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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/4/22

SPONSOR HJC LAST UPDATED \_\_\_\_\_ HB 55/HJCS

SHORT TITLE Public-Private Partnership Act SB \_\_\_\_\_

ANALYST Graeser/J. Torres

### REVENUE (dollars in thousands)

| Estimated Revenue |      |      |      |      | Recurring or<br>Nonrecurring | Fund<br>Affected |
|-------------------|------|------|------|------|------------------------------|------------------|
| FY22              | FY23 | FY24 | FY25 | FY26 |                              |                  |
|                   | NFI  | NFI  | NFI  | NFI  | Recurring                    | General Fund     |

Parenthesis ( ) indicate revenue decreases

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| FY22    | FY23    | FY24    | 3 Year<br>Total Cost | Recurring or<br>Nonrecurring | Fund<br>Affected |
|---------|---------|---------|----------------------|------------------------------|------------------|
| \$500.0 | \$500.0 | \$500.0 | \$1,500.0            | Recurring                    | NMFA             |

Parenthesis ( ) indicate expenditure decreases

See discussion at **FISCAL IMPLICATIONS**

Section 14(HH) of this bill conflicts with Section 19(HH) of HB4

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Finance Authority (NMFA)  
 Mortgage Finance Authority (MFA)  
 Aging and Long-term Services Department (ALTSD)  
 General Services Department (GSD)  
 Attorney General's Office (NMAG)

### SUMMARY

#### Synopsis of Bill

The House Judiciary Committee Substitute for House Bill 55 permits public and private partners to enter into an agreement with the objective of constructing or improving broadband telecommunication network facilities. The act stipulates how public-private partnerships are agreed upon and specifies approval requirements and restrictions. The act establishes the public-private partnership board and delegates administrative responsibilities to the New Mexico Finance

Authority (NMFA). NMFA is to provide staff support to the board, administer the fund, develop grant and loan application forms, make loans and grants recommended by the board, promulgate rules for issuing revenue and refunding bonds, issue bonds, charge fees as appropriate, be compensated from the fund as appropriate, and take all necessary actions to implement the act. The board’s responsibilities include determining the use of a public-private partnership agreement and ensuring prudent expenditures of public funds.

The act also creates the public-private partnership project fund consisting of appropriations, payments of principal, and interest on loans made from the fund, income from investment of the fund, and any other money administered or otherwise allocated to the fund. Money in the public-private partnership fund may be used to create grants for cost-benefit studies, provide loans for financing broadband telecommunication infrastructure projects, for grants or loans to an Indian nation, tribe, or pueblo that has entered a public-private partnership with a private partner for the development of a public project, and for administrative and reimbursable costs incurred by the board and authority. With board approval, NMFA may issue revenue bonds for broadband telecommunication infrastructure, as well as issue refunding bonds for purposes including refinancing. These bonds are not state obligations and must be payable from the NMFA’s revenue only.

The bill defines public projects to mean “(1) the construction or improvement of a public transportation facility or public transportation infrastructure other than a toll road; or (2) public construction or improvement of broadband telecommunications network facilities. The act allows for certain exceptions to the Procurement Code and authorizes NMFA to buy bonds as investments for the public projects revolving fund (PPRF).

The effective date of this bill is July 1, 2022. The provisions are repealed effective July 1, 2032.

## **FISCAL IMPLICATIONS**

There is no anticipated general fund revenue impact of the provisions of this bill. If there are revenue impacts, they will be noted as affecting the public-private partnership fund as administered by NMFA.

NMFA notes a probable operating budget impact:

“Although HB55 does not provide any initial funding for the fund, NMFA estimates start-up costs and operating costs to be approximately \$500,000 per year.”

NMFA expands on this comment:

“The Committee Substitute for HB55 now includes language to allow the PPRF to purchase public-private partnership (“P3”) bonds issued by the NMFA should the projects and funding meet PPRF credit structuring standards and, to the extent that the PPRF has capacity, to invest in the P3 revenue bonds given PPRF concentration constraints. Initial P3 revenue bonds may not be well rated but as the P3 program grows and as revenues become more certain, ratings should improve and standalone P3 revenue bonds will become more viable.”

## SIGNIFICANT ISSUES

NMFA comments on the addition of PPRF investment to the original bill:

“The Committee Substitute for HB55 now includes language to allow the PPRF to purchase public-private partnership (“P3”) bonds issued by the NMFA should the projects and funding meet PPRF credit structuring standards and, to the extent that the PPRF has capacity, to invest in the P3 revenue bonds given PPRF concentration constraints. Initial P3 revenue bonds may not be well rated but as the P3 program grows and as revenues become more certain, ratings should improve and standalone P3 revenue bonds will become more viable.”

NMFA has commented on the history of this proposal and other significant issues.

“During the 2019 legislative session, HB286 (the forerunner Public-Private Partnership bill) was introduced. At that time, NMFA made suggestions to improve workability of the bill. SB143, introduced during the 2021 legislative session, addressed NMFA’s 2019 concerns.”

“HB55 structures the public-private partnership (“P3”) framework so that, with future legislation, the structure could be utilized beyond public transportation projects and broadband projects. While transportation projects are a focus of P3s nationwide, New Mexico tends to lack the transportation density necessary to underpin most P3 transportation projects. P3 transportation projects may also be dependent on New Mexico Department of Transportation priorities. Broadband, and technology in general, offers greater opportunity for P3 partnerships as technology need not be as population density dependent as public transportation projects tend to be. While \$10,000,000 is a reasonable minimum for public projects to be funded from the Fund, the still relatively narrow focus of what can be a Public Project may limit resulting P3 activity in New Mexico.”

“Given population density considerations in New Mexico and given the rapid advance of technological innovations globally to bridge density issues, further expansion of the definition of public projects to encompass other technological innovations and technology infrastructure could result in a more impactful P3 program.”

“The issue, when it comes to bonding, is the level and certainty of the revenue sources behind the bonds as these determine bond ratings, pricing and salability. Without initial funding of the P3 project fund, revenue bonds cannot be issued and public projects cannot be funded. With sufficient initial capitalization and assurance as the ability to service bond debt service, grants and loans can be made with the P3 project fund recapitalized with loan repayments.”

“The Act could include language to allow the Public Project Revolving Fund (“PPRF”) to purchase the P3 revenue bonds should the projects and funding meet PPRF credit structuring standards and to the extent that the PPRF has capacity to invest in the P3 revenue bonds given PPRF concentration constraints. Initial P3 revenue bonds may not be well rated but as the P3 program grows and as revenues become more certain, ratings should improve and standalone P3 revenue bonds will become more viable.”

ALTSD notes two issues of significance:

- “Older adults and disabled adults would benefit from transportation infrastructure

improvements as well as reliable broadband telecommunications network facilities, as would the general population. In 2001, there were an estimated 27.5 million licensed drivers in the U.S. age 65 and older; 4.7 million more than in 1991. (Federal Highway Administration).<sup>1</sup> Older adults make up a significant number of the individuals licensed in the United States.”

- “Oversight of government contracts which in some cases may not have the staff or expertise to fully analyze long-term financial obligations of the public-private partnership agreements. HB55 may provide support to governments to analyze complex legal and financial issues.”

## **PERFORMANCE IMPLICATIONS**

NMFA is charged with administering the Public-private Partnership Fund and comments on performance implications as follows:

“Performance will be driven by P3 activity. Given the anticipated initial limited level of P3 activity, performance in operating the P3 program should not be an issue.”

## **ADMINISTRATIVE IMPLICATIONS**

NMFA is charged with administering the Public-private Partnership Fund and comments on administrative implications as follows:

“NMFA will be taking on additional administrative responsibilities in servicing a new Board and in managing the P3 fund. NMFA has the necessary expertise and expects that it will be able to fund any additional capacity needed given compensation language in the Act. Language relating to issuing revenue or refunding bonds needs to be the most precise, given Federal oversight of municipal bonds. Bonding language in the Act is sufficient for its purposes though bond impairment language would be beneficial.”

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

This bill is the drafting base for the public-private partnerships proposed in HB4. Section 14, Subsection HH of HB55 amends the Procurement Code to include the Public-Private Partnership Act exemption. This conflicts with Section 19 (HH) of HB-4 that provides a Hydrogen Hub Development Act exemption.

ALTSD notes that this bill is similar to 2021 SB143 and 2020 HB264 and related to 2020 SB59.

## **TECHNICAL ISSUES**

This substitute bill contains a delayed repeal date of July 1, 2032. Because this is a relatively new provision in the state, it is appropriate and important for the Legislature to review the issue after a few years to determine if there should be more guardrails established. NMFA notes that after July 1, 2032 delayed repeal of sections 1 through 13, there may be no continuing need for the exception to the Procurement Code in Section 14 of the bill or with the investment authority granted to NMFA/PPRF in Section 15.

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<sup>1</sup> <https://www.bts.gov>

**Tort Claims Issues:**

HB55 provides for the merging of public and private partners into public-private partnerships, under public-private partnership agreements. Section 41-4-4 NMSA 1978 grants public entities and employees immunity from liability for tort claims except as waived under the New Mexico Religious Freedom Restoration Act [[28-22-1](#) to [28-22-5](#) NMSA 1978] or the Tort Claims Act.

Section 41-4-8(A) NMSA 1978 states in part that immunity: “does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of the following [enumerated] public utilities....”

Section 41-4-8(B) NMSA 1978 states: “The liability imposed pursuant to Subsection A of this section shall not include liability for damages resulting from bodily injury, wrongful death or property damage: (1) caused by a failure to provide an adequate supply of gas, water, electricity or services as described in Subsection A of this section; or (2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.”

HB55 presents a potential issue as to whether this creation of a public-private partnership under public-private partnership agreement nullifies the immunity otherwise available to public utilities, entities and employees under the New Mexico Tort Claims Act.

**Proprietary Information and IPRA Issues:**

HB-55 Section 3(D)(12) indicates that the agreement may “provide for the protection of proprietary information of the private partner.”

Because the partnership also involves a private entity, the bill may require language as to how the proprietary information will be protected under IPRA requirements that apply to the public entity.

This bill provides some additional guidance by adding the following the following provision:

(12) provide for the protection of proprietary information of the private partner, except as that information is needed for operations and maintenance by a public entity or for public health and safety.

**Indian Sovereignty Issues:**

HB55 Section 5(I). “take all other action necessary to implement the Public-Private Partnership Act, including entering into joint powers agreements with any other public sector partner or Indian nation, tribe or pueblo and retaining legal counsel and experts when appropriate.

HB55 Section 7(E) provides for a grant or loan of money in the public-private partnership fund to an: “Indian nation, tribe or pueblo that has entered into a public-private partnership with a private partner for the development of a public project” under enumerated conditions.

In *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2017-NMSC-007, 388 P.3d 977, the court held that dismissal was proper under: “the unequivocal precedent of the United States Supreme Court [which] declares only two exceptions to tribal sovereign immunity—the tribes’s waiver of immunity or congressional authorization—neither of which exists in the instant case.”

See also: Update of Selected Studies in Transportation Law,  
<https://www.nap.edu/catalog/25514/update-of-selected-studies-in-transportation-law-volume-8-section-3-indian-transportation-law>; &  
[https://www.nap.edu/cart/download.cgi?record\\_id=25514&file=42-46](https://www.nap.edu/cart/download.cgi?record_id=25514&file=42-46):

“Sovereign immunity ... extends to commercial activities off of Indian lands and can only be waived by the tribe or Congress”, citing *Michigan v Bay Mills Indian Community*, 134 S. Ct. 2024, 188 L. Ed. 2d `071 (2014).

Under this precedent, tribal sovereign immunity can only be expressly waived by an authorized member of the Indian nation, tribe or pueblo; or by a Congressional waiver. If not waived, tribal sovereign immunity will apply to judicial actions taken against said entities.

An express waiver of tribal sovereign immunity should therefore be included in HB55, and in any related legislation (and agreements) involving the Indian nation, tribe or pueblo in order to preserve the state’s pursuit of default and other contract remedies.

### **Procurement Code Issues:**

HB55(14)(HH) amends the New Mexico Procurement Code to exempt agreements and contracts entered into pursuant to the Public-Private Partnership Act Section 13-1-98 NMSA 1978. The express purposes of the: “Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity.” Section 13-1-29(C), NMSA 1978; *Planning & Design Solutions v. City of Santa Fe*, 1994-NMSC-112, 118 N.M. 707, 885 P.2d 628. In *Planning & Design Solutions v. City of Santa Fe*, the Court held that Santa Fe had violated the Procurement Code and found that: “Of all the interests involved in competitive bidding, the public interest is the most important. [citation omitted]. An economical and efficient system of procurement directly benefits taxpayers. [citation omitted]. Through competitive bidding the municipality hopes to obtain the best product at the best price. [citation omitted]. Thus the Code protects against the evils of favoritism, nepotism, patronage, collusion, fraud, and corruption in the award of public contracts. [citation omitted]. It is certainly in the public interest that the City abide by the procurement rules it has set for itself.”

The suggested amendment proposed under HB55 Section 14(HH) may be found to violate the purposes and protections of the New Mexico Procurement Code.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

NMFA indicates that potential public partners are attracted to states that have clear P3 rules and laws in effect. New Mexico has been deemed lacking in this area by P3 monitoring organizations nationwide. Not enacting this bill may cause potential private partners to bypass New Mexico with otherwise viable P3 projects.

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