

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR
SENATE BILL 143

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

AN ACT

RELATING TO PUBLIC PROJECTS; ENACTING THE NEW MEXICO
INFRASTRUCTURE INVESTMENT ACT; ALLOWING THE STATE AND LOCAL
GOVERNMENTS TO ENTER INTO LONG-TERM PARTNERSHIPS WITH PRIVATE
SECTOR PARTNERS TO FACILITATE PUBLIC PROJECTS; PROVIDING POWERS
AND DUTIES.

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 "New Mexico Infrastructure Investment Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
New Mexico Infrastructure Investment Act:

A. "department" means the general services
department;

B. "local government" means a municipality; a
county; or a regional entity created by a joint powers

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1 agreement between one or more public agencies;

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

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

15 E. "public partner" means a local government, state
16 agency, state institution or an instrumentality of the state;

17 F. "public-private partnership" means an agreement
18 between one or more public partners and one or more private
19 partners for the design, development, financing or
20 construction of a public project;

21 G. "public project":

22 (1) means:

23 (a) telecommunications infrastructure,
24 other communications infrastructure that is ancillary to the
25 development or operation of a public project and broadband

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1 infrastructure that will be located in an area identified as an
2 underserved area by the federal communications commission; and

3 (b) a project in a public building or
4 infrastructure in a public building that involves conservation
5 of natural resources; and

6 (2) does not include a project that changes
7 the franchise rights or territory of a regulated public
8 utility; and

9 H. "user fee" means a rate, fee or other charge
10 imposed by a partner for use of all or part of a public
11 project.

12 SECTION 3. [NEW MATERIAL] PROJECT DEVELOPMENT--
13 PROCUREMENT.--

14 A. A public partner may procure a public project
15 using any of the following:

16 (1) a request for proposals in which the
17 public partner describes a class of public project or a
18 geographic area in which a person is invited to submit a
19 proposal to develop a public project;

20 (2) a solicitation using a request for
21 qualifications, short-listing of qualified offerors, a request
22 for proposals, negotiations or other procurement procedures;
23 and

24 (3) a procurement seeking development and
25 finance plans that are most advantageous to the public partner

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1 and suitable for the public project.

2 B. For a procurement in which the public partner
3 issues a request for qualifications or similar solicitation
4 document, the public partner shall issue a request that sets
5 forth the factors that will be evaluated and the manner in
6 which responses will be evaluated.

7 C. In evaluating proposals, the public partner
8 shall require specific justification and support for a proposal
9 that may affect:

10 (1) public employees' employment; or

11 (2) the cost of public service delivery.

12 D. The public partner may charge and retain a
13 reasonable administrative fee for the cost of experts that are
14 consulted pursuant to Subsection E of this section; provided
15 that the administrative fee shall not exceed the reasonable
16 cost of evaluating the proposal.

17 E. The public partner shall consult with in-house
18 or contracted financial, legal, architectural or other experts
19 and advisors to assist in the design, evaluation, negotiation,
20 construction administration and development of a public-private
21 partnership agreement for a public project.

22 F. In addition to making proposals available to the
23 public pursuant to Subsection G of this section and providing
24 the opportunity for written comments from the public, the
25 public partner shall hold at least three public hearings prior

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1 to entering into a public-private partnership, the last of
2 which shall be held at least thirty days before the public
3 partner gives final approval to the public-private partnership
4 and all of which shall be preceded by at least thirty days'
5 notice. The meetings shall be subject to the Open Meetings
6 Act.

7 G. A request for proposals issued pursuant to the
8 New Mexico Infrastructure Investment Act shall require the
9 offeror to include with its proposal an executive summary
10 covering the major elements of its proposal that do not address
11 the offeror's price, financing plan or other confidential or
12 proprietary information or trade secrets that the offeror
13 intends to be exempt from disclosure. After the public-private
14 partnership is awarded and before the conclusion of any
15 challenge to the award, the Inspection of Public Records Act
16 applies to any release of any part of the proposals.

17 H. An offeror shall identify those portions of a
18 proposal or other submission that the offeror, with the public
19 partner's concurrence, considers to be a trade secret or
20 confidential commercial, financial or proprietary information.
21 For trade secrets and confidential and proprietary information
22 to be exempt from disclosure, the offeror shall do all of the
23 following:

24 (1) invoke exclusion upon submission of the
25 information or materials for which protection is sought;

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

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

5 (4) fully comply with any applicable state law
6 with respect to information or materials that the offeror
7 contends should be exempt from disclosure.

8 I. A public partner shall consider an offeror's
9 request to withhold certain information in a proposal from
10 disclosure and shall issue a written determination either
11 accepting or rejecting the offeror's request. Following the
12 public partner's determination, any portions of the proposal
13 not withheld from disclosure shall be made available to the
14 public by request and the public partner shall maximize public
15 access to the disclosed portions of the proposal through
16 reasonable means available to the public partner.

17 SECTION 4. [NEW MATERIAL] PROCUREMENTS--RESTRICTIONS.--

18 A. The resident preferences provided in Sections
19 13-1-21 and 13-1-22 NMSA 1978 apply to procurements pursuant to
20 the New Mexico Infrastructure Investment Act. The construction
21 of a public project is a public works for the purposes of the
22 Public Works Minimum Wage Act, the Subcontractors Fair Practice
23 Act, any other provisions of Chapter 13, Article 4 NMSA 1978
24 and the Public Works Apprenticeship and Training Act.

25 B. Every public-private partnership agreement shall

1 include a provision that defines the roles and responsibilities
2 of the partners. A private partner may require that a public
3 project be operated and maintained to the private partner's
4 standards and specifications as set out in the agreement.

5 SECTION 5. [NEW MATERIAL] DEPARTMENT--POWERS AND DUTIES--
6 ASSISTANCE WITH DUTIES.--

7 A. The department shall:

8 (1) in consultation with the state purchasing
9 agent, the New Mexico finance authority, the economic
10 development department, the department of finance and
11 administration, the office of the state engineer and any other
12 person that the department deems necessary, develop a minimum
13 set of guidelines to implement the provisions of the New Mexico
14 Infrastructure Investment Act, including guidelines on the
15 process that the department shall follow when it reviews and
16 approves public-private partnership agreements and the
17 information that is required to be included in a requested
18 proposal;

19 (2) before a public-private partnership may be
20 established, review and approve all public-private partnership
21 agreements;

22 (3) establish an evaluation process to
23 determine whether projects should be developed as public-
24 private partnerships or using traditional procurement and
25 funding methods prior to the initiation of contract

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1 negotiations with a private partner;

2 (4) encourage maximum competition among
3 private entities to pursue the development and operation of
4 public projects;

5 (5) provide technical assistance to local
6 governments and regional entities on the use of public-private
7 partnerships to meet their needs;

8 (6) assist the public partner in negotiating
9 agreements;

10 (7) assist the public partner in preparing any
11 documents related to a specific agreement;

12 (8) assist the public partner regarding any
13 relevant federal securities or other laws and related
14 disclosure requirements;

15 (9) assist the public partner regarding
16 accounting, investment and tax requirements applicable to the
17 specific public project; and

18 (10) on or before December 1 of each year,
19 submit a report to the legislature on any proposed or pending
20 agreements and any agreements completed during the preceding
21 year. The report shall specifically name each proposed,
22 pending or completed public project and include a summary of
23 the project, a description of the project's scope and finance
24 plan and the status of any related permitting or land
25 acquisition under way.

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1 B. The department or a local government may:

2 (1) in accordance with Subsection D of Section
3 3 of the New Mexico Infrastructure Investment Act, retain, as
4 necessary, financial, legal and other experts to assist it in
5 carrying out its duties pursuant to the New Mexico
6 Infrastructure Investment Act, including assistance with the
7 review of public-private partnership agreements;

8 (2) solicit the expertise of state agencies,
9 state institutions, state instrumentalities and local
10 governments to assist the department or local government in
11 carrying out its duties pursuant to the New Mexico
12 Infrastructure Investment Act, including reviewing public-
13 private partnership proposals; and

14 (3) receive appropriations and money from any
15 other source, including other state agencies or local
16 governments, regional organizations or the federal government,
17 to carry out its duties pursuant to the New Mexico
18 Infrastructure Investment Act.

19 SECTION 6. [NEW MATERIAL] EVALUATION CRITERIA.--Before
20 entering into a public-private partnership, a public partner
21 and the department shall consider:

22 A. the ability of the public project to meet the
23 needs of the community in which it is to be located, including
24 improving and streamlining services to the public; providing or
25 enhancing educational, cultural and recreational opportunities;

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1 promoting economic growth or job creation; or otherwise serving
2 a public purpose;

3 B. the proposed cost and financial plan for the
4 public project;

5 C. the performance benchmarks contained in the
6 proposal;

7 D. the estimated operating costs of the public
8 project;

9 E. the financial commitment of the private partner;

10 F. risk associated with the project's proposed
11 financing;

12 G. the general reputation, qualifications, industry
13 experience and financial capacity of the offeror;

14 H. the compatibility of the public project with
15 local and regional land and water plans or other infrastructure
16 plans;

17 I. the feasibility and proposed design and
18 management of the public project;

19 J. the degree of innovation; efficiency; and
20 technical, scientific, technological and socioeconomic merit of
21 the proposal;

22 K. comments from potential users, local citizens,
23 affected jurisdictions and other interested persons;

24 L. benefits to the public, including improvements
25 in economic growth, job creation, public safety and quality of

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1 life;

2 M. the offeror's safety record;

3 N. retention and training of New Mexico residents
4 in occupations and professions related to planning, design,
5 construction, project management, general management,
6 administration, legal, accounting and other areas of the public
7 project over the life of the public-private partnership;

8 O. the offeror's commitment to use New Mexico
9 building materials and manufactured goods and local services to
10 the extent possible;

11 P. green building design and construction
12 certification by a nationally recognized organization; and

13 Q. innovations in energy efficiency or generation.

14 SECTION 7. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP
15 AGREEMENTS--REQUIREMENTS.--

16 A. A public partner and the department shall
17 require a public-private partnership agreement to include
18 provisions that:

19 (1) require operations and maintenance of a
20 public project, except a public project that is broadband
21 infrastructure, to be performed by the public partner;

22 (2) if applicable, authorize the public
23 partner or the private partner to establish and collect user
24 fees, rents, advertising and sponsorship charges, service
25 charges or other charges allowed in the agreement, including

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1 provisions that:

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

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

7 (c) govern enforcement of user fees,
8 including provisions for mechanisms to ensure that users are
9 identified and notified of fees owed;

10 (3) require a maximum negotiated rate of
11 return on the private partner's investment, including:

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

15 (b) a formula for the adjustment of user
16 fees and other charges during the term of the public-private
17 partnership; and

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

22 (4) if applicable, allow for payments to be
23 made by the public partner to the private partner, including
24 availability payments or performance-based payments;

25 (5) if applicable, allow the public partner to

1 accept payments from and share revenue with the private
2 partner;

3 (6) describe how the public and private
4 partners will share management of the risks of the public
5 project;

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

9 (8) allocate financial responsibility for cost
10 overruns to the partner or partners that are responsible for
11 the cost overruns;

12 (9) establish the damages to be assessed for a
13 partner's nonperformance;

14 (10) establish performance criteria or
15 incentives, or both;

16 (11) address the acquisition of property
17 interests that may be required, including provisions that allow
18 the public or private partner to acquire real property,
19 including acquisition by exchange of other real property that
20 is owned by the state, a local government or the federal
21 government;

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

24 (13) with respect to a public project that is
25 broadband infrastructure, identify to which partner the project

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1 will revert upon termination of the public-private partnership;

2 (14) establish how the condition and
3 maintenance level of a public project will be measured and
4 require a public project that reverts to the public partner to
5 meet a condition and maintenance level measurement of eighty-
6 five percent when the project reverts;

7 (15) for a public project with a term that is
8 longer than twenty-five years and that reverts to the public
9 partner, address responsibility for reconstruction or
10 renovations that are required so that the public project meets
11 all applicable government standards before the project reverts;

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

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

19 (18) require a private partner to provide,
20 either directly or through the principal contractor who is in
21 charge of the project, performance and payment bonds as
22 required by Section 13-4-18 NMSA 1978 for those components of a
23 public project that involve construction. For components that
24 do not involve construction, require parent company guarantees,
25 letters of credit or other acceptable forms of security or a

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1 combination of any of these, the penal sum or amount of which
2 may be less than one hundred percent of the value of the
3 contract involved based on the public partner's or the
4 department's determination of what is required to adequately
5 protect the public partner, made on a project-by-project basis;

6 (19) provide clawback or recapture provisions
7 that protect public investment in the public project; and

8 (20) specify dispute resolution procedures to
9 be followed and remedies available to the partners.

10 B. A public-private partnership agreement may
11 include a provision for public workers to be trained on the
12 operation and maintenance of the public project.

13 C. The public-private partnership agreement shall
14 include a clear statement of:

15 (1) when a public project that is broadband
16 infrastructure will revert to the public partner or private
17 partner, or when a public project that is not broadband
18 infrastructure will revert to the public partner; and

19 (2) which partner will own any real property
20 pertaining to the public project when the project reverts.

21 D. The term of initial agreements entered into
22 pursuant to the New Mexico Infrastructure Investment Act may be
23 for a term not to exceed fifty years, and such agreements may
24 be extended for additional terms; provided that an extension
25 shall be subject to the same review and negotiation process as

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1 the original agreement.

2 E. The public-private partnership agreement shall
3 contain a provision by which the private partner expressly
4 agrees that it is prohibited from seeking injunctive or other
5 equitable relief to delay, prevent or otherwise hinder the
6 public partner or any other jurisdiction from developing,
7 constructing or maintaining a public project that was planned
8 and that would or might affect the revenue that the private
9 partner would or might derive from the public project developed
10 pursuant to the New Mexico Infrastructure Investment Act,
11 except that the agreement may provide for reasonable
12 compensation to the private partner for the adverse effect
13 resulting from the public partner's development, construction
14 and maintenance of an unplanned facility that affects the
15 public project's revenue.

16 F. The state board of finance shall approve the
17 assignment, transfer or sale of assets or investment in a
18 public project that creates debt obligation of the public
19 partner.

20 SECTION 8. [NEW MATERIAL] FUNDING AND FINANCING.--

21 A. Any lawful source of funding may be used for the
22 development or management of a public project, including:

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

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

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

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

10 (5) other available forms of public and
11 private capital.

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

19 C. The public partner may accept money from the
20 United States or any of its agencies to carry out the
21 provisions of the New Mexico Infrastructure Investment Act,
22 whether the money is made available by grant, loan or other
23 financing arrangement. The public partner assents to any
24 federal requirements, conditions or terms of any federal
25 funding accepted by the public partner pursuant to this

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1 subsection. The public partner may enter into agreements or
2 other arrangements with the United States or any of its
3 agencies as may be necessary to carry out the provisions of
4 that act.

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

9 E. A public project may be funded in whole or in
10 part by contributions of money or property made by a private
11 person, a private entity or the state or any agency,
12 institution, instrumentality or political subdivision of the
13 state.

14 F. Federal, state and local money may be combined
15 with private sector money for public project purposes as
16 allowed by law or by the provisions of a grant, gift or
17 donation.

18 G. Any revenue bonds issued as a result of the New
19 Mexico Infrastructure Investment Act are not general
20 obligations of this state or any local government and are not
21 secured by or payable from any money or assets of the state or
22 any local government other than the money and revenues
23 specifically pledged to the repayment of the revenue bonds.

24 SECTION 9. [NEW MATERIAL] REVERSION OF A PUBLIC
25 PROJECT.--At the end of the term of the public-private

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1 partnership agreement:

2 A. if the public project is broadband
3 infrastructure, the public project shall revert to the public
4 partner or private partner as provided in the public-private
5 partnership agreement; or

6 B. for all other public projects, the public
7 project shall revert to the public partner.

8 SECTION 10. [NEW MATERIAL] MATERIAL DEFAULT--REMEDIES.--

9 A. Upon the occurrence and during the continuation
10 of material default by the private partner, the public partner
11 may elect to take over the public project, including the
12 succession of all right, title and interest in the public
13 project, subject to any liens on revenue previously granted by
14 the private partner.

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

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

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

23 SECTION 11. EFFECTIVE DATE.--The effective date of the
24 provisions of this act is July 1, 2017.