

1 HOUSE BILL 286

2 **54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019**

3 INTRODUCED BY

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7
8 FOR THE LEGISLATIVE FINANCE COMMITTEE

9
10 AN ACT

11 RELATING TO PUBLIC PROJECTS; ENACTING THE PUBLIC-PRIVATE
12 PARTNERSHIPS ACT; CREATING THE PUBLIC-PRIVATE PARTNERSHIPS
13 BOARD; CREATING THE PUBLIC-PRIVATE PARTNERSHIP PROJECT FUND;
14 ALLOWING THE STATE AND LOCAL GOVERNMENTS TO ENTER INTO
15 PARTNERSHIPS WITH PRIVATE SECTOR PARTNERS TO FACILITATE PUBLIC
16 PROJECTS; PROVIDING POWERS AND DUTIES; REQUIRING REPORTS.

17
18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

19 SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
20 cited as the "Public-Private Partnerships Act".

21 SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
22 Public-Private Partnerships Act:

23 A. "authority" means the New Mexico finance
24 authority;

25 B. "board" means the public-private partnership

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1 board;

2 C. "capital project" means the acquisition,
3 improvement, alteration or reconstruction of assets of a
4 long-term character, including land and infrastructure;

5 D. "force majeure" means an uncontrollable force or
6 natural disaster not within the power of the public or private
7 partner;

8 E. "lease payments" means any form of payment,
9 including a land lease, by a governmental entity to a private
10 partner for the use of a qualifying project;

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

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

20 H. "non-state money" means money that does not
21 derive from revenue acquired from taxes, fees or other money
22 accruing to the state treasury or a fund established pursuant
23 to a state statute;

24 I. "private partner" means one or more persons who
25 have entered into a public-private partnership with a public

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1 partner and who are not the federal government or any agency or
2 instrumentality of the federal government; another state or
3 territory of the United States; a sovereign or foreign
4 government; or the state or an agency, branch, institution,
5 instrumentality or political subdivision of the state;

6 J. "public partner" means a local government, state
7 agency, state institution or instrumentality of the state;

8 K. "public-private partnership agreement" means a
9 contract between a public partner and a private partner for the
10 delivery of a capital asset or the maintenance of a capital
11 asset that is negotiated pursuant to the Public-Private
12 Partnerships Act as an alternative to the contractual processes
13 and requirements of the Procurement Code;

14 L. "qualifying project" means a project that has
15 been certified pursuant to Section 6 of the Public-Private
16 Partnerships Act;

17 M. "revenue" means all revenue, income, earnings,
18 user fees, lease payments or other service payments that
19 support the development or operation of a qualifying project,
20 including money received as a grant or otherwise from the
21 federal government, a governmental entity or any agency or
22 instrumentality of the federal government or governmental
23 entity in aid of the project;

24 N. "unsolicited offer" means a request to a public
25 partner for a governmental action, barter or payment by a

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1 potential private partner in exchange for a capital project or
2 public service where the public partner has not published a
3 request for proposals to contract for that capital project or
4 public service; and

5 O. "user fee" means a rate, fee or other charge
6 imposed by a partner for use of all or part of a capital
7 project.

8 SECTION 3. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIPS
9 BOARD--CREATED--MEMBERSHIP.--

10 A. The "public-private partnerships board" is
11 created and is administratively attached to the authority. The
12 authority shall provide necessary administrative services to
13 the board.

14 B. The board consists of:

15 (1) the secretary of economic development or
16 the secretary's designee;

17 (2) the secretary of finance and
18 administration or the secretary's designee;

19 (3) the secretary of general services or the
20 secretary's designee;

21 (4) the secretary of transportation or the
22 secretary's designee;

23 (5) the chief executive officer of the
24 authority or the chief executive officer's designee; and

25 (6) four public members appointed by the New

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1 Mexico legislative council.

2 C. The public members appointed initially shall
3 draw lots for staggered terms in such a way that two members
4 shall serve for six years, one member shall serve for four
5 years and one member shall serve for two years. Thereafter,
6 the public members shall serve for six-year terms.

7 D. The members shall select a chair and vice chair,
8 who shall serve a terms of two years.

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

13 SECTION 4. [NEW MATERIAL] BOARD--DUTIES.--

14 A. The board shall meet at least every other month
15 or at the call of the chair.

16 B. The board shall review and approve grant and
17 loan applications made to the public-private partnership
18 project fund and approve public-private partnership agreements.

19 C. The board shall promulgate rules to implement
20 the provisions of the Public-Private Partnerships Act,
21 including the review process that the board will follow for
22 review of grant and loan applications made to the public-
23 private partnership project fund and approval of public-private
24 partnership agreements.

25 SECTION 5. [NEW MATERIAL] NEW MEXICO FINANCE

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1 AUTHORITY--POWERS AND DUTIES.--The authority shall:

2 A. provide staff support to the board;

3 B. promulgate rules for the implementation of the
4 Public-Private Partnerships Act, including the review process
5 that the board will follow for review of grant and loan
6 applications made to the public-private partnership project
7 fund and of public-private partnership agreements; provided
8 that the authority shall consult with the state purchasing
9 agent, the department of finance and administration, the
10 secretary of general services and the secretary of public
11 education in the development of the rules; and

12 C. make final approval decisions for grant and loan
13 applications made to the public-private partnership project
14 fund and for public-private partnership agreements.

15 SECTION 6. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP
16 PROJECT FUND CREATED--STUDY GRANTS--INFRASTRUCTURE LOANS.--

17 A. The "public-private partnership project fund" is
18 created within the authority and shall be administered by the
19 authority. The fund consists of appropriations, payments of
20 principal and interest on loans made from the fund, income from
21 investment of the fund and any other money distributed or
22 otherwise allocated to the fund. Balances in the fund at the
23 end of any fiscal year shall not revert to the general fund.
24 The fund may consist of such subaccounts as the authority deems
25 necessary to carry out the purposes of the fund.

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1 B. The board shall establish procedures and adopt
2 rules as required to administer the public-private partnership
3 project fund and to recover from the fund the costs of
4 administering the fund and originating grants and loans.

5 C. Money in the public-private partnership project
6 fund may be used to make a grant of up to seventy-five thousand
7 dollars (\$75,000) to a local government for the purposes of
8 studying the costs and benefits of using a public-private
9 partnership agreement as an alternative to the requirements and
10 processes of the Procurement Code or other methods allowed by
11 statute to procure or maintain a capital project; provided that
12 the grant applicant shall provide matching funding in non-state
13 money equal to at least twenty-five percent of the total cost
14 of the study.

15 D. Money in the public-private partnership project
16 fund may be used to provide a loan as funding for the
17 procurement or maintenance of a capital asset through a public-
18 private partnership agreement; provided that:

19 (1) a loan award shall be made on a
20 competitive basis pursuant to a point system established
21 pursuant to Subsection E of this section;

22 (2) a loan applicant shall provide matching
23 funding in non-state money that equals at least thirty percent
24 of the entire cost of the applicant's monetary obligation for
25 the public-private partnership agreement; and

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1 (3) the loan applicant submits to the board
2 the certification and analysis required in Section 8 of the
3 Public-Private Partnerships Act.

4 E. The board shall establish by rule:

5 (1) the standards for the certification and
6 analysis required in Section 8 of the Public-Private
7 Partnerships Act; and

8 (2) a point system to be used for competitive
9 ranking of loans to qualifying projects.

10 SECTION 7. [NEW MATERIAL] PROCUREMENTS--REQUIREMENTS.--

11 A. A public-private partnership agreement must be
12 approved by the board if the:

13 (1) public project cost is greater than twenty
14 million dollars (\$20,000,000); or

15 (2) public-private partnership term is longer
16 than five years.

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

24 C. A public-private partnership agreement shall
25 include an operating agreement that defines the roles and

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1 responsibilities of the partners. The operating agreement
2 shall require that a public project be operated and maintained
3 to the operating and maintenance standards and specifications
4 as set out in the agreement.

5 D. A public-private partnership agreement shall:

6 (1) provide clawback or recapture provisions
7 that protect the public investment;

8 (2) specify remedies available to the parties
9 and dispute resolution procedures to be followed;

10 (3) for those components of a public project
11 that involve construction, require a private partner to
12 provide, either directly or through the principal contractor
13 that is in charge of the project, performance and payment bonds
14 as required by Section 13-4-18 NMSA 1978; and

15 (4) for those components of a public project
16 that do not involve construction, require a private partner to
17 provide parent company guarantees, letters of credit or other
18 acceptable forms of security, the penal sum or amount of which
19 may be less than one hundred percent of the value of the
20 contract involved based on the public partner's or the board's
21 determination of what is required to adequately protect the
22 public partner.

23 SECTION 8. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP
24 AGREEMENTS--REQUIREMENTS--RESTRICTIONS.--

25 A. Prior to entering into a public-private

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1 partnership agreement, a public partner shall:

2 (1) publish a cost-benefit analysis of the
3 life-cycle cost of using a public-private partnership agreement
4 to procure the project in comparison with the life-cycle cost
5 of using the methods authorized in the Procurement Code or
6 other laws outside of the Public-Private Partnerships Act;

7 (2) certify to the board that use of
8 governmental procurement processes within the Procurement Code
9 or other laws outside of the Public-Private Partnerships Act
10 would prohibitively delay or increase the cost of the project;
11 and

12 (3) hold at least one public meeting pursuant
13 to the Open Meetings Act dedicated to an examination of the
14 purpose of the public-private partnership and the analysis and
15 certification required pursuant to this subsection.

16 B. In a public-private partnership, the public
17 partner, and the board, with respect to public-private
18 partnership proposals that it approves, shall require, at a
19 minimum, an agreement to include provisions, as applicable,
20 that:

21 (1) specify how revenue will be collected,
22 accounted for and audited; and

23 (2) address how the public and private
24 partners will share management of the risks of the public
25 project.

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1 C. A public-private partnership agreement shall
2 include a clear statement of which partner will own any real
3 property pertaining to the public project when the project
4 reverts to the public partner based on the terms of the
5 agreement.

6 D. The term of initial agreements entered into
7 pursuant to the Public-Private Partnerships Act may be for a
8 term not to exceed fifty years, and such agreements may be
9 extended for additional terms; provided that an extension shall
10 be subject to the same review and negotiation process as the
11 original agreement.

12 E. A public-private partnership agreement shall
13 contain a provision by which the private partner expressly
14 agrees that it is prohibited from seeking injunctive or other
15 equitable relief to delay, prevent or otherwise hinder the
16 public partner or any other jurisdiction from developing,
17 constructing or maintaining a public project that was planned
18 and that would or might affect the revenue that the private
19 partner would or might derive from the public project developed
20 pursuant to the Public-Private Partnerships Act, except that
21 the agreement may provide for reasonable compensation to the
22 private partner for the adverse effect resulting from
23 development, construction and maintenance of an unplanned
24 facility that affects the public project's revenue.

25 F. The state board of finance shall approve the

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1 assignment, transfer or sale of assets or investment in a
2 public project that creates debt obligation of the public
3 partner.

4 G. A pledge of revenues or property from a public-
5 private partnership as security for financing shall not
6 constitute in any manner or to any extent a general obligation
7 of the state or local government, unless explicitly agreed to
8 by the state or local government.

9 H. Any revenue bonds issued as a result of the
10 Public-Private Partnerships Act are not general obligations of
11 the state or any local government and are not secured by or
12 payable from any money or assets of the state or any local
13 government other than the money and revenues specifically
14 pledged to the repayment of the revenue bonds.

15 SECTION 9. [NEW MATERIAL] USER FEES AT END OF AGREEMENT
16 PERIOD.--The public partner may continue or cease collection of
17 user fees after the end of the term of the public-private
18 partnership agreement, based on a determination of the public
19 project's future operations.

20 SECTION 10. [NEW MATERIAL] REVERSION OF PUBLIC PROJECT TO
21 PUBLIC PARTNER.--If the public-private partnership is
22 terminated, the powers and duties of the private partner cease,
23 except for any duties and obligations that extend beyond the
24 termination as provided in the public-private partnership
25 agreement, and the public project reverts to the public partner

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1 and shall be dedicated for public use.

2 SECTION 11. [NEW MATERIAL] MATERIAL DEFAULT--REMEDIES.--

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

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

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

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

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

18 (2) may develop and operate the public
19 project, impose user fees for the use of the public project and
20 comply with any service contracts; and

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

24 SECTION 12. [NEW MATERIAL] POLICE POWERS--VIOLATIONS OF
25 LAW.--All law enforcement officers of the state or local

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1 government have the same powers and jurisdiction within the
2 limits of the public project as they have in their respective
3 areas of jurisdiction and access to the public project at any
4 time to exercise such powers and jurisdictions.

5 SECTION 13. [NEW MATERIAL] UTILITY CROSSINGS.--Subject to
6 the requirements of federal and state laws, contractual
7 agreements and land conveyance documents, a public or private
8 partner and any utility whose facility is to be crossed or
9 relocated shall cooperate fully in planning and arranging the
10 manner of the crossing or relocation of the utility facility.

11 SECTION 14. [NEW MATERIAL] REPORT.--By November 1, 2019
12 and by November 1 of each year thereafter, the board shall
13 provide a report to the legislature regarding:

14 A. the grant and loan applications made to the
15 public-private partnership project fund and approved by the
16 board;

17 B. the public-private partnership agreements
18 reviewed by the board;

19 C. the status of the public-private partnership
20 project fund; and

21 D. any recommended changes to the Public-Private
22 Partnerships Act.

23 SECTION 15. EFFECTIVE DATE.--The effective date of the
24 provisions of this act is July 1, 2019.

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