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FISCAL IMPACT REPORT

ORIGINAL DATE 3/3/17

SPONSOR SCORC/SJC LAST UPDATED _____ HB _____

SHORT TITLE New Mexico Infrastructure Investment Act SB CS/CS/143/SCORCS/SJC

ANALYST Graeser

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	R or NR **	Fund Affected
Total			See fiscal impact			General Fund/Other State Funds

Parenthesis () indicate expenditure decreases. ** R = recurring; NR = non-recurring

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)

New Mexico Municipal League (NMML)

Department of Finance and Administration (DFA)/Board of Finance (BoF) on original bill

Economic Development Department (EDD) on original bill

General Services Department (GSD) (on 2015 HB 299)

State Personnel Office (SPO) on 2015 HB 299)

Public Regulation Commission (PRC) on 2015 HB 299)

SUMMARY

Synopsis of Bill

Senate Judiciary Committee substitute for Senate Corporations and Transportation substitute for Senate Bill 143 enacts the “New Mexico Infrastructure Investment Act” (NMIIA) to allow state and local governments to enter into long-term agreements with private sector partners to facilitate public projects narrowly limited to:

- Telecommunications, broadband and other communications infrastructure ancillary to the development or operation of a public project;
- A project in a public building or infrastructure in a public building that involves conservation of natural resources;

These partnerships are known in the procurement and contractor community as P3s.

The proposed NMIIA excludes projects that change franchise rights or territories of regulated public facilities.

The effective date of the provisions of this bill is July 1, 2017.

A section-by-section description is included in attachment 1.

FISCAL IMPLICATIONS

The bill could have a future impact on the general fund and local government and federal funds. However, any future impacts may be in the nature of accelerating the construction of broadband infrastructure, the installation of solar electric arrays, mini-split (air source) heat pumps or water collection or conservation equipment in public buildings.

The SJC substitute includes far more specific controls at the state level than previous versions and moved all of the provisions closer to the Procurement Code.

EDD notes the following: "...Depending on the project and the proposed terms of the agreement, the amount of risk facing the public and private entity can vary considerably. For some projects, the public entity may be serving only as an issuer of conduit debt, enabling the private borrower to gain access to tax-exempt financing but with no promise to commit any other public funding. In other instances the public entity may be required to guarantee the private party's debt or otherwise place public funds directly at risk."

The bill provides that as security for the payment of financing, revenues from the public project may be pledged, but that revenue bonds issued as a result of the NMIIA 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 advice on laws, disclosures, accounting, investments, taxes and other requirements. The exact amount of extra resources, of course depends on how many projects are negotiated.

SIGNIFICANT ISSUES

This bill is similar to the Public-Private Partnership Act (PPPA) proposed by HB 299 in 2015 and HB 405 and SB 273 in 2013 and to the original SB 143 filed for this session. There are profound differences, however, related to the very narrow scope of this SJC sub.

A major difference between the SCORC substitute and the precursor bills was the access to public databases and the imposition of severe civil penalties for negligent use of data or unauthorized disclosure of data. The SCORC substitute did not allow the public partner access to confidential public data; hence there was no need for a civil penalty. The SCTC sub also deletes a penalty for failure to pay a user fee, which in the original bill was declared a petty misdemeanor subject to imprisonment of up to six months in the county jail and/or a fine of not more than \$500. This petty misdemeanor was inappropriate in an essentially civil context of ordinary private commerce. These features are not in the SJC substitute.

The earlier bills were more explicit and expansive in coverage of the proposal and included explicitly an extensive list of allowed projects and project areas.

SB 143/SJCS notably does not include this degree of specificity or expansiveness. The SCTC substitute removes most of the potential risk to a sponsoring government in favor of a short list of allowed projects that may assist the state and local governments to access the capital to develop statewide broadband infrastructure and to install natural resource conservation technologies in public buildings.

DFA/BoF has provided the following analysis of the original SB-143.

“The bill creates a new Procurement Code exemption that may exclude potentially large amounts of tax dollars from general procurement standards. It is unclear why these types of agreements warrant this exemption, other than the fact that the bill will allow private companies to send unsolicited proposals to public bodies (which also seems unwarranted). The Procurement Code provides important safeguards against complacency and corruption. By exempting these agreements from the Procurement Code, the bill could open a door for deals that allow public funds to be used without ensuring the most competitive outcome. It may be difficult to determine whether these agreements violate the anti-donation clause of the State Constitution (Article IX, Section 14), which prohibits public bodies from donating anything of value to private parties. In the case of these agreements, it is unclear whether it will be possible to obtain an appraisal or market rental analysis as evidence that the services to be provided by the private partner are equal to or greater than the benefit the private partner receives from the public body.”

“Because the bill exempts the agreements from the Procurement Code, it will be difficult to develop the guidelines, processes and decide which agreements warrant approval. Additionally, due to the nature of the agreements, it would be very difficult for the State Board of Finance to approve the asset dispositions as they may be in violation of the current rules.”

“Related to the ability of public bodies to issue revenue bonds under the new Act, the State Board of Finance approves bond issuances for state agencies and higher education institutions. The bill would allow public bodies to issue revenue bonds with partnership revenues pledged for repayment, but the bill does not require any oversight body (such as the State Board of Finance) to review and approve such bond issuances. Bond issuance and debt management is a critical financial role that many state agencies are not well prepared to implement. It is unclear whether any such revenue bonds would be marketable. The ability to issue bonds at a palatable rate of interest depends on the credit quality of the revenue stream pledged for repayment, which cannot be anticipated at this time.”

DFA has indicated opposition to previous versions of this bill. Currently, they are preparing an update based on the changes contained in the SJC version of this concept.

However, the SJC substitute moves the bill closer to the Procurement Code. It does not allow the presentation of unsolicited proposals. It requires ownership of public buildings infrastructure to revert to the sponsoring government. It does allow, however, that broadband telecommunications infrastructure can revert to the public partner or to the private partner at the termination of the agreement as specified in the original agreement.

GSD is assigned major responsibilities. In the previous versions of this bill, GSD was only required to consult on and approve projects over \$50 million and lasting over 35 years. This limitation has been removed. GSD would be a major partner in any public-private partnerships.

EDD provided the following discussion on previous versions of this bill:

Use of a Public-Private Partnership (P3) has become popular for economic development or redevelopment purposes. These partnerships include the use of public resources or financing capabilities to promote local economic development. Generally, public resources are required to make the project feasible. In these P3 agreements, the public entity will provide some combination of tax incentives, public land or other assets, infrastructure investments or financing assistance. Typically, the private entity will contribute capital investments, commit to provide jobs, contribute development expertise and assume most of the financial risk for the ultimate project outcomes. These “partnerships” can either have short life spans covering only the construction period for the project, or longer life spans covering debt repayment or long-term operating agreements.

The vetting of private entities is a significant act and assures the entities possess the financial capacity to carry out and sustain the project. However there are established entities that specialize in Public Private Partnerships (P3) and this method has been used successfully in many other states.

From the perspective of NMEDD, the public project should be highly analyzed and vetted to assure a significant beneficial economic impact to the community. The bill addresses issues of importance to economic development and includes upholding the fairness of clauses identified in the NM Infrastructure Act.

New Mexico continues to have limited broadband infrastructure. P3’s have worked successfully in Kentucky (see link: <http://rcnky.com/articles/2014/12/23/kentucky-embark-statewide-broadband-initiative> and for downtown revitalization such as in the case in Cincinnati.

The entire issue of voiding the protections to local communities from the requirements of the procurement code may remain in SB143/SJC.

More specifically, the AGO had the following comments on this bill:

CS/CS/Senate Bill 143 would enact the “New Mexico Infrastructure Investment Act” to allow ‘public partner’(s) defined as state agency, state institution or an instrumentality of the state to enter into partnerships with the private sector, using some different methods than offered by the existing procurement code to facilitate public infrastructure projects. These are known in the procurement and contractor community as P3s.

This is essentially a version of the Public Private Partnership legislation that has been enacted in some form in 33 states. It allows for agreements between public and private partners to make agreements to development of telecommunications, broadband, other communications infrastructure and a project in a public building that involves conservation of natural resources, without having to comply with the Procurement Code. The bill does not address whether the agreement must comply with the Procurement Code in the event that this new section of law is silent on an issue.

The resident preferences in the procurement code at NMSA 1978 Sections 13-1-21 and 13-1-22 are incorporated into the proposed Act.

There is a white paper created by the National Association of State Procurement Officials, the National Association of State Facilities Administrators and the National Association of State Chief Administrators¹. There are advantages and disadvantages of going around existing procurement codes to enact special procurement processes for public private partnerships with for profit private companies and individuals. This bill is sufficiently permissive to allow any number of types of agreements as long as they are limited to the defined ‘public projects’ and comply with the resident preferences of Section 13-1-21 and 22 in the Procurement Code. It is unclear why this workaround of the established protections, procedures and processes of the existing Procurement Code, is necessary.

PERFORMANCE IMPLICATIONS

The powers and duties assigned to GSD and Board of Finance may implicate the performance measures of these agencies.

ADMINISTRATIVE IMPLICATIONS

GSD’s comments on 2015’s HB 299 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.

In this SJC version of the concept, GSD is assigned major responsibilities and would probably need additional resources to administer the provisions of this substitute bill.

OTHER SUBSTANTIVE ISSUES

SPO reports (2015 HB 299) 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

¹ https://afd34ee8b0806295b5a7-9fbee7de8d51db511b5de86d75069107.ssl.cf1.rackcdn.com/GOV16_P3_Guide.pdf

ALTERNATIVES

The OAG suggests that an alternative to this stand-alone bill is to enact a subsection of the Procurement Code instead of a whole new section of law.

LFC staff explain that this would emphasize that procurement in general is governed by the procurement code and that the NMIA provisions are a severely limited exception to the full provisions of the procurement code.

LG/sb

Attachment 1

SB 143 – Section by Section

New Mexico Infrastructure Investment Act Sections 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 narrowly specifies allowed project and project types that can be financed using this method. Allowed projects are restricted to “telecommunication, broadband and other communications infrastructure that is ancillary to the development or operation of a public project” and “a project in a public building that involves conservation of natural resources.”

Section 3 defines a variety of project procurement methods including other methods that the public partner believes will further implementation of the NMIAA. However, this version no longer allows unsolicited proposals; the bill addresses how proposals are evaluated; the charging of administrative fees by the public partner to evaluate a proposal; public partner consultation with experts; contractor insurance; public hearings held; and the handling of trade secrets and proprietary information. The section also requires at least three public hearings, the last of which shall be held at least 30 days before the public partner gives final approval. These hearings are subject to the provisions of the Open Meetings Act. Off errors may request that certain information be held confidential, but the public partner may honor that request or not as it chooses. The offer is open to public requests through IPRA.

Section 4 provides restrictions on procurements including use of resident preference and compliance with minimum wage and other provisions related to public works employment. Provisions in the original bill requiring agreements to define roles and responsibilities; and allowing agreements to require that a public project be operated and maintained to the private partner’s standards and specifications have been deleted.

Section 5 defines GSD duties to include developing guidelines; approving NMIAA agreements (previous versions assigned this responsibility for projects 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. In addition, GSD is required to, before approving a project, assist a public partner with negotiations, preparing documents, and advise on laws, disclosures, accounting, investment and tax issues.

Section 6 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 7 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. This section also requires that a project meet a condition and maintenance level measurement of 85 percent when the public project reverts to the public partner. The section also requires that

any public building infrastructure will revert to the public partner at the end of the agreement, but that for broadband infrastructure, the property will revert as determined in the partnership agreement.

Section 8 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 9 restates that public building infrastructure will revert to the public partner at the end of the agreement, but that for broadband infrastructure, the property will revert as determined in the partnership agreement.

Section 10 provides remedies for default by a private partner. The loophole if the default is caused by a “force majeure” is deleted.

Section 11 establishes an effective date of July 1, 2017.