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STATE PROCUREMENT OFFICE**

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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
COMMITTEE ON GOVERNMENT REFORM
FEBRUARY 5, 2021, 9:00 A.M.

HOUSE BILL 1212
RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

Chair McKelvey, Vice-Chair Wildberger, and members of the committee, thank you for the opportunity to submit testimony on HB1212. The State Procurement Office (SPO) offers the following comments and recommendation:

The bill identifies the need to clarify options and procurement guidance for public infrastructure projects. The Hawaii Public Procurement Code does not preclude the use of optional delivery methods, including design-build-operate-maintain and design-build-finance-operate-maintain contracts. However, clarification taken from the 2007 Model Code for Public Infrastructure Procurement, prepared by the American Bar Association, promotes for the fair and equitable treatment of all persons involved in public infrastructure procurement by government agencies and maximizes the purchasing value of public funds while maintaining a procurement system of quality and integrity.

Design-build-finance-operate-maintain is a proven delivery method in common use throughout the world and in American antiquity. Design-build-finance-operate-maintain integrates long term operation and maintenance, as well as project finance, into a single competition. Design-build-finance-operate-maintain depends on the prior establishment of functional requirements of a project.

Design-build-finance-operate-maintain has characteristics distinct from design-build-operate-maintain as defined in Appendix A Section 18. In design-build-finance-operate-maintain, no agency funds are appropriated to pay for any part of the services provided by the contractor during the contract period. This distinction is important in the statutory scheme, since the government's competitive sealed proposal process is structured on

the premise that offerors will be required to finance the project, with no expectation of state appropriations. This project delivery method should be carefully and wisely used, since design-build-finance-operate-maintain makes practical sense only where government has made a preliminary determination that project revenues are sufficient, over the length of the proposed contract, to cover design, construction, finance, and operations.

(18) *Design-build-operate-maintain* means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the funds required to pay for the services provided by the contractor during the contract period are either appropriated to the [Purchasing Agency] prior to award of the contract or secured by the [Purchasing Agency] through fare, toll, or user charges.

Design-build-operate-maintain integrates long term operation and maintenance into a single competition. Design-build-operate-maintain depends on the prior establishment by the government of the functional requirements of a project. Note the differences in the definition of design-build-operate-maintain from that of design-build-finance-operate-maintain. Projects which are partially or completely funded by direct public appropriations or by publicly imposed user charges, fares, or tolls are defined in the Code as design-build-operate-maintain projects. ¹

The SPO recommends the following changes to Sections 3 and 4:

SECTION 3. Section 103D-4, Hawaii Revised Statutes, is amended by adding four new definitions to be appropriately inserted and to read as follows:

"Design-build-finance-operate-maintain" means a project delivery method in which the purchasing agency enters into a single contract for design, construction, financing, maintenance, and operation of an infrastructure facility over a contractually defined period. No purchasing agency funds are appropriated to pay for any part of the services provided by the contractor during the contract period.

"Design-build-operate-maintain" means a project delivery method in which the purchasing agency enters into a single

¹ American Bar Association (ABA) 2007 Model Code for Public Infrastructure Procurement (PIP), Appendix A

contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the funds required to pay for the services provided by the contractor during the contract period are either appropriated by the purchasing agency prior to award of the contract or secured by the purchasing agency through fare, toll, or user charges.

"Independent peer reviewer services" means additional ~~professional services~~ Architectural and Engineering services provided to the purchasing agency in design-build-operate-maintain or design-build-finance-operate-maintain procurements to confirm that the key elements of the professional engineering and architectural design provided by the contractor conform to the applicable standard of care.

"Infrastructure facility" means a building, a structure, or networks of buildings, structures, pipes, controls, and equipment that provide transportation, utilities, public education, or public safety services, including government office buildings; public schools; courthouses; jails; prisons; public hospitals; water treatment plants, distribution systems, and pumping stations; wastewater treatment plants, collection systems, and pumping stations; solid waste disposal plants, incinerators, landfills, and related facilities; public roads and streets; highways; public parking facilities; public transportation systems, terminals- (delete comma) and rolling stock; and rail, air, and water port structures, terminals, and equipment." (remove quote)

SECTION 4. Section 103D-303, Hawaii Revised Statutes, is amended by amending subsection (i) to read as follows:

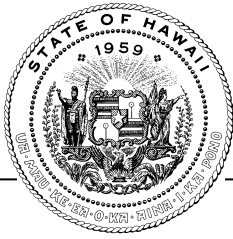
"(i) In addition to any other provisions of this section, construction projects may be solicited through a request for proposals to use the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery method; provided that:

- (1) A request for proposals is issued to prequalify offerors to select a short list of no more than three responsible offerors, prior to the submittal of proposals; provided that the number of offerors to be selected for the short list shall be stated in the request for proposals and prompt notice is given to all offerors as to which offerors have been short-listed;
- (2) A conceptual design fee may be paid to non-selected offerors that submit a technically responsive proposal; provided that the cost of the entire project is greater than \$1,000,000; and
- (3) The criteria for pre-qualification of offerors, design requirements, development documents, proposal evaluation criteria, terms of the payment of a conceptual design fee, or any other pertinent information shall be stated in the request for proposals.
- (4) Each request for proposals to use the design-build, design-build-operate-maintain or design-build-finance-operate-maintain project delivery method shall:
Describe on the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance.
~~(A) State the relative importance of:~~

- ~~(i) Demonstrated compliance with the design requirements;~~
- ~~(ii) Offeror qualifications;~~
- ~~(iii) Financial capacity;~~
- ~~(iv) Project schedule;~~
- ~~(v) Price or lifecycle price; and~~
- ~~(vi) Other factors, if any; and~~
- ~~(B) Require each offeror, for a project:~~
 - ~~(i) With a contract price estimated to exceed \$10,000,000;~~
 - ~~(ii) With a contract period of operations and maintenance of at least ten years; or~~
 - ~~(iii) In other circumstances identified by the comptroller by rule,
to include and identify qualified and competent independent peer reviewer services, which shall be an additional evaluation factor in the award of the contract."~~

The SPO recommends that Section 5 of this bill be removed. Section 103D-323, Hawaii Revised Statutes, pertain to bid security. The proposed changes do not support the purpose of a bid security, which is to protect the State against the failure or refusal of an offeror to execute the contract for the work bid or to supply the necessary performance and payment bonds, as required.

Thank you.



OFFICE OF PLANNING STATE OF HAWAII

DAVID Y. IGE
GOVERNOR

MARY ALICE EVANS
DIRECTOR
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Statement of
MARY ALICE EVANS
Director, Office of Planning
before the
HOUSE COMMITTEE ON GOVERNMENT REFORM
Friday, February 5, 2021
9:00 AM
Via Videoconference

in consideration of
HB 1212
RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

Chair McKelvey, Vice Chair Wildberger, and Members of the House Committee on Government Reform.

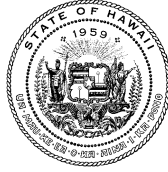
The Office of Planning (OP) **supports** HB 1212, which establishes an Office of Public-Private Partnership and the position of State Public-Private Partnership Coordinator within the Department of Accounting and General Services (DAGS), and adds definitions and revisions to Hawai'i Revised Statutes (HRS) Chapter 103D, the State Procurement Code, to facilitate implementation of public-private partnerships (P3s).

OP has actively promoted the use of P3s through educational and informational workshops in its roles as the co-chair of the Hawaii Interagency Council for Transit-Oriented Development (TOD Council) and the State TOD lead agency. Experience with P3s nationally and internationally shows that this approach delivers projects on-time, under budget, and exceeds quality expectations. Public agencies are provided with cost certainty and much of the risks of cost, schedule, and performance are transferred to the private sector while maintaining public ownership of the asset.

In the *State of Hawaii Strategic Plan for TOD*, a major plan recommendation is to “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 establishes a much needed P3 Office to facilitate implementation with well-considered provisions to clarify its allowance in public procurement. The defining role of the proposed office to provide technical assistance to and facilitate access to specialized expertise and services for State and county agencies is exactly what TOD agencies need and have requested. Accordingly, we support this measure and urge your favorable consideration.

Thank you for this opportunity to testify.

DAVID Y. IGE
GOVERNOR



CURT T. OTAGURO
COMPTROLLER
AUDREY HIDANO
DEPUTY COMPTROLLER

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
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WRITTEN TESTIMONY
OF
CURT T. OTAGURO, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE HOUSE COMMITTEE ON
GOVERNMENT REFORM

FRIDAY, FEBRUARY 5, 2021, 9:00 A.M.
CONFERENCE ROOM 309, STATE CAPITOL

H.B. 1212

RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

Chair McKelvey, Vice Chair Wildberger, and members of the Committee, thank you for the opportunity to submit testimony on H.B. 1212.

The Department of Accounting and General Services (DAGS) offers the following comments on the proposed legislation to establish the office of public-private partnerships and the position of state public-private partnerships coordinator, to add design-build-operate-maintain and design-build-finance-operate-maintain project delivery methods to the Procurement Code and related conditions and requirements, and to appropriate funds.

1. DAGS has determined the design-build-finance-maintain (DBFM) project delivery method to be advantageous to the state's interests for the current New Aloha Stadium Entertainment District public-private partnership, for which the state will enter into a single contract for design, construction, financing, and maintenance of an infrastructure facility over a contractually defined period, while operation of the resulting stadium facility and collection of revenues resulting from such operation

will reside with the Stadium Authority. Such considerations may also be true for future public-private partnership projects whenever the project owner (the government entity that will manage the improvements) wishes to retain control over the facility or infrastructure operations. The department suggests the language of the bill be amended, throughout, to also add the design-build-finance-maintain (DBFM) project delivery method to the Procurement Code.

2. Section 2 of the bill enumerates the Duties of the proposed office in subparagraph (6) on page 5, lines 18-19, and includes language to the effect that the proposed office will assist state and county agencies on public-private partnership projects "... with the legal authority to coordinate activities that involve cross-agency responsibilities ...". We are concerned such legal authority may be construed to dilute or circumvent the home rule authority of any affected county. DAGS suggests the language regarding the proposed office's legal authority to coordinate the public-private partnership coordination activities of the counties be stricken from the bill; and further suggests the proposed office's duties be limited to public-private partnerships of the state.
3. Additionally, the enumeration of Duties of the proposed office in subparagraph (9) on page 6, lines 12-17, of the bill includes the duties that are now the responsibility of DAGS' Public Works Division (PWD) and may result in duplication of those responsibilities. DAGS suggests the entire contents of the identified subparagraph be stricken from the bill.

4. Section 3 of the bill adds certain definitions to section 103D-4, Hawaii revised Statutes. DAGS suggests the definition of design-build-finance-maintain also be added, as follows:

“Design-build-finance-maintain” means a project delivery method in which the purchasing agency enters into a single contract for design, construction, financing, and maintenance of an infrastructure facility over a contractually defined period.

5. The department also suggests the definition of infrastructure facility set forth in section 3 of the bill be amended to include other forms of vertical and horizontal public infrastructure not addressed in the bill’s current language, including but not limited to stadiums, convention centers, entertainment districts, and similar facilities that are owned and operated by the public (i.e., the government) and which contribute to the network of essential facilities and systems that facilitate the economy and enhance the affected community’s standard of living.
6. In section 4 of the bill, the language proposed to amend section 103D-303, Hawaii Revised Statutes subsection (i) at subsection (4)(B) on page 10, lines 12-20, and page 11, lines 1-2, requires that each offeror, under certain conditions, to include and identify independent peer reviewer services. It is unclear what the required peer review services are intended to accomplish, and the department suggests the bill be amended to directly address such intent.
7. In section 5 of the bill, the language proposed to amend section 103D-323, Hawaii Revised Statutes section (a) retains the following “... bid security shall be required only for construction contracts to be awarded pursuant to sections 103D-302 and 103D-303 ...” (emphasis supplied), which can be construed to prohibit requirement

of bid security for contracts not awarded under one of those cited sections. It is likely that current and future public-private partnerships, the components of which may include construction, will be awarded outside the provisions of the cited sections. For example, if a public-private partnership involves financing by the private partner, the contract award may be made under section 37D, Management of Financing Agreements. In such an example, it would not be to the state's best interests to be precluded from requiring bid security simply because the contract will not be awarded under one of the cited sections. The department suggests, therefore, that the language of the bill be amended to permit requirement of bid security for public-private partnership contracts that are to be awarded under statutory provisions other than the cited sections.

8. Section 6 of the bill appropriates funds to establish and operate the office and to establish and fill the public-private partnership coordinator position. Discharging the duties enumerated in the bill will require more than a single position. The department suggests the bill's appropriation language be amended to permit establishment and filling of a sufficient number of positions subordinate to the public-private coordinator position to enable the office to properly discharge those duties, and to specify if any such subordinate positions shall be exempted from chapter 76.

Thank you for the opportunity to submit comments on this matter.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

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

The Thirty-First Legislature, State of Hawaii
House of Representatives
Committee on Government Reform

Testimony by
Hawaii Government Employees Association
February 5, 2021

H.B. 1212 – RELATING TO PUBLIC-PRIVATE PARTNERSHIPS

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO raises strong concerns over the intent and impact of H.B. 1212 which establishes and appropriates funding for the Office of Public-Private Partnership within the Department of Accounting and General Services and adds new project 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 taxpayer 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 a 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. 1212 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. 1212.

Respectfully submitted,

Randy Perreira
Executive Director