Legislative Analysis

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PUBLIC ACT 51 OF 1951 – SBE/DBE PROGRAMS, MTF REVENUE/DISTRIBUTION, CONSTRUCTION WARRANTIES, RAIL GRADE CROSSING SURFACE PROGRAM, USE OF CITY MTF REVENUE FOR TRANSIT

House Bill 5460 as enrolled
Public Act 473 of 2014
Sponsor: Rep. Dan Lauwers
House Committee: Transportation and Infrastructure
Senate Committee: Infrastructure Modernization

Complete to 1-28-14

A SUMMARY OF HOUSE BILL 5460 AS ENROLLED

House Bill 5460 would amend six sections of Public Act 51 of 1951 (Act 51), the act that establishes major state transportation funds and programs. Among other things, Act 51: establishes the Michigan Transportation Fund (MTF); directs the distribution of MTF revenue to other state funds and programs, as well as to local road agencies (county road commissions, and cities and villages); prescribes uses of MTF revenue by local road agencies; and establishes the State Trunkline Fund (STF) and prescribes uses of STF revenue.

House Bill 5460 would make the following amendments to Act 51:

■ Amend Section 9b regarding the Disadvantaged Business Enterprises (DBE) program of the Michigan Department of Transportation (MDOT, or department).

■ Amend Section 10 to allow the MTF to receive money from any source. Current law generally limits sources of MTF revenue to constitutionally restricted motor fuel taxes and vehicle registration taxes.

■ Amend Section 10 to make an exception to the current MTF distribution through reference to Section 143 of the Motor Fuel Tax Act [the subject of House Bill 5477].

■ Amend Section 10 to earmark up to $3.0 million from the MTF for a new [railroad] grade crossing surface account established and defined in Section 11.

■ Amend Section 11, Subdivision (1)(g), regarding the department's authority to enter into contracts for the construction and preservation of state trunkline roads and bridges.

■ Amend Section 11, Subsections 2 and 14, and Sections 12, 13, and 14 regarding highway construction warranties and related reporting requirements.

■ Amend Section 13 to authorize a city that meets specific criteria to use a portion of its MTF revenue distribution for public transit purposes.

House Bill 5460 is tie-barred to House Joint Resolution UU, which would amend the Michigan Constitution to, among other things, increase the maximum permitted state general sales and use tax from 6% to 7% after October 1, 2015, and, at the same time, exempt gasoline and diesel motor fuel sales from the state's general sales and use tax after October 1, 2015. House Bill 5460 would take effect only if the resolution is approved by voters at the May 5, 2015, regular election.

BACKGROUND INFORMATION AND DETAILED ANALYSIS

Section 9b – Provisions dealing with Small Business Enterprise (SBE)/Disadvantaged Business Enterprise (DBE) program

Section 9b was added by amendment to Act 51 (1997 PA 79) as part of a 1997 transportation funding package. The section directs the department to take certain actions with regard to contracts to construct or reconstruct roads and bridges.

Section 9b, Subsection 1, currently requires the department to: establish technical assistance programs for minority business enterprises (MBEs); assist in creating and developing nontraditional capital to assist MBEs in competing for contracts; assist in creating and developing incentives for firms to mentor MBEs and help MBEs gain experience and resources necessary to compete for contracts; create programs to inform MBEs of opportunities to compete to contracts.

Section 9b, Subsection 4, currently requires the department to: consult with the state Chamber of Commerce and Michigan Minority Business Development Council on requests for proposals and request for bids to ensure competitive and inclusive strategies that ensure an inclusive and competitive bid environment; appoint at least one representative of the Minority Business Development Council or department's MBE division to proposal- or quote-review panels; establish within the department's DBE division a surety division to assist qualified bidders in securing bonding and in monitoring payments to vendors and suppliers.

Section 9b, Subsection 2, currently establishes reporting requirements. Specifically, the subsection requires the department to notify the majority and minority chairpersons of the House and Senate Appropriations committees and the majority and minority chairpersons of the House and Senate committees that consider transportation matters of each contract awarded to MBEs under provisions of the section. [Section 9b, Subsection 3, defines terms used in the section.]

House Bill 5460 would amend Section 9b of Act 51. Specifically, the bill would eliminate the term "minority business enterprise" and instead refers to "small business enterprise" and "disadvantaged business enterprise." The bill defines these terms through reference to definitions in federal law, specifically to 13 CFR Part 121 for "small business enterprise," and 49 CFR Part 26 for "disadvantaged business enterprise." [The balance of this analysis will use the abbreviations "SBE" for small business enterprise,

and "DBE" for disadvantaged business enterprise; these terms are not abbreviated in the bill.]

The bill adds "to maintain" to the scope of contracts that would be subject to the requirements of Section 9b, subsection 1. As a result, the Subsection 1 requirements would be mandated for the department for contracts "to construct, repair, or *maintain* roads and bridges." However, the bill does not make this change with respect to the requirements of subsection 4, renumbered as subsection 5 in the bill; those requirements would only apply to contracts to "to construct or repair roads and bridges."

With respect to technical assistance programs of Subsection 1, the bill would establish different requirements for SBEs and MBEs. Specifically, the bill would require the department to establish technical assistance programs to prepare SBEs to compete for contracts on projects that use only state funds, and MBEs to compete for projects that include federal aid funds. The bill includes examples of technical assistance; specifically the use of technical assistants, best value contracting procurement, and training for work under the subdivision, i.e. a contract to construct, repair, or maintain roads or bridges.

With respect to Subsection 1 requirements that the department assist in creating and developing nontraditional capital, the bill directs the department, in conjunction with the Michigan Economic Development Corporation (MEDC), to investigate the creation of a state revolving loan fund within the MEDC to provide necessary capital. The bill directs the department and the MEDC to report on the results of the investigation [of a revolving loan program within the MEDC] to the House and Senate Appropriations committees no later than one year after the effective date of the enacted bill.

Subsection 1 of Section 9b currently requires the department to assist in creating and developing incentives for firms to mentor MBEs to gain the experience and resources necessary to compete for contracts. In addition to changing the scope of the requirement to SBEs and DBEs (from MBEs), the bill provides examples of specific incentives: "programs for the training and placement of skilled workers for infrastructure trades and related occupations, either independently or in cooperation with other state agencies." The bill directs the department to "investigate the potential of incorporating a 5-year skilled worker projection into its current 5-year plans." The bill also directs the department to report on the results of that investigation to the house and senate appropriations committees no later than one year after the effective date of the enacted bill.

The bill adds a new Subdivision *e* within Subsection 1 to require the department to, except as otherwise provided in the subdivision, and when practical, develop SBE or DBE utilization plans for larger and more complex projects. The subdivision would require the department to use SBE or DBE utilization plans for projects in which the final cost is anticipated to exceed $8.0 million, unless the project specifications or current best practices did not justify the use of such plans. The subdivision also requires the department to include a list of projects in which the final cost is anticipated to exceed $8.0 million and whose project specifications or current best practices did not justify the use of an SBE or DBE utilization plan in the report required by subsection (2). The subdivision does not preclude the use of an SBE or DBE utilization plan for a project

with a final anticipated cost of below $8.0 million when the use of such a plan is appropriate for the project, or when a DBE utilization goal has been established consistent with federal requirements. The bill provides that the project threshold of $8.0 million may be adjusted annually to reflect research-based or national best practices.

The bill would amend Section 9b, Subsection 2, reporting requirements to require the department to also provide a list of contracts that used SBE or DBE utilization plans implemented under Subdivision (1)(e), and to provide a recommendation as to whether the benchmark figure described in Subdivision (1)(e) [i.e. $8.0 million] should be increased or decreased based on department experience and national best practices.

The bill would add a new Subsection 3 to require the department to conduct a disparity study of the use of SBE and DBE in state contracts. The bill requires that the study use standards developed by the Transportation Research Board's National Cooperative Highway Research Program. The subsection requires the department to report on the results of the study and recommendations for process improvement to address disparities to House and Senate Appropriations committees no later than one year after the bill's enactment.

With respect to Subsection 4 requirements that the department consult with the state Chamber of Commerce and Michigan Minority Business Development Council on requests for proposals and request for bids to ensure competitive and inclusive strategies which ensure an inclusive and competitive bid environment: the bill would add the word "annually" to the consultation requirement and would add the following organizations to those with whom the department would be required to consult: the Michigan Infrastructure and Transportation Association, the Black Caucus Foundation of Michigan (excluding currently serving legislators), and the Michigan Hispanic Chamber of Commerce.

The bill would strike the current requirement that the department appoint at least one representative of the Minority Business Development Council or department's MBE division to proposal- or quote-review panels. The bill would instead require the department to "review current contract processes to determine whether SBEs or DBEs are adequately informed of the process for appealing contract decisions or learning how to improve bids for future contracts."

The bill would strike the current requirement that the department establish a surety division within the department's DBE division.

Section 10 – Provisions Regarding Sources of MTF Revenue

Section 10 of Act 51 establishes the MTF and directs the distribution of MTF revenue to other state transportation funds, to special program accounts, and to local road agencies (county road commissions, cities, and villages). MTF revenue is derived primarily from motor fuel taxes and vehicle registration taxes – taxes that are constitutionally dedicated for transportation. MTF revenue in FY 2013-14 totaled $1.8 billion.

Section 10 currently lists specific MTF revenue sources, i.e. money received and collected under: the Motor Fuel Tax Act [motor fuel taxes on gasoline and diesel motor fuel]; Sections 801 through 810 of the Michigan Vehicle Code [vehicle registration taxes]; the Motor Carrier Act (1933 PA 254); and income or profit from investment of fund monies. [The current reference to the Motor Carrier Act appears to be an anachronism in that Motor Carrier Act regulatory fees are not a constitutionally dedicated fund source and Motor Carrier Act regulatory fees are not credited to the MTF.]

House Bill 5460 would amend Section 10 to strike the list of revenue sources. The bill would instead authorize the State Treasurer to "receive money or other assets from any source for deposit into the fund." The bill also authorizes the State Treasurer to direct investment of the MTF and requires the State Treasurer to credit to the MTF interest and earnings from fund investments.

Although the bill adds language to authorize the State Treasurer to "receive money or other assets from any source for deposit into the fund," the bill retains contradictory language that "*except as provided in this act, no other money, whether appropriated from the general fund of this state or any other source, shall be deposited in the Michigan transportation fund*."

The bill also retains current provisions that directs the Legislature to appropriate funds [presumably from the MTF] for the necessary expenses incurred in the administration and enforcement of the Motor Fuel Tax Act, Sections 801 through 810 of the Michigan Vehicle Code, and the Motor Carrier Act. [The bill replaces the term "funds" with "money."] The reference to the Motor Carrier Act appears to be an anachronism in that the Motor Carrier Act provides no revenue to the MTF and MTF revenue is not used in the administration of the Motor Carrier Act. We believe the language directing reimbursement of necessary expenses should reference the Motor Carrier Fuel Tax Act (1980 PA 119).

Section 10 – Provisions Regarding the Distribution of MTF Revenue

As noted above, Section 10 of Act 51 establishes the MTF and directs the distribution of MTF revenue to other state transportation funds, to special program accounts, and to local road agencies (county road commissions, cities, and villages). The specific language establishing the MTF formula distribution is "All money in the MTF is apportioned and appropriated in the following manner:"

House Bill 5460 would preface the above sentence with the phrase" "*Except as provided in Section 143 of the Motor Fuel Tax Act*." Enrolled House Bill 5477 would amend Section 143 to change the distribution of Motor Fuel Tax revenue for the fiscal years ending September 30, 2016, and September 30, 2017. For the period beginning October 1, 2015, through September 30, 2016, Enrolled House Bill 5477 would direct that "the first $400.0 million received and collected under this act is appropriated to and shall be deposited in the state treasury to the credit of the Michigan Transportation Fund and allocated as provided in Section 10(1) of 1951 PA 51, and the remainder shall be allocated to indebtedness incurred for projects described in Section 11 of 1951 PA 51."

Enrolled House Bill 5477 provides a similar earmark for the period beginning October 1, 2016, through September 30, 2017. Specifically, the bill would say that "the first $800.0 million received and collected under this act is appropriated to and shall be deposited in the state treasury to the credit of the Michigan Transportation Fund and allocated as provided in Section 10(1) of 1951 PA 51, and the remainder shall be allocated to indebtedness incurred for projects described in Section 11 of 1951 PA 51."

Enrolled House Bill 5477 also indicates that "the money required to be allocated to indebtedness incurred for projects described in Section 11 of 1951 PA 51 shall be expended on that indebtedness no later than September 30, 2017."

Sections 10 and 11 – Provisions Establishing a Rail Grade Crossing Surface Account

House Bill 5460 would amend Section 10 of Act 51 to create an earmark of up to $3.0 million annually from the MTF for a new grade crossing surface account within the STF. Specifically, the earmark would be established in new subdivision, Section 10(1)(b). The bill would also amend Section 11 of the act to establish and define the grade crossing surface account "for expenditure for rail grade crossing surface improvement purposes at rail grade crossing on public roads and streets under the jurisdiction of counties, cities, or villages."

These provisions are similar to provisions in House Bill 4757 as introduced. For a more detailed analysis of these provisions, see the HFA Analysis of House Bill 4757, as introduced, http://legislature.mi.gov/doc.aspx?2013-HB-4757.

Section 11(1)(g) – Provisions Regarding MDOT Contracting Authority

Section 11 of Act 51 establishes the State Trunkline Fund (STF) and directs the priority order of appropriations from the STF. As provided in Section 11, the STF is appropriated for the construction and preservation of state trunkline roads and bridges and for MDOT administration.

Section 11 also contains provisions not directly related to STF appropriations: the section establishes a rail grade crossing program; authorizes the use of STF money and STF note or bond proceeds for loans to county road commissions, cities, and villages; and, in Subdivision (1)(g), authorizes the department to enter into agreements with county road commissions, cities, and villages "to perform work on a highway, road, or street." The subdivision authorizes such agreements to provide for "the performance by any of the contracting parties of any of the work contemplated by the contract including engineering services, and the acquisition of right of way […]." Under provisions of this subdivision, these agreements may also provide for joint participation in costs.

It is our understanding that this subdivision currently provides authority for MDOT to enter into agreements with county road commissions, cities, and villages related to local federal aid projects and transportation economic development projects. Further, it is our understanding that this subdivision provides authority for the department to enter into cost-sharing agreements with road commissions, cities, and villages related state trunkline construction contracts.

House Bill 5460 would substitute the term "local road agency" for county road commissions, cities, and villages, and would add "a private sector company" to the entities which whom the department could enter into agreements. The bill would also specifically include *maintenance* in the work for which the department may enter agreements. As a result, the proposed amendments to Section 11(1)(g) would authorize the department to enter into agreements with *a local road agency* or a *private sector company* to perform work on a highway, road, or street, including *maintenance*, engineering services, and the acquisition of right of way.

House Bill 5460, in new Subsection 15, would define "local road agency" to mean what that term means under Section 9a of Act 51, i.e., "a county road commission or designated county road agency or city or village that is responsible for the construction or maintenance of public roads within the state under this act."

Sections 11(2), 11(14), 12, 13, and 14 – Provisions Concerning Highway Construction Warranties

Section 11, Subsection (2) currently includes provisions directing the department, with respect to state trunkline projects, where possible, to secure warranties of not less than 5-year full replacement guarantee for contracted construction work. House Bill 5460 would amend this subsection to require the department, with respect to state trunkline projects, where possible, to "secure *pavement* warranties for full replacement *or appropriate repair* for contracted construction work *on pavement projects whose cost exceeds $1 million and projects for new construction or reconstruction undertaken after the effective date* [of the enacted bill]." The bill would require the department to compile and make available to the public an annual report of all warranties secured under Subsection (2), and all pavement projects whose costs exceed $1.0 million for which a warranty was not secured.

The bill would also add a new Subsection (14) to Section 11 to establish reporting requirements, in addition to those established in Subsection (2), with respect to these warranty provisions. Specifically, the bill would require an annual report listing all warranties secured under Subsection (2), and indicating whether any of those warranties were redeemed. The subsection would also require the report to list pavement projects whose costs exceed $1.0 million for which a warranty was not secured. The bill would require the report to be made available upon request and posted on the department's website. The report would include the following information: the type of project, the cost or estimated cost of the project, and the expected lifespan of the project.

The bill would add similar requirements to Section 12 with regard to county road commission projects and to Section 13 with regard to city and village projects. However, the warranty provisions dealing with county road commissions and cities and villages would only apply if allowed by the federal highway administration and the department.

The amendments to Sections 12 and 13 would require county road commissions and cities and villages, respectively, to submit a proposed warranty program to the department no later than **February 1, 2016**. The bill indicates that if approved the

proposed warranty program of a county road commission or city or village would be implemented no later than one year after approval.

The warranty reporting requirements for country road commissions, cities, and villages would be identical to those established under Section 11 for the department. However, the vehicle for the report would be the annual report already required of local road agencies under Section 14 of Act 51.

Section 14 currently requires separate accounting by local road agencies of Michigan Transportation Fund revenue, accurate and uniform records of all road and street work and funds, and annual reports by local road agencies of "the mileage of each road system under their jurisdiction and the receipts and disbursements of road and street funds." House Bill 5460 would amend this section to require a local road agency to post its annual report on its website, if it has a website.

Section 13 – Use of City and Village MTF Revenue for Public Transit

As noted above, Section 10 of Act 51 governs the distribution of MTF revenue. Among other things, Section 10 directs that 28.1% of the MTF balance, after various statutory deductions, be distributed to cities and villages. Section 13 of Act 51 prescribes how this MTF revenue is distributed among the state's 533 cities and villages. Section 13 also provides directives on the use of MTF revenue by cities and villages. Generally speaking, Section 13 directs the city/village distribution of MTF revenue to city and village *Major Street* funds, and *Local Street* funds – city/village *major streets* and *local streets* are defined in Sections 6 through 9 of Act 51.

House Bill 5460 would amend Section 13, by adding new Subdivision 14, to authorize a city to use up to 20% of its MTF distribution for *public transit purposes*. The bill would require approval by the director of the Michigan Department of Transportation for this use. The provision would apply only if "*more than 10 million passengers used public transit within the city during the previous fiscal year*."

FISCAL IMPACT:

House Bill 5460 would have the following fiscal impacts.

Amendments to Section 9b regarding the department's DBE program would appear to have a minimal fiscal impact. Additional administrative or reporting requirements would likely come from existing DBE program resources.

The impact of the amendment to Section 10 to allow the MTF to receive money from any source cannot be readily determined. The bill would strike language that generally limits sources of MTF revenue to constitutionally restricted motor fuel taxes and vehicle registration taxes and adds language to authorize the State Treasurer to "receive money or other assets from any source for deposit into the fund." However, the bill retains contradictory language that "*except as provided in this act, no other money, whether appropriated from the general fund of this state or any other source, shall be deposited in the Michigan transportation fund*."

The bill would amend Section 10 to make an exception to the current MTF distribution through reference to Section 143 of the Motor Fuel Tax Act. The impact of this change would depend on the interpretation of the language of Section 143 of the Motor Fuel Tax Act, as that act would be amended by Enrolled House Bill 5477.

The bill would also amend Section 10 to earmark up to $3.0 million from the MTF for a new [railroad] grade crossing surface account established and defined in Section 11. This earmark would reduce the amount available for distribution to other recipients of MTF funding, effectively reducing the amount available to the Comprehensive Transportation Fund by $300,000; the distribution to county road commissions by $1.1 million; and the amount available to cities and villages by $588,600. However, the new targeted grade crossing surface program would be used exclusively on rail crossings on roads under county, city, and village jurisdiction. Although the bill would create the grade crossing surface account within the STF, it would effectively reduce the amount available for other STF programs by $1.1 million.

The bill would amend Section 11(1)(g) to authorize the department to enter into agreements with *a local road agency* or a *private sector company* to perform work on a highway, road, or street, including *maintenance*, engineering services and the acquisition of rights of way. The fiscal impact of the proposed amendments to this subsection cannot be readily determined. It is not clear how the inclusion of a "private sector company" among those entities with whom the department could enter into agreements, or the inclusion of "maintenance" in the work which could be contemplated by a contract, would affect the department's contracting authority. The department currently has broad authority to contract with both county road commissions, cities, and villages, as well as private contractors, for work on state trunkline roads and bridges under both 1964 PA 286 and 1925 PA 17.

The bill's amendments to Section 11, Subdivision 1(g) do not appear related to the apparent current intention of the subdivision to provide for state/local cost sharing agreements.

House Bill 5460 would amend Section 11, Subsection (2), to require MDOT, with respect to state trunkline projects, where possible, to "secure pavement warranties for full replacement or appropriate repair guarantee for contracted construction work on pavement projects whose cost exceeds $1 million and projects for new construction or reconstruction undertaken after the effective date [of the enacted bill]."

The bill would add almost identical language to Section 12 with respect to county road commissions, and to Section 13 with respect to cities and villages. [The proposed amending language for Sections12 and 13 would establish the warranty requirement *if allowed by the federal highway administration and the department*.]

The bill would also establish reporting requirements for the department, county road commissions, and cities and villages with respect to these warranty provisions.

The impact of these provisions on the Michigan Department of Transportation and local road agencies would depend on the number and nature of the warranties required under terms of the bill.

Increased use of *performance warranties* for construction and reconstruction work could increase the cost of construction and preservation work. In a performance warranty contract, the contractor may be forced to obtain a warranty bond to ensure that any corrective work will be performed during the warranty period. The warranty bond is a direct cost to the contractor which would likely be passed on to the owner in higher bid prices. How much bid prices would increase, and whether the owner receives additional value – e.g., increased assurance of a well-built road – for the increased cost is difficult to determine. The department's experience with full performance warranties on construction or reconstruction contracts has been limited.

In addition to possible direct cost increases, the bonding requirements of performance warranties may indirectly increase construction bid prices by limiting the number of bidders on some jobs and thus reducing competition. Under a performance warranty, contractors are generally required to secure a warranty bond for the warranty period – which may be as long as 10 years. If the contractor goes out of business, the bonding company guarantees that the warranty will be honored. As long as the warranty bond is outstanding, contractors have diminished bonding capacity. Contractors, particularly smaller contractors, may find it hard to obtain sufficient additional bonding to bid on new jobs. Some small contractors may simply be unable to obtain bonding needed to secure performance warranties.

For additional background information on road construction warranties, see the House Fiscal Agency publication: ***Transportation: Road Construction Warranties***, March 2001, at: http://www.house.mi.gov/hfa/Archives/PDF/warrant.pdf

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