

SENATE BILL No. 97

February 2, 2017, Introduced by Senators KOWALL and HERTEL and referred to the Committee on Commerce.

A bill to authorize certain public authorities to develop certain eligible projects and to enter into certain agreements; to impose certain conditions on those agreements; to impose certain powers and duties on certain state and local officials and employees; to authorize the financing of certain eligible projects; and to exempt certain property from certain taxes.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act shall be known and may be cited as the
2 "Michigan alternative project delivery act".

3 Sec. 3. As used in this act:

4 (a) "Develop" or "development" means the study, planning,
5 design, acquisition, construction, reconstruction, rehabilitation,
6 improvement, repair, financing, management, operation, or
7 maintenance of an eligible project and any other service related to

1 an eligible project. Develop or development also includes the
2 imposition, charging, assessment, collection, and enforcement of
3 user fees related to an eligible project.

4 (b) "Eligible project" means 1 or more of the following:

5 (i) A transportation project.

6 (ii) A facility project.

7 (c) "Facility project" means a building, structure,
8 appurtenance, or other real property necessary or desirable for the
9 delivery of health care or laboratory facilities. Facility project
10 also includes services related to the delivery of health care or
11 laboratory facilities.

12 (d) "Local unit of government" means 1 or more of the
13 following:

14 (i) A county.

15 (ii) A city.

16 (iii) A township.

17 (iv) A village.

18 (v) A school district.

19 (vi) An intermediate school district.

20 (vii) A community college.

21 (viii) A public university.

22 (ix) An authority of an entity described in this subdivision.

23 (e) "Private party" means a person that is not the United
24 States, another nation, this state, another state, or a local unit
25 of government, or a political subdivision of the United States,
26 another nation, this state, another state, or a local unit of
27 government.

1 (f) "Public authority" means this state, a state department,
2 or a state agency.

3 (g) "Public-private agreement" means an agreement between a
4 public authority and 1 or more private parties for the development
5 of an eligible project. A public-private agreement may include 1 or
6 more local units of government.

7 (h) "Transportation project" means any roadway, railway,
8 transit system, building, structure, appurtenance, or other real
9 property used directly or indirectly in the transportation of
10 persons or the transportation or storage of goods, substances, or
11 vehicles. Transportation project also includes services related to
12 the transportation of persons or the transportation or storage of
13 goods, substances, or vehicles. A transportation project does not
14 include a bridge or other infrastructure directly associated with
15 an international border crossing.

16 (i) "User fees" means user fees, consumption charges, rents,
17 license fees, or similar or ancillary charges relating to the use
18 of eligible projects. User fees also include fees and charges for
19 creating, maintaining, and administering an account, including
20 credit card, bank, and similar fees and charges. User fees do not
21 include tolls charged on any transportation project.

22 (j) "Work product" means any technical or financial concepts
23 that are 1 or more of the following:

24 (i) Included in a bidder's response to a request for
25 qualifications or in a bidder's proposal for the development of an
26 eligible project.

27 (ii) Submitted by a bidder for review by the public authority

1 in accordance with the public authority's request for
2 qualifications or request for proposals for the development of an
3 eligible project.

4 (iii) Raised by a bidder at a meeting with the public
5 authority prior to the due date for proposals, including any
6 alternative technical or financial concepts, ideas, innovation,
7 technology, techniques, methods, processes, unique uses of
8 commercial items, design concepts, solutions, construction means
9 and methods, project execution approach, drawings, reports, plans
10 and specifications, information, and submittals that constitute
11 intellectual property of the bidder for the development of an
12 eligible project.

13 (iv) Raised in any negotiations between the public authority
14 and a bidder prior to award and execution of a public-private
15 agreement.

16 Sec. 5. (1) A public authority may do 1 or more of the
17 following:

18 (a) Consider, compare, and implement various methods for
19 procuring and developing eligible projects, including methods that
20 are alternatives to methods traditionally used by the public
21 authority.

22 (b) Enter into public-private agreements to develop eligible
23 projects.

24 (c) Enter into any agreements ancillary to public-private
25 agreements, including, but not limited to, 1 or more of the
26 following:

27 (i) Agreements with financial, legal, and other consultants

1 with specialized knowledge to do 1 or more of the following:

2 (A) Assist in the study, planning, design, structuring,
3 drafting, procurement, evaluation, and negotiation of public-
4 private agreements.

5 (B) Assist in the administration of public-private agreements
6 and the operation or maintenance of eligible projects.

7 (ii) Agreements between the public authority and 1 or more of
8 the following:

9 (A) A private party.

10 (B) A private party's lenders.

11 (C) Federal, state, and local units of government.

12 (d) Work together with other public authorities to develop
13 eligible projects through public-private agreements.

14 (e) Bundle 2 or more eligible projects under 1 public-private
15 agreement.

16 (f) Procure services, award contracts, administer revenues,
17 appropriate funds of that public authority, and take any other
18 action as may be required in connection with the development of
19 eligible projects through public-private agreements.

20 (g) Subject to applicable law, exercise the power of eminent
21 domain to acquire property, permanent or temporary easements,
22 rights-of-way, or other rights in property that are necessary to
23 develop an eligible project, regardless of whether the property
24 will be owned in fee simple by the public authority or whether that
25 property will be leased to, licensed to, or operated by a private
26 party in connection with the development of the eligible project
27 through a public-private agreement.

1 (2) Nothing in this act expands the type of asset or provision
2 of type of services that a public authority is otherwise authorized
3 to develop under existing laws applicable to that public authority.
4 Nothing in this act authorizes a public authority to charge or
5 collect tolls on a transportation project.

6 (3) A public-private agreement is subject to all of the
7 following, as applicable:

8 (a) The fair and open competition in governmental construction
9 act, 2011 PA 98, MCL 408.871 to 408.883.

10 (b) The local government labor regulatory limitation act, 2015
11 PA 105, MCL 123.1381 to 123.1396.

12 (4) A public authority shall hold a public hearing not less
13 than every 5 years after the completion of an eligible project to
14 conduct a public review of the eligible project.

15 Sec. 7. (1) Prior to developing an eligible project, a public
16 authority shall consider and compare various methods for the
17 development of an eligible project and identify the proposed
18 delivery method.

19 (2) Notwithstanding any other provision of state law, the
20 public authority may use any procurement method and process that
21 the public authority determines is appropriate to solicit private
22 parties and award public-private agreements under this act,
23 including, but not limited to, any of the following or combination
24 of the following, at the public authority's discretion:

25 (a) Calls for project proposals that private parties are
26 invited through a competitive process to submit to develop an
27 eligible project.

1 (b) Competitive solicitations using 1 or more of requests for
2 qualifications, prequalification or short-listing of qualified
3 proposers, requests for proposals, preproposal meetings with
4 individual short-listed proposers, revised proposals, and final and
5 best offers.

6 (c) Unsolicited proposals, provided that if the public
7 authority determines that there is sufficient merit to pursue any
8 unsolicited proposal, reasonable opportunity for other persons to
9 submit competing proposals for consideration and possible contract
10 award is provided.

11 (d) Negotiations with 1 or more bidders prior to award.

12 (3) For any procurement in which the public authority issues a
13 request for qualifications, request for proposals, or similar
14 solicitation document, the request must generally set forth the
15 factors that the public authority will evaluate when reviewing the
16 submittals. The public authority may, in its discretion, determine
17 which factors it will consider and the relative weight of those
18 factors in the evaluation process to obtain the best value for the
19 public authority. Evaluation methodologies for selection may
20 include best value, low bid or proposal, lowest responsible or
21 adjusted bid or proposal, qualifications-based selection, lowest
22 public contribution, most expansive project, or any combination of
23 the foregoing or any other evaluation methodology for selection
24 that the public authority determines appropriate for the eligible
25 project.

26 (4) The public authority may pay stipends or payments for work
27 product on terms and conditions and in the amounts as determined in

1 the public authority's discretion in the following circumstances,
2 or in other circumstances that the public authority determines to
3 be appropriate in its discretion:

4 (a) To short-listed or prequalified bidders if the public
5 authority cancels the procurement prior to the due date for
6 proposals in the request for proposals.

7 (b) To bidders that submit a proposal provided that the public
8 authority determines that the proposal is responsive to the public
9 authority's request for proposals or similar solicitation document
10 and meets all requirements established by the public authority for
11 the eligible project.

12 (5) In exchange for a stipend or payment for work product, the
13 public authority may require the bidder to grant to the public
14 authority the right to use some or all of the work product
15 contained in the proposal.

16 (6) The public authority may identify in a request for
17 qualifications, request for proposals, or similar solicitation
18 document a process whereby bidders may request and receive
19 authorization to deviate from technical and financial
20 specifications, subject to demonstrating to the public authority
21 that the deviations provide the same or greater quality, utility,
22 function, and value.

23 (7) Notwithstanding any other provision of law, the public
24 authority may do 1 or more of the following:

25 (a) Provide exclusive protest remedies in its requests for
26 qualifications, requests for proposals, or similar solicitation
27 documents.

1 (b) Limit the rights of private parties responding to
2 solicitation documents to protest matters arising in connection
3 with the procurement.

4 (c) Require that private parties responding to solicitation
5 documents expressly waive all other rights and remedies that may be
6 available under applicable law.

7 (8) Except as expressly provided otherwise in this subsection,
8 a writing prepared, owned, used, in the possession of, or retained
9 by the public authority in the performance of an official function
10 is a public record and must be made available to the public in
11 compliance with the freedom of information act, 1976 PA 442, MCL
12 15.231 to 15.246. Documents and other analysis used in the
13 decision-making process and preparation of the procurement
14 documents and proposals are not subject to release or disclosure by
15 the public authority until final award and execution of the public-
16 private agreement and the conclusion of any protest or other
17 challenge to the award or the lapse of the protest period without
18 challenge, absent an administrative or judicial order requiring
19 such release or disclosure. However, if the public authority
20 decides not to pursue or complete an eligible project, then
21 documents and other analysis used in the decision-making process or
22 in the preparation of the procurement documents or proposals not
23 otherwise exempt from disclosure are a public record and must be
24 made available to the public in compliance with the freedom of
25 information act, 1976 PA 442, MCL 15.231 to 15.246.

26 (9) The characterization by the private party of information
27 as being confidential trade secrets or commercial or financial

1 information exempt from disclosure is not binding upon the public
2 authority if the information is not afforded that protection under
3 this act or state law.

4 (10) When developing a facility project under a public-private
5 agreement, the public authority shall consult with the state budget
6 director regarding the future fiscal impact on the affected state
7 department, state agency, or authority of this state.

8 Sec. 9. (1) Any lawful source of public or private funding and
9 financing, or combination of these, may be utilized for the
10 development of an eligible project under this act.

11 (2) A public-private agreement may require the private party
12 to arrange for all or a portion of the financing required for the
13 eligible project. A public authority may also elect in its
14 discretion to contribute funds or financing required for the
15 eligible project in lieu of or in combination with funding or
16 financing arranged by the private party. A public authority may
17 elect in its discretion to participate with the private party in
18 any gains realized through revenue sharing, cost-saving sharing
19 agreements, or the refinancing of the eligible project, as
20 determined by the public authority in its discretion.

21 (3) A public authority may accept from the United States, any
22 state, or a local unit of government or any political subdivision
23 of the United States, any state, or a local unit of government
24 funds or credit assistance as is available to it for carrying out
25 the purposes of this act, whether the funds are made available by
26 grant, loan, guaranty, line of credit, or other financing
27 arrangement. A public authority may enter into these arrangements

1 and other agreements with the United States, any state, or a local
2 unit of government or any political subdivision of the United
3 States, any state, or a local unit of government, as may be
4 necessary, proper, and convenient for carrying out the purposes of
5 this act. A public authority may seek allocation for, issue, and
6 provide for the issuance of private activity bonds under applicable
7 federal, state, or local programs, including as described in 26 USC
8 141. A public authority may apply for or facilitate the application
9 for or secure financing from any source and make funds available to
10 1 or more private parties either directly or through other public
11 authorities.

12 (4) A public authority may accept from any source any grant,
13 donation, gift, or other form of conveyance of land, money, other
14 real or personal property, or other valuable thing made to the
15 public authority for carrying out the purposes of this act.

16 (5) A public authority may impose and collect user fees,
17 increase the user fees, and use lawful measures to enforce the user
18 fees or authorize another person to impose, collect, increase, and
19 enforce the user fees to the same extent as available to the public
20 authority. Subject to the public-private agreement, the public
21 authority shall determine the use, application, and sharing of
22 collected user fees. User fees may be imposed, charged, and
23 collected by manual, digital, or electronic means. A public-private
24 agreement may also include a schedule, formula, or mechanism for
25 the adjustment of user fees during the term of the public-private
26 agreement.

27 (6) Bonds, notes, and other obligations may be issued under

1 applicable law for the purposes of providing funding for an
2 eligible project. Revenues, including user fees, generated or
3 received pursuant to a public-private agreement may be directed to
4 a segregated account and pledged for the repayment of bonds, notes,
5 or other obligations without appropriation. Bonds, notes, or other
6 obligations supported by revenue received from or payments made
7 pursuant to a public-private agreement are not a debt of this
8 state. Any financing may be structured on a senior, parity, or
9 subordinate basis with any other financing or funding.

10 (7) Notwithstanding any other provision of this act, if any
11 property of a public authority is leased, at the conclusion of the
12 lease the property remains property of the public authority.

13 Sec. 11. (1) A public-private agreement may include 1 or more
14 of the following:

15 (a) Provisions addressing the allocation and management of
16 project risks, including, but not limited to, design, construction,
17 geotechnical, delay, permitting, governmental approvals, change of
18 law, utility adjustments, change in utility costs, operations and
19 maintenance, force majeure, insurance availability and costs,
20 inflation, and financing risks.

21 (b) Provisions addressing payments on terms determined by the
22 public authority, including, but not limited to, milestone
23 payments, progress payments, availability or service fee payments,
24 and other compensation.

25 (c) Provisions requiring that the private party or 1 or more
26 of its contractors provide proposal, performance, or payment
27 security. Performance or payment security if required may be in the

1 amounts determined by the public authority and in the form of
2 bonds, guarantees, letters of credit, committed equity, or any
3 other type of financial instrument, or any combination of these,
4 each as determined by the public authority.

5 (d) Provisions requiring that the private party lease or lease
6 back or otherwise be granted licenses, rights of entry, or rights
7 to operate the eligible project through the term of the public-
8 private agreement.

9 (e) Provisions requiring that either the public authority or
10 the private party provide the utilities required during the
11 development of the eligible project, including the right and
12 authority to adjust, relocate, or protect-in-place existing
13 utilities.

14 (f) Provisions allowing or requiring the use of arbitration or
15 other alternative dispute resolution procedures to resolve disputes
16 between the parties to a public-private agreement. The alternative
17 dispute resolution procedures may include, but are not limited to,
18 binding or nonbinding process, arbitration or mediation, the
19 establishment of a board to hear disputes, or resort to the courts.

20 (g) Provisions establishing criteria for determining
21 substantial completion, final acceptance, occupancy, or service
22 readiness of the eligible project and any applicable commissioning
23 of the eligible project.

24 (h) Provisions addressing the public authority's requirements
25 for programming, operations, use, and change in use of the eligible
26 project and flexibility to expand, rehabilitate, or reconstruct the
27 eligible project.

1 (i) Provisions addressing, as applicable, the operations,
2 maintenance, and facilities management services, including
3 maintenance and renewal, to be provided by the private party, the
4 public authority, or third parties.

5 (j) Provisions addressing responsibility for maintenance and
6 rehabilitation in order for an eligible project to meet the
7 standards determined by the public authority, in its discretion, at
8 the end of the term of the public-private agreement.

9 (k) Provisions specifying events of default and remedies
10 available to the private party, the public authority, and third
11 parties.

12 (l) Provisions setting forth the technical standards and
13 specifications with which the private party must comply.

14 (m) Provisions that provide requirements for insurance with
15 the coverages and deductibles as determined by the public authority
16 to be appropriate in its discretion.

17 (n) Provisions regarding the maintenance and auditing of the
18 private party's books and records.

19 (2) A public-private agreement shall not be entered into for
20 an initial period exceeding 50 years from final acceptance or
21 occupancy or service readiness of the eligible project, as
22 applicable.

23 (3) A public-private agreement may not prohibit a public
24 authority from constructing, repairing, reconstructing, or
25 expanding a facility that competes for user fees with the eligible
26 facility developed under the public-private agreement.

27 Sec. 13. (1) The authority granted under this act supplements

1 and is independent of any existing authority and does not limit,
2 replace, or detract from existing authority.

3 (2) This act does not affect or impair a public-private
4 agreement or other agreement entered into before the effective date
5 of this act.

6 (3) Nothing in this act prevents a public authority or a local
7 unit of government from using other legal authority to enter into
8 public-private agreements or other agreements for either of the
9 following:

10 (a) For the development of eligible projects described under
11 this act.

12 (b) For the development of projects outside the scope of this
13 act.

14 Sec. 15. Property developed under and subject to a public-
15 private agreement is exempt from any and all state and local ad
16 valorem and other property taxes that otherwise might be
17 applicable.

18 Sec. 16. (1) A public authority may impose user fees as
19 provided in section 9(5).

20 (2) User fees shall be administered, collected, and enforced
21 as provided by law.

22 (3) In addition to other rights and remedies available to a
23 public authority or a private entity under a public-private
24 agreement, the public authority or another person authorized to do
25 so by the public authority may bring a civil action against a
26 person who fails to pay a user fee if the required sum remains
27 unpaid for 180 days in order to collect the unpaid sum in a court

1 having jurisdiction. If the civil action results in a judgment
2 against the defendant, the defendant is required to reimburse the
3 plaintiff for all costs of enforcement and collection, including
4 filing and legal fees.

5 Sec. 17. Nothing contained in this act shall limit or modify
6 the rights and powers of law enforcement officers to enforce
7 traffic violations and other laws upon any eligible project
8 developed under this act or the subject of a public-private
9 agreement.