H.B. NO. 3145

A BILL FOR AN ACT

RELATING TO STATE AND COUNTY CONTRACTS FOR SERVICES.

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

SECTION 1. 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 including nonprofit organizations, mutual benefit societies, and private sector contractors to provide services to the government.

In June 2007, the law that conferred broad contracting authority upon the State and counties 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 counties to contract with non-government entities to obtain services that are critical for the efficient, cost effective, and uninterrupted delivery of services by the state and county governments.

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

ensure that government services are provided to the residents of the State, 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.

SECTION 2. Chapter 46, Hawaii Revised Statutes, is amended by adding to part II a new section to be appropriately designated and to read as follows:

"**§46-___ Contracted services not subject to this part.** Services obtained by a county with a population of 500,000 or more pursuant to contracts for services authorized by section 103-__shall not be subject to and are exempt from the civil service."

SECTION 3. Chapter 76, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

1 "**§76-__ Contracted services not subject to civil service.**
2 Services obtained by the State or the counties pursuant to
3 contracts for services authorized by section 103-__shall not be
4 subject to and are exempt from the civil service to which this
5 chapter applies."
6 SECTION 4. Chapter 103, Hawaii Revised Statutes, is
7 amended by adding to part I a new section to be appropriately
8 designated and to read as follows:
9 "**§103-___ State and county contracts for services;**
10 **exemptions from civil service.** (a) Notwithstanding any other
11 law to the contrary, services that are customarily and
12 historically provided by civil servants may be obtained through
13 State or county contracts for services with private entities
14 entered into in accordance with chapter 103D or 103F, when the
15 circumstances and requirements set forth in subsection (b), (c),
16 (d), (e), (f), (g), or (h) are present and satisfied.
17 (b) The State or a county may enter into a contract to
18 obtain services from a private entity when the services needed
19 would otherwise be provided by one or more employees with
20 permanent appointments to civil service positions that have been
21 vacant for at least six_successive months provided that:

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

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

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

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

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

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

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

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

1 The director of the respective agency shall be responsible
2 for making all determinations of cost effectiveness necessary to
3 effect the provisions of this subsection.
4 (d) The State or a county may enter into a contract to
5 obtain services from a private entity when the services are
6 needed on an intermittent or irregular basis and the amount of
7 work involved could not occupy a full-time equivalent employee
8 with a permanent appointment to a civil service position of the
9 State or county agency engaging the contract.
10 (e) The State or a county may enter into a contract to
11 obtain services from a private entity when refuse collection and
12 removal, janitorial, and groundskeeping or landscaping services
13 are needed for a State or county office space that is leased and
14 the landlord is unwilling or unable to provide such services, or
15 the amount of work to provide such services would not warrant a
16 full-time civil service position.
17 (f) The State or a county may enter into a contract to
18 obtain services from a private entity for capital investment
19 projects authorized by the legislature, a county council, an
20 appropriate executive agency or administrative office, or major
21 repair and maintenance projects.

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

(h) The State or a county may enter into a contract to obtain services from a private entity whenever there is legislative intent to appropriate funds for the purchase of such services.

(i) In lieu of contracts entered into by the State pursuant to this section, the director of human resources development is authorized to create and transfer to a State department or agency, as many permanent positions as the department or agency is able to fund in order to provide the services."

SECTION 5. Section 46-33, Hawaii Revised Statutes, is amended to read as follows:

"**§46-33 Exemption of certain county positions.** In any county with a population of 500,000 or more, the civil service to which this section refers is comprised of all positions in the public service of such county, now existing or hereafter established, and embraces all personal services performed for such county, except the following:

(1) Positions of officers elected by public vote; positions of heads of departments; position of the clerk; position of the manager of the board of water supply and position of the chief of police.

(2) Positions in the office of mayor, but such positions, except those of the heads of the offices of information and complaint and budget director, shall be included in the position classification plan. Employees of the municipal library and of the offices of information and complaint and budget director, other than the head of such offices, however, shall not be exempted from civil service.

(3) Positions of deputies of the corporation counsel, deputies of the prosecuting attorney, and law clerks.

(4) Positions of members of any board, commission, or equivalent body.

(5) Positions filled by inmates, patients, or students in city institutions or in the schools.

(6) Positions of district magistrates, jurors, and witnesses.

(7) Personal services obtained by contract where the director of civil service has certified that the

service is special or unique, is essential to the public interest and that, because of circumstances surrounding its fulfillment, personnel to perform such service cannot be obtained through normal civil service recruitment procedures. Any such contract may be for any period not exceeding one year.

(8) Personal services of a temporary nature needed in the public interest where the need for the same does not exceed ninety days, but before any person may be employed to render such temporary service the director of civil service shall certify that the service is of a temporary nature and that recruitment through normal civil service recruitment procedures is not practicable. The employment of any person for service of a temporary nature may be extended for good cause for an additional period not to exceed ninety days upon similar certification by the director subject to approval of the civil service commission.

(9) Personal services performed on a fee, contract or piecework basis by persons who may lawfully perform their duties concurrently with their private business or profession or other private employment, if any, and

whose duties require only a portion of their time, where it is impracticable to ascertain or anticipate the portion of time devoted to the service of the city and such fact is certified to by the director of civil service.

(10) Positions of temporary election clerks in the office of the clerk employed during the election periods, but the positions filled by such employees shall be included in the position classification plan.

(11) Positions of one first deputy and private secretaries to heads of departments and their first deputies, but private secretarial positions shall be included in the position classification plan. The first deputy in the department of civil service, however, shall not be exempt from civil service.

(12) Personal services obtained through a contract or agreement for a grant, subsidy, or purchase of service made pursuant to chapter 42F or 103F."

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

"(b) The civil service to which this chapter applies shall comprise all positions in the State now existing or hereafter

established and embrace all personal services performed for the State, except the following:

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

(2) Positions filled by persons employed by contract where the director of human resources development has certified that the service is special or unique or is essential to the public interest and that, because of circumstances surrounding its fulfillment, personnel to perform the service cannot be obtained through normal civil service recruitment procedures. Any such contract may be for any period not exceeding one year;

(3) Positions that must be filled without delay to comply with a court order or decree if the director determines that recruitment through normal recruitment civil service procedures would result in delay or noncompliance, such as the Felix-Cayetano consent decree;

(4) Positions filled by the legislature or by either house or any committee thereof;

(5) Employees in the office of the governor and office of the lieutenant governor, and household employees at Washington Place;

(6) Positions filled by popular vote;

(7) Department heads, officers, and members of any board, commission, or other state agency whose appointments are made by the governor or are required by law to be confirmed by the senate;

(8) Judges, referees, receivers, masters, jurors, notaries public, land court examiners, court commissioners, and attorneys appointed by a state court for a special temporary service;

(9) One bailiff for the chief justice of the supreme court who shall have the powers and duties of a court officer and bailiff under section 606-14; one secretary or clerk for each justice of the supreme court, each judge of the intermediate appellate court, and each judge of the circuit court; one secretary for the judicial council; one deputy administrative director of the courts; three law clerks for the chief

justice of the supreme court, two law clerks for each associate justice of the supreme court and each judge of the intermediate appellate court, one law clerk for each judge of the circuit court, two additional law clerks for the civil administrative judge of the circuit court of the first circuit, two additional law clerks for the criminal administrative judge of the circuit court of the first circuit, one additional law clerk for the senior judge of the family court of the first circuit, two additional law clerks for the civil motions judge of the circuit court of the first circuit, two additional law clerks for the criminal motions judge of the circuit court of the first circuit, and two law clerks for the administrative judge of the district court of the first circuit; and one private secretary for the administrative director of the courts, the deputy administrative director of the courts, each department head, each deputy or first assistant, and each additional deputy, or assistant deputy or assistant defined in paragraph (16);

(10) First deputy and deputy attorneys general, the administrative services manager of the department of

1 attorney general, one secretary for the administrative
2 services manager, an administrator and any support
3 staff for the criminal and juvenile justice resources
4 coordination functions, and law clerks;
5 (11) (A) Teachers, principals, vice-principals, complex
6 area superintendents, deputy and assistant
7 superintendents, other certificated personnel,
8 not more than twenty noncertificated
9 administrative, professional and technical
10 personnel not engaged in instructional work;
11 (B) Effective July 1, 2003, teaching assistants,
12 educational assistants, bilingual/bicultural
13 school-home assistants, school psychologists,
14 psychological examiners, speech pathologists,
15 athletic health care trainers, alternative school
16 work study assistants, alternative school
17 educational/supportive services specialists,
18 alternative school project coordinators, and
19 communications aides in the department of
20 education;

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

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

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

(13) Positions filled by inmates, kokuas, patients of state institutions, persons with sever physical or mental handicaps participating in the work experience training programs, and students and positions filled through federally funded programs that provide temporary public service employment such as the federal Comprehensive Employment and Training Act of 1973;

(14) A custodian or guide at Iolani Palace, the Royal Mausoleum, and Hulihee Palace;

(15) Positions filled by persons employed on a fee, contract, or piecework basis, who may lawfully perform

their duties concurrently with their private business or profession or other private employment and whose duties require only a portion of their time, if it is impracticable to ascertain or anticipate the portion of time to be devoted to the services of the State;

(16) Positions of first deputies or first assistants of each department head appointed under or in the manner provided in section 6, Article V, of the State Constitution; three additional deputies or assistants either in charge of the highways, harbors, and airports divisions or other functions within the department of transportation as may be assigned by the director of transportation, with the approval of the governor; four additional deputies in the department of health, environmental health, hospitals, and health resources administration, including other functions within the department as may be assigned by the director of health, with the approval of the governor; an administrative assistant to the state librarian; and an administrative assistant to the superintendent of education;

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

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

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

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

(21) Employees hired under the tenant hire program of the Hawaii public housing authority; provided that not more than twenty-six per cent of the authority's work force in any housing project maintained or operated by the authority shall be hired under the tenant hire program;

(22) Positions of the federally funded expanded food and nutrition program of the University of Hawaii that require the hiring of nutrition program assistance who live in the areas they serve;

(23) Positions filled by severely handicapped persons who are certified by the state vocational rehabilitation office that they are able to perform safely the duties of the position;

(24) One public high school student to be selected by the Hawaii state student council as a nonvoting member on the board of education as authorized by the State Constitution;

(25) Sheriff, first deputy sheriff, and second deputy sheriff;

(26) A gender and other fairness coordinator hired by the judiciary; [~~and~~]

(27) Positions in the Hawaii national guard youth challenge academy[~~.~~]; and

(28) Personal services obtained through a contract or agreement for a grant, subsidy, or purchase of service made pursuant to chapter 42F or 103F."

SECTION 7. Section 76-77, Hawaii Revised Statutes is amended to read as follows:

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

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

(2) Positions of officers elected by public vote, positions of heads of departments, and positions of one first deputy or first assistant of heads of departments;

(3) Positions of deputy county attorneys, deputy corporation counsel, deputy prosecuting attorneys, and law clerks;

(4) Positions of members of any board, commission, or agency;

(5) Positions filled by students; positions filled through federally funded programs which provide temporary public service employment such as the federal

1 Comprehensive Employment and Training Act of 1973; and
2 employees engaged in special research or demonstration
3 projects approved by the mayor, for which projects
4 federal funds are available;
5 (6) Positions of district judges, jurors, and witnesses;
6 (7) Positions filled by persons employed by contract where
7 the personnel director has certified that the service
8 is special or unique, is essential to the public
9 interest, and that because of the circumstances
10 surrounding its fulfillment, personnel to perform the
11 service cannot be recruited through normal civil
12 service procedures; provided that no contract pursuant
13 to this paragraph shall be for any period exceeding
14 one year;
15 (8) Positions of a temporary nature needed in the public
16 interest where the need does not exceed ninety days;
17 provided that before any person may be employed to
18 render temporary service pursuant to this paragraph,
19 the director shall certify that the service is of a
20 temporary nature and that recruitment through normal
21 civil service recruitment procedures is not
22 practicable; and provided further that the employment

of any person pursuant to this paragraph may be extended for good cause for an additional period not to exceed ninety days upon similar certification by the director;

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

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

(11) Positions of one private secretary for each department head; provided that the positions shall be included in the classification systems;

(12) Positions filled by persons employed on a fee, contract, or piecework basis who may lawfully perform their duties concurrently with their private business or profession or other private employment, if any, and whose duties require only a portion of their time, where it is impracticable to ascertain or anticipate the portion of time devoted to the service of the county and that fact is certified by the director;

(13) Positions filled by persons with a severe disability who are certified by the state vocational

rehabilitation office as able to safely perform the duties of the positions;

(14) Positions of the housing and community development office or department of each county; provided that this exemption shall not preclude each county from establishing these positions as civil service positions;

(15) The following positions in the office of the prosecuting attorney: private secretary to the prosecuting attorney, secretary to the first deputy prosecuting attorney, and administrative or executive assistants to the prosecuting attorney; provided that the positions shall be included in the classification systems; [~~and~~]

(16) Positions or contracts for personal services with private persons or entities for services lasting no more than one year and at a cost of no more that $750,000[~~.~~]; and

(17) Personal services obtained through a contract or agreement for a grant, subsidy, or purchase of service made pursuant to chapter 42F or 103F."

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.

INTRODUCED BY: Calvin K.Y. Say

BY REQUEST

JAN 22 2008

H.B. NO. 3145

Report Title:
Procurement; State and County Contracts

Description:
Authorizes the procurement of contracts for services by the State and counties and exempts the contracts from chapter 76, Hawaii Revised Statutes.

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JUSTIFICATION SHEET

DEPARTMENT: Human Resources Development

TITLE: A BILL FOR AN ACT RELATING TO STATE AND COUNTY 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 46, chapter 76, and 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

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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.