

JAN 19 2007

A BILL FOR AN ACT

RELATING TO TRANSPORTATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 **"CHAPTER**

5 **HAWAII PUBLIC-PRIVATE TRANSPORTATION ACT**

6 § -1 **Title.** This chapter may be cited as the "Hawaii
7 Public-Private Transportation Act."

8 § -2 **Definitions.** As used in this chapter, unless the
9 context requires a different meaning:

10 "Affected jurisdiction" means any county in which all or a
11 portion of a qualifying transportation facility is located and
12 any other responsible public entity directly affected by the
13 qualifying transportation facility.

14 "Asset management" means a systematic process of operating
15 and maintaining the state system of highways by combining
16 engineering practices and analyses with sound business practices
17 and economic theory to achieve cost-effective outcomes.



1 "Comprehensive agreement" means the comprehensive agreement
2 between the private entity and the responsible public entity
3 required by section -10.

4 "Concession" means any lease, license, franchise, easement,
5 or other binding agreement transferring rights for the use or
6 control, in whole or in part, of a qualifying transportation
7 facility by a responsible public entity to a private entity for
8 a definite term during which the private entity provides
9 transportation-related services including, but not limited to,
10 operations and maintenance, revenue collection, toll-collection
11 enforcement, design, construction, and other activities that
12 enhance throughout, reduce congestion, or otherwise manage the
13 facility in return for the right to receive all or a portion of
14 the revenues of the qualifying transportation facility.

15 "Concession payment" means a payment from a private entity
16 to a responsible public entity in connection with the
17 development or operation, or both, of a qualifying
18 transportation facility pursuant to a concession.

19 "Department" means the department of transportation.

20 "Develop" or "development" means to plan, design, develop,
21 finance, lease, acquire, install, construct, or expand.



1 "Interim agreement" means an agreement, including a
2 memorandum of understanding or binding preliminary agreement,
3 between the private entity and the responsible public entity
4 that provides for completion of studies and any other activities
5 to advance the development or operation, or both, of a
6 qualifying transportation facility.

7 "Material default" means any default by the private entity
8 in the performance of its duties under section -9(e) that
9 jeopardizes adequate service to the public from a qualifying
10 transportation facility and remains unremedied after the
11 responsible public entity has provided notice to the private
12 entity and a reasonable cure period has elapsed.

13 "Multimodal transportation facility" means a transportation
14 facility consisting of multiple modes of transportation.

15 "Operate" or "operation" means to finance, maintain,
16 improve, equip, modify, repair, or operate.

17 "Private entity" means any natural person, corporation,
18 general partnership, limited liability company, limited
19 partnership, joint venture, business trust, public benefit
20 corporation, non-profit entity, or other business entity.



1 "Public entity" means the State and any state agency or
2 authority or any county but shall not include any public service
3 company.

4 "Qualifying transportation facility" means one or more
5 transportation facilities developed or operated, or both, by a
6 private entity pursuant to this chapter.

7 "Responsible public entity" means a public entity,
8 including county governments, that has the power to develop or
9 operate, or both, the qualifying transportation facility.

10 "Revenues" means all revenues, including, but not limited
11 to, income, earnings, user fees, lease payments, allocations,
12 federal, state, and county appropriations or the appropriations
13 or other funds available to any political subdivision,
14 authority, or instrumentality thereof, bond proceeds, equity
15 investments, or service payments arising out of or in connection
16 with supporting the development or operation, or both, of a
17 qualifying transportation facility, including without
18 limitation, money received as grants or otherwise from the
19 federal government, from any public entity, or from any agency
20 or instrumentality of the foregoing in aid of the facility.

21 "Service contract" means a contract entered into between a
22 public entity and the private entity pursuant to section -6.



1 "Service payments" means payments to the private entity in
2 connection with the development or operation, or both, of a
3 qualifying transportation facility pursuant to a service
4 contract.

5 "Transportation facility" means any road, bridge, tunnel,
6 overpass, ferry, airport, mass transit facility, vehicle parking
7 facility, port facility, or similar commercial facility used for
8 the transportation of persons or goods, together with any
9 buildings, structures, parking areas, appurtenances, and other
10 property needed to operate such facility; however, a commercial
11 or retail use or enterprise not essential to the transportation
12 of persons or goods shall not be a "transportation facility".

13 "User fees" mean the rates, tolls, fees, or other charges
14 imposed by the private entity for use of all or a portion of a
15 qualifying transportation facility pursuant to the interim or
16 comprehensive agreement.

17 § -3 Policy. (a) The legislature finds that:

- 18 (1) There is a public need for timely development or
19 operation, or both, of transportation facilities
20 within the State that address the needs identified by
21 the appropriate state or county transportation plan by
22 improving safety, reducing congestion, increasing



1 capacity, and enhancing economic efficiency and that
2 the public need may not be wholly satisfied by
3 existing methods of procurement in which qualifying
4 transportation facilities are developed or operated,
5 or both;

6 (2) The public need may not be wholly satisfied by
7 existing ways in which transportation facilities are
8 developed or operated, or both; and

9 (3) Authorizing private entities to develop or operate, or
10 both, one or more transportation facilities may result
11 in the development or operation, or both, of
12 transportation facilities for the public in a more
13 timely, more efficient, or less costly fashion,
14 thereby serving the public safety and welfare.

15 (b) An action, other than the approval of the responsible
16 public entity under section -5, shall serve the public
17 purpose of this chapter if the action, including undertaking a
18 concession, facilitates the timely development or operation, or
19 both, of a qualifying transportation facility.

20 (c) It is the intent of this chapter, among other things,
21 to encourage investment in the State by private entities that
22 facilitates the development or operation, or both, of



1 transportation facilities. Accordingly, public and private
2 entities may have the greatest possible flexibility in
3 contracting with each other for the provision of the public
4 services that are the subject of this chapter.

5 (d) This chapter shall be liberally construed in
6 conformity with the purposes hereof.

7 § -4 **Prerequisite for operation.** Any private entity
8 seeking authorization under this chapter to develop or operate,
9 or both, a transportation facility shall first obtain approval
10 of the responsible public entity under section -5. The
11 private entity may initiate the approval process by requesting
12 approval pursuant to section -5(a) or the responsible public
13 entity may request proposals pursuant to section -5(b).

14 § -5 **Approval by the responsible public entity.** (a) A
15 private entity may request approval by the responsible public
16 entity. Any such request shall be accompanied by the following
17 material and information, unless waived by the responsible
18 public entity in its guidelines or other instructions given, in
19 writing, to the private entity with respect to the
20 transportation facility or facilities that the private entity
21 proposes to develop or operate, or both, as a qualifying
22 transportation facility:



- 1 (1) A topographic map (1:2,000 or other appropriate scale)
2 indicating the location of the transportation facility
3 or facilities;
- 4 (2) A description of the transportation facility or
5 facilities, including the conceptual design of the
6 facility or facilities and all proposed
7 interconnections with other transportation facilities;
- 8 (3) The proposed date for development or operation, or
9 both, of the transportation facility or facilities
10 along with an estimate of the life-cycle cost of the
11 transportation facility as proposed;
- 12 (4) A statement setting forth the method by which the
13 private entity proposes to secure any property
14 interests required for the transportation facility or
15 facilities;
- 16 (5) Information relating to the current transportation
17 plans, if any, of each affected jurisdiction;
- 18 (6) A list of all permits and approvals required for
19 developing or operating improvements to the
20 transportation facility or facilities from county,
21 state, or federal agencies and a projected schedule
22 for obtaining those permits and approvals;



- 1 (7) A list of public utility facilities, if any, that will
2 be crossed by the transportation facility or
3 facilities and a statement of the plans of the private
4 entity to accommodate such crossings;
- 5 (8) A statement setting forth the private entity's general
6 plans for developing or operating, or both, the
7 transportation facility or facilities, including
8 identification of any revenue, public or private, or
9 proposed debt or equity investment or concession
10 proposed by the private entity;
- 11 (9) The names and addresses of the persons who may be
12 contacted for further information concerning the
13 request;
- 14 (10) Information on how the private entity's proposal will
15 address the needs identified in the appropriate state
16 or county transportation plan by improving safety,
17 reducing congestion, increasing capacity, and
18 enhancing economic efficiency; and
- 19 (11) Any additional material and information that the
20 responsible public entity may reasonably request
21 pursuant to its guidelines or other written
22 instructions.



1 (b) The responsible public entity may request proposals
2 from private entities for the development or operation, or both,
3 of transportation facilities. The responsible public entity
4 shall not charge a fee to cover the costs of processing,
5 reviewing, and evaluating proposals received in response to
6 these requests.

7 (c) The responsible public entity may grant approval of
8 the development or operation, or both, of the transportation
9 facility or facilities as a qualifying transportation facility
10 if the responsible public entity determines that it serves the
11 public purpose of this chapter. The responsible public entity
12 may determine that the development or operation, or both, of the
13 transportation facility or facilities as a qualifying
14 transportation facility serves a public purpose if:

15 (1) There is a public need for the transportation facility
16 or facilities the private entity proposes to develop
17 or operate, or both, as a qualifying transportation
18 facility;

19 (2) The transportation facility or facilities and the
20 proposed interconnections with existing transportation
21 facilities and the private entity's plans for
22 development or operation, or both, of the qualifying



1 transportation facility or facilities are reasonable,
2 in the opinion of the responsible public entity, and
3 will address the needs identified in the appropriate
4 state or county transportation plan by improving
5 safety, reducing congestion, increasing capacity, and
6 enhancing economic efficiency;

7 (3) The estimated cost of developing or operating, or
8 both, the transportation facility or facilities is
9 reasonable in relation to similar facilities; and

10 (4) The private entity's plans will result in the timely
11 development or operation, or both, of the
12 transportation facility or facilities or their more
13 efficient operation.

14 In evaluating any request, the responsible public entity
15 may rely upon internal staff reports prepared by personnel
16 familiar with the operation of similar facilities or the advice
17 of outside advisors or consultants having relevant experience.

18 (d) The responsible public entity may charge a reasonable
19 fee to cover the costs of processing, reviewing, and evaluating
20 the request submitted by a private entity pursuant to subsection
21 (a), including, without limitation, reasonable attorney's fees
22 and fees for financial and other necessary advisors or



1 consultants. The responsible public entity shall also develop
2 guidelines that establish the process for the acceptance and
3 review of a proposal from a private entity pursuant to
4 subsections (a) and (b). The guidelines shall establish:

5 (1) A specific schedule for review of the proposal by the
6 responsible public entity;

7 (2) A process for alteration of that schedule by the
8 responsible public entity if it deems that changes are
9 necessary because of the scope or complexity of
10 proposals it receives;

11 (3) The process for receipt and review of competing
12 proposals; and

13 (4) The type and amount of information that is necessary
14 for adequate review of proposals in each stage of
15 review.

16 The guidelines shall provide for a prioritized documentation,
17 review, and selection process for qualifying transportation
18 facilities that have approved or pending state and federal
19 environmental clearances, secured significant right of way, have
20 previously allocated significant state or federal funding, or
21 exhibit other circumstances that could reasonably reduce the
22 amount of time to develop or operate, or both, the qualifying



1 transportation facility in accordance with the purpose of this
2 chapter.

3 (e) The approval of the responsible public entity shall be
4 subject to the private entity's entering into an interim
5 agreement or a comprehensive agreement with the responsible
6 public entity.

7 (f) In connection with its approval of the development or
8 operation, or both, of the transportation facility or facilities
9 as a qualifying transportation facility, the responsible public
10 entity shall establish a date for the acquisition of or the
11 beginning of construction of or improvements to the qualifying
12 transportation facility. The responsible public entity may
13 extend that date from time to time.

14 (g) The responsible public entity shall take appropriate
15 action, as more specifically set forth in its guidelines, to
16 protect confidential and proprietary information provided by the
17 private entity.

18 (h) The responsible public entity may also apply for,
19 execute, and endorse applications submitted by private entities
20 to obtain federal credit assistance for qualifying projects
21 developed or operated, or both, pursuant to this chapter.



1 § -6 **Service contracts.** In addition to any authority
2 otherwise conferred by law, any public entity may contract with
3 a private entity for transportation services to be provided by a
4 qualifying transportation facility in exchange for any service
5 payments and other consideration that the public entity may deem
6 appropriate.

7 § -7 **Affected jurisdictions.** (a) Any private entity
8 requesting approval from, or submitting a proposal to, a
9 responsible public entity under section -5 shall notify each
10 affected jurisdiction by furnishing a copy of its request or
11 proposal to each affected jurisdiction.

12 (b) Each affected jurisdiction that is not a responsible
13 public entity for the respective qualifying transportation
14 facility, within sixty days after receiving a request for
15 comments from the responsible public entity, shall submit any
16 comments it may have in writing on the proposed qualifying
17 transportation facility to the responsible public entity and
18 indicate whether the facility will address the needs identified
19 in the appropriate state or county transportation plan by
20 improving safety, reducing congestion, increasing capacity, and
21 enhancing economic efficiency.



1 § -8 **Dedication of public property.** Any public entity
2 may dedicate any property interest that it has for public use as
3 a qualified transportation facility if it finds that doing so
4 will serve the public purpose of this chapter. In connection
5 with a dedication, a public entity may convey any property
6 interest that it has, subject to the conditions imposed by
7 general law governing such conveyances, to the private entity,
8 subject to this chapter, for any consideration that the public
9 entity may determine. The consideration may include, without
10 limitation, the agreement of the private entity to develop or
11 operate, or both, the qualifying transportation facility. The
12 property interests that the public entity may convey to the
13 private entity in connection with a dedication under this
14 section may include licenses, franchises, easements,
15 concessions, or any other right or interest that the public
16 entity deems appropriate. The property interest including, but
17 not limited to, a leasehold interest in or rights to use real
18 property constituting a qualifying transportation facility shall
19 be considered property indirectly owned by the public entity.

20 § -9 **Powers and duties of the private entity.** (a) The
21 private entity shall have all power allowed by law generally to
22 a private entity having the same form of organization as the



1 private entity and shall have the power to develop or operate,
2 or both, the qualifying transportation facility and impose user
3 fees and enter into service contracts in connection with the use
4 thereof. No tolls or user fees may be imposed by the private
5 entity without the necessary federal, state, or county
6 approvals.

7 (b) The private entity may own, lease, or acquire any
8 other right to use or develop or operate, or both, the
9 qualifying transportation facility.

10 (c) Subject to applicable permit requirements, the private
11 entity shall have the authority to cross any canal or navigable
12 watercourse both above ground or below ground so long as the
13 crossing does not unreasonably interfere with then current
14 navigation and use of the waterway and subject to military
15 concurrence where applicable.

16 (d) In operating the qualifying transportation facility,
17 the private entity may:

18 (1) Make classifications according to reasonable
19 categories for assessment of user fees; and

20 (2) With the consent of the responsible public entity,
21 make and enforce reasonable rules to the same extent
22 that the responsible public entity may make and



1 enforce rules with respect to a similar transportation
2 facility.

3 (e) The private entity shall:

4 (1) Develop or operate, or both, the qualifying
5 transportation facility in a manner that meets the
6 standards of the responsible public entity for
7 transportation facilities operated and maintained by
8 the responsible public entity, all in accordance with
9 the interim agreement or the comprehensive agreement;

10 (2) Keep the qualifying transportation facility open for
11 use by the members of the public, in accordance with
12 the terms and conditions of the interim or
13 comprehensive agreement after its initial opening,
14 upon payment of the applicable user fees and service
15 payments; provided that the qualifying transportation
16 facility may be temporarily closed because of
17 emergencies or, with the consent of the responsible
18 public entity, to protect the safety of the public or
19 for reasonable construction or maintenance procedures;

20 (3) Maintain, or provide by contract for the maintenance
21 of, the qualifying transportation facility;



1 (4) Cooperate with the responsible public entity in
2 establishing any interconnection with the qualifying
3 transportation facility requested by the responsible
4 public entity; and

5 (5) Comply with the interim or comprehensive agreement and
6 any service contract.

7 § -10 **Comprehensive agreement.** (a) Prior to developing
8 or operating, or both, the qualifying transportation facility,
9 the private entity shall enter into a comprehensive agreement
10 with the responsible public entity. The comprehensive agreement
11 shall provide for, as appropriate:

12 (1) Delivery of performance and payment bonds in
13 connection with the development or operation, or both,
14 of the qualifying transportation facility, in the
15 forms and amounts satisfactory to the responsible
16 public entity;

17 (2) Review of plans for the development or operation, or
18 both, of the qualifying transportation facility by the
19 responsible public entity and approval by the
20 responsible public entity if the plans conform to
21 standards acceptable to the responsible public entity;



- 1 (3) Inspection of, construction of, or improvements to the
2 qualifying transportation facility by the responsible
3 public entity to ensure conformance with standards
4 acceptable to the responsible public entity;
- 5 (4) Maintenance of a policy or policies of public
6 liability insurance (copies of which shall be filed
7 with the responsible public entity accompanied by
8 proofs of coverage) or self-insurance, each in form
9 and amount satisfactory to the responsible public
10 entity and reasonably sufficient to ensure coverage of
11 tort liability to the public and employees and to
12 enable the continued operation of the qualifying
13 transportation facility;
- 14 (5) Monitoring of the maintenance practices of the private
15 entity by the responsible public entity and the taking
16 of any actions that the responsible public entity
17 finds appropriate to ensure that the qualifying
18 transportation facility is properly maintained;
- 19 (6) Reimbursement to be paid to the responsible public
20 entity for services provided by the responsible public
21 entity;



- 1 (7) Filing of appropriate financial statements in a form
2 acceptable to the responsible public entity on a
3 periodic basis;
- 4 (8) Compensation to the private entity, which may include
5 a reasonable development fee, a reasonable maximum
6 rate of return on investment, and reimbursement of
7 development expenses in the event of termination for
8 convenience by the responsible public entity as agreed
9 upon between the responsible public entity and the
10 private entity;
- 11 (9) The date of termination of the private entity's
12 authority and duties under this chapter and dedication
13 to the appropriate public entity; and
- 14 (10) Guaranteed cost and completion guarantees related to
15 the development or operation, or both, of the
16 qualified transportation facility and payment of
17 damages for failure to meet the completion guarantee.
- 18 (b) The comprehensive agreement shall provide for any user
19 fees that may be established from time to time by agreement of
20 the parties. Any user fees shall be set at a level that takes
21 into account any lease payments, service payments, and
22 compensation to the private entity or as specified in the



1 comprehensive agreement. A copy of any service contract shall
2 be filed with the responsible public entity. A schedule of the
3 current user fees shall be made available by the private entity
4 to any member of the public on request. In negotiating user
5 fees under this section, the parties shall establish fees that
6 are the same for persons using the facility under similar
7 conditions, except as required by agreement between the parties
8 to preserve capacity and prevent congestion on the qualifying
9 transportation facility. The execution of the comprehensive
10 agreement or any amendment thereto shall constitute conclusive
11 evidence that the user fees provided for therein comply with
12 this chapter. User fees established in the comprehensive
13 agreement as a source of revenues may be in addition to, or in
14 lieu of, service payments.

15 (c) In the comprehensive agreement, the responsible public
16 entity may agree to make grants or loans, from time to time,
17 from amounts received from the federal government or any agency
18 or instrumentality thereof for the development or operation, or
19 both, of the qualifying transportation facility.

20 (d) The comprehensive agreement shall incorporate the
21 duties of the private entity under this chapter and may contain
22 any other terms and conditions that the responsible public



1 entity determines serve the public purpose of this chapter.
2 Without limitation, the comprehensive agreement may contain
3 provisions under which the responsible public entity agrees to
4 provide notice of default and cure rights for the benefit of the
5 private entity and the persons specified therein as providing
6 financing for the qualifying transportation facility. The
7 comprehensive agreement may contain any other lawful terms and
8 conditions to which the private entity and the responsible
9 public entity mutually agree, including, without limitation,
10 provisions regarding unavoidable delays or provisions providing
11 for a loan of public funds for the development or operation, or
12 both, of one or more qualifying transportation facilities.

13 (e) The comprehensive agreement shall provide for the
14 distribution of any earnings in excess of the maximum rate of
15 return as negotiated in the comprehensive agreement. Without
16 limitation, excess earnings may be distributed to the state
17 highway fund, to the responsible public entity, or to the
18 private entity for debt reduction or they may be shared with
19 appropriate public entities. Any payments under a concession
20 arrangement for which the State is the responsible public entity
21 shall be paid into the state highway fund.



1 (f) Any changes in the terms of the comprehensive
2 agreement, as may be agreed upon by the parties from time to
3 time, shall be added to the comprehensive agreement by written
4 amendment.

5 (g) Notwithstanding any contrary provision of this
6 chapter, a responsible public entity may enter into a
7 comprehensive agreement with multiple private entities if the
8 responsible public entity determines in writing that it is in
9 the public interest to do so.

10 (h) The comprehensive agreement may provide for the
11 development or operation, or both, of phases or segments of the
12 qualifying transportation facility.

13 § -11 Interim agreement. (a) Prior to or in connection
14 with the negotiation of the comprehensive agreement, the
15 responsible public entity may enter into an interim agreement
16 with the private entity proposing the development or operation,
17 or both, of the facility or facilities. The interim agreement
18 may:

19 (1) Permit the private entity to commence activities for
20 which it may be compensated relating to the proposed
21 qualifying transportation facility, including project
22 planning and development, advance right-of-way



1 acquisition, design and engineering, environmental
2 analysis and mitigation, surveying, conducting
3 transportation and revenue studies, and ascertaining
4 the availability of financing for the proposed
5 facility or facilities;

6 (2) Establish the process and timing of the negotiation of
7 the comprehensive agreement; and

8 (3) Contain any other provisions related to any aspect of
9 the development or operation, or both, of a qualifying
10 transportation facility that the parties may deem
11 appropriate.

12 (b) Notwithstanding anything to the contrary in this
13 chapter, a responsible public entity may enter into an interim
14 agreement with multiple private entities if the responsible
15 public entity determines in writing that it is in the public
16 interest to do so.

17 § -12 **Multiple public entities.** (a) If a private
18 entity submits a proposal pursuant to section -5(a) to
19 develop or operate, or both, a qualifying transportation
20 facility or a multimodal transportation facility that may
21 require approval by more than one public entity, representatives
22 of each of the affected public entities, prior to acceptance of



1 the proposal, shall convene and determine which public entity
2 shall serve as the coordinating responsible public entity. That
3 determination shall occur within sixty days of the receipt of a
4 proposal by the respective public entities.

5 (b) If public entities request proposals from private
6 entities for the development or operation, or both, of a
7 qualifying transportation facility or a multimodal
8 transportation facility pursuant to section -5(b), the
9 determination of which public entity shall serve as the
10 coordinating responsible public entity shall be made prior to
11 any request for proposals.

12 (c) Once a determination has been made in accordance with
13 subsections (a) or (b), the coordinating responsible public
14 entity and the private entity shall proceed in accordance with
15 this chapter.

16 § -13 **Federal, state, and county assistance.** (a) The
17 responsible public entity may take any action to obtain federal,
18 state, or county assistance for a qualifying transportation
19 facility that serves the public purpose of this chapter and may
20 enter into any contracts required to receive such assistance.
21 If the responsible public entity is a state agency, any funds
22 received from the state or federal government or any agency or

1 instrumentality thereof shall be subject to appropriation by the
2 legislature. The responsible public entity may determine that
3 it serves the public purpose of this chapter for all or any
4 portion of the costs of a qualifying transportation facility to
5 be paid, directly or indirectly, from the proceeds of a grant or
6 loan made by the county, state, or federal government, or any
7 agency or instrumentality thereof.

8 (b) The responsible public entity may agree to make grants
9 or loans, from time to time, from amounts received from the
10 federal, state, or county government, or any agency or
11 instrumentality thereof, for the development or operation, or
12 both, of the qualifying transportation facility.

13 (c) Nothing in this chapter or in an interim or
14 comprehensive agreement entered into pursuant to this chapter
15 shall be deemed to enlarge, diminish, or affect the authority,
16 if any, otherwise possessed by the responsible public entity to
17 take action that would impact the debt capacity of the State or
18 the affected jurisdictions.

19 § -14 **Financing.** Any financing of a qualifying
20 transportation facility may be in the amounts and upon the terms
21 and conditions that may be determined by the parties to the
22 interim or comprehensive agreement. Without limiting the



1 generality of the foregoing, the private entity and the
2 responsible public entity may propose to utilize any and all
3 revenues that may be available to them and, to the fullest
4 extent permitted by applicable law, may: issue debt, equity, or
5 other securities or obligations; enter into leases, concessions,
6 and grant and loan agreements; access any designated
7 transportation trust funds; borrow or accept grants from any
8 state infrastructure bank; and secure any financing with a
9 pledge of, security interest in, or lien on, any or all of its
10 property, including all of its property interests in the
11 qualifying transportation facility.

12 § -15 **Material default; remedies.** (a) Upon the
13 occurrence and during the continuation of material default, the
14 responsible public entity may exercise any or all of the
15 following remedies:

16 (1) Elect to take over the transportation facility or
17 facilities, and in such case, it shall succeed to all
18 of the right, title, and interest in the
19 transportation facility or facilities, subject to any
20 liens on revenues previously granted by the private
21 entity to any person providing financing therefore;



1 (2) Terminate the interim or comprehensive agreement and
2 exercise any other rights and remedies that may be
3 available to it at law or in equity; and

4 (3) Make or cause to be made any appropriate claims under
5 the performance or payment bonds, or both, required by
6 section -10.

7 (b) In the event the responsible public entity elects to
8 take over a qualifying transportation facility pursuant to
9 subsection (a), the responsible public entity may develop or
10 operate, or both, the transportation facility, impose user fees
11 for the use thereof, and comply with any service contracts as if
12 it were the private entity. Any revenues that are subject to a
13 lien shall be collected for the benefit of, and paid to, secured
14 parties, as their interests may appear, to the extent necessary
15 to satisfy the private entity's obligations to secured parties,
16 including the maintenance of reserves, and the liens shall be
17 correspondingly reduced and, when paid off, released. Before
18 any payments to, or for the benefit of, secured parties are
19 made, the responsible public entity may use revenues to pay
20 current operation and maintenance costs of the transportation
21 facility or facilities, including compensation to the
22 responsible public entity for its services in operating and



1 maintaining the qualifying transportation facility. Remaining
2 revenues, if any, after all payments for operation and
3 maintenance of the transportation facility or facilities and to,
4 or for the benefit of, secured parties have been made, shall be
5 paid to the private entity, subject to the negotiated maximum
6 rate of return. The right to receive payment, if any, shall be
7 considered just compensation for the transportation facility or
8 facilities. The full faith and credit of the responsible public
9 entity shall not be pledged to secure any financing of the
10 private entity by the election to take over the qualifying
11 transportation facility. Assumption of operation of the
12 qualifying transportation facility shall not obligate the
13 responsible public entity to pay any obligation of the private
14 entity from sources other than revenues.

15 § -16 **Condemnation.** (a) At the request of the private
16 entity, the responsible public entity may exercise any power of
17 condemnation that it has under law for the purpose of acquiring
18 any lands or estates or interests therein to the extent that the
19 responsible public entity finds that this action serves the
20 public purpose of this chapter. Any amounts to be paid in a
21 condemnation proceeding shall be paid by the private entity.



1 (b) Except as provided in subsection (a), the power of
2 condemnation may not be exercised against a qualifying
3 transportation facility until the department, after notice to
4 the private entity and the secured parties, as may appear in the
5 private entity's records, and an opportunity for hearing, has
6 entered a final declaratory judgment that a material default has
7 occurred and is continuing.

8 (c) After the entry of such a final order by the
9 department, any responsible public entity having the power of
10 condemnation under state law may exercise the power of
11 condemnation to acquire the qualifying transportation facility
12 or facilities in lieu of, or at any time after taking over the
13 transportation facility pursuant to section -15(a)(1).
14 Nothing in this chapter shall be construed to limit the exercise
15 of the power of condemnation by any responsible public entity
16 against a qualifying transportation facility after the entry by
17 the department of a final declaratory judgment order pursuant to
18 subsection (b). Any person that has provided financing for the
19 qualifying transportation facility and the private entity, to
20 the extent of its capital investment, may participate in the
21 condemnation proceedings with the standing of a property owner.



1 § -17 **Utility crossings.** The private entity and each
2 public service company, public utility, and cable television
3 provider whose facilities are to be crossed or affected shall
4 cooperate fully with the other in planning and arranging the
5 manner of the crossing or relocation of the facilities. Any
6 entity possessing the power of condemnation is hereby expressly
7 granted powers in connection with the moving or relocation of
8 facilities to be crossed by the qualifying transportation
9 facility, or that must be relocated to the extent that the
10 moving or relocation is made necessary or desirable by
11 construction of or improvements to the qualifying transportation
12 facility, which shall be construed to include construction of or
13 improvements to temporary facilities for the purpose of
14 providing service during the period of construction or
15 improvement. If the private entity and any public service
16 company, public utility, and cable television provider are not
17 be able to agree upon a plan for the crossing or relocation, the
18 department may determine the manner in which the crossing or
19 relocation is to be accomplished and any damages due arising out
20 of the crossing or relocation. The department may employ expert
21 engineers who shall examine the location and plans for a
22 crossing or relocation, hear any objections and consider



1 modifications, and make a recommendation to the department. In
2 such a case, the cost of the experts shall be borne by the
3 private entity. Any amount to be paid for a crossing,
4 construction, moving, or relocating of facilities shall be paid
5 for by the private entity or any other person contractually
6 responsible therefore under the interim or comprehensive
7 agreement or under any other contract, license, or permit. The
8 department shall make a determination within ninety days of
9 notification by the private entity that the qualifying
10 transportation facility will cross utilities subject to the
11 department's jurisdiction.

12 § -18 **Police powers; violations of law.** (a) All police
13 officers and other law enforcement officers having police powers
14 of the State and of each affected county shall have the same
15 powers and jurisdiction within the limits of the qualifying
16 transportation facility that they have in their respective areas
17 of jurisdiction, and these officers shall have access to the
18 qualifying transportation facility at any time for the purpose
19 of exercising their powers and jurisdiction. This authority
20 does not extend to the private offices, buildings, garages, and
21 other improvements of the private entity to any greater degree



1 than the police power extends to any other private buildings and
2 improvements.

3 (b) To the extent the transportation facility is a road,
4 bridge, tunnel, overpass, or similar transportation facility for
5 motor vehicles, the traffic and motor vehicle laws of the State
6 or, if applicable, any county jurisdiction shall be the same as
7 those applying to conduct on similar transportation facilities
8 in the State or a county. Punishment for offenses shall be as
9 prescribed by law for conduct occurring on similar
10 transportation facilities in the State or a county.

11 § -19 **Dedication of assets.** The responsible public
12 entity shall terminate the private entity's authority and duties
13 under this chapter on the date set forth in the interim or
14 comprehensive agreement. Upon termination, the authority and
15 duties of the private entity under this chapter shall cease and
16 the qualifying transportation facility shall be dedicated to the
17 responsible public entity or, if the qualifying transportation
18 facility was initially dedicated by an affected jurisdiction, to
19 that affected local jurisdiction for public use.

20 § -20 **Sovereign immunity.** Nothing in this chapter shall
21 be construed as or deemed a waiver of the sovereign immunity of
22 the State, any responsible public entity, any affected county



1 jurisdiction, or any officer or employee thereof with respect to
2 the participation in, or approval of all or any part of, the
3 qualifying transportation facility or its operation, including
4 but not limited to interconnection of the qualifying
5 transportation facility with any other transportation facility.
6 A county in which a qualifying transportation facility is
7 located shall possess sovereign immunity with respect to its
8 construction and operation.

9 § -21 Procurement. (a) The Hawaii public procurement
10 code, chapter 103D, shall not apply to this chapter; however, a
11 responsible public entity may enter into an interim or a
12 comprehensive agreement only in accordance with guidelines
13 adopted by it that are consistent with procurement:

14 (1) Through "competitive sealed bidding" as defined in
15 section 103D-302; or

16 (2) Of other than professional services through
17 competitive negotiation. The responsible public
18 entity shall not be required to select the proposal
19 with the lowest price offer, but may consider price as
20 one factor in evaluating the proposals received.

21 Other factors that may be considered shall include:



- 1 (A) The proposed cost of the qualifying
2 transportation facility;
- 3 (B) The general reputation, qualifications, industry
4 experience, and financial capacity of the private
5 entity;
- 6 (C) The proposed design, operation, and feasibility
7 of the qualifying transportation facility;
- 8 (D) The eligibility of the facility for priority
9 selection, review, and documentation timelines
10 under the responsible public entity's guidelines;
- 11 (E) Local citizen and public entity comments;
- 12 (F) Benefits to the public;
- 13 (G) The private entity's compliance with a minority
14 business enterprise participation plan or good
15 faith effort to comply with the goals of such a
16 plan;
- 17 (H) The private entity's plans to employ local
18 contractors and residents;
- 19 (I) The safety record of the private entity;
- 20 (J) The ability of the facility to address the needs
21 identified in the appropriate state or county
22 transportation plan by improving safety, reducing



1 congestion, increasing capacity, and enhancing
2 economic efficiency; and

3 (K) Other criteria that the responsible public entity
4 deems appropriate.

5 (b) A responsible public entity shall proceed in
6 accordance with the guidelines adopted by it pursuant to
7 subsection (a)(1) unless it determines that proceeding in
8 accordance with the guidelines adopted by it pursuant to this
9 subsection is likely to be advantageous to the responsible
10 public entity and the public, based on:

- 11 (1) The probable scope, complexity, or urgency of a
12 project;
- 13 (2) Risk sharing including guaranteed cost or completion
14 guarantees, added value, or debt or equity investments
15 proposed by the private entity; or
- 16 (3) An increase in funding, dedicated revenue source, or
17 other economic benefit that would not otherwise be
18 available.

19 When the responsible public entity determines to proceed
20 according to the guidelines adopted by it pursuant to this
21 subsection, it shall state the reasons for its determination in
22 writing. If a state agency is the responsible public entity,



1 the approval of the director of transportation shall be required
2 as more specifically set forth in the guidelines before the
3 comprehensive agreement is signed.

4 (c) Interim or comprehensive agreements for maintenance or
5 asset management services for a transportation facility that is
6 a highway, bridge, tunnel, or overpass, and any amendment or
7 change order thereto that increases the highway lane-miles
8 receiving services under such an agreement, shall be procured in
9 accordance with guidelines that are consistent with procurement
10 through competitive sealed bidding as defined in section
11 103D-302. Furthermore, the contracts shall be of a size and
12 scope to encourage maximum competition and participation by
13 qualified contractors.

14 (d) Subsection (c) shall not apply to maintenance or asset
15 management services agreed to as part of the initial provisions
16 of any interim or comprehensive agreement entered into for the
17 original construction, reconstruction, or improvement of any
18 highway and shall not apply to any concession that, at a
19 minimum, provides for:

20 (1) The construction, reconstruction, or improvement of
21 any transportation facility, or



1 (2) The operation and maintenance of any transportation
2 facility with existing toll facilities.

3 (e) Nothing in this section shall require that
4 professional services be procured by any method other than
5 competitive negotiation in accordance with the Hawaii public
6 procurement code.

7 § -22 Posting of conceptual proposals; public comment;
8 public access to procurement records. (a) Conceptual proposals
9 submitted in accordance with section -5(a) or (b) to a
10 responsible public entity shall be posted by the responsible
11 public entity within ten working days after acceptance of the
12 proposals as follows:

13 (1) For responsible public entities that are state
14 agencies, departments, and institutions, posting shall
15 be on the department of accounting and general
16 services' website; and

17 (2) For responsible public entities that are county public
18 bodies, posting shall be on the responsible public
19 entity's website or by publication, in a newspaper of
20 general circulation in the county in which the
21 contract is to be performed, of a summary of the
22 proposals and the location where copies of the



1 proposals are available for public inspection.
2 Posting may also be on the department of accounting
3 and general services' website in the discretion of the
4 county responsible public entity.

5 In addition to the posting requirements, at least one copy
6 of the proposals shall be made available for public inspection.
7 Nothing in this section shall be construed to prohibit the
8 posting of the conceptual proposals by additional means deemed
9 appropriate by the responsible public entity so as to provide
10 maximum notice to the public of the opportunity to inspect the
11 proposals. Trade secrets, financial records, or other records
12 of the private entity excluded from disclosure shall not be
13 required to be posted, except as otherwise agreed to by the
14 responsible public entity and the private entity.

15 (b) In addition to the posting requirements of subsection
16 (a), for thirty days prior to entering into an interim or
17 comprehensive agreement, a responsible public entity shall
18 provide an opportunity for public comment on the proposals. The
19 public comment period required by this subsection may include a
20 public hearing in the sole discretion of the responsible public
21 entity. After the end of the public comment period, no
22 additional posting shall be required.

1 (c) Once the negotiation phase for the development of an
2 interim or a comprehensive agreement is complete and a decision
3 to award has been made by a responsible public entity, the
4 responsible public entity shall present the major business
5 points of the interim or comprehensive agreement, including the
6 use of any public funds, to its oversight board, if any, at a
7 regularly scheduled meeting of the board that is open to the
8 public.

9 (d) Once an interim agreement or a comprehensive agreement
10 has been entered into and the process of bargaining of other
11 interim agreements related to the qualifying transportation
12 facility or the process of bargaining of all phases or aspects
13 of the comprehensive agreement is complete, a responsible public
14 entity shall make procurement records available for public
15 inspection, upon request. For the purposes of this subsection,
16 procurement records shall not be interpreted to include trade
17 secrets of the private entity or financial records, including
18 balance sheets or financial statements of the private entity
19 that are not generally available to the public through
20 regulatory disclosure or otherwise.



1 (e) Cost estimates relating to a proposed procurement
2 transaction prepared by or for a responsible public entity shall
3 not be open to public inspection.

4 (f) Any inspection of procurement transaction records
5 under this section shall be subject to reasonable restrictions
6 to ensure the security and integrity of the records.

7 (g) This section shall apply to accepted proposals
8 regardless of whether the process of bargaining will result in
9 an interim or a comprehensive agreement.

10 (h) A responsible public entity and any independent review
11 panel appointed to review information and advise the responsible
12 public entity may hold closed meetings to discuss or consider
13 records exempt from disclosure; provided the meetings are held
14 in accordance with the procedural requirements of section 92-5.

15 § -23 Jurisdiction. The department of transportation
16 shall have exclusive jurisdiction to adjudicate all matters
17 specifically committed to its jurisdiction by this chapter."

18 SECTION 2. This Act shall take effect on July 1, 2007.

19

INTRODUCED BY: *Imaine R. Thomas*
C/R



Report Title:

Public-Private Transportation

Description:

Allows private entities to enter into agreements to construct, improve, maintain, and operate transportation facilities in the State.

