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## FISCAL IMPACT REPORT

<b>SPONSOR</b>	House Transportation and Public Works Committee	<b>LAST UPDATED</b>	1/30/24
		<b>ORIGINAL DATE</b>	1/29/24
<b>SHORT TITLE</b>	Public Private Partnership Agreements	<b>BILL NUMBER</b>	CS/House Bill 190/HTPWCS
		<b>ANALYST</b>	Torres, J./Graeser

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\* (dollars in thousands)

Agency/Program	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	Indeterminate but minimal	Indeterminate but minimal		Recurring	Other state funds
DFA/SBOF	\$200.0	\$200.0	\$200.0	\$600.0	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent analysis of this legislation.

### Sources of Information

LFC Files

#### Original Agency Analysis Received From

New Mexico Attorney General (NMAG)  
General Services Division (GSD)  
New Mexico Finance Authority (NMFA)  
State Ethics Commission (SEC)  
Department of Transportation (NMDOT)

#### Received after Original LFC FIR

Department of Finance and Administration (DFA/BOF)

## SUMMARY

### Synopsis of HTPWC Substitute for House Bill 190

The House Transportation, Public Works and Capital Improvements Committee substitute for House Bill 190 (HB190) amends the New Mexico Procurement Code (NMPC) to add a “public-private partnership” option. This option allows state and local public bodies to enter into a hybrid “public-private partnership” that grants the private entity a “concession” to operate and profit from a public project. Board of Finance Division approval is required.

The bill defines a “public project” as including the construction of a transportation facility or infrastructure, as well as public construction of broadband and electric vehicle charging facilities. Division rules shall require that the “public-private partnership agreement” is in writing; uses public employees whenever possible; contains a fixed price; and includes limited liability standards applicable to the state issuer of the request for proposal. The division must approve the

“public-private partnership agreement,” which is also subject to the division’s rules. Section 13-1-150 NMSA 1978 is amended to include reference to “Sections 1 through 5 of this 2024 Act.”

This bill does not contain an effective date and, as a result, would go into effect 90 days after the Legislature adjourns, or May 15, 2024, if enacted.

## **FISCAL IMPLICATIONS**

HB190 requires the Board of Finance (BOF) Division of the Department of Finance and Administration (DFA) to oversee the requirements of the new section of the Procurement Code and to promulgate rules on public-private partnerships.

DFA/BOF provided the following estimated budget impact:

There are fiscal implications to the BOF’s annual operating budget related to administering this program. The bill as drafted directs the BOF to promulgate rules for review and approval of public-private partnership contracts and agreements and requires the BOF review all proposals received from solicitations. Currently the BOF Division does not have adequate staff or resources to carry out the requirements specified in the bill, including the promulgation of rules and review and oversight of proposals and agreements. SBOF would need one additional FTE and additional contractual legal support to aid in developing rules and in reviewing proposals and agreements. The current operating budget for SBOF does not include any excess to cover hiring additional FTE or contracting additional legal support. BOF would need to request a deficiency appropriation from the General Fund to cover the estimated shortfall budget of \$200 thousand annually.

SEC states:

SEC is charged with enforcement of the Procurement Code and failures to comply with the code may result in additional staff time to review, investigate, and potentially enforce the provisions of the code.

Other responding agencies did not note fiscal impacts.

## **SIGNIFICANT ISSUES**

NMAG’s analysis of the original bill states:

Article IX, Section 14 of the New Mexico Constitution (the “anti-donation clause”) generally requires public entities to receive a fair exchange for any transfer of a thing of value to a private entity. See, e.g., *State ex rel. State Engineer v. Lewis*, 2007-NMCA-008 ¶51 (finding no issue of fact as to whether the state received “market value” at the time of the transaction). Presumably, the value received by the public body for the granting of a concession would be the services provided by the private partner that would otherwise require expenditures by the public body. The fair market value of this concession is presumably ensured through the RFP procedures in Section 2 of the bill.

BOF adds it may be difficult to determine the fair market value of a concession, thereby thwarting anti-donation protections against graft or malfeasance. Also noted is a potential increase in user fees. The board states: “The market value of a concession may not equal its

value to the state and its citizens.” The analysis also discusses a potential conflict in the bill’s delegated responsibilities to the division director rather than the BOF. The agency states this may be an improper delegation of legislative authority to the executive branch due to a lack of legislative standards. Citing *Montoya v. O’Toole*, 1980-NMSC-045. The analysis also states that the bill’s broad definition of “public project” may interfere with State Personnel Board rules at 1.7.10.9 NMAC. Finally, the agency questions whether local public bodies will be given the same authority to enter into “public-private partnerships” as granted to state agencies.

NMAG further states:

Pursuant to Section 6-1-1, NMSA 1978, the Board of Finance Division (Division) of the Department of Finance and Administration (DFA) generally provides administrative support to the Board of Finance (Board). The Secretary of DFA appoints a director (Director) to the Division that will recommend Board actions. The Board ‘has general supervision of the fiscal affairs of the state,’ and is authorized to conduct whatever investigations ‘it deems necessary to perform the duties imposed upon it,’ and further enjoys broad rulemaking authority. Section 6-1-1(E), (F). The Board further has approval authority over any state sale, trade or lease of real property for a consideration greater than \$25 thousand. Section 13-6-2.1 NMSA 1978. In light of the Board’s plenary authority over fiscal matters pursuant to Section 6-1-1, conflict may arise between the Director and the Board if this bill provides exclusive approval authority to the Director. Furthermore, to the extent concessions involve a real property lease or other transaction greater than \$25,000, the concession would require Board approval regardless and result in a duplicative effort by both the Board and the Director. Finally, the Board, not the Division, currently enjoys rulemaking authority. To grant rulemaking authority to the Division rather than to the Board would presumably empower the Director to unilaterally promulgate rules without public transparency on the deliberations for such rules.

All public bodies are subject to the New Mexico Inspection of Public Records Act at 14-2-1 et seq. (IPRA). IPRA additionally directly obligates those private entities that ‘act on behalf of a public entity’ or provide services ‘that constitute a public function.’ See, *New Mexico Found. for Open Gov’t v. Corizon Health*, 2020-NMCA-014, ¶¶ 6, 26, 460 P.3d 43, 52. To the extent that the ‘Private partners’ as defined in this bill are performing a public function, those entities are likely subject to IPRA.

This bill broadly defines a ‘public project’ and otherwise presents no limitation on what public functions would be subject to privatization through a concession. To the extent the granting of a concession warrants reducing the number of that public body’s employees, such reductions in force would presumably be subject to State Personnel Board rules at 1.7.10.9 NMAC.

Many municipalities and counties voluntarily adopt the Procurement Code to govern their purchasing practices. It is unclear whether this bill intends to provide local public bodies (i.e., municipalities and counties) with the same authority to enter into ‘public-private partnerships’ that state agencies would enjoy.

GSD states:

The bill adds a “new” category to the procurement process for public-private partnership agreements which includes allowance of unsolicited bids submitted by private entities directly to an agency or local public body. It is not clear as to how these public-private

agreements would be initially determined (professional or general services) per GSD/SPD's current procurement process (§13-1-111) as well as for how long a contract can be put in place (§13-1-150). Under current procurement practices General Service agreements are handled by [State Purchasing Division] SPD and not the agency.

HB190 also suggests another competitive means of procurement based on “sealed qualifications” and “subsequent negotiation” which appears to bypass the competitive sealed proposal process §13-1-111 through §13-1-124 which is initiated by the public body, not the vendor or private entity. This ‘new’ means of procurement also appears to confuse competitive procurements with sole source procurements in that it requires posting to allow for public challenge. This proposed language could have unintentional implications in the use of term ‘proposal’ in the Procurement Code as well as create a potential to violate the Governmental Conduct Act §10-16- 13 regarding prohibited bidding.<sup>1</sup>

NMFA states:

HB190 amends the Procurement Code by adding new material that will allow public partners and private partners to enter into public private partnership (P3) agreements for public projects either through a competitive procurement process, or through an unsolicited procurement process. Unsolicited procurements require public notice if considered for approval and must follow public notice requirements depending on the size of the unsolicited procurement. The bill requires the State Board of Finance to promulgate rules to, among other things, establish when P3 agreements can be used, set minimum requirements, and receive, review and approve P3 agreements.

## **PERFORMANCE IMPLICATIONS**

NMFA states:

The intent of HB190 is to provide for a variety of public project delivery methods to be used at the discretion of a public entity under the guidelines promulgated by the State Board of Finance.

## **ADMINISTRATIVE IMPLICATIONS**

NMDOT states:

HB190 allows private partners to submit unsolicited proposals to NMDOT and Board of Finance Division. At this time, as noted above, NMDOT cannot estimate the administrative impact of this activity. NMDOT notes that public partners will have continuing project oversight obligations concerning the administration of the public-private partnership agreement, as well as possible ongoing operations and maintenance obligations for the public project once construction is complete, which may require use of dedicated FTE for the life of each public project.

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<sup>1</sup> 10-16-13. “Prohibited bidding. No state agency or local government agency shall accept a bid or proposal from a person who directly participated in the preparation of specifications, qualifications or evaluation criteria on which the specific competitive bid or proposal was based. A person accepting a bid or proposal on behalf of a state agency or local government agency shall exercise due diligence to ensure compliance with this section.”

BOF states that this bill has administrative for both the DFA and the NMAG.

NMAG provides legal support to the Board. Enactment of this legislation would have an impact on workload and responsiveness for both agencies. HB190 requires SBOF, and specifically the division and its director, to promulgate rules for reviewing and approving public-private partnership agreements. The SBOF is a small division of five staff that is supported by the NMAG for legal representation. NMAG recently lost the senior attorney that supported the Board. Due to the unforeseen changes with legal support provided by NMAG, SBOF will likely need to contract legal support to assist with this program. Currently SBOF does not have adequate resources to implement this program.

## **TECHNICAL ISSUES**

NMDOT states:

HB190 could be more clearly drafted to clarify that public-private partnership agreements are intended for use on public projects, the use of which generate user fees or other recurring operational revenue. This change may help address a concern that all opportunities to use private funding for any public project development or construction would be used pursuant to the public-private partnership agreement process.

NMDOT suggests the following amendment under definitions: “public-private partnership agreement” means a contract between one or more public partners and one or more private partners in connection with the development of a public project that generates revenue.

JT/LG/al/hg/ss