## Agenda

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<td>General Discussion and Q&amp;A</td>
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Recap of Day 1

- Wide spectrum of P3 modalities and no one size fits all
- Funding vs. Financing
- VFM and Project Screening
- Transaction Considerations and Risk Allocation
- Diverse examples of IPD/P3 in all sectors (Wrap-up this morning)

Infrastructure & Service Delivery Spectrum of Options

Traditional Delivery
- Works & Service Contracts (DBB, CMAR, PDB, DB)
- Performance Contracts (SPC, O&M, peer partnering, etc.)

Public-Private-Partnerships
- Lease-like Agreements (LDO, DBOM, Affermage, Lease-Backs)

Privatization
- Concessions (DBFOM, BOT, etc.)
- Divestiture (Sale, Sale-leaseback, etc.)

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Module 3: Best Practice and Requirements for an Enabling Framework
IPD Life-Cycle

P3 Program Management

Deal Structure
- Project scoping and structuring
- Feasibility and business case
- Scoring / accounting considerations
- Risk allocation
- Financial structuring
- Performance standards
- Economic regulation
- Investor targeting

Deal Execution
- Procurement strategy
- Selection criteria
- Investor sounding
- Procurement documents
- Procurement management
- Proposal review and selection
- Award protest management

Deal Closure
- Contract negotiations
- Commercial and financial close
- Transition assistance
- Permits and licensing
- Employee transfers (when applicable)
- Design/set-up of governance structures

Funding/Financing Options
PSC and Value-for-Money Analysis
Affordability Analyses
Change Management/Stakeholder Outreach
Human and Institutional Capacity Development

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Enabling Framework Components

- Policy Framework
  - Legal and Regulatory Framework
    - Institutional Framework
    - Operational Framework
Policy Framework

• Defines why and under what conditions that public authorities will leverage Innovative Project Delivery and other forms of P3

• Policy framework is typically articulated in a policy statement that lays out the objectives of an IPD approach i.e.:
  - “IPD is part of the State’s commitment to delivering infrastructure across a broad range of sectors in the timeliest and most cost-effective manner”
  - “IPD is a tool to enable improved government facilities, more effective delivery of government services, economic development, and more resources available for public purposes”

• Policy statement should also define broader parameters for application and commitment to key objectives (like “balanced and sustainable structures that deliver value-for-money for taxpayers over the life of the project”)

P3 Life-Cycle

Framework Phase

Partnership Phase

Transaction Phase
Legal and Regulatory Framework
Legislative and Regulatory Framework

• An appropriate enabling legislative framework is important for buying-down risk and optimizing VfM.
• A number of best practice toolkits exist on the national and international level.
• While legislative frameworks are tailored to the needs of specific jurisdictions, there are some best practice parameters that should always be considered.
• Diverse strategies for enabling legislation: *Multi-Sector versus Sector-Specific legislation*

1. **General framework**
   • General guiding principles for a favorable legislative framework
     • Transparency
     • Fairness
     • Long-term sustainability of regulation

2. **Scope of authority to award IPD**
   • Law should *identify the public authorities empowered to award and enter into IPD agreements* for the implementation of privately financed infrastructure projects.
   • Application for *new and existing* public facilities and systems.
   • The law should *identify the sectors* or types of infrastructure in respect of which IPD may be granted.
   • The law should specify the extent to which IPD might be executed across *multiple jurisdictions* via P4/ joint powers, etc.
3. **Administrative coordination**
   - Institutional mechanisms should be established to coordinate activities of public authorities responsible for issuing approvals, licenses, permits or authorizations required for the implementation of privately financed infrastructure projects

4. **Authority to regulate infrastructure services**
   - The authority to regulate infrastructure services should not be entrusted to entities that directly or indirectly provide infrastructure services.
   - The rules governing regulatory procedures should be made public.
   - Law should establish transparent procedures whereby the private partner may request a review of regulatory decisions

5. **Project risks**
   - No unnecessary statutory or regulatory limitations should be placed upon the contracting authority’s ability to agree on an allocation of risks that is suited to the needs of the project.

6. **Government financial supports**
   - Law should clearly state which public authorities may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide.
Legislative and Regulatory Framework

7. Selection and Award Process

- The law should provide for the selection of the private partner through transparent and efficient competitive procedures adapted to the particular needs of privately financed infrastructure projects.

- **Pre-selection criteria and procedures (RFQ)**

- **Procedures for requesting proposals (RFP)**
  - Allowable procedures
  - Content of the final request for proposals
  - Clarification Criteria
  - Evaluation and selection criteria

- **Final Negotiations and Contract Award**
  - Financing conditions

- **Award without Competitive Procedures**
  - Unsolicited Proposals

- **Confidentiality**

- **Protests and Appeals**

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Legislative and Regulatory Framework

8. Legislative framework and project agreement
   - General provisions on the project agreement
     • Organization of the private partner (i.e., requirement of selected bidder to establish a special purposes independent legal entity).
     • Financial arrangements
       - User Fees
       - Budget-based payments
     • Security interests (right of private partner to secure any financing required for the project with a security interest in any of its property, with a pledge of shares of the project company, with a pledge of the proceeds and receivables arising out of the IPD, or with other suitable security, without prejudice to any rule of law that might prohibit the creation of security interests in public property.)
     • Assignment (need for consent of contracting authority)
     • Transfer of controlling interest in Private Partner
     • Lender Rights
     • Construction and Operational Baseline Requirements
9. Duration, extension and termination of the project agreement

10. Consequences of expiry or termination of the project agreement
   - Transfer of assets to the contracting authority or to a new private partner
   - Financial arrangements upon termination
   - Wind-up and transitional measures

11. Dispute Resolution

12. Other

There are plenty of recent examples of well-developed (and not-so-well-developed) multi-sector enabling statutes that Hawaii can leverage should it choose to create broad-based enabling legislation for IPD
Institutional Framework
Institutional Framework

- Organizational structure for oversight and implementation of P3 program and transactions
- Can be centralized or decentralized and may involve a wide variety of governance and oversight structures.
- Critical to identify management and reporting structure (for approvals, authorizations, etc.)
- Need to clearly identify who is in charge of:
  1. Enabling framework i.e., broader program issues, state financial supports, etc.)
  2. Project execution
  3. Project and Program oversight
- Importance of distinguishing between promotion and executive functions.
- No one-size-fits-all formula to creating the optimal institutional framework for P3
# Types of P3 Offices

## Advisory
- Develop best practice templates and standards
- Central repository of information
- Transaction advisory support to executive agencies
- Cross-sector program promotion and coordination
- Capacity building

## Executive
- Project identification, screening, and execution
- Transaction structuring and implementation
- Project promotion / investor outreach
- Contract governance and oversight
- Central repository of information

## Regulatory
- Review and approval of transactions
- Promulgation of standards and templates
- Central repository of information
- Program oversight and monitoring
- Capacity building (focused on standards and requirements)

## Hybrid
- Development and promulgation of best practice and standards
- Targeted transaction design and implementation
- Central repository of information
- Project and program promotion
- Capacity building

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Role of IPD Office

- Despite efforts to establish standardized institutional arrangements, no single “one-size-fits-all” formula
- Governments suffer from different institutional weaknesses in IPD activities and, therefore, IPD offices in different jurisdictions will require unique structures and competencies

Defining the Role of a P3 Office

**P3 Functions**
- P3 Enabling Framework
- P3 Policy & Strategy
- Project Identification / Feasibility
- Transaction Design / Financial Assessment / Risk Allocation
- Investment Promotion / Procurement
- Contract Governance & Oversight
- P3 Program Management

**P3 Challenges**
- Lack of Coordination
- Poor Incentives
- Lack of Skills or Technical Expertise
- High Transaction Costs
- Lack of Information
- Conflicting Responsibilities

**P3 Office Functions to Overcome Challenges**
- Framework and Policy Formulation and Coordination
- Quality Control
- P3 Technical Assistance
- Standardization / Dissemination of Best Practice
- Project & Program Promotion / Central Repository
- Centralized Authority
P3 Office Start-up and Design Considerations

- P3 Office’s responsibilities and functions
- Office’s level of authority
- Office’s appropriate location within government

Determine role of P3 office
P3 Office coordinates P3 projects for entire department. However, it is a separate P3 Transportation Partnership Board that reviews and approves potential P3 Transportation Projects for procurement.
Proposed Institutional Framework for USACE P3

USACE AFD Office Functional Framework

<table>
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<th>Project Development</th>
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<td><strong>Enabling Framework</strong></td>
<td><strong>Alternative Finance &amp; Delivery</strong></td>
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<tr>
<td>- Program Management &amp; Oversight</td>
<td>- Innovative Finance &amp; Delivery / Project Execution</td>
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<td>- Strategic Planning</td>
<td>- Project Management</td>
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<tr>
<td>- Policy development</td>
<td>- Project Finance</td>
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<tr>
<td>- Legislative / Regulatory Framework</td>
<td>- Transaction Advisory Services / Technical Assistance</td>
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<tr>
<td>- Institutional Framework</td>
<td>- Coordination with local sponsors / stakeholders</td>
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<tr>
<td>- Liaison with ASA(CW), OMB, and Congress</td>
<td>- Value-for-Money assessment</td>
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<td>- Operating procedures and guidelines</td>
<td>- Investor Outreach</td>
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<tr>
<td>- Project screening and pipeline development</td>
<td>- Procurement Management</td>
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<tr>
<td>- Vetting / approval of project proposals</td>
<td>- Change Management</td>
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<tr>
<td>- Standardized / Best Practices</td>
<td>- Assistance with contract governance &amp; oversight</td>
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<td>- Program risk identification and mitigation strategies</td>
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<tr>
<td>- AFD financial management (budget, contingent liabilities, etc.)</td>
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<tr>
<td>- Reporting</td>
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Cross-Cutting Functions

- Training / Capacity building
- Public outreach
- Marketing and investment promotion
- Change management
Operational Framework
Operational Framework

- How will P3 transactions be managed and executed?

1.0 Introduction

1.1 Purpose of these Guidelines
1.2 Modification of Guidelines
1.3 Organization of these Guidelines
1.4 Regulations
1.5 Defined Terms
1.6 Relationship between the DC OP3 and Other District Agencies
1.7 Public is Engaged in the P3 Process
1.8 Funding of Project Development
1.9 Application of Other Laws
1.10 Conflict of Interest, Open Meeting and FOIA Requirements

2.0 Project Identification

2.1 Outline of the Solicited Project Identification Process
2.2 Identified Solicited Projects

3.0 Project Screening for Solicited Proposals

3.1 Stage One: Initial Screening
3.2 Stage Two: Detailed Screening
3.3 Creation and Publication of P3 Project Pipeline
3.4 Project Prioritization
4.0 Project Development
  4.1 Project Development Tasks
  4.2 First-Level Project Value-for-Money Analysis
  4.3 Draft Public Sector Comparator
  4.4 Statement of Intent to Procure as a Public-Private Partnership

5.0 Project Procurement – Solicited Projects

5.1 Request for Information
  5.1.1 Public Notice
  5.1.2 Schedule
  5.1.3 Industry Conference and One-on-One Meetings
  5.1.4 Use of Responses to Request for Information

5.2 Pre-Qualification / Request for Qualification
  5.2.1 Public Notice
  5.2.2 Schedule
  5.2.3 Minimum Required for Pre-qualification
  5.2.4 Other Requirements and Criteria for Pre-qualification
  5.2.5 Certification of Pre-qualification
  5.2.6 Collaborative Review and Feedback
  5.2.7 Application Fee

5.2.8 Modification and Cancellation of Request for Qualification
5.2.9 Use of Responses to Request for Qualification

5.3 Review of Draft Request for Proposals
  5.3.1 Public Review of Draft Request for Proposals
  5.3.2 Approval of Proposed Request for Proposals by the Council

5.4 Solicitation through Request for Proposals
  5.4.1 Public Notice
  5.4.2 Schedule
  5.4.3 Requests for Proposals Requirements
  5.4.4 Evaluation and Selection Criteria Requirements
  5.4.5 Format for Responses and Executive Summaries
  5.4.6 Evaluation of Responses to Request for Proposals
  5.4.7 Selection of Preferred Bidder
  5.4.8 Publication of Responsive Executive Summaries
  5.4.9 Payment of Stipends
Guidelines

5.4.10 Use of Responses to Request for Proposals
5.4.11 Confidential Information Included as Part of a Solicited Proposal

6.0 Project Procurement – Unsolicited Projects

6.1 Time Periods for Acceptance of Unsolicited Proposals
6.2 Discussions with DC OP3 before Submission of Unsolicited Proposal
6.3 Structure and Format of Unsolicited Proposals
6.4 Preliminary Evaluation of Unsolicited Proposals
   6.4.1 Preliminary Evaluation Criteria
   6.4.2 Preliminary Evaluation Fee
   6.4.3 Preliminary Evaluation Results
6.5 Comprehensive Evaluation of Unsolicited Proposal
   6.5.1 Unsolicited Proposal Clarification
   6.5.2 Notification of the Unsolicited Proposer
   6.5.3 Public Notice and Alternative Proposals
   6.5.4 Schedule
   6.5.5 Requirements of Alternative Proposals
   6.5.6 Updated Submittals by the Original Unsolicited Proposer
   6.5.7 Comprehensive Evaluation
   6.5.8 Comprehensive Evaluation Review Costs
6.5.9 Use of Unsolicited Proposals
6.5.10 Selection of a Preferred Bidder
6.5.11 Office of the Chief Financial Officer (OCFO) Certification
6.5.12 Office of the Attorney General (OAG) Certification
6.5.13 Notice of Selection of Preferred and Secondary Bidders
6.5.14 Communication during the Procurement Process
6.5.15 Confidential Information Included as Part of an Unsolicited Proposal

7.0 Rules to Ensure Ethical Conduct

7.1 Ethical Duty
7.2 Ethical Obligations under the Comprehensive Code of Conduct
   7.2.1 Duty of Loyalty
   7.2.2 Financial Conflicts
   7.2.3 Private Gain
   7.2.4 Nonpublic Information
   7.2.5 Outside Employment
   7.2.6 Gifts from Outside Sources
   7.2.7 Post-Employment Conflicts of Interest
   7.2.8 Government Property
Guidelines

7.2.9 Disclosure of Prior Employment
7.2.10 Additional Obligations
7.3 Reporting Conflicts and Violations
   7.3.1 District Employees
   7.3.2 Private Entity Employees
7.4 Mitigating Conflicts and Violations

8.0 The Public-Private Partnership Agreement
   8.1 Requirements for the Public-Private Partnership Agreement
   8.2 Negotiation
   8.3 Engagement of Secondary Bidder
   8.4 Facilities Plan Approval
   8.5 Prohibition Regarding Non-Compete Provisions
   8.6 Access and Right to Inspect
   8.7 External Funding
   8.8 Projects of Regional Scope
   8.9 Sovereign Immunity
   8.10 Remedies
   8.11 Compliance with Federal and District Laws
   8.12 Repayment of Fees Paid by the Original Unsolicited Proposer
   8.13 Monitoring of P3 Agreement Performance

9.0 Final Approval of the Public-Private Partnership Agreement
   9.1 Council Report Requirements
   9.2 Council Approval of the Public-Private Partnership Agreement
Key Considerations for Change Management

**Stakeholder Management & Strategic Messaging**
- Importance of stakeholder management
- Identify Key Stakeholders (Stakeholder Matrix) and assess level of interest
- Develop Strategic Messaging/Communications Plan (terminology matters)
- Distinguishing the transaction from the use of proceeds/savings

**Transaction Governance and Authorization Structure**
- Importance of clear decision making parameters to mitigate procurement risk
- Leveraging relevant precedents
- Enabling market valuation

Sample Stakeholder Matrix

- Keep Satisfied
- Engage Closely and Influence Actively
- Monitor
- Keep Informed
Module 3: Best Practice and Requirements for an Enabling Framework

QUESTIONS AND DISCUSSION
Module 4: Key Public Sector Considerations relating to Innovative Project Delivery
Structuring Successful & Sustainable Transactions

- Wide variety of legal financial, operational, and technical factors to consider in structuring transactions
- Steep learning curve for P3 program and transaction development
- Many of the skills needed across the IPD life-cycle are not readily available in the public sector, so best practice suggests leveraging advisors and experts to assist in ensuring that early deals are fair, balanced and sustainable over the term of the contract
- Best-in-class investors, operators and construction partners will insist on well-designed and structured transactions that reflect industry best practice.
Managing Advisors

• Different approaches to managing third party experts and advisors:

Single Lead Advisor Structure

Multiple Advisor Structure

• Decision as to optimal structure depends on abilities of government sponsor
• Importance of selecting the “right” advisors
• Budgeting and compensation strategies
Risk Sharing

• Key Consideration: Recognizing and understanding retained risks and responsibilities

### Risk Distribution in PPP

**Publicly-Financed Project**
- Force Majeure
- Design
- Political Risks
- Construction
- Regulatory
- Operation
- Financial

**Public-Private-Partnership Project**
- Force Majeure
- Demand
- Design
- Construction
- Financial
- Operation
- Regulatory
- Right of Way

• Funding and appropriations
• Termination and compensation considerations
• Management and budgeting for contingent liabilities
Program and Contract Governance and Oversight

Contract Governance & Oversight

Performance and Compliance Monitoring & Enforcement

- Construction Phase
- Operational Phase
- Wrap-Up / Asset Transfer

Contract Management

- Relationship Management
- Regulation / compliance
- Dispute Resolution
- Renegotiations / Amendments

Project & Program Assessment

- Appraisal of benefits and VfM
- Audits
- Manage contingent liabilities and government obligations
- Refinement of best practices

- During contract execution, a wide variety of issues will need to be managed. They can occur during the construction period, operation period, and/or during contract close-out (wrap-up). Public authorities need to have processes and procedures in place for addressing these issues.

- Oversight responsibilities change according to the phase of the contract (construction, operations, wrap-up)

- Common use of independent engineers (sometimes lenders’ representatives) for oversight
Contract Governance and Oversight

**Construction**
- Transition to construction
  - Design / build approvals and permits
  - Construction Programming
  - Other
- Construction Compliance
  - Schedule
  - Construction & Engineering standards (Output based)
  - Environmental compliance
  - Other
- Relationship Management
  - Change orders
  - Dispute resolution
  - Renegotiation
  - Asset Acceptance

**Operations**
- Performance Monitoring
  - Facilities
  - EMP / Master Plan
  - Service levels and standards
  - Output indicators
  - Regular compliance audits
- Contractual Compliance
  - O&M standards / EMP
  - Reporting
  - Service & Quality levels
  - Financial Structures
  - Other
- Relationship Management
  - Adjustments / Renegotiation
  - Dispute resolution
  - Contract governance
  - Other

**Wind-Up**
- Project Wind-up
  - Termination provisions
  - Audits and inventories
  - O&M transfer
  - Asset hand-back
- Overall Project Assessment
  - Project assessments
  - Value-for-Money audits
  - Financial performance
  - Other
- Relationship Management
  - Transition to new service provider
Program and Contract Governance and Oversight

P3 Contract Governance & Oversight Structure

Audit Requirements / Regulatory Framework

- Performance Surveyor
- Independent Engineer

Contracting Authority

PPP Agreement

Private Partner SPV

External Experts

PMU Director

Engineer
Legal Advisor
Finance Advisor
Operations Advisor

Project Management Unit
Procurement Strategy and Management

- How alternative finance and delivery procurements differ from traditional procurement

 PPP Process Flow

Due Diligence, Feasibility Study and Options Analysis

External experts, together with the Project Implementation Unit, undertake due diligence and prepare an investment grade feasibility study and contracting options analysis. Recommendation made on basis of Value-for-Money (VfM).

Decision based on objective criteria (Value-for-Money)

Public Authority’s Decision

- Rejection of PPP Option
  - Public Authorities pursue traditional contracting options (public finance) or abandon the project

- Approval of PPP Option
  - Public Authorities proceed to detailed transaction design and implementation

Project Start-Up

Hiring of Advisors & Experts

Issue Request for Qualifications

Issue RFP and Draft Contract

Bidder Conference

Submission of Proposals

Evaluation and Contract Award

Incorporation of SPV

Signed PPP Contract

Financial Close & Effective Date

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Identifying and Analyzing IPD/P3 Projects

Needs Analysis
- Define infrastructure and service needs, including minimum output standards
- Needs are defined in terms of demand forecasts for specified services

Technical Options Analysis
- Examine the range of reasonable options for meeting output specifications
- Example: Build a new road vs. increase capacity of public transport

Due Diligence
- Identify and analyze all legal, regulatory, technical, commercial, financial, social and environmental issues
- Due diligence must be thorough and objective

Value Assessment / Evaluation of Contracting Options
- VfM is calculated over the life of the infrastructure facility
- Different contracting options should be compared on the basis of VfM

Affordability Assessment
- Affordability for users is assessed by willingness and ability to pay
- Affordability for Government is based on expected payments and budget assumptions over project

Financial Analysis
- Financial model determines the conditions under which a project will be financially viable
- Sensitivity analyses are performed to assess impact of different risks

Project Viability
- Investor interest, risk allocation and mitigation strategies, and other factors must also be assessed before making a final decision regarding project viability.

Verification and Sign-Off
- Advisors should sign off on the feasibility study after all the analysis has been completed
- Study should include a detailed explanation of assumptions and methodologies

Project Management Plan
- The feasibility study should also include a detailed work plan for implementing the project, as well as proposed project implementation program
## Transaction Implementation Process

### Project Start-Up
- Organizing for Project Implementation
- Creating the Project Implementation Unit
- Hiring transaction and technical advisors
- Establishing work plan and budget
- Developing code of conduct, etc.
- Pre-Feasibility Studies
- Initial Market Testing
- “Public-Sector-Comparator” baseline
- Preliminary Options Analysis

### Feasibility & Transaction Design
- Due Diligence
- Identify / prioritize government objectives
- Investment grade feasibility studies
- Technical project design
- Demand studies / forecasting
- Project Scope and KPI’s
- Regulatory structuring
- Environmental impact assessment
- Financial structuring and modeling
- Risk allocation and mitigation
- Risk Matrix
- Credit enhancement / guarantees
- Options analysis and transaction design
- Value-for-Money analysis
- Bid evaluation criteria
- Assessment of investor interest
- Stakeholder consultations

### Procurement and Transaction Implementation
- Preparation of tender documents
- PPP project promotion
- Procurement management
- Interaction with bidders / clarifications
- Proposal evaluation / contract award
- Management of appeals
- Contract negotiation / formalization

### Transition and Conditions Precedent
- Compliance with Conditions Precedent to contract effective date
- Financial close
- Permits and licenses
- Entry into force of the PPP contract
Sample Procurement Process Established by DC OP3

OP3 Procurement Process for Solicited Proposals

- RFI
- RFQ
- Shortlisting / Pre-qual
- Draft RFP
- RFP issued
- Procurement Mgmt
- Bid Submission
- Bid Evaluation
- Negotiate Agreement
- Financial Close

Contract Governance and Oversight
(Performance monitoring, enforcement, relationship management, dispute resolution, etc.)
Sample Procurement Process Established by DC OP3

DCOP3 Procurement Process for Unsolicited Proposals

1. Discussions with OP3
2. Unsolicited Proposal
3. Preliminary Evaluation
4. Public Notice / Alternative Proposals
5. Evaluate Proposals
6. Clarifications
7. Determine Preferred Bidder
8. CFO / AG Review and Certification
9. Select Winner
10. Negotiate Agreement
11. Financial Close

Contract Governance and Oversight
(Performance monitoring, enforcement, relationship management, dispute resolution, etc.)
Key Considerations

• Procurement Strategy and Management
  - Importance of pre-defining Authorizations and Approvals
  - Upset limits (usually for social sector projects)
  - The role of competition / attracting interest and selecting the ideal partner
  - Other considerations (stipends, alternative technical concepts (ATC), innovative financial proposals (IFP), etc.)

• Labor issues

• Other public financial considerations funding
Module 4: Key Public Sector Considerations relating to Innovative Project Delivery

QUESTIONS AND DISCUSSION
Final Thoughts

- IPD is another tool in the toolbox for delivery of public infrastructure and services
- When done correctly, IPD can provide tax-payers with timelier and more cost-effective infrastructure and services, while also ensuring that public assets are adequately maintained over the life of the contract
- IPD have demonstrated their value by accelerating infrastructure delivery and reducing life-cycle costs (on average from 15%-25% versus traditional delivery)
- Nevertheless, IPD are extremely complex instruments that involve contingent liabilities for the state and consequently must be evaluated, structured and implemented with great care.
- Hawaii would benefit from organizing itself to enable IPD in accordance with best-practice and may wish to incorporate IPD into its standard project review and approval process
- Hawaii would benefit from broad-based enabling legislation (which may now be even more important in light of proposed national infrastructure plan).

**Infrastructure & Service Delivery Spectrum of Options**

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Thank you

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