

Recommendations for
House Bill No. 4961, Providing for Public-Private Transportation Facilities
Public Interest Research Group in Michigan
September 3, 2009

Additions to Sec. 7B, pp. 7-10.

Concern:

No provision to ensure public safety and up-to-date maintenance.

Recommendation:

The construction and operation of a transportation facility authorized by this section shall comply with all requirements of federal, state, and local laws; state, regional, and local comprehensive plans; department rules, policies, procedures, and standards for transportation facilities; and any other conditions which the department determines to be in the public's best interest. All agreements must reserve for this state the right to update the standards of any public-private agreement to reflect new laws or the most recent practices and technologies adopted by other governments operating similar assets.

Concern:

The proposed bill relinquishes the legislature's responsibility for approving public-private partnerships, even in the case of a large dollar value deal.

Recommendation:

The legislature shall approve by the passage of law any public-private agreement valued at more than \$100 million.

(Also change Sec. 6a.(i), p. 4, ll. 17-18, to:

Enter into public-private agreements under Section 7B with the approval of the commission **or the legislature as authorized under Section 7B.**)

Sec. 7B(1), p. 7, ll. 20-23.

Recommendation:

The agreement shall include terms designed to protect the public interest and assurance **transparency and** accountability of an operator to the department **and the people of this state.**

Sec. 7B(2), p. 8, ll. 2-15.

Concerns:

No deal should last longer than 30 years because of uncertainty over future conditions and because the risks of a bad deal grow exponentially over time. The terms of the deal should be defined both in terms of economic viability and the public interest. Public control of transportation outcomes should not be impeded.

Recommendation:

A public-private agreement shall provide for the terms of the use and operation of a transportation facility by an operator for a period determined necessary for the economic viability of the agreement **and the best interests of the public, not to exceed 30 years.** The agreement may provide for an initial term and 1 or more optional terms **so long as either party can sever optional terms.** The agreement shall provide that the ownership of a transportation facility within this state shall be vested in an instrumentality of government and that title to the transportation facility shall not be encumbered. **The agreement must have adequate safeguards in place to ensure that no additional costs or service disruptions will be realized by the traveling public and residents of the state in the event of default or cancellation of the agreement by the department. The agreement must reserve for the department the opportunity to add capacity to the proposed project and other transportation facilities serving similar origins and destinations without penalty.** No provision of a public-private agreement shall allow the public to be deprived of the use and benefit of a transportation facility ~~except as necessary to implement tolls or other charges authorized by this section or to regulate the level or character of permissible uses of the transportation facility.~~ A public-private agreement shall provide for the termination of the agreement.

Sec. 7B(5), p. 9, ll. 16-19.

Concern:

Department could be prevented from bringing suit against operator.

Recommendation:

A public-private agreement may provide for the use of arbitration, mediation, or other alternative dispute resolution mechanism for the resolution of disputes between the department and an operator, **but the remedies listed in this subsection shall not be exclusive and the department may still bring suits for violation of the agreement.**

Sec. 7C (1), p. 10, ll. 17-18.

Concern:

By permitting unsolicited proposals, this law will result in private entities defining potential deals, rather than the Department of Transportation determining public needs and then seeking bidders.

Recommendation:

The department may solicit proposals ~~or receive unsolicited proposals~~ for a public-private agreement...

(This renders the final six lines of the section, from p. 10, l. 26 through p. 11, l. 4, unnecessary. Other references to “unsolicited proposals” in the bill would also need to be removed.)

Sec. 7C(4), p. 11, l.18 – p. 12, l. 12.

Concern:

There is no requirement that the financial benefits to the state must exceed the value over time of what could have been obtained by collecting the same fees or tolls and obtaining any upfront funds through the public borrowing process.

Recommendation:

(4) The department ~~may~~ **shall** consider ~~1 or more~~ **all** of the following factors in evaluating and selecting a bid or proposal to enter into a public-private agreement with a private entity:

(a) **a publically available cost-benefit analysis that must demonstrate the ability of the project to save the public money and serve the public’s best interests. The cost-benefit analysis shall be completed before any public-private agreement is approved or finalized. The analysis shall include:**

(i) **an analysis of the value that could be generated by public bonding against the revenue stream generated by the asset if a public entity were granted a comparable fee- or toll-hike schedule as would a private entity;**

(ii) **a comparison of the value of alternative options over the entire life cycle of the agreement;**

(iii) **analysis of potential risks from private default or inability to reinvest in improvements, and how these risks would be allocated;**

(iv) **the costs of monitoring, compliance with a lease, as well as the cost of enforcing lease terms through litigation and other means.**

...

Sec. 7C(6), p. 12, l. 17 – p. 13, l. 5.

Concern:

The bill allows the private entities to define which information they want to keep secret from the public and shields it from the Freedom of Information Act.

Recommendation:

(6) A private entity seeking a public-private agreement shall identify those portions of a proposal that the private entity considers to be confidential, proprietary information, or trade secrets and provide any justification as to why these materials, upon request, should not be disclosed by the department. Patent information will be covered until the patent expires. Other information such as originality of design or records of negotiation may only be protected under this section until an agreement is reached. Disclosure must occur before final agreement and execution of the contract. Projects under federal jurisdiction or using federal funds must conform to federal regulations under the Freedom of Information Act.

Sec. 7G(5), p. 17, ll. 16-19.

Concern:

The power to deny citizens the right to use a public transportation facility should not be held by a private company.

Recommendation:

Omit Section 7G(5).