

Legislative Analysis



PUBLIC ACT 51 of 1951 – CONTRACTS FOR STATE TRUNKLINE AND LOCAL ROAD MAINTENANCE

Mary Ann Cleary, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5167 (Substitute H-1)

Sponsor: Rep. Wayne Schmidt

Committee: Transportation and Infrastructure

Complete to 5-5-14

A SUMMARY OF HOUSE BILL 5167 (SUBSTITUTE H-1) AS ADOPTED BY COMMITTEE ON 4-29-14)

House Bill 5167 (H-1) would amend two sections of 1951 PA 51, the act which governs the distribution of funds for state and local road and bridge programs:

The bill would amend Section 11, the section which establishes and directs appropriations from the State Trunkline Fund (STF), and more specifically, Section 11(1)(g), a subdivision dealing with the Michigan Department of Transportation's authority to enter into cost sharing agreements with county road commissions, cities, and villages for work on a "highway, road, or street." The bill would substitute the term "local road agency" for current references to "county road commission, city, and village;" would also authorize the department to enter into agreements with a "private sector company;" and would add "maintenance" to the work which could be contemplated by the agreement.

The bill would also amend Section 11c, a section which currently prescribes contracting requirements for certain federal-aid construction contracts. The bill would add language requiring the department and certain local road agencies to: develop and implement a "performance based maintenance system;" develop and implement a "performance rating system" for maintenance services; for a portion of new or renewed contracts, provide for payment for maintenance services based on the outputs or outcomes associated with the performance rating system; and competitively bid and award a contract for "the full performance of maintenance services" on a portion of highways, streets, roads, and bridges under agency jurisdiction. The bill would also add reporting requirements associated with these new contracting requirements.

BACKGROUND INFORMATION AND DETAILED ANALYSIS

Section 11 – Background Information and Proposed Amendments

Section 11 of 1951 PA 51 establishes the 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 administration of the Michigan Department of Transportation.

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 authorizes the department to enter into agreements with county road commissions, cities, and villages "to perform work on a highway, road, or street."

House Bill 5167 (H-1) would make one substantive change to Section 11. The bill would amend Subdivision 1(g) regarding the department's authority to enter into agreements with county road commissions, cities, and villages.

Section 11, Subsection 1(g) currently authorizes the department to enter into agreements with county road commissions, cities, and villages "to perform work on a highway, road, or street," including engineering services and the acquisition of right of way. The subsection also authorizes agreements to provide for joint participation in costs.

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

Section 1c of 1951 PA 51 currently requires participation by certain cities in the cost of state trunkline construction contracts; these cost sharing provisions are reflected in agreements between the department and the applicable cities. In addition, some state trunkline projects include contract work on local facilities – such as upgrades to municipal water, sewer, or drainage systems – as part of a state trunkline construction contract; local agency financial obligations related to those local elements of the construction contract are defined by agreement between the department and the local agency.

House Bill 5167 would substitute the term "local road agency" for county road commissions, cities, and villages, and would add "a private sector company." The bill would also specifically include *maintenance* in the work for which the department may enter agreements. As a result, the proposed amendments to Subsection (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.

The H-1 substitute would define "local road agency" to mean what that term means under Section 9a of Act 51: "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."

[Provisions in the bill as introduced, authorizing the department to borrow money from county road commissions, cities, and villages, are not included in the H-1 substitute.]

Section 11c – Background Information and Proposed Amendments

Section 11c of 1951 PA 51 currently reads:

"All federal aid construction projects, all other projects of the department concerning highways, streets, roads, and bridges, whose cost exceeds \$100,000.00 for construction or preservation as defined in Section 10c, shall be performed by contract awarded by competitive bidding unless the department shall affirmatively find that under the circumstances relating to those projects, some other method is in the public interest. All of those findings shall be reported to the state transportation commission 90 days before work is commenced and promptly in writing to the Appropriations committees of the Senate and House of Representatives. However, in a case in which the department determines emergency action is required, the reports need not be filed before work is commenced but shall be promptly filed. Local road agencies that make a decision not to perform construction or preservation projects exceeding \$100,000.00 shall contract for this work through competitive bidding."

The language of this section is somewhat confusing. It is not clear if the phrase "whose cost exceeds \$100,000.00 for construction or preservation as defined in Section 10c" applies to "*all other projects of the department concerning highways, streets, roads, and bridges,*" or if it also applies to the phrase "*all federal aid construction projects.*"

It is our understanding that this section effectively requires that all department contracts for construction or preservation in excess of \$100,000 be performed by contract awarded by competitive bidding, unless the department finds that under circumstances specific to a project, an alternative contracting method is in the public interest.

The section also requires the department, when it finds that a method other than competitive bidding is in the public interest, to notify the State Transportation Commission 90 days before work is commenced, and the House and Senate Appropriations committees "promptly." The department has used certain contracting methods other than competitive bidding, such as Design-Build and Construction Manager/General Contractor. It is not clear how, in relation to these non-competitive contracts, the department currently demonstrates compliance with the notification requirements of Section 11c.

The language of Section 11c also appears to require that all local agency federal-aid construction projects whose costs exceed \$100,000 be performed by contract awarded by competitive bidding. For projects with estimated construction costs of \$100,000 or less, the local agency may perform the work with its own forces. Work performed by local road agency forces, as opposed to a private contractor through competitive bidding, is termed "force account" work.

The department has established guidelines for the use of non-competitive bidding by local road agencies on federal-aid projects. The department guidelines parallel Federal Highway Administration policy on the use of agency force account on federal aid projects (FHWA Order 5060.1, dated March 12, 2012). Among the department

guidelines is the requirement that the local agency demonstrate that the use of force account would result in a savings of at least 6% as compared to competitive bidding.

The current guidance document, *Construction of Federally Funded Local Agency Projects by Non-Competitive Bid Contract (Force Account)*, dated May, 2011, is available from the department's website. In addition, the department's Local Agency Program Unit publishes an annual report of non-competitive local agency projects. That report is also available on the department's website.

Most local road agency force account work is associated with local federal aid projects. However, in some instances the department may employ a local road agency to perform force account work related to a state trunkline construction project – typically for incidental work such as maintaining a detour or upgrading or timing traffic signals. It is not clear if Section 11c also applies to these kinds of force account projects.

House Bill 5167 (H-1) would amend Section 11c to read as follows:

"All construction projects of the department or a local road agency concerning highways, streets, roads, and bridges for construction or preservation as defined in Section 10c shall be performed by contract awarded by competitive bidding unless the department or the local road agency affirmatively finds that under the circumstances relating to those projects, some other method is in the public interest. The director of the department or the local road agency shall report any findings that a method other than competitive bidding is in the public interest to the state transportation commission 90 days before the award of a contract using a method other than competitive bidding. The director of the department or the local road agency shall also report a finding that a method other than competitive bidding is in the public interest in writing to the appropriations committees of the Senate and House of Representatives not less than 60 days before the award of a contract using a method other than competitive bidding. However, in a case in which the department or a local road agency determines emergency action is required, the reports need not be filed before a contract is awarded but shall be promptly filed."

House Bill 5167 (H-1) would strike the \$100,000 threshold of current law and would appear to require competitive bidding of both state and local construction and *preservation* projects, unless the department or local road agency affirmatively finds that under the circumstances relating to those projects, some other method is in the public interest. Maintenance, including routine maintenance, is a subset of *preservation* under the definitions of 10c.

The bill would require the department director or the director of the local road agency to notify the State Transportation Commission and the House and Senate Appropriations committees, 90 days, and 60 days, respectively, prior to the *award* of a contract using a method other than competitive bidding. However, the term "award" is generally used in connection with competitively bid contracts. It is not clear what the term "award" means with regard to projects performed under force account by local road agencies.

The notification requirement would appear to be applicable to both local force account contracts and to contracts awarded to private contractors using non-competitive bidding methods such as Design-Build and Construction Manager/General Contractor.

State Trunkline Maintenance Contracting

House Bill 5167 (H-1) would add five new subsections to Section 11c regarding contracts for the performance of maintenance services on state trunkline highways.

Subsection (2) would require the department to "develop and implement a performance-based maintenance system to improve efficiencies and outcomes in the performance of maintenance services on state trunkline highways."

Subsection (3) would require the department, not later than September 30, 2015, to develop and implement a "performance rating system" for maintenance services performed on all highways, streets, and roads under the department's jurisdiction. The bill would also require data collection on maintenance activities, including associated costs.

Subsection (4) would require that, not later than September 30, 2015, a minimum of 20% of all new or renewed contracts entered into by the department for maintenance services provide for payment based on the outputs or outcomes associated with the performance rating system.

Subsection (5) would require that, not later than September 30, 2017, the department competitively bid and award a minimum of one contract for "the full performance of maintenance services" of highways, streets, roads, and bridges under department jurisdiction for an area "not smaller than the jurisdiction of one department service center."

Subsection (6) would require the department director, not later than December 1, 2016, and on December 1 of each subsequent year, to report on the results and findings on outcomes "of state trunkline highway maintenance services, the contracting process, and contract performance for all contracts entered into [under Section 11c] to the House and Senate Appropriations committees.

The term "department service center" is not defined in the bill but appears to refer to Transportation Service Center (TSC), an administrative unit of the department. TSCs were first established through a 1997 department reorganization. There were originally 26 TSCs established as part of that reorganization; there are currently 22 TSCs in the state. The area of jurisdiction of these TSCs is not fixed. The department director has the authority under 1964 PA 286 to reorganize the department, including the power to "create, merge, and abolish organizational divisions within the department." As a result, the department director could open new TSCs, close existing TSCs, or change the geographic or administrative authority of any TSC.

Local Agency Maintenance Contracting

House Bill 5167 (H-1) would add five new subsections to Section 11c regarding local road agency contracts for the performance of maintenance services.

Subsection (7) would require local road agencies that had received at least \$20.0 million in Michigan Transportation Fund funding in calendar year 2013 to "develop and implement a performance-based maintenance system to improve efficiencies and outcomes in the performance of maintenance services on highways, streets, and roads under [agency] jurisdiction."

Subsection (8) would require those local agencies described in Subsection (7), not later than September 30, 2016, to develop and implement a "performance rating system" for maintenance services performed on all highways, streets, and roads agency jurisdiction. The bill would also require data collection on maintenance activities, including associated costs.

Subsection (9) would require that, not later than September 30, 2015, a minimum of 20% of all new or renewed contracts entered into by those local road agencies described in Subsection (7) for maintenance services provide for payment based on the outputs or outcomes associated with the performance rating system.

Subsection (10) would require that, not later than September 30, 2017, local road agencies described in Subsection (7) competitively bid and award a minimum of one contract for "the full performance of maintenance services" for a minimum of 20% of the highways, streets, roads, and bridges under agency jurisdiction."

Subsection (11) would require the chief executive of each agency described in Subsection (7), not later than December 1, 2016, and on December 1 of each subsequent year, to report on the results and findings on outcomes "of the maintenance services performed on all highways, streets, and roads under [the local agency's] jurisdiction to the House and Senate Appropriations committees.

Definitions

House Bill 5167 (H-1) 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."

The bill would also define "maintenance services" to mean "routine and reactive maintenance activities undertaken to ensure the normal and safe operation of a highway, street, or road, including activities performed on an appurtenance or roadside feature associated with a highway, street, or road that is necessary for the safe operation of the appurtenance or roadside feature." The definition would exclude "a construction activity that is intended to significantly repair, resurface, rehabilitate, or reconstruct a highway, street, or road, of an appurtenance or roadside feature associated with a highway, street, or road."

[We note that the phrase "highways, streets, and roads" is used in Subsections 3, 7, 8, 11, and 12. The phrase "highways, streets, roads, and *bridges*" is used in Subsections 5 and 10.]

Department Administrative Functions

House Bill 5167 H-1) does not include a provision, which had been included in the bill as introduced, that would have required the department to competitively bid out certain administrative and management activities.

FISCAL IMPACT:

Under House Bill 5167 (H-1), amendments to Section 11, Subdivision (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. 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 proposed amendments to Subsection 1(g) do not appear consistent with the apparent current intention of the subdivision to provide for state/local cost sharing agreements.

With regard to the proposed amendments to Section 11c of the act:

The bill would strike the \$100,000 threshold in current law and would appear to require competitive bidding of both state and local construction and *preservation* projects, "*unless the department or local road agency finds that under the circumstances relating to those projects, some other method is in the public interest.*" Maintenance, including routine maintenance, is a subset of *preservation* under the definitions of Section 10c.

It is not clear how the proposed amendment would affect the use of local agency force account work federal-aid projects. A restriction on local agency force account work could result in increased costs to local road agencies and the department; under current program guidelines, the use of local road agency force account is authorized only when the local road agency can demonstrate that the use of force account would result in a savings of at least 6% as compared to competitive bidding.

The bill would also amend Section 11c to require the department, and certain local road agencies, under circumstances defined in the bill, to develop and implement a performance based maintenance system, a performance rating system for maintenance services, payment for maintenance services based on the outputs or outcomes associated with the performance rating system, competitively bid contracts for "the full performance of maintenance services."

The effect of these requirements could result in some work being performed by private contractors that is currently performed by classified department employees under the

state civil service system and by public employees of local road agencies. The fiscal impact of these proposed requirements cannot be readily estimated at this time.

Subsection (7) would establish performance based maintenance contracting requirements for local road agencies that had received at least \$20.0 million in Michigan Transportation Fund (MTF) funding in *calendar year* 2013. Only five local road agencies clearly meet the \$20.0 million threshold under the bill – the Wayne County Department of Public Works, the Macomb County Department of Roads, the Road Commission for Oakland County, the Kent County Road Commission, and the city of Detroit. The Genesee County Road Commission may meet the \$20.0 million threshold depending on the timing of MTF payments in the 2013 calendar year, and whether Local Program Fund payments were considered MTF funding.

Fiscal Analyst: William E. Hamilton

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