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SENATE BILL 143

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

INTRODUCED BY

Michael Padilla

AN ACT

RELATING TO PUBLIC PROJECTS; ENACTING THE NEW MEXICO
INFRASTRUCTURE INVESTMENT ACT; ALLOWING THE STATE AND LOCAL
GOVERNMENTS TO ENTER INTO LONG-TERM PARTNERSHIPS WITH PRIVATE
SECTOR PARTNERS TO FACILITATE PUBLIC PROJECTS; PROVIDING POWERS
AND DUTIES; PRESCRIBING PENALTIES.

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

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
cited as the "New Mexico Infrastructure Investment Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
New Mexico Infrastructure Investment Act:

A. "department" means the general services
department;

B. "force majeure" means an uncontrollable force or
natural disaster not within the power of a public or private

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1 partner;

2 C. "local government" means a municipality; a
3 county; or a regional entity created by a joint powers
4 agreement between one or more public agencies;

5 D. "material default" means a failure of a private
6 partner to perform any duties under a public-private
7 partnership, which failure jeopardizes delivery of adequate
8 service to the public and remains unsatisfied after a
9 reasonable time and after the private partner has received
10 written notice from the public partner of the failure;

11 E. "private partner" means one or more persons who
12 have entered into a public-private partnership with a public
13 partner and who are not the federal government or any agency or
14 instrumentality of the federal government; another state or
15 territory of the United States; a sovereign or foreign
16 government; or the state or an agency, branch, institution,
17 instrumentality or political subdivision of the state;

18 F. "public partner" means a local government, state
19 agency, state institution or an instrumentality of the state;

20 G. "public-private partnership" means an agreement
21 between one or more public partners and one or more private
22 partners for the design, development, financing, construction,
23 operation or maintenance of a public project;

24 H. "public project":

25 (1) means:

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1 (a) a building or other facility and
2 infrastructure, except affordable housing pursuant to the
3 Affordable Housing Act, that meets a public purpose and is
4 developed or operated for a public entity;

5 (b) utility, telecommunications,
6 broadband, energy and other communications infrastructure that
7 is ancillary to the development or operation of a public
8 project;

9 (c) infrastructure needed to conserve
10 natural resources or generate utility savings;

11 (d) a project that involves conservation
12 of natural resources; generation of utility savings; habitat or
13 environmental restoration, cleanup or reuse; or recycling
14 facilities or solid waste management facilities that produce
15 electric energy derived from solid waste; or

16 (e) improvements necessary or desirable
17 to any unimproved state-owned or locally owned real estate; and

18 (2) does not include a project that changes
19 the franchise rights or territory of a regulated public
20 utility;

21 I. "user fee" means a rate, fee or other charge
22 imposed by a partner for use of all or part of a public
23 project; and

24 J. "utility" means a privately, publicly or
25 cooperatively owned line, facility or system for producing,

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1 transmitting or distributing communications, cable television,
2 power, electricity, light, heat, gas, oil, crude products,
3 water, steam, waste, storm water not connected with highway
4 drainage or any other similar commodity, including a fire or
5 police signal system or street lighting system, which directly
6 or indirectly serves the public; but "utility" does not include
7 electric utilities and electric utility facilities that are
8 subject to regulation by the public regulation commission.

9 SECTION 3. [NEW MATERIAL] PROJECT DELIVERY METHODS--
10 PROPOSALS.--A public partner may provide for the development of
11 a public project using a variety of project delivery methods,
12 which methods shall be documented in written agreements. The
13 methods may include:

- 14 A. predevelopment agreements leading to other
15 implementing agreements;
- 16 B. design-build agreements;
- 17 C. design-build-finance agreements;
- 18 D. construction manager at risk;
- 19 E. agreements that provide for the private partner
20 to design, build, manage, maintain, operate or lease a public
21 project; or
- 22 F. other project delivery methods or agreements or
23 combination of methods or agreements that the public partner
24 determines is most advantageous to the public interest.

25 SECTION 4. [NEW MATERIAL] PROJECT DEVELOPMENT--

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1 PROCUREMENT.--

2 A. A public partner may:

3 (1) procure a public project using any of the
4 following:

5 (a) a request for proposals in which the
6 public partner describes a class of public project or a
7 geographic area in which a person is invited to submit a
8 proposal to develop a public project;

9 (b) a solicitation using a request for
10 qualifications, short-listing of qualified proposers, a request
11 for proposals, negotiations or other procurement procedures;

12 (c) a procurement seeking development
13 and finance plans that are most advantageous to the public
14 partner and suitable for the public project;

15 (d) a best-value selection procurement
16 based on price or a financial proposal, or both, or other
17 factors; and

18 (e) other procedures that the public
19 partner determines may further the implementation of the New
20 Mexico Infrastructure Investment Act; and

21 (2) consider an unsolicited proposal if the
22 public partner determines that there is sufficient merit to
23 pursue the unsolicited proposal and a reasonable opportunity
24 for other persons to submit competing proposals for
25 consideration.

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1 B. For a procurement in which the public partner
2 issues a request for qualifications or similar solicitation
3 document or following a public partner's decision to consider
4 an unsolicited proposal, the public partner shall issue a
5 request that generally sets forth the factors that will be
6 evaluated and the manner in which responses will be evaluated.

7 C. In evaluating proposals, the public partner and
8 the department, if required, shall:

9 (1) consider a range of factors deemed
10 appropriate to obtain the best value for the state or local
11 government; and

12 (2) require specific justification and support
13 for a proposal that may affect:

14 (a) public employees' employment; or

15 (b) the cost of public service delivery.

16 D. The public partner may charge and retain a
17 reasonable administrative fee for the evaluation of an
18 unsolicited proposal and for the cost of experts that are
19 consulted pursuant to Subsection E of this section; provided
20 that the administrative fee shall not exceed the reasonable
21 cost of evaluating the proposal.

22 E. The public partner shall consult with in-house
23 or contracted financial, legal or other experts to assist in
24 the evaluation, negotiation and development of a public-private
25 partnership agreement for a public project.

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1 F. If contractor insurance is required for services
2 procured pursuant to this section, the insurance shall be
3 placed with an insurer authorized to transact insurance in New
4 Mexico or with a surplus lines insurer approved by the office
5 of superintendent of insurance or its successor agency.

6 G. Before a public-private partnership is formed,
7 the public partner shall hold at least one public hearing and
8 may hold additional public hearings, all of which shall be
9 preceded by at least thirty days' notice.

10 H. A request for proposals issued pursuant to the
11 New Mexico Infrastructure Investment Act shall require the
12 proposer to include with its proposal an executive summary
13 covering the major elements of its proposal that do not address
14 the proposer's price, financing plan or other confidential or
15 proprietary information or trade secrets that the proposer
16 intends to be exempt from disclosure. The executive summary
17 shall be subject to release and disclosure to the public at any
18 time. Notwithstanding other provisions of law, to maximize
19 competition, no part of a proposal or other formal procurement
20 or evaluation document, other than the executive summary, shall
21 be subject to release or disclosure by the public partner
22 before the public-private partnership award is made and before
23 the conclusion of any challenge to the award, absent an
24 administrative or judicial order requiring release or
25 disclosure. After the public-private partnership is awarded

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1 and after the conclusion of any challenge to the award, the
2 Inspection of Public Records Act applies to any release of any
3 part of the proposal. An unsolicited proposal shall contain an
4 executive summary and shall be afforded the same protections as
5 a solicited proposal.

6 I. A solicited or unsolicited proposer shall
7 identify those portions of a proposal or other submission that
8 the proposer, with the public partner's concurrence, considers
9 to be a trade secret or confidential commercial, financial or
10 proprietary information. For trade secrets and confidential
11 and proprietary information to be exempt from disclosure, the
12 proposer must do all of the following:

13 (1) invoke exclusion upon submission of the
14 information or materials for which protection is sought;

15 (2) identify with conspicuous labeling the
16 information or materials for which protection is sought;

17 (3) state the reasons why protection is
18 necessary; and

19 (4) fully comply with any applicable state law
20 with respect to information or materials that the proposer
21 contends should be exempt from disclosure.

22 SECTION 5. [NEW MATERIAL] PROCUREMENTS--RESTRICTIONS.--

23 A. The resident preferences provided in Sections
24 13-1-21 and 13-1-22 NMSA 1978 apply to procurements pursuant to
25 the New Mexico Infrastructure Investment Act. The construction

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1 of a public project is a public works for the purposes of the
2 Public Works Minimum Wage Act, the Subcontractors Fair Practice
3 Act, any other provisions of Chapter 13, Article 4 NMSA 1978
4 and the Public Works Apprentice and Training Act.

5 B. Before it may be awarded, every public-private
6 partnership shall include an operating agreement that defines
7 the roles and responsibilities of the partners. A private
8 partner may require that a public project be operated and
9 maintained to the private partner's standards and
10 specifications as set out in the agreement.

11 C. If a public project includes building
12 maintenance, as to the maintenance activities, the public
13 partner or department shall not approve a project that replaces
14 an existing public employee unless the employee is offered
15 alternate equivalent employment.

16 SECTION 6. [NEW MATERIAL] DEPARTMENT--POWERS AND DUTIES--
17 ASSISTANCE WITH DUTIES.--

18 A. The department shall:

19 (1) in consultation with the state purchasing
20 agent, the New Mexico finance authority, the economic
21 development department, the department of finance and
22 administration, the office of the state engineer and any other
23 person that the department deems necessary, develop a minimum
24 set of guidelines to implement the provisions of the New Mexico
25 Infrastructure Investment Act, including guidelines on the

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1 process that the department shall follow with respect to those
2 public-private partnership agreements that the department is
3 required to review and approve and the information that is
4 required to be included in a proposal's executive summary;

5 (2) before a public-private partnership may be
6 established, review and approve all public-private partnership
7 agreements that include:

8 (a) a total public project cost that is
9 greater than fifty million dollars (\$50,000,000); or

10 (b) a public-private partnership term
11 that is longer than thirty-five years;

12 (3) in evaluating public-private partnership
13 agreements, consider whether projects should be developed as
14 public-private partnerships or using traditional procurement
15 and funding methods;

16 (4) manage public communication and education,
17 including public hearings, regarding the scope, cost and
18 impacts of proposed public-private partnerships to maximize the
19 opportunity for public input on proposals;

20 (5) promote the New Mexico Infrastructure
21 Investment Act to encourage maximum competition among private
22 entities to pursue the development and operation of public
23 projects;

24 (6) serve as a resource for the legislature
25 and its staff regarding the policy and financial impacts of

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1 public project proposals and the implications of proposed or
2 pending public project agreements on the state's credit or
3 other obligations;

4 (7) provide technical assistance to local
5 governments and regional entities on the use of public-private
6 partnerships to meet their needs; and

7 (8) with respect to public-private partnership
8 agreements that the department is required to review and
9 approve, on or before December 1 of each year, submit a report
10 to the legislature on any proposed or pending agreements and
11 any agreements completed during the preceding year. The report
12 shall specifically name each proposed, pending or completed
13 public project and include a summary of the project, a
14 description of the project's scope and finance plan and the
15 status of any related permitting or land acquisition under way.

16 B. The department or a local government may:

17 (1) as necessary, retain financial, legal and
18 other experts to assist it in carrying out its duties pursuant
19 to the New Mexico Infrastructure Investment Act, including
20 assistance with the review of public-private partnership
21 agreements;

22 (2) solicit the expertise of state agencies,
23 state institutions, state instrumentalities and local
24 governments to assist the department or local government in
25 carrying out its duties pursuant to the New Mexico

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1 Infrastructure Investment Act, including reviewing public-
2 private partnership proposals; and

3 (3) receive appropriations and money from any
4 other source, including other state agencies or local
5 governments, regional organizations or the federal government,
6 to carry out its duties pursuant to the New Mexico
7 Infrastructure Investment Act.

8 C. All state agencies, state institutions, state
9 instrumentalities and local governments, as appropriate, shall
10 cooperate with the department or a local government and assist
11 it in carrying out its duties by providing technical
12 assistance, analysis and other services as requested by the
13 department or local government.

14 SECTION 7. [NEW MATERIAL] DEPARTMENT--ADVICE AND
15 ASSISTANCE--REVIEW AND APPROVAL OF AGREEMENTS.--With respect to
16 public-private partnership agreements that the department is
17 required to review and approve, and before approving a public-
18 private partnership, the department shall:

19 A. assist the public partner in negotiating
20 agreements;

21 B. assist the public partner in preparing any
22 documents related to a specific agreement;

23 C. identify, and advise the public partner
24 regarding, any relevant federal securities or other laws and
25 related disclosure requirements; and

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1 D. identify, and advise the public partner
2 regarding, accounting, investment and tax requirements
3 applicable to the specific public project.

4 **SECTION 8. [NEW MATERIAL] EVALUATION CRITERIA.**--Before
5 entering into a public-private partnership, a public partner
6 and the department, if required, shall consider:

7 A. the ability of the public project to meet the
8 needs of the community in which it is to be located, including
9 improving and streamlining services to the public; providing or
10 enhancing educational, cultural and recreational opportunities;
11 promoting economic growth or job creation; or otherwise serving
12 a public purpose;

13 B. the proposed cost and financial plan for the
14 public project;

15 C. the performance benchmarks contained in the
16 proposal;

17 D. the estimated operating costs of the public
18 project;

19 E. the financial commitment of the private partner;

20 F. risk associated with the project's proposed
21 financing;

22 G. the general reputation, qualifications, industry
23 experience and financial capacity of the proposer;

24 H. the compatibility of the public project with
25 local and regional land and water plans or other infrastructure

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1 plans;

2 I. the feasibility and proposed design and
3 management of the public project;

4 J. the degree of innovation; efficiency; and
5 technical, scientific, technological and socioeconomic merit of
6 the proposal;

7 K. comments from potential users, local citizens,
8 affected jurisdictions and other interested persons;

9 L. benefits to the public, including improvements
10 in economic growth, job creation, public safety and quality of
11 life;

12 M. the proposer's safety record;

13 N. efforts to be made through the public-private
14 partnership to retain and train New Mexico residents in
15 occupations and professions related to planning, design,
16 construction, project management, general management,
17 administration, legal, accounting and other areas of the public
18 project over the life of the public-private partnership;

19 O. the proposer's commitment to use New Mexico
20 building materials and manufactured goods and local services to
21 the extent possible;

22 P. green building design and construction
23 certification by a nationally recognized organization;

24 Q. innovations in energy efficiency or generation;

25 and

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1 R. other criteria that the public partner and the
2 department deem appropriate for consideration.

3 SECTION 9. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP
4 AGREEMENTS--REQUIREMENTS--PENALTIES.--

5 A. The public partner, and the department with
6 respect to public-private partnership proposals that it
7 reviews, shall require a public-private partnership agreement
8 to include provisions that:

9 (1) if applicable, authorize the public
10 partner or the private partner to establish and collect user
11 fees, rents, advertising and sponsorship charges, service
12 charges or other charges allowed in the agreement, including
13 provisions that:

14 (a) specify how revenue will be
15 collected, accounted for and audited;

16 (b) establish circumstances under which
17 the public partner may receive all or a share of revenue from
18 such charges; and

19 (c) govern enforcement of user fees,
20 including provisions for the use of cameras or other mechanisms
21 to ensure that users are identified and notified of fees owed
22 and provisions that allow the private partner access to
23 relevant public databases for enforcement purposes. Negligent
24 use of data contained in such public databases, including
25 unauthorized disclosure of the data, shall result in a civil

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1 penalty of ten thousand dollars (\$10,000) for each violation;

2 (2) if user fees and other charges are
3 provided for, require a maximum negotiated rate of return on
4 the private partner's investment, including:

5 (a) fees and charges that may be
6 collected directly by the private partner or a third party
7 engaged by the private partner for that purpose;

8 (b) a formula for the adjustment of user
9 fees and other charges during the term of the public-private
10 partnership;

11 (c) for an agreement that does not
12 include a formula described in Subparagraph (b) of this
13 paragraph, provisions regulating the private partner's return
14 on investment; or

15 (d) other strategies that the public
16 partner or the department deems appropriate;

17 (3) if applicable, allow for payments to be
18 made by the public partner to the private partner, including
19 availability payments or performance-based payments;

20 (4) if applicable, allow the public partner to
21 accept payments from and share revenue with the private
22 partner;

23 (5) describe how the public and private
24 partners will share management of the risks of the public
25 project;

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1 (6) specify how the public and private
2 partners will share the costs of development of the public
3 project;

4 (7) allocate financial responsibility for cost
5 overruns to the partner or partners that are responsible for
6 the cost overruns;

7 (8) establish the damages to be assessed for a
8 partner's nonperformance;

9 (9) establish performance criteria or
10 incentives, or both;

11 (10) address the acquisition of property
12 interests that may be required, including provisions that allow
13 the public or private partner to acquire real property,
14 including acquisition by exchange of other real property that
15 is owned by the state, a local government or the federal
16 government;

17 (11) establish recordkeeping, accounting and
18 auditing standards to be used for the public project;

19 (12) establish how the condition and
20 maintenance level of a public project will be measured and
21 require a public project to meet a condition and maintenance
22 level measurement of eighty-five percent when the public
23 project reverts to the public partner;

24 (13) for a public project with a term that is
25 longer than twenty-five years, address responsibility for

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1 reconstruction or renovations that are required so that the
2 public project meets all applicable government standards before
3 the public project reverts to the public partner;

4 (14) provide for responsibilities for law
5 enforcement on public projects;

6 (15) identify public partner specifications
7 that must be satisfied, including provisions allowing the
8 private partner to request and receive authorization to deviate
9 from the specifications on a showing satisfactory to the public
10 partner that the deviation is necessary;

11 (16) require a private partner to provide,
12 either directly or through the principal contractor who is in
13 charge of the project, performance and payment bonds as
14 required by Section 13-4-18 NMSA 1978 for those components of a
15 public project that involve construction. For components that
16 do not involve construction, require parent company guarantees,
17 letters of credit or other acceptable forms of security or a
18 combination of any of these, 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
21 department's determination of what is required to adequately
22 protect the public partner, made on a project-by-project basis;

23 (17) provide clawback or recapture provisions
24 that protect public investment in the public project; and

25 (18) specify dispute resolution procedures to

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1 be followed and remedies available to the partners.

2 B. The public-private partnership agreement shall
3 include a clear statement of when a public project will revert
4 to the public partner and which partner will own any real
5 property pertaining to the public project when the project
6 reverts to the public partner based on the terms of the
7 agreement.

8 C. The term of initial agreements entered into
9 pursuant to the New Mexico Infrastructure Investment Act may be
10 for a term not to exceed fifty years, and such agreements may
11 be extended for additional terms; provided that an extension
12 shall be subject to the same review and negotiation process as
13 the original agreement.

14 D. The public-private partnership agreement shall
15 contain a provision by which the private partner expressly
16 agrees that it is prohibited from seeking injunctive or other
17 equitable relief to delay, prevent or otherwise hinder the
18 public partner or any other jurisdiction from developing,
19 constructing or maintaining a public project that was planned
20 and that would or might affect the revenue that the private
21 partner would or might derive from the public project developed
22 pursuant to the New Mexico Infrastructure Investment Act,
23 except that the agreement may provide for reasonable
24 compensation to the private partner for the adverse effect
25 resulting from development, construction and maintenance of an

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1 unplanned facility that affects the public project's revenue.

2 E. The state board of finance shall approve the
3 assignment, transfer or sale of assets or investment in a
4 public project.

5 SECTION 10. [NEW MATERIAL] FUNDING AND FINANCING.--

6 A. Any lawful source of funding may be used for the
7 development or management of a public project, including:

8 (1) proceeds of grant anticipation revenue
9 bonds, private activity bonds, revenue bonds or other bonds
10 allowed by federal or state law;

11 (2) grants, loans, loan guarantees, lines of
12 credit, revolving lines of credit or other arrangements as
13 allowed by federal or state law;

14 (3) other federal, state or local revenues;

15 (4) user fees, lease payments, availability
16 payments, gross or net receipts from sales, proceeds from the
17 sale of development rights, franchise charges, permit charges,
18 advertising and sponsorship charges, service charges or any
19 other lawful form of consideration; and

20 (5) other available forms of public and
21 private capital.

22 B. As security for the payment of financing
23 described in this section, the revenues from a public project
24 may be pledged, but no pledge of revenues or property
25 constitutes in any manner or to any extent a general obligation

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1 of the state or local government, unless explicitly agreed to
2 by the state or local government. Financing may be structured
3 on a senior, parity or subordinate basis to any other
4 financing.

5 C. The public partner may accept money from the
6 United States or any of its agencies to carry out the
7 provisions of the New Mexico Infrastructure Investment Act,
8 whether the money is made available by grant, loan or other
9 financing arrangement. The public partner assents to any
10 federal requirements, conditions or terms of any federal
11 funding accepted by the public partner pursuant to this
12 subsection. The public partner may enter into agreements or
13 other arrangements with the United States or any of its
14 agencies as may be necessary to carry out the provisions of
15 that act.

16 D. The public partner may accept from any source
17 any grant, donation, gift, conveyance of land, other real or
18 personal property or other thing of value made to the public
19 partner for the purposes of a public project.

20 E. A public project may be funded in whole or in
21 part by contributions of money or property made by a private
22 person, a private entity or the state or any agency,
23 institution, instrumentality or political subdivision of the
24 state.

25 F. Federal, state and local money may be combined

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1 with private sector money for public project purposes as
2 allowed by law or by the provisions of a grant, gift or
3 donation.

4 G. Any revenue bonds issued as a result of the New
5 Mexico Infrastructure Investment Act are not general
6 obligations of this state or any local government and are not
7 secured by or payable from any money or assets of the state or
8 any local government other than the money and revenues
9 specifically pledged to the repayment of the revenue bonds.

10 SECTION 11. [NEW MATERIAL] USER FEES AT END OF AGREEMENT
11 PERIOD.--The public partner may continue or cease collection of
12 user fees after the end of the term of the public-private
13 partnership agreement, based on a determination of the public
14 project's future operations.

15 SECTION 12. [NEW MATERIAL] REVERSION OF PUBLIC PROJECT TO
16 PUBLIC PARTNER.--If a public-private partnership is terminated,
17 the powers and duties of the private partner cease, except for
18 any duties and obligations that extend beyond the termination
19 as provided in the public-private partnership agreement, and
20 the public project reverts to the public partner and shall be
21 dedicated for public use.

22 SECTION 13. [NEW MATERIAL] MATERIAL DEFAULT--REMEDIES.--

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

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

5 (2) terminate the public-private partnership
6 and exercise any other rights and remedies that may be
7 available.

8 B. If the public partner elects to take over a
9 public project pursuant to Subsection A of this section, the
10 public partner:

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

13 (2) may develop and operate the public
14 project, impose user fees for the use of the public project and
15 comply with any service contracts; and

16 (3) may solicit proposals for the maintenance
17 and operation of the public project as provided in the New
18 Mexico Infrastructure Investment Act for original proposals.

19 SECTION 14. [NEW MATERIAL] POLICE POWERS--VIOLATIONS OF
20 LAW.--State or local government law enforcement officers have
21 the same powers and jurisdiction within the limits of the
22 public project as they have in their respective areas of
23 jurisdiction and access to the public project at any time to
24 exercise such powers and jurisdictions.

25 SECTION 15. [NEW MATERIAL] UTILITY CROSSINGS.--Subject to

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1 the requirements of federal and state laws, contractual
2 agreements and land conveyance documents, a public or private
3 partner and any utility whose facility is to be crossed or
4 relocated shall cooperate fully in planning and arranging the
5 manner of the crossing or relocation of the utility facility.

6 SECTION 16. [NEW MATERIAL] PENALTIES.--A person who fails
7 to pay a user fee required for the privilege of using property
8 included in a public project is guilty of a petty misdemeanor
9 and shall be sentenced as provided in Section 31-19-1 NMSA
10 1978.

11 SECTION 17. EFFECTIVE DATE.--The effective date of the
12 provisions of this act is July 1, 2017.