

MICHIGAN ALTERNATIVE PROJECT DELIVERY ACT: PUBLIC-PRIVATE AGREEMENTS

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 97 substitute H-1 as reported from committee
Sponsor: Sen. Michael Kowall
House Committee: Transportation and Infrastructure
Senate Committee: Transportation
Complete to 12-7-17

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

Senate Bill 97 would create a new act, the “Michigan Alternative Project Delivery Act.” The bill would do the following:

- Allow a public authority 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.
- Allow any lawful source of public and private funding and financing to be used for the development of an eligible project under the proposed act.
- Allow a public authority to impose, increase, collect, and enforce user fees, or authorize another person to impose, increase, collect, and enforce user fees.
- Prescribe a penalty for a person who failed to pay a user fee for use of a transportation project.
- Allow a public authority to issue bonds, notes, or other obligations, under applicable law, for the purposes of providing funding for an eligible project. The bill authorizes the pledge of revenue generated through a public-private agreement, including user fees, for repayment of bonds, notes, or other obligations. The bill states that such bonds shall not be considered a debt of the state.
- Specify that nothing in the proposed act would expand the type of asset or provision of type of services that a public authority would otherwise be authorized to develop under applicable existing law. Nothing in the proposed act would authorize a public authority to charge or collect tolls on a transportation project.
- Specify that 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, as applicable.
- Require a public authority to hold a public hearing not less often than every five years after the completion of an eligible project to conduct a public review of the eligible project.

- Specify that a public authority could not initiate a procurement to enter into a public-private agreement unless the agreement is in the best interest of this state as determined by the public authority.
- Require to be established within the state transportation department a P3 advisory board composed of three individuals appointed by the governor, including 1 each from a list of 3 individuals selected by the speaker of the house and a list of 3 individuals selected by the senate majority leader.
- Except for any procurement of a public-private agreement already commenced, require a public authority, prior to issuing a request for proposal for an agreement for an eligible project, to submit to the P3 advisory board a report of the analysis, justifications, and rationale for proceeding with an agreement. The report could include financial, price, life cycle cost, risk transfer, technical, schedule, quality, or innovation considerations, or any combination of these.
- Specify that, within 30 days after receipt of the P3 advisory board report, it could provide commentary to the public authority. The P3 advisory board would have to notify each member of the house and senate appropriations committees, the house and senate fiscal agencies, and the house and senate caucus policy offices of the proposed public-private agreement. If the project is a transportation project, the board would have to notify house and senate standing committees with jurisdiction over transportation issues.
- Specify that after the procurement for the public-private partnership is completed and an agreement entered into, the public authority would be required to submit to the P3 advisory board a biannual report on the status of the implementation of the eligible project and any major issues, challenges, or successes arising out of the partnership in the immediately² preceding fiscal years.
- Require the P3 advisory board to forward a copy of the biannual report to the house and senate appropriations committees, the house and senate fiscal agencies, and the house and senate policy offices.
- Require a public authority to consider and compare various methods for developing a project and identify the proposed delivery method.
- Provide that, notwithstanding any other provision of state law, the public authority may use any procurement method and process that the public authority determines is appropriate to solicit private parties and award public-private agreements under the act.
- Require a public authority to consult with the State Budget Director regarding the fiscal impact on affected state agencies when developing a 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.

- Specify that the proposed act would not affect a public-private agreement entered into before the bill's effective date, or prohibit a public authority from using other legal authority to enter into a public-private agreement.
- Provide that property developed or held by a private party under a public-private agreement would be exempt from all state and local ad valorem and other property taxes that otherwise would be applicable.

The bill uses several defined terms that affect the scope and authority of the bill. Specifically, the bill includes the following definitions:

- “Public authority” means the State of Michigan, a state department, or state agency.
- “Public-private agreement” means an agreement between a public authority and one or more private parties for the development of an eligible project. A public-private agreement may include one or more local units of government, defined as a county, city, township, village, school district, intermediate school district, community college, and public university.
- “Eligible project” means either a “facility project” (buildings related to health care delivery or laboratories) or a “transportation project.”
- “Transportation project” means any roadway, railway, transit system, building, structure, appurtenance, or other real property used directly or indirectly in the transportation of persons or the transportation or storage of goods, substances, or vehicles. Transportation project also includes services related to the transportation of persons or the transportation or storage of goods, substances, or vehicles. The bill excludes from the definition a bridge or other infrastructure directly associated with an international border crossing.
- “Develop” or “development” means 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 bill indicates that “develop” or “development” includes the imposition, charging, assessment, collection, and enforcement of user fees related to an eligible project.
- “User fees” means user fees, consumption charges, rents, license fees, or similar or ancillary charges relating to the use of eligible projects. User fees also include fees and charges for creating, maintaining, and administering an account, including credit card, bank, and similar fees and charges.

FISCAL IMPACT:

Senate Bill 97 would provide authority to “public authorities” to enter into “public-private agreements” with one or more private parties for the development of “eligible projects” under conditions established under the bill. The bill defines “public authorities” to mean the state, state departments, and state agencies. As a result, the bill is specific to state government and does not directly affect local units of government. However, the bill indicates that a public-private agreement may include one or more local units of government.

The bill would have no direct fiscal impact on local units of government, with the possible exception of Section 15 of the bill, which indicates that “property developed or held by a private party under a public-private agreement would be exempt from all state and local ad valorem and other property taxes that otherwise would be applicable.” The impact of this tax exemption would depend on the circumstances of specific eligible projects developed under public-private agreements.

While the bill would apply broadly to all state departments and agencies, the bill also defines “eligible project” narrowly to mean either a *transportation project* or a *facility project*. The bill defines *facility project* to mean “a building, structure, appurtenance, or other real property necessary or desirable for the delivery of health care or laboratory facilities,” including “services related to the delivery of health care or laboratory facilities.” Supporters of the bill testified (November 7, 2017) that the narrow scope of the term “eligible project” would effectively limit the use of the authority granted in the bill to the Michigan Department of Transportation (MDOT) with respect to state transportation projects, and the Department of Technology, Management, and Budget (DTMB) with respect to facility projects.

The bill is permissive and does not impose new requirements or direct costs on state agencies.

Senate Bill 97 would provide to state agencies the option of using public-private agreements for the procurement of certain types of defined projects under specific conditions established in the bill. The bill does not repeal or limit current state laws governing project procurement and contracting. Section 13(3) of the bill indicates that “Nothing in this act prevents a public authority or a local unit of government from using other legal authority to enter into public-private agreements.”

Senate Bill 97 would give to state agencies broad authority in the use of different procurement methods for public-private agreements. Specifically, Section 7(2) of the bill indicates that “notwithstanding any other provision of state law, the public authority may use any procurement method and process that the public authority determines is appropriate to solicit private parties and award public-private agreements under this act.”

The bill does not appear to grant to state agencies an expanded scope of authority beyond that currently granted through specific authorizing legislation. For example, the powers and duties of the State Transportation Commission, MDOT, and the MDOT Director are established under Public Act 284 of 1964. Senate Bill 97 would not alter those provisions of Public Act 284. MDOT does not have legal authority to establish toll roads under Public Act 284, and would not be granted such authority under Senate Bill 97.

Similarly, the powers and duties of DTMB are established in the Management and Budget Act (Public Act 431 of 1984). Specifically, Section 237 of the Management and Budget Act grants to DTMB authority over all aspects of state agency capital outlay procurement. Senate Bill 97 does not appear to alter DTMB’s general authority over state procurement.

The bill requires a public authority to consult with the State Budget Director regarding the fiscal impact on affected state agencies when developing a project.

Section 5(2) of Senate Bill 97 states that “Nothing in this act expands the type of asset or provision of type of services that a public authority is otherwise authorized to develop under existing laws applicable to that public authority.”

The bill would provide to state agencies additional authority to finance eligible projects. Specifically, the bill would allow a public authority to impose, increase, collect, and enforce user fees for use of an eligible project. The bill would also authorize a public authority to issue bonds, notes, or other obligations for the purposes of providing funding for an eligible project. The bill authorizes the pledge of revenue generated through a public-private agreement, including user fees, for repayment of bonds, notes, or other obligations. Bonds issued under provisions of the bill would be revenue bonds and not general obligation bonds or “a debt of this state.”

The bill includes *transportation projects* within the definition of *eligible projects*. However, the bill specifically excludes from the definition of *transportation project* “a bridge or other infrastructure directly associated with an international border crossing.”

The bill specifically excludes from the definition of *user fees* “tolls charged on any transportation project.” In addition, Section 5(2) of the bill states “Nothing in this act authorizes a public authority to charge or collect tolls on a transportation project.” As a result, the bill does not authorize the establishment of toll roads through public-private agreements.

As noted above, the bill would apply to “public authorities” as defined in the bill and is not specific to any particular state department. House Bill 4925 of the 2013-2014 Legislative Session, which authorized certain public-private agreements, was specific to the Michigan Department of Transportation. <http://legislature.mi.gov/doc.aspx?2013-HB-4925>

Note on Public-Private-Partnerships

Senate Bill 97 would authorize the use by state agencies of “public-private-agreements” under specific terms and conditions of the bill. While the bill uses the defined term, “public-private-agreements,” the term “public-private-partnerships” (shortened to “P3s” or “PPPs”) is commonly used to denote this type of procurement method. One definition of P3s, from the National Conference of State Legislatures’ website, is: “PPPs are agreements that allow private companies to take on traditionally public roles in infrastructure projects, while keeping the public sector ultimately accountable for a project and the overall service to the public. In PPPs, a government agency typically contracts with a private company to renovate, build, operate, maintain, manage or finance a facility. PPPs cover as many as a dozen types of innovative contracting, project delivery and financing arrangements between public and private sector partners.”

State agencies, and in particular, MDOT, have already used P3 procurement methods for some capital construction contracts under current legal authority. See House Fiscal Agency publication “Public-Private-Partnerships in Transportation”

<http://www.house.mi.gov/hfa/pdf/transportation/ncslppps.pdf>

and the Michigan Department of Transportation’s Innovative Contracting webpage:

http://www.michigan.gov/mdot/0,1607,7-151-9625_21539_53226---,00.html

Supporters of Senate Bill 97 testified (November 7, 2017) that separate P3 enabling legislation is needed to provide assurance to private investors that such public-private agreements are, in

fact, authorized under Michigan law. Testimony indicated that private investors look to states with specific P3 enabling legislation. According to the National Conference of State Legislatures, as of May 2015, 33 states, as well as the District of Columbia and Puerto Rico, had passed P3 enabling legislation.

<http://www.ncsl.org/Portals/1/Documents/transportation/PPP-Toolkit-Update-May-2015.pdf>

For specific procurements, P3 contracting methods may be more efficient and effective than traditional methods. According a Federal Highway Administration fact sheet, P3 agreements “can provide access to private capital, reduce costs borne by transportation agencies, accelerate project delivery, shift project risk, spur innovation, and provide for more efficient management.” P3 agreements may also provide for the incorporation of performance measures.

However, P3 agreements generally involve the transfer of project or contract risk to the private contractor. Private sector contractors may factor into contract prices increased risks associated with a P3 agreement. The most *efficient* procurement method is a function of a number of project-specific factors.

P3 procurement methods may also be selected for reasons of *effectiveness*. A P3 procurement method, such as Design-Build, Design-Build-Finance, or Construction Manager/General Contractor, may deliver a specific transportation facility faster than a traditional Design-Bid-Build procurement, giving the public the use of a new facility months or years sooner than a traditional procurement method.

Additional information on P3 procurements in transportation may be found on the Federal Highway Administration website: <http://www.fhwa.dot.gov/PPP/index.htm>.

POSITIONS:

The American Council of Engineering Companies supports the bill as introduced. (11-7-17)

The Associated General Contractors of Michigan supports the bill. (11-30-17)

A representative of HNTB testified in support of the bill on 11-7-17 and supports the bill as reported from committee. (11-30-17)

The Detroit Regional Chamber of Commerce supports the bill. (11-28-17)

The Michigan Infrastructure and Transportation Association supports the bill as introduced. (11-7-17)

The Michigan Society of Professional Engineers supports the bill as introduced. (11-7-17)

Legislative Analyst: E. Best

Fiscal Analyst: William E. Hamilton

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