

Legislative Analysis



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

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House Bill 5167 (Substitute H-3)

Sponsor: Rep. Wayne Schmidt

House Committee: Transportation and Infrastructure

Senate Committee: Infrastructure Modernization

Complete to 12-18-14

A SUMMARY OF HOUSE BILL 5167 (PROPOSED H-3)

House Bill 5167 was passed by the House on May 8, 2014 and was returned by the Senate as Substitute (S-2) on June 11, 2014. Among other differences, the Senate substitute included a tie-bar to House Bill 5477, a bill to amend the Motor Fuel Tax Act.

House Bill 5167 (H-3) is a House substitute for the Senate substitute. The H-3 substitute is substantially the same as the Senate-passed bill, except that the H-3 substitute is not tie-barred to House Bill 5477. Instead, House Bill 5167 (H-3) is tie-barred to House Joint Resolution UU, which would amend the State Constitution to eliminate the sales and use tax on gasoline and diesel fuel after October 1, 2015, and increase the sales and use tax by 1% (from 6% to 7%). The resolution would require voter approval at the May 12, 2015, regular election.

In addition, the H-3 substitute changes some of the implementation and reporting dates established in the bill.

HOUSE BILL 5167 (PROPOSED H-3)

Act 51 of 1951 PA 51 (Act 51) is the act that governs the distribution of funds for state and local road and bridge programs. Section 11c of the act currently prescribes contracting requirements for certain federal-aid construction contracts. House Bill 5167 (H-3) 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; and
- provide for payment for some maintenance services based on the outputs or outcomes associated with the performance rating system.

The bill would also add reporting requirements associated with these new contracting requirements.

[Neither the H-3 substitute nor the Senate-passed bill includes amendments to Section 11 of Act 51 which had been included in the bill as introduced and in the House-passed substitute.]

BACKGROUND INFORMATION AND DETAILED ANALYSIS

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 only 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. Construction work

performed by local road agency forces, as opposed to private contractors 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-3) would amend Section 11c to read as follows:

"All construction 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 affirmatively finds that under the circumstances relating to those projects, some other method is in the public interest. The director of the department shall report his or her findings 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 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."

Thus the bill would require the department director to report his or her *findings* to the State Transportation Commission 90 days before work is commenced, and "promptly in writing" to the House and Senate Appropriations Committees. The "findings" of these reports are presumably findings that some other contracting method, other than competitive bidding, was in the public interest.

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.

The bill would add new subsection (2) which would established similar contracting requirements for local road agencies:

"All construction projects of a local road agency whose cost exceeds \$100,000.00 for construction or preservation excluding maintenance, shall be performed by contract awarded by competitive bidding unless the local road agency affirmatively finds that under the circumstances relating to those projects, some other method is in the public interest. Installation or upgrading of advanced traffic management and signals is exempt from this subsection. A county road commission shall report its findings before work is commenced in writing to the county board of commissioners of that county and the state transportation commission. A city or village shall report its findings before work is commenced in writing to the governing elected body of that city or village and the state transportation commission."

State Trunkline Maintenance Contracting

House Bill 5167 (H-3) would add four new subsections to Section 11c regarding contracts for the performance of maintenance services on state trunkline highways.

Subsection (3) 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 (4) would require the department, not later than **February 1, 2016**, 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 require that the performance rating system provide for "the collection of data on all maintenance activities, including the quantities and locations of activities performed and the costs associated with those activities."

Subsection (5) would require that, beginning **October 1, 2016**, a minimum of 20% of all funds expended by the department for *maintenance services* be based on the performance outputs or outcomes associated with the performance rating system established under Subsection (4).

Subsection (6) would require the department director, not later than **June 1, 2017**, and on December 1 of each subsequent year, to report results and findings on the 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.

Local Agency Maintenance Contracting

House Bill 5167 (H-3) would add four new subsections to Section 11c regarding local road agency contracts for the performance of *preventative* maintenance services.

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

Subsection (8) would require those local road agencies described in Subsection (7), not later than **February 1, 2017**, to develop and implement a “performance rating system” for preventative maintenance services performed on all highways, streets, and roads under local road agency jurisdiction. The bill would require that the performance rating system provide for “the collection of data on all *preventative* maintenance activities, including the quantities and locations of activities performed and the costs associated with those activities.”

Subsection (9) would require that, beginning **October 1, 2017**, a minimum of 20% of all funds expended by the local road agencies described in subsection (7) for preventative maintenance services be based on the outputs or outcomes associated with the performance rating system required under Subsection (8).

Subsection (10) would require the chief executive of each local road agency “required to competitively bid under this section,” not later than June 1, 2018 and on June 1 of each subsequent year, to report results and findings on the outcomes of the preventative maintenance services performed on all highways, streets, and roads under [the local road agency's] jurisdiction, the contracting process, and contract performance for all contracts entered into [under Section 11c] to the department director and to the House and Senate Appropriations Committees.

Definitions

House Bill 5167 (H-3) 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 bill defines “maintenance services” and Sections 3, 4, 5, and 6 concern “maintenance services” performed on highways, streets, and roads of the Michigan

Department of Transportation. However, provisions concerning local road agencies in Sections 7, 8, 9, and 10 use the term "*preventative* maintenance services."

FISCAL IMPACT:

House Bill 5167 (H-3) would amend Section 11c of Act 51. It is not clear how the proposed amendments to the section's current language would affect the use of local agency force account work on federal-aid projects – if at all. 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, under circumstances defined in the bill, to develop and implement a performance based maintenance system, a performance rating system for maintenance services, and payment for some maintenance services based on the outputs or outcomes associated with the performance rating system.

The bill would establish similar provisions for certain local road agencies – although the bill uses the term "preventative maintenance systems" in those provisions concerning 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 *fiscal year* 2013; i.e. the fiscal year ending September 30, 2013. Only six local road agencies 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, Genesee County Road Commission, the Kent County Road Commission, and the city of Detroit.

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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.