

LFC Requester:	
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**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original X **Amendment** _____
Correction _____ **Substitute** _____

Date Prepared: 1/24/24
Bill No: HB 190

Sponsor: The Honorable Joy Garratt
and Patricia A. Lundstrom

Agency Name and Code Number: 305 – New Mexico
Department of Justice

Short Title: Private Public Partnership
Agreements

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands) n/a

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands) n/a

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands) n/a

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
 Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

House Bill (“HB”) 190 would amend the New Mexico Procurement Code (the “Procurement Code”) to add an option for state and local public bodies to enter into a hybrid “public-private partnership” that would grant a private entity a “concession” to operate and profit from a public project with the approval of the Board of Finance Division.

FISCAL IMPLICATIONS

None noted.

SIGNIFICANT ISSUES

1. Article IX, Section 14 of the New Mexico Constitution (the “anti-donation clause”) generally requires public entities to receive a fair exchange for any transfer of a thing of value to a private entity. *See, e.g., State ex rel. State Eng’r v. Lewis*, 2007-NMCA-008 ¶51 (finding no issue of fact as to whether the state received “market value” at the time of the transaction). Presumably, the value received by the public body for the granting of a concession would be the services provided by the private partner that would otherwise require expenditures by the public body. The fair market value of this concession is presumably ensured through the RFP procedures in Section 2 of the bill.
2. Pursuant to Section 6-1-1, NMSA 1978, the Board of Finance Division (“the Division”) of the Department of Finance and Administration (“DFA”) generally provides administrative support to the Board of Finance (“the Board”). The Secretary of DFA appoints a director (“the Director”) to the Division that will recommendation Board actions. The Board “has general supervision of the fiscal affairs of the state,” and is authorized to conduct whatever investigations “it deems necessary to perform the duties imposed upon it,” and further enjoys broad rulemaking authority. Section 6-1-1(E), (F). The Board further has approval authority over any state sale, trade or lease of real property for a consideration greater than \$25,000. Section 13-6-2.1 NMSA 1978. In light of the Board’s plenary authority over fiscal matters pursuant to Section 6-1-1, conflict may arise between the Director and the Board if this bill provides exclusive approval authority to the Director. Furthermore, to the extent concessions involve a real property lease or other transaction greater than \$25,000,

the concession would require Board approval regardless and result in a duplicative effort by both the Board and the Director. Finally, the Board, not the Division, currently enjoys rulemaking authority. To grant rulemaking authority to the Division rather than to the Board would presumably empower the Director to unilaterally promulgate rules without public transparency on the deliberations for such rules.

3. All public bodies are subject to the New Mexico Inspection of Public Records Act at 14-2-1 et seq. (“IPRA”). IPRA additionally directly obligates those private entities that “act on behalf of a public entity” or provide services “that constitute a public function. *See, New Mexico Found. for Open Gov’t v. Corizon Health*, 2020-NMCA-014, ¶¶ 6, 26, 460 P.3d 43, 52. To the extent that the “Private partners” as defined in this bill are performing a public function, those entities are likely subject to IPRA.
4. This bill broadly defines a “public project” and otherwise presents no limitation on what public functions would be subject to privatization through a concession. To the extent the granting of a concession warrants reducing the number of that public body’s employees, such reductions in force would presumably be subject to State Personnel Board rules at 1.7.10.9 NMAC.
5. Many municipalities and counties voluntarily adopt the Procurement Code to govern their purchasing practices. It is unclear whether this bill intends to provide local public bodies (i.e., municipalities and counties) with the same authority to enter into “public-private partnerships” that state agencies would enjoy.

PERFORMANCE IMPLICATIONS

This bill would eliminate current metrics for assessing performance on a public project by a public body after the granting of a concession; performance measures by a private partner may or may not serve as an adequate substitute for such metrics.

ADMINISTRATIVE IMPLICATIONS

If this bill passes, it would reduce the administrative expenses for State or local governments to the extent concessions are granted to private partners for public projects.

If this bill passes, it will likely increase the administrative burden on the Division as the reviewing and approving authority for such projects.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted.

TECHNICAL ISSUES

1. To the extent a public body intends to proceed with an unsolicited partnership proposal pursuant to Section 3 of the bill, the proposal procedures should, as with Section 2, explicitly comply with the Procurement Code.
2. An exhaustive review for conflicts with the Procurement Code is not available within the timeframe for this bill analysis. On a related note, the bill does not state whether

the legislature would intend its provisions to constitute a specific exception to the general provisions of the Procurement Code to the extent any conflicts arise.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

None noted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS