How to revive contracting as a policy option in Hawaii

A small but powerful change in state law is all that is needed

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Table of Contents

4. Executive summary
5. History of the Konno decision
5. The Legislature gets involved
7. The “simplest” solution
7. Time to revisit Acts 230 and 90
8. An option for the short term
8. Exemptions in the law
10. Benefits of privatization
10. The case for civil service
10. Conclusion
11. Appendices
   a. Timeline
   b. State reports on the Konno decision
   c. Resources for lawmakers
13. Endnotes
A 1997 Hawaii Supreme Court ruling known as the “Konno decision” set a precedent that remains a significant obstacle to many forms of privatization in Hawaii, such as contracting and public-private partnerships, but there could be a simple way for the state Legislature and governor to change that.

Specifically, the Legislature could enact legislation similar to Acts 230 and 90 — which expired in 2003 and 2007, respectively — to create an environment that promotes privatization, where appropriate. This would go a long way toward improving government services, reducing government spending, expanding job opportunities and easing the need for taxes in Hawaii.

In the Konno decision, the state’s high court agreed that civil service, as defined by an existing statute, consisted of “those services that have been customarily and historically provided by civil servants.” This decision effectively set a precedent that has prevented civil service positions from being filled by the private sector, including jobs not yet created.

It recognized only two exceptions: 1) when the employees have been “expressly excluded” by separate statutes, such as with prisoners, and 2) when “personnel to perform the service cannot be recruited through normal civil service procedures.”

The latter exception can apply for up to one year, if the state or counties can show they are unable to fill a civil service position with a public employee. Otherwise, filling the position with a civil servant is the legal imperative.

In the aftermath of the ruling, both state and county departments were unsure about the legality of the contracts they had made with the private sector. The state Legislature responded over the next few years by approving Acts 230 and 90, to reduce the interruption of government service. Both Acts outlined circumstances under which it would be permissible to have private employees do work previously done by civil servants.

In 2000, the Legislature gave to the director of the state Department of Human Resources Development, through Act 253, the authority to determine which civil service roles qualified for exemption. The Act said that except for positions “that are … exempted by (Hawaii Revised Statute) section 46-33, 76-16, or 76-77, or by other law,” it was up to the DHRD director to determine whether a position would classify as an exempt position, albeit based on the criteria that no qualified civil servants could fill the role. The DHRD director was also tasked with “(minimizing) the use of exempt positions.”

Since the sunsetting of Acts 230 and 90, there has been a high threshold for public-private partnerships, the use of private employees and privatization of government services. Outside of the temporary, year-long exemptions under the Hawaii Revised Statutes and the DHRD’s shrinking list of exempt positions, explicit legislative action has been necessary in every instance in which the private sector has been called on to fill roles “customarily and historically” performed by civil servants.

But that doesn’t have to be. In its Konno ruling, even the state Supreme Court recognized the merits of privatization, but said it was the role of the Legislature to change the law, if it wanted greater policy flexibility.
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Efforts to privatize government services in Hawaii came to a virtual halt after the Hawaii Supreme Court in 1997 rendered a decision that seemed to block the practice.

But there could be a simple way to mitigate that 21-year-old ruling, assuming there is sufficient political will.

Known as “the Konno decision,”1 the ruling was based partly on the wording of Hawaii Revised Statute 76-16, which defines civil service as “all positions in the State now existing or hereafter established and embrace all personal services performed for the State.”

The high court judges also relied on a legal approach known as the “nature of the services test,” which they said holds that all jobs that have been “customarily and historically provided by civil servants” cannot be privatized “absent a showing that civil servants cannot provide those services.”

The case at hand concerned an attempt by Hawaii County Mayor Stephen Yamashiro to close an old county landfill and open a new one with privatized workers. Responding to a legal challenge brought by the United Public Workers union, the court held that “the landfill worker positions at Pu‘uanahulu (the site of the new landfill) were within the civil service” and “governed by merit principles under article XVI, section 1 of the Hawai‘i Constitution.”

“As civil service positions,” it continued, “they are also subject to the civil service statutes contained within HRS chs. 76 and 77. Therefore, privatization of the operation of the new landfill deprived civil servants of the protections guaranteed in article XVI, section 1 and HRS chs. 76 and 77. Thus, the County violated constitutionally mandated merit principles and civil service statutes.”

In other words, the Konno Decision set a precedent that Hawaii law not only protects current civil service employees from privatization, but also prevents the government from hiring private employees for any future positions, provided civil servants have performed similar duties in the past.

The Legislature gets involved

In the following decade, Hawaii saw a slew of laws aimed at both increasing and decreasing the barriers to privatization.

Because the Konno decision jeopardized many state and county contracts throughout Hawaii, the state Legislature in 1998 enacted a stopgap measure, Act 2302, which established “a process to facilitate increased public-private competition and partnerships.” Originally scheduled to sunset in 2001, then
extended to 2003, the Act expressly permitted privatization of civil service jobs, but only if it did not result in “the loss of a job by a covered employee, or the transfer of a covered employee to another position without adequate training.”

In 2000, the Legislature approved Act 253¹, a law that was intended to affirm the Konno decision. It did that by aligning HRS 76-16 with the Konno ruling, allowing privatization only when permitted through legal exemptions, rather than modifying Hawaii’s civil service recruitment procedures, which the court had said the Legislature had the power to do. Because of Act 253, HRS 76-16 now says⁴:

“... the public policy of the State is that all positions in the civil service systems of the respective jurisdictions shall be filled through civil service recruitment procedures based on merit, and that the civil service system of the respective jurisdictions shall comprise all positions, whether permanent or temporary, in the jurisdiction now existing or hereafter established and embrace all personal services performed for the jurisdiction, except employees or positions exempted under this section, or sections 46-33 and 76-77.”

Additionally, the new law required the director of the state Department of Human Resources Development (DHRD) to “minimize the use of exempt positions.”⁵

In 2001, a year after Act 253 was approved, Hawaii’s Legislature enacted Act 90.⁶ This law, enacted with a sunset clause, allowed for the privatization of government employees, regardless of civil service protections, “when there is reasonable basis to believe that the service of equivalent or better quality than that which could be provided by a government agency can be provided at lower cost.”

Act 90 was motivated largely by rising public employment costs coupled with a decline in Hawaii’s economy.⁷ Then-Gov. Ben Cayetano believed enabling privatization might help with the state’s finances, but it generated a significant backlash from Hawaii’s unions,⁸ and in 2007 was allowed to expire.⁹

A year before that happened, in 2006, Act 300¹⁰ was enacted, which removed certain exemptions from Hawaii civil service law in order to comply with Act 253.

Thus Hawaii law came almost full circle back to endorsing the Konno decision, with Acts 253 and 300. As with the Konno decision, those two Acts say that except for explicit exemptions, such as
interns and prisoners, no position that has been “customarily and historically” provided by civil servants, including those which haven’t even been created yet, can be filled by the private sector unless there are no public employees qualified to fill it.

A rude reminder of the impact of the Konno decision occurred in 2016, two years after the Honolulu City Council voted to defund front-loader trash collection services to about 180 apartment, condominium and nonprofit buildings, providing an opening for private refuse companies to pick up the slack.

The United Public Workers union challenged the city’s decision on the grounds that it violated the Konno decision, and in 2016 the state Supreme Court upheld a Circuit Court injunction against the city’s plan.

Other cases in which the Konno decision helped thwart privatization of government services include the 2015 decision by state officials to discontinue at least 99 private contracts and the abandoned 2016 attempt to use private security at Honolulu International Airport.

**The ‘simplest’ solution**

So, once again, Hawaii’s government agencies are facing barriers regarding privatization, just as they did before the passage of Act 230 and Act 90.

What to do now?

The simplest solution — technically, at least — would be to remove the language from HRS 76-16 that requires civil service positions be filled exclusively by government employees. By amending the part of HRS 76-16 that requires all government positions “now existing and hereafter” to be filled through civil service recruitment procedures, the barrier created by the Konno decision could be removed.

This would be the most straightforward fix, but, of course, any options stated in this report would have to deal with the political realities, which as we have seen can be formidable.

**Time to revisit Acts 230 and 90**

Which brings us to another option regarding how to make privatization more feasible in Hawaii: Enact a new law that embodies the best elements of the now-expired Acts 90 and 230.
Those would include allowing for privatization when it is fiscally beneficial, similar to the language of Act 90, and maintaining reasonable civil service protections, as mandated in Act 230.

As stated before, enacting such legislation would require strong political will, but the potential benefits of the proposal deserve thorough examination.

**An option for the short term**

In lieu of enacting a law that would simplify the privatization process generally, there is a short-term workaround. The keys are found in HRS 76-16 and 76-77, which provide the state and counties the authority to hire for up to a year private entities that can perform jobs customarily performed by civil servants, provided that qualified government employees are unable to fill the role.

A case where this could apply is on Maui, where the county’s Department of Water Supply has fallen far behind in processing Upcountry residents’ applications for water service. As of December 2017, the list of applicants stood at 1,728, with the department handling only about 60 applications per year. The department said this is because there are only two engineers processing the paperwork. By relying on the language in HRS 76-77, the county personnel director could authorize the department to hire private engineers to speed up the process, albeit for only one year.

In similar cases at the state level, it would be the state DHRD director who would make such a determination, under HRS 76-16.

**Exemptions in the law**

Many state departments already employ private-sector workers, and are legally allowed to do this because of exemptions in Hawaii laws HRS 76-16 and HRS 76-77.

For example, HRS 76-16, section B, exemption 13, allows the state agencies to contract with certain people with mental disabilities participating in work training programs. Under this exemption, the Judiciary contracts with the Kona Association for Retarded Citizens to provide work experience in cleaning the Kona Driver Education office.

Table 1 lists state agencies that contract with private-sector janitorial workers, and the likely exemption for which those contracts qualify. All of the contracts fall under one of the following three exemptions under HRS 76-16, section B:

- Exemption 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.”

- Exemption 13: “Positions filled by inmates, patients of state institutions, persons with severe physical or mental disabilities participating in the work experience training programs; positions
filled with students in accordance with guidelines for established state employment.”

- Exemption 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 service of the State.”

Table 1
State agency private-sector janitorial contracts and likely exemptions

<table>
<thead>
<tr>
<th>Department</th>
<th>Contracts</th>
<th>Reason for using private employees</th>
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<tbody>
<tr>
<td>Accounting and General Services</td>
<td>Arc of Kona (Big Island)</td>
<td>Exemption 13</td>
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<td></td>
<td>Pacific Ohana Masonry (Maui)</td>
<td>Exemption 15</td>
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<td></td>
<td>CW Maintenance (Big Island)</td>
<td>Exemption 15</td>
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<tr>
<td>Business, Economic Development &amp; Tourism</td>
<td>Alafale, LLC (Oahu)</td>
<td>Exemption 2</td>
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<td>PWC Hawaii Corporation (Big Island)</td>
<td>Exemption 2</td>
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<td></td>
<td>Waikiki Health (Oahu)</td>
<td>Exemption 13</td>
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<td>Federal Maintenance Hawaii, Inc. (Oahu)</td>
<td>Exemption 2 and 15</td>
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<tr>
<td>Defense</td>
<td>Jani-King (Big Island)</td>
<td>Exemption 2</td>
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<td>Hawaiian Homelands</td>
<td>Jonique &amp; Co, LLC (Oahu)</td>
<td>Exemption 15</td>
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<td>H&amp;L Services (Big Island)</td>
<td>Exemption 15</td>
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<td>Heidi kalehuawehe (Maui)</td>
<td>Exemption 15</td>
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<tr>
<td>Public Housing Authority</td>
<td>Lions’ Cleaning and Maintainence Inc. (Oahu)</td>
<td>Exemption 2</td>
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<tr>
<td>Public Library System</td>
<td>West Oahu Aggregate Co. Inc. (Oahu)</td>
<td>Exemption 2</td>
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<tr>
<td>Health</td>
<td>Jani-King (Maui)</td>
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<td>Jani-King (Oahu)</td>
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<td>Human Resources Development</td>
<td>Lions’ Cleaning and Maintainence Inc. (Oahu)</td>
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<td>Judiciary</td>
<td>Alafale, LLC (Oahu)</td>
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<td>Kona Association for Retarded (Big Island)</td>
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<td>Jessi-D Cleaning Services (Big Island)</td>
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<td>Lavi’s Cleaning Service (Big Island)</td>
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<td>Lavi’s Cleaning Service (Big Island)</td>
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<td>Aina Property Services (Kauai)</td>
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<td>Arc of Hilo (Big Island)</td>
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<td>Land and Natural Resources</td>
<td>PWC Hawaii Corporation (Big Island)</td>
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<tr>
<td>University of Hawaii</td>
<td>Arc of Kona (Big Island)</td>
<td>Exemption 13</td>
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Benefits of privatization

Why is it desirable to have private companies providing public services?

Because it can increase governmental efficiency and broaden private sector employment opportunities. As the Hawaii Supreme Court noted in its 1997 decision, “Services can often be provided more efficiently by private entities than by civil servants.”

But that’s not all. Hinting at the value of competition, the court also said that, “The productivity of civil servants can be enhanced in that the threat of privatization serves as an incentive to improve performance.”

As Hawaii’s bureaucracy currently functions, there is little or no competition spurring innovation or efficiency. If privatization were more easily achievable, government agencies would feel pressure to improve services, or else lose their lock on government funding.

And there is yet another benefit of privatization. According to the state Supreme Court, it “may also give public employers increased leverage in labor negotiations, thus avoiding costly labor disputes.”

The case for civil service

As for the purported benefits of civil service, the court said they include “elimination of the ‘spoils system,’” and promotion of the “positive principles of public administration such as openness, merit, and independence.”

Unfortunately, Hawaii’s current legal environment has resulted in the civil service posing as a roadblock to better government service, as well as a betrayal of the very principles upon which civil service is based.

Conclusion

The Hawaii Supreme Court’s 1997 Konno decision erected a huge barrier in the path of privatization in Hawaii, but clearing that hurdle might be easier than initially thought.

As it stands, if the state or counties want to privatize any government services, specific legislative exceptions are required. Additionally, legislators have little choice but to wait until a government service already is failing, then pass a self-contained law that addresses only that specific situation.

But Hawaii lawmakers shouldn’t have to do this every time they want to privatize a government service. By revisiting, refining and reintroducing privatization laws of the past, plus working with other laws that provide short-term options, Hawaii policymakers could once again have the vital option of turning to the private sector to achieve their goals.

This could go a long way toward improving government services, reducing government spending, expanding job opportunities and lightening Hawaii’s tax requirements.
Appendices

Timeline:

1997: The Hawaii Supreme Court rendered its “Konno decision,” which left state and county departments unclear about existing and future contracts with private entities.

1998: Act 230 (SB 2213, page 47) enacted. Set to sunset in 2001, it:

>> Provided state and county the authority to contract with private sector, even for services customarily and traditionally performed by civil servants.

>> Protected civil servants by preventing contracts with private entities that would displace or transfer them without training.

>> Created a committee to develop a “managed competition” framework, though the framework never was completed.

Video transcripts of the legislative testimony at https://tinyurl.com/y87dv9k9 (part 1) and https://tinyurl.com/y9rstoko (part 2).

2000: Act 253 enacted, which:

>> Established the director of the state Department of Human Resources as the authority for interpreting whether civil service positions fall under civil service protections or qualify for an exemption.

>> Declared the domain of civil servants to be “all positions within a jurisdiction that are not exempted by section 46-33, 76-16, or 76-77, or by other law and must be filled through civil service recruitment procedures based on merit.”

>> Established that positions — except for those exempt through explicit laws — qualify for an exemption only if they cannot be filled by a civil servant.

>> Established that the civil service system falls under the “merit principle” guidelines.

>> Defined the merit principle to include “equal opportunity,” “impartial selection of the most competent individual,” “incentives for promotional opportunities,” “reasonable job security” and “equal pay for equivalent roles.”

2001: Act 230 extended, though without the provision protecting civil servants by preventing contracts with private entities that would displace or transfer them without training.

2001: Act 90 enacted. Set to sunset in 2007, this law:

>> Enabled the state and counties to utilize private sector employees through individual contracts and managed competition.

>> Reinstated the right of public employees to strike.
Repealed “essential employee status,” a designation meaning the position was necessary in order to avoid or remove danger to public health or safety.

Allowed the state and counties to contract with private entities, if it were determined that it would result in equivalent or better service and reduce spending. The law did not spell out how that determination was to be made.

Legislative testimony related to Act 90 can be viewed at https://tinyurl.com/yabld9an.

2003: Part IV of Act 230, which allowed for privatization, repealed.

2006: Act 300 enacted. This law established that the director of DHRD must convert an exempt position to a civil service position as soon as the exemption is no longer necessary.

2007: The portion of Act 90 that allowed privatization repealed.

State reports on the Konno decision


Resources for lawmakers


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7 David Shapiro, “The Cayetano years: a retrospective,” The Honolulu Advertiser, Honolulu, 2001, http://the.honoluluadvertiser.com/article/2001/Dec/23/op/op04a.html: “By the time Cayetano took office, the economy was in recession, the surplus was gone and he faced staggering deficits that for the first time forced a governor to lay off state employees to balance the budget. … With the tight budgets he faced, he needed to slow pay raises, reduce overly generous benefits and reform work rules that thwarted efficiency and accountability in state government.”


9 Kevin Dayton, “Extend privatize law, says Big Isle,” The Honolulu Advertiser, Feb. 28, 2007, http://the.honoluluadvertiser.com/article/2007/Feb/28/In/FP702280406.html: “The Hawai‘i Government Employees Association has announced that one of its priorities this year is to have Act 90 expire.”


12 “Settlement with union over private-sector contracts could cost millions,” Hawaii News Now, Oct. 19, 2015: “The United Public Workers union filed grievances in 2007 and a prohibited practices complaint in 2009, complaining that the state unlawfully privatized services that historically had been performed by unionized workers, such as grounds keeping along state highways. … The state’s decision to transition at least 99 of the 506 contracts currently filled by private workers means departments will have to ask lawmakers for money to fund the positions.”
13 Nicholas Fillmore, "Policing of Hawaii Airport Triggers Lawsuit," Courthouse News Service, Pasadena, Calif., July 14, 2016, https://www.courthousenews.com/Policing-of-Hawaii-Airport-Triggers-Lawsuit: "In Konno v. County of Hawaii, the Hawaii Supreme Court held that the contracting out or privatization of services which have historically and customarily been performed by civil servants violates the constitutionally protected merit principle. The law enforcement and policing services performed by the Securitas personnel at HIA have historically and customarily been performed by civil servants under the merit system."

14 "Maui County Water Resources Committee meeting," video, Jan. 3, 2018, at 34'05"-34'18", YouTube, www.youtube.com/watch?v=-Ifek5Fwmrc&feature=youtu.be&t=34m5s.

15 Hawaii Revised Statutes 76-77, Hawaii State Legislature, https://www.capitol.hawaii.gov/hrscurrent/ Vol02_Ch0046-0115/HRS0076/HRS_0076-0077.htm: "Positions filled by persons employed by contract where the personnel director has certified that the service is special or unique, is essential to the public interest, and that because of the circumstances surrounding its fulfillment, personnel to perform the service cannot be recruited through normal civil service procedures; provided that no contract pursuant to this paragraph shall be for any period exceeding one year."

16 Hawaii Revised Statutes 76-16, Hawaii State Legislature, https://www.capitol.hawaii.gov/hrscurrent/ Vol02_Ch0046-0115/HRS0076/HRS_0076-0016.htm: "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."

