AN ACT

RELATING TO PUBLIC PROJECTS; ENACTING THE PUBLIC-PRIVATE
PARTNERSHIPS ACT; ALLOWING THE STATE AND LOCAL GOVERNMENTS TO
ENTER INTO LONG-TERM PARTNERSHIPS WITH PRIVATE SECTOR PARTNERS
TO FACILITATE PUBLIC PROJECTS; PROVIDING POWERS AND DUTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
cited as the "Public-Private Partnerships Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Public-Private Partnerships Act:

   A. "department" means the general services
department;

   B. "force majeure" means an uncontrollable force or
natural disaster not within the power of the public or private
partner;

.204617.2
C. "local government" means a municipality; a county; or a regional entity created by a joint powers agreement between one or more public agencies;

D. "material default" means a failure of a private partner to perform any duties under a public-private partnership, which failure jeopardizes delivery of adequate service to the public and remains unsatisfied after a reasonable time and after the private partner has received written notice from the public partner of the failure;

E. "private partner" means one or more persons who have entered into a public-private partnership with a public partner and who are not the federal government or any agency or instrumentality of the federal government; another state or territory of the United States; a sovereign or foreign government; or the state or an agency, branch, institution, instrumentality or political subdivision of the state;

F. "public partner" means a local government, state agency, state institution or instrumentality of the state;

G. "public-private partnership" means an agreement between one or more public partners and one or more private partners for the design, development, financing, construction, operation or maintenance of a public project;

H. "public project":

(1) means:

(a) a building or other facility and
infrastructure, except affordable housing pursuant to the Affordable Housing Act, that meets a public purpose and is developed or operated for a public entity;

(b) a building or other facility for a public school or a public post-secondary educational institution, including: 1) a functionally related and subordinate facility; 2) a stadium or other facility primarily used for school events; and 3) any depreciable property provided for use in a school facility that is operated as part of the public school system or a public post-secondary educational institution;

(c) a hospital or a health care, behavioral health, hospice or other treatment facility;

(d) cultural or recreational facilities, including theaters, museums, convention centers, lodging, community centers, stadiums, athletic facilities, golf courses or similar facilities;

(e) parking lots or garages;

(f) airports, railways, subways or other transportation facilities and roads;

(g) improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;

(h) utility, telecommunications, broadband, energy and other communications infrastructure that
is ancillary to the development or operation of a public
project;

(i) infrastructure needed to conserve
natural resources or generate utility savings;

(j) a facility or infrastructure used in
connection with the byproducts of watershed restoration or
hazardous fuels reduction;

(k) a project that involves habitat or
environmental restoration, cleanup or reuse;

(l) dams and reservoirs;

(m) a sewerage or water treatment
facility, power generating plant, pump station, natural gas
compressing station or similar facility;

(n) a sewerage, water, gas or other
pipeline;

(o) a transmission line;

(p) a radio, television, cell or other
tower;

(q) improvements necessary or desirable
to any unimproved state-owned real estate or real estate owned
by a local government;

(r) information technology systems and
infrastructure; or

(s) recycling facilities or solid waste
management facilities that produce electric energy derived from
solid waste; and

(2) does not include a project that changes
the franchise rights or territory of a regulated public
utility;

I. "user fee" means a rate, fee or other charge
imposed by a partner for use of all or part of a public
project; and

J. "utility" means a privately, publicly or
cooperatively owned line, facility or system for producing,
transmitting or distributing communications, cable television,
power, electricity, light, heat, gas, oil, crude products,
water, steam, waste, storm water not connected with highway
drainage or any other similar commodity, including a fire or
police signal system or street lighting system, which directly
or indirectly serves the public; but "utility" does not include
electric utilities and electric utility facilities that are
subject to regulation by the public regulation commission,
except for the purpose of addressing utility crossings pursuant
to Section 15 of the Public-Private Partnerships Act.

SECTION 3. [NEW MATERIAL] PROJECT DELIVERY METHODS--
PROPOSALS.--A public partner may provide for the development of
a public project using a variety of project delivery methods,
which methods shall be documented in written agreements. The
methods may include:

A. predevelopment agreements leading to other
implementing agreements;

B. design-build agreements;

C. design-bid-build agreements;

D. design-build-finance agreements;

E. construction manager at risk;

F. agreements that provide for the private partner
to design, build, manage, maintain, operate or lease a public
project; or

G. other project delivery methods or agreements or
combination of methods or agreements that the public partner
determines is most advantageous to the public interest.

SECTION 4. [NEW MATERIAL] PROJECT DEVELOPMENT--

PROCUREMENT.--

A. A public partner may:

(1) procure a public project using any of the
following:

(a) requests for proposals in which the
public partner describes a class of public project or a
geographic area in which a person is invited to submit
proposals to develop a public project;

(b) solicitations using requests for
qualifications, short-listing of qualified proposers, requests
for proposals, negotiations or other procurement procedures;

(c) procurements seeking development and
finance plans that are most advantageous to the public partner
and suitable for the public project;

(d) best-value selection procurements based on price or financial proposals, or both, or other factors; and

(e) other procedures that the public partner determines may further the implementation of the Public-Private Partnerships Act; and

(2) consider an unsolicited proposal if the public partner determines that there is sufficient merit to pursue the unsolicited proposal and a reasonable opportunity for other persons to submit competing proposals for consideration to ensure maximum competition among proposals submitted and the best value for the public partner.

B. For a procurement in which the public partner issues a request for qualifications or similar solicitation document or following a public partner's decision to consider an unsolicited proposal, the public partner shall issue a request that sets forth the factors that will be evaluated and the manner in which responses will be evaluated.

C. In evaluating proposals, the public partner, and the department if required, shall:

(1) consider a range of factors they deem appropriate to obtain the best value for the state or local government; and

(2) require specific justification and support
for a proposal that may affect:

(a) public employees' employment; or

(b) the cost of public service delivery.

D. The public partner may charge and retain a reasonable administrative fee for the evaluation of an unsolicited project proposal and for the cost of experts that are consulted pursuant to Subsection E of this section; provided that the administrative fee shall not exceed the reasonable cost of evaluating the proposal.

E. The public partner shall consult with in-house or contracted financial, legal, architectural or other experts and advisors to assist in the design, evaluation, negotiation, construction administration and development of public-private partnership agreements for a public project.

F. If contractor insurance is required for services procured pursuant to this section, the insurance shall be placed with an insurer authorized to transact insurance in New Mexico or with a surplus lines insurer approved by the office of superintendent of insurance or its successor agency.

G. In addition to making proposals available to the public pursuant to Subsection H of this section and providing the opportunity for written comments from the public, the public partner shall hold at least one public hearing and may hold additional public hearings prior to entering into a public-private partnership, all of which shall be preceded by

.204617.2

- 8 -
at least thirty days' notice. The meetings shall be subject to
the Open Meetings Act.

H. Each request for proposals issued pursuant to
the Public-Private Partnerships Act shall require the proposer
to include with its proposal an executive summary covering the
major elements of its proposal that do not address the
proposer's price, financing plan or other confidential or
proprietary information or trade secrets that the proposer
intends to be exempt from disclosure. Any unsolicited proposal
shall also include a similar executive summary. After the
public-private partnership is awarded and the conclusion of any
protest or other challenge to the award, the Inspection of
Public Records Act applies to any release of any part of the
proposals.

I. A solicited or unsolicited proposer shall
identify those portions of a proposal or other submission that
the proposer, with the public partner's concurrence, considers
to be a trade secret or confidential commercial, financial or
proprietary information. For trade secrets and confidential
and proprietary information to be exempt from disclosure, the
proposer must do all of the following:

(1) invoke exclusion on submission of the
information or other materials for which protection is sought;

(2) identify with conspicuous labeling the
data or other materials for which protection is sought;
(3) state the reasons why protection is necessary; and
(4) fully comply with any applicable state law with respect to information that the proposer contends should be exempt from disclosure.

J. A public partner shall consider a proposer's request to withhold certain information in a proposal from disclosure and shall issue a written determination either accepting or rejecting the proposer's request. Following the public partner's determination, any portions of the proposal not withheld from disclosure shall be made available to the public by request and the public partner shall maximize public access to the disclosed portions of the proposal through reasonable means available to the public partner.

SECTION 5. [NEW MATERIAL] PROCUREMENTS--RESTRICTIONS.--

A. The resident preferences provided in Sections 13-1-21 and 13-1-22 NMSA 1978 apply to procurements pursuant to the Public-Private Partnerships Act. The construction of a public project is a public works for the purposes of the Public Works Minimum Wage Act, the Subcontractors Fair Practices Act, any other provisions of Chapter 13, Article 4 NMSA 1978 and the Public Works Apprentice and Training Act.

B. Before it may be awarded, every public-private partnership shall include an operating agreement that defines the roles and responsibilities of the partners. The operating
agreement shall require that a public project be operated and
maintained to the operating and maintenance standards and
specifications as set out in the agreement.

C. Should a public project include building
maintenance, as to the maintenance activities, the public
partner or department shall not approve a project that
displaces an existing government employee unless the employee
is offered alternate equivalent employment.

SECTION 6. [NEW MATERIAL] DEPARTMENT--POWERS AND DUTIES--
ASSISTANCE WITH DUTIES.--

A. The department shall:

(1) in consultation with the state purchasing
agent, the New Mexico finance authority, the economic
development department, the department of finance and
administration, the office of the state engineer and any other
person that the department deems necessary, develop a minimum
set of guidelines to implement the provisions of the Public-
Private Partnerships Act, including the process that the
department shall follow with respect to the public-private
partnership agreements that the department is required to
review and approve and the information that is required to be
included in a requested or unsolicited proposal;

(2) before a public-private partnership may be
established, review and approve all public-private partnership
agreements that include:
(a) a total public project cost that is greater than fifty million dollars ($50,000,000); or

(b) a public-private partnership term that is longer than thirty-five years;

(3) establish an evaluation process to determine whether projects should be developed as public-private partnerships or using traditional procurement and funding methods prior to the initiation of contract negotiations with a private partner;

(4) manage public communication and education, including public hearings, regarding the scope, cost and impacts of proposed public-private partnerships in order to maximize the opportunity for public input on proposals;

(5) encourage maximum competition among private entities to pursue the development and operation of public-private projects in the state;

(6) serve as a resource for the legislature and its staff regarding the policy and financial impacts of proposals and the implications of proposed or pending public project agreements on the credit or other obligations of the state;

(7) provide technical assistance to local governments and regional entities on the use of public-private partnerships to meet their needs; and

(8) on or before December 1 of each year,
submit a report to the legislature on any pending, proposed or completed public-private partnership agreements that the department is required to review and approve. The report shall specifically name the public-private project, its proposed scope, the proposed finance plan, the status of permitting and land acquisition and a summary of any public project agreements pending at the time of the report.

B. The department or a local government may:

(1) in accordance with Subsection D of Section 4 of the Public-Private Partnerships Act, retain, as necessary, financial, legal and other experts to assist it in carrying out its duties pursuant to the Public-Private Partnerships Act, including assistance with the review of public-private partnership agreements;

(2) solicit the expertise of state agencies, state institutions, state instrumentalities and local governments to assist the department or local government in carrying out its duties pursuant to the Public-Private Partnerships Act, including reviewing public-private partnership proposals; and

(3) receive appropriations and money from any other source, including other state agencies or local governments, regional organizations or the federal government, to carry out its duties pursuant to the Public-Private Partnerships Act.
C. All state agencies, state institutions, state instrumentalities and local governments, as appropriate, shall cooperate with the department or a local government and assist it in carrying out its duties by providing technical assistance, analysis and other services as requested by the department or a local government.

SECTION 7. [NEW MATERIAL] DEPARTMENT--ADVICE AND ASSISTANCE--REVIEW AND APPROVAL OF AGREEMENTS.--With respect to public-private partnership agreements that the department is required to review and approve, and before approving a public-private partnership, the department shall:

A. assist the public partner in negotiating agreements;

B. assist the public partner in preparing any documents related to a specific agreement;

C. identify, and advise the public partner regarding, any relevant federal securities or other laws and related disclosure requirements; and

D. identify, and advise the public partner regarding, accounting, investment and tax requirements applicable to specific public projects.

SECTION 8. [NEW MATERIAL] EVALUATION CRITERIA.--Before entering into a public-private partnership, the public partner, and the department if required, shall consider:

A. the ability of the public project to meet the
needs of the community in which it is to be located, including improving and streamlining services to the public; providing or enhancing educational, cultural and recreational opportunities; promoting economic growth or job creation; or otherwise serving a public purpose;

B. the proposed cost and financial plan for the public project;

C. the performance benchmarks contained in the proposal;

D. the estimated operating costs of the public project;

E. the financial commitment of the private partner;

F. the risk of the proposed financing;

G. the general reputation, qualifications, industry experience and financial capacity of the proposer;

H. the compatibility of the public project with local and regional land and water plans or other infrastructure plans;

I. the feasibility and proposed design and management of the public project;

J. the degree of innovation; efficiency; and technical, scientific, technological and socioeconomic merit of the proposal;

K. comments from potential users, local citizens, affected jurisdictions and other interested persons;
L. benefits to the public, including improvements in economic growth, job creation, public safety and quality of life;

M. the safety record of the proposer;

N. efforts to be made through the public-private partnership to retain and train New Mexico residents in occupations and professions related to planning, design, construction, project management, general management, administration, legal, accounting and other areas of the public project over the life of the public-private partnership;

O. the commitment to use New Mexico building materials and manufactured goods and local services to the extent possible;

P. green building design and construction certification by a nationally recognized organization;

Q. innovations in energy efficiency or generation;

and

R. other criteria that the public partner and the department deem appropriate for consideration.

SECTION 9. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS--REQUIREMENTS.--

A. In a public-private partnership, the public partner, and the department with respect to public-private partnership proposals that it reviews, shall require an agreement to include provisions, as applicable, that:
(1) authorize the public partner or the
private partner to establish and collect user fees, rents,
advertising and sponsorship charges, service charges or other
dues allowed in the agreement, including provisions that:

(a) specify how revenue will be
collected, accounted for and audited;

(b) establish circumstances under which
the public partner may receive all or a share of revenue from
such charges; and

(c) govern enforcement of user fees,
including provisions for mechanisms to ensure that users are
identified and notified of fees owed and provisions that allow
the private partner access to information from relevant public
databases for enforcement purposes. Negligent use of the data
contained in the databases, including unauthorized disclosure
of the data, shall result in a civil penalty of ten thousand
dollars ($10,000) for each violation;

(2) provide for a maximum negotiated rate of
return on the private partner's investment, including:

(a) fees and charges that may be
collected directly by the private partner or a third party
engaged by the private partner for that purpose;

(b) a formula for the adjustment of user
fees and other charges during the term of the public-private
partnership;
(c) for an agreement that does not include a formula described in Subparagraph (b) of this paragraph, provisions regulating the private partner's return on investment; or

(d) other strategies that the public partner or the department deems appropriate;

(3) allow for payments to be made by the public partner to the private partner, including availability payments or performance-based payments;

(4) allow the public partner to accept payments and share revenue with the private partner;

(5) address how the public and private partners will share management of the risks of the public project;

(6) specify how the public and private partners will share the costs of development of the public project;

(7) allocate financial responsibility for cost overruns to the partner or partners that were responsible for the cost overruns;

(8) establish the damages to be assessed for nonperformance;

(9) establish performance criteria or incentives, or both;

(10) address the acquisition of property
interests that may be required, including provisions that allow
the public or private partner to acquire real property,
including acquisition by exchange of other real property that
is owned by the state, a local government or the federal
government;

(11) establish recordkeeping, accounting and
auditing standards to be used for the public project;

(12) for a public project with a term that is
longer than twenty-five years, address responsibility for
reconstruction or renovations that are required so that the
public project meets all applicable government standards before
the public project reverts to the public partner;

(13) provide for responsibilities for law
enforcement on public projects;

(14) identify public partner specifications
that must be satisfied, including provisions allowing the
private partner to request and receive authorization to deviate
from the specifications on a showing satisfactory to the public
partner that the deviation is necessary;

(15) require a private partner to provide,
either directly or through the principal contractor who is in
charge of the project, performance and payment bonds as
required by Section 13-4-18 NMSA 1978 for those components of a
public project that involve construction. For components that
do not involve construction, require parent company guarantees,
letters of credit or other acceptable forms of security or a combination of any of these, the penal sum or amount of which may be less than one hundred percent of the value of the contract involved based on the public partner's or the department's determination of what is required to adequately protect the public partner, made on a project-by-project basis;

    (16) provide clawback or recapture provisions that protect the public investment; and

    (17) specify remedies available to the parties and dispute resolution procedures to be followed.

B. The public-private partnership agreement shall include a clear statement of which partner will own any real property pertaining to the public project when the project reverts to the public partner based on the terms of the agreement.

C. The term of initial agreements entered into pursuant to the Public-Private Partnerships Act may be for a term not to exceed fifty years, and such agreements may be extended for additional terms; provided that an extension shall be subject to the same review and negotiation process as the original agreement.

D. The public-private partnership agreement shall contain a provision by which the private partner expressly agrees that it is prohibited from seeking injunctive or other equitable relief to delay, prevent or otherwise hinder the
public partner or any other jurisdiction from developing,
constructing or maintaining a public project that was planned
and that would or might affect the revenue that the private
partner would or might derive from the public project developed
pursuant to the Public-Private Partnerships Act, except that
the agreement may provide for reasonable compensation to the
private partner for the adverse effect resulting from
development, construction and maintenance of an unplanned
facility that affects the public project's revenue.

E. The state board of finance shall approve the
assignment, transfer or sale of assets or investment in a
public project that creates debt obligation of the public
partner.

SECTION 10. [NEW MATERIAL] FUNDING AND FINANCING.--

A. Any lawful source of funding may be used for the
development or management of a public project pursuant to the
Public-Private Partnerships Act, including:

(1) proceeds of grant anticipation revenue
bonds, private activity bonds, revenue bonds or other bonds
allowed by federal or state law;

(2) grants, loans, loan guarantees, lines of
credit, revolving lines of credit or other arrangements as
allowed by federal or state law;

(3) other federal, state or local revenues;

(4) user fees, lease payments, availability
payments, gross or net receipts from sales, proceeds from the
sale of development rights, franchise charges, permit charges,
advertising and sponsorship charges, service charges or any
other lawful form of consideration; and

(5) other forms of public and private capital
that are available.

B. As security for the payment of financing
described in this section, the revenues from the public project
may be pledged, but no pledge of revenues or property
constitutes in any manner or to any extent a general obligation
of the state or local government, unless explicitly agreed to
by the state or local government. Financing may be structured
on a senior, parity or subordinate basis to any other
financing.

C. The public partner may accept money from the
United States or any of its agencies to carry out the
provisions of the Public-Private Partnerships Act, whether the
money is made available by grant, loan or other financing
arrangement. The public partner assents to any federal
requirements, conditions or terms of any federal funding
accepted by the public partner pursuant to this subsection.
The public partner may enter into agreements or other
arrangements with the United States or any of its agencies as
may be necessary to carry out the provisions of that act.

D. The public partner may accept from any source
any grant, donation, gift, conveyance of land, other real or personal property or other thing of value made to the public partner for the purposes of a public project.

E. A public project may be funded in whole or in part by contributions of money or property made by a private person, a private entity or the state or any agency, institution, instrumentality or political subdivision of the state.

F. Federal, state and local money may be combined with private sector money for public project purposes as allowed by law or by the grant, gift or donation provisions.

G. Any revenue bonds issued as a result of the Public-Private Partnerships Act are not general obligations of this state or any local government and are not secured by or payable from any money or assets of the state or any local government other than the money and revenues specifically pledged to the repayment of the revenue bonds.

SECTION 11. [NEW MATERIAL] USER FEES AT END OF AGREEMENT PERIOD.--The public partner may continue or cease collection of user fees after the end of the term of the public-private partnership agreement, based on a determination of the public project's future operations.

SECTION 12. [NEW MATERIAL] REVERSION OF PUBLIC PROJECT TO PUBLIC PARTNER.--If the public-private partnership is terminated, the powers and duties of the private partner cease,
except for any duties and obligations that extend beyond the
termination as provided in the public-private partnership
agreement, and the public project reverts to the public partner
and shall be dedicated for public use.

SECTION 13. [NEW MATERIAL] MATERIAL DEFAULT--REMEDIES.--

A. Upon the occurrence and during the continuation
of material default by the private partner, not related to an
event of force majeure, the public partner may:

   (1) elect to take over the public project,
including the succession of all right, title and interest in
the public project, subject to any liens on revenue previously
granted by the private partner; and

   (2) terminate the public-private partnership
and exercise any other rights and remedies that may be
available.

B. If the public partner elects to take over a
public project pursuant to Subsection A of this section, the
public partner:

   (1) shall collect and pay any revenue that is
subject to lien to satisfy an obligation;

   (2) may develop and operate the public
project, impose user fees for the use of the public project and
comply with any service contracts; and

   (3) may solicit proposals for the maintenance
and operation of the public project as provided in the Public-
Private Partnerships Act for original proposals.

SECTION 14. [NEW MATERIAL] POLICE POWERS--VIOLATIONS OF LAW.--All law enforcement officers of the state or local government have the same powers and jurisdiction within the limits of the public project as they have in their respective areas of jurisdiction and access to the public project at any time to exercise such powers and jurisdictions.

SECTION 15. [NEW MATERIAL] UTILITY CROSSINGS.--Subject to the requirements of federal and state laws, contractual agreements and land conveyance documents, a public or private partner and any utility whose facility is to be crossed or relocated shall cooperate fully in planning and arranging the manner of the crossing or relocation of the utility facility.

SECTION 16. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2017.

- 25 -