

# Legislative Analysis



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

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### House Bill 5167

Sponsor: Rep. Wayne Schmidt

Committee: Transportation

Complete to 12-19-13

### A SUMMARY OF HOUSE BILL 5167 AS INTRODUCED 12-4-13

House Bill 5167 would amend two sections of 1951 PA 51, the act which governs funding for state and local road and bridge programs. Specifically, the bill would amend Section 11, the section which establishes and directs appropriations from the State Trunkline Fund (STF), and Section 11c which prescribes contracting requirements for certain federal-aid construction contracts.

#### ***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 would make two substantive changes to Section 11. The bill would amend Subsection 1(g) regarding the department's authority to enter into agreements with county road commissions, cities, and villages. The bill would also add new Subsection 10 to authorize the department to borrow money from county road commissions, cities, and villages.

These substantive changes are described in additional detail below. In addition, because Section 11 covers a number of disparate subjects, this analysis includes a table showing the Section 11 provisions in current law and changes proposed under House Bill 5167.

**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 agreements with road commissions, cities, and villages related state trunkline construction contracts.

Section 1c of 1951 PA 51 currently requires cost participation by certain cities in 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 cost participation in those local elements of the construction contract is 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 *local road agencies* 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 bill does not define "local road agency."

It is not clear how the inclusion of "private sector company" among those entities with which the department could enter into agreements, or the inclusion of "maintenance" in the work that 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, and private contractors, for work on state trunkline roads and bridges under both 1964 PA 286 and 1925 PA 17. Effectively, the department's entire capital construction program is carried out by private construction contractors. Most engineering services related to the department's capital construction program are carried out by private engineering consulting firms under contract with the department. In addition, most of the department's trunkline maintenance program is currently carried out by local road agencies under contract with the department or by private contractors or subcontractors performing certain specialized maintenance work items.

The proposed amendments to Subsection 1(g) do not appear consistent with the apparent intention of the subsection to provide for state/local cost sharing agreements.

**New – Section 11, Subsection 10** – Subsections 4 through 9 of Section 11 currently authorize the use of STF money and STF note or bond proceeds for loans to county road commissions, cities, and villages. House Bill 5167 would add a new Subsection 10 to authorize the department to borrow money from a local road agency if the agency had accumulated "unexpended money" from money distributed under the act. The bill indicates that the borrowed money would be for transportation purposes or for the

purpose of matching federal funds provided for transportation purposes. The bill also directs that money loaned to the department be repaid in accordance with an agreement between the local road agency and the department.

The proposed language is permissive with regard to the department; it authorizes—but does not require—the department to borrow money from local road agencies. The bill does not indicate whether the loan program would be voluntary with respect to the local road agency.

***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 notify 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 (FHEA 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 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 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" with regard to contracts would appear to be specific to 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 projects awarded to private contractors using non-competitive bidding methods such as Design-Build and Construction Manager/General Contractor. However, again, it is not clear what the term "award" means with regard to projects performed by local agency force account.

### ***State Maintenance Contracting***

House Bill 5167 would amend Section 11c to add new subsection (2) to require the department, not later than September 30, 2013, to competitively bid and award a minimum of one contract for the "full performance of maintenance services of highways, streets, roads, and bridges under its jurisdiction for an area not smaller than the jurisdiction of one department service center."

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.

The bill would also require the department director to report results and findings made during the contracting process and contract performance for all contracts under the subsection annually on December 1 of each year to the House and Senate Appropriations committees.

### ***Local Agency Maintenance Contracting***

House Bill 5167 would amend Section 11c to add new subsection (3) to require a local road agency that received at least \$20.0 million in funding from the MTF in *calendar year* 2010 to competitively bid and award a minimum of one contract, by September 30, 2014, for the "full performance of maintenance services for a minimum of 20% of the highways, streets, roads, and bridges under the jurisdiction of that local road agency."

The bill would also require the chief executive of each local road agency required to competitively bid [maintenance work] under the subsection to report results and findings made during the contracting process and contract performance for all contracts under the subsection annually on December 1 of each year to the House and Senate Appropriations committees.

Only 5 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 or may not meet the \$20.0 million threshold depending on the timing of MTF payments in the 2010 calendar year, and whether or not Local Program Fund payments were considered MTF funding.

***Department Administrative Functions***

House Bill 5167 would amend Section 11c to add new subsection (4) to require the department, not later than September 30, 2013, to competitively bid out "the administrative and management activities of the department in its entirety for a minimum of the jurisdictional area of one department service center."

[See the discussion, above, of the term "department service center."]

The bill would also require the department director to report results and findings made during the contracting process and contract performance for all contracts under the subsection annually on December 1 of each year to the House and Senate Appropriations committees.

**FISCAL IMPACT:**

Section 11 of 1951 PA 51 establishes the STF and directs the priority order of appropriations from the STF. As provided in Section 11, STF is appropriated for the construction and preservation of state trunkline roads and bridges and for administration of the Michigan Department of Transportation. The STF derives most of its revenue from a distribution of Michigan Transportation Fund (MTF) revenue as directed in Section 10 of the act.

House Bill 5167's proposed amendments to Section 11, Subsection (1)(g) would authorize the department to enter into agreements with *local road agencies* 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.

As noted above, it is not clear how the inclusion of "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.

House Bill 5167's proposed new Section 11, Subsection 10 would allow the department to borrow "unexpended" money from local road agencies. The fiscal impact of this new subsection cannot be determined at this time. The bill is permissive with regard to the department; it authorizes but does not require the department to borrow money from local



road agencies. The bill does not indicate whether the loan program would be voluntary with respect to the local road agency.

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 would likely 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 proposed amendments to Section 11c would also require the competitive bidding of some department maintenance services and some department administration functions, and with regard to at least five local road agencies, the competitive bidding of some maintenance services. The effect of these requirements could result in some work currently performed by classified department employees under the state civil service system, and by public employees of local road agencies, being performed by private contractors. The fiscal impact of these proposed requirements cannot be readily estimated at this time.

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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.

Section 11, 1951 PA 51 and Amendments Proposed in House Bill 5167 (2013-2014 Legislative Session)

<u>Subsection/ Subdivision</u>	<u>Current Law</u>	<u>House Bill 5167</u>	<u>Notes</u>
(1)	Establishes STF as separate fund in state treasury. <i>Subdivisions (1)(a) through (1)(h) establish the priority order of STF appropriations:</i>	No substantive change.	STF receives revenue from a distribution of MTF revenue as provided in Section 10 of 1951 PA 51.
(1)(a)	For STF debt service	No substantive change.	
(1)(b)	To the Transportation Economic Development Fund (TEDF), less TEDF-related debt service.	No substantive change.	Section 10(1)(h) of 1951 PA 51 appropriates \$36.775 million, and \$3.5 million from the Michigan Transportation Fund (MTF) to the STF for subsequent deposit to the TEDF.
(1)(c)	To the Rail Grade Crossing Account; also establishes Rail Grade Crossing Program criteria.	No substantive change.	Section 10(1)(a) of 1951 PA 51 appropriates \$3.0 million from the MTF to the STF for subsequent deposit to the Rail Grade Crossing Account.
(1)(d)	For STF operating expenses as appropriated by the legislature.	No substantive change.	Administrative costs of the Michigan Department of Transportation.
(1)(e)	For the preservation of state trunkline highways and bridges.	No substantive change.	"Preservation" is defined in Section 10c(l) of 1951 PA 51.



(1)(f)	For "opening, widening, improving, construction, and reconstruction of state trunkline highways and bridges" and related right of way acquisition and incidental work.	No substantive change.	
(1)(g)	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"; authorizes agreements to provide for joint participation in costs.	Substitutes the term "local road agency" for county road commissions, cities, and villages, and includes "a private sector company." Specifically includes <i>maintenance</i> in the work which may be contracted.	"Local road agency" is not defined in the bill.
	Authorizes the department to <i>advance</i> [STF] money to county road commissions, cities, and villages to pay for rail grade crossing improvements.	Substitutes the term "local road agency" for county road commissions, cities, and villages.	
(1)(h)	For inventory and supplies required for activities of the department [preservation of state trunkline highways and bridges.]	No substantive change.	
(2)	Establishes 90% minimum STF spending for "preservation" as opposed to construction.	No substantive change.	See House Fiscal Agency Fiscal Forum, <i>The Padden Amendment</i> .
(3)	Establishes 90% minimum spending from state trunkline federal aid for "preservation" as opposed to construction.	No substantive change.	See House Fiscal Agency Fiscal Forum, <i>The Padden Amendment</i> .
(4)	Authorizes department to loan [STF] money to county road commissions, cities, and villages to pay for capital costs of transportation purposes. Money for loans may be made from STF bonds or notes or directly from STF. Loans not subject to the Revised Municipal Finance Act.	Substitutes the term "local road agency" for county road commissions, cities, and villages.	

(5)	Authorizes county road commissions, cities, and villages to borrow money from STF bonds or notes or directly from STF.	Substitutes the term "local road agency" for county road commissions, cities, and villages.
(6)	Provisions regarding repayment of loans made by the department to county road commissions, cities, and villages.	Substitutes the term "local road agency" for county road commissions, cities, and villages.
(7), (8)	Provisions regarding loans made by the department to county road commissions, cities, and villages.	Substitutes the term "local road agency" for county road commissions, cities, and villages.
(9)	Authorizes the State Transportation Commission to issue bonds and notes to make loans to county road commissions, cities, and villages.	Substitutes the term "local road agency" for county road commissions, cities, and villages.
	Requires that department notify House and Senate Appropriations Subcommittees on Transportation if there are extras or overruns which would require notification of State Administrative Board, or the State Transportation Commission or both on any contract between the department and a local road agency or private business.	No change.  Notification requirements of this subsection do not appear to conform with current practice.

**NEW Subsection 10.**  
 Authorizes department to borrow money from a local road agency if agency had accumulated "unexpended money" from money distributed under the act - for transportation purposes or for the purpose of matching federal funds provided for transportation purposes. Indicates that money loaned to

the department be repaid in accordance with an agreement between the local road agency and the department.

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| (10) | Provides for establishment of intergovernmental communication procedures for implementation and administration of the loan program established in Subsections (4) to (9).                              | Renumbered as Subsection 11.<br>Substitutes the term "local road agency" for county road commissions, cities, and villages; includes reference to new Subsection (10). |
| (11) | Establishes 10% limitation on department administrative expenses.  | Renumbered as Subsection 12.<br>No substantive change.   |
| (12) | Directs that any performance audits of the department be conducted under audit standards established by the U. S. General Accounting Office.   | Renumbered as Subsection 13.<br>No substantive change.   |
| (13) | Indicates that contracts to advance money to a county road commission, city, or village under Subsection 1(h) [for rail grade crossing projects] are not subject to the Revised Municipal Finance Act. | Renumbered as Subsection 14.<br>No substantive change.   |
| (14) | Defines rail grade crossing improvements.  | Renumbered as Subsection 15.<br>No substantive change.   |