

FISCAL IMPLICATIONS

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

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.

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.

SIGNIFICANT ISSUES

AGO had the following comments:

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.

PERFORMANCE IMPLICATIONS

AGO notes 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.

ADMINISTRATIVE IMPLICATIONS

GSD’s comments included the following:

- the act would allow the state to enter into partnerships to build or renovate infrastructure;
- capital outlay funds appropriated each year are not enough to keep up with the growing demand for repairs and replacement of infrastructure, buildings and building systems; and

- design, build, maintenance projects offer faster delivery of the end product and ensure maintenance will be performed throughout the life cycle of a project.

OTHER SUBSTANTIVE ISSUES

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%20istrate%20puentes/1208_transportation_istrate_puentes.pdf

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Continue to use the current methods of procurement and funding for public works projects.

AHO/aml/bb

Public-Private Partnership Act

Section 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, and “utility” which excludes electric utilities and facilities subject to regulation by PRC.

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 PPPA, 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 PPPA 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.

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.

House Bill 299 - Attachment 1

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.