

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SENATE BILL

51ST LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2014

INTRODUCED BY

DISCUSSION DRAFT

AN ACT

RELATING TO PUBLIC PROJECTS; ENACTING THE PUBLIC-PRIVATE PARTNERSHIPS ACT; ALLOWING THE STATE AND CERTAIN LOCAL GOVERNMENTS TO ENTER INTO PARTNERSHIPS WITH PRIVATE SECTOR PARTNERS TO FACILITATE PUBLIC PROJECTS.

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. "authority" means the New Mexico finance authority;

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

.194788.2

underscoring material = new
[bracketed material] = delete

underscoring material = new
~~[bracketed material] = delete~~

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

4 D. "maintain" or "maintenance" includes repair,
5 rehabilitation, capital maintenance, improvement, retrofitting
6 and refurbishment of a public project but does not include
7 custodial or janitorial services for a building;

8 E. "manage" or "management" means action to
9 maintain operations of a public project;

10 F. "material default" means a failure of a private
11 partner to perform any duties under a public-private
12 partnership, which failure jeopardizes delivery of service to
13 the public in connection with the public-private partnership
14 and remains unsatisfied after thirty days and after the private
15 partner has received written notice from the public partner of
16 the failure;

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

24 H. "public partner" means the state government, a
25 local government or an instrumentality of the state or local

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

1 government;

2 I. "public-private partnership" means the agreement
3 between one or more public partners and one or more private
4 partners for the development, financing, construction,
5 management or improvement of a public project, including a
6 lease, ground lease, franchise, easement, permit or other
7 agreement;

8 J. "public project" means:

9 (1) a building or other facility that meets a
10 public purpose and is developed for a public entity, except
11 that "public project" does not mean affordable housing pursuant
12 to the Affordable Housing Act;

13 (2) a building or other facility for a public
14 school or a public post-secondary educational institution,
15 including:

16 (a) a school building;

17 (b) a functionally related and
18 subordinate facility;

19 (c) a stadium or other facility
20 primarily used for school events;

21 (d) the acquisition of land for a
22 building or facility; and

23 (e) any depreciable property provided
24 for use in a school facility that is operated as part of the
25 public school system or a public post-secondary educational

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

- 1 institution;
- 2 (3) cultural or recreational facilities,
- 3 including theaters, museums, convention centers, community
- 4 centers, stadiums, athletic facilities, golf courses or similar
- 5 facilities;
- 6 (4) parking lots or garages;
- 7 (5) airports, subways or similar facilities;
- 8 (6) improvements, together with equipment,
- 9 necessary to enhance the energy efficiency and the public
- 10 safety and security of buildings to be principally used by a
- 11 public entity;
- 12 (7) utility and telecommunications and other
- 13 communications infrastructure;
- 14 (8) dams and reservoirs;
- 15 (9) a sewerage or water treatment facility,
- 16 power generating plant, pump station, natural gas compressing
- 17 station or similar facility;
- 18 (10) a sewerage, water, gas or other pipeline;
- 19 (11) a transmission line;
- 20 (12) a radio, television, cell or other tower;
- 21 (13) improvements necessary or desirable to
- 22 any unimproved state-owned or locally owned real estate; or
- 23 (14) recycling facilities or solid waste
- 24 management facilities that produce electric energy derived from
- 25 solid waste; and

.194788.2

underscored material = new
[bracketed material] = delete

1 K. "utility" means a privately, publicly or
2 cooperatively owned line, facility or system for producing,
3 transmitting or distributing communications, cable television,
4 power, electricity, light, heat, gas, oil and crude oil
5 products, water, steam, waste, storm water not connected with
6 highway drainage or any other similar commodity, including a
7 fire or police signal system or street lighting system, that
8 directly or indirectly serves the public.

9 **SECTION 3. [NEW MATERIAL] RULES--PUBLIC-PRIVATE**
10 **PARTNERSHIPS.--**The authority shall adopt rules to carry out the
11 provisions of the Public-Private Partnerships Act, which rules
12 shall comply with the Procurement Code, Sections 13-1-146
13 through 13-1-148 and 13-4-18 through 13-4-20 NMSA 1978, and
14 with the Open Meetings Act.

15 **SECTION 4. [NEW MATERIAL] SOLICITATION OF PROPOSALS.--**In
16 anticipation of development of a public project, a public
17 partner shall issue a request for qualifications or similar
18 solicitation document that shall generally set forth the
19 factors that will be evaluated and the manner in which
20 responses will be evaluated. Unsolicited proposals shall not
21 be reviewed or otherwise considered by a public partner.

22 **SECTION 5. [NEW MATERIAL] PROJECT DELIVERY METHODS--**
23 **PROPOSALS.--**A public partner may provide for the development of
24 a public project using a variety of project delivery methods
25 and forms of agreements. A public-private partnership shall

.194788.2

underscored material = new
[bracketed material] = delete

1 not be used to create a tax increment development district.
2 The project delivery methods and forms of agreements may
3 include:

- 4 A. predevelopment agreements leading to other
5 implementing agreements;
- 6 B. design-build agreements;
- 7 C. design-build-finance agreements;
- 8 D. design-build-maintain agreements;
- 9 E. design-build-finance-manage agreements;
- 10 F. design-build-manage-maintain agreements;
- 11 G. design-build-finance-manage-maintain agreements;
- 12 H. construction manager at risk;
- 13 I. concession agreements that provide for the
14 private partner to design or build a public project; or
- 15 J. other project delivery methods or agreements or
16 a combination of methods or agreements that the public partner
17 determines will serve the public interest.

18 SECTION 6. [NEW MATERIAL] PROJECT DEVELOPMENT--
19 PROCUREMENT.--

20 A. A public partner may procure a public project
21 using any of the following:

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

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

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

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

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

9 (5) other procedures that the public partner
10 determines may further the implementation of the Public-Private
11 Partnerships Act.

12 B. If contractor insurance is required for services
13 procured pursuant to this section, the insurance shall be
14 placed with an insurer authorized to transact insurance in New
15 Mexico or with a surplus lines insurer approved by the office
16 of superintendent of insurance.

17 C. Before the public partner begins the process for
18 procuring a public project, the public partner shall hold at
19 least one public hearing with at least thirty days' notice and
20 shall hold at least one additional public hearing with at least
21 thirty days' notice before an agreement is signed.

22 D. Each request for proposals issued pursuant to
23 the Public-Private Partnerships Act shall require the proposer
24 to include with its proposal an executive summary covering the
25 major elements of its proposal that do not address the

.194788.2

underscoring material = new
~~[bracketed material]~~ = delete

1 proposer's price, financing plan or other confidential or
2 proprietary information or trade secrets that the proposer
3 intends to be exempt from disclosure. The executive summary
4 shall be subject to release and disclosure to the public at any
5 time. Notwithstanding other provisions of law, in order to
6 maximize competition pursuant to the Public-Private
7 Partnerships Act, no part of a proposal other than the
8 executive summary shall be subject to release or disclosure by
9 the public partner before an award of the public-private
10 partnership contract and the conclusion of any protest or other
11 challenge to the award, absent an administrative or judicial
12 order requiring release or disclosure. After the award of the
13 contract and the conclusion of any protest or other challenge
14 to the award, the Inspection of Public Records Act applies to
15 any release of any part of the proposal.

16 E. A proposer shall identify those portions of a
17 proposal or other submission that the proposer considers to be
18 a trade secret or confidential commercial, financial or
19 proprietary information. For trade secrets and confidential
20 and proprietary information to be exempt from disclosure, the
21 proposer shall do all of the following:

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

24 (2) identify with conspicuous labeling the
25 data or other materials for which protection is sought;

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

1 (3) state the reasons why protection is
2 necessary; and

3 (4) fully comply with any applicable state law
4 with respect to information that the proposer contends should
5 be exempt from disclosure.

6 SECTION 7. [NEW MATERIAL] PROCUREMENTS--RESTRICTIONS.--

7 A. Procurements pursuant to the Public-Private
8 Partnerships Act are subject to the provisions of the
9 Procurement Code. The resident preferences provided in
10 Sections 13-1-21 and 13-1-22 NMSA 1978 apply to procurements
11 pursuant to the Public-Private Partnerships Act. The
12 construction of a public project is a public works for the
13 purpose of the Public Works Minimum Wage Act, the
14 Subcontractors Fair Practice Act, other provisions of Chapter
15 13, Article 4 NMSA 1978 and the Public Works Apprentice and
16 Training Act.

17 B. Every public-private partnership shall include
18 an operation agreement that defines the roles and
19 responsibilities of the public and private partners.

20 C. Should management of a public project include
21 building maintenance, as to the maintenance activities, the
22 authority shall not approve a public project that displaces or
23 replaces government or public employees.

24 SECTION 8. [NEW MATERIAL] EVALUATION CRITERIA.--Before a
25 public partner may enter a proposed public-private partnership,

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

1 the public partner and the authority shall consider:

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

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

10 C. the general reputation, qualifications, industry
11 experience, safety record and financial capacity of the
12 proposer;

13 D. the performance benchmarks contained in the
14 proposal;

15 E. the estimated management costs of the public
16 project;

17 F. the financial commitment of the private partner;

18 G. the risk of proposed financing;

19 H. the innovation of proposed financing;

20 I. full-cost assessment and comparison of
21 development, including conventional bonding, other public
22 financing mechanisms and triple bottom line accounting
23 principles;

24 J. the compatibility of the public project with
25 local and regional land and water plans;

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

1 K. the feasibility and proposed design and
2 construction management of the public project;

3 L. the degree of innovation; efficiency; and
4 technical, scientific, technological and socioeconomic merit of
5 the proposal;

6 M. comments from potential users, local residents,
7 affected jurisdictions and other interested persons;

8 N. benefits to the public, including improvements
9 in economic growth, public safety, environmental protections
10 and quality of life;

11 O. efforts to be made by the partnership to retain
12 and train New Mexico residents in occupations and professions
13 related to planning, design, construction, project management,
14 general management, administration and legal, accounting and
15 other areas of the public project over the life of the
16 public-private partnership agreement;

17 P. the commitment to use green building standards,
18 New Mexico building materials and manufactured goods and local
19 services;

20 Q. green building design and construction
21 certification by a nationally recognized organization;

22 R. innovations in energy efficiency or generation;
23 and

24 S. other criteria that the public partner and
25 authority deem appropriate to obtain the best value for the

.194788.2

underscored material = new
[bracketed material] = delete

1 state or local government.

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

4 A. The public partner shall require a public-
5 private partnership agreement to include provisions as
6 applicable that:

7 (1) authorize the public partner to establish
8 and collect rents, advertising and sponsorship charges, service
9 charges or other charges allowed in the agreement, including
10 provisions that:

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

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

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

19 (3) allow the public partner to accept
20 payments and share revenue with the private partner;

21 (4) address how the public and private
22 partners will share management of the risks of the public
23 project;

24 (5) specify how the public and private
25 partners will share the costs of development of the public

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

1 project;

2 (6) allocate financial responsibility for cost
3 overruns to the public partner or private partner, or both,
4 that were responsible for the cost overruns;

5 (7) establish the damages to be assessed for
6 nonperformance;

7 (8) establish performance criteria;

8 (9) address the acquisition of property
9 interests that may be required, including provisions that allow
10 the public or private partner to acquire real property,
11 including acquisition by exchange of other real property that
12 is owned by the state, a local government or the federal
13 government; provided that the public partner may not exercise
14 its power of eminent domain to benefit the private partner;

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

17 (11) address responsibility for reconstruction
18 or renovations that are required so that the public project
19 meets all applicable government standards before the public
20 project reverts to the public partner;

21 (12) provide for responsibilities for law
22 enforcement on public projects;

23 (13) identify public partner specifications
24 that must be satisfied, including provisions allowing the
25 private partner to request and receive authorization to deviate

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

1 from the specifications on a showing satisfactory to the public
2 partner and the authority that the deviation is necessary;

3 (14) require a private partner to provide
4 performance and payment bonds as required by Section 13-4-18
5 NMSA 1978 for those components of a public project that involve
6 construction;

7 (15) require parent company guarantees,
8 letters of credit or other acceptable forms of security or a
9 combination of any of these, the penal sum or amount of which
10 may be less than one hundred percent of the value of the
11 contract involved based on the public partner's and the
12 authority's determinations of what is required to adequately
13 protect the public partner, made on a project-by-project basis,
14 for components that do not involve construction;

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

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

19 B. The public-private partnership agreement shall
20 include a clear statement that the public partner will own any
21 real property pertaining to the public project when the project
22 reverts to the public partner.

23 C. The term of agreements entered into pursuant to
24 the Public-Private Partnerships Act may be for a term not to
25 exceed twenty-five years. A public-private partnership may be

.194788.2

underscored material = new
[bracketed material] = delete

1 extended for additional terms; provided that an extension shall
2 be subject to the same review, negotiation and approval process
3 as the original agreement.

4 D. The public-private partnership agreement shall
5 contain a provision by which the private partner expressly
6 agrees that it is prohibited from seeking injunctive or other
7 equitable relief to delay, prevent or otherwise hinder the
8 public partner or any other jurisdiction from developing,
9 constructing or maintaining any public project that was planned
10 or unplanned at the time the public-private partnership was
11 executed and that would or might affect the revenue that the
12 private partner would or might derive from the public project
13 developed under an agreement pursuant to the Public-Private
14 Partnerships Act.

15 E. The public-private partnership agreement shall
16 require that the state board of finance approve the assignment,
17 transfer or sale of assets or investment in a public project.
18 Sale or lease for longer than twenty-five years of state
19 property requires legislative approval.

20 SECTION 10. [NEW MATERIAL] REVIEW AND APPROVAL OF
21 AGREEMENTS--AMENDMENTS.--

22 A. Public partners seeking to enter or renew
23 public-private partnerships shall submit proposed public-
24 private partnerships to and obtain approval of proposed
25 public-private partnerships from:

.194788.2

underscoring material = new
~~[bracketed material] = delete~~

1 (1) either the governing body of the public
2 partner's local government or, if the public partner is the
3 state, the department of transportation or the general services
4 department; and

5 (2) the authority.

6 B. Public partners seeking to amend an existing
7 public-private partnership such that the financial impact of
8 the amendment is equal to or greater than twenty-five percent
9 of the total cost of the public project shall use the same
10 approval process provided in this section for proposed public-
11 private partnerships and renewed public-private partnerships.

12 C. The governing body of a local government, or, if
13 the public partner is the state, the department of
14 transportation or the general services department, and the
15 authority shall review and approve or disapprove public-private
16 partnership agreements proposed to be entered into or renewed
17 by a public partner. A public-private partnership agreement
18 shall not be effective unless it is approved as provided in
19 this section.

20 D. Proposed public-private partnerships may also be
21 submitted to the attorney general for review and approval or
22 disapproval.

23 E. Within thirty days of receipt of proposed
24 public-private partnership agreements from a public partner,
25 the governing body of a local government or, if the public

.194788.2

underscoring material = new
~~[bracketed material]~~ = delete

1 partner is the state, the department of transportation or the
2 general services department, the authority and, if applicable,
3 the attorney general shall:

4 (1) advise the public partner concerning the
5 legality of the proposal;

6 (2) advise the public partner on legal
7 procedures and practices related to implementation of specific
8 projects that use a partnership;

9 (3) assist the public partner in negotiating
10 partnership agreements;

11 (4) assist the public partner in preparing any
12 documents related to a specific partnership;

13 (5) advise the public partner regarding any
14 relevant federal securities or other laws and related
15 disclosure requirements; and

16 (6) advise the public partner regarding
17 accounting, investment and tax requirements applicable to
18 specific projects that use a partnership.

19 F. The authority and the attorney general may
20 request the assistance of agencies of state or local
21 governments to assist in the review of a proposed public-
22 private partnership.

23 G. The New Mexico finance authority oversight
24 committee shall provide final approval of proposed public-
25 private partnerships that receive the approval of the

.194788.2

underscoring material = new
[bracketed material] = delete

1 authority.

2 SECTION 11. [NEW MATERIAL] FUNDING AND FINANCING.--

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

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

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

12 (3) other federal, state or local revenues;

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

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

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

.194788.2

underscoring material = new
~~[bracketed material]~~ = delete

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

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

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

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

23 G. Any revenue bonds issued pursuant to the
24 Public-Private Partnerships Act are not general obligations of
25 this state or any local government and are not secured by or

.194788.2

underscored material = new
[bracketed material] = delete

1 payable from any money or assets of the state or any local
2 government other than the money and revenues specifically
3 pledged to the repayment of the revenue bonds.

4 SECTION 12. [NEW MATERIAL] REVERSION OF PUBLIC PROJECT TO
5 PUBLIC PARTNER.--When the public-private partnership
6 terminates, the powers and duties of the private partner cease,
7 except for any duties and obligations that extend beyond the
8 termination as provided in the public-private partnership
9 agreement, and the public project reverts to the public partner
10 and shall be dedicated for public use.

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

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

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

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

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

25 (1) shall collect and pay any revenue that is

underscored material = new
[bracketed material] = delete

1 subject to lien to satisfy an obligation;

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

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

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

14 SECTION 15. [NEW MATERIAL] UTILITY CROSSINGS.--A public
15 or private partner and any utility whose facility is to be
16 crossed or relocated shall cooperate fully in planning and
17 arranging the manner of the crossing or relocation of the
18 utility facility.

19 SECTION 16. EFFECTIVE DATE.--The effective date of the
20 provisions of this act is July 1, 2014.