

LFC Requester:

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**NMDOT BILL ANALYSIS
2024 REGULAR SESSION**

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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:

Date Prepared: February 1, 2024

Original Bill No.
Correction Substitute X

Bill No. HB 190/HTPWC Sub

Sponsor: Joy Garratt and
Patricia A. Lundstrom

Agency/ Code: NMDOT - 805 - OGC

Person Writing Analysis: Christina Baca, Rhonda Lopez and
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Short Title Public Private Partnership
Agreements

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SECTION II: FISCAL IMPACT

Not applicable.

SECTION III: NARRATIVE

BILL SUMMARY

The House Transportation, Public Works and Capital Improvements Committee substitute for House Bill 190 (HB 190/HTPWC Sub) changes the definition of “public project”, adds additional considerations to the Board of Finance Division (BFD) of the Department of Finance and Administration promulgation of rules for public-private partnership agreements, and amends NMSA 1978, Section 13-1-150 to allow public-private partnership agreement multi-term contracts that are for over \$25,000 to have a term of twenty-five years, including all extensions and renewals.

HB 190/HTPWC Sub provides for the use of public-private partnership agreements as a means of procuring and funding the development of public projects under the Procurement Code. HB 190/HTWPC Sub allows public partners (state agencies and local public bodies) the ability to request competitive sealed proposals or competitive qualifications-based sealed proposals for public-private partnership agreements. Private partners are also allowed to submit unsolicited proposals to a public partner or to the BFD which commences a competitive procurement process after a stated period of notice based on the unsolicited proposal’s value.

HB 190/HTPWC Sub tasks the BFD to promulgate rules for public-private partnership agreements use, contents of a public-private partnership agreement, minimum requirements, and standards to limit liability. The BFD is also tasked with receiving, reviewing, and approving public-private

partnership agreements prior to performance of the agreement.

In addition, HB 190/HTPWC Sub sets forward that public-private partnership agreements may be set under any project delivery method or agreement or combination of methods or agreements with the public partner providing continuous oversight of the public project, as determined necessary by the BFD. HB 190/HTPWC Sub also states performance under a public project pursuant to a public-private partnership agreement is a public work for purposes of the Public Works Minimum Wage Act, the Subcontractors Fair Practices Act, and the Public Works Apprentice and Training Act.

HB 190/HTPWC Sub does not contain an effective date and, as a result, would go into effect 90 days after the Legislature adjourns, or May 15, 2024, if enacted.

FISCAL IMPLICATIONS

HB 190/HTPWC Sub would implement a procedural change allowing public entities to consider public-private partnership agreements as part of the project delivery method for projects that fit any established criteria set by rule from the BFD. HB 190/HTPWC Sub would also allow for private entities to submit unsolicited proposals to the NMDOT or BFD for consideration. At this time, any estimate of the fiscal impact to the NMDOT based on use of public-private partnership agreements would be speculative. Similarly, at this time NMDOT cannot estimate any fiscal impact of receiving unsolicited proposals, and the cost and time to review and coordinate with BFD in proceeding through the unsolicited proposal process.

SIGNIFICANT ISSUES

HB 190/HTPWC Sub adds under Section 4, pg. 7, lines 24-24, and pg. 8, line 1, “the private partner shall employ public employees when possible for the private partner’s performance of the agreement ...”. As written, this may be contrary to NMSA 1978, Section 10-16-4.3, Prohibited employment, of the Governmental Conduct Act, which states, “[i]t is unlawful for a state agency employee ... who is participating directly or indirectly in the contracting process to become or to be, while such an employee, the employee of any person or business contracting with the governmental body by whom the employee is employed.” While this appears to be the most express prohibition on the added language, it does appear to be violative of other provisions of the Governmental Conduct Act dealing with employees of a state agency and their interaction with private entities.

PERFORMANCE IMPLICATIONS

Public partners may be able to shift a portion of the risks of design, construction, and financing of a potential qualifying public projects to the private partners in exchange for the public partner’s long-term obligations and concessions under the public-private partnership agreement.

ADMINISTRATIVE IMPLICATIONS

HB 190/HTPWC Sub allows private partners to submit unsolicited proposals to NMDOT and BFD. At this time, NMDOT cannot estimate the administrative impact of this activity.

NMDOT notes that public partners will have continuing project oversight obligations concerning the administration of the public-private partnership agreement, as well as possible ongoing

operations and maintenance obligations for the public project once construction is complete, which may require use of dedicated FTE for the life of each public project.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None at this time.

TECHNICAL ISSUES

HB 190//HTPWC Sub could be revised to clarify that public-private partnership agreements are intended for use on public projects, the use of which generate user fees or other recurring operational revenue. This change may help to address a concern that all opportunities to use private funding for any public project development or construction would be used pursuant to the public-private partnership agreement process. See suggested Amendment below.

OTHER SUBSTANTIVE ISSUES

None at this time.

ALTERNATIVES

None at this time.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

NMDOT will continue to plan its multi-modal transportation project based on applicable federal and state funding sources and the use of traditional project delivery methods.

AMENDMENTS

NMDOT suggests the following amendments to HB 190/HTPWC Sub.

No. 1 pg. 3, lines 2-5;

I. “public-private partnership agreement” means a contract between one or more public partners and one or more private partners in connection with the development of a public project that generates revenue.

No. 2 pg. 3, lines 6-13;

J. “public project” means:

(1) the construction of a public transportation facility or the construction of public transportation infrastructure other than a toll road;

(2) public construction of broadband telecommunications network facilities; or

(3) public construction of electric vehicle charging facilities;

when the public partner makes a determination that a public-private partnership would best address the needs and requirements of the public project;