

## TRANSPORTATION: PUBLIC-PRIVATE AGREEMENTS

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**House Bill 4925 (Substitute H-2)**

**Sponsor: Rep. Marilyn Lane**

**Committee: Transportation and Infrastructure**

**Complete to 5-8-14**

## SUMMARY OF HOUSE BILL 4925 (H-2) AS ADOPTED BY COMMITTEE

The bill would amend Public Act 286 of 1964 to authorize the Department of Transportation to enter into certain public-private agreements.

Public Act 286 of 1964 provides for the organization, powers, and duties of the State Transportation Commission and the State Transportation Department, and provides for the appointment, powers, and duties of the State Transportation Director.

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

**House Bill 4925 (H-2)** would amend Public Act 286 of 1964 to authorize *public-private agreements* relating to "*researching, planning, studying, designing, developing, financing, acquiring, constructing, charging user fees, operating, or maintaining a public transportation facility,*" and "*to provide for other arrangements for the creation and operation of public transportation facilities that may be financed by user fees, charges, and other revenue.*"

As outlined in the bill title and described in the body of the bill, the bill would also amend the act to:

- *Provide for public transportation facilities*
- *Provide for the creation of certain authorities*
- *Provide for the sale of bonds*
- *Provide for certain powers of certain state departments*

Both the bill as introduced and the H-1 substitute would authorize the department director to enter into public-private agreements subject to the approval of the *State Transportation Commission*. The H-2 substitute would authorize the department director to enter into public private agreements subject to the approval of the *Legislature*. The bill makes

other changes throughout the bill to reflect the change from commission approval to legislative approval.

The bill would amend five sections currently in the act: Sections 1, 6a, 7, 7a, and 10. The bill would also add eight new sections. The new sections contain provisions related to public-private agreements.

The bill is specific to the Michigan Department of Transportation.

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

Note that while public-private *partnership* (PPP) is a commonly used term, the bill refers to public-private *agreements*.

The term PPP can be used to describe a number of procurement methods in which a private entity assumes a larger role in the planning, financing, design, construction, operation, and maintenance of a transportation facility as compared to traditional procurement methods. The department already has authority to use certain PPP procurements methods, including design-build and design-build-finance type contracts. Of the various PPP procurement methods, the department appears to lack only the statutory authority to enter into a long-term lease using a pledge of toll revenues or certain kinds of design-build-finance contracts involving the pledge of toll revenues. A department presentation on PPPs has indicated that "enabling legislation [is] required to move to broader concession-type leases."<sup>2</sup>

The bill provides for the sale of bonds. Although the bill does not use the term "*revenue bonds*," specific provisions the bill would limit bonding authority under the act to revenue bonds, i.e. bonds issued under a pledge of repayment from user fees generated from public-private agreements.

The Michigan Department of Transportation does not, under current law, have a general authority to establish toll roads. The bill would not grant to the department, the department director, or the commission a general authority to impose tolls. The provisions regarding tolls or user fees relate only to public- private agreements under the

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

<sup>2</sup> June 18, 2009 testimony to the House Committee on Transportation in support of House Bill 4961 of the 2009-2010 Legislative Session.

bill. [The bill uses the terms "user fees" and "ancillary charges" in place of the terms "tolls" or "tolling."]

The bill would permit a public-private agreement to provide for the charging and collection of user fees and ancillary charges for the use of a public transportation facility.

The bill would not allow the conversion of non-tolled facilities existing at the time the bill was enacted into tolled or user-fee lanes. The bill indicates that a user fee may be imposed on a highway only if imposed for the use of a highway constructed after the effective date of the enacted bill, or, for the use of highways with expanded capacity beyond highway capacity in place on the effective date of the enacted bill.

The H-2 substitute specifically states that *"nothing in this section allows the conversion of any lanes existing on the effective date of the amendatory act that added this section into tolled or user-fee lanes except that the department may determine which lane of an existing highway is designated for imposition of user fees if capacity of that highway is expanded."* [This wording is slightly different in the H-1 substitute and bill as introduced.]

The H-1 substitute is identical to the bill as introduced except for two changes in Section 1, the definitions section of the bill. The H-1 substitute would strike references to the government of Canada, and to the Canadian International Bridges and Tunnels Act in the definition of "Instrumentality of Government." In addition, the H-1 substitute strikes the word "international" from the definition of "public transportation facility."

The H-2 substitute differs from the H-1 substitute in that it would require legislative approval of public-private agreements, rather than State Transportation Commission approval.

## **BACKGROUND INFORMATION:**

### **Background on Public Private Partnerships Generally**

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

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

The FHWA website identifies several PPP options for the construction or reconstruction of transportation facilities.<sup>3</sup>

*Design-Build* – a project delivery method that combines two, usually separate services into a single contract. With design-build procurements, owners execute a single fixed-fee contract for both architectural/engineering services and construction. The design-build entity may be a single firm, a consortium, joint venture, or other organization assembled for a particular project.<sup>4</sup>

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

*Design-Build-Finance-Operate (DBFO)* – a procurement method in which the responsibilities for designing, building, financing, and operating are bundled together and transferred to private sector partners. One commonality that cuts across all DBFO projects is that they are either partly or wholly financed by debt leveraging revenue streams dedicated to the project. Direct user fees (tolls) are the most common revenue source. However, others range from lease payments to shadow tolls and vehicle registration fees. Future revenues are leveraged to issue bonds or other debt that provide funds for capital and project development costs. They are also often supplemented by public sector grants in the form of money or contributions in kind, such as right-of-way. In certain cases, private partners may be required to make equity investments as well.<sup>5</sup>

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

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

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

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<sup>3</sup> The descriptions of PPPs from the FHWA PPP website were edited by the HFA analyst to improve readability.

<sup>4</sup> The Minnesota Department of Transportation used a design-build procurement for the replacement of the I-35W Bridge over the Mississippi River in Minneapolis. For a description of this project, see "Minneapolis Speedway" from the March 2009 issue of Governing Magazine. <http://www.governing.com/article/minneapolis-speedway>

<sup>5</sup> The Confederation Bridge linking Prince Edward Island and New Brunswick Canada was constructed using a DBFO procurement. See [http://en.wikipedia.org/wiki/Confederation\\_Bridge](http://en.wikipedia.org/wiki/Confederation_Bridge)

*Long-Term Lease* – This PPP model involves the long term lease of existing, publicly-financed toll facilities to a private sector concessionaire for a prescribed concession period during which the concessionaire has the right to collect tolls on the facility. In exchange, the private partner must operate and maintain the facility and in some cases make improvements to it. The private partner must also pay an upfront concession fee.<sup>6</sup>

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

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

For additional information on public-private partnerships, see the House Fiscal Agency publication *Public Private Partnerships in Transportation*  
<http://www.house.mi.gov/hfa/PDF/Transportation/NCSLPPPs.pdf>

## CONTENT OF THE BILL:

The bill is specific to the Michigan Department of Transportation and deals primarily with the department's authority to enter into certain kinds of contracts described in the bill as public-private agreements. Our analysis below describes the specific content of the bill.

### **Definitions:**

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

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

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<sup>6</sup> Two widely publicized PPP contracts involved the long-term lease of public facilities to private concessionaires in return for concession fee payments. The first was the October 2004 agreement between the city of Chicago and the Skyway Concession Company (SCC) involving a 99-year lease of the 7.8 mile Chicago Skyway. The SCC made an upfront concession payment to the city of \$1.83 billion. The SCC took responsibility for all operating and maintenance costs of the facility in exchange for the right to all toll and concession revenue over the life of the lease. A 2006 contract between the state of Indiana and a private investment group involved a 75- year lease of the 167 mile Indiana Tollway. The contract included a concession fee payment to the state of \$3.85 billion. A more detailed discussion of these agreements is found on the FHWA website noted above.

**"Instrumentality of government"** would mean a public entity in the United States created or empowered to carry out functions commonly carried out by units of government, public agencies, or public authorities. The bill includes the following sentence: *"Instrumentality of government includes a public agency or public authority created by another state of the United States."* The H-1 substitute strikes references to the government of Canada, and to the Canadian International Bridges and Tunnels Act that had been in the bill as introduced.

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

**"Public-private agreement"** would mean "an agreement between a private entity and the department or between a private entity, the department, and one or more instrumentalities of government that relates to researching, planning, studying, designing, developing, financing, acquiring, constructing, charging user fees, operating, or maintaining a public transportation facility, or any combination of those activities." A public-private agreement would include an agreement between the department and one or more instrumentalities of government if the agreement is related to a project that has or will have an agreement between the department or an instrumentality of government and a private entity.

**"Public transportation facility"** would mean any new or existing domestic highway, lane, road, bridge, tunnel, overpass, ramp, interchange, ferry, airport, vehicle parking facility, vehicle transportation facility, port facility, locks facility, rail facility, intermodal or other public transit facility, or any other equipment, rolling stock, site, or facility used in the transportation of persons, goods, substances, vehicles, information, or matter of any kind, and any building, structure, parking area, appurtenance, or other property necessary or desirable for the facility.

The H-1 substitute strikes the words "or international" following in the word "domestic" that had been in the bill as introduced.

### **Authority of the Department Director**

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

- The act currently provides for the director to supervise the work of department employees; the bill would add the words **"and agents."**
- The act currently indicates that the director may employ personnel necessary to carry out the duties of the director and the responsibilities of the department "subject to laws governing state employment." The bill would amend the sentence to read "subject to **contractual obligations** and laws governing state employment" – apparently to indicate that the employment of personnel is subject to both laws and contract terms.

- The act currently allows the director, subject to commission approval, to delegate powers to any department employee. The bill would strike the phrase "subject to the approval of the commission." The bill would prohibit the director from delegating the power to enter into public-private agreements.
- The act currently provides for the director to establish a program of current and long-range planning for the *transportation systems* under the department's jurisdiction. The bill would add "**public transportation facilities of the department**" to the planning requirement.
- The act currently authorizes the director to purchase "materials, supplies, and equipment as necessary and proper to carry out the duties of the department as provided by law governing state purchasing." The bill would strike the balance of the sentence after the word "equipment."
- The bill would add a new subsection to authorize the director to purchase **services in accordance with applicable civil service rules**.
- The bill would add a new subsection to authorize the director to acquire interests in real and personal property, including by condemnation.
- The H-2 substitute would add a new subsection to authorize the director to enter into public-private agreements under Section 7b subject to the approval of the *legislature*. [This is different from the H-1 and introduced versions of the bill, which had made the department director's authority to enter into public-private agreements subject to State Transportation Commission approval.]

### **State Transportation Commission Powers and Duties**

Section 7 of the act currently provides for the powers and duties of the State Transportation Commission, subject to the provisions of Article V, Section 28 of the 1963 Constitution.

Under current law, among the powers and duties of the commission is the "awarding of all contracts for the construction, improvement, and maintenance, of the highways and public transportation facilities under its jurisdiction as provided by law." The bill would amend this section to authorize the commission to *approve* contracts for *award* by the *department* as provided *by resolution of the commission*. The bill also changes the reference from "transportation facilities" to "**public** transportation facilities."

The H-2 substitute does not include language that would have included in the powers and duties of the State Transportation Commission the "*approval for award by the department of all public-private agreements*."

Section 7 currently authorizes the *commission* to acquire, own, and hold real and personal property, as well as to sell, lease, dispose of, or encumber such property. The bill would amend this language to allow the commission to *authorize* the *department* to acquire,

own, and hold *interests* in real and personal property, and to sell, lease, dispose of, or encumber such property *subject to resolutions of the commission*.

The bill adds a new subsection to require the commission to conduct a public hearing at least once every five years to receive public comment and input with regard to then existing public transportation facilities operated under a public-private partnership.

### **Provisions Regarding Construction Contracts**

Section 7a of the act currently authorizes construction contracts to provide for periodic partial payment to contractors and authorizes the department to establish specifications regarding the retainage of a portion of the amount earned under construction contracts. The bill would amend this section to indicate that the definition of "construction contract" does not include public-private agreements. The bill also changes the current term "contractor" to "*construction contractor*" and indicates that a *construction contractor* is "a person or entity, other than this state, or an agency or department of this state, who is a party to a construction contract."

The bill changes other references throughout the section from "*contractor*" to "*construction contractor*."

These changes to Section 7a would appear to make a distinction between the payment provisions applicable to construction contractors and those applicable to public-private agreements.

The bill strikes a definition of "project" in this same section.

### **Provisions Regarding Public-Private Agreements**

The bill adds a new section, Section 7b, which would authorize the department to enter into public-private agreements as provided in the act. The H-2 substitute amends this section to make the department's authority to enter public-private agreements subject to approval of the legislature.

The new section is broadly permissive; it indicates that "*a public-private agreement may contain terms and conditions that the department may determine or negotiate to facilitate the researching, planning, studying, designing, developing, financing, acquiring, constructing, charging user fees, governing, operating, or maintaining a public transportation facility in the public interest.*"

The section requires that the agreement "*include terms designed to protect the public interest and ensure accountability of a concessionaire to the department or a public entity created under Michigan law for a public transportation facility in this state, whichever is applicable.*" The section also requires that a public transportation facility be publicly owned and dedicated to public use as a transportation facility as provided in the act.



Subsections 7b(2) through 7b(13) of the bill require or authorize specific provisions in public-private agreements, as described further below:

#### Terms of Use of Transportation Facilities

The bill would require that a public-private agreement provide for the "terms of use and operation of a public transportation facility by a concessionaire for a period the department determines is necessary for the development and financing of a public transportation facility and the economic feasibility of the public-private agreement."

The bill would allow a public-private agreement to include a lease, license, right of entry, or other instrument for the public transportation facility as the department determines is in the best interest of the public.

The bill would allow an agreement for an initial operating term of up to 50 years from the completion of construction [of the public transportation facility], or the commencement of the collection of user fees, whichever was later. The bill would permit agreements longer than 50 years if a longer term was required for the economic feasibility of the public-private agreement as determined by the department and approved by the commission.

The bill would require that the agreement provide that the ownership of a public transportation facility within this state be vested in the department or a public entity created under Michigan law and that title to the public transportation facility not be encumbered.

The bill would prohibit a public-private agreement from depriving the public of the use and benefit of a public transportation facility except as necessary to implement user fees or ancillary charges authorized by the section, to regulate the level or character of permissible uses of the transportation facility, to address issues of public safety or security, or to maintain, repair, or improve the public transportation facility.

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

The bill indicates that nothing in a public-private agreement shall prohibit the department from constructing, operating, and maintaining any transportation project that is in the department's long-range plan in effect at the time proposals are submitted, or prohibit any municipality, county, or other local agency from constructing, operating, or maintaining any transportation project.

#### User Fees (Tolling)

The bill would permit a public-private agreement to provide for the charging and collection of user fees and ancillary charges for the use of a public transportation facility. The bill uses the terms "user fees" and "ancillary charges" in place of the terms "tolls" or "tolling."

Once established, the bill would permit the increase in user fees and ancillary charges by no more than cumulative annual increases in the consumer price index designated in the public-private agreement without the written approval of the department. The bill would

provide an exception to this consumer price limitation to user fees and ancillary charges intended to control or manage traffic volume or flow, i.e. congestion-based pricing.

The bill would allow the imposition of a reasonable administrative charge if a user elects to pay a user fee through separate billing.

The bill indicates that a user fee may be imposed on a highway only if imposed for the use of a highway constructed after the effective date of the bill once enacted, or for the use of highways with expanded capacity beyond highway capacity in place on the effective date of the enacted bill.

The bill indicates that user fees and ancillary charges imposed for the use of the public transportation facility in this state are not subject to regulation by any other governmental entity.

The H-2 substitute also states that "*nothing in this section allows the conversion of any lanes existing on the effective date of the amendatory act that added this section into tolled or user-fee lanes except that the department may determine which lane of an existing highway is designated for imposition of user fees if capacity of that highway is expanded.*" [This wording is slightly different in the H-1 substitute and bill as introduced.]

#### Use of User Fees and Ancillary Charges

The bill indicates that compensation paid to the department in connection with a public-private agreement, including the department's portion of user fees and ancillary charges imposed for use of a public transportation facility shall be used for transportation purposes.

#### Department Oversight of Operator

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

#### Immunity

The bill indicates that the state, including the department, does not have liability for the acts or omissions of a concessionaire or other party to a public-private agreement.

#### Use of Transportation Facility for Commercial Activities

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

### Performance Bonds/Letter of Credit

The bill would require a public-private agreement for a public transportation facility to impose on a concessionaire the same requirements of law imposed on contracts "when [the department] contracts directly for the construction or operation of a public transportation facility." The bill would require a public-private agreement to establish the amounts of payment or performance bonds, or other security. The bill would allow a public-private agreement to authorize a concessionaire to provide a letter of credit in lieu of payment or a performance bond. The bill would also allow the department, if it determined that bonds or letters of credit were not reasonably available in sufficient amounts, to accept other commercially reasonable forms of security, including parent corporation guarantees, to supplement available payment bonds, performance bonds, or letters of credit. The bill indicates that the department shall require the post of sufficient security to fulfill the purposes of a payment and performance bond.

The bill also indicates that in lieu of the posting of security by the concessionaire, or in supplement to the security provided by the concessionaire, the department may accept security from entities other than the concessionaire, as long as the purposes of a payment and performance bond are fulfilled.

### General Authority

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

### Reversion of Facility to the Department

The bill requires that for public-private agreements that include an operations phase, the agreement must require that the public transportation facility revert back to the department at the end of the term in a condition specified by the department.

### Refinancing Gains

The bill would require that public-private agreements include provisions that address the department's rights to share in refinancing gains received by a concessionaire.

### Ability of Concessionaire to Transfer Interest

The bill would require that public-private agreements include provisions that specify restrictions on the ability of the concessionaire to transfer its interest in a public-private agreement without the consent of the department.

### Condemnation Authority

The bill would prohibit the delegation of the power of condemnation to the concessionaire, and requires that all rights of way acquired through condemnation used for a public transportation facility be publicly owned during the term of a public private agreement.

## **Provisions Regarding the Creation of Authorities**

The bill adds a new section to the act, Section 7c, regarding the creation of authorities.

### **Authority to Create Authorities**

The bill would authorize the department, upon approval by the State Transportation Commission, to "create public transportation authorities as separate legal entities within the department that may exercise the powers of the department in regard to public-private agreements under this act, to the extent authorized by an agreement between the department and the public transportation authority."

The bill says that a public transportation authority is an "instrumentality of this state" that may sue and be sued and enter into contracts, including public-private agreements, to the extent authorized by an agreement with the department."

The bill indicates that the department is not liable for the acts and omissions of the public transportation authority, except to the extent expressly authorized in an agreement between a public transportation authority and the department.

The bill says that employees of the public transportation authority are employees of the state, and the authority shall comply with the rules of the Civil Service Commission. The bill also indicates that the public transportation authority is an agency of the state entitled to governmental immunity.

The bill indicates that the department and the public transportation authority shall comply with all applicable state and federal laws and regulations, including but not limited to applicable environmental laws and regulations.

## **Provisions Regarding the Selection of Public-Private Agreement Contractors**

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

### **General Authority**

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

### **Reimbursement of Cost of Proposals**

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

### **Unsolicited Proposals**

The bill would grant to the department sole discretion as to whether, and to what extent, to consider an unsolicited proposal. The bill would allow the department to amend an

unsolicited proposal. The bill would require the department to solicit competing proposals, using the criteria in subsection (5), before entering into a public-private agreement for a public transportation facility proposed by an unsolicited proposal.

#### Procurement Methods

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

- Sealed bidding.
- Selection of proposals, with or without negotiations, based on qualifications, development proposals, technical proposals, financial proposals, best value, or any combination of them.
- Any competitive selection process that the department determines to be appropriate or reasonable.

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

#### Project Selection Criteria

The bill would require the department to consider all of the following factors in selecting a project:

- The ability of the public transportation facility to improve safety or operations, reduce congestion, reduce travel times, increase capacity, enhance environmental quality, promote economic development, or any combination of those or similar factors.
- Benefits to the public.
- Ability to increase federal or other nonstate revenue to this state.

#### Proposal Selection Criteria

The bill would require the department to consider all of the following factors in selecting a bid or proposal to enter into a public-private agreement:

- The proposed cost of and financial plan for the public transportation facility.
- The general reputation, qualifications, industry experience, safety record, labor record, and financial capacity of the private entity.
- The proposed design, operation, and feasibility of the public transportation facility.

- To the extent permitted by federal law, the proposed plan of the private entity to individuals authorized to work in the United States work relating to the public transportation facility.
- Any other criteria, including prequalification under rules promulgated by the department or through 1933 PA 170, that the department considers necessary or appropriate in the best interests of this state or the people of this state.

### Multiple Entities

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

### Confidentiality

The bill allows the department to promise to keep trade secrets or proprietary commercial or financial information provided by a private entity confidential only for purposes of seeking or entering into a public-private agreement. The bill indicates that upon receipt of a sufficiently detailed request by a private entity, the department must provide a description of the information to which its promise of confidentiality will extend. The bill indicates that the designated confidential information is not subject to the Freedom of Information Act.

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

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

### Cost Benefit Analysis

The bill would require the department to perform a cost benefit analysis, including a risk transfer of allocation assessment, to determine whether a proposed public-private agreement is the most economically beneficial way to perform the proposed project. The bill requires the department to choose an appropriate methodology to utilize in the cost benefit analysis, and to state the assumptions used in the analysis. The bill also requires that the cost-benefit analysis include "all necessary monitoring and oversight of any private entity by a public entity."

The bill requires the department to publish the results of the analysis on its website.

The bill would prohibit the State Transportation Commission from approving a public-private agreement unless it determines that a public-private agreement is the most economically beneficial way to perform the project, including consideration of whether the [public-private] agreement reduces the risk to the state, including financial risks, compared to other [procurement] options and financing arrangements.

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

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

### **Not Subject to Ad Valorem Property Taxes**

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

### **Subject to Motor Fuel Taxes**

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

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

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

### **Disposition of Revenue**

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

## **Provisions Regarding Bonding**

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

### **Authority to Issue Bonds**

The bill authorizes the department to issue and sell bonds or notes for the purpose of providing funds to carry out the provisions of this act with respect to the development, acquisition, construction, financing, maintenance, or operation of a public transportation facility provided for by a public-private agreement or the refunding of any bonds or notes, together with any costs associated with the transaction.

### *Not Full Faith and Credit Bonds*

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

### *Source of Debt Service Payments*

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

### *Use of Bond Counsel and Consultants*

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

### *Use of Private Activity Bonds or Other Financial Instruments*

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

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

### *No Limitation on Bonding from Other Sources*

The bill indicates that the section does not limit a governmental entity's authority to issue bonds or other financial instruments for transportation projects under other laws or from financing a public transportation facility with funds provided or raised under other laws, including, but not limited to, laws authorizing the sale of bonds.<sup>7</sup>

### **Provisions Regarding Other Sources of Financing**

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

### *Federal Infrastructure Bank*

The bill authorizes the department to accept from the United States or any of its agencies, including, but not limited to, a federal infrastructure bank, funds that are available to the

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<sup>7</sup> The department is currently authorized in 1951 PA 51 to issue bonds or notes by pledging constitutionally restricted transportation revenue. See HFA paper *State Transportation Borrowing and Debt Service*.



department for carrying out a public-private agreement, whether the funds are made available by grant, loan, line of credit, loan guarantee, or other financial assistance.

#### Acceptance of Federal Requirements

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

#### Agreements with Federal Agencies

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

#### Acceptance of Other Sources of Financing

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

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

#### **Provisions Regarding Authority of Law Enforcement**

The bill adds a new section to the act, Section 7h, regarding jurisdictional authority of law enforcement on public transportation facilities.

#### Authority of Law Enforcement

The bill indicates law enforcement officers of the state and local units of government in which all or part of a public transportation facility authorized by a public-private agreement is located have the same powers and jurisdiction within the limits of the public transportation facility as they have in their respective areas of jurisdiction to enforce traffic and motor vehicle laws. The bill provides that authorized emergency vehicles (as defined in Section 2 of the Michigan Vehicle Code) and occupants of authorized emergency are afforded access to a public transportation facility while in the performance of an official duty without the payment of a user fee or other charge.

#### Authority of Michigan Vehicle Code and Local Traffic Ordinances

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

### Data Collection

The bill directs that the public-private agreement include provisions relating to the permitted retention and use by the concessionaire of collected data and customer information. The bill requires a public-private agreement to prohibit the sale and use of such data for commercial purposes unrelated to the use of the public transportation facility.

The bill permits the use of measures and devices to record users of a public transportation facility to facilitate the collection of user fees. The bill would prohibit the use or disclosure of a recording of the use of a public transportation facility except in the enforcement and collection of user fees for use of the public transportation facility, by a police officer while lawfully enforcing his or her duties as a police officer, or to create statistical reports that do not disclose the identity of the specific users of the [public transportation] facility.

### Penalties for Failure to Pay a User Fee

The bill indicates that a person who fails to pay a user fee imposed for use of a public transportation facility is responsible for a civil infraction and would be required to pay a civil fine of \$50.00. In addition, the person would be required to pay the operator [in this instance bill uses the term "operator", rather than "concessionaire"] two times the amount of the user fee.

The bill provides that if the required sum remains unpaid for 180 days after the person's use of the transportation facility, the department, an authority, an instrumentality of government, or a private entity authorized to do so by the department, may bring a civil action against the person to collect the unpaid charges in a court having jurisdiction, and that if the civil action results in a judgment for unpaid charges, the defendant would also be required to reimburse the plaintiff for all filing fees incurred by the plaintiff plus \$500.00 in compensation for the costs of bringing the civil action.

The bill indicates that during the period a person who owes and has failed to pay charges, fees, and costs may be barred from using the public transportation facility.

The bill contains standards for proving that a particular vehicle used a public transportation facility without payment of the applicable user fee, and addresses the question of whether liability falls on a motor vehicle lessee or the leased vehicle owner.

### **Provisions Regarding Applicability of Federal Aid Requirements**

The bill adds a new section to the act, Section 7i, to indicate that "notwithstanding any other provision of this act, if federal funds are used for a public transportation facility, the applicable federal law or rules control if they conflict with this act."

### **Technical Amendments**

The bill makes technical changes to Section 10 of the act.

## ADDITIONAL ANALYSIS:

### Scope of the Bill

**Definition** – The bill would define public-private agreements as "*an agreement between a private entity and the department or between a private entity, the department, and one or more instrumentalities of governmental that relates to researching, planning, studying, designing, developing, financing, acquiring, constructing, charging user fees, operating, or maintaining a public transportation facility, or any combination of those activities.*"

The bill also indicates that a public-private agreement "*includes an agreement between the department and one or more instrumentalities of government if the agreement is related to a project that has or will have an agreement between the department or an instrumentality of government and a private entity.*" This definition would appear to encompass most of the department's current activities other than those currently carried out entirely by state forces.

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

### *Other Statutory Requirements*

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

**Public Act 286 of 1964** (which would be amended by House Bill 4925) provides for the organization, powers, and duties of the State Transportation Commission and the State Transportation Department, and provides for the appointment, powers and duties of the State Transportation Director.

**Public Act 59 of 1915** provides for the construction, improvement, and maintenance of highways and includes provisions governing contract bid process and contract payments. The act appears to apply to both country road commissions and the state highway commissioner (i.e. the director of the state transportation department).

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

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

**Section 11c of Public Act 51 of 1951** requires that construction and preservation projects whose cost exceeds \$100,000 be performed by contract awarded by competitive bidding, unless the department affirmatively finds another method to be in the public interest. The section requires the department to such findings to the State Transportation Commission

90 days before work is commenced and promptly in writing to the House and Senate Appropriations committees.

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

#### *Authority to Toll*

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

The bill would not grant to the department or the department director or the commission a general authority to impose tolls. The provisions regarding tolls or user fees relate only to public-private agreements under the bill. [The bill uses the terms "user fees" and "ancillary charges" in place of the terms "tolls" or "tolling."] The bill would permit a public-private agreement to provide for the charging and collection of user fees and ancillary charges for the use of a public transportation facility.

The bill would not allow the conversion of non-tolled facilities existing at the time the bill was enacted into tolled or user-fee lanes. The bill indicates that a user fee may be imposed on a highway only if imposed for the use of a highway constructed after the effective date of the enacted bill, or, for the use of highways with expanded capacity beyond highway capacity in place on the effective date of the enacted bill.

The H-2 substitute differs from the H-1 substitute in that it would require legislative approval of public-private agreements, rather than State Transportation Commission approval.

## **FISCAL IMPACT**

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

The department has indicated that public-private agreements are an additional procurement and financing option for delivering its transportation program.

The H-2 substitute would authorize the department to enter into public-private agreements, subject to legislative approval. The bill would have no direct fiscal impact on local units of government.

To the extent that the bill would allow tolling of transportation facilities through a public-private agreement, under the conditions described in the body of this analysis, the bill could result in additional state transportation revenue – specifically for new facility or

expanded-capacity projects. Certain types of public-private agreements could provide the department with additional financing options for delivery of its transportation program.

This analysis offers no conclusion as to whether public-private agreements are, as a rule, more or less costly to the public owner than traditional procurement methods. As noted in the body of this analysis, there are a number of different types of public-private agreements. It appears that the most efficient procurement method is a function of a number of project-specific factors.

In addition to efficiency considerations, a public-private partnership procurement option may be selected for reasons of program effectiveness. A public-private partnership procurement method, such as design-build, or design-build-finance, may deliver a specific transportation facility faster than a traditional design-bid-build procurement, giving the public the economic use of a new facility months or years sooner than a traditional procurement method. In some cases, a concession-type public-private agreement may allow for the construction of a new facility or the expanded capacity of an existing facility that the public agency could not self-finance through traditional methods.

As noted above, H-2 substitute that make the department's authority to enter into public-private agreements subject to legislative approval. This requirement could affect the department's ability to negotiate with potential contract partners, and the willingness of potential contract partners to seek public private agreements with the department.

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