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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/03/17

SPONSOR Larrañaga/Cisneros LAST UPDATED 2/13/17 HB 275

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

ANALYST Graeser

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

	FY17	FY18	FY19	3 Year Total Cost	R or NR **	Fund Affected
<b>Total</b>			See fiscal impact			General Fund/Other State Funds

Parenthesis ( ) indicate expenditure decreases. \*\* R = recurring; NR = non-recurring

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of State Engineer/Interstate Stream Commission (OSE/ISC)  
 Public School Finance Authority (PSFA)  
 New Mexico Municipal League  
 General Services Department (GSD)  
 Department of Finance and Administration

Conflicts with or duplicates provisions of SB 143.

### SUMMARY

#### Synopsis of Bill

House Bill 275 enacts the “Public-Private Partnership Act” (PPPA) to allow state and local governments to enter into long-term agreements with private sector partners to facilitate public projects apparently limited to:

- buildings and infrastructure that meets a public purpose and is developed or operated for a public entity;
- utility, telecommunications infrastructure ancillary to the development or operation of a public project;
- infrastructure needed to conserve natural resources or generate utility savings;
- a project that involves conservation of natural resources; generating of utility savings; habitat or environmental restoration, cleanup or reuse; or recycling facilities or solid waste management facilities that produce electric energy derived from solid waste; or
- improvements necessary or desirable to any unimproved state-owned or locally owned real estate.

The proposed PPPA, also known in the economic development community as P3, excludes affordable housing projects pursuant to the Affordable Housing Act and projects that change franchise rights or territories of regulated public facilities.

The PPPA identifies the “public department” that coordinates large PPPA agreements as GSD.

The effective date of the provisions of this bill is July 1, 2017.

A section-by-section description is included as an appendix.

## **FISCAL IMPLICATIONS**

The bill could have a future impact on the general fund, and local government and federal funds.

GSD has concerns about budget:

The responsibilities placed upon GSD by the Public-Private Partnership Act include creating the guidelines that ensure proper adherence to State statutes. The Act calls for GSD to hire consultants as necessary to help in carrying out the duties required by the Act. The consultants needed may be in the areas of finance, law and other highly technical fields. The funds to hire these experts have not been appropriated to GSD.”

The larger projects will require review and oversight by GSD. Funds will be needed to hire additional personnel or to reach out to contractors for assistance. This will put an additional burden on GSD financially. GSD will require additional operating revenue to assist public partners with negotiations and contracts and advise on laws, disclosures, accounting, investments, taxes and other requirements.

At the current time there is no way to estimate the cost impact to GSD, but will definitely require additional FTE on the documentation and implementation portions of the bill. The number of partnerships that may be formed in the future is unknown. The size of the public projects that may use this method will have an effect on GSD as well as the complexity of the agreements in terms of structuring the financing and any special terms and conditions.

PSFA is concerned that, “...capital outlay funds appropriated each year are not enough to keep up with the growing demand for repairs and replacement of school infrastructure and maintenance. The act would allow the state to enter into partnership to build, renovate and maintain school infrastructure. The maintenance requirement could help to ensure the building lasts its expected life.”

PSFA is equally concerned with budget implications: “... this bill does not make an appropriation, but could have a future impact on the state general fund, the PSCO fund, local government funds and federal funds. The bill provides for an administrative fee to be imposed to assist with the PPPA process, but only for unsolicited proposals. For all solicited proposals and remaining PPPA processes, the department or local governments may retain financial, legal and other experts to assist, or to solicit the expertise of state agencies, state institutions, state instrumentalities and local governments, and may receive appropriations to carry out its duties, but without making an appropriation, the department or local government’s budgets may be impacted. It is indeterminate at this time the extent of the impact.”

OSE has similar budget concerns, "...It would also require the OSE, as a state agency, to provide technical assistance, analysis, and other services to the department and local governments as required. This could include assistance from OSE staff in areas of water rights permitting, dam safety, and hydrology. Because the number of public-private partnership that may result and the type and extent of technical assistance that may be requested is unknown the OSE cannot quantify the additional fiscal impact at this time."

## **SIGNIFICANT ISSUES**

This bill is very similar to the Public-Private Partnership Act (PPPA) proposed by HB 299 in 2015 and HB 405 and SB 273 in 2013. However, these earlier bills were more explicit in coverage of the proposal.

GSD has articulated the reasons that P3s have been successful in other states and the argument in favor of this financing device for New Mexico.

The aging infrastructure and facilities in the State of New Mexico is reaching critical proportions. Capital outlay funds appropriated each year are not enough to keep up with the growing demand for repairs and replacement of essential infrastructure, buildings and building systems. The Public-Private Partnership Act will allow the State and other governmental entities to enter into partnerships in order to build or renovate major facilities and the much needed infrastructure. At a time when funds are in short supply this method provides another approach to modernizing State and local government facilities in order to make the State better for all of its citizens and to attract more businesses to the area.

There are many advantages to the use of Public-Private Partnerships. The design, build, maintenance project can offer the benefit of a faster delivery of the end product and therefore potential cost savings. The maintenance aspect of the project can ensure that continuous and proper maintenance will be performed throughout the life of the project resulting in less overall costs. The fact that both the public and private sectors are involved in the project means that risks are spread between the two entities.

Public-Private Partnerships are new to the State of New Mexico and very complex in nature. Although these types of projects have been successfully executed in other states and with the federal government, every effort must be made to ensure that the State receives the best value for its citizens.

DFA may have administrative authority over some projects and is concerned with the exception to the Procurement Code:

The bill creates a new Procurement Code exemption that may exclude potentially large amounts of tax dollars from general procurement standards. It is unclear why these types of agreements warrant this exemption, other than the fact that the bill will allow private companies to send unsolicited proposals to public bodies (which also seems unwarranted). The Procurement Code provides important safeguards against complacency and corruption. By exempting these agreements from the Procurement Code, the bill could open a door for deals that allow public funds to be used without ensuring the most competitive outcome. Without first undergoing a competitive

procurement, it may be difficult to determine whether these agreements violate the anti-donation clause of the State Constitution (Article IX, Section 14), which prohibits public bodies from donating anything of value to private parties. In the case of these agreements, it is unclear whether it will be possible to obtain an appraisal or market rental analysis as evidence that the services to be provided by the private partner are equal to or greater than the benefit the private partner receives from the public body.

Because the bill exempts the agreements from the Procurement Code, it will be difficult to develop the guidelines, processes and decide which agreements warrant approval. Additionally, due to the nature of the agreements, it would be very difficult for the State Board of Finance to approve the asset dispositions as they may be in violation of its current rules.

Related to the ability of public bodies to issue revenue bonds under the new Act, the State Board of Finance approves bond issuances for state agencies and higher education institutions. The bill would allow public bodies to issue revenue bonds with partnership revenues pledged for repayment, but the bill does not explicitly require any oversight body (such as the State Board of Finance) to review and approve such bond issuances. Bond issuance and debt management is a critical financial role that many state agencies are not well prepared to implement. It is unclear whether any such revenue bonds would be marketable. The ability to issue bonds at a palatable rate of interest depends on the credit quality of the revenue stream pledged for repayment, which cannot be anticipated at this time.

The Tax Increment Development Act (NMSA 5-15-2, otherwise known as the TIDD Act) provides a similar funding mechanism as is proposed under this legislation. Upon approval by the SBOF, the Tax Increment of Development Act provides state and local gross receipts tax financing and local property tax financing through revenue bonds for public infrastructure projects for the purpose of supporting private economic development and job creation. These bonds are limited to a term of 25 years and require Legislative approval. The bill contemplates project terms in excess of 35 years without legislative approval. It seems inconsistent that State debt incurred under this legislation, which allows for a greater period of indebtedness, would have a less stringent approval process than under the TIDD Act.

## **PERFORMANCE IMPLICATIONS**

The powers and duties assigned to GSD and Board of Finance may implicate the performance measures of these agencies.

## **OTHER SUBSTANTIVE ISSUES**

In its review of 2015 HB 299, SPO reports that while 33 states have some form of PPP authorizing legislation in place, most are focused on transportation. However, in 2013, Maryland passed some of the most thorough PPP legislation which could serve as a model for states interested in starting a PPP program.

SPO also cited the Brookings-Rockefeller Project on State and Metropolitan Innovation:

Despite the considerable attention to them, the evidence on PPPs is frustratingly sparse. This is partly because infrastructure PPPs are long term arrangements and most have only been implemented in the last few decades. Therefore, there are few projects that have completed their life-cycle, allowing for ex-post analysis. Further, it is difficult to construct the hypothetical alternative to a PPP, which is the outcome in the absence of the PPP... Based on an analysis of 21 PPP projects and 33 traditional projects undertaken since 2000 in Australia, the PPP projects had a 1.1 percent net cost overrun, in comparison with 15 percent in the case of traditional procurement.

[http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20strate%20pue/ntes/1208\\_transportation\\_istrate\\_puentes.pdf](http://www.brookings.edu/~media/research/files/papers/2011/12/08%20transportation%20strate%20pue/ntes/1208_transportation_istrate_puentes.pdf)

The OSE/ISC enters into agreements with private entities on collaborative projects. The Public-Private Partnership Act would impose additional requirements in entering into these agreements, in addition to requirements to provide technical assistance, analysis and other services to the general services department and local governments as requested for their projects.

On a related bill, EDD provided the following discussion:

Use of a Public-Private Partnership (P3) has become popular for economic development or redevelopment purposes. These partnerships include the use of public resources or financing capabilities to promote local economic development. Generally, public resources are required to make the project feasible. In these P3 agreements, the public entity will provide some combination of tax incentives, public land or other assets, infrastructure investments or financing assistance. Typically, the private entity will contribute capital investments, commit to provide jobs, contribute development expertise and assume most of the financial risk for the ultimate project outcomes. These “partnerships” can either have short life spans covering only the construction period for the project, or longer life spans covering debt repayment or long-term operating agreements.

New Mexico continues to have limited broadband infrastructure. P3’s have worked successfully in Kentucky (see link: <http://rcnky.com/articles/2014/12/23/kentucky-embark-statewide-broadband-initiative> and for downtown revitalization such as in the case in Cincinnati.

OAG had the following comments relative to 2015’s HB-299:

The Procurement Code, NMSA 1978, Sections 13-1-28 to -199, applies to “every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” NMSA 1978, § 13-1-30. There is no mention of the Procurement Code in HB 299. Although this does not necessarily indicate a conflict, there are several areas in HB 299 that may conflict with existing law. For example, HB 299 discusses requests for proposals, as well as solicited or unsolicited proposals. This may violate the processes laid out in the Procurement Code for bidding (including sealed bids, invitation for bids, and certain contracts). *See* NMSA 1978, §§ 13-1-102 to -122.

HB 299 discusses some of the requirements for the agreements, specifically user fees. Though this does not appear to violate statutes as is; however, it is possible the user fees included in an agreement could violate statutes relating to permissible user fees (including taxing implications).

HB 299 requires these partnership agreements to contain a provision prohibiting the private party from seeking injunctive or equitable relief under certain circumstances. Forcing this provision in every partnership agreement could result in a violation of a private party's rights under state or federal law, particularly in situations where it may be unclear whether the situation falls under the circumstances listed by the Public-Private Partnerships Act.

HB 299 deals with “public projects” and “agreements” and overlaps and may conflict with statutes involving “public works contracts” under NMSA 1978, Sections 13-4-1 to -9.

Many of these issues remain in HB 275.

On a related bill the OAG had the following comments pertinent to HB-275.

This is essentially a version of the Public Private Partnership legislation that has been enacted in some form in 33 states. It allows for more creative approaches to getting infrastructure needs met through working with private vendors for construction in ways that the various procurement codes do not.

The resident preferences in the procurement code at NMSA 1978 Sections 13-1-21 and 13-1-22 are incorporated into the proposed Act.

There are several vague terms that could be clarified, such as referring to certain fees as “reasonable.” This would leave the term open to subjective interpretation. It may be helpful to further clarify these references or place an individual or entity (e.g the department or public partner) with authority to determine what constitutes “reasonable” under the specific circumstances.

The bill would exempt an executive summary and other documents submitted with a request for proposals under the act from inspection under the Inspection of Public Records Act. ... The proposal, except the executive summary, would then be subject to inspection after the award is issued and any challenge to the award is resolved.

There is a white paper created by the National Association of State Procurement Officials, the National Association of State Facilities Administrators and the National Association of State Chief Administrators. There are advantages and disadvantages of going around existing procurement codes to enact special procurement processes for public private partnerships with for profit private companies and individuals. For profit companies are generally in favor of any opportunity to streamline the contract procurement process.

EDD notes the following: “...Depending on the project and the proposed terms of the agreement, the amount of risk facing the public and private entity can vary considerably. For some projects,

the public entity may be serving only as an issuer of conduit debt, enabling the private borrower to gain access to tax-exempt financing but with no promise to commit any other public funding. In other instances the public entity may be required to guarantee the private party's debt or otherwise place public funds directly at risk.”

The bill provides that as security for the payment of financing, revenues from the public project may be pledged, but no pledge of revenues or property constitutes a general obligation of the state or any local government, unless explicitly agreed to by the state or local government. The bill provides that revenue bonds issued as a result of the PPPA are not general obligations of the state or any local government and are not secured by assets of the state or any local government other than the money and revenues pledged to the repayment of the revenue bonds.

### **TECHNICAL ISSUES**

The OSE/ISC is concerned with paragraph C of Section 10 provides that, ‘The public partner assents to any federal requirements, conditions or terms of any federal funding accepted by the public partner pursuant to this subsection.’ This language would require public agencies to assent to requirements, conditions or terms that might be contrary to or inconsistent with state law.

### **ALTERNATIVES**

OAG suggests that a viable alternative to this bill would be to enact a subsection of the Procurement Code instead of a whole new section of law.

LG/sb/al/jle

## House Bill 275 – Page A1

Section-by-Section Appendix (Prepared by OSE)

Section 1 identifies the short title of the act as the “Public-Private Partnerships Act.”

Section 2 provides definitions used in the act.

Section 3 identifies the variety of project delivery methods that may be used in developing a public project, and requires the methods to be documented in the written agreement.

Section 4 specifies the methods that may be used to procure public projects with a private partner.

Section 5 provides restrictions on procurements including the use of residence preference and compliance with minimum wage and other provisions related to public works employment; requires operating agreements that define the roles and responsibilities of the partners; and requires the public partner or General Services Department to not approve a public project that includes building maintenance if it results in the displacement of an existing government employee unless the employee is offered alternate equivalent employment.

Section 6 defines GSD duties to include developing guidelines in consultation with the OSE and others to develop a minimum set of guidelines to implement the provisions of the Act; approving public-private partnership agreements greater than \$50 million or 35 years; establishing evaluation process for considering whether projects should use public-private agreements or traditional procurement and funding methods; managing public input; encouraging competition among private entities; producing annual reports to the legislature; providing technical assistance to local governments and regional entities; retaining experts; receiving appropriations; and requiring cooperation from other public entities.

Section 6 allows imposes a requirement on state agencies, institutions, instrumentalities and local governments to provide technical assistance, analysis and other services to GSD or a local government.

Section 7 requires GSD, before approving a project, to assist a public partner with negotiations, prepare documents, and advise on laws, disclosures, accounting, investment and tax issues.

Section 8 defines evaluation criteria, including consideration for how the public is served; the estimated operating costs; risk of proposed financing; financial capacity of the proposer; compatibility of the public project with other infrastructure plans; public comments; safety record of the proposer; and use of green building methods and NM residents to support the project.

Section 9 requires an agreement to include provisions, as applicable, to authorize and address user fees; rate of return on a private partner’s investment; sharing of costs, risks, and revenue; acquisition of property; accounting standards; long-term maintenance; bonds, guarantees, or other forms of security; clawback provisions; remedies for disputes; reasonable compensation to a private partner from an unplanned facility that affects revenue; and State Board of Finance approval of the transfer or sale of assets or investment in a public-private partnership project.

Section 10 authorizes the use of any lawful source of public and private funding, including federal funding; allows revenues to be pledged as security; and provides that revenue bonds issued are not secured by assets of the state other than the money and revenues pledged to the repayment of revenue bonds.

Paragraph C of Section 10 provides that, ‘The public partner assents to any federal requirements, conditions or terms of any federal funding accepted by the public partner pursuant to this subsection.’ This language may subject the public partner, which will be a state or local government agency or body, to requirements, terms or conditions that may be contrary or against state law, such as the public body indemnifying the federal government.”

Section 11 allows the public partner to continue or cease user fees at the end of the agreement.

Section 12 reverts the public project to the public partner if the partnership is terminated.

Section 13 provides remedies for default by a private partner not caused by a “force majeure.”

Section 14 provides for equal police powers within the public project’s parameters.

Section 15 mandates cooperation by partners and any utility if utility facilities are to be relocated or crossed.

Section 16 identifies the effective date as July 1, 2017.

## SB 143 – Section by Section

New Mexico Infrastructure Investment Act Sections 1 and 2 cite the act and definitions including “material default” to mean a failure of a private partner to perform, “user fee” to mean a charge imposed by a partner for use of a public project, “utility” which excludes electric utilities and facilities subject to regulation by PRC and specifies allowed project and project types that can be financed using this method.

Section 3 defines a variety of project delivery methods including other methods and agreements that the public partner determines is most advantageous to the public interest.

Section 4 defines a variety of project procurement methods including other methods that the public partner believes will further implementation of the NMIAA, including unsolicited proposals; addresses how proposals are evaluated; the charging of administrative fees by the public partner to evaluate an unsolicited proposal; public partner consultation with experts; contractor insurance; public hearings held; and the handling of trade secrets and proprietary information.

Section 5 provides restrictions on procurements including use of resident preference and compliance with minimum wage and other provisions related to public works employment; requires agreements to define roles and responsibilities; and allows agreements to require that a public project be operated and maintained to the private partner’s standards and specifications.

Section 6 defines GSD duties to include developing guidelines; approving NMIAA agreements greater than \$50 million or 35 years; considering whether projects should use PPP’s or traditional procurement and funding methods; managing public input; encouraging competition among private entities; producing annual reports to the legislature; providing technical assistance; retaining experts; receiving appropriations; and requiring cooperation from other public entities.

Section 7 requires GSD, before approving a project, assist a public partner with negotiations, preparing documents, and advise on laws, disclosures, accounting, investment and tax issues.

Section 8 defines evaluation criteria, including consideration for how the public is served; the estimated operating costs; risk of proposed financing; financial capacity of the proposer; compatibility of the public project with other infrastructure plans; public comment; safety record of the proposer; and use of green building methods and NM residents to support the project.

Section 9 allows agreement provisions to address user fees; return on a private partner’s investment; sharing of costs, risks, and revenue; accounting standards; long-term maintenance; bonds, guarantees, or other forms of security; clawback provisions; remedies for disputes; reasonable compensation to a private partner from an unplanned facility that affects revenue; and State Board of Finance approval of the transfer or sale of assets or investment in a PPP project. This section also requires that a project meet a condition and maintenance level measurement of 85 percent when the public project reverts to the public partner.

Section 10 authorizes the use of any lawful source of public and private funding; as security, allows revenues to be pledged; and provides that revenue bonds issued are not secured by assets of the state other than the money and revenues pledged to the repayment of revenue bonds.

Section 11 allows the public partner to continue or cease user fees at the end of the agreement.

Section 12 reverts the public project to the public partner if the partnership is terminated.

Section 13 provides remedies for default by a private partner not caused by a “force majeure.”

Section 14 provides for equal police powers within the public project's parameters.

Section 15 mandates cooperation by partners if utility facilities are to be relocated or crossed.

Section 16 provides a penalty for a person who fails to pay a user fee; making it a petty misdemeanor and subject to sentencing as defined by Section 31-19-1.