

HOUSE BILL 264

54TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2020

INTRODUCED BY

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This document incorporates amendments that have been adopted during the current legislative session. The document is a tool to show the amendments in context and is not to be used for the purpose of amendments.

FOR THE LEGISLATIVE FINANCE COMMITTEE

AN ACT

RELATING TO PUBLIC PROJECTS; ENACTING THE PUBLIC-PRIVATE PARTNERSHIP ACT; ALLOWING PUBLIC PARTNERS TO ENTER INTO PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS TO FACILITATE PUBLIC PROJECTS; CREATING THE PUBLIC-PRIVATE PARTNERSHIP BOARD; CREATING THE PUBLIC-PRIVATE PARTNERSHIP PROJECT FUND; AUTHORIZING GRANTS, LOANS AND BONDS; PROVIDING POWERS AND DUTIES; REQUIRING REPORTS.

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

SECTION 1. [NEW MATERIAL] SHORT TITLE.--Sections 1

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through 13 of this act may be cited as the "Public-Private Partnership Act".

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

- A. "authority" means the New Mexico finance authority;
- B. "board" means the public-private partnership board;
- C. "private partner" means an individual, a foreign or domestic corporation, a general partnership, a limited liability company, a limited partnership, a joint venture, a business trust, a public benefit corporation, a nonprofit entity or other private business entity or combination thereof;
- D. "public partner" means the state or any of its branches, agencies, departments, boards, instrumentalities or institutions and all political subdivisions of the state or any of its agencies, instrumentalities and institutions, including a department, an agency, an institution of higher education, a board or a commission;
- E. "public-private partnership" means an arrangement between one or more public partners and one or more private partners for the development of a public project pursuant to the Public-Private Partnership Act;
- F. "public-private partnership agreement" means a contract between one or more public partners and one or more

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private partners in connection with the development of a public project;

G. "public project" means a public transportation facility or infrastructure or improvement to a public transportation facility, other than a toll road;

H. "revenue" means all revenue, income, earnings, user fees, lease payments or other service payments that support the development of a public project, including money received as a grant or otherwise from the federal government, a public partner or any agency or instrumentality of the federal government; and

I. "user fees" means rates, fees or other charges imposed by the public partner or the private partner for use of all or part of a public project.

SECTION 3. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS--APPROVAL REQUIREMENTS--RESTRICTIONS.--

A. In order to provide economic and administrative efficiencies in connection with the development of public projects, a public partner is authorized to enter into public-private partnership agreements.

B. Prior to entering into negotiations regarding the use of a public-private partnership agreement as a method of implementing a proposed public project, the public partner shall publish its interest in considering such an agreement, and such publication shall include a description of the scope

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of the proposed public project.

C. Prior to entering into a public-private partnership agreement, a public partner shall:

(1) undertake a cost-benefit analysis of a public-private partnership project in comparison with the traditional public-partner-managed project;

(2) determine whether the application of procurement rules applicable to the public partner would delay or increase the cost of the proposed public project;

(3) conduct a public hearing relating to the proposed public-private partnership held in accordance with the Open Meetings Act;

(4) demonstrate that the proposed public project serves an important public purpose and fulfills an important public need; and

(5) demonstrate that the proposed public project will comply with applicable state and federal law.

D. A public-private partnership agreement shall:

(1) define the roles and responsibilities of the public partners and the private partners;

(2) provide clawback or recapture provisions that protect the public investment in the event of a default on the agreement;

(3) provide a finance plan detailing the financial contributions and obligations of the public and

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private partners;

HLVMC→~~(4) require a private partner to provide guarantees, letters of credit or other acceptable forms of security, the amount of which may be less than one hundred percent of the value of the contract involved based on the determination of the public partner, or for public-private partnership agreements requiring board approval, based on the determination by the board;~~←HLVMC

HLVMC→(4) require a private partner to provide, or cause to be provided, performance and payment bonds as required pursuant to Section 13-4-18 NMSA 1978;←HLVMC

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

(6) specify how debts incurred on behalf of the public partner or private partner will be repaid;

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

(8) provide that, in the event of an uncured default, the public partner may:

(a) 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

(b) terminate the public-private

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partnership and exercise any other rights and remedies that may be available;

(9) specify the term of the public-private partnership agreement, which shall not exceed thirty years;

(10) limit a private partner from seeking injunctive or other equitable relief to in any way restrict a public partner from developing, constructing or maintaining a public project, except that the public-private partnership agreement may provide for reasonable compensation to the private partner for the adverse effect resulting from development, construction, operation and maintenance of another public project of the public partner;

(11) provide for the protection of proprietary information of the private partner;

(12) provide that operations and maintenance of a public project be performed by the public partner;

(13) provide provisions for termination of the public-private partnership agreement, including the cessation of the powers and duties of the private partner; and

(14) provide that the public project shall revert to the public partner and be dedicated for public use.

E. A public-private partnership agreement for a public project for which the cost is in excess of ten million dollars (\$10,000,000) shall not become effective until it is approved by the board pursuant to the Public-Private

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Partnership Act.

F. Within thirty days of execution by a public partner and a private partner, a copy of the fully executed public-private partnership agreement for a public project for which the cost is less than or equal to ten million dollars (\$10,000,000) shall be delivered to the board for reporting pursuant to the Public-Private Partnership Act.

SECTION 4. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP BOARD--CREATED--MEMBERSHIP.--

A. The "public-private partnership board" is created. The authority shall provide necessary administrative services to the board.

B. The nine members of the board shall be:

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

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

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

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

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

(6) four public members appointed by the New Mexico legislative council who shall have experience in

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architecture, development, engineering, public projects, project finance, public finance or bond and finance law.

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

D. The members shall select a chair, who shall be a public member and 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 5. [NEW MATERIAL] BOARD--POWERS.--The board may:

A. meet quarterly and at such other times as deemed necessary by the chair;

B. develop forms of applications for approval of public-private partnership agreements;

C. receive for reporting purposes executed public-private partnership agreements for public projects for which the cost is less than or equal to ten million dollars (\$10,000,000);

D. review and consider for approval proposed public-private partnership agreements for a public project for which the cost is in excess of ten million dollars

(\$10,000,000);

E. certify the need for the issuance of revenue bonds and refunding bonds by the authority;

F. determine the use of a public-private partnership agreement and ensure that the proposed funding mechanism is a prudent expenditure of public funds;

G. promulgate rules establishing the application process and criteria for the approval of public-private partnership agreements in accordance with the provisions of the State Rules Act;

H. make recommendations for approval to the authority of public projects seeking grants or loans from the public-private partnership project fund; and

I. take all other action necessary to implement the Public-Private Partnership Act, including entering into joint powers agreements and retaining legal counsel and experts when appropriate.

SECTION 6. [NEW MATERIAL] NEW MEXICO FINANCE AUTHORITY--
DUTIES.--The authority shall:

- A. provide staff support to the board;
- B. administer the public-private partnership project fund;
- C. develop forms of grant and loan applications for public partners seeking funds from the public-private partnership project fund;

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D. make loans and grants from the public-private partnership project fund for public projects that have been recommended for approval by the board pursuant to the Public-Private Partnership Act;

E. promulgate rules relating to the issuance of bonds for public projects;

F. upon certification by the board, issue revenue bonds and refunding bonds in accordance with the provisions of the Public-Private Partnership Act;

G. fix, revise from time to time, charge and collect fees and other charges in connection with making loans and grants from the public-private partnership project fund;

H. be compensated from the public-private partnership project fund for administrative and reimbursable costs in connection with the authority's support of the board and administration of the public-private partnership project fund; and

I. take all other action necessary to implement the Public-Private Partnership Act, including entering into joint powers agreements with other agencies.

SECTION 7. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP PROJECT FUND CREATED--STUDY GRANTS--INFRASTRUCTURE LOANS.--

A. The "public-private partnership project fund" is created within the authority. The fund consists of appropriations, payments of principal and interest on loans

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made from the fund, income from investment of the fund and any other money distributed or otherwise allocated to the fund. Balances in the fund at the end of any fiscal year shall not revert to the general fund. The fund may consist of such subaccounts as the authority deems necessary to carry out the purposes of the fund.

B. Money in the public-private partnership project fund may be used to make grants of up to seventy-five thousand dollars (\$75,000) to a public partner for the purposes of studying the costs and benefits of entering into a public-private partnership agreement for a proposed public project. A private partner shall provide funds matching the public partner's monetary obligation for the cost of the study, as required by the authority.

C. Money in the public-private partnership project fund may be used to provide loans for financing a public project through a public-private partnership agreement; provided that:

(1) the private partner shall provide funds matching the public partner's monetary obligation for the public-private partnership agreement, as provided by rule; and

(2) the public partner shall certify to the board that the public partner has taken all action necessary to approve the public-private partnership agreement and that the public-private partnership agreement contains all terms and

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conditions required by the Public-Private Partnership Act.

D. Money in the public-private partnership project fund may be used pursuant to Subsections B and C of this section only for:

- (1) grants or loans to a public partner; and
- (2) a public project for which the cost is in excess of ten million dollars (\$10,000,000).

E. Money in the public-private partnership project fund may be used for grants or loans to an Indian nation, tribe or pueblo that has entered into a partnership with a private partner for the development of a public project only if:

- (1) the cost of the public project is in excess of ten million dollars (\$10,000,000);
- (2) the agreement between the Indian nation, tribe or pueblo and the private partner is approved by the board; and
- (3) the grant or loan application is recommended for approval by the board and approved by the authority.

F. Money in the public-private partnership project fund may be used for administrative and reimbursable costs incurred by the board and by the authority.

SECTION 8. [NEW MATERIAL] APPLICABILITY OF CERTAIN OTHER LAWS.--The construction of a public project pursuant to a public-private partnership agreement is a public work for the

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purposes of the Public Works Minimum Wage Act, the Subcontractors Fair Practices Act and the Public Works Apprenticeship and Training Act.

SECTION 9. [NEW MATERIAL] REVENUE BONDING AUTHORITY.--

A. Upon certification of the board, the authority may issue revenue bonds, the pledged revenues for which shall be fees, charges, lease payments, installment sale payments or other revenue sources of a public project for any one or more of the purposes authorized by the Public-Private Partnership Act.

B. The authority may pledge irrevocably any or all of the revenue received by the authority to the payment of the interest on and principal of revenue bonds for any of the purposes authorized in the Public-Private Partnership Act.

C. In addition to the pledge of revenues to the payment of revenue bonds, the authority may grant a mortgage on a public project that has been solely financed by revenue bonds to the bondholders or a trustee for the benefit of the holders of revenue bonds.

D. Revenue in excess of the annual principal and interest due on revenue bonds secured by a pledged revenue may be accumulated in a debt service reserve account. The authority may appoint a commercial bank trust department to act as paying agent or trustee of the revenue and to administer the payment of principal of and interest on the revenue bonds.

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E. Except as otherwise provided in the Public-Private Partnership Act, revenue bonds:

(1) may have interest, principal value or any part thereof payable at intervals or at maturity as may be determined by the authority;

(2) may be subject to prior redemption at the authority's option at a time and upon terms and conditions, with or without the payment of a premium, as determined by the authority;

(3) may mature at any time not exceeding thirty years after the date of issuance;

(4) may be serial in form and maturity, may consist of one bond payable at one time or in installments or may be in another form determined by the authority;

(5) shall be sold for cash at, above or below par and at a price that results in a net effective interest rate that does not exceed the maximum permitted by the Public Securities Act and the Public Securities Short-Term Interest Rate Act; and

(6) may be sold at public or negotiated sale.

F. At a regular or special meeting, the authority may, upon receipt of a certification from the board, adopt a resolution that:

(1) declares the necessity for issuing revenue bonds;

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(2) authorizes the issuance of revenue bonds by an affirmative vote of a majority of all of the members of the authority; and

(3) designates the sources of revenues to be pledged to the repayment of the revenue bonds.

SECTION 10. [NEW MATERIAL] REFUNDING BOND AUTHORITY.--

A. Upon certification of the board, the authority may issue refunding bonds for the purpose of refinancing, paying and discharging all or any part of outstanding bonds for the:

(1) acceleration, deceleration or other modification of the payment of the outstanding bonds, including any capitalization of any interest thereon in arrears or about to become due for any period not exceeding two years from the date of the refunding bonds;

(2) reduction of interest costs or affecting other economies; or

(3) modification or elimination of restrictive contractual limitations pertaining to the issuance of additional bonds or concerning the outstanding bonds or public project relating to the outstanding bonds.

B. The authority may pledge irrevocably for the payment of interest, principal and premium, if any, on refunding bonds the appropriate pledged revenues, which may be pledged to an original issue of bonds.

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C. In addition to the pledge of revenue to the payment of refunding bonds, the authority may grant a mortgage on a public project that has been solely financed by revenue bonds to the bondholders or a trustee for the benefit of the holders of the bonds.

D. Refunding bonds may be issued separately or in combination in one series or more.

E. Refunding bonds shall be authorized by resolution. Bonds that are refunded shall be paid at maturity or on any permitted prior redemption date in the amounts, at the time and places and, if called prior to maturity, in accordance with any applicable notice provisions, all as provided in the proceedings authorizing the issuance of the refunded bonds or otherwise appertaining thereto, except for any such bond that is voluntarily surrendered for exchange or payment by the holder or owner.

F. The principal amount of the refunding bonds may exceed the principal amount of the refunded bonds and may also be less than or the same as the principal amount of the bonds being refunded if provision is duly and sufficiently made for the payment of the refunded bonds.

G. The proceeds of refunding bonds, including accrued interest and premiums appertaining to the sale of refunding bonds, shall be immediately applied to the retirement of the bonds being refunded or placed in escrow in a commercial

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bank or trust company that possesses and exercises trust powers and that is a member of the federal deposit insurance corporation.

H. Refunding bonds may bear additional terms and provisions as determined by the authority subject to the limitations in this section relating to original bond issues. Refunding bonds are not subject to the provisions of any other statute.

I. Refunding bonds:

(1) may have interest, principal value or any part thereof payable at intervals or at maturity, as determined by the authority;

(2) may be subject to prior redemption at the authority's option at a time or times and upon terms and conditions with or without payment of premium or premiums, as determined by the authority;

(3) may be serial in form and maturity or may consist of a single bond payable in one or more installments or may be in another form, as determined by the authority; and

(4) shall be exchanged for the bonds and any matured unpaid interest being refunded at not less than par or sold at public or negotiated sale at, above or below par and at a price that results in a net effective interest rate that does not exceed the maximum permitted by the Public Securities Act.

J. At a regular or special meeting, the authority

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may adopt a resolution by majority vote to authorize the issuance of the refunding bonds.

SECTION 11. [NEW MATERIAL] BONDS NOT OBLIGATION OF STATE.--All bonds or other obligations issued pursuant to the Public-Private Partnership Act are payable solely from the revenue of the authority that may be pledged to the payment of such obligations, and the bonds or other obligations shall not create an obligation, debt or liability of the state or any other of its political subdivisions. No breach of any pledge, obligation or agreement of the authority shall impose a pecuniary liability or a charge upon the general credit or taxing power of the state or any other of its political subdivisions.

SECTION 12. [NEW MATERIAL] REPORT.--By December 1, 2020, and by December 1 of each year thereafter, the board shall provide a report to the governor and the New Mexico finance authority oversight committee regarding:

- A. the grant and loan applications approved by the board;
- B. the public-private partnership agreements approved by or reported to the board;
- C. the status of the public-private partnership project fund;
- D. any certifications for the issuance of revenue or refunding bonds made by the board to the authority; and

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E. any recommended changes to the Public-Private Partnership Act.

SECTION 13. [NEW MATERIAL] CUMULATIVE AUTHORITY.--The Public-Private Partnership Act shall be deemed to provide an additional and alternative method for the doing of things authorized by that act and shall be regarded as supplemental and additional to powers conferred by other laws and shall not be regarded as in derogation of any powers now existing; provided that the issuance of bonds pursuant to the provisions of the Public-Private Partnership Act need not comply with the requirements of any other law applicable to the issuance of bonds, except the Public Securities Act, the Public Securities Short-Term Interest Rate Act and the Public Securities Limitation of Action Act, which acts shall apply.

SECTION 14. Section 13-1-98 NMSA 1978 (being Laws 1984, Chapter 65, Section 71, as amended by Laws 2019, Chapter 48, Section 13 and by Laws 2019, Chapter 63, Section 1) is amended to read:

"13-1-98. EXEMPTIONS FROM THE PROCUREMENT CODE.--The provisions of the Procurement Code shall not apply to:

A. procurement of items of tangible personal property or services by a state agency or a local public body from a state agency, a local public body or external procurement unit except as otherwise provided in Sections 13-1-135 through 13-1-137 NMSA 1978;

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B. procurement of tangible personal property or services for the governor's mansion and grounds;

C. printing and duplicating contracts involving materials that are required to be filed in connection with proceedings before administrative agencies or state or federal courts;

D. purchases of publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection services;

E. purchases of books, periodicals and training materials in printed or electronic format from the publishers or copyright holders thereof and purchases of print, digital or electronic format library materials by public, school and state libraries for access by the public;

F. travel or shipping by common carrier or by private conveyance or to meals and lodging;

G. purchase of livestock at auction rings or to the procurement of animals to be used for research and experimentation or exhibit;

H. contracts with businesses for public school transportation services;

I. procurement of tangible personal property or services, as defined by Sections 13-1-87 and 13-1-93 NMSA 1978, by the corrections industries division of the corrections department pursuant to rules adopted by the corrections

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industries commission, which shall be reviewed by the purchasing division of the general services department prior to adoption;

J. purchases not exceeding ten thousand dollars (\$10,000) consisting of magazine subscriptions, web-based or electronic subscriptions, conference registration fees and other similar purchases where prepayments are required;

K. municipalities having adopted home rule charters and having enacted their own purchasing ordinances;

L. the issuance, sale and delivery of public securities pursuant to the applicable authorizing statute, with the exception of bond attorneys and general financial consultants;

M. contracts entered into by a local public body with a private independent contractor for the operation, or provision and operation, of a jail pursuant to Sections 33-3-26 and 33-3-27 NMSA 1978;

N. contracts for maintenance of grounds and facilities at highway rest stops and other employment opportunities, excluding those intended for the direct care and support of persons with handicaps, entered into by state agencies with private, nonprofit, independent contractors who provide services to persons with handicaps;

O. contracts and expenditures for services or items of tangible personal property to be paid or compensated by

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money or other property transferred to New Mexico law enforcement agencies by the United States department of justice drug enforcement administration;

P. contracts for retirement and other benefits pursuant to Sections 22-11-47 through 22-11-52 NMSA 1978;

Q. contracts with professional entertainers;

R. contracts and expenditures for legal subscription and research services and litigation expenses in connection with proceedings before administrative agencies or state or federal courts, including experts, mediators, court reporters, process servers and witness fees, but not including attorney contracts;

S. contracts for service relating to the design, engineering, financing, construction and acquisition of public improvements undertaken in improvement districts pursuant to Subsection L of Section 3-33-14.1 NMSA 1978 and in county improvement districts pursuant to Subsection L of Section 4-55A-12.1 NMSA 1978;

T. works of art for museums or for display in public buildings or places;

U. contracts entered into by a local public body with a person, firm, organization, corporation or association or a state educational institution named in Article 12, Section 11 of the constitution of New Mexico for the operation and maintenance of a hospital pursuant to Chapter 3, Article 44

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NMSA 1978, lease or operation of a county hospital pursuant to the Hospital Funding Act or operation and maintenance of a hospital pursuant to the Special Hospital District Act;

V. purchases of advertising in all media, including radio, television, print and electronic;

W. purchases of promotional goods intended for resale by the tourism department;

X. procurement of printing, publishing and distribution services for materials produced and intended for resale by the cultural affairs department;

Y. procurement by or through the public education department from the federal department of education relating to parent training and information centers designed to increase parent participation, projects and initiatives designed to improve outcomes for students with disabilities and other projects and initiatives relating to the administration of improvement strategy programs pursuant to the federal Individuals with Disabilities Education Act; provided that the exemption applies only to procurement of services not to exceed two hundred thousand dollars (\$200,000);

Z. procurement of services from community rehabilitation programs or qualified individuals pursuant to the State Use Act;

AA. purchases of products or services for eligible persons with disabilities pursuant to the federal

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Rehabilitation Act of 1973;

BB. procurement, by either the department of health or Grant county or both, of tangible personal property, services or construction that are exempt from the Procurement Code pursuant to Section 9-7-6.5 NMSA 1978;

CC. contracts for investment advisory services, investment management services or other investment-related services entered into by the educational retirement board, the state investment officer or the retirement board created pursuant to the Public Employees Retirement Act;

DD. the purchase for resale by the state fair commission of feed and other items necessary for the upkeep of livestock;

EE. contracts entered into by the crime victims reparation commission to distribute federal grants to assist victims of crime, including grants from the federal Victims of Crime Act of 1984 and the federal Violence Against Women Act of 1994;

FF. procurement by or through the early childhood education and care department of early pre-kindergarten and pre-kindergarten services purchased pursuant to the Pre-Kindergarten Act;

GG. procurement of services of commissioned advertising sales representatives for New Mexico magazine;

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HH. agreements and contracts entered into pursuant to the Public-Private Partnership Act; and

[~~HH.~~] II. procurements exempt from the Procurement Code as otherwise provided by law."

SECTION 15. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2020.

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