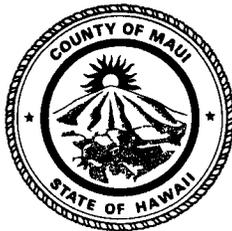


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April 17, 2018

MEMO TO: Riki Hokama, Chair
Budget & Finance Committee

FROM: Richelle Thomson, Deputy Corporation Counsel

A handwritten signature in black ink, appearing to read "R Thomson", is written over the printed name of the sender.

SUBJECT: Fiscal Year 2019 Budget (CC-7)(BF-1)

This memo is in response to your memo dated April 16, 2018, requesting information on the Hawaii Supreme Court's ruling in Konno v. County of Hawaii, 85, Hawaii 61 (1997), and specifically as it relates to the following questions:

1. What constitutes a qualified maintenance contract, allowable under state law.
2. When is it necessary to add additional equivalent personnel versus a maintenance contract.

For general information on this department's advice regarding the Konno decision and the process for determining whether and how an exemption from civil service under Section 76-77, Hawaii Revised Statutes (HRS), may be determined, please see the attached memo dated August 27, 2015, which was generated to assist the departments and the Director of Personnel Services, who must approve such exemption determinations. Please also see DPS's Civil Service Flow Chart, attached.

Maintenance contracts (e.g., building, custodial, or grounds maintenance) are services contracts that may fall into one or more categories of exemptions under HRS §76-77. For example, HRS §76-77(8) provides an exemption for

services required for less than 90 days; HRS §76-77(12) provides an exemption for services of independent contractors under certain circumstances; and HRS §76-77(13) provides an exemption for positions filled by persons with severe disabilities.

However, we understand your question to refer to HRS §76-77, specifically paragraph (16), which reads:

§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:

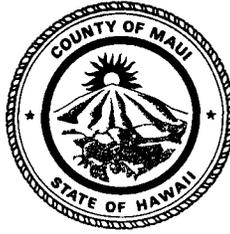
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(16) Positions or contracts for personal services with private persons or entities for services lasting no more than one year and at a cost of no more than \$750,000; provided that the exemption under this paragraph shall apply to contracts for building, custodial, and grounds maintenance services with qualified community rehabilitation programs, as defined in section 103D-1001, lasting for no more than a year and at a cost of no more than \$850,000.

A “qualified community rehabilitation program” is a “nonprofit community rehabilitation program for persons with disabilities” that complies with the provisions of §103D-1001, HRS. This Department has previously advised that contracts with qualified community rehabilitation programs may be entered into for a per-contract value limit of \$850,000, even if the aggregate value of such contracts exceeds this threshold (e.g., multiple maintenance contracts issued to Kalima o Maui). Such contracts may not exceed one year in duration.

We have advised the departments that, in general, when maintenance (or other) services are anticipated to be necessary in an ongoing basis, it may be prudent to request Council’s approval for funding of additional civil service positions to accommodate these needs.

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August 27, 2015

To: All Departments
From: Patrick K. Wong, Corporation Counsel
Re: Civil Service Determination

In 1997, the Hawaii Supreme Court issued its decision in Konno v. County of Hawaii, 85 Haw. 61, 937 P.2d 397 (1997). The decision related primarily to the extent of the applicability of civil service laws, and the Court held that the County of Hawaii violated civil service statutes and the State Constitution when it privatized the operation of a landfill. In defining "civil service" the Court relied on §76-77, Hawaii Revised Statutes ("HRS"), which states, in relevant part:

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[.]

The Court interpreted this language to mean that the Legislature intended this section to be read very broadly, but not to the level of absurdity. In discussing absurdity, the Court used Hawaiian Electric, GTE Hawaiian Tel, and Bank of Hawaii as examples of organizations that provide a "public service" and do not employ civil servants. The Court stated that the sudden and radical expansion of the civil service system to include employees of those organizations would be absurd. The Court went on to explain that "civil service" should not be limited to only those employees paid regular salaries by the government because that would, "allow the state or counties to avoid civil

To: All Departments
Date: August 27, 2015
Page 2

service coverage simply by reducing the size of their official payroll.” The Court also discussed that a “formal employment contract between the government and the individual” is not a requirement for the application of HRS §76-77, emphasizing that the statute focuses on the, “nature of positions and the services provided[,]” not on the existence of a contract. The Court went on to state that if in order for the statute to be applicable a “formal employment contract between the government and the individual” was required, the government could render the statute a nullity by contracting with corporations rather than directly hiring individuals, which was clearly not the intent of the statute.

In determining the extent to which the protection of civil service laws extends, the Court reviewed the “nature of services” test, “functional inquiry” test, and “bad faith” test, ultimately deciding the “nature of services” test to be most consistent with the language of HRS §76-77. The “nature of services test” was analyzed by the Court as follows:

1. Broadest of the three approaches, consistent with the broad coverage suggested by HRS §76-77.
2. Coverage is limited to those types of services **customarily and historically performed by civil servants.**
3. Focuses on the **types of services performed** rather than the particular programs or governmental functions involved or the intent or motive underlying the decision, consistent with the language in HRS §76-77, “all personal services performed for each County[.]”

It is also important to be aware of the reasons the Court used to reject the application of the “functional inquiry” test and the “bad faith” test. The Court rejected the “functional inquiry” test because under this test, new programs, performing new functions, are not subject to civil service laws, which is inconsistent with HRS §76-77, which incorporates into civil service, “all positions in the public service of each county, now existing or hereafter established[.]” The “bad faith” test focuses on an analysis of whether the “employer acts in bad faith with the intent to circumvent the civil service laws,” and was rejected as, “it is very narrow and therefore inconsistent with the broad language of HRS §76-77.” The Court also stated that HRS §76-77 is silent on the relevance of a government agency’s “intent or motive” in determining civil service coverage, furthering the Court’s dismissal of the “bad faith” test.

When making the determination of whether the civil service law is applicable in a particular situation, the Court acknowledged the exceptions to

To: All Departments
Date: August 27, 2015
Page 3

civil service listed in HRS §76-77, noting that some of the exceptions require certification by the Director of Personnel Services.

When performing an analysis of whether a Personal Services Contract is compliant with HRS §76-77 please be mindful of the following:

1. HRS §76-77 is intended to be read broadly and “comprises all positions in the public service of each county, now existing or hereafter established, and embraces all personal services performed for each county[.]”
2. “Services” means labor, time, or effort furnished by a contractor.
2. Is this a service customarily and historically performed by civil servants in the County of Maui (by your department or another department)?
3. New programs and new functions are not automatically exempt from HRS §76-77.
4. A contract with a corporation does not automatically exempt the service from HRS §76-77.
5. Are any of the HRS § 76-77 exceptions applicable? If you have questions, please consult with Corporation Counsel and the Director of Personnel Services.
6. Has an “E/P” been requested for these services?
7. Have these services been previously provided via a contract for goods and services or professional services? If so, for how long?

