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FISCAL IMPACT REPORT

ORIGINAL DATE 3/8/17

SPONSOR HLEDC LAST UPDATED _____ HB 534/HLEDCS

SHORT TITLE Public Peace, Health, Safety & Welfare SB _____

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

None on this substitute bill.

Comments on either SB-143 or HB-275

Office of State Engineer/Interstate Stream Commission (OSE/ISC)

Public School Finance Authority (PSFA)

New Mexico Municipal League

General Services Department (GSD)

Department of Finance and Administration

Conflicts with or duplicates provisions of HB-275 and SB 143; may be related to SB-418 and SB-464.

SUMMARY

Synopsis of Bill

House Labor and Economic Development Committee Substitute for House Bill 534 enacts the “Public-Private Partnership Act” (PPPA or P3A) to allow state and local governments to enter into long-term agreements with private sector partners to facilitate public projects. This substitute bill is apparently intended to be an omnibus P3 act embracing a number of allowed projects. The bill is intended to apply to virtually every conceivable project which could be jointly built and operated by a public entity operating in partnership with a private entity, except affordable housing. This list of potential projects includes:

- buildings and infrastructure that meets a public purpose and is developed or operated for a public entity;
- a building or other facility for a public school or a public post-secondary educational

- institution, including a stadium;
- a hospital or a healthcare, behavioral health, hospice or other treatment facility;
- cultural or recreational facilities, including theaters, museums, convention centers, lodging, community centers, stadiums, athletic facilities, golf courses or similar facilities;
- parking lots or garages;
- airports, railways, subways or other transportation facilities and roads;
- improvements and equipment necessary to enhance public safety and security of buildings to be principally used by a public entity;
- utility, telecommunications, broadband, energy and other communications infrastructure ancillary to the development or operation of a public project;
- infrastructure needed to conserve natural resources or generate utility savings;
- a facility or infrastructure used in connection with the byproducts of watershed restoration or hazardous fuels reduction;
- a project that involves habitat or environmental restoration, cleanup or reuse;
- dams and reservoirs;
- a sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;
- a sewerage, water, gas or other pipeline;
- a transmission line;
- a radio, television, cell or other tower;
- improvements necessary or desirable to any unimproved state-owned real estate or real estate owned by a local government;
- information technology systems and infrastructure; or
- recycling facilities or solid waste management facilities that produce electric energy derived from solid waste.

A utility does not include electric utilities and electric utility facilities that are subject to regulation by the PRC.

The proposed PPPA, also known in the economic development community as P3, excludes affordable housing projects pursuant to the Affordable Housing Act and projects that change franchise rights or territories of regulated public facilities.

The PPPA identifies the “public department” that coordinates large PPPA agreements as GSD.

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

A section-by-section description is included as an appendix.

FISCAL IMPLICATIONS

The bill could have a future impact on the general fund, and local government and federal funds.

On the original bill in this series (HB-275), GSD has concerns about budget:

The responsibilities placed upon GSD by the Public-Private Partnership Act include creating the guidelines that ensure proper adherence to State statutes. The Act calls for GSD to hire consultants as necessary to help in carrying out the duties required by the

Act. The consultants needed may be in the areas of finance, law and other highly technical fields. The funds to hire these experts have not been appropriated to GSD.”

The larger projects will require review and oversight by GSD. Funds will be needed to hire additional personnel or to reach out to contractors for assistance. This will put an additional burden on GSD financially. GSD will require additional operating revenue to assist public partners with negotiations and contracts and advise on laws, disclosures, accounting, investments, taxes and other requirements.

At the current time there is no way to estimate the cost impact to GSD, but will definitely require additional FTE on the documentation and implementation portions of the bill. The number of partnerships that may be formed in the future is unknown. The size of the public projects that may use this method will have an effect on GSD as well as the complexity of the agreements in terms of structuring the financing and any special terms and conditions.

PSFA is concerned that, “...capital outlay funds appropriated each year are not enough to keep up with the growing demand for repairs and replacement of school infrastructure and maintenance. The act would allow the state to enter into partnership to build, renovate and maintain school infrastructure. The maintenance requirement could help to ensure the building lasts its expected life.”

PSFA is equally concerned with budget implications: “... this bill does not make an appropriation, but could have a future impact on the state general fund, the PSCO fund, local government funds and federal funds. The bill provides for an administrative fee to be imposed to assist with the PPPA process. For all solicited proposals and remaining PPPA processes, the department or local governments may retain financial, legal and other experts to assist, or to solicit the expertise of state agencies, state institutions, state instrumentalities and local governments, and may receive appropriations to carry out its duties, but without making an appropriation, the department or local government’s budgets may be impacted. It is indeterminate at this time the extent of the impact.”

OSE has similar budget concerns, “...It would also require the OSE, as a state agency, to provide technical assistance, analysis, and other services to the department and local governments as required. This could include assistance from OSE staff in areas of water rights permitting, dam safety, and hydrology. Because the number of public-private partnership that may result and the type and extent of technical assistance that may be requested is unknown the OSE cannot quantify the additional fiscal impact at this time.”

SIGNIFICANT ISSUES

This bill is very similar to the Public-Private Partnership Act (PPPA) proposed this session in HB-275, in HB 299 in 2015 and HB 405 and SB 273 in 2013. However, this bill is far more expansive and extensive than these earlier bills in project area coverage.

GSD has articulated the reasons that P3s have been successful in other states and the argument in favor of this financing device for New Mexico.

The aging infrastructure and facilities in the State of New Mexico is reaching critical proportions. Capital outlay funds appropriated each year are not enough to keep up with

the growing demand for repairs and replacement of essential infrastructure, buildings and building systems. The Public-Private Partnership Act will allow the State and other governmental entities to enter into partnerships in order to build or renovate major facilities and the much needed infrastructure. At a time when funds are in short supply this method provides another approach to modernizing State and local government facilities in order to make the State better for all of its citizens and to attract more businesses to the area.

There are many advantages to the use of Public-Private Partnerships. The design, build, maintenance project can offer the benefit of a faster delivery of the end product and therefore potential cost savings. The maintenance aspect of the project can ensure that continuous and proper maintenance will be performed throughout the life of the project resulting in less overall costs. The fact that both the public and private sectors are involved in the project means that risks are spread between the two entities.

Public-Private Partnerships are new to the State of New Mexico and very complex in nature. Although these types of projects have been successfully executed in other states and with the federal government, every effort must be made to ensure that the State receives the best value for its citizens.

DFA may have administrative authority over some projects and is concerned with the exception to the Procurement Code:

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. 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. Without first undergoing a competitive procurement, 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 its 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 explicitly 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.

The Tax Increment Development Act (NMSA 5-15-2, otherwise known as the TIDD Act) provides a similar funding mechanism as is proposed under this legislation. Upon approval by the SBOF, the Tax Increment of Development Act provides state and local gross receipts tax financing and local property tax financing through revenue bonds for public infrastructure projects for the purpose of supporting private economic development and job creation. These bonds are limited to a term of 25 years and require Legislative approval. The bill contemplates project terms in excess of 35 years without legislative approval. It seems inconsistent that State debt incurred under this legislation, which allows for a greater period of indebtedness, would have a less stringent approval process than under the TIDD Act.

PERFORMANCE IMPLICATIONS

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

OTHER SUBSTANTIVE ISSUES

In its review of 2015 HB 299, SPO reports 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%20pue ntes/1208_transportation_istrate_puentes.pdf

The OSE/ISC enters into agreements with private entities on collaborative projects. The Public-Private Partnership Act would impose additional requirements in entering into these agreements, in addition to requirements to provide technical assistance, analysis and other services to the general services department and local governments as requested for their projects.

On a related bill, EDD provided the following discussion:

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.

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

OAG had the following comments relative to 2015’s HB-299:

The Procurement Code, NMSA 1978, Sections 13-1-28 to -199, applies to “every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction.” NMSA 1978, § 13-1-30. There is no mention of the Procurement Code in HB 299. Although this does not necessarily indicate a conflict, there are several areas in HB 299 that may conflict with existing law. For example, HB 299 discusses requests for proposals, as well as solicited or unsolicited proposals. This may violate the processes laid out in the Procurement Code for bidding (including sealed bids, invitation for bids, and certain contracts). *See* NMSA 1978, §§ 13-1-102 to -122.

HB 299 discusses some of the requirements for the agreements, specifically user fees. Though this does not appear to violate statutes as is; however, it is possible the user fees included in an agreement could violate statutes relating to permissible user fees (including taxing implications).

HB 299 requires these partnership agreements to contain a provision prohibiting the private party from seeking injunctive or equitable relief under certain circumstances. Forcing this provision in every partnership agreement could result in a violation of a private party’s rights under state or federal law, particularly in situations where it may be unclear whether the situation falls under the circumstances listed by the Public-Private Partnerships Act.

HB 299 deals with “public projects” and “agreements” and overlaps and may conflict with statutes involving “public works contracts” under NMSA 1978, Sections 13-4-1 to -9.

On a related bill the OAG had the following comments pertinent to HB-275.

This is essentially a version of the Public Private Partnership legislation that has been enacted in some form in 33 states. It allows for more creative approaches to getting infrastructure needs met through working with private vendors for construction in ways that the various procurement codes do not.

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 are several vague terms that could be clarified, such as referring to certain fees as “reasonable.” This would leave the term open to subjective interpretation. It may be helpful to further clarify these references or place an individual or entity (e.g the department or public partner) with authority to determine what constitutes “reasonable” under the specific circumstances.

The bill would exempt an executive summary and other documents submitted with a request for proposals under the act from inspection under the Inspection of Public Records Act. ... The proposal, except the executive summary, would then be subject to inspection after the award is issued and any challenge to the award is resolved.

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 Administrators. 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. For profit companies are generally in favor of any opportunity to streamline the contract procurement process.

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 no pledge of revenues or property constitutes a general obligation of the state or any local government, unless explicitly agreed to by the state or local government. The bill provides that revenue bonds issued as a result of the PPPA 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.

TECHNICAL ISSUES

The OSE/ISC is concerned with paragraph C of Section 10 provides that, ‘The public partner assents to any federal requirements, conditions or terms of any federal funding accepted by the public partner pursuant to this subsection.’ This language would require public agencies to assent to requirements, conditions or terms that might be contrary to or inconsistent with state law.

ALTERNATIVES

OAG suggests that a viable alternative to this bill would be to enact a subsection of the Procurement Code instead of a whole new section of law.

LG/sb

Section-by-Section Appendix

Section 1 identifies the short title of the act as the “Public-Private Partnerships Act.”

Section 2 provides definitions used in the act, including an extensive list of projects eligible for treatment as public-private partnerships.

Section 3 prohibits any project that involves the appropriation or diversion of water or the transfer of water rights.

Section 4 identifies the variety of project delivery methods that may be used in developing a public project, and requires the methods to be documented in the written agreement.

Section 5 specifies the methods that may be used to procure public projects with a private partner.

Section 6 provides restrictions on procurements but require use of residence preference and compliance with minimum wage and other provisions related to public works employment; requires operating agreements that define the roles and responsibilities of the partners; and requires the public partner or General Services Department to not approve a public project that includes building maintenance if it results in the displacement of an existing government employee.

Section 7 defines GSD duties to include developing guidelines in consultation with the OSE and others to develop a minimum set of guidelines to implement the provisions of the Act; approving public-private partnership agreements greater than \$50 million or 35 years; establishing evaluation process for considering whether projects should use public-private agreements or traditional procurement and funding methods; managing public input; encouraging competition among private entities; producing annual reports to the legislature; providing technical assistance to local governments and regional entities; retaining experts; receiving appropriations; and requiring cooperation from other public entities. Also allows GSD and local entities to hire experts and solicit the expertise of state agencies, institutions, instrumentalities and local governments to provide technical assistance, analysis and other services to GSD or a local government.

Section 8 requires GSD, before approving a project, to assist a public partner with negotiations, prepare documents, and advise on laws, disclosures, accounting, investment and tax issues.

Section 9 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 comments; safety record of the proposer; efforts to be made to retain and train New Mexico residents to support the project; use of green building methods and innovations in energy efficiency or generation; and “other criteria that the public partner and GSD deem appropriate for consideration”.

Section 10 requires an agreement to include provisions, as applicable, to authorize and address user fees; rate of return on a private partner’s investment; sharing of costs, risks, and revenue; acquisition of property; 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 public-private partnership project. This section also allows a public partner access to information from “relevant public databases for enforcement purposes.” Negligent (or fraudulent?) use of the data contained in the databases, including unauthorized disclosure of the data, shall result in a civil penalty of ten thousand dollars for each violation. This section also limits the term of an initial agreement to be 50 years and requires a clear agreement on which partner will own any real property pertaining to the public projects when the project reverts to the public partner. The section also requires that the agreement specifies that the private partner waives certain rights, including that the public partner is prohibited from seeking injunctive or other equitable relief to delay, prevent or otherwise hinder the public partner developing a competing project.

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Section 11 authorizes the use of any lawful source of public and private funding, including federal funding; allows revenues to be pledged as security; 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.

Paragraph C of Section 11 provides that, ‘The public partner assents to any federal requirements, conditions or terms of any federal funding accepted by the public partner pursuant to this subsection.’ This language may subject the public partner, which will be a state or local government agency or body, to requirements, terms or conditions that may be contrary or against state law, such as the public body indemnifying the federal government.”

Section 12 allows the public partner to continue or cease user fees at the end of the agreement.

Section 13 reverts the public project to the public partner if the partnership is terminated.

Section 14 provides remedies for default by a private partner not caused by a “force majeure.”

Section 15 provides for equal police powers within the public project’s parameters.

Section 16 mandates cooperation by partners and any utility if utility facilities are to be relocated or crossed.

Section 17 identifies the effective date as July 1, 2017.