

LFC Requester: _____

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

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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 **Amendment**
Correction **Substitute**

Date 1/30/2024

Bill No: HTPWC/ HB 190

Sponsor: Garratt and Lundstrom
Short Title: _____

Agency Name and Code SBOF/DFA—34100
Number: _____
Person Writing Marcos B. Trujillo
Phone: 505-690-8374 **Email** Marcosb.trujillo@dfa.nm.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$200,000	\$200,000	\$200,000	\$600,000	New Recurring	GL

(Parenthesis () Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

House Transportation, Public Works, and Capital Improvements Committee Substitute for HB 190 amends the New Mexico Procurement Code, Section 13-1-1 adding four new sections authorizing state and local public bodies to enter into “concession” contracts with private partners to operate and profit from a public project, subject to State Board of Finance (SBOF) review and approval once rules have been promulgated. Public projects are now defined as public transportation facilities or public transportation infrastructure other than a toll road; broadband telecommunications network facilities; or public electric vehicle charging facilities. SBOF is defined and referred to as the “Division” of the Department of Finance and Administration.

FISCAL IMPLICATIONS

There are fiscal implications to the SBOF’s annual operating budget related to administering this program. The bill as drafted directs the SBOF to promulgate rules for review and approval of public-private partnership contracts and agreements. Currently the SBOF Division does not have adequate staff or resources to carry out the requirements specified in the bill, including the promulgation of rules and review and oversight of contracts and agreements. SBOF would need one additional FTE and additional contractual legal support to aid in developing rules and in reviewing contracts and agreements. The current operating budget for SBOF does not include any excess to cover hiring additional FTE or contracting additional legal support. SBOF would need to request a deficiency appropriation from the General Fund to cover the estimated shortfall budget of \$200,000 annually.

SIGNIFICANT ISSUES

1. Art. 9, Section 14 of the New Mexico Constitution (“the anti-donation clause”) generally requires public entities to receive fair current market value for any transfer of a thing of value to a private entity from a public 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 and revenues therefrom 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. However, the current fair market value of a concession may be

difficult to assess for the purpose of approving the concession by the Division. This bill thus may thwart the protections of the anti-donation clause, such as against graft or malfeasance.¹

2. Pursuant to Section 6-1-1, NMSA 1978, the Board of Finance Division of the Department of Finance and Administration generally provides administrative support to the Board of Finance. The Secretary of DFA appoints a director to the Division that will recommend 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 has 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. The delegation to the Division to promulgate rules as to the applicability of this Section may constitute an improper delegation of legislative authority to the executive branch for lack of specific legislative standards. *See, e.g., Montoya v. O’Toole*, 1980-NMSC-045.
4. Many municipalities and counties voluntarily adopt the 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.

PERFORMANCE IMPLICATIONS

HB 190 does not have a performance measuring mechanism for monitoring ongoing oversight and success for any approved projects.

ADMINISTRATIVE IMPLICATIONS

There are administrative implications of the bill that relate to SBOF and the Department of Justice (DOJ), formally known as the Attorney General’s Office. The DOJ provides legal support to the Board. Enactment of this legislation would have an impact on workload and responsiveness for both agencies. HB 190 requires SBOF, and specifically the division and its director, to promulgate rules for reviewing and approving public-private partnership agreements. The SBOF is a small division of five staff that is supported by the DOJ for legal representation. The DOJ recently lost the senior attorney that supported the Board. Due to the unforeseen changes with legal support provided by the DOJ, SBOF will likely need to contract legal support to assist with this program.

¹ Moreover, private interests bidding on a concession may uniformly fail to reflect the costs to the public of privatization through increased user fees – the market value of a concession may not equal its value to the state and its citizens.

Currently SBOF does not have adequate resources to implement this program.

Additionally, as mentioned within the Significant Issues of this FIR, the bill provides exclusive approval authority to the SBOF Division Director of public-private agreements and authority to promulgate rules, instead of the Board of Finance. This is problematic and conflicts with the role of the Board.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

The SBOF recommends that HB 190 specify that the authority provided under the bill be provided to the State Board of Finance and not the “Division”, as is currently defined. The current definition and authority provided to the “Division” is presumably granting rule making authority to the administrative staff for the State Board of Finance. To grant rulemaking authority to the “Division” rather than to the Board would presumably empower the Director to unilaterally promulgate rules without public transparency and may constitute an improper delegation of legislative authority.

SBOF recommends the bill include an appropriation of \$200,000 each year over the next three years to administer the program. The bill as drafted directs the SBOF to promulgate rules for review and approval of public-private partnership contracts and agreements. Currently SBOF does not have adequate resources to administer this program. SBOF would need to hire an additional FTE and contractual legal support.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS