

Testimony by:  
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IN REPLY REFER TO:

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

March 20, 2018  
3:00 p.m.  
State Capitol, Room 224



**H.B. 2581 H.D. 2  
RELATING TO PUBLIC PRIVATE PARTNERSHIPS**

House Committee on Government Relations  
House Committee on Economic Development, Tourism, and Technology

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The Department of Transportation (DOT) **supports** the intent of this bill with reservations. As written, this bill proposes to establish the Office of Public-Private Partnership and the position of State Public-Private Partnership Coordinator within the Department of Accounting and General Services (DAGS), adds public-private partnership project delivery methods to the Procurement Code and related conditions and requirements, requires an annual report, and appropriates funds.

Procurement, budgeting, fiscal and contract administration challenges seems to show the need for a procuring agency to have different options for project delivery. Creating a coordinator and a state office providing the support and guidance to the procuring agency to use the public-private project delivery method may help in its successful implementation.

However, the DOT has concerns as H.D. 2 appears to remove the bill's original intent to add two new project delivery methods to the Procurement Code (HRS 103D) under the Competitive Sealed Proposals Method of Procurement. These two new project delivery methods were the design-build-finance-operate-maintain, and the design-build-operate-maintain. These two design-build methods would be the way to deliver a project as a public-private partnership. Instead, current language in H.D. 2 appears to use only the term "design-build." For example, the proposed amendment to HRS 103D-303(i) (at page 11, Lines 1-20) states:

"In addition to any other provisions of this section, construction projects may be solicited through a request for proposals to use any combination of the design-build [~~method;~~] or public-private partnership delivery methods;..."

Moreover, the proposed amendment to HRS 103D-303(i)(4) (page 12, Lines 3-5) states:

“Each request for proposals to use any combination of the design-build or public-private partnership methods shall:...”<sup>1</sup>

These revisions becomes problematic as language in the proposed bill would add new requirements to the basic design-build project delivery method severely limiting the ability and flexibility the DOT has in the delivery of basic design-build projects.

While the DOT recognizes that revisions to the Procurement Code could be beneficial at times, the DOT views basic design-build projects and the current process as generally meeting its needs. A revision with the intent or effect of adding new requirements would add to the regulatory burden instead of streamlining the project delivery process.

Thank you for the opportunity to provide testimony.

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<sup>1</sup> Followed by a listing of requirements meant to apply to public-private partnerships, which currently do not apply to the basic design-build method, including, but not limited to new approvals by the governor, director of finance, comptroller (outside of the Budget process).

**LATE**

**HB-2581-HD-2**

Submitted on: 3/19/2018 10:09:37 PM

Testimony for GVO on 3/20/2018 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
De MONT R. D. CONNER	Testifying for Ho'omanapono Political Action Committee (HPAC)	Support	Yes

Comments:

Since language was added to support UNION WORKERS, we would like to suggest adding language that allows for Union Representatives to be included in any negotiation between the Public Agency & the Private partner, to insure that Union members' interests are protected during all contract negotiations Secondly, we seek a specific amendment that specifies that NO PRIVATE CORPORATION SHALL BUILD ANY PRISON OR JAIL IN HAWAII, WITHOUT UNION WORKERS, since customarily & historically, all of our Prisons & Jails were built using UNION WORKERS. See Konno v. County of Hawaii 937 P.2d 397, 85 Hawai'i 61 (1997). Mahalo.



**LATE**

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SENATE COMMITTEES ON GOVERNMENT OPERATIONS AND ECONOMIC DEVELOPMENT,  
TOURISM & TECHNOLOGY

Tuesday, March 20, 2018 — 3:00 p.m. — Room 224

**Ulupono Initiative Strongly Supports HB 2581 HD 2 with Comments, Relating to Public-Private Partnerships**

Dear Chair Kim, Vice Chair Ruderman, Chair Wakai, Vice Chair Taniguchi, and Members of the Committees:

My name is Murray Clay and I am Managing Partner of the Ulupono Initiative, a Hawai'i-based impact investment firm that strives to improve the quality of life for the people of Hawai'i by working toward solutions that create more locally produced food; increase affordable, clean, renewable energy; and better management of waste and fresh water. Ulupono believes that self-sufficiency is essential to our future prosperity and will help shape a future where economic progress and mission-focused impact can work hand in hand.

**Ulupono strongly supports HB 2581 HD 2**, which establishes the Office of Public-Private Partnership (P3), the Coordinator position, and establishes new delivery methods, because it aligns with our goals of developing infrastructure more efficiently and affordably.

The State of Hawai'i has many infrastructure needs, yet often finds itself faced with complex projects that are over budget, not on time, or not built or maintained in a quality manner. One solution is to work with the private sector on planning, building, financing, operating, and maintaining projects. Yet, these complex deals require expertise in bridging workable and financially appropriate structures for the benefit of all parties. The funding for an Office of Public-Private Partnership and staff is vital if Hawai'i wants to participate in public-private partnerships.

At conferences and thru our consultants, we have heard that private sector financiers often want to work with a local dedicated P3 office that can assist them in navigating that locale's needs, laws, and politics. Dedicated staff would provide an important liaison in attracting private sector financing interest while also encouraging consistent out of the box thinking from within the government bureaucracy.

In late 2016, Ulupono became interested in P3s as federal funding for the rail project was

*Investing in a Sustainable Hawai'i*

threatened to be revoked. We learned more about public-private partnerships and subsequently commissioned a study conducted by Jones Lang LaSalle to look for alternative financing solutions for the rail project. After reviewing the analysis, we became a proponent of P3 structures as being a more effective way to conduct business for certain large-scale government infrastructure projects. For example, we believe if the Honolulu rail project used a P3 structure such as design-build-finance-operate-maintain at the project's beginnings, the City and County of Honolulu would have significantly reduced its financial exposure and likely improved project delivery and accountability. In addition, according to the study's findings, the total cost for the rail project increases by \$114 million for every year of delay. The City would have been able to lock in many of their costs, which greatly assists lawmakers for future budget planning purposes. Currently, the Honolulu Area for Rapid Transit board is supportive of P3s and has hired Ernst and Young to further look into P3 solutions for the rail project.

As costs in Hawai'i continue to rise at a rapid rate, existing infrastructure continues to age, and government's expensive long-term obligations continue to grow, it seems logical that State government would want to setup structures and personnel to support alternative delivery methods such as P3. Furthermore, under the current Trump administration, it appears federal funding for infrastructure projects might favor projects that incorporate private sector funding. Without building up internal State government P3 expertise and experience, Hawai'i could risk losing a large amount of federal funding over the coming years.

From the rail study, we also discovered that it would be helpful for lawmakers to establish in statute or administrative rules that the State is able to use P3 structures such as design-build-operate-maintain and design-build-finance-operate-maintain. Without a definitive ruling, there appears to be varied opinions amongst key stakeholders, about what P3 structures are currently allowed.

When discussing this bill with our Jones Lang LaSalle consultant Jill Jamieson, who is one of the nation's leading P3 experts with years of experience, strongly believes the State needs a comprehensive P3 bill, she provided numerous comments on the current version of the bill.

**General Comments:** While this bill represents a slight improvement on the previous version of House Bill 2581, it still does not reflect best practice or baseline P3 legislative principles. It also appears to want to be both a design-build bill and a P3 bill and these are VERY different things from a legal perspective. It would be better to separate them.

#### **Key considerations:**

1. The legislation lacks an adequate definition of a Public-Private-Partnership (P3). This lack of clarity will almost certainly generate confusion as to the bill's intended scope of application and, more broadly, obscure other provisions with the State's procurement code. For instance, in multiple provisions the law contemplates a

simple design-build as a P3 (which is not a P3). The law also references the ability to leverage the law for the “procurement of goods and services”, which is not P3. Moreover, there are no provisions limiting the applicability of this law to public purpose infrastructure, so it appears as though it could be abused and/or applied to private-use facilities on public land (which would typically be contemplated under a simple ground-lease).

2. The law does not address ANY basic financial considerations critical to P3, such as allowable compensation mechanisms, user fees, budget considerations for multi-year obligations and contingent liabilities, allowable financial support mechanisms, use of federal credit and grant programs, etc. This creates great uncertainty as the usefulness of the law, but also exposes the public to financial risk.
3. The law does not address key legal issues critical to P3, such as asset ownership, contract term restrictions, incorporation requirements for SPV, ownership transfers, etc.
4. The law does not establish any criteria for the use of P3 (such as affordability, value-for-money, public-purpose requirements, etc.), which could quickly lead to abuse.
5. The law appears more favorable to the private partner than in other jurisdictions (i.e., compensation for design fees is not standard in P3 legislation).
6. Some Specific concerns:
  - (i) Independent peer reviewer: This is not standard in the industry and should not be codified in law. Contract governance and oversight mechanism, including the use of independent engineers, performance appraisals, auditors, etc. are standard, but how they are structured (and paid for) depends on the specifics of the transaction. For instance, in many cases, the lenders’ representatives may provide inspection information to the State, which could be adequate. In others, the State might want to retain services from an independent engineer. These services are best NOT contracted by the Private Partner (that would be like the private partner selecting and paying for its own regulator).
  - (ii) The RFP submission requirements and evaluation criteria are not industry standard and will likely not result in maximizing public interest.
  - (iii) The requirement to include union workers will likely deter investment. Flexibility might be considered to allow for union workers or similar arrangements (such as a project labor agreement, secondment arrangements, etc.).

Given the complex issues involving P3s, Ulupono would be happy to make our rail P3 consultant Jill Jamieson of Jones Lang LaSalle in Washington D.C. available for a call to



answer any technical questions you may have.

Thank you for this opportunity to testify.

Respectfully,

Murray Clay  
Managing Partner

**LATE**

**HB-2581-HD-2**

Submitted on: 3/19/2018 10:35:16 PM  
Testimony for GVO on 3/20/2018 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Rachel L. Kailianu	Testifying for Ho`omana Pono, LLC	Support	Yes

Comments:

We STRONGLY SUPPORT this bill with the addition of language protecting UNION WORKERS. We seek 2 AMENDMENTS.

- 1.) All P3 contract negotiations MUST have a Union representative present to insure that Union interests are protected.
- 2.) Add the following language: NO PRISONS OR JAILS WILL BE BUILT IN HAWAII WITHOUT UNION WORKERS. This is because, customarily & historically, all prisons & jails in Hawaii were built using UNION WORKERS. Mahalo.





**HAWAII GOVERNMENT EMPLOYEES ASSOCIATION**  
AFSCME Local 152, AFL-CIO

**RANDY PERREIRA**, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

**LATE**

The Twenty-Ninth Legislature, State of Hawaii  
The Senate  
Committee on Government Operations  
Committee on Economic Development, Tourism, and Technology

Testimony by  
Hawaii Government Employees Association

March 20, 2018

H.B. 2581, H.D. 2 – RELATING TO PUBLIC-PRIVATE PARTNERSHIPS


The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO would like to provide comments over the intent of H.B. 2581, H.D. 2 which establishes and appropriates funding for the Office of Public-Private Partnership within the Department of Accounting and General Services to plan and coordinate collaboration amongst state and county agencies to develop and implement public-private partnership projects and adds project delivery methods to the Procurement Code, with related conditions and requirements.

While we acknowledge that there can be benefit to certain public-private partnerships (P3s) in securing and leveraging private funds for the public's use, there are also many examples of inefficiencies, failures and negative impacts to public assets and the public's trust in government as a result of P3s. In order to ensure the public's trust, there must be accountability and oversight for every agency that expends tax payer dollars, independent of political shifts or the whims of a new Administration. We appreciate the efforts made to flesh out the scope and duties of the Office of Public-Private Partnership and recognize the current H.D. 2 adds language that if a contract for delivery of a construction project is procured using a P3 method it shall specify, if an operational phase is part of the project delivery, the use of public worker union positions. However, this legislation contains no assurances that a P3 project would be operated by government employees. Additionally, we continue to raise concerns over the implications of adding overly broad definitions to the Procurement Code which could enable the state to privately operate any and all of its facilities, including public schools, prisons, hospitals, water treatment plants, collection systems, landfills, public roads, parking lots, airports, and highways, among others, as well as language that would facilitate the sale of public buildings.

While H.B. 2581, H.D. 2 can be well intended, this current version is overly broad and all encompassing. We prefer policy that strictly limits the scope of P3s to securing a fusion of private sector funding.

Thank you for the opportunity to provide comments on the broad scope of H.B. 2581, H.D. 1.

Respectfully submitted,

  
for Randy Perreira  
Executive Director