

H.B. NO. 70  
H.D. 3  
S.D. 1  
PROPOSED

**Report Title:**

Public Private Partnerships; Transportation

**Description:**

Allows the State to enter into agreements with private entities to build, operate, own, or finance transportation facilities including toll highways. (PROPOSED HB70 SD1)



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# A BILL FOR AN ACT

RELATING TO TRANSPORTATION.

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

1           SECTION 1. The legislature finds that the economic,  
2 social, and environmental well-being of the state and the  
3 maintenance of a high quality of life for the people of the  
4 state require an efficient transportation system.

5           The ability of the State to provide an efficient  
6 transportation system can be enhanced by a public-private sector  
7 program which could authorize private entities to undertake all  
8 or a portion of the study, planning, design, development,  
9 financing, acquisition, installation, construction, improvement,  
10 operation, or maintenance of transportation systems and facility  
11 projects. This public-private program will provide benefits to  
12 both the public and private sectors. Public-private initiatives  
13 provide a sound economic investment opportunity for the private  
14 sector. Such initiatives provide the State with increased  
15 options to develop the state's infrastructure and can supplement  
16 state transportation revenues.

17           The purpose of this Act is to achieve the following goals  
18 through public-private partnerships:



- 1           (1) Provide a well-defined mechanism to facilitate the  
2           collaboration and creative cost and risk sharing in  
3           transportation projects between public and private  
4           partners;
- 5           (2) Bring innovative thinking from the private sector to  
6           bear on transportation needs within the state and  
7           access specialized development, financing, design,  
8           construction, management, operations, management  
9           services, and techniques available in the private  
10          sector;
- 11          (3) Reduce the public cost of project delivery and  
12          services for eligible facilities;
- 13          (4) Expedite project delivery;
- 14          (5) Encourage private investment in public infrastructure;
- 15          (6) Use funding sources that are financially advantageous  
16          and in the public interest;
- 17          (7) Encourage life-cycle efficiencies in transportation  
18          projects;
- 19          (8) Provide better use and leverage of public resources  
20          and savings to taxpayers, by increasing private  
21          investment in public facilities and enhancing capital  
22          formation for large projects;



- 1 (9) Develop eligible facilities with the cooperation,  
2 consultation, and support of affected communities and  
3 county jurisdictions;
- 4 (10) Solicit, evaluate, negotiate, and administer public-  
5 private agreements with the private sector relating to  
6 the planning, financing, development, design,  
7 construction, upgrading, reconstruction, operation, or  
8 maintenance of transportation systems and facilities;  
9 and
- 10 (11) Obtain assistance in the development of these  
11 transportation systems and facilities from federal  
12 programs administered by the United States Department  
13 of Transportation.

14 The legislature intends that the powers granted to the  
15 state department of transportation and other agencies in this  
16 Act are in addition to any other powers authorized under  
17 applicable law.

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





1 "Hawaii based company" means any person or legal entity,  
2 including corporations, partnerships, and limited liability  
3 companies and partnerships, whose operations are headquartered  
4 in the state.

5 "Private partner" means a person, entity, or organization  
6 that is not the federal government, the State, a county, or a  
7 unit of government.

8 "Program" means the public-private partnerships in a  
9 transportation program as provided in this chapter.

10 "Public-private partnership agreement" means any binding  
11 agreement transferring rights for the use or control, in whole  
12 or in part, of an eligible facility by the department or other  
13 unit of government to a private partner in accordance with this  
14 chapter.

15 "Unit of government" means any department or agency of the  
16 State, any public corporation established under state law or  
17 county ordinance, or any intergovernmental agency or  
18 corporation.

19 § -2 **Rules.** The department shall adopt, amend, or  
20 repeal rules pursuant to chapter 91, as it determines necessary  
21 to effectuate this chapter.



1           **§ -3 Project delivery methods.** The department may  
2 provide for the development or operation of eligible facilities  
3 using a variety of project delivery methods and forms of  
4 agreement. Such methods may include, without limitation:

- 5           (1) Predevelopment agreements leading to other  
6           implementing agreements;
- 7           (2) A design-build agreement;
- 8           (3) A design-build-maintain agreement;
- 9           (4) A design-build-finance-operate agreement;
- 10          (5) A design-build-operate-maintain agreement;
- 11          (6) An agreement providing for the private partner to  
12          design, build, operate, maintain, manage, or lease an  
13          existing, enhanced, upgraded, or new facility; and
- 14          (7) Such other project delivery method or agreement or  
15          combination of methods or agreements as in the  
16          determination of the department will serve the public  
17          interest.

18           **§ -4 Posting of conceptual proposals; public comment;**  
19 **public access to procurement records.** (a) Conceptual proposals  
20 submitted in accordance with this chapter to a unit of  
21 government shall be posted by the responsible unit of government  
22 within thirty working days after acceptance of the proposals in



1 accordance with chapter 103D. In addition to the posting  
2 requirements, at least one copy of each proposal shall be made  
3 available for public inspection. Nothing in this section shall  
4 be construed to prohibit the posting of the conceptual proposals  
5 by additional means to provide maximum notice to the public of  
6 the opportunity to inspect the proposals. Prior to posting or  
7 otherwise disclosing the conceptual proposal, the responsible  
8 public entity may redact information from the conceptual  
9 proposal to the extent permitted by chapter 92F.

10 (b) In addition to the posting requirements of subsection  
11 (a), for thirty days prior to entering into an interim or  
12 comprehensive agreement, the responsible unit of government  
13 shall provide an opportunity for public comment on the  
14 proposals. The public comment period required by this  
15 subsection may include a public hearing in the sole discretion  
16 of the responsible unit of government.

17 (c) Once an interim agreement or a comprehensive agreement  
18 has been entered into, the responsible unit of government shall  
19 make procurement records available for public inspection, upon  
20 request. For the purposes of this subsection, procurement  
21 records shall not be interpreted to include trade secrets or



1 confidential information, which may be withheld from public  
2 disclosure under chapter 92F.

3 (d) This section shall apply to accepted proposals  
4 regardless of whether the process of bargaining will result in  
5 an interim or a comprehensive agreement.

6 (e) A responsible unit of government and any independent  
7 review panel appointed to review information and advise the  
8 responsible unit of government may hold a meeting closed to the  
9 public for the purpose of considering records exempt from  
10 disclosure; provided that the meetings are held in accordance  
11 with the procedural requirements of sections 92-4 and 92-5.

12 § -5 **Public-private partnership agreements.** (a) In any  
13 public-private partnership agreement for any eligible facility  
14 under this chapter, the department may:

15 (1) Authorize the private partner to collect user fees,  
16 tolls, fares, or similar charges, including, without  
17 limitation, provisions:

18 (A) Specifying the technology to be used in the  
19 facility;

20 (B) Establishing circumstances under which the  
21 department may receive a share of revenues from  
22 such charges; and



- 1 (C) Governing enforcement of tolls, including use of
- 2 cameras or other mechanisms to ensure that users
- 3 pay tolls that are due, and allowing the private
- 4 partner access to relevant state and county
- 5 databases to the extent necessary to collect and
- 6 enforce tolls;
- 7 (2) Allow for payments to be made by the State to the
- 8 private partner, including but not limited to
- 9 availability payments or performance-based payments;
- 10 (3) Accept payments of money and share revenues with the
- 11 private partner;
- 12 (4) Address the method of sharing risk management and
- 13 insurance for the project;
- 14 (5) Specify the method of sharing the costs of development
- 15 of the project;
- 16 (6) Allocate financial responsibility for cost overruns;
- 17 (7) Establish the damages to be assessed for
- 18 nonperformance;
- 19 (8) Establish performance criteria or incentives;
- 20 (9) Address the acquisition of rights-of-way and other
- 21 property interests that may be required, including
- 22 provisions addressing the exercise of eminent domain;



- 1 (10) Establish recordkeeping, accounting, and auditing  
2 standards to be used for the project;
- 3 (11) Address responsibility for reconstruction or  
4 renovations required for a facility to meet all  
5 applicable government standards upon transfer of the  
6 facility to public ownership;
- 7 (12) Provide for patrolling and law enforcement of any  
8 eligible facility and any related public facilities;
- 9 (13) Identify any department specifications that must be  
10 satisfied, including allowing the private partner to  
11 request and receive authorization to deviate from such  
12 specifications on making a showing of need  
13 satisfactory to the department;
- 14 (14) Require a private partner to provide performance and  
15 payment bonds, parent company guarantees, letters of  
16 credit, and other acceptable forms of security, the  
17 penal sum or amount of which may be less than one  
18 hundred per cent of the value of the contract involved  
19 based upon the department's determination, made on a  
20 facility-by-facility basis, of what is required to  
21 adequately protect the State;



- 1 (15) Authorize the private partner in a partnership  
2 agreement under this chapter to collect user fees,  
3 tolls, fares, or similar charges to cover its costs  
4 and provide for a reasonable rate of return on the  
5 private partner's investment, including, without  
6 limitation, the following provisions:
- 7 (A) That the charges may be collected directly by the  
8 private partner or by a third party engaged for  
9 that purpose;
- 10 (B) A formula for the adjustment of user fees, tolls,  
11 fares, or similar charges during the term of the  
12 agreement;
- 13 (C) For an agreement that does not include such a  
14 formula, provisions regulating the private  
15 partner's return on investment; or
- 16 (D) A list of various traffic management strategies,  
17 including without limitation:
- 18 (i) General purpose toll lanes;
- 19 (ii) High occupancy vehicle lanes where single or  
20 low occupancy vehicles may "buy-in" to use  
21 higher occupancy vehicle lanes by paying a  
22 toll;



1 (iii) Lanes or facilities where the tolls may vary  
2 during the course of the day or week or  
3 according to levels of congestion  
4 anticipated or experienced; or

5 (iv) Any combinations of, or variations on, the  
6 foregoing, or other strategies, that the  
7 department may determine appropriate on a  
8 facility-by-facility basis;

9 and

10 (16) Specify remedies available and dispute resolution  
11 procedures, including but not limited to the right of  
12 the private partner to institute legal proceedings to  
13 obtain an enforceable judgment or award against the  
14 department in the event of a default by the  
15 department, and procedures for use of dispute review  
16 boards, mediation, facilitated negotiation,  
17 arbitration, and other alternative dispute resolution  
18 procedures.

19 (b) Any public-private partnership agreement shall contain  
20 provisions that:

21 (1) Provide incentives to use Hawaii based companies and a  
22 Hawaii based workforce pool;



1 (2) All rights, title, and interest in the eligible  
2 facility shall be transferred to the department after  
3 receipt of a mutually agreeable amount by the private  
4 partner, where upon the eligible facility shall be  
5 classified as a state public road and operated and  
6 maintained as such;

7 (3) Require all user fees, tolls, fares, or similar  
8 charges to be used exclusively for the planning,  
9 financing, construction, and maintenance of new  
10 eligible facilities; provided that a county with a  
11 population of less than five hundred thousand may  
12 charge a separate fee that may be used for the  
13 planning, financing, construction, and maintenance of  
14 new lanes on existing road shoulders, easements,  
15 setbacks, and rights of way; and

16 (4) Public transportation by bus shall be exempt from  
17 tolls, fares, user fees, or similar charges.

18 (c) The department may enter into agreements with any  
19 private partner that includes provisions as described in  
20 subsection (a) notwithstanding any other provision of state law  
21 or rule or county ordinance or rule; provided that all  
22 agreements entered into between the department and any private



1 partner shall be presented in a report to the legislature by the  
2 department and the agreement shall be executed unless rejected  
3 by a three-fourths vote of the members of each house of the  
4 legislature.

5       §   -6 **Emergency declaration; general use of road.** During  
6 any emergency as declared by the governor through an executive  
7 order, the department may declare that the eligible facility  
8 shall be open for general use without the collection of user  
9 fees, tolls, fares, or similar charges, until such time that the  
10 governor declares the emergency no longer exists.

11       §   -7 **Fines; toll evaders.** The department shall adopt  
12 rules in accordance with chapter 91 to establish fines for any  
13 motorist who violates this chapter by evading the payment of an  
14 appropriate levied toll on any toll highway constructed,  
15 operated, owned, or financed under this chapter.

16       §   -8 **Police powers; violations of law.** (a) All police  
17 officers and other law enforcement officers having police powers  
18 of the State and of each affected county shall have the same  
19 powers and jurisdiction within the limits of the eligible  
20 facility that they have in their respective areas of  
21 jurisdiction, and these officers shall have access to the  
22 eligible facility at any time for the purpose of exercising



1 their powers and jurisdiction. This authority shall not extend  
2 to the private offices, buildings, garages, and other  
3 improvements of the private partner to any greater degree than  
4 the police powers apply to any other private buildings and  
5 improvements.

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

14 § -9 **Funding and financing.** (a) The department may, in  
15 connection with providing for the development or operation of an  
16 eligible facility, allow funding from any lawful source,  
17 including without limitation:

18 (1) The proceeds of grant anticipation revenue bonds  
19 authorized by Title 23 United State Code Section 122  
20 or any other applicable federal or state law;

21 (2) Grants, loans, loan guarantees, lines of credit,  
22 revolving lines of credit, or other arrangements



1 available under the Transportation Infrastructure  
2 Finance and Innovation Act under Title 23 United  
3 States Code Section 181 or any other federal or state  
4 law;

5 (3) Federal, state, or county revenues;

6 (4) User fees, tolls, fares, charges, lease proceeds,  
7 rents, availability payments, gross or net receipts  
8 from sales, proceeds from the sale of development  
9 rights, franchise fees, permit fees, or any other  
10 lawful form of consideration;

11 (5) Private activity bonds as described by Title 26 United  
12 States Code Section 142(a)(15) and other forms of  
13 private capital; and

14 (6) Any other forms of public and private capital as may  
15 be available.

16 (b) As security for the payment of financing described in  
17 this section, the revenues from the project may be pledged, but  
18 no such pledge of revenues shall constitute in any manner or to  
19 any extent a general obligation of the State or any county. Any  
20 financing may be structured on a senior, parity, or subordinate  
21 basis to any other financing.



1           (c) The department, and any other unit of government  
2 authorized by the department, may issue toll revenue bonds to  
3 provide funds for any project under this chapter.

4           (d) The department may accept from the United States or  
5 any of its agencies, any funds that are available to the State  
6 or to any other unit of government for carrying out the purposes  
7 of this chapter, whether the funds are made available by grant,  
8 loan, or other financing arrangement. The department may enter  
9 into such agreements and other arrangements with the United  
10 States or any of its agencies as may be necessary, proper, and  
11 convenient for carrying out the purposes of this chapter.

12           (e) The department may accept from any source any grant,  
13 donation, gift, or other form of conveyance of land, money,  
14 other real or personal property, or other valuable thing made to  
15 the State, the department, or another unit of government for  
16 carrying out the purposes of this chapter.

17           (f) Any eligible facility may be funded in whole or in  
18 part by contribution of any funds or property made by any  
19 private partner or public-sector partner that is a party to any  
20 agreement entered into under this chapter.

21           (g) Federal, state, and county funds may be combined with



1 any private-sector funds for any project purposes,  
2 notwithstanding any other provision of state law or rule or  
3 county ordinance or regulation.

4       **§ -10 Confidentiality and public disclosure.** A proposer  
5 shall identify those portions of a proposal or other submission  
6 that the proposer considers to be trade secrets or confidential  
7 commercial, financial, or proprietary information. The  
8 identified information shall be withheld from public disclosure  
9 to the extent permitted by chapter 92F.

10       **§ -11 Federal laws.** If no federal funds are used on an  
11 eligible facility, the laws of the State, including this  
12 chapter, shall govern. Notwithstanding any provisions of this  
13 chapter, if federal funds are used on an eligible facility and  
14 applicable federal statutes or regulations conflict with this  
15 chapter or require provisions or procedures inconsistent with  
16 this chapter, the applicable federal statutes or regulations  
17 shall govern."

18       SECTION 3. This Act shall take effect on July 1, 2020.

