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BILL ANALYSIS

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Senate Bill 157 (Substitute S-2 as reported)
Sponsor: Senator Rick Jones
Committee: Michigan Competitiveness

Date Completed: 4-17-17

RATIONALE

According to the December 2016 report of the 21st Century Infrastructure Commission, which was created by Executive Order 2016-5, "Most of Michigan's drinking water and wastewater management systems were built between 50 and 100 years ago and utilize outdated technology and approaches for treatment, distribution, and collection." The report also stated, "Many government procurement specifications and policies do not include mechanisms to evaluate and utilize new technologies or alternative materials that can provide cost savings and enhance environmental outcomes. Regulatory policies can discourage innovation because permitting entities are unfamiliar or uncomfortable with new technologies, materials, or use of old technologies and materials in new and novel ways."

In view of these circumstances, it has been suggested that municipalities should not prevent the use of certain types of piping material, or require the use of only a single type, when they are undertaking water supply or wastewater projects. Reportedly, some local units of government in Michigan allow only one type of piping material to be used, precluding the consideration of other materials that might be more suitable to a project as well as economical. Some people believe that the law should prohibit restrictions of this nature, if piping material meets industry standards and a project involves State funding.

CONTENT

The bill would enact the "Public Works Quality Materials Procurement Act" to prohibit a public entity from adopting or enforcing an ordinance that restricted or prohibited the evaluation, comparison, or use of certain pipe and piping materials that met current American Society for Testing and Materials (ASTM), American Water Works Association (AWWA), or NSF International standards, to be used for a public works project (a water supply project or a wastewater project) financed in whole or in part by public funds.

This provision would not limit the professional judgment of the project's engineer to specify or select any acceptable pipe and piping material based on the performance requirements for the particular public works project.

"Public entity" would mean a city, village, township, county, school district, community college district, intermediate school district, public authority, or public airport authority. "Public funds" would include State legislative appropriations and State tax revenue for public works projects.

"Ordinance" would mean an ordinance, resolution, or other appropriate legislative enactment of the governing body of a public entity. The term would not include design or construction specifications developed by a professional engineer in consultation with the public entity that are specific to a particular public works project.

"Pipe and piping materials" would mean pipes and piping materials used to transport drinking water and wastewater.

"Water supply project" would mean pipe and piping materials, lines, and other facilities needed for the pumping, treatment, and distribution of drinking water. "Wastewater project" would mean sanitary sewers, pipe and piping materials, interceptors or waste treatment facilities, and facilities for the collection and disposal of liquid and solid waste.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

It is clear that Michigan's water supply and wastewater infrastructure is badly outdated and the systems throughout the State are in serious need of repair and replacement. This situation affects the health of the State's residents, as well as the health of the economy. As the Governor pointed out in Executive Order 2016-5, out-of-date water and sewer infrastructure represents potential significant health hazards and costs to residents and government. The Executive Order also stated, "Michigan's aging wastewater treatment systems represent a barrier to economic growth and water quality improvement...". Addressing the infrastructure needs will not come without a sizeable cost, however. According to one estimate, Michigan cities will have to spend some \$13.0 billion over the next 20 years to make the necessary improvements.

In light of the need to update the infrastructure and the cost of doing so, it is essential for municipalities to ensure that the materials selected for a project are the most suitable and cost-effective, for both initial implementation and long-term maintenance and operation. This cannot be achieved if a local unit restricts piping to only one type of material, when other materials might be the best for an individual project. Under the bill, municipalities could not preclude the consideration of piping material that met industry standards, if a public works project were funded entirely or partly with State revenue. Professional engineers bidding on a project would have the ability to incorporate in their plans the piping material that they considered most appropriate, without being restricted to a specific type dictated by a municipality. At the same time, local units still would have the authority to specify what piping material to use for a particular project, based on consultation with a professional engineer. By ensuring an open and competitive process for the consideration of different piping materials, the bill would protect public resources and taxpayer dollars.

Supporting Argument

A study performed by BCC Research, on behalf of the American Chemistry Council, showed that communities with "closed competition" (i.e., they limit the types of materials, usually to a single type, that may be used for water infrastructure pipes) experience higher costs compared with communities with "open competition". The study compared costs in four Michigan cities, two with open competition and two with closed competition. The report of the study, dated November 3, 2016, stated, "Key project findings indicate that communities with open competition enjoy lower pipe cost, on average, for water main installation or replacement projects, reaching average savings of 27% for 8-inch pipe and 34% for 12-inch pipe, in comparison to municipalities employing closed competition practices." The study also found that the cost of the same type of material, ductile iron pipe of the same diameter, was less in open bid cities than in closed bid cities.

Opposing Argument

The bill represents a solution in need of a problem. There is little evidence, if any, that municipalities in Michigan have enacted ordinances, adopted resolutions, or otherwise legislated the use of a single type of piping material. Rather than simply being unnecessary, however, the bill would create the potential for a number of problems. Among other things, the bill would weaken local control and undermine the ability of public entities to rely on their own knowledge and

experience regarding community needs and conditions. These conditions might include, for example, soil type, water table, drainage, and the proximity of highways and utilities. If a local unit does, in fact, have a preference for a specific piping material, that is likely because the material has been tried and tested and is known to be suitable for the region. Furthermore, a public entity might have personnel trained in the use and maintenance of a certain type of piping, and the entity might own the equipment and tools required to install and repair it, as well as maintain a supply of the material. Switching to a different type of piping could be expensive and inefficient.

Response: Although a certain material might have been used in a community for decades, there is the possibility that a different, newer material would be a better option for a public works project. In fact, a century or half-century of reliance on a single material might be a sufficient reason by itself for a community to consider whether a different material would be appropriate. A public entity will not know whether this is the case if it is not willing to consider and evaluate alternative products. As the 21st Century Infrastructure Commission recommended, municipalities and local utilities should put in place a process to periodically review and evaluate new technologies, procurement manuals, or standard operating practices to allow for open competition for technology and materials meeting relevant professional standards.

Furthermore, the bill would prohibit a public entity from adopting or enforcing an *ordinance* that restricted the evaluation or use of piping material. The proposed definition of "ordinance" specifically excludes "design or construction specifications developed by a professional engineer in consultation with the public entity that are specific to a particular public works project". In other words, a local unit still would have the authority to specify the desired material on a project-by-project basis.

Opposing Argument

The language of the bill is open to interpretation. If a community could not develop or adopt engineering standards or specifications that referred to or required a specific material, the type of material that contractors were using in their bids would not be known until after the bids were received. As a result, the local agency and its engineer likely would have to evaluate materials at that stage, rather than identifying what was needed in the beginning. Also, it is unclear whether firms submitting bids would be required to prepare designs and projected costs for each type of material that met ASTM, AWWA, or NSF International standards.

In addition, the bill states that it "does not limit the professional judgment of *the project's engineer* to specify or select any acceptable pipe and piping materials...". (Emphasis added.) Depending on the situation, a project's engineer might be either a municipal employee or a private contractor. If he or she is not a municipal employee, the engineer for a project might not be known until after bids are submitted and the parties have entered into a contract. Also, in practice, project engineers are often project managers and are not necessarily responsible for design work.

Rather than protecting the judgment of engineers, the bill would generate added work for public agencies and potential contractors, create delays, and waste both public and private resources. The bill's ambiguity could result in litigation claiming that the selection of piping material violated the legislation, leading to additional delays and costs.

The bill also could create friction between municipal engineers and those in the private sector. Private engineering firms typically are retained for an individual project, or part of a project. Municipal engineers, on the hand, not only are involved in the design and implementation of a project, but also must deal with its long-term operation and maintenance, as well as the entire system that encompasses a particular project.

Opposing Argument

Simply because an industry standard exists for a piping material does not mean that it should be considered for all projects, or even a particular project. According to the American Water Works Association, for example, "AWWA standards describe minimum requirements and do not contain all of the engineering and administrative information normally contained in specifications. The AWWA standards usually contain options that must be evaluated by the user of the standard. Until

each optional feature is specified by the user, the product or service is not fully defined. AWWA publication of a standard does not constitute endorsement of any product or product type, nor does AWWA test, certify, or approve any product." In other words, even if a piping material meets an association's standards, it will not necessarily perform adequately or safely under any given circumstances.

Opposing Argument

According to Committee testimony, legislation similar to this bill has been introduced in approximately a half-dozen other states, in some cases multiple times. These proposals have been consistently rejected, because they are attempts to force municipalities to consider certain types of piping. Public entities already have the discretion to consider, evaluate, and select a variety of materials, however, and should retain the authority to specify the type of material they consider suitable. Municipalities and their engineers are capable of doing their jobs and making decisions that serve the best interests of their community, which current law allows them to do.

Response: As noted above, a public entity still would be able to designate design or construction specifications developed by a professional engineer in consultation with the public entity for a particular project. Municipalities also could reject bids that did not meet their needs and could negotiate contract terms that incorporated the piping material they considered appropriate for a project.

Opposing Argument

The proposed definition of "public funds" is overly broad. Revenue sharing dollars should be clearly excluded from the term. The bill also should clarify that the term would refer only to the public funding allocated specifically to a particular project.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have an unknown fiscal impact on public entities, which could be positive or negative. The bill would tend to increase costs in circumstances where a public entity found that pipe and piping materials meeting industry standards would be useful for the efficient and reliable operation, maintenance, or expansion of water supply or wastewater systems. Alternatively, the bill could promote the consideration of a variety of materials for projects that could result in cost savings. Assuming that public entities already review options for pipe and piping materials used in local water supply or wastewater systems, there would not be additional savings from prohibiting an ordinance that specifies pipe and piping materials to be used in local projects.

Fiscal Analyst: Elizabeth Pratt

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.