

Legislative Analysis



WARRANTIES ON ROAD REPAIRS

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

House Bill 5460

Sponsor: Rep. Dan Lauwers

Committee: Transportation and Infrastructure

Complete to 4-28-14

A SUMMARY OF HOUSE BILL 5460 AS INTRODUCED 4-17-14

House Bill 5460 would amend Public Act 51 of 1951, the statute that governs the distribution of Michigan Transportation Fund (MTF) revenue. The bill would require the Michigan Department of Transportation, county road commissions, and cities and villages to "secure warranties for full replacement guarantee for construction and preservation projects." The bill would also require county road commissions and cities and villages to include warranty information in the biennial road or street reports required under Section 14 of Act 51. Specifically, road commissions and cities and villages would be required to include a list of all road or street construction and preservation warranties, and indicate whether any of the listed warranties were redeemed.

MCL 247.611, 247.612, and 247.613.

BACKGROUND INFORMATION:

There have been several initiatives by the Michigan Legislature regarding the use of warranties on highway construction projects. Boilerplate language was added to the 1996-97 transportation appropriations bill (1996 PA 341, Section 603) to require the use of warranties on state trunkline construction projects "where possible." Subsequent transportation appropriations bills included similar boilerplate language, including language that would have extended warranty requirements to county, city, and village road agencies. In 1997, language regarding warranties was added to 1951 PA 51, the statute that governs the distribution of MTF revenue. Specifically, 1997 PA 79 amended Section 12 of Act 51 to read: "Of the amounts appropriated for state trunk line projects, the department shall, where possible, secure warranties of not less than 5-year full replacement guarantee for contracted construction work." The warranty language did not apply to county road commissions or cities and villages.

In its June 1, 2000 report, the Michigan Act 51 Funding Study Committee recommended that "all road agencies seek warranties from construction contractors, where appropriate."

The Michigan Department of Transportation awarded its first pavement warranty contract in 1996. As of June 2009, 626 contracts awarded by the department included pavement warranty provisions; 39 bridge projects included warranty provisions. [We are in the process of obtaining updated warranty figures from the department.] Most of these warranty contracts have been on Capital Preventive Maintenance (CPM) projects.

Relatively few of the contracts for pavement rehabilitation, reconstruction, or new pavement construction include warranty provisions.

The department uses two different kinds of construction warranties on paving projects: *materials and workmanship warranties* and *performance warranties*. Under a *materials and workmanship warranty*, the contractor is responsible for correcting defects in work elements within contractor control (materials and workmanship), during the warranty period. Since the owner, the department, is still responsible for project design, the contractor assumes no responsibility for defects due to design decisions. Under a *performance warranty*, the contractor assumes full responsibility for pavement performance during the warranty period. In effect, the contractor guarantees that the pavement will perform at a desired quality level.

Under a *performance warranty*, the contractor may assume responsibility for some or all design decisions, e.g., design/build projects.

FISCAL IMPACT:

Section 11 Act 51 of 1951 currently requires the Michigan Department of Transportation to 'where possible secure warranties of not less than 5 years for full replacement guarantee for contracted construction work.' This language was added by 1997 PA 79. House Bill 5460 would strike the words 'where possible' and the words 'of not less than 5 years' and would require "warranties for full replacement guarantee for construction and preservation projects."

House Bill 5460 would also amend Section 12 with respect to county road commissions, and Section 13 with respect to cities and villages to require county road commissions, and cities and villages to "secure warranties for full replacement guarantee for construction and preservation projects." The bill would also require county road commissions and cities and villages to include warranty information in the biennial road or street reports required under Section 14 of Act 51. Specifically, road commissions and cities and villages would be required to include a list of all road or street construction and preservation warranties, and indicate whether any of the listed warranties were redeemed.

The impact of these provisions on the Michigan Department of Transportation and local road agencies would depend on the meaning of the phrase "full replacement guarantee for construction and preservation projects," and whether this phrase would effectively require a *performance warranty* for all construction and preservation work performed on state trunklines, country roads, and city and village streets. We note that the term preservation encompasses the term *maintenance* under the definitions of Section 10c of Act 51.

Requiring performance warranties for all construction and preservation work could increase the cost of construction and preservation work. In a performance warranty contract, the contractor is 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 – 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 would be 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 would have diminished bonding capacity. Contractors, particularly smaller contractors, may find it hard to obtain sufficient additional bonding to bid on new jobs. Small contractors may simply be unable to obtain bonding needed to secure performance warranties.

Legislative Analyst: E. Best
Fiscal Analyst: William E. Hamilton

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