **Authorize a public authority to include provisions addressing the allocation of project risk, payment terms, utilities, and other matters in a public-private agreement.**
- **Specify that authority granted under the Act would supplement any existing authority.**

- **Provide that property developed or held by a private party under a public-private agreement would be exempt from all applicable State and local ad valorem and other property taxes.**
- **Allow a public authority or another authorized person to bring a civil suit against a person who failed to pay a user fee if the required sum remained unpaid for 180 days.**

Definitions

"Public-private agreement" would mean an agreement between a public authority and one or more private parties for the development of an eligible project. A public-private agreement could include one or more local units of government.

"Develop" or "development" would mean the study, planning, design, acquisition, construction, reconstruction, rehabilitation, improvement, repair, financing, management, operation, or maintenance of an eligible project and any other service related to an eligible project. The term would include the imposition, charging, assessment, collection, and enforcement of user fees related to an eligible project.

"Eligible project" would mean one or both of the following: a) a transportation project, or b) a facility project. "Facility project" would mean a building, structure, appurtenance, or other real property necessary or desirable for the delivery of health care or laboratory facilities. The term would include services related to the delivery of health care or laboratory facilities.

"Transportation project" would mean any roadway, railway, transit system, building, structure, appurtenance, or other real property used directly or indirectly in the transportation or storage of goods, substances, or vehicles. The term would include services related to the transportation of people or the transportation and storage of goods, substances, or vehicles, but would not include a bridge or other infrastructure directly associated with an international border crossing.

"Private party" would mean a person that is not the United States, another nation, the State, another state, or a local unit of government, or a political subdivision of such an entity. "Local unit of government" would mean one or more of the following: a county, a city, a township, a village, a school district, an intermediate school district, a community college, a public university, or an authority of any of those entities.

"User fees" would mean user fees, tolls, consumption charges, rents, license fees, or similar or ancillary charges relating to the use of eligible projects. User fees also would include fees and charges for creating, maintaining, and administering an account, including credit card, bank, and similar fees and charges. The term would not include tolls charged on any transportation project.

Powers of a Public Authority

A public authority would be authorized to do one or more of the following:

- Consider, compare, and implement various methods for procuring and developing eligible projects, including alternatives to traditional methods used by the public authority.
- Enter into public-private agreements to develop eligible projects.
- Work together with other public authorities to develop eligible projects.
- Bundle two or more eligible projects under one public-private agreement.
- Procure services, award contracts, administer revenue, appropriate its funds, and take any other action that could be required in connection with the development of eligible projects through public-private agreements.
- Subject to applicable law, exercise the power of eminent domain to acquire property, permanent or temporary easements, rights-of-way, or other rights in property necessary to develop an eligible project, regardless of whether the property would be owned in fee simple by the public authority or leased, licensed to, or operated by a private party in connection with the development of the eligible project.

A public authority also could enter into any agreements ancillary to public-private agreements, including one or more of the following: a) agreements with financial, legal, or other consultants with specialized knowledge to assist in the study, planning, design, structuring, drafting, procurement, evaluation, and negotiation of public private agreements; or assist in the administration of public-private agreements and the operation or maintenance of eligible projects, or b) agreements between the public authority and a private party, a private party's lender, or Federal, State, and local governments.

Nothing in the proposed Act would expand the type of asset or provision of type of service that a public authority otherwise would be authorized to develop under existing law. A public-private agreement would be subject to the Fair and Open Competition in Governmental Construction Act and the Local Government Labor Regulatory Limitation Act.

A public authority would have to hold a public hearing at least every five years after the completion of an eligible project to conduct a public review of the project.

Before developing an eligible project, a public authority would have to consider and compare various methods for the development of an eligible project and identify the proposed delivery method. Notwithstanding any other provision of State law, the public authority could use any procurement method and process that it determined was appropriate to solicit private parties and award public-private agreements under the proposed Act, including any of the following:

- Calls for project proposals that private parties would be invited through a competitive process to submit to develop the project.
- Competitive solicitations using one or more requests for qualifications, prequalification or short-listing of qualified proposers, requests for proposals, preproposal meetings with individual short-listed proposers, revised proposals, and final and best offers.
- Unsolicited proposals, provided that if the public authority determined that there was sufficient merit to pursue any unsolicited proposal, reasonable opportunity for other entities to submit competing proposals for consideration and possible award would be provided.
- Negotiations with one or more bidders prior to award.

For any procurement in which the public authority issued a request for qualification, request for proposals, or similar solicitation document, the request would have to set forth, generally, the factors that the public authority would evaluate when reviewing the submittals. The public authority, in its discretion, could determine which factors it would consider and the relative weight of those factors in the evaluation process to obtain the best value. Evaluation methodologies for selection could include best value, low bid or proposal, lowest responsible or adjusted bid or proposal, qualifications-based selection, lowest public contribution, most expansive project, or any combination of those factors or other evaluation methodology that the public authority determined appropriate for the project.

The public authority could pay stipends or payments for work product on terms and conditions and in the amounts as determined in its discretion in the following circumstances, or in other circumstances that it determined to be appropriate, including the following:

- To short-listed or prequalified bidders if the public authority canceled the procurement before the due date for proposals in the request for proposals.
- To bidders that submitted a proposal, provided the public authority determined that the proposal was responsive to the request for proposal or similar solicitation document and met other requirements established by the public authority for the project.

("Work product" would mean any technical or financial concepts, that are one or more of the following: a) included in a bidder's response to a request for qualifications or in a bidder's proposal for the development of an eligible project; b) submitted by the bidder for review by the public authority in accordance with its request for qualifications or request for proposals for the development of an eligible project; c) raised by the bidder at a meeting with the public authority before the due date for proposals, including any alternative technical or financial concepts, ideas,

innovation, technology, techniques, methods, processes, unique uses of commercial items, design concepts, solutions, construction means and methods, project execution approach, drawings, reports, plans and specifications, information, and submittals that constitute intellectual property of the bidder; or d) raised in any negotiations between the public authority and a bidder before award and execution of a public-private agreement.)

In exchange for a stipend or payment for work product, the public authority could require the bidder to grant to the public authority the right to use some or all of the work product contained in the proposer's proposal. The public authority could identify in a request for qualification or similar solicitation document a process whereby bidders could request and receive authorization to deviate from technical and financial specifications, subject to demonstrating to the authority that the deviations would provide the same or greater quality, utility, function, and value.

Notwithstanding any other provision of law, the public authority could do one or more of the following:

- Provide exclusive protest remedies in its solicitation documents.
- Limit the rights of private parties responding to solicitation documents to protest matters that arose in connection with the procurement.
- Require that private parties responding to solicitation documents expressly waive all other rights and remedies that could be available under applicable law.

FOIA; Confidential Information & Trade Secrets

Except as expressly provided otherwise, a writing prepared, owned, used, in the possession of, or retained by a public authority in the performance of an official function would be a public record subject to Freedom of Information Act (FOIA). Documents and other analysis used in the decision-making process and preparation of the procurement documents and proposals would not be subject to release or disclosure until final award and execution of the public-private agreement and the conclusion of any protest or challenge to the award or the lapse of the protest period without challenge, absent an administrative or judicial order requiring a release or disclosure. However, if the public authority decided not to pursue or complete a project, then documents and other analysis used in the decision-making process or in the preparation of the procurement documents or proposals not otherwise exempt from disclosure would be a public record and would have to be made available to the public under FOIA.

The characterization by a private party of information as being confidential trade secrets or commercial or financial information exempt from disclosure would not be binding upon a public authority if the documents were not afforded that protection under the proposed Act or existing law.

When developing a facility project under a public-private agreement, a public authority would have to consult with the State Budget Director regarding the future fiscal impact on the affected State department, State agency, or State authority.

Funding, Financing, & User Fees

Any lawful source of public and private funding and financing, or combination of these, could be used for the development of an eligible project under the proposed Act. A public-private agreement could require the private party to arrange for all or a portion of the financing required for the project. A public authority could elect to contribute funds or financing instead of or in combination with that arranged by the private party, or could participate with the private party in any gains realized through revenue sharing, cost-saving sharing agreement, or refinancing of the project.

A public authority could accept from the United States, any state, or a local unit of government, or any political subdivision of such an entity, funds or credit assistance available to it for carrying out the purposes of the Act, regardless of the financing arrangement, and as necessary, proper, and convenient for carrying out the purposes of the Act. A public authority could seek allocation

for, issue, and provide for the issuance of private activity bonds under applicable Federal, state, or local programs. A public authority could apply for or facilitate the application for or secure financing from any sources and make funds available to one or more private parties either directly or through other public authorities.

A public authority could accept from any source any grant, donation, gift, or other form of conveyance of real or personal property or other valuable thing made to the public authority for carrying out the purposes of the Act.

A public authority could impose and collect user fees, increase the user fees, and use lawful measures to enforce them or authorize another person to impose, collect, increase, and enforce the user fees to the same extent as available to the public authority. Subject to the public-private agreement, the use, application, and sharing of collected user fees would have to be determined by the public authority. User fees could be imposed, charged, and collected by manual, digital, or electronic means. The public-private agreement also could include a schedule, formula, or mechanism for adjustment of user fees during the term of the agreement.

Bonds, notes and other obligations could be issued under applicable law to provide funding for an eligible project. Revenue, including user fees, received under an agreement could be directed to a segregated account and pledged for the repayment of obligations without appropriation. Obligations supported by revenue received from or payments made under a public-private agreement would not be considered a debt of the State. Any financing could be structured on a senior, parity, or subordinate basis with any other financing or funding.

Notwithstanding any other provision of the proposed Act, if any property of a public authority were leased, the property would remain the property of the authority at the conclusion of the lease.

Public-Private Agreement Provisions

A public-private agreement could include provisions that addressed one or more of the following:

- The allocation and management of project risks, including design, construction, geotechnical, delay, permitting, governmental approvals, change of law, utility adjustments, change in utility costs, operations and maintenance, force majeure, insurance availability and costs, inflation, and financing risks.
- Payments on terms determined by the public authority.
- A requirement that the private party or one or more of its contractors provide proposal, performance, or payment security, and, if required, the form and amount of performance or payment security.
- A requirement that the private party lease or lease back or otherwise be granted licenses, rights of entry, or right to operate the land and the eligible project through the terms of the public-private agreement.
- The provision of utilities required during the development of the eligible project, including the right and authority to adjust, relocate, or protect-in-place existing utilities.
- The use of arbitration or other alternative dispute resolution procedures between the public authority and private party.
- Criteria for determining substantial completion, final acceptance, occupancy, or service readiness of the eligible project and any applicable commissioning of the eligible project.
- The public authority's requirements for programming, operations, use, and change in the use of the eligible project and flexibility to expand, rehabilitate, or reconstruct the project.
- The operations, maintenance, and facilities management services, including maintenance and renewal, to be provided by the private party, the public authority, or third parties.
- Responsibility for maintenance and rehabilitation for an eligible project to meet the standards determined by the public authority at the end of public-private agreement.
- Events of default and remedies available to the private party, the public authority, and third parties.
- Technical standards and specifications with which the private party would have to comply.

- Requirements for insurance with the coverages and deductibles as determined by the public authority to be appropriate in its discretion.
- The maintenance and auditing of the private party's books and records.

(The term "force majeure" generally refers to an event or circumstance beyond the control of the parties, such as an act of nature or a war.)

A public-private agreement could not be entered into for an initial period exceeding 50 years from final acceptance or occupancy or service readiness of the eligible project, as applicable. An agreement also could not prohibit a public authority from constructing, repairing, reconstructing, or expanding a facility that competed for user fees with the eligible facility developed under the public-private agreement.

Failure to Pay User Fee

User fees would have to be administered, collected, and enforced as provided by law. In addition to any other rights and remedies available to a public authority or private entity under a public-private agreement, the public authority or another person authorized to do so by the public authority, could bring a civil suit against a person who failed to pay a user fee if the required sum remained unpaid for 180 days, in order to collect the unpaid user fees in a court having jurisdiction. If the civil action resulted in a judgment against the defendant, the defendant also would have to reimburse the plaintiff for all costs of enforcement and collection, including filing and legal fees.

Scope of the Act

The authority granted under the proposed Act would supplement and would be independent of any existing authority, and would not limit, replace, or detract from existing authority. The proposed Act would not affect or impair a public-private agreement or other agreement entered into before the Act's effective date.

Nothing in the proposed Act would prevent a public authority or a local unit of government from using other legal authority to enter into public-private agreements or other agreements for the development of eligible projects, or the development of projects outside the scope of the Act.

Nothing contained in the Act would limit or modify the rights and power of law enforcement officers to enforce traffic violations and other laws upon any eligible project developed under the proposed Act or the subject of a public-private agreement.

BACKGROUND

A public-private partnership is an agreement (usually long-term) between public and private sectors entities used to finance, build, and operate an infrastructure project. Typically, the private sector party designs, constructs, and implements the project, while the public partner defines and monitors compliance with the agreement. When the project is completed, the private partner is compensated, usually through user fees, service fees, or lease payments on the project. The project risks are shared and assigned to each party according to its ability to cope with them. A public-private partnership arrangement is used typically for a public authority to construct public projects without the resources (because of high debt or insufficient revenue) to fund the project itself. Public-private partnership arrangements have been used to fund the construction of toll roads and other transportation projects, convention centers, hospitals, and other facilities.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Governor Rick Snyder created the 21st Century Infrastructure Commission to develop recommendations to address Michigan's ailing infrastructure and meet State infrastructure needs over the next 30 to 50 years. In its report, the Commission identified and investigated a variety of infrastructure project delivery methods, including public-private partnerships. A public-private partnership is not always the best means to deliver a project to a community; however, when used strategically, a public-private partnership can provide earlier and greater cost certainty and allows risk to be transferred to the party best able to handle it. Because a public-private partnership agreement can allow a private party to have an equity interest in the project after completion, the project is able to attract more investment for greater up-front capital deployment compared with traditional public sector arrangements for raising money, such as bonding. Typically, public-private partnership arrangements require the private sector contractor to operate and maintain the project after its construction. This provides an incentive for better quality design and construction, which reduces long-term costs and results in superior facilities for public use.

According to testimony presented in the Senate Committee on Commerce, 35 states (including all of the states in the Great Lakes region except Michigan), the District of Columbia, and Puerto Rico, have some form of enabling legislation for public-private partnerships. This legislation generally serves to encourage private sector involvement in public sector infrastructure projects, and allows states to take advantage of Federal funds and other opportunities. The current Federal administration has expressed an interest in increased infrastructure spending, and at least one bill has been introduced to provide for tax-exempt financing for government-owned buildings.¹

Senate Bill 97, as enabling legislation for public-private partnerships in Michigan, would signal to private sector interests the State's willingness to invest in its infrastructure, and would allow for flexibility on bidding, contractor selection, the nature of projects, and the methods of financing that the State could use to develop new infrastructure projects. While encouraging flexibility in certain areas, the bill would provide for a narrow scope of projects (transportation projects or health care and laboratory facilities projects). The bill also would limit the entities that would have the authority to enter into public-private partnerships to the State and State agencies. Finally, the bill would encourage fiscal restraint by requiring consultations with the State Budget Director regarding the future fiscal impact on the State of facility projects developed under a public-private agreement.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bill would have an indeterminate, though likely minimal, fiscal impact at the State and local levels. The bill would not directly create new revenue or costs. The bill would empower a public authority with options to manage, create, and spend revenue sources, including private investment, grants, Federal aid, the imposition of user fees (excluding tolls), and bond issuance, but the bill would not mandate a specific method, or methods, of revenue creation.

Fiscal Analyst: Michael Siracuse

¹ S. 326, 115th Congress. The bill would provide a maximum of \$5.0 billion in tax-exempt bonds for financing the construction of a "qualified government buildings", including an elementary or secondary school, a facility at a state college or university used for educational purposes, a public library, a court building, a hospital, laboratory, or health care facility, a public safety facility, or a government office building.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.