

SENATE BILL No. 627

December 1, 2015, Introduced by Senator KOWALL and referred to the Committee on Commerce.

A bill to authorize this state and certain public authorities to develop certain eligible projects and to enter into certain agreements; to impose certain conditions on those agreements; to impose certain powers and duties on certain state and local officials and employees; to authorize the financing of certain eligible projects; and to exempt certain property from certain taxes.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act shall be known and may be cited as the
2 "Michigan alternative project delivery act".

3 Sec. 3. As used in this act:

4 (a) "Develop" or "development" means the study, planning,
5 design, acquisition, construction, reconstruction, rehabilitation,
6 improvement, repair, financing, management, operation, or

1 maintenance of an eligible project and any other service related to
2 an eligible project. Develop or development also includes the
3 imposition, charging, assessment, collection, and enforcement of
4 user fees related to an eligible project.

5 (b) "Eligible project" means any existing, enhanced, expanded,
6 rehabilitated, refurbished, upgraded, or new asset or portion of an
7 asset or services or provision of services under the jurisdiction
8 and control of this state or any of its agencies, political
9 subdivisions, special districts, public corporations established
10 under state law, regional or local governmental entities, joint
11 powers authorities, or any intergovernmental agency or corporation.
12 This includes, without limitation, any facility, asset, or service
13 and associated services that serve a public purpose, any capital or
14 financial asset, real estate or facility used directly or
15 indirectly in the transportation of persons, and the transportation
16 or storage of goods, substances, vehicles, information, or matter
17 of any kind, or in the generation and transport of energy, or the
18 transport and treatment of water, wastewater, and waste, and any
19 building, structure, and appurtenance, or other real property or
20 information or management system necessary or desirable for the
21 delivery of government functions, or health care, education,
22 justice, security, or entertainment services.

23 (c) "Predevelopment agreement" means an agreement between a
24 public authority and 1 or more private parties, pursuant to a
25 competitive process, to perform activities that may include, but
26 are not limited to, the study, planning, and design of an eligible
27 project that may lead to a public-private agreement to develop an

1 eligible project.

2 (d) "Private party" means a person, entity, or organization
3 that is not this state or the federal government, a political
4 subdivision of this state, a local unit of government, or any other
5 public authority.

6 (e) "Public authority" means this state, a political
7 subdivision of this state, a county, city, township, village,
8 school district, intermediate school district, community college,
9 or public university that receives appropriations from this state,
10 any agency, board, commission, authority, or instrumentality of an
11 entity described in this subdivision, or any 2 or more of the
12 foregoing working together to develop an eligible project.

13 (f) "Public-private agreement" means an agreement between a
14 public authorities and 1 or more private parties for the
15 development of an eligible project under this act. Public-private
16 agreement also includes a predevelopment agreement.

17 (g) "User fees" means user fees, tolls, consumption charges,
18 rents, license fees, or similar or ancillary charges from users of
19 eligible projects. User fees also include fees and charges for
20 maintaining and administering an account, including credit card,
21 bank, and similar fees and charges.

22 (h) "Work product" means any technical or financial concepts,
23 including 1 or more of the following:

24 (i) Included in a bidder's response to a request for
25 qualifications or any portion of the bidder's response or in a
26 bidder's proposal or any portion of the proposal.

27 (ii) Submitted by the bidder for review by the public

1 authority in accordance with the public authority's request for
2 qualifications or request for proposals.

3 (iii) Raised by the bidder at 1-on-1 meetings or alternative
4 technical or financial concepts meetings with the public authority
5 prior to the due date for proposals, and in each case includes any
6 alternative technical or financial concepts, ideas, innovation,
7 technology, techniques, methods, processes, unique uses of
8 commercial items, design concepts, solutions, construction means
9 and methods, project execution approach, drawings, reports, plans
10 and specifications, information, and submittals that constitute
11 intellectual property of the bidder.

12 (iv) Raised in any negotiations between the public authority
13 and a bidder prior to award and execution of a public-private
14 agreement.

15 Sec. 5. A public authority is authorized to do 1 or more of
16 the following:

17 (a) Consider, compare, and implement various methods for
18 procuring and developing eligible projects, including methods that
19 are alternatives to methods traditionally used by the public
20 authority.

21 (b) Enter into public-private agreements to develop eligible
22 projects.

23 (c) Enter into any agreements ancillary to public-private
24 agreements, including, but not limited to, 1 or more of the
25 following:

26 (i) Agreements with financial, legal, and other consultants
27 with specialized knowledge to do 1 or more of the following:

1 (A) Assist in the study, planning, design, structuring,
2 drafting, procurement, evaluation, and negotiation of public-
3 private agreements.

4 (B) Assist in the administration of public-private agreements
5 and the operation or maintenance of eligible projects.

6 (ii) Agreements between the public authority and 1 or more of
7 the following:

8 (A) A private party.

9 (B) A private party's lenders.

10 (C) Federal, state, and local governments.

11 (d) Work together with other public authorities to develop
12 eligible projects through public-private agreements.

13 (e) Bundle 2 or more eligible projects under 1 public-private
14 agreement.

15 (f) Procure services, award contracts, administer revenues,
16 appropriate funds, and take any other action as may be required in
17 connection with the development of eligible projects through
18 public-private agreements.

19 (g) Subject to applicable law, exercise the power of eminent
20 domain to acquire property, permanent or temporary easements,
21 rights-of-way, or other rights in property that are necessary to
22 develop an eligible project under this act, regardless of whether
23 the property will be owned in fee simple by the public authority or
24 whether that property will be leased to, licensed to, or operated
25 by the private party in connection with the development of the
26 eligible project through the public-private agreement.

27 Sec. 7. (1) Prior to developing an eligible project, a public

1 authority shall consider and compare various methods for the
2 development of an eligible project and identify the proposed
3 delivery method.

4 (2) Notwithstanding any other provision of state law, the
5 public authority is authorized to use any procurement method and
6 process that the public authority determines is appropriate to
7 solicit private parties and award public-private agreements under
8 this act, including, but not limited to, any of the following or
9 combination of the following, at the public authority's discretion:

10 (a) Calls for project proposals, whereby the public authority
11 describes the eligible project that private parties are invited
12 through a competitive process to submit proposals to develop the
13 eligible project.

14 (b) Competitive solicitations using 1 or more of requests for
15 qualifications, prequalification or short-listing of qualified
16 proposers, requests for proposals, preproposal meetings with
17 individual short-listed proposers, revised proposals, and final and
18 best offers.

19 (c) Unsolicited proposals, provided that if the public
20 authority determines that there is sufficient merit to pursue any
21 unsolicited proposal, reasonable opportunity for other entities to
22 submit competing proposals for consideration and possible contract
23 award is provided.

24 (d) Negotiations with 1 or more bidders prior to award.

25 (3) For any procurement in which the public authority issues a
26 request for qualifications, request for proposals, or similar
27 solicitation document, the request shall generally set forth the

1 factors that the public authority will evaluate when reviewing the
2 submittals. The public authority may, in its discretion, determine
3 which factors it will consider and the relative weight of those
4 factors in the evaluation process to obtain the best value for the
5 public authority. Evaluation methodologies for selection may
6 include best value, low bid or proposal, lowest responsible or
7 adjusted bid or proposal, qualifications-based selection, lowest
8 public contribution, most expansive project, or any combination of
9 the foregoing or any other evaluation methodology for selection
10 that the public authority determines appropriate for the eligible
11 project.

12 (4) The public authority is authorized to pay stipends or
13 payments for work product on terms and conditions and in the
14 amounts as determined in the public authority's discretion in the
15 following circumstances, or in other circumstances that the public
16 authority determines to be appropriate in its discretion, including
17 1 or more of the following:

18 (a) To short-listed or prequalified bidders if the public
19 authority cancels the procurement prior to the due date for
20 proposals in the request for proposals.

21 (b) To unsuccessful bidders that submit a proposal provided
22 that the public authority determines that the proposal is
23 responsive to the public authority's request for proposals or
24 similar solicitation document and meets all requirements
25 established by the public authority for the project.

26 (c) To the selected bidder if the public authority cancels the
27 eligible project after selection of the bidder.

1 (5) In exchange for a stipend or payment for work product, the
2 public authority may require the bidder to grant to the public
3 authority the right to use some or all of the work product
4 contained in the proposer's proposal.

5 (6) The public authority may identify in a request for
6 qualifications, request for proposals, or similar solicitation
7 document a process whereby bidders may request and receive
8 authorization to deviate from technical and financial
9 specifications, subject to demonstrating to the public authority
10 that the deviations provide the same or greater quality, utility,
11 function, and value.

12 (7) Notwithstanding any other provision of law, the public
13 authority may do 1 or more of the following:

14 (a) Provide exclusive protest remedies in its requests for
15 qualifications, requests for proposals, or similar solicitation
16 documents.

17 (b) Limit the rights of private parties responding to
18 solicitation documents to protest matters arising in connection
19 with the procurement.

20 (c) Require that private parties responding to solicitation
21 documents expressly waive all other rights and remedies that may be
22 available under applicable law.

23 (8) Except as expressly provided otherwise in this section, a
24 writing prepared, owned, used, in the possession of, or retained by
25 the public authority in the performance of an official function
26 shall be a public record and shall be made available to the public
27 in compliance with the freedom of information act, 1976 PA 442, MCL

1 15.231 to 15.246. Documents and other analysis used in the
2 decision-making process and preparation of the procurement
3 documents and proposals shall not be subject to release or
4 disclosure by the public authority until final award and execution
5 of the public-private agreement and the conclusion of any protest
6 or other challenge to the award or the lapse of the protest period
7 without challenge, absent an administrative or judicial order
8 requiring such release or disclosure. A record or portion of a
9 record, material, or other data received, prepared, used, or
10 retained by the public authority that is a trade secret or
11 confidential commercial, financial, or proprietary information and
12 acknowledged by the public authority as confidential shall not be
13 subject to the disclosure requirements of the freedom of
14 information act, 1976 PA 442, MCL 15.231 to 15.246. A bidder may
15 identify those portions of a proposal or other submission that the
16 bidder considers to be trade secrets or confidential commercial,
17 financial, or proprietary information. In order for confidential
18 and proprietary information and trade secrets to be exempt from
19 disclosure, the bidder shall do all of the following:

20 (a) Invoke the exclusion upon submission of the information or
21 other materials for which protection is sought.

22 (b) Identify the data or other materials for which protection
23 is sought with conspicuous labeling.

24 (c) State the reasons why protection is necessary.

25 (d) Fully comply with any applicable provisions of law with
26 respect to information the bidder contends should be exempt from
27 disclosure.

1 (9) The characterization by the private party of documents as
2 being confidential and proprietary information and trade secrets
3 exempt from disclosure is not binding upon the public authority if
4 the documents are not afforded that protection under this act or
5 existing law.

6 Sec. 9. (1) Any lawful source of public and private funding
7 and financing, or combination of these, may be utilized for the
8 development of an eligible project under this act.

9 (2) A public-private agreement may require the private party
10 to arrange for all or a portion of the financing required for the
11 eligible project. Public authorities may also elect in their
12 discretion to contribute funds or financing required for the
13 eligible project in lieu of or in combination with funding or
14 financing arranged by the private party. Public authorities may
15 elect in their discretion to participate with the private party in
16 any gains realized through revenue sharing, cost-saving sharing
17 agreements, or the refinancing of the eligible project, or offer
18 revenue protection guarantees, as determined by the public
19 authority in its discretion.

20 (3) The public authority may accept from the United States,
21 any state, or any of their respective agencies, or from any
22 regional or local governmental entity, funds or credit assistance
23 as are available to it for carrying out the purposes of this act,
24 whether the funds are made available by grant, loan, guaranty, line
25 of credit, or other financing arrangement. The public authority may
26 enter into these arrangements and other agreements with the United
27 States, any state, or any of their respective agencies, or with any

1 regional or local governmental entity, as may be necessary, proper,
2 and convenient for carrying out the purposes of this act. The
3 public authority may seek allocation for, issue, and provide for
4 the issuance of private activity bonds under applicable federal,
5 state, or local programs, including as described in 26 USC 141. A
6 Public authority may apply for or facilitate the application for or
7 secure financing from such sources and make funds available to 1 or
8 more private parties either directly or through other public
9 authorities.

10 (4) The public authority may accept from any source any grant,
11 donation, gift, or other form of conveyance of land, money, other
12 real or personal property, or other valuable thing made to the
13 public authority for carrying out the purposes of this act.

14 (5) Public authorities may impose and collect user fees,
15 increase the user fees, and use lawful measures to enforce the user
16 fees or authorize, pursuant to a public-private agreement or
17 otherwise, a private party or another public entity to impose,
18 collect, increase, and enforce the user fees to the same extent as
19 available to the public authority. Subject to the public-private
20 agreement, the use, application, and sharing of collected user fees
21 shall be determined by the public authority or the private party
22 shall be as determined by the public authority in its discretion.
23 User fees may be imposed, charged, and collected by manual,
24 digital, or electronic means, including by video, transponder, tag,
25 camera, and any other suitable technology or means. The public-
26 private agreement may also include a schedule, formula, or
27 mechanism for the adjustment of user fees during the term of the

1 public-private agreement.

2 (6) Bonds, notes, and other obligations may be issued under
3 applicable law for the purposes of providing funding for an
4 eligible project. Revenues, including user fees, received pursuant
5 to a public-private agreement may be directed to a segregated
6 account and pledged for the repayment of bonds, notes, or other
7 obligations without appropriation. Bonds, notes, or other
8 obligations supported exclusively by revenue received from a
9 public-private agreement shall not be considered a debt of this
10 state. Any financing may be structured on a senior, parity, or
11 subordinate basis with any other financing or funding.

12 (7) Public authorities may impose or increase and collect fees
13 and, subject to applicable law, taxes to support the development of
14 the eligible project.

15 Sec. 11. (1) Notwithstanding any other provision of law, the
16 public authority is authorized to include in a public-private
17 agreement any provision that the public authority determines is
18 necessary or appropriate. A public-private agreement may include 1
19 or more of the following provisions:

20 (a) Provisions addressing the allocation and management of
21 project risks including without limitation design, construction,
22 geotechnical, delay, permitting, governmental approvals, change of
23 law, utility adjustments, change in utility costs, operations and
24 maintenance, force majeure, insurance availability and costs,
25 inflation, and financing risks.

26 (b) Provisions addressing payments on terms determined by the
27 public authority, which may include without limitation milestone

1 payments, progress payments, availability or service fee payments,
2 and other compensation.

3 (c) Provisions requiring that the private party or 1 or more
4 of its prime contractors provide proposal, performance, or payment
5 security. Performance or payment security if required may be in the
6 amounts determined by the public authority and in the form of
7 bonds, guarantees, letters of credit, committed equity, or any
8 other type of financial instrument, or any combination of the
9 foregoing, each as determined by the public authority.

10 (d) Provisions requiring that the private party lease or lease
11 back or otherwise be granted licenses, rights of entry, or right to
12 operate the lands and the eligible project through the term of the
13 public-private agreement.

14 (e) Provisions requiring that either the public authority or
15 the private party provide the utilities required during
16 construction and operation of the eligible project, including the
17 right and authority to adjust, relocate, or protect-in-place
18 existing utilities.

19 (f) Provisions allowing or requiring the use of arbitration or
20 other alternative dispute resolution procedures to resolve disputes
21 between the public authority and the private party. Such
22 alternative dispute resolution procedures may include, but are not
23 limited to, binding or nonbinding process, arbitration or
24 mediation, the establishment of a board to hear disputes, or resort
25 to the courts.

26 (g) Provisions establishing criteria for determining
27 substantial completion, final acceptance, occupancy, or service

1 readiness of the eligible project and any applicable commissioning
2 of the eligible project.

3 (h) Provisions addressing the public authority's requirements
4 for programming, operations, use, and change in use of the eligible
5 project and flexibility to expand, rehabilitate, or reconstruct the
6 eligible project.

7 (i) Provisions addressing, as applicable, the operations,
8 maintenance, and facilities management services, including
9 maintenance and renewal, to be provided by the private party, the
10 public authority, or third parties.

11 (j) Provisions addressing responsibility for maintenance and
12 rehabilitation in order for an eligible project to meet the
13 standards determined by the public authority, in its discretion, at
14 the end of the term of the public-private agreement.

15 (k) Provisions providing for compensation of the private party
16 upon early termination of the public-private agreement.

17 (l) Provisions specifying events of default and remedies
18 available to the private party and the public authority.

19 (m) Provisions setting forth the technical standards and
20 specifications with which the private party must comply.

21 (n) Provisions that provide requirements for insurance with
22 the coverages and deductibles as determined by the public authority
23 to be appropriate in its discretion.

24 (o) Provisions regarding the maintenance and auditing of the
25 private party's books and records.

26 (2) Except as otherwise provided in this subsection, a public-
27 private agreement shall not be entered into for an initial period

1 exceeding 50 years from final acceptance or occupancy or service
2 readiness of the eligible project, as applicable. However, the term
3 of the public-private agreement may be extended as a result of
4 force majeure or as a means to compensate a private party for an
5 event or occurrence set out in the public-private agreement which
6 entitles them to additional compensation or funds from the public
7 authority.

8 Sec. 13. (1) The authority granted under this act supplements
9 and is independent of any existing authority and does not limit,
10 replace, or detract from existing authority.

11 (2) This act supersedes all conflicting laws.

12 (3) Public contracting and procurement laws that restrict or
13 limit, or prescribe terms for, procurement or contracting under
14 this act shall not apply if they affect application of
15 environmental, health, safety, labor, and land use laws.

16 (4) If a public authority that is this state or an agency of
17 this state intends to be a party to a public-private agreement
18 under this act for the real property lease or construction of an
19 eligible project that otherwise would be subject to the management
20 and budget act, 1984 PA 431, MCL 18.1101 to 18.1594, the public
21 authority shall submit a proposed project summary for the eligible
22 project to the senate and house appropriations committees for
23 review. If both appropriations committees fail to reject by
24 resolution the proposed project summary within 30 calendar days of
25 the date it is submitted, the procurement may continue and any
26 awarded public-private agreement may be submitted to the state
27 administrative board for approval. A proposed project summary may

1 be resubmitted to the senate and house appropriations committees if
2 rejected.

3 Sec. 15. Property developed or held by a private party under a
4 public-private agreement shall be exempt from any and all state and
5 local ad valorem and property taxes that otherwise might be
6 applicable.

7 Sec. 16. (1) A public authority may impose user fees as
8 provided in section 9(5).

9 (2) Except as otherwise provided in this subsection, the
10 imposition of user fees for the use of an eligible project is not
11 subject to regulation by any other governmental agency. User fees
12 shall be administered, collected, and enforced as provided by law.

13 (3) In addition to other rights and remedies available to a
14 public authority or a private entity under a public-private
15 agreement, a person who fails to pay a user fee imposed for use of
16 an eligible project authorized by a public-private agreement is
17 liable for, and shall pay, 3 times the amount of the user fee. In
18 addition to other rights and remedies available to a public
19 authority or a private entity under a public-private agreement, if
20 the required sum remains unpaid for 180 days after the person's use
21 of the eligible project, the government agency, or a private entity
22 authorized to do so by the government agency, may bring a civil
23 action against the person to collect the unpaid user fees in a
24 court having jurisdiction. If the civil action results in a
25 judgment for unpaid charges, the defendant shall also be required
26 to reimburse the plaintiff for all costs of enforcement and
27 collection, including filing and legal fees.

1 (4) During the period that a person owes and has failed to pay
2 user fees for a transportation facility under subsection (3), the
3 person and a motor vehicle used by the person may be barred from
4 using the transportation facility.

5 (5) Except as provided in section 675b of the Michigan vehicle
6 code, 1949 PA 300, MCL 257.675b, involving leased vehicles, proof
7 that a particular vehicle used a transportation facility without
8 payment of the applicable user fee, together with proof from the
9 department of state of the name of the vehicle's registered owner,
10 creates a presumption that the vehicle's registered owner was the
11 person who used the transportation facility, who failed to pay the
12 user fee, and who is prima facie responsible for the unpaid user
13 fees. If the conditions of section 675b of the Michigan vehicle
14 code, 1949 PA 300, MCL 257.675b, are satisfied, the lessee or
15 renter of a motor vehicle and not the leased vehicle owner is the
16 person liable under this section, for which purposes the entity
17 that gives notice of unpaid user fees to the vehicle's registered
18 owner shall be given the notice that would otherwise be given to
19 the clerk of the court or parking violations bureau under section
20 675b of the Michigan vehicle code, 1949 PA 300, MCL 257.675b.