September 2, 1997

The Honorable Richard D. Wurdeman
County of Hawaii Corporation Counsel
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720-4262

Dear Mr. Wurdeman:

Re: Application of the Konno v. County of Hawaii Decision to the Construction of Certain Civil Services Laws For Purposes of Privatization

This responds to your May 26, 1997, letter conveying four questions about the appropriate construction of certain provisions of the civil service law, chapter 76, Hawaii Revised Statutes ("HRS"), in light of the Supreme Court's recent decision in Konno v. County of Hawaii, 85 Haw. 61, 937 P.2d 397 (1997).[1]

The four questions and a brief summary of your opinion as to how cited provisions of the civil service laws should be construed to answer each question, are set out below. Before addressing your questions, however, an outline of the analytical "road map" we are using to respond to Konno-related questions from state agencies may be helpful to an understanding of our responses.

The existence and dimensions of the civil service are defined in the Hawaii Revised Statutes by section 76-16, HRS, (for the State), section 76-77, HRS, (for counties with populations of less than 500,000 -- essentially the Neighbor Island counties, including the County of Hawaii), and section 46-33, HRS, (for counties with populations of 500,000 or more -- essentially the City and County of Honolulu). Each section begins with a nearly identical opening clause which states the general proposition that the civil service of the respective jurisdictions "comprises all positions . . . now existing or hereafter established" and "embraces all personal services," followed by an enumerated list of exceptions. (top)

In Konno[2] , the Supreme Court confirmed that the statutory clause in section 76-77 and reprised in sections 76-16 and 46-33, defines the civil service of the County of Hawaii and the respective other jurisdictions. It held that in Hawaii, the civil service "encompasses those services that have been customarily and historically provided by civil servants," unless one of the enumerated exceptions applies. Id., 85 Haw. at 72, 937 P.2d at 408. The court concluded that (1) civil servants must provide all services government needs or offers, unless the service is excepted from the civil service, or civil servants had not "customarily or historically" provided a service, (2) operation of a landfill is work the County and government generally have "customarily and historically" performed,[3] (3) neither "privatization" generally nor for the specific purpose of operating a government landfill is excepted from section 76-77's (and sections 76-16's or 46-33's) civil service coverage,[4] id., 85 Haw. at 75, 937 P.2d at 411, and (4) accordingly, the County's WMI contract violated civil service laws and was void as a violation of public policy, id., 85 Haw. at 64, 937 P.2d at 400.

The court reached its conclusions after adopting the "nature of services" test from among the three tests used by courts in other states to determine when privatization is permitted.[5] Under the "nature of services" test, contracts for services are authorized only if the service obtained is a service excepted from section 76-16 or -77 (or 46-33), id., 85 Haw. at 72, 937 P.2d at 408, a service performed by workers exempt from civil service coverage, id., 85 Haw. at 74, 937 P.2d at 410, or a service not "customarily and historically" performed by civil servants, id., 85 Haw. at 72, 937 P.2d at 408. The court deemed this test to be most useful and appropriate for determining when public services are authorized to be provided by private contractors because section 76-77 (and sections 76-16 and 46-33) "defines 'civil service' in terms of the nature of the positions and

the services provided," id., 85 Haw. at 75, 937 P.2d at 411. Each section specifies that the civil service consists of "all positions in the public service" and "all personal services," and use of the term "all" "indicates that 'civil service' was meant to be read broadly." Id., 85 Haw. at 71, 937 P.2d at 407. (top)

Given this, our analytical road map begins with a determination of whether a contract is a contract for services.[6] If it is a contract for services, we then determine whether the service or a position performing the service falls within one of the enumerated exceptions of section 76-16, 76 77 or 46-33.[7] Finally, if the service is not one of the enumerated exceptions to civil service, we determine whether the service has "customarily and historically" been provided by a civil servant, including whether a showing can be made that civil servants cannot provide the service, id., 85 Haw. at 69, 937 P.2d at 405.

I. QUESTIONS PRESENTED.

Question 1:

> In applying [Konno's] customary and historically test, does one look to the custom and history of the jurisdiction or all jurisdictions?

Summary of Hawaii Corporation Counsel's Opinion: Given the expressly stated legislative intent for state-county uniformity in sections 76-2 and 76-3, HRS,[8] "customary and historically" must be determined by looking at the State, including the other counties, as a whole.[9] (top)

Summary of Attorney General's Opinion: We agree that sections 76-2 and 76-3 reflect an interest in ensuring that there be uniformity among the State's and the counties' civil service systems. However, we do not agree that because of this, an inter-jurisdictional test must be satisfied. A jurisdiction does not have to establish that it and every other civil service system in Hawaii has never previously utilized a civil servant to provide a service before it may contract for that service. Instead, we believe that a jurisdiction only needs to survey its own prior customs and history to determine whether civil servants have "customarily and historically" provided the services sought.

Discussion

The Konno decision begs this question but does not provide guidelines or insights as to how it should be addressed or decided. Nevertheless, there is support for rejecting a rigid rule that Konno's "customarily and historically"/"nature of services" test must be applied inter jurisdictionally. In at least four instances, the wording and structure of the civil service law suggest boundaries for Konno's "customarily and historically"/"nature of services" test coincident with each jurisdiction's borders. (top)

First, the introductory language of sections 76-16, 76-77, and 46-33 expressly delimits the geographic area to which each section applies. Section 76-16 begins:

> The civil service to which this part applies comprises all positions in the State now existing or hereafter established and embraces all personal services performed for the State, except the following: . . . .

(emphases added). Section 76-77 begins:

> 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: . . . .

(emphases added). Section 46-33 begins:(top)

> 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: . . . .

(emphases added).

Second, chapter 76 includes three separate sections for civil service exceptions rather than a central list to be used by all jurisdictions; the sections are similarly but notidentically worded.[10]

Third, since 1947, the civil service laws have included a provision, similar to section 76-2, that directs that the civil service laws be interpreted uniformly by the Territory/State and the several counties, and designates a single arbiter for settling differences in interpretation which may arise from among the several civil service jurisdictions. Between 1947 and 1955, the Attorney General was the single arbiter for interpreting the civil service laws for the Territory and each of the counties to maximize uniformity. However, since 1955, how a civil service law is interpreted does not depend solely upon the Attorney General's interpretation of the law. Instead, each jurisdiction's attorney is authorized to interpret the civil service laws. For purposes of uniformity, questions posed to a county attorney may also be posed to the Attorney General. If the two attorneys' interpretations differ, section 76-2 confers jurisdiction on the First Circuit Court to resolve the differences between the chief legal officers' interpretations to ensure uniformity by adopting either attorney's interpretation, or fashioning an alternative interpretation. The process is still designed to foster uniformity but not necessarily along jurisdictional lines. (top)

Fourth, the plain language of section 76-3 recognizes that the several civil service systems need not be administered uniformly -- the only requirement is that they "be as uniformly administered as is practicable." (Emphasis added.) The difference between the City and County of Honolulu's and the County of Hawaii's implementation of the responsibilities imposed upon them by sections 841-3 and 841-12, HRS, illustrates the wisdom of this provision, and counsels the application of Konno's "customarily and historically"/"nature of services" testintra-jurisdictionally.[11]

Chapter 841, HRS, entitled "Inquests, Coroners", designates the City and County Medical Examiner and the chiefs of police of the Neighbor Island counties to serve as the coroners of their respective counties. Section 841-3 requires the coroners to inquire into and make a complete investigation of deaths that occur under certain specified circumstances; and section 841-12 specifies that when these circumstances occur, it is the duty of the coroner to remove the body from the place of death. Civil servants employed by the Medical Examiner of the City and County of Honolulu have "customarily and historically" implemented the City Medical Examiner's duty to remove on Oahu. However, we understand from the claims asserted in County of Hawaii v. Hawaii Island Humane Society, Civil No. 97-244 (Haw. 3d Cir.), dismissed (July 1, 1997), that the County of Hawaii has relied upon contracts with private mortuaries to satisfy this statutory requirement, because the necessity to remove bodies pursuant to section 841-12 is unpredictable and does not occur with sufficient regularity or frequency in the County of Hawaii to justify the time and expense of establishing even a part-time civil service position. (top)

In this and other contexts in which civil service systems are or have been administered differently, there is no practicable (or logical) means of administering the Konno "customarily and historically"/"nature of services" test uniformly. When one jurisdiction has "customarily and historically" provided a government service with civil servants and one has provided the service through contracts with private entities, do we determine "custom" and "history" by the practice of the jurisdiction which provided the service first? For the longest period of time? With the greatest frequency? Or is it determined by the practice of a plurality? A simple majority? Or a super majority of jurisdictions? (top)

We need to note also that when the civil service laws as we know them today were originally adopted in 1955, the Legislature sought uniformity between and among all of the civil service systems. To ensure this uniformity, each jurisdiction was required to use the classification plan of

the Territory or, if the Territory lacked a counterpart position, the classification or job description for a similar position of the City and County of Honolulu. See section 4-32, Revised Laws of Hawaii 1955.[12] However, in 1961, because the requirement was neither implemented nor enforced, each jurisdiction was permitted to establish its own classification plan. The Legislature replaced section 4-32's inter-system classification plan approach with a system of benchmark classes which has since served as the single point of reference with which to ensure uniformity among the jurisdictions' job descriptions and compensation. See Act 188, 1961 Haw. Sess Laws 305; H. Stand. Comm. Rep. No. 903, Haw. H.J. 1018 (1961). The benchmark classes were established periodically through contributions from each civil service system. This significantly reduced the uniformity among the various civil service systems even though the uniform interpretation statute in effect at the time, section 3-2, Revised Laws of Hawaii 1955, (section 76-2's predecessor) was not revised. (top)

Because the Konno court provided no guidance for addressing your question, and the civil service laws were not adopted with an awareness of the "nature of services" test itself, it is our view that the "practicable" response to your first question is to advise use of an intra-jurisdictional point of reference in applying Konno's "customarily and historically" test.

Question 2:

> Is there a temporal limit to what is considered customary and historic?

Summary of Hawaii Corporation Counsel's Opinion: When a particular service has historically and customarily been performed in a jurisdiction or several jurisdictions by contract as well as by civil servants, determining what is historical and customary the entire time that the service was performed should be apportioned between the contract and civil servant, and if the service was provided for more of that period by contract, then the service may be provided by contract. (top)

Summary of Attorney General's Opinion: We disagree. We were unable to find any basis in the civil service laws or the underlying legislative history to support your opinion.

Discussion

In opting to impose the "nature of services" rather than the "functional inquiry" test to determine when a contract for services is not violative of the civil service laws, the Supreme Court in Konno specifically pointed out that it could not engraft a temporal limit onto the "customarily and historically"/"nature of services" test. As we noted earlier, the court concluded that the Legislature's use of the phrase "now existing or hereafter established" in section 76-77 "clearly encompasses new programs as well as old," id., 85 Haw. at 72, 937 P.2d at 408, and foreclosed us from contracting for services for new programs performing new functions, id., 85 Haw. at 69, 937 P.2d 405. (top)

Question 3:

> Does chapter 42D, HRS, or section 143-15, HRS, provide authority to contract with nonprofit organizations and humane societies, respectively, despite Konno?

Summary of Hawaii Corporation Counsel's Opinion: Because the language of chapter 42D and section 143-15 is no more specific than in section 46-85, HRS, which the Supreme Court rejected as not excepting the operations of the Pu'uanahulu landfill from civil service, chapter 42D and section 143-15 are not sufficient to invoke the civil service exception in section 76-77(10) for contracts with nonprofit organizations and humane societies.

Summary of Attorney General's Opinion: In the Legislature, and in the Second and Third Circuit Courts of the State of Hawaii, the Attorney General has asserted that chapter 42D contracts are contracts to disburse appropriations, and that contracts to disburse appropriations are not subject

to the requirements of the civil service laws, or the decision inKonno.[13] The Attorney General has also indicated that laws like section 143-15 are sufficiently specific to invoke the civil service exception conferred by section 76-77(10) (and its state counterpart at section 76-16(17)), even though these laws do not include the phrase ("without regard to chapters 76 and 77") often included in non-civil service laws to except employees, positions, or services from thecivil service.[14] The profit or nonprofit status of a contractor is not a factor in this analysis. (top)

Discussion

A. Contracts to Disburse Appropriations, Including Chapter 42D Contracts.

Chapter 42D contracts are used to disburse appropriations of public money to private entities, and to impose the standards for the receipt and use of the money which the Legislature devises in furtherance of the requirements of article VII, section 4 of the State Constitution. Article VII, section 4 provides:

> No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of Section 4 of Article I of this constitution. No grant of public money or property shall be made except pursuant to standards provided by law. (top)

The section permits the Legislature to make grants of public money to private entities if the grants are made for a public purpose, and in accordance with standards provided by law. The section was added to the Constitution in 1978 to establish controls "for the appropriation of public funds to private organizations conducting programs which the legislature has determined to be in the public interest." Stand. Comm. Rep. No. 66, 1 Proceedings of the Constitutional Convention of Hawaii of 1978 at660 (1980).[15]

Chapter 42D (which was originally enacted and codified as chapter 42, HRS, by Act 207, 1981 Haw. Sess. Laws 394) provides the legislatively enacted "standards" article VII, section 4 requires, for a comprehensive community-based social service system which, by design, utilizes non-civil servants to provide services ordinarily provided by government agencies. See Conf. Comm. Rep. No. 58, Haw. S.J. 935 (1981) ("The purpose of this bill is to establish standards for grants, subsidies, and purchases of services pursuant to Article VII, section 4 of the State Constitution which requires that 'no grant of public money or property shall be made except pursuant to standards provided by law.' This means that all appropriations of public funds must be made in accordance with standards, whether these appropriations are made at the State or County levels . . . .") (top)

Definitions set forth in section 42D-1, HRS, for chapter 42D's terms contemplate contracts with private entities for the provision of government services by private entities:

> "Provider" means any organization contracted by the State to provide services under a purchase of service agreement.
>
> "Purchase of service" means an appropriation of public funds for the provision of services by an organization to specific members of the general public on behalf of an agency to fulfill a public purpose. Payments for these services shall be substantially equal in value to the services provided; . . . .
>
> "Recipient" means any organization receiving a grant or subsidy. (top)
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> "Subsidy" means an appropriation of public funds made to alter the price or the cost of a particular good or service of the recipient to provide services or goods to the general public or specified members of the general public at a lower price than would otherwise be charged by the recipient.

Act 190, 1997 Haw. Sess. Laws ____, which was recently enacted to replace and recodify chapter 42D and other laws enacted to satisfy article VII, section 4's requirements, reaffirms the importance of chapter 42's and chapter 42D's comprehensive scheme for disbursing public money to a wide-ranging community-based network of private service providers: "The legislature finds there is a need to improve the process used to expend state funds for grants, subsidies, and purchases of services, particularly the process used to purchase health and human services from organizations and individuals in the community available and qualified to act on behalf of the State in responding to the health and human service needs of its citizens." Section 1,Act 190.[16] (top)

The constitutional responsibility to disburse appropriations of public money only in accordance with the requirements of article VII, section 4 of the State Constitution applies equally to the counties. Section 42D-10, HRS, provides:

> Standards of political subdivisions. Each county shall establish standards for the grant of public money or property pursuant to section 4 of Article VII of the Constitution of the State ofHawaii.[17]

B. Services Excepted Under Section 76-16(17) and76-77(10).[18]

It has also been the Attorney General's opinion that the terms "state statutes" and "other law" in sections 76-77(10) and 76-16(17), respectively, do not refer only to statutes or laws that include the phrase "without regard to chapters 76 and 77." We believe the terms must also be construed as referring both to laws that expressly authorize an agency to obtain identified services through contracts with private entities, and laws that do not refer to contracts but establish a comprehensive scheme for providing public services and define objectives that cannot be achieved without private sector participation. None of the examples which follow include the phrase "without regard to chapters 76 and 77." (top)

Any other interpretation of sections 76-16(17) and 76-77(10) would either effectively repeal innumerable laws that do not include the "without regard to chapters 76 and 77" language but expressly or implicitly contemplate the delivery of public services through private contractors, or countenance application of such laws in derogation or violation of the limits of sections 76 16(17)'s and 76-77(10)'s exceptions. Any other interpretation also contradicts well-established rules of statutory construction. Implied repeals are disfavored; "if effect can reasonably be given to two statutes, it is proper to presume that the earlier statute is intended to remain in force and that the later statute did not repeal it." State v. Gustafson, 54 Haw. 519, 521, 511 P.2d 161 (1973). Statutes should be construed to avoid making surplusage of sentences, clauses, and words. State v. Ganal, 81 Haw. 358, 917 P.2d 370 (1996). Statutes should be construed to give all of their parts effect. Bragg v. State Farm Mutual Auto Insurance Co., 81 Haw. 302, 916 P.2d 1203 (1996). Statutes dealing with the same subject should be construed consistently and with reference to each other. Richardson v. City and County of Honolulu, 76 Haw. 46, 868 P.2d 1193 (1994). (top)

Two provisions of chapter 143, HRS, illustrate the first of these two additional bases for invoking the civil service exception described in sections 76-16(17) and 76-77(10). Without any reference to the counties' civil service systems or any other operating detail, section143-15[19] expressly authorizes the counties to rely upon private sector contracts to establish animal pounds and to impound animals, and section143-16[20] even more explicitly directs the County of Kauai to contract, by name, with the Kauai Humane Society, a private organization, for this purpose. The plain language and legislative history of these sections make very clear that the Legislature intended to authorize county reliance upon private humane societies to impound stray dogs within their borders. This can be accomplished only if sections 76-16(17) and 76-77(10) are interpreted broadly. A more restricted construction would foreclose the counties from ever implementing sections 143-15 and143-16.[21] (top)

Section 46-13.1, HRS, is a good example of the second kind of "other law" or "state statute," for excepting an employee, position, or service from the civil service under sections 76 16(17) and76-77(10).[22] It establishes a comprehensive statutory scheme for counties to rely upon to secure fire fighting services from volunteers who are not civil servants. Again, its literal provisions can be given effect only if the terms "other law" or "state statute" used in sections 76 16(17) and 76-77(10) are construed liberally. See also section 302A-1507, HRS(1996 Supp.).[23]

The Konno discussion of section 76-77(10) at 85 Haw. 72-74, 937 P.2d 408-410, does not preclude this reading. Although the court indicated that "[i]nasmuch as HRS § 46-85 mentions nothing about civil service positions, it does not include a specific exemption," id., 85 Haw. at 73, 937 P.2d at 409; the discussion seems to allow that the court may have been willing to find the requisite exemption in section 46-85 if "HRS § 46-85 [was] ambiguous as to whether it contains an exemption to civil service coverage," id.; and the legislative history of section 46-85 indicated something other than that "the authorization to contract given to counties in HRS § 46-85 was intended to be used for garbage-to-energy plants, not landfills," id., 85 Haw. at 73-4, 937 P.2d at 409-410. In our view, the court rejected the County's section 76-77(10) argument not because section 46-85 made no reference to the civil service laws but because the court was not convinced that section 46-85's authorization to contract applied to both garbage-to-energy plants and landfills. (top)

Question 4:

> Is HRS § 76-77 unconstitutional, in that it only applies to Hawaii, Maui, and Kauai?

Summary of Hawaii Corporation Counsel's Opinion: Section 76-77 is unconstitutional because (1) it allocates functions to the counties but is not a general law, and (2) deals with what may be an issue of statewide concern but again is not a general law. To satisfy the requirements of article VIII, sections 2 and 6 of the State Constitution, the law allocating a function or addressing a statewide concern must apply equally and identically to all counties. Section 76-77 only applies to the Neighbor Island counties, and section 46-33, its closest counterpart for purposes of the City and County of Honolulu, is not literally co-extensive and does not include counterparts to all of the other procedural provisions to which the Neighbor Island counties are subject. (top)

Summary of Attorney General's Opinion: For the reasons outlined in the discussion above, we disagree that the civil service systems defined in sections 76-77 and 46-33 are substantively so different as to represent special, rather than general laws for purposes of article VIII, sections 2 and 6 of the State Constitution. We also are not convinced that laws the Legislature enacts to assign functions to the counties to address a statewide concern must necessarily be codified in a single section or chapter of the Hawaii Revised Statutes. However, because the procedure outlined in section 76-2 is limited in its application to interpretations of chapters 76 and 77, the constitutionality of any provision of these two chapters is an issue beyond the bounds of that process.

II. CONCLUSION.

We have tried to provide detailed responses to your questions to enable you to use our conclusions to resolve other questions arising in other contexts that you may be asked in the future (if you agree with our interpretation of provisions of chapter 76 discussed above). We would appreciate knowing whether, as a result of the discussions presented here, there continue to be differences between your interpretation and our interpretation of the civil service laws we address. Please also let us know as soon as possible if the County of Hawaii decides that a declaratory judgment proceeding pursuant to section 76-2 is necessary. (top)

Very truly yours,

Charleen M. Aina

Deputy Attorney General

APPROVED:

Margery S. Bronster
Attorney General

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[1]The purpose of your letter was to initiate the process set out in section 76-2, HRS, to resolve conflicts between the Attorney General and any county corporation counsel or attorney about the construction and interpretation of the civil service laws in order to ensure the uniform interpretation of those laws. Pursuant to that process, if a county attorney's opinion conflicts with the one the Attorney General renders, either the county attorney or the Attorney General may seek a declaratory judgment from the First Circuit Court as to the proper interpretation of the provision. (*return to document*)

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[2]The appeal arose out of a collective bargaining prohibited practice complaint filed by the United Public Workers and several of its members, at the Hawaii Labor Relations Board, pursuant to section 89-13, HRS, challenging the County of Hawaii's contract with Waste Management Inc. ("WMI") to develop, construct, and operate a county landfill at Pu'uanahulu. The union claimed variously that the County was obligated under its collective bargaining contract with the union to negotiate with the union before entering into the WMI contract because it affected the terms and conditions of its members' employment, and that the contract violated the merit principles of the civil service and was therefore invalid. The court's decision deals principally with the union's second claim. (*return to document*) (top)

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[3]In the May 13, 1997 order the court entered in response to the County's and WMI's motions for reconsideration, the court further noted:

> We take this opportunity to reassert the central meaning of our decision. Privatization involves two important, but potentially conflicting policy concerns. On the one hand, privatization purportedly can improve the efficiency of public services. On the other hand, privatization can interfere with the policies underlying the civil service as set forth by the legislature, i.e., elimination of the spoils system and the encouragement of openness, merit, and independence. In the absence of clear legislative support for privatization, we must interpret the laws as they currently exist. Our statutes, and indeed our constitution, reflect strong support for the policies underlying the civil service. As a court, our decisions relating to disputes governed by the application of statutory law (and not otherwise implicating constitutional principles) must be based on that statutory law as it currently exists, and not on statutory law as it could be or even as it should be. The determination of what that law could be or should be is one that is properly left to the people, through their elected legislative representatives.

85 Haw. at 79, 937 P.2d at 415. (*return to document*) (top)

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[4]"Privatization" has been defined several ways. In Konno, the court adopted the definitions for "privatization" proffered by Timothy P. Dowling in Note, Civil Service Restrictions in Contracting Out by State Agencies, 55 Wash.L.Rev. at 419 n.3 (1980): "'the transfer by governmental entities of responsibility for the performance of desired functions, mostly of a personal service (i.e. administrative) nature, to private institutions' or 'the replacement of members of [a] bargaining unit by the employees of an independent contractor performing the same work under similar conditions of employment.'" Id., 85 Haw. at 68, 937 P.2d at 404. The term has also been used by

others, interchangeably, to mean "getting out of the business of delivering a service (usually through the sale of government-owned assets)," and "private contracting" where "government purchases a fixed amount of service and requires the private company to meet specific quality measures." Melia, "Public Profits from Private Contracts A Case Study in Human Services," Pioneer Institute for Public Policy Research (June 1997). (*return to document*)

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[5]In adopting the "nature of services" test, the court considered, but rejected the "functional inquiry" test (because the opening clauses of sections 76-16, 76-77, and 46-33 include the phrase "all positions . . . now existing or hereafter established," id., 85 Haw. at 72, 937 P.2d at 408, and the "bad faith" test (because nothing in section 76-16, 76-77, or 46-33 "indicates that intent or motive is relevant to civil service coverage at all," id.). (*return to document)* (top)

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[6]We are on record with Representative David Tarnas as suggesting that contracts to acquire completed capital improvement projects are contracts for an object or thing, and not for services, and therefore it is possible to conclude that the Konno decision does not apply to contracts to acquire them even when the contract is with a general contractor from the private sector to construct them. At footnote 8 of the Konno decision the court did observe:

> We agree that the construction of the new landfill may be different from that of the old landfill. Indeed, because Hawai'i County has not constructed landfills in compliance with the strict new federal regulations in the past, one could argue that the construction of the new landfill does not involve a service customarily and historically provided by civil servants. Furthermore, the UPW does not challenge the private construction of the new landfill. However, the contract with WMI was for both the construction and the operation of the landfill. It is the operation of the landfill that conflicts with civil service laws and merit principles. (top)

85 Haw. at 72 n.8, 937 P.2d at 408 n.8. (*return to document*)

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[7]You should also note that our analytical road map does not assess whether the contract for services is with a corporation or firm. In Konno, the court rejected the defendants' argument that since the County had contracted with a corporation, its contract was not for "personal services" and, therefore, was not subject to section 76-77. Id. 85 Haw. at 75, 937 P.2d at 411. In light of this judicial holding, we have abandoned the advice provided in the April 28, 1981, letter to the Director of Personnel Services to that effect, and have not included a "who is the contractor?" inquiry in our analytical road map. (*return to document*)

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[8]Section 76-2, HRS, provides:

> Uniform interpretation. It is the intent of the legislature that the construction and interpretation of any of the provisions of this chapter and of chapter 77 be uniform for the State and the several counties. (top)
>
> All questions requiring the construction or interpretation of any of the provisions of this chapter or of chapter 77 shall be submitted to the attorney general for an opinion and the attorney general shall render an opinion promptly on any such question when requested by the head of any department of the State or any county. In case the opinion is in conflict with an opinion rendered upon the same or substantially similar question by any county attorney or corporation counsel and the question upon which the opinion is rendered has been raised by a county, the question may, either at the instance of the county attorney, corporation counsel or the attorney general, be

> submitted to the circuit court of the first judicial circuit for a declaratory judgment on the question, and jurisdiction to hear and determine the questions is hereby conferred upon the circuit court. The circuit court shall determine the question without delay.

Section 76-3, HRS, provides:

> Uniform administration. It is the intent of the legislature that the system of personnel administration established by this chapter and chapter 77 shall be as uniformly administered as is practicable. In order to promote such uniformity, the several commissioners and directors of the state department of human resources development and of the county departments of civil service, the administrative director of the courts, and the Hawaii health systems corporations chief executive officer's designee shall meet at least once each year at the call of the director of human resources development of the State. (*return to document*) (top)

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[9]From other discussions with you, we understand you have concluded that the County must survey its customs and history, and the customs and history of each of the other civil service jurisdictions. It can contract for services, only if it and all of the other jurisdictions have never used civil servants to provide the service the County seeks. (*return to document*)

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[10]One difference is that section 46-33 does not include a "'specifically exempted' by law or statute" exception analogous to section 76-16(17) or 76-77(10). In addition, laws like section 90 2, HRS, exempt volunteers and the services they provide from employment laws, including the civil service laws, but section 90-2 is not available to the counties. Other laws, like section 143 16, HRS, which is discussed in greater detail at note 11 and in our response to Question 3 are available only to one county. (*return to document*) (top)

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[11]Section 143-16, HRS, which is discussed in our response to Question 3, is an even clearer example of this practical impossibility. The County of Kauai is mandated to act independently of the other counties: the county is directed to contract with "the Kauai Humane Society" to operate Kauai's dog pound. (*return to document*)

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[12]The legislative history of Act 274, 1955 Haw. Sess. Laws 304, particularly the floor statements in both houses on the sixtieth day of the session, Haw. H.J. 533 (1955), Haw. S.J. 444 (1955), confirms that this was the Legislature's intent. (*return to document*) (top)

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[13]The Attorney General expressed this position (1) to the Legislature earlier this year in testimony on H.B. Nos. 1686 and 1798 and S.B. No. 1472, (2) in amicus curiae statements of position for which she sought leave of court to file in County of Hawaii v. Hawaii Island Humane Society, Civil No. 97-244 (Haw. 3d Cir.), dismissed (July 1, 1997), and County of Maui v. Maui Economic Opportunity, Inc., Civil No. 97-0359 (Haw. 2d Cir.), dismissed (July 3, 1997) and (3) in a Haw. R. Civ. Proc. Rule 12(h) suggestion of lack of jurisdiction to interpret the civil service laws, filed on behalf of the Kau Soil and Water Conservation District in County of Hawaii v. Alert Alarm, Inc., Civil No. 97-259 (Haw. 3d Cir.) dismissed (July 1, 1997).

This is step 1 of our analytical road map wherein we ask, is the contract a contract for goods? For construction? To disburse appropriations? Or for services? In every instance in which the contract is for something other than services, the analysis goes no further. (*return to document*) (top)

[14]This rationale is also the basis, alternatively, for excepting chapter 42D contracts from the requirements of the civil service laws and Konno. (*return to document*)

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[15]The Committee on Taxation and Finance observed:

> In effect, the additional language will require the legislature to establish standards for the appropriation of funds to private organizations conducting programs which the legislature has determined to be in the public interest. No such standards exist at the present time even though the legislature appropriates several millions of dollars each biennium to private organizations. The requirement that the legislature set standards would be useful to the legislature itself as well as provide the public with an understanding as to what guidelines govern, and which types of organizations qualify for, the appropriation of grants and subsidies. (*return to document*) (top)

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[16]In section 1 of Act 190, the Legislature also noted:

> The objective of this single process to purchase and provide health and human services is to ensure the fair and equitable treatment of all persons who apply to, and are paid to provide those services on the agencies' behalf. It is the intent of this legislature that this improved process result in a simpler, standardized process for both state agencies and the providers to use, and to optimize information-sharing, planning, and service delivery efforts.

The provisions of Act 190, including the repeal of chapter 42D, will be fully effective on July 1, 1998. (*return to document*) (top)

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[17]Article 25, "Appropriation of Funds to Nonprofit Organizations," of the Hawaii County Code (1996), appears to implement the County of Hawaii counterpart to chapter 42D. Section 2 135 of the Hawaii County Code provides:

> The purpose of this article is to establish standards for the appropriation of funds to nonprofit organizations providing programs and services which the County has determined to be in the public's interest.

Section 2-139(a)(4) of the Hawaii County Code provides: "Upon favorable action by the council to appropriate funds for the grant, the director shall prepare a contract with the nonprofit organization for the purpose of the grant award . . . ." (*return to document*) (top)

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[18]The civil service exception at section 76-16(17) was adopted when the civil service was first established in 1939. Its initial wording referred to "officers" rather than "positions" but otherwise the wording of the exception is substantially unchanged. Section 76-77(10) was added in 1955. There is no elaboration in the legislative history of Act 187, 1939 Haw. Sess. Laws 7, or Act 274, 1955 Haw. Sess. Laws 307, which is helpful in interpreting the intent or scope of the exceptions. (*return to document*)

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[19]Section 143-15 provides in pertinent part:

> Contracts for seizing and impounding dogs. Any county may contract with any society or organization formed for the prevention of cruelty to animals, or similar dog

> protective organization, for the seizure and impounding of all unlicensed dogs, and for the maintenance of a shelter or pound for unlicensed dogs, . . . The county may prescribe in the contract the manner in which the work is to be done by the society or organization and it may also direct the disposition to be made of all dogs seized . . . . (*return to document*) (top)

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[20]Section 143-16 provides in pertinent part:

> Contract between county of Kauai and Kauai Humane Society. Pursuant to authorization provided in section 143-15 the county council of the county of Kauai shall contract with the Kauai Humane Society, an incorporated nonprofit association organized under the laws of the State for the prevention of cruelty to animals, upon the subject matters contained in section 143-15 and shall appropriate the moneys collected by the director of finance of the county of Kauai . . . for use by the Kauai Humane Society. . . (*return to document*) (top)

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[21]Other examples of "other laws" or "state statutes" that expressly refer to contracts with the private sector and can only be implemented if section 76-16(17) and 76-77(10) are interpreted liberally include: section 201-3(1)(C), HRS, entitled "Specific research and promotional functions of the department" (Department of Business, Economic Development & Tourism "shall . . . [m]ake grants to and contracts with appropriate agencies, firms, or individuals for surveys, studies, research, and promotion"); and section 302A-407, HRS, entitled "School bus contracts" ("Any other law to the contrary notwithstanding, school bus contracts between the State and a private contractor may be extended for two years by mutual agreement"). (*return to document*) (top)

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[22]Section 46-13.1, HRS, provides in pertinent part as follows:

> Volunteer fire stations. The council of the several counties may establish and maintain one or more volunteer fire stations in any area or areas of the county as it may determine to be necessary to provide adequate fire protection. . . The officers, firefighters or other personnel necessary for the operation or maintenance of these stations shall be selected and appointed by the fire chief partially or entirely on a voluntary noncompensatory basis and except as otherwise provided in this section. All volunteer personnel for any volunteer fire station shall serve at the pleasure of the fire chief. . . .

The section also includes provisions to provide volunteer firefighters with workers compensation benefits, as employees of the county, in the event they sustain an injury or die arising out of their training or performance of firefighting services. (*return to document*) (top)

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[23]Section 302A-1507 provides in pertinent part:

> Classroom cleaning project; established. (a) There is established a classroom cleaning project in schools designated to participate in school/community-based management. Each school/community-based management school, through its council, may develop mechanisms to provide for classroom cleaning, including but not limited to having parent, student, or other community groups clean the classrooms on a regular, continuing basis. (*return to document*) (top)