

JAN 26 2009

A BILL FOR AN ACT

RELATING TO GOVERNMENT CONTRACTS FOR SERVICES.

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

1 SECTION 1. In 2001, the legislature found that it was
2 important for the state and county governments to be authorized
3 to deliver services by the most efficient means possible. As a
4 result, the legislature empowered the state and county
5 governments to contract with non-government entities including
6 nonprofit organizations, mutual benefit societies, and private
7 sector contractors to provide services to the government.

8 In June 2007, the law that conferred broad contracting
9 authority upon the State and counties expired. This law was
10 part II of Act 90, Session Laws of Hawaii 2001. As a result,
11 there is now uncertainty regarding the authority of the State
12 and counties to contract with non-government entities to obtain
13 services that are critical for the efficient, cost effective,
14 and uninterrupted delivery of services by the state and county
15 governments.

16 Consequently, these contracts may be subject to legal
17 challenge, pursuant to *Konno v. County of Hawaii*, 85 Haw. 61
18 (1997). In order to avoid the risk of costly litigation and to

1 ensure that government services are provided to the residents of
2 the State, this Act seeks to amend the State's and the counties'
3 procurement and civil service laws to maintain the current
4 relationship between the State and the counties and their
5 respective contractors who provide vital services to the
6 government and the citizens of Hawaii. Included within this
7 bill are limited exemptions to the civil service law that will
8 allow the government to contract with non-government entities
9 without causing a substantial burden on our existing public
10 sector civil servants.

11 SECTION 2. Chapter 103, Hawaii Revised Statutes, is
12 amended by adding to part I a new section to be appropriately
13 designated and to read as follows:

14 "§103- State and county contracts for services;
15 exemptions from civil service. (a) Notwithstanding any other
16 law to the contrary, services that are customarily and
17 historically provided by civil servants may be obtained through
18 state or county contracts for services with private entities
19 when the circumstances and requirements set forth in subsection
20 (b), (c), (d), (e), (f), (g), (h), or (i) are present and
21 satisfied.

1 (b) The State or a county may enter into a contract to
2 obtain services from a private entity when the services needed
3 would otherwise be provided by one or more employees with
4 permanent appointments to civil service positions that have been
5 vacant for at least six successive months provided that:

6 (1) The respective department demonstrates to the
7 jurisdiction's director that it has expended
8 legitimate efforts to fill the position;

9 (2) The jurisdiction's director certifies that the
10 respective department has made legitimate efforts to
11 fill the position; and

12 (3) The duration of contracts entered into pursuant to
13 this subsection shall not exceed one year.

14 (c) The State or a county may enter into a contract to
15 obtain services from a private person when performance of the
16 needed services requires or involves:

17 (1) Special equipment, materials, or supplies that the
18 State or a county does not have and would not be cost
19 effective to purchase, rent, maintain, or store;

20 (2) Special knowledge, experience, training, or expertise
21 that state or county employees do not have and would
22 not be cost effective to obtain;

1 (3) Services necessary to maintain warranties under a pre-
2 existing equipment or goods contract;

3 (4) Access to proprietary information that the State or a
4 county does not have and would not be cost effective
5 to obtain.

6 The head of the respective department shall be responsible
7 for making all determinations of cost effectiveness necessary to
8 effect the provisions of this subsection.

9 (d) The State or a county may enter into a contract to
10 obtain services from a private entity when the services are
11 needed on an intermittent or irregular basis and the amount of
12 work involved could not occupy a full-time equivalent employee
13 with a permanent appointment to a civil service position of the
14 state or county department engaging in the contract.

15 (e) The State or a county may enter into a contract to
16 obtain services from a private entity when refuse collection and
17 removal, janitorial, and grounds keeping and landscaping
18 services are needed for a state or county office space that is
19 leased and the landlord is unwilling or unable to provide such
20 services, or the amount of work to provide such services would
21 not warrant a full-time civil service position.

1 (f) The State or a county may enter into a contract to
2 obtain services from a private entity for capital improvement or
3 major repair and maintenance projects authorized by the
4 legislature or a county council.

5 (g) The State or a county may enter into a contract to
6 obtain services from a private entity whenever such services are
7 necessary for the State or a county to comply with federal law.

8 (h) The State or a county may enter into a contract to
9 obtain services from a private entity whenever funds for the
10 contract have been appropriated for the purchase of service to
11 be provided by the contract provided that the period of the
12 contract shall not exceed the period for which the appropriation
13 is available.

14 (i) The State or a county may enter into a contract to
15 obtain services from a private entity whenever there is an
16 unforeseen need for services and there are no authorized
17 positions available to provide the services provided that such
18 contracts shall not exceed one year.

19 (j) In lieu of contracts entered into by the State
20 pursuant to this section, the director of human resources
21 development is authorized to create and transfer to a state
22 department or agency, as many permanent civil service positions

1 as the department or agency is able to fund in order to provide
2 the services.

3 (k) Services obtained through contracts authorized by this
4 section shall not be subject to, and shall be exempt from, the
5 civil service.

6 (l) The impact on every civil service employee adversely
7 affected by a contract entered into pursuant to this section may
8 be minimized or avoided by:

9 (1) Reassigning the employee to a civil service position
10 the employee is qualified to fill; or

11 (2) Retraining the employee to qualify for reassignment.

12 (m) For purposes of this section, "department" means a
13 principal department of the State or a county and includes an
14 agency, office, board, commission, or any other entity
15 administratively attached to a principal department; and
16 "jurisdiction" and "director" means what they mean under section
17 76-11."

18 SECTION 3. Section 46-33, Hawaii Revised Statutes, is
19 amended to read as follows:

20 **"§46-33 Exemption of certain county positions.** In any
21 county with a population of 500,000 or more, the civil service
22 to which this section refers is comprised of all positions in

1 the public service of such county, now existing or hereafter
2 established, and embraces all personal services performed for
3 such county, except the following:

- 4 (1) Positions of officers elected by public vote;
5 positions of heads of departments; position of the
6 clerk; position of the manager of the board of water
7 supply and position of the chief of police[-];
8 (2) Positions in the office of mayor, but such positions,
9 except those of the heads of the offices of
10 information and complaint and budget director, shall
11 be included in the position classification plan.
12 Employees of the municipal library and of the offices
13 of information and complaint and budget director,
14 other than the head of such offices, however, shall
15 not be exempted from civil service[-];
16 (3) Positions of deputies of the corporation counsel,
17 deputies of the prosecuting attorney, and law
18 clerks[-];
19 (4) Positions of members of any board, commission, or
20 equivalent body[-];
21 (5) Positions filled by inmates, patients, or students in
22 city institutions or in the schools[-];

- 1 (6) Positions of district magistrates, jurors, and
2 witnesses[-] i;
- 3 (7) Personal services obtained by contract where the
4 director of civil service has certified that the
5 service is special or unique, is essential to the
6 public interest and that, because of circumstances
7 surrounding its fulfillment, personnel to perform such
8 service cannot be obtained through normal civil
9 service recruitment procedures. Any such contract may
10 be for any period not exceeding one year[-] i;
- 11 (8) Personal services of a temporary nature needed in the
12 public interest where the need for the same does not
13 exceed ninety days, but before any person may be
14 employed to render such temporary service the director
15 of civil service shall certify that the service is of
16 a temporary nature and that recruitment through normal
17 civil service recruitment procedures is not
18 practicable. The employment of any person for service
19 of a temporary nature may be extended for good cause
20 for an additional period not to exceed ninety days
21 upon similar certification by the director subject to
22 approval of the civil service commission[-] i;

- 1 (9) Personal services performed on a fee, contract, or
2 piecework basis by persons who may lawfully perform
3 their duties concurrently with their private business
4 or profession or other private employment, if any, and
5 whose duties require only a portion of their time,
6 where it is impracticable to ascertain or anticipate
7 the portion of time devoted to the service of the city
8 and such fact is certified to by the director of civil
9 service[-];
- 10 (10) Positions of temporary election clerks in the office
11 of the clerk employed during the election periods, but
12 the positions filled by such employees shall be
13 included in the position classification plan[-];
- 14 (11) Positions of one first deputy and private secretaries
15 to heads of departments and their first deputies, but
16 private secretarial positions shall be included in the
17 position classification plan. The first deputy in the
18 department of civil service, however, shall not be
19 exempt from civil service[-]; and
- 20 (12) Personal services not currently being provided by
21 civil service employees that are obtained through a
22 contract or agreement for a grant, subsidy, or

1 purchase of service made pursuant to chapter 42F or
2 103F.

3 The director of civil service shall determine the applicability
4 of this section to specific positions."

5 SECTION 4. Section 76-16, Hawaii Revised Statutes, is
6 amended by amending subsection (b) to read as follows:

7 "(b) The civil service to which this chapter applies shall
8 comprise all positions in the State now existing or hereafter
9 established and embrace all personal services performed for the
10 State, except the following:

11 (1) Commissioned and enlisted personnel of the Hawaii
12 national guard as such, and positions in the Hawaii
13 national guard that are required by state or federal
14 laws or regulations or orders of the national guard to
15 be filled from those commissioned or enlisted
16 personnel;

17 (2) Positions filled by persons employed by contract where
18 the director of human resources development has
19 certified that the service is special or unique or is
20 essential to the public interest and that, because of
21 circumstances surrounding its fulfillment, personnel
22 to perform the service cannot be obtained through

- 1 normal civil service recruitment procedures. Any such
2 contract may be for any period not exceeding one year;
- 3 (3) Positions that must be filled without delay to comply
4 with a court order or decree if the director
5 determines that recruitment through normal recruitment
6 civil service procedures would result in delay or
7 noncompliance, such as the Felix-Cayetano consent
8 decree;
- 9 (4) Positions filled by the legislature or by either house
10 or any committee thereof;
- 11 (5) Employees in the office of the governor and office of
12 the lieutenant governor, and household employees at
13 Washington Place;
- 14 (6) Positions filled by popular vote;
- 15 (7) Department heads, officers, and members of any board,
16 commission, or other state agency whose appointments
17 are made by the governor or are required by law to be
18 confirmed by the senate;
- 19 (8) Judges, referees, receivers, masters, jurors, notaries
20 public, land court examiners, court commissioners, and
21 attorneys appointed by a state court for a special
22 temporary service;

1 (9) One bailiff for the chief justice of the supreme court
2 who shall have the powers and duties of a court
3 officer and bailiff under section 606-14; one
4 secretary or clerk for each justice of the supreme
5 court, each judge of the intermediate appellate court,
6 and each judge of the circuit court; one secretary for
7 the judicial council; one deputy administrative
8 director of the courts; three law clerks for the chief
9 justice of the supreme court, two law clerks for each
10 associate justice of the supreme court and each judge
11 of the intermediate appellate court, one law clerk for
12 each judge of the circuit court, two additional law
13 clerks for the civil administrative judge of the
14 circuit court of the first circuit, two additional law
15 clerks for the criminal administrative judge of the
16 circuit court of the first circuit, one additional law
17 clerk for the senior judge of the family court of the
18 first circuit, two additional law clerks for the civil
19 motions judge of the circuit court of the first
20 circuit, two additional law clerks for the criminal
21 motions judge of the circuit court of the first
22 circuit, and two law clerks for the administrative

1 judge of the district court of the first circuit; and
2 one private secretary for the administrative director
3 of the courts, the deputy administrative director of
4 the courts, each department head, each deputy or first
5 assistant, and each additional deputy, or assistant
6 deputy or assistant defined in paragraph (16);

7 (10) First deputy and deputy attorneys general, the
8 administrative services manager of the department of
9 attorney general, one secretary for the administrative
10 services manager, an administrator and any support
11 staff for the criminal and juvenile justice resources
12 coordination functions, and law clerks;

13 (11) (A) Teachers, principals, vice-principals, complex
14 area superintendents, deputy and assistant
15 superintendents, other certificated personnel,
16 not more than twenty noncertificated
17 administrative, professional, and technical
18 personnel not engaged in instructional work;

19 (B) Effective July 1, 2003, teaching assistants,
20 educational assistants, bilingual/bicultural
21 school-home assistants, school psychologists,
22 psychological examiners, speech pathologists,

1 athletic health care trainers, alternative school
2 work study assistants, alternative school
3 educational/supportive services specialists,
4 alternative school project coordinators, and
5 communications aides in the department of
6 education;

7 (C) The special assistant to the state librarian and
8 one secretary for the special assistant to the
9 state librarian; and

10 (D) Members of the faculty of the University of
11 Hawaii, including research workers, extension
12 agents, personnel engaged in instructional work
13 and administrative, professional, and technical
14 personnel of the university;

15 (12) Employees engaged in special, research, or
16 demonstration projects approved by the governor;

17 (13) Positions filled by inmates, kokuas, patients of state
18 institutions, persons with severe physical or mental
19 handicaps participating in the work experience
20 training programs, and students and positions filled
21 through federally funded programs that provide
22 temporary public service employment such as the

- 1 federal Comprehensive Employment and Training Act of
2 1973;
- 3 (14) A custodian or guide at Iolani Palace, the Royal
4 Mausoleum, and Hulihee Palace;
- 5 (15) Positions filled by persons employed on a fee,
6 contract, or piecework basis, who may lawfully perform
7 their duties concurrently with their private business
8 or profession or other private employment and whose
9 duties require only a portion of their time, if it is
10 impracticable to ascertain or anticipate the portion
11 of time to be devoted to the services of the State;
- 12 (16) Positions of first deputies or first assistants of
13 each department head appointed under or in the manner
14 provided in section 6, Article V, of the State
15 Constitution; three additional deputies or assistants
16 either in charge of the highways, harbors, and
17 airports divisions or other functions within the
18 department of transportation as may be assigned by the
19 director of transportation, with the approval of the
20 governor; four additional deputies in the department
21 of health, each in charge of one of the following:
22 behavioral health, environmental health, hospitals,

1 and health resources administration, including other
2 functions within the department as may be assigned by
3 the director of health, with the approval of the
4 governor; an administrative assistant to the state
5 librarian; and an administrative assistant to the
6 superintendent of education;

7 (17) Positions specifically exempted from this part by any
8 other law; provided that all of the positions defined
9 by paragraph (9) shall be included in the position
10 classification plan;

11 (18) Positions in the state foster grandparent program and
12 positions for temporary employment of senior citizens
13 in occupations in which there is a severe personnel
14 shortage or in special projects;

15 (19) Household employees at the official residence of the
16 president of the University of Hawaii;

17 (20) Employees in the department of education engaged in
18 the supervision of students during meal periods in the
19 distribution, collection, and counting of meal
20 tickets, and in the cleaning of classrooms after
21 school hours on a less than half-time basis;

S.B. NO. 923

- 1 (21) Employees hired under the tenant hire program of the
2 Hawaii public housing authority; provided that not
3 more than twenty-six per cent of the authority's work
4 force in any housing project maintained or operated by
5 the authority shall be hired under the tenant hire
6 program;
- 7 (22) Positions of the federally funded expanded food and
8 nutrition program of the University of Hawaii that
9 require the hiring of nutrition program assistants who
10 live in the areas they serve;
- 11 (23) Positions filled by severely handicapped persons who
12 are certified by the state vocational rehabilitation
13 office that they are able to perform safely the duties
14 of the positions;
- 15 (24) One public high school student to be selected by the
16 Hawaii state student council as a nonvoting member on
17 the board of education as authorized by the State
18 Constitution;
- 19 (25) Sheriff, first deputy sheriff, and second deputy
20 sheriff;
- 21 (26) A gender and other fairness coordinator hired by the
22 judiciary; [and]

1 (27) Positions in the Hawaii national guard youth challenge
2 academy[-]; and

3 (28) Personal services not currently being provided by
4 civil service employees that are obtained through a
5 contract or agreement for a grant, subsidy, or
6 purchase of service made pursuant to chapter 42F or
7 103F.

8 The director shall determine the applicability of this
9 section to specific positions.

10 Nothing in this section shall be deemed to affect the civil
11 service status of any incumbent as it existed on July 1, 1955."

12 SECTION 5. Section 76-77, Hawaii Revised Statutes is
13 amended to read as follows:

14 "§76-77 Civil service and exemptions. The civil service
15 to which this part applies comprises all positions in the public
16 service of each county, now existing or hereafter established,
17 and embraces all personal services performed for each county,
18 except the following:

19 (1) Positions in the office of the mayor; provided that
20 the positions shall be included in the classification
21 systems;

S.B. NO. 923

- 1 (2) Positions of officers elected by public vote,
2 positions of heads of departments, and positions of
3 one first deputy or first assistant of heads of
4 departments;
- 5 (3) Positions of deputy county attorneys, deputy
6 corporation counsel, deputy prosecuting attorneys, and
7 law clerks;
- 8 (4) Positions of members of any board, commission, or
9 agency;
- 10 (5) Positions filled by students; positions filled through
11 federally funded programs which provide temporary
12 public service employment such as the federal
13 Comprehensive Employment and Training Act of 1973; and
14 employees engaged in special research or demonstration
15 projects approved by the mayor, for which projects
16 federal funds are available;
- 17 (6) Positions of district judges, jurors, and witnesses;
- 18 (7) Positions filled by persons employed by contract where
19 the personnel director has certified that the service
20 is special or unique, is essential to the public
21 interest, and that because of the circumstances
22 surrounding its fulfillment, personnel to perform the

1 service cannot be recruited through normal civil
2 service procedures; provided that no contract pursuant
3 to this paragraph shall be for any period exceeding
4 one year;

5 (8) Positions of a temporary nature needed in the public
6 interest where the need does not exceed ninety days;
7 provided that before any person may be employed to
8 render temporary service pursuant to this paragraph,
9 the director shall certify that the service is of a
10 temporary nature and that recruitment through normal
11 civil service recruitment procedures is not
12 practicable; and provided further that the employment
13 of any person pursuant to this paragraph may be
14 extended for good cause for an additional period not
15 to exceed ninety days upon similar certification by
16 the director;

17 (9) Positions of temporary election clerks in the office
18 of the county clerk employed during election periods;

19 (10) Positions specifically exempted from this part by any
20 other state statutes;

- 1 (11) Positions of one private secretary for each department
2 head; provided that the positions shall be included in
3 the classification systems;
- 4 (12) Positions filled by persons employed on a fee,
5 contract, or piecework basis who may lawfully perform
6 their duties concurrently with their private business
7 or profession or other private employment, if any, and
8 whose duties require only a portion of their time,
9 where it is impracticable to ascertain or anticipate
10 the portion of time devoted to the service of the
11 county and that fact is certified by the director;
- 12 (13) Positions filled by persons with a severe disability
13 who are certified by the state vocational
14 rehabilitation office as able to safely perform the
15 duties of the positions;
- 16 (14) Positions of the housing and community development
17 office or department of each county; provided that
18 this exemption shall not preclude each county from
19 establishing these positions as civil service
20 positions;
- 21 (15) The following positions in the office of the
22 prosecuting attorney: private secretary to the

1 prosecuting attorney, secretary to the first deputy
2 prosecuting attorney, and administrative or executive
3 assistants to the prosecuting attorney; provided that
4 the positions shall be included in the classification
5 systems; [and]

6 (16) Positions or contracts for personal services with
7 private persons or entities for services lasting no
8 more than one year and at a cost of no more than
9 \$750,000; provided that the exemption under this
10 contract shall apply to contracts for building,
11 custodial, and grounds maintenance services with
12 qualified community rehabilitation programs, as
13 defined in section 103D-1001, lasting for no more than
14 a year and at a cost of no more than \$850,000~~[-]~~ ;and

15 (17) Personal services not currently being provided by
16 civil service employees that are obtained through a
17 contract or agreement for a grant, subsidy, or
18 purchase of service made pursuant to chapter 42F or
19 103F.

20 The director shall determine the applicability of this
21 section to specific positions and shall determine whether or not

1 positions exempted by paragraphs (7) and (8) shall be included
2 in the classification systems.

3 Nothing in this section shall be deemed to affect the civil
4 service status of any incumbent private secretary of a
5 department head who held that position on May 7, 1977."

6 SECTION 6. Each affected state and county department or
7 agency that contracts for services pursuant to section 103- ,
8 Hawaii Revised Statutes, in section 2 of this Act shall submit a
9 report to the legislature no later than twenty days prior to the
10 convening of the regular session of each year beginning with the
11 regular session of 2010. The report shall include the following
12 information about each contract entered into in the previous
13 fiscal year:

- 14 (1) A description of the services obtained;
- 15 (2) The subsection of section 103- pursuant to which the
16 contract was entered into, and the agency's or
17 department's justification for entering in the
18 contract;
- 19 (3) The total sums paid as consideration under the
20 contract;
- 21 (4) A copy of the contract; and

S.B. NO. 923

1 (5) The number of civil service employees displaced, if
2 any, by the contract, and the measures taken to
3 minimize or avoid adverse effects on those employees.

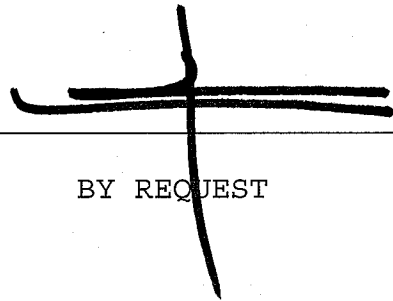
4 SECTION 7. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 8. This Act shall take effect upon its approval.

7

8

INTRODUCED BY: _____

A large, bold, handwritten signature in black ink, consisting of a vertical line and a horizontal line crossing at the top right, with a horizontal line extending to the left.

9

BY REQUEST

Report Title:

Procurement; State and County Contracts

Description:

Provides flexibility and reliability to the hiring and contracting processes by exempting positions or contracts with private persons or businesses for personal services from civil service law.

SB 923

JUSTIFICATION SHEET

DEPARTMENT: Human Resources Development

TITLE: A BILL FOR AN ACT RELATING TO GOVERNMENT CONTRACTS FOR SERVICES.

PURPOSE: The purpose of this bill is to reinstate the authority of the State and the counties to contract with non-governmental contractors for services under specific circumstances.

MEANS: Add a new section to chapter 103, Hawaii Revised Statutes, and amend sections 46-33, 76-16(b), and 76-77, Hawaii Revised Statutes.

JUSTIFICATION: In 2001, the Legislature found that it was important for the state and county governments to be authorized to deliver services by the most efficient means possible. As a result, the Legislature empowered the State and county governments to contract with non-government entities to provide services to the government. This contracting authority allowed the State and county governments to inject substantial resources into local businesses.

In June 2007, the law that conferred broad authority upon the State and the counties to contract expired. This law was part II of Act 90, Session Laws of Hawaii 2001. As a result, there is now uncertainty regarding the authority of the State and the counties to contract with Hawaii businesses, nonprofit organizations, and mutual benefit societies to obtain services that are critical for the efficient, cost effective, and uninterrupted delivery of services by the State and county governments.

Consequently, the contracts between the State or county governments and these entities are now subject to legal challenge. The basis for this legal challenge was a

prior Hawaii Supreme Court decision in *Konno v. County of Hawaii*, 85 Haw. 61 (1997), in which the court declared that a contract between the government and a non-government entity was void because the services had historically and customarily been provided by civil servants and because there was no exception in the civil service laws to allow for the contract between the government and outside entities.

In order to avoid the risk of costly litigation and to ensure that Hawaii is not harmed by the expiration of Act 90, this bill seeks to amend the State's and the counties' procurement and civil service laws to maintain the current relationship between the State and the counties and their respective contractors who provide vital services to the government and the citizens of Hawaii. Included within this bill are limited exemptions to the civil service law that will allow the government to continue to contract with non-government entities without causing a substantial burden on our existing public sector civil servants.

Impact on the public: More efficient governmental operation. Eliminate imminent disruptive impact upon the provision of governmental services.

Impact on the department and other agencies: More efficient governmental operation. Eliminate imminent disruptive impact upon the provision of governmental services.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: None.

OTHER AFFECTED
AGENCIES: Judiciary, University of Hawaii, Department of Education, Department of Human Resources

Development, City and County of Honolulu,
County of Maui, County of Hawaii, and County
of Kauai.

EFFECTIVE DATE: Upon approval.