



EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

Testimony of **Ford Fuchigami**
Administrative Director, Office of the Governor

To the
House Committee on Labor & Public Employment
February 12, 2019
10:00 a.m., Conference Room 309

In consideration of
House Bill No. 889
RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

Chair Johanson, Vice Chair Eli, and committee members,

The Governor's office supports the intent of **House Bill 889**, Relating to Public-Private partnerships.

We defer specific comments to testimony submitted separately by the State Procurement Office and ask that the comments and recommendations offered in their testimony be incorporated into this bill.

Thank you for the opportunity to provide testimony.

DAVID Y. IGE
GOVERNOR



SARAH ALLEN
ADMINISTRATOR
BONNIE KAHAKUI
ASSISTANT ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
SARAH ALLEN, ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE HOUSE COMMITTEE
ON
LABOR & PUBLIC EMPLOYMENT

February 12, 2019, 10:00 a.m.

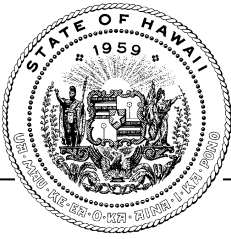
HB889
RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

Chair Johanson, Vice-Chair Eli, and members of the committee, thank you for the opportunity to submit testimony on HB889. The State Procurement Office (SPO) supports the intent of this bill that will create an office of public-private partnership, who will develop educational and advisory programs that enhance the public-private partnership procurement process. This bill also proposes to add public-private partnership methods to the procurement code.

The SPO supports the intent of bill because it identifies the need to clarify options and procurement guidance for public infrastructure projects. However, it also proposes to amend sections in the procurement code (code), specifically competitive sealed proposals which is typically the method used to contract for Public-Private Partnerships (P3). The code does not preclude the use of innovative project delivery models, including design-build-finance-operate-maintain contracts. The only area that was previously in question, was if full negotiations could take place. However, the Attorney General submitted to Legislature their official opinion that discussions and negotiations are interchangeable (Reference Attachment 1 – AG Opinion, dated April 18, 2018). The Federal Acquisition Regulations and the ABA Procurement Model Code also recognize competitive sealed proposal discussions as a form of negotiations.

The SPO recommends the creation of a task force as proposed in SB1003 relating to project delivery task guidelines. It would be in the best interest of the state to conduct research and develop institutional framework and tools to support state agencies in identifying, implementing and overseeing innovative project delivery arrangements such as P3.

Thank you.



OFFICE OF PLANNING STATE OF HAWAII

DAVID Y. IGE
GOVERNOR

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Statement of
RODNEY FUNAKOSHI
Planning Program Administrator, Office of Planning
before the
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Tuesday, February 12, 2019
10:00 AM
State Capitol, Conference Room 309

in consideration of
HB 889
RELATING TO PUBLIC-PRIVATE PARTNERSHIPS.

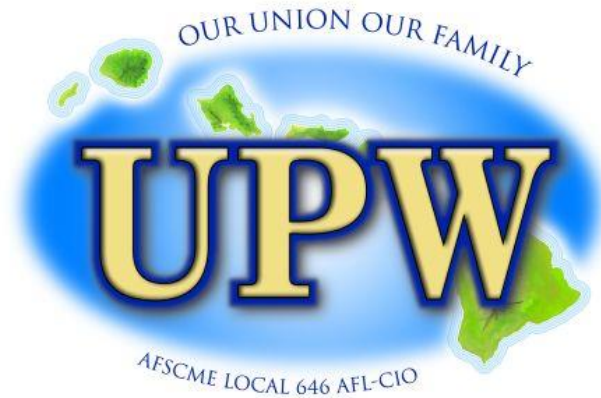
Chair Johanson, Vice Chair Eli, and Members of the House Committee on Labor and Public Employment.

The Office of Planning (OP) **supports** HB 889 which establishes an Office of Public-Private Partnership and the position of State Office of Public-Private Partnership Coordinator within the Department of Accounting and General Services, and adds definitions and revisions to Chapter 103D, the State Procurement Code, to facilitate implementation of public-private partnerships (P3s).

As lead agency for State Transit-Oriented Development (TOD) and co-chair of the Hawaii Interagency Council for Transit-Oriented Development (TOD Council), OP has been actively promoting the use of P3s through educational and information workshops over the past two years. Experience with P3s nationally and internationally shows that using this approach delivers projects on-time, under budget and exceeds quality expectations. This contracting method provides the public agency with cost certainty and transfers the risks of cost, schedule and performance to the private sector while maintaining public ownership of the asset.

In the TOD Council's *State TOD Strategic Plan*, revised August 2018, action items recommended to improve TOD implementation include "Support legislation and funding to establish a Public-Private Partnership Office", and authorize standards of practice for P3 or alternative or innovative financing delivery systems. This bill does just that. Accordingly, we support this measure and urge your favorable consideration.

Thank you for this opportunity to testify.



THE HAWAII STATE HOUSE OF REPRESENTATIVES

The Thirtieth Legislature
Regular Session of 2019

Committee on Labor & Public Employment

Representative Aaron Ling Johanson, Chair
Representative Stacylynn K.M. Eli, Vice Chair

Date of Hearing: Tuesday, February 12, 2019
Time of Hearing: 10:00 a.m.
Place of Hearing: Conference Room 309

TESTIMONY ON HB889 RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

By DAYTON M. NAKANELUA,
State Director of the United Public Workers,
AFSCME Local 646, AFL-CIO ("UPW")

My name is Dayton M. Nakanelua, the State Director of the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). The UPW is the exclusive bargaining representative for approximately 14,000 public employees, which include blue collar, non-supervisory employees in Bargaining Unit 01 and institutional, health and correctional employees in Bargaining Unit 10, in the State of Hawaii and four counties. The UPW also represents about 1,500 members in the private sector.

HB889 establishes the Office of Public-Private Partnership and adds P3 project delivery methods related and related conditions and requirements to the Hawaii Public Procurement Code. There have been varying successes and failures of Public-Private Partnerships with the pros and cons of P3 expounded many times over. The UPW limits its testimony at this time to the possible effects of any form of P3 arrangement regarding public employees affected by P3 and the lack of provisions to resolve or correct any negative employment conditions e.g. lack of opportunities for skills development and job growth, employment

security, promotional opportunities and more, upon public workers within the civil service system.

UPW comments:

Page 4, line 12 to 19. do not analyze the employment status and effect on civil service employees especially in maintenance and operation. There is no provision for the possibility of the transfer of technology where possible to develop public employees and departments to gain new skills and knowledge for the long-term benefit of government and the public. According to writings on P3, "If the expertise in the partnership lies heavily on the private side, the government is at an inherent disadvantage." We look to the success of China that compels many foreign businesses that desire to conduct business in China to transfer technology, information and to train Chinese workers. The state of Hawaii should do likewise.

Page 7, line 6. does mention "personnel impacts" after the fact but offers no provision to avoid negative "personnel impacts" before the project begins. There is no provision to comply with HRS 89 (collective bargaining) or HRS 76 (civil service). These are serious omissions and are unacceptable.

The UPW **strongly opposes** HB889.

Thank you for the opportunity to submit this testimony.



**TESTIMONY TO THE HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
State Capitol, Conference Room 309
415 South Beretania Street
10:00 AM**

February 12, 2019

RE: HOUSE BILL NO.889, RELATED TO PUBLIC-PRIVATE-PARTNERSHIPS (P3's)

Chair Johanson, Vice Chair Eli, and members of the committee:

My name is Gladys Quinto-Marrone, CEO of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii. Our members build the communities we all call home.

BIA-Hawaii **supports the intent** of H.B. 889, which proposes to establish the Office of Public-Private Partnerships, and the position of State Office of Public-Private Partnerships Coordinator. The bill also adds public-private partnerships project delivery methods and related conditions and requirements to the Hawaii Public Procurement Code.

We understand that public-private- artnership (P3s) are gaining popularity around the world primarily due to the lack of government funds to develop social infrastructure. We believe that one of the first objectives of this office should be to create enabling legislation that would provide the process government agencies would follow in entering into a P3 arrangement. We also suggest that the new office have the ability to lease government lands, which is not a part of Chapter 103D HRS. Typically, investors in P3s are provided with some type of security for their investment through either a contract or some type of lease-back agreement with the investor having ownership of the improvement until such time as they are able to recoup their investment, and the government agency would end up owning the improvement.

We appreciate the opportunity provide comments on H.B. 889.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

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

The Thirtieth Legislature, State of Hawaii
House of Representatives
Committee on Labor and Public Employment

Testimony by
Hawaii Government Employees Association
February 12, 2019

H.B. 889 – RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO raises strong concerns over the intent of H.B. 889 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 public-private partnership delivery methods to the Procurement Code.

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. As drafted, we respectfully raise strong concerns over the unintended consequences of establishing any office that has carte blanche authority over its own objectives, goals, criteria, and measurements of efficacy. 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.

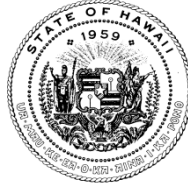
Additionally, we raise strong concerns over the implications of a project delivery system that allows any combination of design, build, finance, operate, or maintain, as it may enable the private operation of any and all of the state's facilities, including public schools, prisons, hospitals, water treatment plants, collection systems, landfills, public roads, parking lots, airports, and highways, among others. H.B. 889 is overly broad and all encompassing, and we prefer policy that strictly limits the scope of P3s to securing a fusion of private sector funding.

Before we consider committing funds and state agency efforts for another "new fix," we respectfully suggest the Legislature prioritize its efforts in determining areas where government inefficiency is resulting in lost resources and revenues, as well as rely on the expertise and suggestions of its workforce.

Thank you for the opportunity to raise concerns on the broad scope of H.B. 889.

Respectfully submitted,

for 
Randy Perreira
Executive Director



LATE

TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

STATE OF HAWAII
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February 12, 2019
10:00 a.m.
State Capitol, Room 309

H.B. 889
RELATING TO PUBLIC-PRIVATE PARTNERSHIPS.

House Committee on Labor & Public Employment

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

The proposed language appears to create a public-private partnership office with a support and advisory role, to provide best practices, coordination and guidance, rather than management and oversight. This approach allows each agency entering into public-private partnerships greater autonomy in furthering its mission.

The DOT supports the proposed revisions to Hawaii Revised Statutes (HRS) 103D-104 which add and define new terms independent peer reviewer services, infrastructure facility, and public-private partnership. However, the DOT would propose that the public-private partnership (P3) method of procurement be created as separate and distinct from the Competitive Sealed Proposals HRS 103D-303 method of procurement as the requirements of the Competitive Sealed Proposals method do not allow some of the P3 proposed requirements such as negotiations of the statement of work, and negotiations of contract price.

Thank you for the opportunity to provide testimony.



Chamber of Commerce HAWAII

The Voice of Business

**Testimony to the House Committee on Labor
Tuesday, February 12, 2019 at 10:00 A.M.
Conference Room 309, State Capitol**

LATE

RE: HB 889 RELATING TO PUBLIC PRIVATE PARTNERSHIPS

Chair Johanson, Vice Chair Eli, and members of the committee:

The Chamber is in supports the intent of HB 889 which proposes to establish the Office of Public-Private Partnership and the position of State Office of Public-Private Partnership Coordinator. The bill also adds public-private partnership project delivery methods and related conditions and requirements to the Hawaii Public Procurement Code.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

We understand that public-private-partnership (P3's) are gaining popularity around the world primarily due to limited government funds to develop social infrastructure. We believe that one of the first objectives of this office should be to create enabling legislation that would provide the process government agencies would follow in entering into a P3 arrangement. We also suggest that the new office have the ability to lease government lands, which is not a part of Chapter 103D HRS. Typically, investors in P3's are provided with some type of security for their investment through either a contract or some type of lease-back agreement with the investor having ownership of the improvement until such time as they are able to recoup their investment and the government agency would end up owning the improvement.

Thank you for the opportunity to testify.



LATE

Email: communications@ulupono.com

HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Tuesday, February 12, 2019 — 10:00 a.m. — Room 309

Ulupono Initiative Supports HB 889 with Comments, Relating to Public-Private Partnerships

Dear Chair Johanson, Vice Chair Eli, and Members of the Committee:

My name is Murray Clay and I am Managing Partner of 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 manage waste and fresh water resources. 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 supports HB 889 with comments, which establishes the Office of Public-Private Partnership (P3) and the position of the State Office of Public-Private Partnership Coordinator, because it aligns with our goal 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, delayed, or do not deliver expected public benefits. One solution is to work with the private sector on designing, building, financing, operating, and maintaining public purpose infrastructure 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 enable public authorities at the state and local level to delivery critical infrastructure in the timeliest and most cost-effective manner possible.

Through an infusion of private capital and management, P3 can ease fiscal restraints and boost efficiency in the provision of public infrastructure and services. P3 have demonstrated their benefit by delivering shorter delivery times, reduced life-cycle asset costs, better value for money, and increased innovation across a range of sectors; however, P3 are highly complex policy instruments that require specialized expertise and skills not always readily available in the public sector. Therefore, in order to ensure that P3 projects are both successful and sustainable, reflecting the optimal balance of public and private sector rights and obligations, public authorities across the country are increasingly

Investing in a Sustainable Hawai'i

establishing dedicated institutional structures to manage and guide P3 programs and projects.

Hawai'i would greatly benefit from a dedicated institutional structure designed to manage and guide both P3 programs and projects. Whether advisory, regulatory or executive in nature, the creation of the appropriate institutional framework for P3 has demonstrated its effectiveness through the following:

- **Standardized Best Practice / Consistency of Criteria.** A centralized P3 office helps to standardize best practice and eliminate the need to “reinvent the wheel” for every project. This is particularly important when a P3 program involves multi-sector projects being implemented by diverse government entities. Best practice can range from a simple repository of information to the creation of standardized contractual terms (templates) and processes. Consistency of criteria is critically important to protect the public against failed projects and mitigate implementation risks.
- **Enhanced Public Sector Capacity.** The ability to leverage “lessons learned”, as well as to have access to best practice and experts greatly bolsters the public sector’s ability to effectively utilize P3. It also helps to ensure that projects are implemented in a successful and sustainable manner, optimizing the balance of rights and responsibilities between the parties. Furthermore, the office of public-private-partnerships serves as a “one-stop shop” for advice and expertise, assisting public sector officials to better understand the requirements of P3 projects. These factors improve the capacity of public sector officials to apply P3 as policy tool.
- **Better Projects.** The existence of a specialized P3 office or center of excellence has consistently yielded more balanced and sustainable projects by facilitating the application of best practice and providing policy makers with easy access to lessons learned.
- **Superior Efficiencies and Economies of Scale.** A specialist P3 office generally results in the more efficient implementation of projects, streamlining processes and reducing transaction times and expenses. In part, this is due to standardized criteria and procedures, which allow government entities to easily access and utilize pre-existing templates and procedures. Likewise, the P3 office reduces transaction costs, allowing public officials to draw on a pool of institutional expertise.
- **Heightened Private Sector Interest / Lower Risk Premiums.** A central P3 office might not only serve as a single marketing forum for a wide variety of projects, but it also helps establish the context within which individual projects are procured, financed and implemented. This often provides comfort to the investors and creditors, who may be unwilling to invest in one-off transactions. The use of standardized contractual provisions helps establish precedents, which reduce the risk profile of individual projects, thereby lowering required financial returns.
- **Greater Transparency and Accountability.** A centralized P3 office can serve as a single repository of information about all projects, thereby facilitating stakeholder understanding of P3 projects and processes. The centralized P3 office typically

publishes project performance metrics, allowing the public to evaluate project performance against other local projects, as well as against projects in other jurisdictions. This fosters greater accountability and transparency in the application of P3, providing greater comfort to the public while simultaneously incentivizing public officials to utilize this policy tool in the best manner possible.

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

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-finance-operate-maintain and design-build-finance-operate-maintain. While a recent opinion issued by the State's Attorney General suggested that there are no statutory prohibitions to a Design-Build-Finance-Operate-Maintain (DBFOM) type of arrangement, the complexity of these contracting structures requires additional consideration.

When discussing this bill with Ms. Jill Jamieson, managing director at Jones Lang LaSalle, one of the nation's leading P3 experts with years of experience, she confirmed the value and importance of establishing an appropriate institutional framework for P3, particularly through the creation of a well-funded central P3 office.

General Comments: This bill goes too far in that it attempts to both create enabling P3 legislation, as well as a centralized P3 office. Our view is that it is inadequate in its scope and application to serve as P3 enabling legislation, however, it is beneficial in that it establishes an institutional framework for enabling P3 through a central P3 office.

In light of the recent Attorney General opinion that suggests that P3 are allowable, this

proposed bill might be abbreviated to simply reflect the creation of a P3 office, without its broader provisions.

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 appropriate location of the Office of Public-Private-Partnerships should be



given additional consideration.

Given the complex issues involving P3s, Ulupono would be happy to make our P3 consultant Jill Jamieson of Jones Lang LaSalle in Washington D.C. available to answer any technical questions you may have.

Thank you for this opportunity to testify.

Respectfully,

Murray Clay
Managing Partner