

HOUSE TAXATION AND REVENUE COMMITTEE SUBSTITUTE FOR
HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 405
51st legislature - STATE OF NEW MEXICO - first session, 2013

AN ACT

RELATING TO PUBLIC PROJECTS; ENACTING THE PUBLIC-PRIVATE PARTNERSHIPS ACT; ALLOWING THE STATE AND CERTAIN LOCAL GOVERNMENTS TO ENTER INTO LONG-TERM PARTNERSHIPS WITH PRIVATE SECTOR PARTNERS TO FACILITATE PUBLIC PROJECTS; CREATING THE PUBLIC-PRIVATE PARTNERSHIPS BOARD; PROVIDING POWERS AND DUTIES; PROVIDING FOR A LONG-RANGE PLAN FOR THE STATE AND LOCAL GOVERNMENTS TO DEVELOP PUBLIC-PRIVATE PARTNERSHIPS FOR PUBLIC PROJECTS; PRESCRIBING PENALTIES; MAKING APPROPRIATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited as the "Public-Private Partnerships Act".

SECTION 2. DEFINITIONS.--As used in the Public-Private Partnerships Act:

A. "board" means the public-private partnerships board;

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

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

D. "material default" means a failure of a private partner to perform any duties under a public-private partnership, which failure jeopardizes delivery of adequate service to the public and remains unsatisfied after a reasonable time and after the private partner has received written notice from the public partner of the failure;

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

F. "public partner" means a state agency, ~~institution~~ or an instrumentality of the state or a local government;

G. "public-private partnership" means the agreement between one or more public partners and one or more private partners for the development, ~~financing~~ or construction of a public project, ~~but does not include operations and maintenance activities, including a lease, ground lease, franchise, easement, permit or other agreement;~~

H. "public project" means:

Comment [L1]: What would "institution" cover that is not already "an instrumentality of the state or a local government"?

Comment [L2]: In and of itself, "financing" isn't a problem, except that without sufficient definition, it could be presumed to cover O & M if the funding would be derived from user fees, etc., generated by the private partner

(1) a building or other facility, except affordable housing pursuant to the Affordable Housing Act, that meets a public purpose and is developed for a public entity;

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

(a) a functionally related and subordinate facility;

(b) a stadium or other facility primarily used for school events; and

(c) any depreciable property provided for use in a school facility that is operated as part of the public school system or a public post-secondary educational institution;

(3) cultural or recreational facilities, including theaters, museums, convention centers, community centers, stadiums, athletic facilities, golf courses or similar facilities;

(4) parking lots or garages;

(5) airports, subways or similar facilities;

(6) improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;

(7) utility and telecommunications and other communications infrastructure;

(8) dams and reservoirs;

(9) a sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;

(10) a sewerage, water, gas or other pipeline;

(11) a transmission line;

(12) a radio, television, cell or other tower;

(13) improvements necessary or desirable to any unimproved state-owned or locally owned real estate; or

(14) recycling facilities or solid waste management facilities that produce electric energy derived from solid waste;

I. "user fee" means a rate, fee or other charge imposed by a public partner for use of all or part of a public project; and

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

K. "value for money analysis" is a process used to compare the financial impacts of a P3 project against those for the traditional public delivery alternative.

SECTION 3. PUBLIC-PRIVATE PARTNERSHIPS BOARD--CREATED--MEMBERSHIP.--

A. The "public-private partnerships board" is created and administratively attached to the general services department. The department shall provide necessary administrative services to the board.

B. The board consists of:

(1) the following state officials or their designees:

- (a) the attorney general;
- (b) the secretary of finance and administration;
- (c) the secretary of general services;
- (d) the secretary of economic development;

and

(e) the state auditor;

(2) three members who represent the private sector, appointed by the New Mexico legislative council;

(3) two members who represent public employees, appointed by the New Mexico legislative council;

(4) one member who represents a social justice or environmental organization; and

~~(5)~~ two members who represent the councils of state government, appointed by the directors of the councils of state government.

C. The private-sector, public employees, social justice or environmental organization, and councils of state government members appointed initially shall draw lots for staggered terms in such a way that two members serve for six years, two members serve for four years and one member serves for two years.

D. The members shall select the chair and vice chair, who shall serve a term of two years.

E. Members who are not public employees are entitled to per diem and mileage as provided in the Per Diem and Mileage Act, but shall receive no other compensation, perquisite or allowance.

SECTION 4. PUBLIC-PRIVATE PARTNERSHIPS BOARD--POWERS AND DUTIES--PLANNING AND REVIEW FUNCTIONS.--

A. The board shall develop a long-term vision and plan for the development of public projects through public-private partnerships. The public-private partnerships plan may be a component of the five-year economic development plan and updated annually with that plan, but the partnerships plan shall be developed as a stand-alone document and shall be specific and targeted in the kinds of public projects that should be sought by the state and local governments initially and for each succeeding five-year or longer period. The board shall engage the public through facilitated meetings throughout the state in the development of the vision and plan, including a focus on how partnerships can provide identifiable, measurable public benefit, including meeting infrastructure deficits and improving

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infrastructure, engendering New Mexico's intellectual capacity and capability; encouraging innovation in technology, building sciences, renewable energy applications and other areas; providing occupational and professional opportunities and training for high-wage employment for the state's work force; and improving the quality of life for all New Mexicans. The board shall also focus on ensuring that public-private partnerships provide the best value for the development of public projects, and meet strong standards for public participation and transparency. In developing the plan, the board shall study best practices for public-private partnerships around the country

B. The board shall seek the input of the state universities; land use and public planners; architects; engineers; contractors; building trades; unions; the national laboratories; experts in work force training and development, finance, law and economic development; and other experts and interested persons. The board shall submit its long-term vision and plan to the governor and the second session of the fifty-first legislature.

C. The board shall promulgate rules to implement the provisions of the Public-Private Partnerships Act, including the review process the board will follow when a public partner proposes a partnership for a public project

D. The board shall consider appropriate amendments to the Procurement Code [insert section]. The board shall present its recommendations for amendments to the Procurement Code to the legislature for approval ~~or when a private entity submits an unsolicited plan for a public project.~~

~~ED.~~ All state agencies, ~~institutions and~~ state instrumentalities, and local governments as appropriate, shall cooperate with the board and assist it in carrying out its duties by providing technical assistance, analysis and other services as requested by the board.

SECTION 5. PROJECT DELIVERY METHODS--PROPOSALS.--A public partner, in consultation with the board, may provide for the development of a public project using a variety of project delivery methods and forms of agreements. The methods may include:

- A. predevelopment agreements leading to other implementing agreements;
- B. design-build agreements;
- C. design-build-finance agreements;
- D. construction manager at risk;

~~E. concession agreements that provide for the private partner to design, build, manage or lease a public project; or~~

~~EF.~~ other project delivery methods or agreements that the public partner determines is most advantageous to the public interest.

SECTION 6. PROJECT DEVELOPMENT--PROCUREMENT.--

- A. A public partner, in consultation with the board,

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Comment [L3]: What might other delivery methods include? I think we just need an example...

may:

(1) procure a public project using any of the following:

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

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

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

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

(e) other procedures that the public partner determines may further the implementation of the Public-Private Partnerships Act; and

(2) consider an unsolicited proposal if the public partner and the board determine that there is sufficient merit to pursue the unsolicited proposal and a reasonable opportunity for other persons to submit competing proposals for consideration ~~as appropriate~~.

B. For a procurement in which the public partner issues a request for qualifications or similar solicitation document, the request shall generally set forth the factors that will be evaluated and the manner in which responses will be evaluated.

C. In evaluating proposals, the public partner and the board shall consider a range of factors they deem appropriate to obtain the best value for the state or local government.

D. The public partner may charge and retain a reasonable administrative fee for the evaluation of an unsolicited project proposal; provided that the administrative fee shall not exceed the reasonable cost of evaluating the proposal.

E. The public partner or the board shall retain financial, legal and other experts to assist in the evaluation, negotiation and development of public-private partnership agreements for a public project; provided that such experts shall have a minimum of five years' relevant experience in their field of expertise.

F. If contractor insurance is required for services procured pursuant to this section, the insurance shall be placed with an insurer authorized to transact insurance in New Mexico or with a surplus lines insurer approved by the insurance division of the public regulation commission or its successor agency.

G. Before the public partner and the board begin the process for procuring a public project, the public partner shall hold at least ~~one~~ two public hearings with at least thirty days' notice and shall hold additional public hearings with at least

three-seven days' notice before an agreement is signed. The board shall provide notice of all hearings to any person requesting notification of proposed public private partnerships.

H. Each request for proposals issued pursuant to the Public-Private Partnerships Act shall require the proposer to include with its proposal an executive summary covering the major elements of its proposal that do not address the proposer's price, financing plan or other confidential or proprietary information or trade secrets that the proposer intends to be exempt from disclosure. The executive summary shall be subject to release and disclosure to the public at any time. Notwithstanding other provisions of law, in order to maximize competition pursuant to that act, no part of a proposal other than the executive summary shall be subject to release or disclosure by the public partner before an award of the public-private partnership contract and the conclusion of any protest or other challenge to the award, absent an administrative or judicial order requiring release or disclosure. After the award of the contract and the conclusion of any protest or other challenge to the award, the Inspection of Public Records Act applies to any release of any part of the proposal. An unsolicited proposal shall contain a similar executive summary and be afforded the same protections as a requested proposal.

I. A solicited or unsolicited proposer shall identify those portions of a proposal or other submission that the proposer considers to be a trade secret or confidential commercial, financial or proprietary information. For trade secrets and confidential and proprietary information to be exempt from disclosure, the proposer must do all of the following:

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

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

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

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

J. The price and financing plan for any proposal shall not be exempt from disclosure.

SECTION 7. PROCUREMENTS--RESTRICTIONS.--

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

B. Every public-private partnership shall include an operating agreement that defines the roles and responsibilities

of the partners. A private partner may require that a public project be operated and maintained to the private partner's standards and specifications as set out in the agreement.

~~C. Should a public project include building maintenance, as to the maintenance activities, the board shall not approve a project that displaces or replaces government employees whose employment is under the Public Employee Bargaining Act.~~

SECTION 8. EVALUATION CRITERIA.--Before entering into a public-private partnership, the public partner and the board shall consider:

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

B. whether the project is consistent with the board's long-term plan for public projects;

C. the proposed cost and financial plan for the public project, including a value for money analysis;

D. the performance benchmarks contained in the proposal;

E. the estimated operating costs of the public project;

F. the financial commitment of the private partner;

G. the risk of proposed financing;

H. the general reputation, qualifications, industry experience and financial capacity of the proposer;

I. the compatibility of the public project with local and regional land and water plans;

J. the feasibility and proposed design and management of the public project;

K. the degree of innovation; efficiency; and technical, scientific, technological and socioeconomic merit of the proposal;

L. comments from potential users, local citizens, affected jurisdictions and other interested persons;

M. benefits to the public, including improvements in economic growth, public safety and quality of life;

N. the safety record of the proposer;

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

P. the commitment to use New Mexico building materials and manufactured goods and local services;

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

R. innovations in energy efficiency or generation; and

S. other criteria that the public partner and the board

deems appropriate.

SECTION 9. BOARD--ADVICE AND ASSISTANCE--REVIEW AND APPROVAL OF AGREEMENTS.--

A. The board, when consulting with and advising a public partner, may assign each member of the board to evaluate proposals and proposed partnership agreements using the member's agency or private-sector resources in their areas of expertise.

B. Before approval of a partnership agreement, the attorney general and the secretary of finance and administration shall, within thirty days of the board's request:

(1) advise the board and the public partner concerning the legality of specific proposed partnerships;

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

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

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

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

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

C. The board may ask other agencies of state or local governments to assist in the review of a proposed public-private partnership.

D. The board shall approve public private partnership project agreements with a value of less than one million dollars.

E. The legislature shall approve public private partnership project agreements with a value equal to or greater than one million dollars.

SECTION 10. PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS-- REQUIREMENTS--PENALTIES.--

A. In a public-private partnership, the public partner and the board shall require the agreement to include provisions as applicable that:

(1) authorize the public partner ~~or the private partner~~ to establish and collect user fees and, rents and to authorize the public partner or private partner to establish and collect, advertising and sponsorship charges, service charges or other charges allowed in the agreement, including provisions that:

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

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

(c) govern enforcement of user fees,

including provisions for the use of cameras or other mechanisms to ensure that users are identified and notified of fees owed and provisions that allow the private partner access to relevant public databases for enforcement purposes. Misuse of the data contained in the databases, including negligence in properly securing the data, shall result in a civil penalty of ten thousand dollars (\$10,000) for each violation;

(2) if user fees and other charges are allowed, the agreement shall provide for a negotiated rate of return on the private partner's investment; ~~including provisions such as the following:~~

~~—— (a) the fees and charges may be collected directly by the private partner or a third party engaged by the private partner for that purpose;~~

~~—— (b) a formula for the adjustment of user fees and other charges during the term of the public private partnership;~~

~~—— (c) for an agreement that does not include a formula described in Subparagraph (b) of this paragraph, provisions regulating the private partner's return on investment; or~~

~~—— (d) other strategies that the public partner determines are appropriate;~~

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

(4) allow the public partner to accept payments and share revenue with the private partner;

(5) address how the public and private partners will share management of the risks of the public project;

(6) specify how the public and private partners will share the costs of development of the public project;

(7) allocate financial responsibility for cost overruns to the partner or partners that were responsible for the cost overruns;

(8) establish the damages to be assessed for nonperformance;

(9) establish performance criteria or incentives, or both;

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

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

(12) for a long-term public project, address responsibility for reconstruction or renovations that are

required so that the public project meets all applicable government standards before the public project reverts to the public partner;

(13) provide for responsibilities for law enforcement on public projects;

(14) identify public partner specifications that must be satisfied, including provisions allowing the private partner to request and receive authorization to deviate from the specifications on a showing satisfactory to the public partner that the deviation is necessary;

(15) require a private partner to provide performance and payment bonds as required by Section 13-4-18 NMSA 1978 for those components of a public project that involve construction. For components that do not involve construction, require parent company guarantees, letters of credit or other acceptable forms of security or a combination of any of these, the penal sum or amount of which may be less than one hundred percent of the value of the contract involved based on the public partner's determination of what is required to adequately protect the public partner, made on a project-by-project basis;

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

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

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

C. The term of agreements entered into pursuant to the Public-Private Partnerships Act may be for a term not to exceed twenty-five years, and such agreements may not be extended for additional terms, ~~provided that an extension shall be subject to the same review and negotiation process as the original agreement.~~

D. The public-private partnership agreement shall contain a provision by which the private partner expressly agrees that it is prohibited from seeking injunctive or other equitable relief to delay, prevent or otherwise hinder the public partner or any other jurisdiction from developing, constructing or maintaining a public project that was planned in accordance with the normal planning process of the public partner and that would or might affect the revenue that the private partner would or might derive from the public project developed under an agreement pursuant to the Public-Private Partnerships Act, except that the agreement may provide for reasonable compensation to the private partner for the adverse effect resulting from development, construction and maintenance of an unplanned facility that affects the public project's revenue.

E. The public-private partnership agreement shall require that the state board of finance must approve the assignment, transfer or sale of assets or investment in a public

project. Sale or lease for longer than ~~twenty-five~~ten years of state property requires legislative approval.

SECTION 11. FUNDING AND FINANCING.--

A. Gross receipts tax or property tax revenues shall not be pledged to any bonds issued pursuant to this act. Any other lawful source of funding may be used for the development or management of a public project pursuant to the Public-Private Partnerships Act, including:

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

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

(3) other federal, state or local revenues;

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

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

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

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

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

E. A public project may be funded in whole or in part by contributions of money or property made by a private person or the state or any agency, institution, instrumentality or political subdivision of the state; provided that any contributions by the state or any agency, institution, instrumentality or political subdivision of the state must be explicitly described in the public private partnership project agreement.

F. Federal, state and local money may be combined with

private sector money for public project purposes as allowed by law or by the grant, gift or donation provisions.

G. Any revenue bonds issued pursuant to the Public-Private Partnerships Act are not general obligations of this state or any local government and are not secured by or payable from any money or assets of the state or any local government other than the money and revenues specifically pledged to the repayment of the revenue bonds.

SECTION 12. USER FEES AT END OF AGREEMENT PERIOD.--The public partner may continue or cease collection of user fees after the end of the term of the agreement.

SECTION 13. REVERSION OF PUBLIC PROJECT TO PUBLIC PARTNER.--If the public-private partnership is terminated, the authority and duties of the private partner cease, except for any duties and obligations that extend beyond the termination as provided in the public-private agreement, and the public project reverts to the public partner and shall be dedicated for public use.

SECTION 14. MATERIAL DEFAULT--REMEDIES.--

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

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

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

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

(1) shall collect and pay any revenue that is subject to lien to satisfy an obligation;

(2) may develop and operate the public project, impose user fees for the use of the public project and comply with any service contracts. ~~and~~

~~(3) may solicit proposals for the maintenance and operation of the public project as provided in the Public-Private Partnerships Act for original proposals.~~

SECTION 15. POLICE POWERS--VIOLATIONS OF LAW.--All law enforcement officers of the state or local government have the same powers and jurisdiction within the limits of the public project as they have in their respective areas of jurisdiction and access to the public project at any time to exercise such powers and jurisdictions.

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

SECTION 17. PENALTIES.--A person who fails to pay a user fee required for the privilege of using property included in a public

project is guilty of a petty misdemeanor and shall be sentenced as provided in Section 31-19-1 NMSA 1978.

SECTION 18. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 201~~4~~.