

JAN 24 2018

A BILL FOR AN ACT

RELATING TO ALTERNATIVE PROJECT DELIVERY.

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

1 SECTION 1. The legislature finds that projects can be
2 delivered in a more efficient manner by increasing the effective
3 use of state resources. The purpose of this Act is to provide
4 an alternative method for state government to finance and
5 deliver public projects on time, on budget, and in compliance
6 with, among other laws, public labor union laws, prevailing wage
7 laws, environmental and historic preservation laws, and all
8 permitting laws. The Act does not mandate, but allows state
9 government to elect an alternative method of managing public
10 lands and awarding contracts, that is separate and apart from
11 chapters 171 and 103D, Hawaii Revised Statutes.

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

15 "CHAPTER

16 ALTERNATIVE PROJECT DELIVERY PROGRAM

17 § -1 Definitions. As used in this chapter:

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1 "Alternative proposal" means a proposal submitted by a
2 private entity to a public entity in response to the public
3 entity's solicitation of alternative proposals pursuant to this
4 chapter.

5 "Department" means the department of accounting and general
6 services.

7 "Material default" means the failure of an operator to
8 perform a duty under a qualified project agreement that
9 jeopardizes the delivery of adequate service to the public and
10 the duty remains unsatisfied after a reasonable period of time
11 and after the operator has received a written notice from the
12 public entity of the failure.

13 "Offeror" means a private entity submitting a proposal to a
14 solicitation of alternative proposals issued by a public entity.

15 "Operator" means a private entity that has entered into a
16 qualified project agreement under section -8.

17 "Private entity" means a natural person, corporation,
18 limited liability company, partnership, joint venture, or other
19 private business entity.

20 "Public entity" means any department, commission, council,
21 board, bureau, authority, committee, institution, legislative
22 body, agency, government corporation, or other establishment or

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1 office of the executive, legislative, or judicial branch of the
2 State, including the office of Hawaiian affairs.

3 "Public notice" means the distribution or dissemination of
4 information to interested parties using methods that are
5 reasonably available, such as the publication of statewide
6 notices on the department's or public entity's internet site,
7 newspaper publication, notice by mail, or electronic mail to
8 private entities on any applicable offeror mailing list; and any
9 other method the public entity deems effective for publicizing
10 the solicitation.

11 "Qualified project" means the planning, acquisition,
12 financing, development, design, construction, reconstruction,
13 rehabilitation, replacement, improvement, maintenance,
14 management, operation, repair, leasing, or ownership of a state
15 project implemented under this chapter.

16 "Qualified project agreement" means an agreement between a
17 public entity and an offeror on the implementation of a
18 qualified project.

19 "Request for information" means the document issued
20 pursuant to section -3 to obtain information from potential
21 offerors on how a qualified project and its associated

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1 solicitation of alternative proposals should be structured

2 before a solicitation of alternative proposals.

3 "Request for qualification" means the document issued

4 pursuant to section -4 used to obtain support of a private

5 entity's skills, resources, capabilities, and experience before

6 submitting a response to a solicitation of alternative

7 proposals.

8 "Solicitation of alternative proposals" means the document

9 used in the competitive proposal process pursuant to section

10 -5 in which alternative proposals are evaluated on the basis

11 criteria identified in the solicitation, and in which discussion

12 and negotiations with offerors may be conducted before final

13 selection and execution of a qualified project agreement.

14 § -2 **Alternative project delivery program; established.**

15 (a) There is established the alternative project delivery

16 program to be administered by the department.

17 (b) The program shall assist public entities with the

18 development, solicitation, evaluation, award, and delivery of

19 qualified projects.

20 (c) Notwithstanding any law to the contrary, the

21 department may retain consultants or enter into contracts to

22 provide financial, legal, or other technical expertise the

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1 department deems necessary to assist in the development,
2 solicitation, evaluation, award, and delivery of qualified
3 projects.

4 (d) A public entity shall notify the department of its
5 intent to use the alternative project delivery program to
6 conduct a request for information, pre-qualification, or
7 solicitation of alternative proposals under this chapter to
8 ensure appropriate application of this chapter.

9 (e) The department shall submit an annual report to the
10 legislature no later than twenty days prior to the convening of
11 each regular session describing the requests for information
12 issued, solicitations of alternative proposals issued,
13 unsolicited proposals received and qualified project agreements
14 entered into under the program, and the amounts received and
15 expended by the alternative project delivery special fund during
16 the previous fiscal year.

17 **§ -3 Requests for information.** (a) A public entity
18 may issue a request for information to obtain information
19 regarding potential qualified projects.

20 (b) A request for information may include, but is not
21 limited to:

22 (1) The objective of the qualified project;

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1 (2) The solicitation of recommendations on how best to

2 achieve the goals of the qualified project;

3 (3) Reservation of the right to incorporate in a

4 solicitation, if issued, any recommendations presented

5 in the response to the request for information; and

6 (4) A provision that neither the public entity nor the

7 private entity responding has any obligation under the

8 request for information.

9 (b) A request for information shall be published in a

10 manner that is intended to give interested parties sufficient

11 public notice, time, and opportunity to respond.

12 (c) Any response to a request for information shall become

13 the property of the public entity issuing the request.

14 (d) A private entity that submits a response to a request

15 for information will not be precluded from submitting a proposal

16 and competing for a resulting qualified project agreement.

17 § -4 Pre-qualification. (a) A public entity may

18 provide for a process of prequalification for private entities

19 to submit a proposal pursuant to section -5. The process

20 shall include public notice of a request for qualifications,

21 which identifies the requirements and the criteria the public

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1 entity will use in determining whether the private entity
2 prequalifies.

3 (b) To be prequalified to submit a proposal pursuant to
4 section -5, a private entity shall, in addition to any
5 requirements set forth in the solicitation of alternative
6 proposals for a qualified project:

7 (1) Have available sufficient sources of funding, capital,
8 securities, or other financial resources necessary to
9 carry out the qualified project if selected;

10 (2) Possess, either through its staff, subcontractors, a
11 consortium, or joint venture agreement, the
12 managerial, organizational, technical capacity, and
13 experience in the type of project being solicited;

14 (3) Agree to comply with all laws governing entities doing
15 business in the State; and

16 (4) Certify that no director, officer, partner, owner, or
17 other individual with direct and significant control
18 over the policy or finances of the private entity has
19 a conflict of interest or has been convicted of
20 corruption, fraud, or crime involving moral turpitude
21 in any jurisdiction of the United States.

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1 (c) If the public entity determines that a
2 prequalification process is appropriate for a qualified project,
3 only a prequalified private entity may be an offeror for that
4 project.

5 § -5 Solicitation of alternative proposals. (a)
6 Proposals for a qualified project shall be solicited by the
7 public entity through a competitive process in which a
8 solicitation of alternative proposals is issued.

9 (b) A solicitation of alternative proposals shall include
10 the following:

- 11 (1) A detailed description of the scope and minimum
12 requirements of the proposed qualified project;
- 13 (2) The material terms and conditions applicable to the
14 alternative proposal process and any resulting
15 contract;
- 16 (3) The criteria for evaluation and selection of a
17 proposal, which shall indicate the relative weight
18 given to each criterion; and
- 19 (4) A statement that offerors shall designate in writing
20 those portions of the proposal that contain trade
21 secrets or confidential commercial, financial, or
22 proprietary information that are to remain

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1 confidential, subject to chapter 92F; and that the
2 material designated as confidential shall be readily
3 separable from the proposal to facilitate inspection
4 of the non-confidential portion.

5 (c) The public entity shall provide public notice of a
6 solicitation of alternative proposals. The solicitation shall
7 be published in a manner that is intended to give interested
8 parties sufficient public notice, time, and opportunity to
9 respond.

10 (d) The public entity shall evaluate each alternative
11 proposal that satisfies the minimum requirements of the
12 solicitation of alternative proposals according to the
13 evaluation and selection criteria contained in the solicitation.

14 (e) The public entity may conduct discussions with
15 offerors that meet the minimum requirements of the solicitation
16 of the purpose of clarification to assure full understanding of,
17 and responsiveness to, the solicitation requirements. Offerors
18 shall be accorded fair and equal treatment with respect to any
19 opportunity for discussion and revision of proposals. Revisions
20 may be permitted after submissions and prior to award for the
21 purpose of obtaining complete and thorough proposals. In
22 conducting discussions, there shall be no disclosure of any

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1 information derived from proposals submitted by competing
2 offerors.

3 (f) The public entity may engage in negotiations with the
4 highest-ranked offeror and may negotiate:

5 (1) The statement of work;

6 (2) The contract price as it is affected by negotiating
7 the statement of work; and

8 (3) Any other terms and conditions reasonably related to
9 those expressly authorized for negotiation in the
10 solicitation of alternative proposals. Accordingly,
11 offerors shall not submit, and the public entity shall
12 not accept, for negotiation any alternative terms and
13 conditions that are not reasonably related to those
14 expressly authorized for negotiation in the
15 solicitation of alternative proposals.

16 In conducting negotiations, there shall be no disclosure of any
17 information derived from proposals submitted by competing
18 offerors.

19 (g) A public entity may terminate negotiations with an
20 offeror if such negotiations are not successful and commence
21 negotiations with the next highest scoring offeror, and continue
22 this process until the public entity has:

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(1) Determined to award the contract to the offeror with whom it is currently negotiating; or

(2) Determined to continue negotiations with the offerors; or

(3) Determined to cancel the solicitation of alternative proposals.

(h) Award may only be made to the offeror whose proposal is determined in writing to be the most advantageous and in the best interests of the State, taking into consideration the criteria set forth in the solicitation of alternative proposals.

(i) Proposals shall be made available to the public upon execution of the alternative project agreement; provided that the public entity shall not disclose any information that has been designated as confidential or proprietary by an offeror, if the public entity determines such designation is proper pursuant to chapter 92F.

(j) The public entity may pay a stipend to an unsuccessful offeror, in an amount and on terms and conditions determined by the public entity. All conditions for a stipend shall be clearly set forth in the solicitation of alternative proposals.

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1 (k) Any response to a solicitation of alternative
2 proposals shall become the property of the public entity issuing
3 the solicitation.

4 § -6 Review of solicitations of alternative proposals;
5 approvals. (a) Before the issuance of a solicitation of
6 alternative proposals pursuant to section -5, the public
7 entity shall submit the proposed solicitation of alternative
8 proposals to the director of finance, the comptroller, and the
9 attorney general for approval.

10 (b) Amendments to the solicitation of alternative
11 proposals may be made, provided that the final solicitation of
12 alternative proposals issued by the public entity shall be
13 substantially similar to the solicitation of alternative
14 proposals approved by the director of finance, the comptroller,
15 and the attorney general.

16 § -7 Qualified project agreements; approvals. (a)
17 After selecting a proposal for a qualified project and obtaining
18 the approval of the director of finance, the comptroller, and
19 the attorney general of a qualified project agreement, the
20 public entity may enter into the qualified project agreement for
21 a qualified project with the selected private entity or
22 entities.

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(b) A qualified project agreement approved and entered into by a public entity pursuant to this chapter shall include the following:

(1) The term length of the agreement, which, notwithstanding any law to the contrary, may be for a period not to exceed ninety-nine years from the date after the full execution of the qualified project agreement;

(2) A complete description of any facilities to be developed and the functions and responsibilities to be performed by public entities and private entities that are party to the agreement;

(3) The types of property interest, if any, that the private entity will have in the project facilities;

(4) The terms of the planning, acquisition, financing, development, design, construction, re-construction, rehabilitation, replacement, improvement, maintenance, management, operation, repair, leasing, and ownership of the facilities;

(5) The rights that the public entities and private entities that are party to the agreement have, if any,

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1 in revenue generated as a result of the qualified
2 project agreement;

3 (6) The minimum quality standards applicable to the
4 qualified project, including performance criteria,
5 reporting requirements, incentives, and penalties for
6 failure to meet these standards;

7 (7) A specific plan to ensure proper maintenance of the
8 project facilities throughout the term of the
9 agreement and a return of the facility to the state in
10 good condition and repair;

11 (8) The compensation of the private entities, including
12 the extent to which and the terms upon which a private
13 entity may charge fees to individuals and entities for
14 the use of the facility, but in no event shall new
15 fees be imposed or existing fees be amended unless
16 authorized by the director of finance;

17 (9) The requirement of an annual independent audit report
18 furnished by the private entity or entities to the
19 department or designated public entity covering all
20 aspects of the agreement;

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- 1 (10) Performance and payment bonds or other security and
2 risk-mitigation tools deemed suitable by the
3 department or designated public entity;
- 4 (11) If the private entity or entities are responsible for
5 operating the qualified project, one or more policies
6 of public liability insurance in amounts determined by
7 the department or designated public entity to ensure
8 coverage of tort liability for the public and
9 employees of the private entities;
- 10 (12) Grounds for termination of the qualified project
11 agreement by the public entity or private entity;
- 12 (13) Procedures for amending the qualified project
13 agreement;
- 14 (14) Disposition of the facility upon the conclusion or
15 termination of the qualified project agreement;
- 16 (15) The rights and remedies available to the State for a
17 material breach of the agreement by the private entity
18 or entities or if there is a material default;
- 19 (16) Identification of funding sources to be used to fully
20 fund the capital, operation, maintenance, and other
21 expenses under the qualified project agreement;

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1 (17) Certification of compliance with applicable federal,
2 state, and local laws; and

3 (18) Any other provisions determined to be appropriate by
4 the department or public entity.

5 (c) Qualified project agreements approved and entered into
6 by a public entity may include review and approval by the public
7 entity of the private entity's plans for the development,
8 operation, and maintenance of the qualified project facilities.

9 (d) No qualified project agreement shall contain any non-
10 compete provisions limiting the ability of a public entity to
11 perform its government functions.

12 (e) The public entity shall have access and the right to
13 inspect the qualified project or facility at any time with
14 reasonable notice.

15 (f) The public entity may apply for and accept funds from
16 the federal government and other sources of financial aid to
17 fund qualified projects or otherwise further the purposes of
18 this chapter.

19 (g) The public entity may enter into qualified project
20 agreements with other local and state government agencies that
21 are regional in scope provided that the regional scope is
22 expressly stated in the solicitation of alternative proposals

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1 submitted to the director of finance, the comptroller, and the
2 attorney general pursuant to section -6.

3 **§ -8 Legal rights; dispute resolution.** (a) The terms
4 of a qualified project agreement shall not be construed as a
5 waiver of the sovereign immunity of the State or as a grant of
6 sovereign immunity to any private entity.

7 (b) No private entity shall be liable for the debts or
8 obligations of the state government or public entities, unless
9 the qualified project agreement provides that a private entity
10 is liable under the qualified project agreement.

11 (c) In addition to any other remedy available to the
12 State, in the event of a material default by an operator, the
13 State may elect to assume the responsibilities and duties of the
14 operator in the qualified project and, in this instance, the
15 State or a designated public entity shall succeed to all of the
16 rights, title, and interest in the qualified project.

17 (d) The State may terminate, with cause, the qualified
18 project agreement and exercise any other rights and remedies
19 that may be available to it under the law or in equity.

20 (e) The State may make or cause to be made any appropriate
21 claims under the maintenance, performance, or payment bonds, or

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1 lines of credit, as set forth in the qualified project
2 agreement.

3 (f) If the State or a designated public entity elects to
4 assume the responsibility and duties of a qualified project
5 pursuant to subsection (c), the State may develop or operate the
6 qualified project, impose previously approved user fees, impose
7 and collect lease payments, and comply with any service
8 contracts as if it were the operator.

9 (g) Qualified project agreements are not a general
10 obligation of the State. The full faith and credit of the State
11 shall not be pledged to secure any financing of the operator by
12 the election to assume the responsibilities of an operator, and
13 the assumption of the operation of the qualified project shall
14 not obligate the public entity, department, or the state
15 government to pay any obligation of the operator from sources
16 other than revenue from the project.

17 § -9 Transparency. (a) Offerors shall identify those
18 portions of a proposal or other submission that the offeror
19 considers to be a trade secret or confidential commercial,
20 financial, or proprietary information. To request nondisclosure
21 of trade secrets and confidential and proprietary information,
22 the offeror shall:

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(1) Submit its request in writing with the proposal, specifically identifying the information or material asserted to be confidential and the justification for confidential treatment;

(2) Clearly mark the information or materials for which protection is sought and submit the information or materials in such a manner as to be readily separable from the rest of the proposal to facilitate public access to and inspection of the non-confidential portion of the proposal; and

(3) Fully comply with any applicable state law with respect to information that the offeror contends should be exempt from disclosure.

The public entity shall consult with the attorney general regarding an offeror's request for non-disclosure of the parts of the proposal the offeror considers confidential. The attorney general shall determine which portions of the request are confidential under law and which portions are not, in accordance with chapter 92F. If the request for confidentiality is denied in whole or in part, the information or material deemed to be non-confidential shall be made available as public information unless the offeror appeals the decision to deny all

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1 or part of the request for confidentiality, pursuant to section
2 92F-42(1).

3 **§ -10 Compliance with federal and state law.** (a)
4 Qualified project agreements shall be exempt from chapter 103D.
5 In connection with any qualified project agreement by which a
6 public entity leases or purchases property from another party,
7 notwithstanding and without regard to chapter 171 or any other
8 law, the public entity may lease or sell, on any terms the
9 public entity shall determine, to that party the site or
10 property to be improved or otherwise to be leased or sold back
11 to the public entity.

12 (b) Unless otherwise provided by law, nothing in this
13 chapter shall exempt qualified projects and participating public
14 and private entities from complying with all applicable federal
15 and state laws and regulations.

16 **§ -11 Applicability; construction.** (a) This chapter
17 shall apply as of January 1, 2019.

18 (b) Nothing in this chapter shall be construed to affect
19 any projects or agreements that are developed, solicited,
20 awarded, or entered into before the effective date of this
21 chapter."

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SECTION 3. The department of accounting and general services is authorized to establish and fill three full-time equivalent (3.00 FTE) positions, exempt from the provisions of chapter 76, Hawaii Revised Statutes, for the purposes of this Act.

SECTION 4. There is appropriated out of the general revenues of the State of Hawaii the sum of \$500,000 or so much thereof as may be necessary for fiscal year 2018-2019 to:

(1) Establish and fill three full-time equivalent (3.00 FTE) positions pursuant to section 3 of this Act; provided that the positions may be added to the position count for the department of accounting and general services; and

(2) Establish and operate the alternative project delivery program.

The sum appropriated shall be expended by the department of accounting and general services for the purposes of this Act.

SECTION 5. This Act, upon its approval, shall take effect on July 1, 2018.

INTRODUCED BY:



BY REQUEST

S.B. NO. 2739

Report Title:

Alternative Project Delivery; Appropriation

Description:

Provides public entities with an alternative method to deliver and finance state projects.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

JUSTIFICATION SHEET

SB. NO. 2739

DEPARTMENT: Accounting and General Services

TITLE: A BILL FOR AN ACT RELATING TO ALTERNATIVE PROJECT DELIVERY.

PURPOSE: The purpose of this bill is to provide an alternative method for state government to finance and deliver public projects on time, on budget, and in compliance with, among other laws, public union laws, such as prevailing wage law, environmental and historic preservation laws, and all permitting laws. The Act does not mandate, but allows state government to elect an alternative method of managing public lands and awarding contracts, that is separate and apart from chapters 171 and 103D, Hawaii Revised Statutes.

MEANS: Add a new chapter to the Hawaii Revised Statutes.

JUSTIFICATION: Projects can be delivered in a more efficient manner by increasing the effective use of state resources.

The general fund appropriation included in this measure has been made with consideration of the statutorily defined appropriation ceiling for the Executive Branch pursuant to section 37-92, Hawaii Revised Statutes. With general fund appropriations of \$7,665,740,429 for fiscal year 2018-2019 authorized for the Executive Branch by the regular and special sessions of 2017, the appropriation ceiling for the Executive Branch has already been exceeded by \$15,217,672 or 0.2 percent in fiscal year 2018-2019. Funding requested in this measure is necessary to operate the alternative project delivery program which will result in the appropriation ceiling for the Executive Branch to now be exceeded in

fiscal year 2018-2019 by an additional \$500,000 or 0.0065 percent.

Impact on the public: Benefit from projects developed through alternative methods to finance and deliver projects on time and on budget in a more efficient manner by increasing the effective use of state resources.

Impact on the department and other agencies: Provide an alternative method of managing public lands.

GENERAL FUND: None with respect to financing projects. Projects involving operations and maintenance will, as currently required for all operating and maintenance requirements, require funding from general funds. \$500,000 to operate the DAGS alternative project delivery program.

PPBS PROGRAM
DESIGNATION: Alternative Project Delivery Program,
Department of Accounting and General
Services

OTHER AFFECTED
AGENCIES: Departments and agencies of the State electing to utilize this alternative method for managing public lands separate from and apart from chapters 171 and 103D, Hawaii Revised Statutes.

EFFECTIVE DATE: July 1, 2018.