

PRIVATIZING CONTINUING EDUCATION OF REAL ESTATE BROKERS AND SALESPERSONS IN HAWAII

JEAN KADOOKA MARDFIN
Researcher

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FOREWORD

This report examines the feasibility of allowing a private organization to administer continuing education (CE) for real estate brokers and salespersons in response to Act 289, Session Laws of Hawaii 1997. Act 289 asked the Bureau to examine seven specific questions:

1. An evaluation of the existing continuing education program and laws that affect the license renewal of all real estate brokers and real estate salespersons;
2. An analysis to determine whether the provision and delivery of continuing education programs by private organizations, such as the Hawaii Association of REALTORS, is more cost-efficient and effective in protecting the public;

3. An evaluation of the educational quality and the availability of a sufficient diversity of courses of varying difficulty if the continuing education program is privatized;
4. Identifying any public policy issues involved;
5. Determining the most appropriate organization, such as the Hawaii Association of REALTORS, to oversee and conduct the continuing education program;
6. A survey of comparable continuing education programs and experiences in other states; and
7. Recommended guidelines for the oversight of the continuing education program to protect the public interest and assure the improvement of the licensee's competency and professional standards.

We thank the staff of the Real Estate Commission and members of the Hawaii Association of Realtors, Hawaii Association of Real Estate Schools, and others for their cooperation and assistance.

Wendell K. Kimura
Acting Director

December 1997

TABLE OF CONTENTS

	<u>Page</u>
FOREWORD	iii
1. INTRODUCTION	1
Chapter 1: Introduction	1
Chapter 2: Continuing Education of Real Estate Brokers and Salespersons in Hawaii	1
Chapter 3: Continuing Education in Other States and Their Comparison to Hawaii	2
Chapter 4: Considering Privatization	2
Chapter 5: Implementation	3
Chapter 6: Findings and Recommendations	3
Continuing Education Generally	3
2. CONTINUING EDUCATION OF REAL ESTATE BROKERS AND SALESPERSONS IN HAWAII	5
What Is the Nature of the Real Estate Professional's Work?	5
Number of Licensees	5
Hawaii's Law and Rules	9
a. Hawaii Revised Statutes (HRS)	9
b. Hawaii Administrative Rules (Rules)	9
Role of the Real Estate Commission (REC)	10
Role of the University of Hawaii Real Estate Research and Education Center ..	12
Schools and Courses	12
The Real Estate Education Fund	12
Bureau's Interviews with Representatives in Different Real Estate Organizations	15
3. CONTINUING EDUCATION IN OTHER STATES AND THEIR COMPARISON TO HAWAII	17
Continuing Education Requirements for Selected Professions	17
Continuing Education for the Real Estate Professional	19
Summary of Hawaii's CE Requirements Compared to Other States	22
Components of CE	22
4. CONSIDERING PRIVATIZATION	24
Defining Privatization	24
Privatization Among States	25

	<u>Page</u>
Privatizing Regulatory Functions	25
The Bureau's Survey Results	26
Part I	28
Description of Maine's Analytical Framework	28
The Policy Decision Criteria	28
The Cost/Benefit Criteria	29
The Outcome Criteria	31
Part II	32
Analysis for Privatization of CE for Real Estate Professionals	32
Examining the Criteria for Policy Decisions	32
Summary of Analysis of the Policy Decision Criteria	34
Examining the Criteria for Cost/Benefit Decisions	35
Discussion of the Perceived Sources of Funding	43
Summary of Analysis of Cost/Benefit Criteria	48
Examining the Criteria for Outcome Decisions	48
Summary of Analysis of Outcome Criteria	50
Further Analysis with Emphasis on Regulated Professions	50
Discussion Based on Schmitt and Shimberg's Elements	51
Can Precise Requirements Be Specified in Advance?	51
Is it easy to measure results or is the task uncertain at the outset and prone to revision or is the value of the product hard to measure?	52
Can an incompetent contractor be readily replaced or is it very disruptive to switch contractors in midstream?	52
Are the ends more important than the means or is the process as important as the end result?	52
Summary of Privatization Analysis as Applied to CE in Hawaii	53
Part III	54
Examples in Other Jurisdictions and Other Professions	54
The Alberta Example	54
Privatization of the Administration of CE for Insurance Agents in Wisconsin	55
Continuing Legal Education, Generally	56

	<u>Page</u>
5. IMPLEMENTATION AND CONCERNS	57
Part I	57
Agreement on What Will Be Privatized	57
Privatizing Less Than the Entire CE Program	58
Testing or Examination Option (Recertification Exam)	58
Course monitoring and instructor evaluation	59
Recordkeeping	60
Part II	60
Some Concerns About HAR as the Appropriate Organization	60
Conflict of Interest Issues	60
Current Costs are Already Low	60
Part III	61
Privatizing CE in Hawaii	61
Hawaii is Similar to Other States	61
The Procurement Code in Hawaii	62
6. FINDINGS AND RECOMMENDATIONS	65
Findings	65
The Bureau's Conclusions	67
Recommendation	70
If the Administration of CE for Real Estate Professionals is Privatized	70
If the Administration of CE for Real Estate Professionals is Not Privatized	71

EXHIBITS

	<u>Page</u>
2-A. Current Real Estate Licensees (1996) by License Type and Island	6
2-B. Chapter 166-99, Hawaii Administrative Rules, section headings under subchapter 9 ..	11
2-C. Continuing Education Providers as of 05/19/97	13
3-A. Status of Mandatory Continuing Education for Selected Professions: 1995	18
4-A. Summary of Arguments For and Against Privatization as Found in Current Literature	27
4-B. Real Estate Education Fund/Revenues and Expenditures and Encumbrances (1992-1996)	37
4-C. Chapter 16-53, Hawaii Administrative Rules	39
4-D. List for an RFP to Administer the CE Program	46
5-A. Administering the Entire CE Process/List of Specific Functions (HAR)	59
6-A. Number of Licensees (1969 to 1996)	69

APPENDICES

A. Act 289, Nineteenth Legislature, 1997 Regular Session, State of Hawaii	72
B. Rules for Procurement Code, Section 122 of Chapter 3	79
C. Draft Bill on the Administration of the CE Program for Real Estate Brokers and Salespersons	116
D. Commissioner of Insurance, Wisconsin, Chapter Ins 28, Continuing Education	117

1. Bla. - page viii

Chapter 1

INTRODUCTION

Act 289, Session Laws of Hawaii 1997 (S.B. No. 1114), a copy of which can be found in Appendix A, directed the Legislative Reference Bureau (Bureau) to conduct a comprehensive study of the continuing education program for real estate licenses and to determine the feasibility of allowing a private organization to administer the continuing education (CE) program for real estate brokers and salespersons. The Act directed the Bureau to examine seven specific questions which the instant report will answer.

Act 289 also:

- (1) Eliminated the waiver provision relating to prerequisites for license renewals for real estate brokers and salespersons effective July 1, 1998;
- (2) Added a definition of continuing education to include courses approved by the Real Estate Commission (REC) and delivered by an approved CE instructor, including national courses taught by instructors certified by national real estate organizations; and as part of the foregoing definition, eliminated the requirement that students enrolled in continuing education courses be tested on the contents of the course.

A licensee who is seeking renewal of a license is still required to take ten hours of CE coursework during the two-year licensure period.

This report is organized as follows:

Chapter 1: Introduction

This chapter describes the Legislature's request and outlines the topic of each chapter. To lead into the report, the first chapter ends with a general discussion about the perceived value of continuing education for professionals who are regulated by government.

Chapter 2: Continuing Education of Real Estate Brokers and Salespersons in Hawaii

The second chapter describes Hawaii's program of continuing professional education affecting license renewal of real estate brokers and salespersons to respond to the first requirement of Act 289 that this study provide: "An evaluation of the existing continuing education program and laws that affect the license renewal of all real estate brokers and real estate salespersons."

This chapter begins with a brief description of the nature of a real estate professional's work and the number of licensees in Hawaii. The role of each partner in the continuing education program will be described along with rules which govern the process. These partners include the Real Estate

Commission (REC), the Hawaii Real Estate Research and Education Center (Center) of the University of Hawaii, and the Hawaii Association of REALTORS (HAR or Realtors), among others. Relevant provisions of the REC rules on continuing education contained in subchapter 9 of Chapter 16-99, Hawaii Administrative Rules, and Chapter 467, Hawaii Revised Statutes, will also be described, followed by a summary of the Bureau's interview results with organizations familiar with the provision of CE to real estate professionals.

Chapter 3: Continuing Education in Other States and Their Comparison to Hawaii

The goal of chapter three is to respond to item 6 of Act 289, calling for: "A survey of comparable continuing education programs and experiences in other states." The chapter begins by describing how many states require continuing education for any profession, not only for real estate brokers and salespersons. White Papers from 1992 and 1995 by the Association of Real Estate Licensing Law Officials (ARELLO) are used to examine where Hawaii stands in relation to other states on continuing education for real estate brokers and salespersons. Several individual states' CE laws are presented for comparative information. Finally, the examination options available in Wisconsin, Connecticut, Colorado, and Idaho are described.

Chapter 4: Considering Privatization

This chapter examines the question of "privatization" in order to answer the following items from Act 289:

Item 2: "An analysis to determine whether the provision and delivery of continuing education programs by private organizations, such as the Hawaii Association of REALTORS, is more cost-efficient and effective in protecting the public";

Item 3: "An evaluation of the educational quality and the availability of a sufficient diversity of courses of varying difficulty if the continuing education program is privatized"; and

Item 4: "Identifying any public policy issues involved" (in the privatization of real estate education programs).

This chapter begins with a definition of privatization, and an identification of what exactly is being suggested for privatization in the CE requirement for the regulation of real estate professionals. In Part 1, this chapter will examine the policy, cost/benefit, and outcome decisions which have been identified by the Office of Policy and Legal Analysis of the State of Maine as vital to any analysis for privatization. In Part 2, the Hawaii situation (administration of CE) as the specific example will be analyzed, using the criteria presented by the state of Maine.

Part 3 of chapter 4 describes (a) the self-regulation provisions of the Real Estate Council of Alberta (RECA) in Canada as an example of "total" privatization; (b) the provisions of Wisconsin's regulatory scheme as an example of privatization by a commercial testing and license management system firm for the administration of the CE function in the insurance field; and (c) a composite

picture of mandatory continuing legal education as an example of a professional organization's management of CE.

Chapter 5: Implementation

Chapter 5 addresses the concerns of implementing privatization if a decision is made to privatize. The goal of chapter 5 is to respond to item 5 of Act 289: "Determining the most appropriate organization, such as the Hawaii Association of REALTORS, to oversee and conduct the continuing education program;" as well as item 7: "Recommended guidelines for the oversight of the continuing education program to protect the public interest and assure the improvement of the licensee's competency and professional standards." Chapter 5 includes a description of Hawaii's procurement code and how it could be applied to the instant case.

Chapter 6: Findings and Recommendations

Chapter 6 contains findings and recommendations.

Continuing Education Generally

Continuing education for professionals is viewed by government regulatory bodies as a way to assure competence in a profession and thereby protect consumers who interact with these professionals. A profession has been defined as "an occupation that requires the possession of a postsecondary degree to qualify for entry, that involves the independent practice or application of a defined and organized body of competencies which is unique to that occupation, and which is formally recognized and regulated--internally or externally--by some type of licensure, accreditation, or permit."¹

Continuing professional education has been defined as "...the varied modes and content of education and learning that are recognized by appropriate authorities as contributing to the knowledge, competence, development, and performance of individual professionals after they have been licensed as practitioners."²

While there is no definitive proof that requiring continuing education of professionals will guarantee improved performance and thereby assure consumer protection, writers often equate a reduction of consumer complaints as one indication of the effectiveness of a good continuing education program. Continuing education has other goals ranging from preventing career

¹John F. Azzaretto, "Quality Control in Continuing Professional Education: Accountability, Effectiveness, and Regulation," in: E. Stephen Hund, ed. Professional Workers as Learners: the Scope, Problems, and Accountability of Continuing Professional Education in the 1990s. U.S. Department Of Education, Office of Educational Research and Improvement (Washington, D.C. 1992), p. 6.

²*Ibid.*, p. 5.

obsolescence, improving career enhancement for the assumption of more responsibility, and broadening knowledge of other fields such as technology. Many professionals must work in teams or begin to specialize. Continuing education courses can help in these areas by developing supervisory skills, intercultural training, teamwork flexibility, and so on.³

³*Ibid.*, pp. 59-61.

Chapter 2

CONTINUING EDUCATION OF REAL ESTATE BROKERS AND SALESPERSONS IN HAWAII

What Is the Nature of the Real Estate Professional's Work?

A succinct, descriptive account of the work of real estate brokers and salespersons can be found in the Auditor's Report of 1994:¹

The practice of real estate includes the marketing of real property interests and the negotiation of agreements to transfer these interests from one party to another. Real property includes land and anything affixed to it such as buildings and fences. Real estate brokers and salespersons are involved in a wide variety of real property transactions, including the rental, lease, purchase, sale, and exchange of residential, commercial, industrial, and agricultural property. Brokers are individuals, partnerships, or corporations responsible for managing a real estate business. They are authorized to carry out all phases of a real estate transaction. Salespersons must be employed by brokers, or contract independently with them, to obtain property listings, locate interested parties, negotiate transfer terms, and draw up agreements. (*Emphasis added*)

Realtors' specialties are varied because of the types of real property transactions involved. The potential for specialization leads to different kinds of property-related responsibilities. This is reflected in the kinds of national professional associations to which realtors belong, such as the Institute of Real Estate Management, the Community Association Institute, the International Council of Shopping Centers, the National Association of Industrial and Office Properties, National Association of Residential Property Managers, and National Association of Real Estate Brokers, to name only a few. The continuing education interests and needs of the real estate professional who works full time in shopping center management often times has little in common with the professional who specializes in residential sales. Therefore, continuing education courses must provide for varied topics and different levels of expertise.

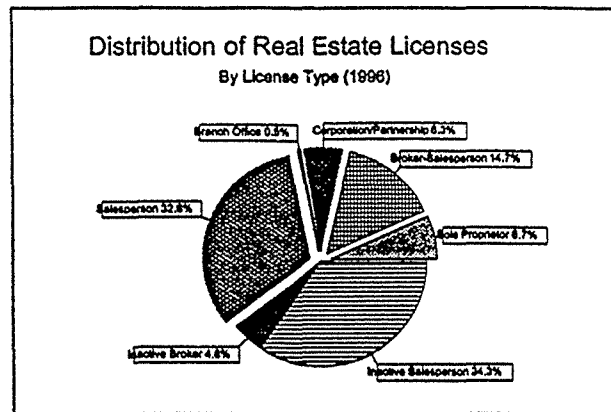
Number of Licensees

In fiscal year 1996 there were 11,116 active licensee brokers and salespersons and 7,165 inactive licensees.² While the number of active licensees remained nearly unchanged since 1995, the number of inactive licensees had increased by 25% from 5,725. Oahu had 7,788 total active licensees, with Hawaii and Maui at 1,295 and 1,362 respectively. Exhibit 2-A lists current real estate licensees by license type and island.

¹Hawaii, Auditor, Evaluation of the Continuing Education Program for Real Estate Brokers and Salespersons: A Report to the Governor and the Legislature of the State of Hawaii, Report No. 94-25, Dec. 1994.

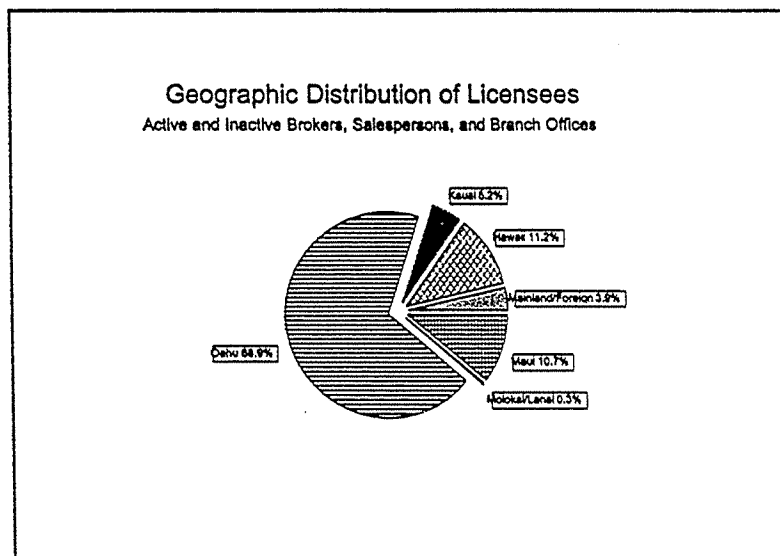
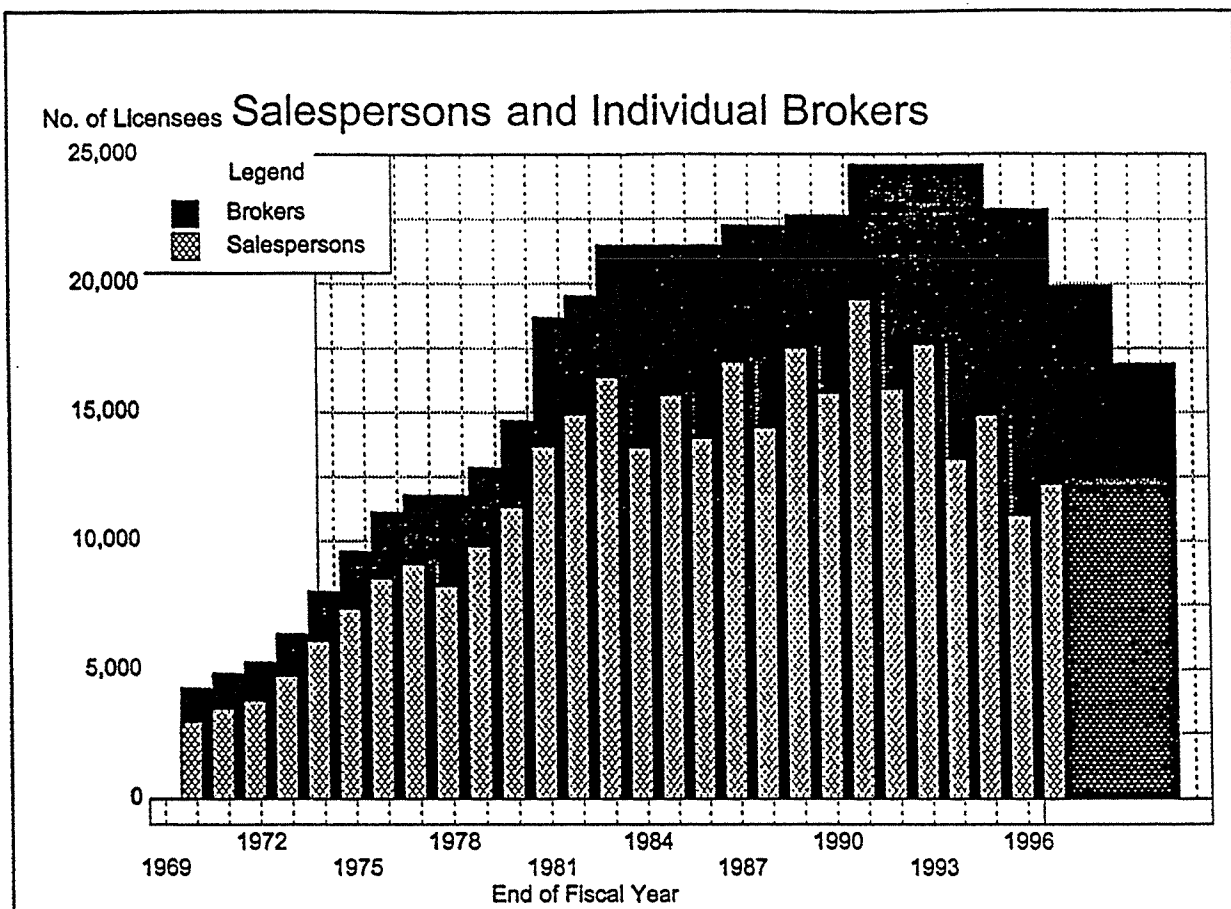
²1996 Annual Report Hawaii Real Estate Commission, p. 11.

Exhibit 2-A

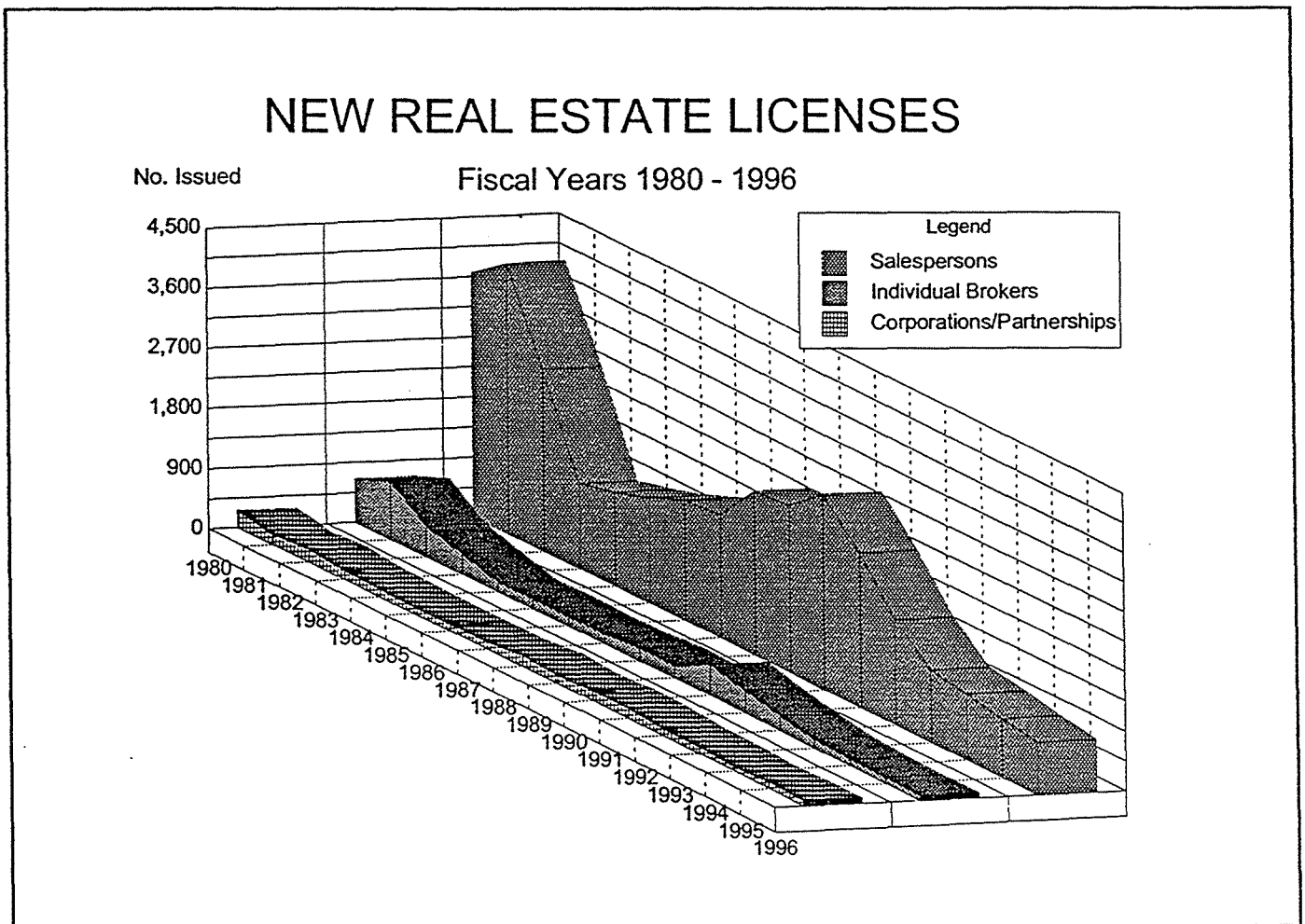


Current Real Estate Licensees (1996) by License Type and Island

	Oahu	Hawaii	Maul	Kauai	Molokai	Lanai	Other	Total
Active								
Broker	1,887	336	310	149	9	1	-	2,692
Salesperson	4,136	652	768	380	18	4	-	5,958
Sole Proprietor	916	153	114	33	3	1	-	1,220
Corporation/Partnership	816	131	145	59	2	1	-	1,154
Branch Office	33	23	25	9	2	-	-	92
Total Active	7,788	1,295	1,362	630	34	7		11,116
Inactive								
Broker	464	87	50	23	-	-	161	785
Salesperson	4,264	640	524	284	3	2	541	6,258
Corporation/Partnership	62	18	10	5	-	-	3	98
Branch Office	13	4	6	1	-	-	-	24
Total Inactive	4,803	749	590	313	3	2		7,165
Total Active and Inactive								
Broker	2,351	423	360	172	9	1	161	3,477
Salesperson	8,400	1,292	1,292	664	21	6	541	12,216
Sole Proprietor	916	153	114	33	3	1	-	1,220
Corporation/Partnership	878	149	155	64	2	1	3	1,252
Branch Office	46	27	31	10	2	0	0	116
Total	12,591	2,044	1,952	943	37	9	705	18,281



New Real Estate Licenses Issued			
	Fiscal Year		
License	1995	1996	% Change
Broker (Individual)	88	81	-8.0%
Broker (Corporation, Partnership)	94	86	-8.5%
Salesperson	886	793	-10.1%
Total	1,068	960	-10.1%



Source: 1996 Annual Report, Hawaii Real Estate Commission.

Hawaii's Law and Rules

a. Hawaii Revised Statutes (HRS)

Chapter 467, Hawaii Revised Statutes, is the primary governing law regarding the licensing, disciplining and other requirements of the real estate industry. In addition, chapters 514A (Condominium Property Regime), 484 (Uniform Land Sales Practices Act), and 515 (Discrimination in Real Property) are other state laws with which brokers and salespersons must be familiar.

While beyond the scope of discussion in this report, a real estate broker also must be knowledgeable with federal laws affecting fair housing, the Americans with Disabilities Act (ADA) and certain disclosure laws (like that involving lead paint), all or some of which may affect a real estate transaction.

b. Hawaii Administrative Rules (Rules)

Administrative agency rules implement many aspects of the Hawaii Revised Statutes, and in the case of Real Estate Brokers, Chapter 16-99, Hawaii Administrative Rules is the lead chapter of reference pertaining to license applications, examination, education, real estate schools, recovery fund, continuing education and other topics. In addition, Chapter 16-107 (Rules relating to Horizontal Property Regimes) may be relevant in situations involving condominiums. For purposes of this report, subchapter 9 of Chapter 16-99, Hawaii Administrative Rules (Continuing Education), and subchapter 5 (Registered Real Estate Schools) will be the focus of discussion.

A real estate school must be registered with the State before it may provide courses to fulfill the educational requirements for a real estate license (§16-99-50, Rules). The application for registration as a school to teach real estate courses follows a specific procedure and must include among other things, a description of the courses to be offered, a schedule of fees, tuition, and the like, the name and qualification of the school's principal, and the names and teaching qualifications of the school's instructors. A surety bond equal to a specified calculation based on number of students, but no less than \$2,000, must also be submitted to the Real Estate Commission (§16-99-53, Rules). Other rules pertain to changes in school's owners, display of certificate of registration and instructor's certificate, the nature of the classrooms, courses, faculty qualifications (each instructor must also be biennially certified by the commission), tuition, books, records, reports, inspections, and renewal of applications of a school's registration, school brochure, school advertising, among other things.

Subchapter 9 provides definitions and details for implementing the continuing education requirements. Exhibit 2-B displays the section headings under subchapter 9 and gives the reader an idea of the kinds of areas covered by these rules. In addition to rules specifying the continuing education hours in license restoration and reinstatement, there are criteria for approving and certifying continuing education courses (§16-99-100, Rules), processing procedures for course offering (§16-99-102, Rules), forfeited registration, certification, reinstatement (§16-99-106, Rules), and course entrance requirements (§16-99-115, Rules), among other things. The Rules are intended

to serve as a set of instructions for anyone interested in providing or participating in a continuing education program in real estate.

The REC is in the process of revising its rules and anticipates final approval in early 1998. These proposed rule amendments will be mentioned in this report when certain aspects of these changes might affect the findings or conclusions of this study.

Role of the Real Estate Commission (REC)

The Real Estate Commission is the agency that licenses and regulates all real estate brokers and salespersons in the State, and is the trustee of the Real Estate Education Fund which is used to promote education and research in real estate for the benefit of licensees and the public. The Commission also regulates condominium managing agents, and other aspects of condominiums which are beyond the scope of this report. The Commission is administratively attached to the Department of Commerce and Consumer Affairs (DCCA) under its Professional and Vocational Licensing (P&VL) Division. Its nine members are appointed by the Governor and its composition is mandated both geographically and by profession. For example, at least four commissioners must be licensed real estate brokers, and two must be public members. Similarly, four members must be residents of the City and County of Honolulu, while the counties of Hawaii, Maui, and Kauai are each represented by one member.

Among other things, the Real Estate Commission registers real estate schools (subchapter 5, Rules), inspects registered schools (§16-99-64, Rules), reviews a school's advertising, mailouts, commercials, and brochures (§16-99-66, Rules); and orders a hearing if a demand is made for one by a school whose application for registration is denied (§16-99-70, Rules). The REC has determined that ten hours of CE per two-year period are necessary for relicensing. Of those ten hours, 3-1/3 hours are mandatory for the Law and Ethics course and 6-2/3 hours are electives.

The REC does not provide instructors for courses in continuing education. Its role is directed to approving courses when the requirements outlined in the Rules are met, registering providers, and certifying instructors, then issuing the license when the application for relicensing has been successfully submitted, along with the required proof of compliance with mandatory CE. This includes the development by the commission through a sole source contract with the University of Hawaii Real Estate Research and Education Center (Center), of real estate courses in contracts, financing, laws and ethics. Other responsibilities of the REC include (1) prescribing core courses (§16-99-88, Rules); reviewing equivalency courses by a licensee (§16-99-89, Rules); prescribing the form of a continuing education certificate of completion (§16-99-94, Rules); acting on applications for registration as a continuing education provider (§16-99-99, -100, Rules) and course offerings (§16-99-102, Rules); and certifying an instructor (§16-99-104, Rules). According to these Rules, the commission can also conduct an investigation, evaluation, or a review of any application for certification as an instructor, a course offering, and registration of a provider, with or without giving any prior notice (§16-99-119, Rules).

Exhibit 2-B

Subchapter 9 Continuing Education

\$16-99-87	Definitions
\$16-99-88	Continuing education implementation
\$16-99-89	Equivalent continuing education
\$16-99-90	License renewal procedure
\$16-99-91	Activating an inactive real estate license
\$16-99-92	Continuing education hours in license restoration and reinstatement cases
\$16-99-93	Excess continuing education hours
\$16-99-94	Continuing education certificates of completion
\$16-99-95	Duplicate continuing education hours
\$16-99-96	An instructor who is a licensee
\$16-99-97	Extensions
\$16-99-98	Prior to offering a continuing education course
\$16-99-99	Application for registration as a continuing education provider
\$16-99-100	Criteria for approving and certifying continuing education courses
\$16-99-101	Courses not acceptable for continuing education requirements
\$16-99-102	General processing procedures for a continuing education course offering
\$16-99-103	Subsequent offerings of a certified continuing education course
\$16-99-104	Application and criteria for certification of a continuing education instructor
\$16-99-105	Biennial provider registration, biennial instructor and course certification
\$16-99-106	Forfeited registration, certification; reinstatement
\$16-99-107	Fees; renewal of provider registration, course, instructor, certificate of completion of course, nonrefundable application fees
\$16-99-108	Revocation or suspension of a continuing education course certification
\$16-99-109	Revocation or suspension of a continuing education provider registration
\$16-99-110	Revocation or suspension of a continuing education instructor certification
\$16-99-111	Record keeping responsibilities of a continuing education provider
\$16-99-112	Record keeping information and retention period
\$16-99-113	Advertising
\$16-99-114	Prohibited advertising practices
\$16-99-115	Continuing education course entrance requirements
\$16-99-116	Discontinuing course offerings
\$16-99-117	Material change
\$16-99-118	Master continuing education instructors list
\$16-99-119	Review, evaluation, and investigation
\$16-99-120	Continuing education provider disclosure statement
\$16-99-121	Faculty
\$16-99-122	Display of certificate of registration and instructor's certificate
\$16-99-123	Classrooms
\$16-99-124	Classroom compliance
\$16-99-125	Tuition and other charges
\$16-99-126	Books and supplies
\$16-99-127	Hearings

Subchapter 10 Condominium Hotel Operators

\$16-99-147	Registration
\$16-99-148	Fidelity bond
\$16-99-149	Client's trust funds, accounting, and records
\$16-99-150	Conduct

Source: Chapter 16-99, Hawaii Administrative Rules.

Role of the University of Hawaii Real Estate Research and Education Center

The Center was created in 1986 after several studies pointed out the value of having a professionally maintained and administered educational and research agency to coordinate the utilization of the educational fund and its programs. It was expected that this delegation of functions would relieve the Real Estate Commission to concentrate on overall policy and the regulation of real estate brokers and salespersons, and reduce the commission's reliance on consultants, among other things.³ The Center is administratively attached to the College of Business Administration, University of Hawaii at Manoa. It is funded from both the Real Estate Education Fund (REEF) and the Condominium Management Education Fund (CMEF), and provides research and education programs that benefit both the real estate industry and consumers.⁴

For example, the Center prepares the Law and Ethics course, which is the mandatory portion of the CE requirement. The Center then offers the course materials and instructor's manual to any provider wishing to provide the course in its CE program. The Center also conducts classes for continuing education instructors as all CE instructors are required to complete one Instructor Development Workshop (IDW) prior to initial certification and again, prior to recertification.⁵ The Center, like the Commission, does not teach CE courses and as such, is not considered a CE provider. The contractual arrangement between the Center and the REC is in the nature of a sole source contract.

Schools and Courses

Exhibit 2-C is a list of CE schools that have been approved by the REC and a list of subjects offered by providers. There are six proprietary schools, two university and community college providers and two related to the professional/trade organization, the Honolulu Board of Realtors and the Maui Board of Realtors.

The Real Estate Education Fund

A Real Estate Education Fund (REEF), consisting of interest on investments in the Real Estate Recovery Fund (§§467-16 and 467-19, HRS) can be used by the Real Estate Commission to improve the real estate industry.

³Hawaii Real Estate Commission, Hawaii Real Estate Research Education Center, Hawaii Real Estate Commission Education Fund (Honolulu: 1984).

⁴1991 Annual Report of the REC, p. 6.

⁵ The Hawaii Association of Realtors also sponsored an IDW course approved by the REC in October 1995 and offered in conjunction with the REALTORS convention in Waikaloa Hawaii and in July 1996 the REC approved another IDW sponsored by HARE. 1996 Annual Report of the REC, p. 6-7.

Exhibit 2-C

CONTINUING EDUCATION PROVIDERS AS OF 05/19/97

This list is regularly updated on the Real Estate Commission's

Web page at: <http://www.hawaii.gov/hirec>.

PROVIDER	TELEPHONE NUMBER
ABE LEE SEMINARS PO BOX 61099 HONOLULU HI 96839	591-4806
DOWER SCHOOL OF REAL ESTATE 2851 E MANOA RD # 1-200 HONOLULU HI 96822	988-5445
DUPLANTY SCHOOL OF REAL ESTATE 1123 11TH AVE STE 404 HONOLULU HI 96816	737-5507
EDDIE FLORES REAL ESTATE CONTINUING EDUCATION 100 N BERETANIA ST STE 129Q HONOLULU HI 96817	521-3044
HONOLULU BOARD OF REALTORS 1136 12TH AVE STE 200 HONOLULU HI 96816	732-3000
JOHN REILLY REAL ESTATE CONTINUING ED CO 701 BISHOP ST HONOLULU HI 96813	523-5030
KAPIOLANI COMMUNITY COLLEGE OFFICE OF COMMUNITY SERVICES 4303 DIAMOND HEAD RD MANONO BLDG HONOLULU HI 96816	734-9286
LEEWARD COMMUNITY COLLEGE SPECIAL PROGRAMS & COMM SVCS 96-045 ALA IKE AD121 PEARL CITY HI 96782	455-0477
MAUI BOARD OF REALTORS INC 2115 WELLS ST WAILUKU HI 96793	242-6431
MAX SHERLEY REAL ESTATE CENTER 250 WAIEHU BEACH RD # 202 WAILUKU HI 96793	871-9714
UH SMALL BUSINESS MGMT PROG COLL OF CONT EDUC & COMM SRVC 2530 DOLE ST SAKAMAKI D400 HONOLULU HI 96822	956-7363

PRIVATIZING CONTINUING EDUCATION

This schedule is regularly updated on the Real Estate Commission's web page at:
<http://www.hawaii.gov/hirec>.

Date	Time	Subject	Provider	Location	Instru
OAHU	OAHU	OAHU	OAHU	OAHU	OAHU
05/23/97	06:00pm	FAIR HOUSING	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
05/23/97	09:00am	INTROOUCION TO BROKER MA	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
05/24/97	01:00pm	DEVELOPING SMALL PROPERTI	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
05/24/97	08:30am	FAIR HOUSING	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
05/24/97	09:00am	* LAW UPDATE/ETHICS 1995-96	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
05/30/97	06:00pm	RESIDENTIAL PROPERTY MGMT	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
05/30/97	09:00am	DISCLOSURES IN HAWAII RES	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
05/31/97	09:00am	* LAW UPDATE/ETHICS 1995-96	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/06/97	06:00pm	INTROOUCION TO BROKER MA	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/06/97	09:00am	FAIR HOUSING	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/07/97	09:00am	* LAW UPDATE/ETHICS 1995-96	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/13/97	06:00pm	DISCLOSURES IN HAWAII RES	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/13/97	09:00am	RESIDENTIAL PROPERTY MGMT	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/14/97	09:00am	* LAW UPDATE/ETHICS 1995-96	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/20/97	06:00pm	FAIR HOUSING	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/20/97	09:00am	INTRODUCTION TO BROKER MA	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/21/97	09:00am	* LAW UPDATE/ETHICS 1995-96	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/27/97	05:30pm	CONDOMINIUMS: LAWS & ISS	DUPLANTY SCHOOL OF REAL ESTATE	DUPLANTY SCH OF REAL ESTATE	HONOLULU
06/27/97	06:00pm	RESIDENTIAL PROPERTY MGMT	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/27/97	09:00am	DISCLOSURES IN HAWAII RES	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
06/28/97	01:00pm	CONDOMINIUM DEVELOPMENT P	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
06/28/97	01:00pm	* LAW UPDATE/ETHICS 1995-96	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
06/28/97	01:00pm	* LAW UPDATE/ETHICS 1995-96	DUPLANTY SCHOOL OF REAL ESTATE	DUPLANTY SCH OF REAL ESTATE	HONOLULU
06/28/97	04:30pm	HAWAII RESIDENTIAL LEASEH	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
06/28/97	08:30am	DEVELOPING SMALL PROPERTI	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
06/28/97	09:00am	HOW TO LIST & SELL BUSINE	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
06/28/97	09:00am	HOW TO MANAGE RESIDENTIAL	DUPLANTY SCHOOL OF REAL ESTATE	DUPLANTY SCH OF REAL ESTATE	HONOLULU
06/28/97	09:00am	* LAW UPDATE/ETHICS 1995-96	DOWER SCHOOL OF REAL ESTATE	DOWER SCHOOL OF REAL ESTATE	HONOLULU
07/18/97	05:30pm	HAWAII RESIDENTIAL LEASEH	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
07/19/97	01:00pm	* LAW UPDATE/ETHICS 1995-96	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
07/19/97	04:30pm	PITFALLS IN MANAGING RESI	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
07/19/97	09:00am	HOMEOWNER'S TAX STRATEGIE	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
07/24/97	01:15pm	DISCLOSURES IN HAWAII RES	ABE LEE SEMINARS	ALA MOANA HOTEL	HONOLULU
07/24/97	08:30am	WILLS, TRUSTS & REAL ESTA	ABE LEE SEMINARS	ALA MOANA HOTEL	HONOLULU
08/08/97	05:30pm	PITFALLS IN MANAGING RESI	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
08/09/97	01:00pm	* LAW UPDATE/ETHICS 1995-96	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
08/09/97	04:30pm	HAWAII RESIDENTIAL LEASEH	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
08/09/97	09:00am	REAL ESTATE TAX SHELTERS	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
08/23/97	01:00pm	FAIR HOUSING	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
08/23/97	08:30am	ZONING-ISSUES, PROBLEMS,	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
09/19/97	05:30pm	PITFALLS IN MANAGING RESI	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
09/20/97	01:00pm	DISCLOSURES IN HAWAII RES	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
09/20/97	01:00pm	PITFALLS IN DROA & ADDEND	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
09/20/97	04:30pm	* LAW UPDATE/ETHICS 1995-96	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
09/20/97	08:30am	WILLS, TRUSTS & REAL ESTA	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
09/20/97	09:00am	HAWAII RESIDENTIAL LEASEH	EDDIE FLORES REAL ESTATE	CENTURY 21 KAHALA HALE	HONOLULU
10/23/97	01:15pm	ZONING-ISSUES, PROBLEMS,	ABE LEE SEMINARS	ALA MOANA HOTEL	HONOLULU
10/23/97	08:30am	* LAW UPDATE/ETHICS 1995-96	ABE LEE SEMINARS	ALA MOANA HOTEL	HONOLULU
11/15/97	01:00pm	DEVELOPING SMALL PROPERTI	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
11/15/97	08:30am	FAIR HOUSING	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
12/06/97	01:00pm	CONDOMINIUM DEVELOPMENT P	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
12/06/97	08:30am	* LAW UPDATE/ETHICS 1995-96	ABE LEE SEMINARS	1221 KAPIOLANI BLVD STE 310	HONOLULU
OTHER	OTHER	OTHER	OTHER	OTHER	OTHER
		CONSENSUAL DUAL AGENCY (C	JOHN REILLY	INTERACTIVE COMPUTER COURSE	REILLY
		TAX FREE EXCHNG OF RESIDE	JOHN REILLY	INTERACTIVE COMPUTER COURSE	REILLY

Bureau's Interviews with Representatives in Different Real Estate Organizations

The Bureau was required by Act 289 to contact seven specified organizations involved in this issue. The Bureau asked each of these organizations to designate a representative who would be able to speak for that organization. The researcher interviewed on the phone or met with the following parties:

- (1) Calvin Kimura, Supervising Executive Officer, Real Estate Commission
- (2) Steven Gilbert, Interim Director, Hawaii Real Estate Education and Research Center
- (3) Dr. Nicholas Ordway, Chair of Real Estate, College of Business Administration University of Hawaii, Manoa, and former Director of Hawaii Real Estate Education and Research Center
- (4) Bill Ramsey, Legislative Committee Chair, Hawaii Association of REALTORS
- (5) Toni Cofran, Building Owners and Managers Association (BOMA-Hawaii)
- (6) Eddie Flores, Hawaii Association of Real Estate Schools
- (7) Richard Ekimoto, representing The Community Associations Institute

In some cases, staff members were also consulted for data. The following statements are composite descriptions based on all interviews and does not represent the opinion or views of any one individual or organization:

(a) There is a perceived lack of sufficient courses or relevant courses in non-residential real property or higher level courses beyond the basic, introductory topics.

(b) Courses were geared to the lowest common denominator in terms of knowledge and experience in the subject, so that the classes are not challenging enough for the students who had more knowledge in that topic.

(c) Because the REC must first register or certify (as applicable) instructors and courses taught by national organizations (often on the mainland), no CE credit can be had, even if the nationally-sponsored class is more relevant than courses available in Hawaii. (However this will change, given the new definition of "continuing education" in Act 289.)

(d) There are some observers who find that some instructors were conveying incorrect information.

(e) There is a feeling that "things take too long" whether this involved Rules changes at the REC, approval of courses, or providers, and other matters related to CE.

(f) There is a feeling that courses are being reviewed by non-educators in the REC and too many reviewers who are not knowledgeable about the subject matter.

(g) There are CE courses being taught in a way that does not facilitate learning, that instructors may not be knowledgeable and do not make the class interesting.

(h) There is not enough variety of courses, or topics are not distributed widely enough in geographic areas or in terms of time span to give licensees greater opportunity to take a certain course if they missed signing up for it earlier.

(i) Laws change annually; yet the law and ethics course if taken in the first year of the two-year cycle does not require licensees to update themselves in the second year. (Actually, the updates are available on the Center's website and every effort is made to keep professionals current through professional newsletters and other means.) Conversely, if a licensee waited until the second year to take the law and ethics course, the licensee would have had a knowledge gap for an entire year.

(j) Because no exam is required in a CE course (see Act 289, Session Laws of Hawaii 1997, in Appendix A), there is no motivation to learn. The licensee need only attend the CE class.

(k) Hawaii's 3-1/3 credit hour requirement makes for an odd calculation of classroom hours. Usually CE hours are based on an hour-for-hour credit (that is, one hour of CE credit for one hour of class time). Hawaii's method of calculation means that a CE course must be structured to extend to 3 hours and 20 minutes. If a nationally taught class is taught for 4 hours, then the full CE credit of 3-1/3 hours can be received for it, but not if the class were 3 hours long.⁶

In the next chapter the Bureau will discuss and compare Hawaii's CE requirements with those in other states.

⁶See Haw. Rev. Stat., §467-11.5, and §16-99-87, Rules. In the Rules, "course and course offering" means a continuing education module of instruction certified by the REC, consisting of a minimum of three and one-third clock hours.

Chapter 3

CONTINUING EDUCATION IN OTHER STATES AND THEIR COMPARISON TO HAWAII

Continuing Education Requirements for Selected Professions

Many states require persons in various professions to demonstrate a minimum level of competence before being licensed and often also require mandatory continuing education in order to renew a license. In Table 7.33 of *The Book of the States*, "Status of Mandatory Continuing Education for Selected Professions: 1995,"¹ fifteen selected professions ranging from architects to veterinarians are displayed. For each state and the District of Columbia, an asterisk indicates whether or not mandatory continuing professional education is required for that profession. Most states require the following professions to show evidence of continuing professional education: certified public accountants (CPAs), nursing home administrators, optometry, pharmacy, and real estate (Exhibit 3-A). In contrast, fewer states require a showing of continuing education from their architects, engineer professionals, nurses, and physical therapists. Other professions such as dentists, lawyers, physicians, psychologists, social workers, and veterinarians fall somewhere in between. In the CSG table, Hawaii is listed as requiring mandatory continuing education for the following professions: CPAs, optometrists, physicians, and real estate professionals. Three of these four categories, CPAs, optometrists, and real estate professionals, are the most frequently listed as professions requiring continuing education across all states. In addition to the CSG list of selected professions, Hawaii requires continuing education for: podiatrists, emergency medicine personnel, chiropractors, real estate appraisers, and electricians. In all, Hawaii requires continuing education for nine of forty-five regulated occupations.²

Mandatory continuing education has been viewed as a legitimate exercise of a state's regulatory power in order to promote public health, safety, or welfare of its citizens. "Each provision of every regulation must have as its sole object the protection of the public, be the least burdensome method of achieving that purpose, and no more restrictive than minimally acceptable standards of care to be provided to the public."³

¹Council of State Governments, The Book of the States, 1996-97 edition (Lexington, KY), Table 7.33, p. 345.

²Hawaii, Auditor, Evaluation of the Continuing Education Program for Real Estate Program for Real Estate Brokers and Salespersons: A Report to the Governor and the Legislature of the State of Hawaii, Report No. 94-25, December 1994, see Overview, Summary, p. 1.

³Richard Morrison, "Continuing Education Requirements: Suggested Guidelines; Resource Briefs," Council on Licensure, Enforcement and Regulation, An affiliate of The Council of State Governments, 1993, p. 2, citing: "Constitutional Limitations on State-imposed Continuing Competency Requirements for Licensed Professionals" in *William and Mary Law Review* 1983, vol. 25-253: 255-312.

Exhibit 3-A

STATUS OF MANDATORY CONTINUING EDUCATION
FOR SELECTED PROFESSIONS: 1995

State or other jurisdiction	Architects	Certified Public Accountants	Dentists	Engineers, Professional	Lawyers	Nurses	Nursing Home Administrator	Optometry	Pharmacy	Physical Therapist	Physicians	Psychology	Real Estate	Social Work	Veterinary Medicine
Alabama	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Alaska	...	*	*	...	*	*	...	*	*	*	*	*	*	*	*
Arizona	...	*	...	E	*	...	*	*	*	...	*	*	*	*	*
Arkansas	...	*	*	E	*	...	*	*	*	*	E	*	*	*	*
California	...	*	*	E	*	*	*	*	*	...	*	*	*	...	...
Colorado	...	*	...	...	*	...	...	*	...	...	...	...	*	...	*
Connecticut	...	*	...	...	...	...	...	*	*	...	...	...	*	...	...
Delaware	...	*	*	...	*	*	*	*	*	*	*	*	*	*	*
Florida	*	*	*	...	*	*	*	*	*	*	*	*	*	*	*
Georgia	...	*	*	*	*	...	*	*	*	*	*	*	*	*	*
Hawaii	...	*	...	...	...	...	...	*	...	...	*	...	*	...	...
Idaho	...	*	*	...	*	...	*	*	*	...	...	*	*	E	*
Illinois	...	*	*	...	...	...	*	*	*	...	...	...	*	*	*
Indiana	...	*	*	E	*	...	*	*	*	...	*	*	*	E	...
Iowa	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Kansas	...	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Kentucky	E	*	*	...	*	*	*	*	*	*	E	*	*	...	*
Louisiana	...	*	*	...	*	*	*	*	*	*	...	*	*	*	*
Maine	...	*	*	...	...	...	*	*	*	...	*	*	*	*	*
Maryland	...	*	*	...	...	...	*	*	*	*	*	*	*	...	*
Massachusetts	...	*	*	...	...	*	*	*	*	...	*	*	...	*	...
Michigan	E	*	*	E	...	E	*	*	*	E	*	E	*	...	E
Minnesota	E	*	*	E	*	*	*	*	*	*	*	*	*	*	E
Mississippi	...	*	*	...	*	*	*	*	*	*	...	*	*	*	*
Missouri	...	*	*	...	*	...	*	*	*	...	*	...	*	E	...
Montana	E	*	*	E	*	...	*	*	*	E	...	*	*	*	*
Nebraska	E	*	*	...	...	*	*	*	*	...	*	*	*	*	*
Nevada	E	*	*	*	*	*	*	*	*	*	*	*	*	*	*
New Hampshire	...	*	*	...	*	*	*	*	*	E	*	*	*	...	*
New Jersey	...	*	*	...	S	...	*	*	*	...	...	...	...	E	...
New Mexico	...	*	*	*	*	*	*	*	*	*	*	*	*	*	*
New York	...	*	...	...	...	...	*	S	...	...	...	...	*	...	...
North Carolina	E	*	*	*	*	...	*	*	*	...	...	E	*	*	*
North Dakota	...	*	*	...	*	...	*	*	*	*	...	*	*	*	*
Ohio	E	*	*	...	*	*	*	*	*	*	*	...	*	*	*
Oklahoma	...	*	*	E	*	...	*	*	*	*	...	*	*	S	*
Oregon	...	*	*	E	*	*	*	*	*	*	...	*	*	*	*
Pennsylvania	...	*	...	...	*	...	*	*	*	*	S	*	*	E	*
Rhode Island	...	*	*	...	*	...	*	*	*	...	*	*	*	...	...
South Carolina	...	*	*	*	*	...	*	*	*	...	...	*	*	*	*
South Dakota	E	*	*	E	...	...	*	*	*	...	...	...	*	*	*
Tennessee	E	*	*	E	*	...	*	*	*	...	...	...	*	...	*
Texas	E	*	*	...	*	*	*	*	*	*	*	*	*	*	*
Utah	E	*	...	E	*	...	*	*	*	...	...	*	*	...	*
Vermont	...	*	...	E	*	...	*	*	*	...	...	*	*	...	...
Virginia	...	*	*	...	*	...	*	*	*	S	...	...	*	...	...
Washington	...	*	...	...	*	...	*	*	*	*	*	*	*	E	*
West Virginia	*	*	E	*	*	...	*	*	*	...	*	*	*	*	*
Wisconsin	...	...	...	...	*	...	*	S	...	...	*	*	*	E	...
Wyoming	...	*	...	*	*	*	*	*	*	...	...	E	*	*	*
Dist. of Columbia	E	*	*	...	...	*	*	*	*	*	E	*	*	E	*

Source: Louis Phillips & Associates, Greenville, S.C.

Key:

* — Required.

E — Enabling legislation.

S — Under certain circumstances.

... — No requirements.

Source: The Book of the States, 1996-97 Edition, The Council of State Governments, Lexington, Kentucky.

Continuing education is required for real estate professionals in all states except New Jersey and Massachusetts. The rationale for the CE requirement is typified by language in California's real estate law: "...it is in the public interest of consumer protection and consumer service that all real estate licensees licensed under the provisions of (the real estate statute) comply with continuing education requirements."⁴

In Pennsylvania, the purpose of continuing education for a real estate broker/salesperson is to provide an education program through which a licensee may obtain the knowledge and skills to:

- (1) Maintain and increase competency to engage in licensed real estate activities.
- (2) Keep a licensee abreast of changes in laws, regulations, practices and procedures that affect the real estate business.
- (3) Better ensure that the public is protected from incompetent practice by licensees.⁵

Continuing Education for the Real Estate Professional

In 1992, ARELLO published a White Paper entitled: "Continuing Education: Areas of Concern." In 1995, ARELLO published an education survey describing "Alternative Methods of Continuing Education". How the various states administer continuing education programs for real estate brokers and salespersons was the subject of the ARELLO survey in 1992. The conclusions in that survey were drawn from 52 responses from 58 jurisdictions. The 1995 ARELLO survey compiled responses from 56 jurisdictions. The date, 1992 or 1995, indicates which survey produced the result in any given statement in this section. We can compare Hawaii's continuing education efforts with these surveys and other states' laws.

(a) Forty-one jurisdictions, including Hawaii, require CE of their real estate licensees; thirteen jurisdictions do not (1995). This statistic differs with that found in the CSG survey, described earlier, in which only Massachusetts and New Jersey indicated they do not require CE of licensees submitting renewal applications. However, the fact still remains that at least 80 per cent of the states require CE of their licensees.

(b) The number of CE hours required of real estate licensees varies across the states from 1.5 hours per licensing period to 15 hours per licensing period (1992, 1995). The renewal period varies from one year to four years (1995). Each state also has different mandatory versus elective hours. For example, Hawaii requires ten hours of continuing education for every two-year licensing period of which 3-1/3 hours are mandatory and the remainder, 6-2/3 hours, are electives.⁶ In some states, statutes specify the subjects approved for CE, such as real estate law, conveyances, appraisal,

⁴§10170, Annotated Calif. Codes. West 1993.

⁵Pennsylvania Code §35.381. Purposes and goals (Continuing education)

⁶Haw. Rev. Stat., §467-11.5, and Hawaii Administrative Rules §16-99-87.

design and construction, marketing, law of agency, and so on.⁷ Generally it is the state's Real Estate Commission that determines the required courses.

In Hawaii, mandatory course subject areas are in laws, rules, and ethics and areas identified as current issues or potential problem areas. Every licensee in Hawaii who renews his license must take a law and ethics course as part of the CE program, although there is no requirement to update oneself in the second year of the two-year biennium if the law and ethics course was taken in the first of the two-year biennium. By the same token, if the licensee waited until the second year of the two-year biennium to complete any CE requirements, that licensee could have been operating without knowledge of law changes that occurred in the first year. (There could have been legislative changes to the real estate laws during the second year and in fact the law and ethics course is updated after the legislative session to make it the most current version available. However, this does not guarantee that a licensee avails himself of the updates.)

According to the ARELLO survey, the major providers of CE courses were proprietary schools and trade associations (1995). In addition to these types of providers, Hawaii also has two community colleges and the University of Hawaii Small Business Management Program providing CE courses.

Oklahoma's statutes provide that continuing education courses shall be satisfied by classroom instruction approved by the commission and offered by the commission, a vocational/technical school, a private school, the Oklahoma Association of Realtors, National Association of Realtors, the Oklahoma Bar Association, American Bar Association, or any affiliate thereof, or similar institution or association approved by the Oklahoma commission.⁸ Hawaii's new definition of continuing education in Act 289 allows a course taught by the National Association of Realtors and other national organizations to qualify for continuing education credit.⁹

(c) Courses are monitored by hiring a paid consultant to evaluate courses and instructors; by having random audits by REC staff, commission members, or volunteers. This process assures course and instructor quality. The tools used for these evaluations include standardized evaluation forms and student evaluation forms. For the 1992 ARELLO survey, Hawaii reported that it requires pre- and post-tests to evaluate student knowledge on the course subject. However, in conducting this study, the Bureau has learned that no uniform monitoring system for instructor classroom presentation or course evaluation is being conducted.

Pennsylvania reported to the Bureau that it contracts with a third party, West Shore Institute, to monitor its thirty approved CE schools to observe the instructor and check on other criteria which

⁷See for example, Colo. Rev. Stat., §72-61-110.5 and Mich. Stat. Ann. §18.425 (2504).

⁸29 Okla. Stat. Ann. §858-307.2.

⁹See SECTION 2, Act 289, Session Laws of Hawaii 1997. According to the National Association of Realtors, Hawaii's three and one-third credit module requirement makes it difficult to apply the typical three-hour national course in Hawaii for CE. A licensee would have to take a longer course, say four hours, to receive 3-1/3 hours of CE credit.

were developed with the assistance of commissioners. At least two visits are made per year, one announced and one unannounced.¹⁰

(d) Documentation of each licensee's CE credits varies across the states. In many states, students receive a certificate of completion which must then be submitted with their license renewal application forms. Some jurisdictions may require the course provider to submit a certified list of attendees to the REC. Oregon leaves CE selection and verification completely to the employing broker. The agency does not certify or approve courses, and demands only the broker's certification that the licensee has completed the required CE (1992, p.33). Hawaii requires that to renew a license, the licensee must provide evidence in the form of the original certificates of course completion attached to the license renewal application (section 16-99-90, Hawaii Administrative Rules).

(e) The most common mode of delivery of instruction remains the traditional classroom instruction model instead of high tech methods such as CD-ROM services. Other instructional methods found in more than 50% of the jurisdictions include convention seminars and written correspondence. Workshops and pre-recorded video programs were the next most frequently cited alternative modes of delivery (1995).

According to information received by the Bureau at a recent ARELLO conference (September 1 to 10, 1997), computer-based instruction (CBI) is increasing especially in sparsely populated states and there is even the possibility of taking courses on the Internet.¹¹

Hawaii has used the Hawaii Interactive Television Services (HITS) but primarily continues to use the classroom model (1995).

(f) Some states offer alternatives to coursework (1995). In Colorado, a licensee may retake and pass the state portion of the licensing examination (40 questions) to fulfill all CE requirements in lieu of 12 hours of CE credit.¹² Connecticut's contractual arrangement allows a testing service to provide a 40-question examination for CE in lieu of the 12-hour requirement.¹³

Wisconsin, like Connecticut, allows a licensee to "test out by taking a 60-question exam for its 12 credits of CE in a two-year licensing period." According to its division Administrator, about 5,100 licensees out of about 28,000 licensees opted to take the test which is administered by a contractor. A study guide is available to the test taker from the Wisconsin Realtors Organization for

¹⁰Telephone interview, Melissa Wilson, Administrative Assistant for Pennsylvania's Real Estate Commission, Harrisburg, June 19, 1997. See: Pennsylvania Code. §35.392 Investigations and inspections

¹¹Technologically, it is possible to download an entire course, participate in learning the course content, take exams in that course, and be given credit by the relevant state's REC all via Internet.

¹²Telephone interview, Daryl Lay, Licensure Division, Real Estate Commission, Colorado July 15, 1997. C.R.S. §12-61-110.5.

¹³Telephone interview, Joan Emerick, Examiner, Connecticut Real Estate Commission, July 15, 1997. See Conn. Gen. Stat. §20-319.

about \$25. The study guide contains sections specially highlighted to indicate likely test question areas. The remainder of the licensees take CE in the traditional classroom method and take tests for their classroom work in order to meet the evidence requirements of having taken CE. Since its inception three renewal periods ago (1993-94 to 1995-96), there was an 86% first-time pass rate, and a 73% repeat pass rate for the test option. The exam which is administered by a contractor, PSI, is available five days a week, for twelve months, from July 1 of the odd-numbered year to June 30 of the even-numbered year and administered at four locations.¹⁴

Idaho has a Challenge Exam whereby a licensee is not required to attend CE courses, but must pass a CE exam consisting of 30 questions prepared by subject matter experts. Course work is available in the form of audio tape or video tapes which sells for \$25 and comes with an outline of the course. Alternatively a licensee may buy just the outline for about \$10 as a self-study guide. About 15% of the licensees take the test without any preparation, but few pass it.¹⁵ If a student receives less than 70% on a challenge examination, the student may retake the examination once. If the student fails the second challenge examination, education credit may be obtained only by successfully completing twelve classroom hours of instruction.¹⁶

Summary of Hawaii's CE Requirements Compared to Other States

Hawaii stands somewhat in the middle in its requirements for 10 mandatory CE hours. The administration of Hawaii's CE is similar in structure to many states in that the REC determines the CE requirements, including approving schools, instructors, and courses. Hawaii is unusual in that it no longer requires any exams be given in a CE course. Hawaii does not have a recertification examination but only a few states provide that option as an alternative to taking CE courses.

Components of CE

The components of a CE program include: approval of CE providers, courses, instructor credentials, verification of student attendance, preparation of renewal license, including the pocket card containing relevant personal information about the realtor/salesperson and a picture identification. Hawaii's REC, even though it does not itself teach CE courses, is responsible for each component. From the foregoing survey of how other states approach CE, it is evident that Hawaii's program has many similarities with other states. While some states have contracted out the administration of an exam which can be used to qualify for CE credit in lieu of classroom work, no state has given up its responsibility of specifying the number of CE credits required during a

¹⁴ Telephone interview, Cletus J. Hansen, Division Administrator, Business Licensing and Regulation Division in the Department of Regulation and Licensing, Madison, Wisconsin, July 17, 1997. Wisconsin Statutes §452.12(5).

¹⁵ Telephone interview, Jim Faust, Education Director, Idaho Real Estate Commission, July 15, 1997. Idaho Code §54-2029, subsections G, H, and I.

¹⁶ Rules of the Idaho Real Estate Commission. Idaho Admin. Procedures Act, 33.01.01 603.15

licensing period, or the nature of the required versus elective courses. It is also unlikely to find a state that has relinquished to the private arena the state's obligation of disciplining its licensees which is not part of CE and, therefore, not in the scope of this report. (But see the description of Alberta, Canada's self regulatory provisions in chapter 4.)

In Hawaii, examinations are not required in CE courses.¹⁷ It is only necessary to show evidence of having attended the required CE course and two electives, totaling ten credit hours during the two-year licensure period. (Hawaii's REC does provide for a private contractor, ASI, to examine applicants for new licenses.) It is important to understand the components that make up a CE program when considering how the issue of privatization will be applied. In this report, the regulatory and policy making aspects of real estate broker and salesperson regulation are not in issue with respect to privatization. Instead privatization will concentrate on only the following aspects: the registration of schools, approval of providers and course content, the monitoring and evaluation of instructor's classroom techniques and accuracy of information, the verification of student (licensee) compliance, and issuance of renewal licenses and photo identity cards.

¹⁷The new definition of "continuing education" in Act 289 specifically provides: "Continuing education courses shall not require an examination".

Chapter 4

CONSIDERING PRIVATIZATION

The issue being examined in this report is whether or not the administration of continuing education programs for real estate brokers and salespersons, which is now handled by the Real Estate Commission should be transferred to a non-governmental organization such as the Hawaii Association of Realtors, thereby privatizing this responsibility. The purpose of this chapter is first, to provide legislators with the analysis, reasoning, and required data that must enter any and every discussion of privatization proposals. To conduct a reasonable analysis, the Bureau selected a framework developed by the Office of Policy and Legal Analysis of the Maine Legislature. The criteria developed by that Maine office encompasses the decisions of policy, costs/benefit, and outcomes. Discussion of the Maine outline is presented in Part 1. The Bureau then uses the criteria from the Maine study, and applies them to the proposed privatization of the CE function in Hawaii. This examination is conducted in Part 2. Part 2 also includes a brief discussion of elements that two authors in the regulatory field have raised as important in the consideration of privatization. This discussion expands upon the issues raised by the Maine analysis.

Part 3 will describe how privatization is handled in Alberta, Canada, for the self-regulation of real estate brokers, in Wisconsin for insurance agents, and in most states' bar associations for attorneys.

Defining Privatization

While many writers have tried to define privatization, others say there is no single definition of privatization. Privatization includes:¹

- (a) The act of reducing the role of government, or increasing the role of the private sector, in an activity or in the ownership of assets;
- (b) The practice of delegating public duties to private organizations; and
- (c) The provision of public sector services through the private sector.

"Contracting out" is another term often used to mean privatization.

According to one writer, privatization can take at least ten different forms, including: contracting out, vouchers, grants and subsidies, franchises, asset sale, deregulation, volunteerism,

¹Karen L. Hruby, Privatization of State Services, Office of Policy and Legal Analysis, Maine Legislature, Augusta, ME: Nov. 1992.

private donation, public-private partnership, and service shedding.² Some authors categorize privatization into only three areas: (a) contracting services out; (b) construction or acquisition and operation of facilities; and (c) sale of assets.³

When privatization is suggested for a government service or good, it is offered because it is believed to result in cost savings, administrative expediency, flexibility, less red tape, and better service. Sometimes privatization is suggested because of lack of agency staff or expertise in government. For whatever reason it is proposed, privatization is only one of many management tools and should not be viewed as a panacea for any governmental ailment.⁴ Reasons for and against privatization must be examined with care even if the proposal to privatize may have been made with little thought of its consequences. Exhibit 4-A summarizes the pros and cons of privatization.

Privatization Among States

When the Council of State Governments surveyed the states in 1993 on the issue of privatization,⁵ the three most common areas in which state governments had privatized service were mental health, social services, and transportation. Other areas privatized were corrections, administrative and general services, and health care. Contracting out was the most commonly used technique.⁶

Privatizing Regulatory Functions

In 1992, the Office of Policy and Legal Analysis of the Maine Legislature conducted a privatization survey of states in New England and the states of California, Florida, Minnesota, Oregon, Pennsylvania, and South Carolina.⁷

That survey showed that in the category of Professional Regulation, there were two sub-categories: enforcement and licensing. In the enforcement area, only five percent of the respondents were privatized, with the privatization method chosen ranging from contracting out the facilities for the service (FC); contracting out the entire service provision (SC), and some other form of

²Keon S. Chi, *Privatization and Contracting for State Services : A Guide*. Council of State Governments, Innovations report, Lexington, KY: April 1988.

³Touche Ross, *State Government Privatization in America; an opinion survey of state governments on their use of privatization*, 1989.

⁴Hruby, p. 3.

⁵Council of State Governments, *Privatization in State Government: Options for the Future*, Lexington, KY 1993.

⁶John O'Leary, ed. *Privatization*, 1994. Reason Foundation, Los Angeles, 1994, p. 7.

⁷Hruby, p. 6.

privatization. In the licensing subcategory, seventeen percent of the respondents had privatized. The methods used were service provision (SC), grants and vouchers, (GV) and other. Unfortunately, this survey summary does not provide more details about the enforcement or licensing categories, so it is not possible to know whether in privatizing the licensing function for example, administration of a continuing education program was one of the components that was privatized. However, it can be concluded that only a few jurisdictions privatize in the Professional Regulation category, with more privatization occurring in the licensing subcategory than in the enforcement subcategory.

The Bureau's Survey Results

The Bureau's research of more than twenty states' real estate commissions found that the privatization of the administration of CE for real estate brokers is not yet a reality in the United States. The Bureau found that at least for real estate brokers and salespersons, the extent of "privatization" is limited to such functions as: (1) allowing private, proprietary schools to teach CE courses; and (2) contracting with a for-profit organization to conduct license renewal examinations. The administrative functions of CE, that is all the functions relating to school approval, course and instructor certification, and specifying the required versus elective CE courses, and the number of credits hours needed to fulfill the CE requirement continue to be the responsibility of the respective state's REC. These administrative functions are not privatized by the State. States appear reluctant to relinquish control over what is viewed as regulatory functions and decisions which rightfully belong to the state government.

In Canada, however, the picture is different. Several provinces have moved away from government regulation to self or industry regulation in slightly different ways. One example, that of the Real Estate Council of Alberta, will be described later in this chapter. The Bureau will also describe privatization of the CE function for insurance agents in Wisconsin. While this example involves a profession other than real estate brokers and salespersons, it is perhaps the most closely related privatization process to the one being considered in this study. The Bureau will also summarize the way attorneys' mandatory continuing legal education (MCLE) is often administered in many states as an example of a professional organization's (bar association) involvement with CE.

Exhibit 4-A

TABLE 1: SUMMARY OF ARGUMENTS FOR AND AGAINST PRIVATIZATION AS FOUND IN CURRENT LITERATURE		
	PROS	CONS
COSTS	<p>1. Cost savings through increased efficiency and cost containment</p> <p>Shifts start-up and capital costs to private firms</p> <p>Increases opportunities for achieving economies of scale and risk sharing</p>	<p>1. Initial cost savings result from "low-balling."</p> <p>Administrative costs often not considered</p> <p>Will result in cost increases because private market is more successful at getting government to fund programs than the public sector</p>
QUALITY	<p>2. Improves the quality of goods and services by providing alternatives</p>	<p>2. Results in lower quality due to cost-cutting by private firms and reduced commitment to public service</p>
STAFFING FLEXIBILITY	<p>3. Provides staffing flexibility for short-term or variable workload projects and when specific skills are needed</p>	<p>3. Reduces hiring to promote equal opportunity</p> <p>Promotes loss of historical context among staff</p>
GOVERNMENT CONTROL	<p>4. Avoids bureaucratic red tape</p> <p>Appeases public mood toward downsizing government</p>	<p>4. Decreases governments' ability to monitor and evaluate services.</p> <p>Possibility for corruption is increased</p>
ADAPTABILITY	<p>5. Private companies can innovate and respond more quickly to change</p>	<p>5. Less continuity of service when vendors change or go out of business</p>
OPERATIONAL ENVIRONMENT	<p>6. Increases competition</p>	<p>6. Lessens commitment to equitable service for all; creaming leaves some groups underserved</p>
PRODUCTIVITY	<p>7. Increases productivity</p>	<p>7. Greater chance for service interruption</p>
ECONOMIC EFFECTS	<p>8. Promotes private sector growth, increasing tax base</p>	<p>8. Provides lower paying private sector jobs at the expense of unionized government jobs, decreasing tax base</p>

Source: Hruby, OPLA, Augusta, ME.

Part I

Description of Maine's Analytical Framework

In order to critically examine Hawaii's situation, the Bureau looked for a practical framework for analyzing a government service in any privatization decision making scheme. The Bureau found that a study from Maine's Office of Policy and Legal Analysis provided a good framework for this analysis. The Maine study contains a process flowchart that is a distillation of many researchers' works in the privatization field and the evaluations of state privatization efforts conducted by Colorado, Minnesota, and Wisconsin.⁸ The Maine flowchart raised critical questions that should be answered before making any privatization decision. This analytical exercise will also help to answer specific issues in Part 2 of this chapter, thereby helping to answer specific issues targeted by Act 289, Session Laws of Hawaii 1997. The Maine analysis examines three decisions based on certain evaluative criteria. These decisions are the policy decision, the cost/benefit decision, and the outcome decision.

The Policy Decision Criteria

The policy decision is determined by asking whether or not the provision of a particular good or service belongs more legitimately to government, private markets, not for-profit organizations or some mix of the three. For example, are the goods and services essential functions of government that must not be considered for privatization? On the other hand, are there some services that should not be provided by the state and should be divested to the private arena? Alternatively, some goods or services in whole or in part may be eligible for evaluation for privatization after analyzing the costs and benefits of doing so. In summary, the policy decision might be viewed as answering the question: What functions should be privatized and what functions should remain with government? The seven policy decision criteria are:

a. *Accountability for Results*

1. *Who will be held ultimately accountable for the results?*
2. *Are there liability considerations that will remain with the state no matter who produces the service?*

b. *Economic Access*

1. *Is it important that the good or service be available to people of all income levels?*
2. *If so, can access be ensured?*

⁸Hruby, p. 7.

c. *Equity in Employment*

1. *In the production of the good or service, is it important to ensure equity in employment, regardless of race, ethnicity or gender?*
2. *Is affirmative action through employment a goal?*

d. *Essentialness*

1. *Is the good or service essential to the role of government? Is it essential to the mission of the agency?*
2. *Will giving control of the good or service to non-government personnel impede government's legitimate functions?*
3. *Would the authority to make policy determinations about or the regulation of goods and services be transferred from the government to the private sector?*

e. *Geographic Access*

1. *Is it important that the good or service be equally available to people in all parts of the state?*
2. *If so, can access be ensured?*

f. *Permanence of the Service*

1. *Is this a good or service for which there is a temporary, cyclical, or sporadic need?*
2. *A permanent need?*

g. *Separability*

Can the provision or production of the good or service be separated easily from other functions of the state or the agency?

The Cost/Benefit Criteria

The cost/benefit decision is the part of any privatization proposal which receives the most attention. The Maine report outlines eight separate criteria for examination to determine what is the most efficient and effective way to produce a service or product. Cost/benefit decisions require collecting accurate and real costs before, during, and after the product or service is created. Another factor is the level of competition available for the program to enhance competition.

a. *Availability of Alternatives*

The first criteria for the cost/benefit decision is whether there are a sufficient number of bidders to ensure a competitive environment.

b. *Cost Effectiveness*

1. *Who can provide the best service at the lowest price, without unacceptable sacrifices?*
2. *What capital costs are involved?*
3. *What administrative/ monitoring costs are involved?*
4. *What evaluation costs are involved?*
5. *Are there other costs involved?*

c. *Current Labor Agreements*

Are any goods or services exempt from privatization under present labor agreements?

d. *Economies of Scale*

1. *Can economies of scale be attained through private production?*
2. *Through government production?*

e. *Means or Ends*

Is either the result or the process clearly more important?

f. *Outcome Evaluation*

1. *How easily can expected or desired outcomes be specified?*
2. *How easily can expected or desired outcomes be measured?*
3. *Can successful outcomes be rewarded?*
4. *Can unsuccessful outcomes be penalized?*

g. *Permanence of the Service*

1. *Is this a good or service for which there is a temporary, cyclical, or sporadic need?*

2. *A permanent need?*

h. *Risk*

Would privatizing the service increase, decrease, or have no effect on the state's exposure to risk?

The Outcome Criteria

The third and final decision is the outcome evaluation which specifies intended and actual goals and identifies at regular intervals, how well the production of goods and services are being met by privatization. Maine's framework provided four specific outcome requirements to answer the question, what should this program accomplish?

a. *Citizen Satisfaction*

1. *How did citizens respond to the good or service?*
2. *How many complaints and compliments were received?*
3. *What kinds of complaint and compliments were made?*
4. *How were complaints resolved?*

b. *Cost/Benefit Analysis*

1. *The cost/benefit analysis that is part of an outcome evaluation compares actual costs with actual results.*
2. *What was spent?*
3. *What was accomplished?*

c. *Minimum Performance Standards*

1. *What minimum performance measures were set?*
2. *Were they met or exceeded?*
3. *Were they sufficient to accomplish the desired outcome?*
4. *Do they need modification?*

d. *Specified Results*

1. *Were specified targets met?*
2. *Were they exceeded?*
3. *What was the quality of the good or service produced?*

The analysis presented in Part 2 will use the framework suggested by the Maine Office of Policy and Legal Analysis to examine the specific application of privatizing the CE function for real estate professionals in Hawaii.

Part II

Analysis for Privatization of CE for Real Estate Professionals

The evaluative criteria for each of these decisions will be applied to the Hawaii question of privatizing the administration of the CE program for real estate professionals. The administration of the CE program includes approving and certifying a CE school, instructors, and course content, maintaining student completion records, and the like.

Examining the Criteria for Policy Decisions

Assuming that the disciplinary aspects and the course hours requirements remain the responsibility of the State, is the administration of the CE function (such as authorized schools, instructors, course content, course examinations, and delivery method) a service that more legitimately belongs to the private market? As the Maine report indicates, any policy decision is not clear cut⁹ but the decision can be made by examining the criteria as follows:

The first criteria for the policy decision is determining accountability for results. In the Hawaii situation, accountability for the administration of CE will continue to rest with the REC. No matter who administers the CE service, if a licensee has difficulty scheduling a CE course because classes are not available on the island, or not available at times convenient to the licensee, or not accessible for other reasons, the licensee's application for renewal would be impacted adversely. Therefore, courses must be available throughout the renewal period of two years and also be available statewide.

⁹The criteria examined here are from: Karen L. Hruby, Privatization of State Services, Office of Policy and Legal Analysis, Augusta, ME, 1992, pp. 7-12.

The second criteria for the policy decision is determining economic access. The Maine study asked whether it is important that the service be available to all income levels. It is important that the CE courses be available to licensees of all income levels. The supervising executive officer at the REC reported that currently, most course fees fall below \$55 and, therefore, to be economically accessible to the vast number of licensees seeking renewal of licenses, this price range must be assured by the private contractor. Some CE courses conducted by national organizations such as the National Association of Realtors may cost in the hundreds of dollars and cover several days of instruction. Some real estate professionals will continue to attend these longer courses and now, with the definition of CE as amended by Act 289, Session Laws of Hawaii 1997, will receive CE credit for these courses.

The third criteria for the policy decision is assuring equity in employment. The courses should be available to all real estate professionals without regard to race, ethnicity, physical disability, or gender. Equity of employment might also involve providers of CE courses to the extent that providers are evaluated on their knowledge, subject expertise, teaching ability and so on, rather than their membership in any particular professional organization, such as the Hawaii Association of Realtors, whose membership includes approximately 50% of all licensed real estate brokers and salespersons (5,578¹⁰ of 11,116 active licensees¹¹).

The fourth criteria for the policy decision is determining the essentialness of the product or service. As long as the State requires continuing education for the re-licensure of real estate professionals, CE will be a necessary program. Giving administrative control of this function to non-government personnel probably will not impede government's legitimate functions because, as discussed earlier, the policy decisions concerning the number of hours and the kind of required and elective courses would still be reserved for the policy makers of the REC. Many states interviewed by the Bureau indicated in general terms that government officials want to retain control over as much of the tasks within their regulatory function and are reluctant to give up this control even of those routine tasks of CE that are being offered for privatization (including registering schools, teachers, and courses, issuing the certificates of renewal).

The fifth criteria for the policy decision is identifying geographic access. All licensees across the State must have fairly equal access to CE courses. It is unlikely that geographic access requirements will change from the current levels. The Bureau's interviews with realtors indicated that those who live on Molokai, Lanai, and other rural areas of neighbor islands especially have the most difficult access problems. Because there are more CE courses available on Oahu, many neighbor islands real estate professionals try to coordinate their class attendance with other events or visits to Oahu.

The profession is making great advances in computer based instruction and in some sparsely populated states like Wyoming, or where staff have been severely cutback due to budgetary

¹⁰Members as of May 1997, membership count information from Hawaii Association of Realtors, Memorandum dated June 26, 1997.

¹¹As of June 30, 1996, 1996 Annual Report of the Hawaii Real Estate Commission, p. 13.

restraints, CE is being provided by methods other than traditional classrooms. It is technologically possible to transmit courses via the Internet to a student with the proper equipment, have the student download the course including test questions, and after successfully completing the course on the computer, relaying that information, again by Internet, back to the provider and/or to the commission for credit.

The sixth criteria for the policy decision is determining the permanence of the service. To the extent that licensure operates on a two-year cycle for renewal, this is a permanent need that is cyclical (unless the CE requirement is eliminated). The greatest interest in CE courses tends to appear near the last six months of the second year when many licensees find the deadline is approaching.

The seventh criteria for the policy decision is the separability of the product or service. CE involves several component parts and if the entire administrative function is not privatized, it is still possible to identify only a few discrete parts, such as: (1) the examination component; (2) evaluating and monitoring instructor effectiveness; (3) a component that involves certifying courses and instructors for privatization; or (4) updating licensee records and issuing licenses.¹² If a component part is separable from the entire administration of the CE function, that part alone could be considered for privatization and privatization could occur in incremental fashion.

Summary of Analysis of the Policy Decision Criteria

The policy decision involves deciding what is an essential government function and what is not an essential government function. The essential government functions are: (1) determining what are required or elective subjects for CE; (2) determining how many CE hours are required vs. how many hours are electives; and (3) any aspects of regulation dealing with investigatory hearings and disciplining a licensee. The administration of the CE function includes the following broad kinds of tasks: registering schools; approving courses for CE credit; certifying instructors and evaluating or monitoring their work; verifying that students have complied with the CE requirements, and issuing the license certificates and picture identification cards. As no state has yet privatized the administration of the CE function for real estate brokers and salespersons, one might conclude that this reluctance may be due to some feeling that even the administration of the CE function is an essential government function.

The Bureau was directed in this study to determine whether the components of the CE function taken all together or separately can be legitimately offered by the private sector. From the examination of each policy decision criteria that the Maine study indicated requires analysis, the Bureau is of the opinion that certain tasks or components of the administration of CE could be offered for privatization without compromising essential governmental functions. The criteria for approving CE schools, instructors, courses, have been established by rules. Therefore, a contractor administering the CE function could follow these criteria to determine whether an applicant (if a

¹²Telephone interview with Calvin Kimura, Supervising Executive Officer, Real Estate Commission, August 11, 1997.

school or instructor) or a course should be approved to provide CE credit. Some components of the CE function are separable from the other functions of the REC, namely those functions dealing with the certification of providers, or evaluation of course content, or perhaps the function of evaluating an instructor's experience and ability to teach a particular course.

None of the private organizations interviewed by the Bureau expressed any interest in assuming the government's role in determining which courses should be required, or conducting investigatory hearings on complaints about a broker or salesperson, or dealing with any of the disciplinary aspects of regulation.

Examining the Criteria for Cost/Benefit Decisions

In an examination of privatization in general, the Office of Policy and Legal Analysis of the Maine Legislature said: "for most goods and services traditionally provided by government, there is a lack of adequate, appropriate information about real costs, benefits and outcomes."¹³ Again, the Bureau examined each criteria and its relevant queries in light of the proposed privatization of the administration of the CE function for Hawaii's real estate brokers and salespersons.

The first criteria for the cost/benefit decision asked if there are a sufficient number of bidders to ensure a competitive environment. The analytical framework provided by Maine considers a competitive environment with several bidders to be more cost-effective. Hawaii State's procurement code also recognized the value of competition. "It is the policy of the State to foster broad-based competition. Full and open competition shall be encouraged. With competition, the State and counties will benefit economically with lowered costs."¹⁴ Of course, it might be possible to find only one bidder, for example, a professional organization such as the Hawaii Association of Realtors, which could do the job for less than the State's costs. However, as will be shown later, the State's costs are presently quite low.

Except for the expressed interest from the Hawaii Association of REALTORS to administer the CE program, it is less clear how many other groups, if any, may be willing to make a proposal to administer the CE program. There may be some interest from commercial examination companies like Assessment Systems, Inc., Iowa Foundation for Medical Care's Licensure software, and National Assessment Institute. Commercial firms may be more interested if similar services are needed by other regulated professions with CE requirements so that a profit can be made by combining several contracts for the State. Without sufficient bidders, the proposal to privatize the administration of only the CE program for real estate professionals may not be a very competitive one.

¹³Hruby, p. 4.

¹⁴Act 8, Special Session Laws of Hawaii 1993, section 1.

The second criteria for the cost/benefit decision examined the price and costs of the service. The Bureau identified financial information from the 1996 Annual Report of the Hawaii Real Estate Commission, displayed in the following charts: (a) Real Estate Education Fund, and (b) Revenues and Expenditures and Encumbrances (1992-1996), both of which are shown in Exhibit 4-B.

Each licensee pays \$40 towards the Real Estate Education Fund (REEF). Continuing education is currently administered by the REC from money in the REEF but continuing education consists of only a small portion of the REEF. As of June 30, 1996, total assets in the REEF were \$534,345 and total expenditures were \$386,766. Most of the money in the REEF is used to provide for personnel expenses and services or products to licensees and potential licensees that are not related to continuing education. For example, personnel in all cost \$199,911 for the year ended June 30, 1996. Direct licensee education to provide for bulletins, meetings, brochures, neighbor island outreach, and so on, totalled \$165,546. Indirect Licensee Education, described by the REC as administrative costs for interactive participation with other organizations, staff development, dues and subscription, totalled \$21,309. From these figures, the REC extracted the costs specific to the administration of the continuing education program and reported those costs as follows:

1. Cost to the State to Operate the CE Function:

Personnel (1/2 clerk typist and 1/5 real estate specialist)	\$23,400
Course development for core course and electives	\$ 1,750
Instructor Development Workshops (IDW)	\$ 1,000
Printing, supplies	<u>\$ 1,000</u>
Total	\$27,150

The cost to administer the CE program as stated by the REC, \$27,150 represents only seven percent (7%) of the total expenditures for 1995-1996 (\$27,150 divided by \$386,766). In testimony to the Conference Committee on Act 289 (S.B. No. 1114, S.D.1, H.D.1), the REC estimated that for fiscal year 1996-1997 the funds budgeted for the CE program was about four percent of the \$717,347 budgeted for all education efforts of the REC.¹⁵

It is likely that the \$27,150 represents less than the true costs of administering the CE program because there may be (a) hidden costs which cannot be broken out of say, the salary of a staff member whose duties overlap into several areas, including investigating a complaint about a CE provider and other non-CE duties; or (b) fixed, overhead and sunk costs such as the cost of a photocopier, the computer system, and the like. For purposes of this study, the only known and ascertainable cost of CE is \$27,150. Of the \$27,150, fully 86%, or \$23,450, is being spent on salaries. The REC has indicated that these staff members would be redeployed for other regulatory matters affecting real estate brokers and salespersons, thus no position reduction is expected even if the administration of the CE function is assumed by a private organization.

¹⁵Testimony to legislative conferees, dated April 17, 1997, from the Real Estate Commission and Department of Commerce and Consumer Affairs on Senate Bill No. 114, SD1, HD1, p. 1.

Exhibit 4-B

Financial Information

Real Estate Education Fund

Real Estate Education Fund Fund Balance As of June 30, 1996 (Unaudited)		Real Estate Education Fund Expenditures and Encumbrances For the year ended June 30, 1996 (Unaudited)	
ASSETS		I. Operations	
Cash		Personnel	\$187,290
In State Treasury	\$174,209	Supplies	2,471
Short-Term cash investment	108,200	Postage	3,830
Investment securities	81,410	Equipment Rentals/Maintenance	5,646
Investment income due from Real Estate		Machinery and Equipment	674
Recovery Fund	170,526		
		Total Operations	\$199,911
Total Assets	\$534,345	II. Direct Licensee Education	
LIABILITY AND FUND BALANCE		Real Estate Bulletin	\$16,248
Liability		Annual Report	20,488
Payable	\$5,206	Hawaii Real Estate Research and	
		Education Center	113,193
Fund Balance		Neighbor Islands Outreach	1,325
Reserve for encumbrances	19,538	Meetings	63
Unreserved	509,601	Brochures	1,500
		Advice, Education, Referral	1,749
		Education and Research	10,980
Total Fund Balance	529,139	Total Direct Licensee	\$165,546
		III. Indirect Licensee Education	
Total Liability and Fund	\$534,345	Interactive Participation w/Other	
		Organizations	\$8,158
		Cooperative Education	418
		Staff Development	202
		Dues and Subscriptions	121
		Miscellaneous	14
		Fund Audit	12,396
		Total Indirect Licensee Education	21,309
		Total Expenditures	\$386,766

Revenues and Expenditures and Encumbrances (1992 - 1996)

(Unaudited)

REAL ESTATE EDUCATION FUND	1992	1993	Fiscal Year 1994	1995	1996
Revenues					
Fees	\$109,710	\$812,310	\$75,510	\$695,185	\$68,895
Investment income	45,077	59,403	56,314	33,881	67,403
Total Revenues	154,787	871,713	131,824	729,066	136,298
Expenditures and Encumbrances	591,889	671,590	624,120	555,367	367,227
Excess (deficiency)	(\$437,102)	\$200,123	(\$492,296)	\$173,699	(\$230,929)

Source: 1996 Annual Report, Hawaii Real Estate Commission.

The types of things that the REC would be able to engage in if the administration of CE were to be privatized and existing staff currently employed in CE activities were to be redeployed include:

- (a) Shortening the response time for phone calls, letters, requests for real estate information and processing of applications for licenses;
- (b) Enhancing prelicensing education;
- (c) Producing pamphlets, brochures, on special topics for which a need is identified;
- (d) Increasing the Specialist of the Day visits to the neighbor islands when citizens on the neighbor island can have direct contact with REC staff; and
- (e) Operating a comprehensive library on real estate materials.

If the REC is allowed to do this, privatization of the CE administration function would result in a cost increase. The REC has stated that because the current staff who perform the CE functions also perform other tasks, there are no plans to eliminate positions or to reduce salaries. Therefore, if the Legislature decides to privatize the administration of the CE function, then only an affirmative act to reduce the REC budget or eliminate staff positions in the REC would result in budget savings to offset the cost of the contract for administering CE functions. If this is not done, costs could actually increase by the amount of the contract. When asked if the REC would raise licensee fees to make up for lost revenue, the REC reported that they would be very reluctant to raise fees. If fees must be raised, then it would be only to retain positions and not to curtail programs. In other words, services like those performed by the University of Hawaii's Real Estate Research and Education Center might be the first affected.¹⁶

2. Cost to a private organization to administer the CE function:

When the Hawaii Association of Realtors (HAR) was asked for cost estimates to administer the CE function, its representatives stated that no estimates could be given.¹⁷ However, their opinion is that the \$40 collected by the REC from each active and inactive licensee for the Real Estate Education Fund every two years¹⁸ will be the source to pay for privatizing the administration of CE. Other sources of funds, they believe, will come from the fees charged upon application to become a registered CE provider, or to be certified as a CE instructor, or for certification of a course.¹⁹ These fees are listed in the Rules and are replicated as Exhibit 4-C. Application fees for a CE provider, instructor, and course varies depending on whether it is the initial approval application or a renewal.

¹⁶Telephone interview, Calvin Kimura, Supervising Executive Officer, Real Estate Commission, November 24, 1997.

¹⁷Interview with Bill Ramsey and Marcia Shimizu, Hawaii Association of Realtors, 24 Sept. 1997.

¹⁸See Hawaii Administrative Rules, §16-53-39 (4)(D) (Department of Commerce and Consumer Affairs).

¹⁹See Hawaii Administrative Rules, §16-53-39 (15, 16, 17, 18, 19) (Department of Commerce and Consumer Affairs).

Exhibit 4-C

§16-53-39 Real estate. The fees for the real estate commission shall be as provided in this section:

- (1) License examination fee shall be determined by contract between the commission and a professional testing service.
- (2) License fees (Active or Inactive):
 - (A) Real estate broker corporation and partnership \$ 100
 - (B) Real estate broker - sole proprietor \$ 80
 - (C) Real estate salesperson, broker-salesperson, principal broker, and broker-in-charge \$ 50
 - (D) Real estate education fund \$ 40
 - (E) Real estate recovery fund \$ 50
- (3) Original license fees (Active or Inactive):
 - (A) First year of the biennium (license fees) plus one-half of the biennial renewal fee:
 - (i) Real estate broker corporation and partnership \$ 280
 - (ii) Real estate broker - sole proprietor \$ 250
 - (iii) Real estate salesperson, broker-salesperson, principal broker, and broker-in-charge \$ 205
 - (B) Second year of the biennium (license fees):
 - (i) Real estate broker corporation and partnership \$ 210
 - (ii) Real estate broker - sole proprietor \$ 190
 - (iii) Real estate salesperson, broker-salesperson, principal broker, and broker-in-charge \$ 160
 - (C) Branch office \$ 180
- (4) Biennial renewal fees (Active or Inactive):
 - (A) Real estate broker corporation and partnership \$ 100
 - (B) Real estate broker - sole proprietor \$ 80
 - (C) Real estate salesperson, broker-salesperson, principal broker, and broker-in-charge \$ 50
 - (D) Real estate education fund \$ 40
 - (E) Branch office \$ 50
- (5) Site office (original and extension fee) \$ 25
- (6) Reinstatement application fee-suspended license \$ 50
- (7) License changes and reissuance license fees:
 - (A) Duplicate wall certificate or pocket identification card \$ 10
 - (B) Change in name of real estate broker corporation or partnership \$ 25
 - (C) Change in place of business or branch office address \$ 25

(D)	Change or add a trade name	\$ 25
(E)	Change from inactive to active	
	(i) Real estate broker corporation or partnership	\$ 75
	(ii) Real estate broker - sole proprietor	\$ 50
	(iii) Real estate salesperson and broker-salesperson, voluntary inactive to active only	\$ 25
(F)	Change in principal broker or broker-in-charge	\$ 25
(8)	Educational waiver application fee	\$ 25
(9)	Experience certificate application fee	\$ 50
(10)	Restoration of forfeited license fees:	
	(A) Shall require the payment of all delinquent renewal fees plus a penalty fee of \$10 for each delinquent renewal period	
	(B) Application fees:	
	(i) Real estate broker corporation or partnership, or principal broker of a real estate broker corporation or partnership	\$ 100
	(ii) Broker-in-charge of a real estate broker corporation or partnership or real estate broker - sole proprietor	\$ 80
	(iii) Real estate salesperson or broker-salesperson	\$ 25
(11)	Additional payment to recovery fund	\$ 25
(12)	Real estate schools:	
	(A) Original certificate of registration for both a broker and salesperson school	\$ 750
	(B) Original certificate of registration for either a broker or salesperson school	\$ 500
	(C) Each additional real estate broker or salesperson school	\$ 250
	(D) Biennial renewal of certificate of school registration	\$ 300
	(E) Each additional course offering \$100 plus \$1 for each certificate of completion to each student	
	(F) Application fee for original certificate, additional school, or renewal of certificate	\$ 50
(13)	Real estate instructors:	
	(A) Original certificate of registration of an instructor and specialized instructor	\$ 25
	(B) Examination fee shall be as determined by contract between the commission and a professional testing service	

CONSIDERING PRIVATIZATION

- (C) Biennial renewal of certificate of registration \$ 50
- (D) Application fee for original certificate or renewal of certificate \$ 50
- (14) Restoration fee for forfeited school and instructor registration shall be the delinquent renewal fees plus a penalty fee of \$10 for each delinquent renewal period.
- (15) Continuing education provider:
 - (A) The initial application for registration of a continuing education provider \$ 200
 - (B) Each continuing education provider's application for renewal registration \$ 150
 - (C) Application for one-time offering for certification includes certification of up to three instructors \$ 250
- (16) Continuing education instructor:
 - (A) Initial application for certification of a continuing education instructor \$ 100
 - (B) Subsequent application for course certification \$ 75
 - (C) Each continuing education instructor's course certificate \$ 20
 - (D) Each continuing education instructor's application for renewal certification \$ 30
 - (E) Each continuing education instructor's course certificate renewal \$ 20
- (17) Continuing education course:
 - (A) Application for certification of a course \$ 300
 - (B) Application to renew course certification \$ 150
- (18) Each course completion certificate \$ 1
- (19) Restoration fee for forfeited provider registration, course certification, and instructor certification shall be the delinquent renewal fees plus a penalty fee of \$10 for each delinquent renewal period.
- (20) Condominium hotel operator:
 - (A) Application fee \$ 50
 - (B) Original registration fee \$ 50
 - (C) Annual reregistration fee \$ 50
- (21) Compliance resolution fund:
 - (A) Compliance resolution fund fee \$ 45
 - (B) Annual compliance resolution fund fee \$ 45
 - (C) Biennial compliance resolution fund fee \$ 90

[Eff and comp 6/7/85; comp 12/7/85; comp 10/3/86; comp 5/1/87; am and comp 12/7/87; am and comp 11/25/88; am

and comp 12/21/89; am and comp 10/4/91; am and comp 6/10/94; am and comp JUL 18 1994] (Auth: HRS §26-9) (Imp: HRS §§26-9, 92-24, 467-9.6, 467-11, 467-16, 467-17, 467-25.5, 467-30)

§16-53-39.1 Real estate appraisers. The fees for real estate appraisers shall be as provided in this section:

- (1) Application fee \$ 25
- (2) Examination and other examination related fees as determined by contract between the department and a professional testing organization.
- (3) License or certificate fee \$ 100
- (4) Application fee for recognition of license or certificate \$ 25
- (5) Annual registry fee, as established by the Appraisal Subcommittee or the Federal Financial Institutions Examination Council.
- (6) Biennial renewal fee \$ 50

Based on the different views of the availability of the \$40 collected for the REEF, the HAR might have assumed that the whole \$40 fee is exclusively available only for CE course administration. However, given the data received from the REC, it is clear that at least in the view of the REC, only a small portion of that \$40 is used for the narrow application described as the administration of continuing education. The larger portion of the \$40 is used mostly for salaries, and more importantly, for general real estate education, whether in the form of bulletins, reports, or brochures, or other indirect educational costs. These costs are in line with the directive in section 467-19(b), Hawaii Revised Statutes, regarding educational purposes, which reads as follows:

(b) Educational purposes as used in subsection (a) shall include those purposes to promote the advancement of education and research in the field of real estate for the benefit of the public and those licensed under the provisions of this chapter and the improvement and more efficient administration of the real estate industry. The commission, in its discretion, may use any and all moneys in the real estate education fund consistent with the above. The commission and the director of commerce and consumer affairs may also use moneys in the education fund to employ necessary personnel, not subject to chapters 76 and 77, to fully effectuate subsection (b) and carry out its purpose.

Discussion of the Perceived Sources of Funding

The fact is that only about \$1.50 per licensee is spent on CE administration-related expenses (totalling \$27,150) and the rest of the REEF funds, according to testimony by the REC presented in April 1997 to the Conference Committee considering S.B. No. 1114 (now Act 289, Session Laws of Hawaii 1997) are used to "...staff the Real Estate Section of the (Real Estate) Branch, with five personnel and fund initiatives and programs intended to improve the licensees' base of knowledge, which will improve the quality of services to consumers. The REEF provides funding for the programs for the Commission's two standing committees, Laws and Rules Review Committee, and the Education Review Committee. Without REEF funding and other source of funding, these programs will most likely be eliminated." The testimony continued:

Elimination of the REEF will reduce direct services provided to real estate licensees and the public. The five positions will be eliminated. This represents a 33-1/3% reduction in the Branch's staff. All applicants will face delays in the review and approval process.²⁰

According to the REC, if the full \$40 goes not to REEF but to a private contractor, then in addition to the concerns expressed in the April testimony, the Hawaii Real Estate Research and Education Center will likely get no funding from the REEF and could be adversely affected, given other budget constraints placed on university operations in recent years.

As to the amount of fees assessed and collected from CE providers, instructors, and courses, the amount collected for the 1997-1998 biennium and deposited into the Professional and Vocational Licensing Division Fund (P&VLD fund) and not the Real Estate Education Fund totaled \$10,015. (Of course, there may be more fees to be collected in the remaining months of the biennium.) If

²⁰Testimony by Calvin Kimura, Supervising Executive Officer, Real Estate Commission, before Joint Conference Committee on S.B. No. 1114, S.D.1, H.D.1, April 17, 1997.

privatized, these fees would no longer be collected by the State, but by the private organization administering the CE function. The decision to raise or lower these fees would no longer be within the purview of the DCCA and the Hawaii Administrative Rules. The question is whether or not \$10,000 (\$5,000 annually), if foregone by the State, would have a negative impact on regulatory functions which are still reserved by the REC, such as investigating complaints, disciplinary matters affecting real estate brokers, and the like.

Adding both figures, the annual CE cost of \$27,000 and the \$5,000 per year collected thus far in fees gives a total of \$32,000 that might be available to a private contractor.

The answer to the question "*Who can provide the best service at the lowest price without unacceptable sacrifices?*" would lead to the answer: "the REC", based merely on the annual cost of \$27,150 which is fairly low. Even assuming this price is artificially low because certain hidden costs are not included in that figure, can a private organization provide the same and better service (in terms of speedy response, variety of courses, wide accessibility on all islands, instructor quality, and so on) for close to that figure plus perhaps \$5,000 per year from application fees from CE providers? The Hawaii Association of Realtors is not sure about costs, and could provide none, so no comparison of cost estimates between government costs and privatized costs can be made.

Other private, for-profit organizations like those currently providing testing services also indicated that they would have to take a look at the State's overall needs as described in the Request for Proposals before deciding whether to venture into making any offers to administer the CE program for the REC.

As indicated in another section, arguments for and against privatization do not turn only on the cost figures alone, despite survey evidence that cost effectiveness appears to be the most frequently used criteria by state agencies in Maine's survey of twelve states.²¹

The third criteria for the cost/benefit decision is identifying the impact, if any, of current labor agreements. The only civil service positions affected by CE and only minimally at that, are the supervising executive officer and the REC secretary who were not included in the calculation of personnel costs in the CE function. Privatization would mean some of the tasks being currently performed by REC personnel (the one-half clerk typist and one-fifth specialist, which positions are not covered by collective bargaining), would be shifted to a private concern. When this shift to privatization occurs, the first issue raised will be whether or not the contract might violate a collective bargaining law and thus, whether the *Konno* decision is applicable.

The Konno case. The applicability of the decision of the Hawaii Supreme Court in *Konno*²² to the examination of current labor agreements in the cost/benefit decision is necessary because in every privatization proposal, questions will be raised about the nature of the civil service positions being affected. In *Konno*, the County of Hawaii was found to have an invalid contract with a waste

²¹Hruby, p. 13.

²²*Konno v. County of Hawaii* (No. 18203), and *UPW v. Yamashiro* (No. 18236), Feb. 28, 1997.

management firm which operated the Puuanahulu landfill. The Hawaii Supreme Court reasoned that the contracted workers were performing tasks which "have been customarily and historically provided by civil servants" and these tasks had not been specially exempted from the (county) civil service law, section 76-7, Hawaii Revised Statutes (the exemptions for state positions are in 76-16).

The issue raised by the *Konno* case that is relevant to the possible privatization of the administration of CE in the regulation of real estate brokers and salespersons is whether the tasks involved are those which "have been customarily and historically provided by civil servants," (the services test in *Konno*) or whether those services have been specifically exempted. The positions which handle CE in the REC are not civil service positions;²³ but even if they were,²⁴ the Legislature could anticipate the question of work customarily and historically provided by civil servants by exempting the tasks of administering the CE function from the provisions of chapters 76 and 77 by amending chapter 467.

Appendix C contains suggested implementing legislation. Providing for the exemption from civil service in chapter 467 instead of adding another exemption in section 76-16 keeps the issue in the subject matter law (real estate brokers and salespersons) where one is more likely to look for topics relating to real estate brokers and salespersons and is the Attorney General's Office's preferred method of amending state statutes to deal with privatization issues raised by the *Konno* decision.

The fourth criteria for the cost/benefit decision is identifying economies of scale. Economies of scale refers to "the reduction in unit cost achieved by manufacturing an item on a large scale."²⁵ The framework for analysis as provided by the Maine report looks to economies of scale as a cost-effective way for government to save money if a private organization can achieve a lower unit cost by providing a service (or product) on a large scale. For example, the preparation of one course, such as the Law and Ethics course produced by the Hawaii Real Estate Research and Education Center, can be used by many different CE providers. A new course syllabus and class material need not be produced by each provider and the "unit cost" for the course presumably is thereby reduced. There is a certainty in the quality and accuracy of the course content and course approval time is reduced. The same idea of multiple uses applies to data collected for an annual report that could be used in legislative testimony, brochures for consumers, and other purposes.²⁶

Therefore, if a private contractor assumed responsibility over a course like Law and Ethics, would the Hawaii Real Estate Research and Education Center be subcontracted to continue to produce the course syllabus and materials or would the contractor do it instead? This is an example

²³Kimura interview, see note 12, *supra*.

²⁴Haw. Rev. Stat., §76-16, the court said, applies to all positions in the civil service in the State "now existing or hereafter established and embrace all personal services performed for the State except...". This means that even if the REC has no current positions handling tasks related to the administration of CE, it would be best to exempt positions if privatization is being considered.

²⁵Random House Webster's College Dictionary, 1991.

²⁶Kimura interview, see note 12, *supra*.

of the considerations which must be examined by the potential contractor in terms of qualified staff and costs.

The fifth criteria for the cost/benefit decision asked which is more important, the result or the process. It appears from the Bureau's interviews that there is equal concern over result and process. For example, the kind of CE courses available (result) is equally as important in the administration of CE as how quickly courses are approved for CE offerings (process). Also, an efficient method of updating records for purposes of the biennial application for license renewal (result) is as important as the instructor's ability to teach interestingly and accurately (process). Some realtors think that a private organization (like the Hawaii Association of Realtors) made up of professionals in the field would be better equipped to determine which persons have the experience and skills to teach a CE course and staff members of the REC not being practitioners, would not be able to judge the skill and knowledge level of a prospective CE instructor applicant. The current standards involved in this process are based on the existing rules and if a CE instructor meets the basic requirements that person is approved. Other criteria such as a teacher's "reputation as a classroom teacher" do not appear in the rules. Some kind of classroom evaluation including student satisfaction and instructor's level of knowledge as determined by a peer evaluator would address these concerns. In terms of the decision to privatize or not, at least one other report (see *supra*, Schmitt and Shimberg) has indicated that if the process is as equally important as the end result, then privatization is not recommended.

The sixth criteria for the cost/benefit decision is how to specify the expected or desired outcomes. Expected or desired outcomes has been specified as the following seventeen items:

Exhibit 4-D

List for an RFP to Administer the CE Program

- Minimum number of courses available on Kauai, Maui, and Big Island
- 800 telephone information number
- Webpage site with information
- Monthly mailouts of course schedules to all principal brokers and upon request
- Minimum number of 3-1/3 hour courses
- Majority of courses shall not be more than \$55
- Allow and provide for a variety of course delivery methods (interactive computer, disc, CD Rom, interactive TV, internet, etc.)

- Diversity of courses for all real estate specialty areas
- Diversity of courses for different levels of real estate knowledge
- Provide course completion certificates
- Provide Real Estate Commission with disc of all licensees who completed course, subject to Commission software, within two weeks of course completion, and within 2 days for courses completed during November and December of an even year
- Security procedures for identification of student and verifying that student took entire course
- Provider and course certification process
- Instructor certification which includes screening, testing, etc.
- Formal evaluation teacher/course evaluation system which at the minimum includes student evaluation forms, peer review monitoring, and remedial education programs
- Annual Instructor Development Workshops
- Provide quarterly reports to the Real Estate Commission

Source: Memo to Jean Mardfin from Calvin Kimura, Supervising Executive Officer, Real Estate Branch, July 31, 1997.

Measurement of these outcomes can vary. In some instances an outcome such as the 800 telephone information number is evident or not evident. If the 800 number is created, then the desired outcome is positive. Other desired outcomes may be more difficult to measure. For example, "diversity of courses for different levels of real estate knowledge" may not be easily measured. Instead, diversity might have to be confirmed by survey verification from students asking if the courses available during a biennial period provided sufficient educational challenges to licensees attending the course and whether there was enough variety of courses for diversity. This opinion would of course be affected by an individual student's own past experience and knowledge.

The desired or expected outcomes must be generated by the REC in light of: (1) what it thinks the administration of the CE program should provide licensees, (2) what the REC is currently providing in that program, and (3) what is the best value for the money that will be spent (or foregone, as the case may be) for the contract. The outcomes listed in Exhibit 4-D are merely an initial listing created for this report and should not be considered fixed and unchangeable. It does, however, provide an adequate variety of tasks that reasonably could encompass the outcomes desired.

The seventh criteria for the cost/benefit decision is determining the permanence of the service. As discussed under Policy Decisions, this is a permanent need unless mandatory CE is repealed.

Finally, the eighth criteria for the cost/benefit decision is determining the risk of privatizing the administration of CE. The risk of privatization is primarily whether a contractor might fail to fulfill its contract of approving courses and providers so that the number of CE courses dwindles, or if courses and instructors are not adequately monitored to assure quality courses. The cost to the REC is whether it is willing and able to step in to replace the failing contractor. The ultimate risk to the licensee is the inability to renew the license if courses are insufficient or nonexistent. An examination of the contractor's longevity in the field, educational commitment, depth of personnel and other factors would be considered before the contractor is chosen to do the assignment.

Whether it is the State or a private organization administering the CE function, the exposure to risk remains the same.

Summary of Analysis of Cost/Benefit Criteria

The expenditures for continuing education (\$27,150) is a small part of the total expenditures for education programs in general for real estate professionals. (This figure does not consider the approximately \$5,000 in fees collected per year.) If the function of administering CE is privatized, the costs may not be reduced very much to the State because personnel positions will not be eliminated and these personnel will perform other functions of the REC. Therefore, actual costs will not go down for purposes of the REC and more likely would increase by \$27,000 (or more), if the REC does not reduce expenditures if the administration of the CE program is privatized. Benefits may lie not so much in dollar cost figures as perhaps in other ways. For example, if relieved of administering the CE function the REC responds faster to other consumer questions, improvement will be seen in public service. If the private contractor is able to approve qualified instructors with specialized experience in certain topics, student interest and enthusiasm for CE courses may rise. If the private contractor is able to provide a much needed course quickly due to changes in laws, there would be increased relevance to licensees' information needs. These benefits and the value of them are difficult to measure much less quantify at this time.

Examining the Criteria for Outcome Decisions

The outcome decision asks what is it that we want this agency (program) to accomplish? This decision is based on identifying the goals that the contractor must provide and these goals must be continually examined during the term of the contract.²⁷ This kind of monitoring and oversight can assure the contractor maintains quality of performance and problems can be readily identified before they become too serious. The specific criteria for analysis in the outcome decision can be found in Exhibit 4-D and are repeated below as each criteria is analyzed for this report.

²⁷ Hruby, p. 12.

Outcomes for administering a CE program have been specifically identified by the REC in Exhibit 4-D. If the outcomes are not successful, there must be some mechanism to cancel the contract. The REC would have to be able to find a replacement or itself fill in and immediately assume the responsibility for administering CE if there is no other private group available to do so.

The first criteria for the outcome decision is determining citizen satisfaction. In this case "citizen" can be identified as the licensee seeking CE credits. Licensees would probably be the first group to notice if CE instructors failed to meet expectations created by privatizing the administration of the CE program. Course evaluation is one method of monitoring the quality of courses. A mechanism would have to be implemented whereby complaints will be received by the REC and not by the contractor because the contractor may or may not take corrective action based on complaints. Investigation of complaints may require REC involvement. In Wisconsin where the CE program is privatized for insurance agents, complaints are investigated by the department, not the contractor.

The second criteria for the outcome decision is a comparison of actual costs with actual results. A comparison of the actual costs with actual results would not be possible until the end of the first contract. At that point what was spent and what was accomplished can be evaluated. The current cost of administering the CE program averages about \$1.50 per licensee (based on the \$27,150 total cost to the REC). (There is about \$5,000 that is collected annually from fees that would bring this figure to a total of about \$32,000 for administering the CE program, but for this discussion the Bureau relied on the REC's cost of \$27,150.) Therefore, if the contract to privatize administration of CE requires the State to pay the private organization more than \$1.50 per licensee, then the State must look at other benefits to justify privatization. Beyond the dollar cost figures, however, is the non-quantifiable aspects of availability of courses in rural areas through television, or perhaps other factors affecting customer satisfaction. More on this subject was discussed under cost/benefit criteria earlier.

The third criteria for the outcome decision is determining minimum performance standards. This can be established early, before asking for proposals from contractors. The minimum performance standards can be found in Exhibit 4-D. For example, sufficient dissemination of information about the CE program would include such requirements as the 800 telephone number, Webpage site, mailouts of course schedules. Adequate availability of CE for licensees would include the requirements of a minimum number of courses on other islands which may be otherwise underserved because of the fewer number of licensees on islands other than Oahu; a \$55 course cost in a majority of courses; variety of course delivery methods; diversity of courses for different specialty areas and levels of knowledge. Quality of courses would be met by the requirements in provider and course certification, evaluation of teachers and courses, instructor development workshops, verification of student completion, and course completion certificates. Finally, monitoring of the privatization contract would be met by providing quarterly reports to the REC and while not specified, monitoring includes responding to citizen and licensee complaints, if any, about the contractor.

The fourth criteria for the outcome decision is having specific results. This criteria can only be answered sometime during the course of the contract period or at its end to determine whether

specified targets were met or exceeded, and whether the service produced was of high, medium, or low quality.

Summary of Analysis of Outcome Criteria

The Bureau received a list of specific items which the administrator of a CE program would have to provide during the course of the contract. In some instances it would be easy to identify whether or not a specification was produced by the contractor. Overall, a contract would have to be let and operational for a while before outcome criteria could be measured.

Further Analysis with Emphasis on Regulated Professions

Although the Bureau did not locate any state that has privatized its CE administrative functions to the extent being proposed here, the testing function in licensing is an area that has been privatized for some time. Schmitt and Shimberg pointed out that other aspects of the regulatory functions are being considered for privatization, namely, maintenance of data banks, preliminary screening of applicants' eligibility, investigations, and mediation.²⁸ For Hawaii, only the maintenance of data banks might belong to the administration CE function. Applicant eligibility screening would probably occur in the initial licensing phase. Investigations and mediation are outside the realm of the instant proposal because investigation of licensees and complaints are not components of the CE function and shall remain tasks for government .

Schmitt and Shimberg outlined certain elements which must be met before privatization can or should be considered in the examination part of regulatory functions. Schmitt and Shimberg wrote:²⁹ "If the *sole* reason for privatizing and the *sole* selection factor is the reduction of state expenditures, agencies should consider the following elements: (*emphasis in text*)

1. Precise requirements can be specified in advance.
2. It is easy to measure results.
3. Incompetent contractors can be readily replaced.
4. The ends are more important than the means."

²⁸Kara Schmitt and Benjamin Shimberg, Demystifying Occupational and Professional Regulation; Answers to Questions You May have been Afraid to Ask, Council on Licensure, Enforcement, and Regulation (Lexington: KY 1996), p. 65.

²⁹Kara Schmitt and Benjamin Shimberg, p. 66-67.

However, they continue, privatization should not be considered if:

1. The task is uncertain at the outset and prone to revision.
2. The value of the product is hard to measure.
3. It is very disruptive to switch contractors in midstream.
4. The process is as important as the end result.
5. The unit of government knows the best means to accomplish the task.³⁰

Discussion Based on Schmitt and Shimberg's Elements

The study from Maine's Office of Policy and Legal Analysis found that cost criteria are considered more often than other factors in a proposal to privatize a government function. The Bureau considered Schmitt and Shimberg's elements worthy of analysis in the context of privatizing the CE administration for real estate brokers and salespersons because in the examination of policy, cost/benefit, and outcome criteria, cost factors tended to overshadow other criteria. Each of the elements from Schmitt and Shimberg is discussed below.

Can Precise Requirements Be Specified in Advance?

- Precise requirements can be specified in advance, in the form of seventeen specifications described above under outcome decision. It is unlikely that the CE administration task is uncertain and prone to revision, as the REC knows the components which are affected in its CE program and these specifications would appear in an RFP if a decision is made to privatize the administration of CE.

Is it easy to measure results or is the task uncertain at the outset and prone to revision or is the value of the product hard to measure?

- Results can be measured if the contractor successfully meets the seventeen specifications. Success would be judged by the number of complaints from the CE students, providers, or instructors during the course of the contract. The value of the product is, therefore, not hard to measure--if participants find it difficult to attend courses because of inadequate publicity, if courses are distributed poorly throughout the state, if there are complaints about poor instruction, insufficient courses, and the like, the REC will learn about it from the licensees seeking to renew their license within the specified time span.

³⁰*Ibid.*, p. 66.

Can an incompetent contractor be readily replaced or is it very disruptive to switch contractors in midstream?

- It is unknown how many qualified, interested, and capable contractors are actually available. The Hawaii Association of Realtors has expressed interest. Other local groups such as Community Association Institute and Hawaii Association of Real Estate Schools do not appear interested at this time. At least one for-profit organization, Assessment Systems Inc. (ASI) has been operating a similar program for Wisconsin's regulatory office for insurance agents and it and other for-profit groups may look at specifications issued by Hawaii for continuing education for real estate professionals.
- It is likely that if a contractor cannot complete the contract, the REC will have to step in almost immediately to do the work. The specification requiring a quarterly report to the REC may provide sufficient, but not an adequate warning system for problems being encountered by the contractor. The REC recognizes the possibility of having to replace a contractor midstream and may be able to cover the program until a new contract is prepared provided no staff reductions have occurred due to privatization and re-deploying the staff.

Are the ends more important than the means or is the process as important as the end result?

- Under the analysis provided by the Maine framework, the question asked is whether the result or the process is more important. The conclusion was both are probably equally important. Schmitt and Shimberg said that privatization should not be considered if the process is as important as the end result. The underlying philosophy for justifying continuing education is to protect consumers with knowledgeable, skilled, practitioners. What would privatization accomplish to further those ends? Will licensees learn more, understand better their legal and ethical obligations, and so on, if the CE program is privatized? These factors cannot be quantified with certainty, but those who are dissatisfied with the operations as administered by the REC feel that privatization is the solution because a wider variety of courses would be made available throughout the state, and the providers, instructors, and so on would be carefully selected, monitored, and evaluated by peers instead of by government bureaucrats.

Finally, Schmitt and Shimberg write that privatization should not be considered if the unit of government knows the best means to accomplish the task.

- It should be clear by now that the REC does not itself teach any real estate course. Its tasks are to see that the providers of courses, the schools, teachers, coursework, and so on meet the requirements mandated by law and rules. It accomplishes these tasks at the cost of about \$27,150 annually and collects about \$5,000 from the CE provider applications annually which are deposited into the Division level funds.

One telling argument that perhaps the unit of government knows best might be the fact that there is no jurisdiction in the nation, at least in the real estate regulatory field, that has given over the administration of the CE function to a private organization. However, a counter argument exists in

the privatization of these very same functions albeit for insurance agents, in Wisconsin. Furthermore, as will be described in greater detail in Part 3, the evolution of MCLE for attorneys in most states follow a model of industry regulation.

Summary of Privatization Analysis as Applied to CE in Hawaii

Privatization is usually proposed to save government money and provide more services to the consumer. The Bureau can make the following observations based on an examination of several criteria deemed important by other states and research offices. These are:

- Even if the Hawaii Association of Realtors (HAR) is willing to participate in the CE administration function to the extent of assuming responsibility over approving courses, registering schools, and certifying instructors, there are at least two points at which charges of conflicts of interest may arise. First, any difference in treatment of members and nonmembers of HAR applying for certification as a CE instructor or a CE provider might raise a claim of conflict if an application is denied. Second, HAR should not itself teach any course just as the REC does not teach any courses.
- The Bureau's second observation is the problem of lack of competition and related to it is the availability of a successor to the contract if there is a breach of the contract during the two-year licensure period. A private, commercial examination company which can provide a range of services (a la Wisconsin's Insurance agents' CE program) may or may not be interested in a contract to administer the CE program for the REC. Therefore, the HAR remains the only local interested party for privatization efforts.
- Despite best efforts, the estimated costs for CE to the REC did not include hidden costs of overhead, sunk costs, portions of salaries of staff members who spend a fraction of their time on various CE investigations, and the like. This raises the third observation, that true costs may be considerably more than the approximately \$27,150 annual amount cited. In addition to this annual cost, about \$5,000 is collected annually in fees by applicants wishing to provide CE courses.

The Bureau has engaged in this analysis to show that any proposal for privatization of an existing program requires close examination of many factors. Industry dissatisfaction with any particular governmental regulatory function does not in itself justify having that function performed by a private organization, nor does it necessarily mean that cost savings will result from privatization. By the same token, even if cost savings cannot be found, there may be other benefits to the citizen/consumer if by privatizing some services, other services provided by government are enhanced.

Part III

Examples in Other Jurisdictions and Other Professions

The Alberta Example

While several states in the United States have private examination firms conducting exams for new licensees (as does Hawaii) or license renewals (see chapter 3 descriptions of Connecticut, Colorado and Idaho), only the Canadian province of Alberta has shifted the entire real estate broker regulatory function to a private organization. As of July 1996, Alberta became the "...only self-administered real estate and mortgage broker regulatory body in North America."³¹ As this is the only example of complete privatization (referred to in Alberta as self-regulation) that the Bureau was able to uncover, an explanation of its operations may prove edifying. The following is a summary of material published in newspapers and other periodicals, and the Alberta web page.³²

Until 1996, the provincial government regulated the real estate brokers in Alberta. According to historical explanation, the movement towards self-regulation started in the mid seventies with the real estate industry taking responsibility for administration of educational standards, examination requirements, licensing, and registration in 1988. By September 1994, there was agreement between industry members, government, and others to establish the Real Estate Council of Alberta (RECA), a non-governmental agency (corporation) responsible for everything that the government agency used to do, including investigating and disciplining members of the real estate profession. The RECA would be a unique model not found elsewhere in North America.

The RECA has four main purposes:

- (a) To set and enforce standards of conduct for the industry and the business of industry members in order to promote the integrity of the industry;
- (b) To protect consumers affected by the industry;
- (c) To provide services that enhance and improve the industry; and
- (d) To administer the Real Estate Agents' Licensing Act, bylaws, and rules.

The government's only functions in this area are to amend legislation or regulations as required and to monitor the RECA. The Minister of Municipal Affairs, who has responsibility for the Real Estate Act, has the power to review the conduct of the RECA if it is in the public interest to do so, and can also order the RECA to take any action considered appropriate.

The RECA is composed of eleven members, usually persons involved in real estate brokering, but also includes two public members. The RECA is funded by industry members. The

³¹Calgary Herald, "Council regulates real estate industry," by Mary Hope, July 4, 1996.

³²www.reca.ab.ca

primary sources of funding are the license and registration fees paid by industry members. Among other things, the RECA sets educational requirements, admission exams, license fees; sets continuing education requirements, standards of conduct and business practices; investigates complaints against members; conducts disciplinary hearings; administers the real estate assurance fund; passes bylaws that describe the duties of its members and officers, administration, and organization of the council.

The RECA provided information about its function in a question and answer format and in one consumer question it was asked: *"Isn't this a bit like putting the fox in charge of the chicken coop? As a consumer, how can I be sure that my interests will be taken into account?"*

The RECA's answer: *"The aims of industry members and consumers are sometimes perceived as very different. This is, in fact, not the case. Industry members who operate unethically can illegally hurt the integrity of the industry. They also have a competitive advantage over those who follow the rules. It is in everyone's best interest for the Council to set standards and to stop unethical or illegal business practices by monitoring the marketplace, carefully investigating complaints, and conducting disciplinary hearings. Although this method of self regulation is new for the real estate industry, there are checks and balances in the Real Estate Act to make sure that the Council carries out its responsibilities as intended by the government. The RECA pledges not to turn a blind eye. It strives to be a neutral regulator that is objective, consistent and fair."*

The RECA is a new approach to industry regulation that is not found anywhere in the United States.

Privatization of the Administration of CE for Insurance Agents in Wisconsin

In Wisconsin, the Assessment Systems, Inc. (ASI) company has tailored its contract with the Wisconsin Department of Insurance to review, approve, or deny the providers and courses of CE for insurance agents. (If denied, the complainant is referred to the State for review, investigation, hearing, and so on.) ASI also audits classes, evaluates courses to see that the instructor takes attendance, and that the required hours of instruction is within the course content as approved. Upon completion of the course, the CE provider credits the student with the credit hours and gives course completion data to ASI on a diskette with the licensee's name, license number, and other vital information. In this way, the Department of Insurance, via computer modem can verify the status of any insurance agent's CE compliance and approve or disapprove applications for license renewal.³³

The differences between privatization of CE for insurance agents in Wisconsin and that proposed for Hawaii's realtors is that an independent, for-profit organization is the contractor in Wisconsin, not a professional organization comprised of members who are insurance agents. Another major difference is its evolutionary history. When CE for insurance agents in Wisconsin was mandated, the Legislature gave the regulatory agency no staff to accomplish this task. The only alternative, therefore, was to seek a private contractor.³⁴ The manner of contracting out was through

³³Telephone interview, Louna Landphier, Chief of Agent Licensing, Wisconsin Insurance Dept., 11 Sept. 1997.

³⁴*Ibid.*

the Request for Proposals (RFP) process, a process that is also available in the Hawaii state procurement code, discussed later in chapter 5.

Continuing Legal Education, Generally

The Bureau emphasizes that the idea of a private organization administering a CE program is not a new or radical proposal because in many states the state supreme court authorizes the state bar to manage or administer the profession's mandatory continuing legal education program (MCLE). The general arrangement is one that evolved over time due to a combination of factors including the fact that probably the state supreme court was not staffed to operate an MCLE program, and the bar association often was. A composite picture³⁵ that is commonly found in the states is a process whereby the state supreme court (analogous to the Real Estate Commission because it is a governmental entity), usually through an MCLE committee or board sets the CE requirements and gives the bar association the authority to hire staff in order to regulate attorneys' compliance. The committee or board approves the providers' programs, which can be provided by a university, bar sections, trial lawyers association, and for-profit organizations. The bar association enforces compliance and recommends attorney suspensions to the state supreme court if MCLE requirements are not fulfilled.

The difference between an MCLE prototype and one for Hawaii's real estate professionals is that there is no contract between the state supreme court and the bar association. The state supreme court does not pay the state bar any contract fee but the attorneys' license fees (or membership fees) go to the state bar association. While some states with mandatory CLE requirements have a unified bar (where every member of the bar must join the state bar association), at least twelve of 39 MCLE states have voluntary bar membership.

³⁵The Bureau contacted the Association of Continuing Legal Education Administrators, (ACLEA) and the bar associations of twelve states, including Hawaii, to develop this general picture of MCLE.

Chapter 5

IMPLEMENTATION AND CONCERNS

Chapter 4 discussed the criteria that any state should examine before deciding whether or not to privatize a particular government product or service. The Legislature, in Act 289, specifically directed the Bureau to identify the most appropriate organization such as the Hawaii Association of REALTORS (HAR) to oversee the CE program. To this end, this chapter describes the components of CE that would comprise the proposed privatization of the administration of CE in order to ascertain whether there is agreement between the State's REC and HAR's understanding of what tasks will be included in the privatization of the CE function. The Bureau contacted and interviewed real estate professional organizations including the Hawaii Association of Real Estate Schools (HARES) and the Community Association Institute (CAI), and except for the HAR, no other organization expressed any interest at this time to administer the CE function. This chapter continues by discussing the weaknesses of proposing the Hawaii Association of Realtors as the organization to oversee the CE function. Finally, the applicable parts of Hawaii's procurement code in the privatization proposal is presented.

For purposes of this report, privatization refers to the shift from government provision of functions and services to provision by the private sector.¹ The type of privatization that this report examines is "contracting out", defined as "the transfer of governmental entities of responsibility for the performance of desired functions mostly of a personal service nature, to private institutions."²

Part I

Agreement on What Will Be Privatized

Some individuals have told the Bureau that to the extent that providers of CE are not from the governmental office of the REC but instead are individuals or proprietary schools, delivery of courses is already privatized. While it is true that private organizations provide the CE classes (in addition, the University of Hawaii's Kauai Community College and Maui Community College teach some CE courses), this observation indicates the level of misunderstanding that might exist among many real estate professionals. The issue being examined for privatization in this report is not the private or public status of the course provider. Instead, privatization as envisioned for the administration of CE means the processes that precede the teaching of the CE course, including registration of CE schools, and certification of a CE instructors and courses. Administrative tasks also include monitoring instructors in the manner of instruction and the accuracy of what is being

¹Hawaii Supreme Court, citing George L. Priest, "Introduction: The Aims of Privatization," 6 Yale L. & Policy Rev. 1,1 (1988) in: *Konno v. County of Hawaii* (No. 18203), and *UPW v. Yamashiro*. (No. 18236), Feb. 28, 1997.

²*Ibid.*

taught, scheduling courses, registering students for class, keeping records of attendees, and issuing CE completion certificates. Other administrative tasks can include the technical aspects of setting up and maintaining a web page, an 800 telephone number, answering phone calls from licensees and submitting to the REC the names of students who have complied with requirements that entitle them to renew their license. All of these parts make up the whole of the administrative function of CE for purposes of this report. All parties in this arrangement of privatizing the administration of CE must agree on what will be privatized because the first problem identified by the Bureau was a lack of consensus about what exactly will be privatized at all.

In order to determine whether the parties, the REC and HAR, both comprehended common tasks involved in administering the CE function, the Bureau asked these offices to submit their views of what would be included in a privatized program. Exhibits 4-D and 5-A (HAR list) are the tasks which each organization considered would be included in a privatized CE scheme. In the REC's exhibit, seventeen tasks are listed in a variety of areas. For example, quick information must be provided to licensees in the form of an 800 number or website, or list of CE courses. On the other hand, the substantive areas involving registering a school or monitoring and evaluating an instructor are also important tasks. All tasks are not necessarily of equal weight. While the REC's list of RFP specifications is more detailed than that from the HAR, both cover the same areas described earlier: "registration of a CE school, certification of a CE instructor and course; monitoring instructors, scheduling courses, registration of students for class, keeping records of attendees, and issuing CE completion certificates." HAR uses the phrase "CE administration" for recordkeeping and issuing certificates of completion, which is not the way this phrase is being used in this study, but these tasks (recordkeeping and issuing certificates) are legitimately within the CE function for privatization. The lists submitted by the REC and the HAR indicate close agreement between the parties of the tasks involved if the administration of CE were to be privatized.

Privatizing Less Than the Entire CE Program

If all of the tasks which comprise the whole administration of CE are not separated from the responsibilities of the REC and assigned (by contract) to a private organization, there are some lesser options to privatize as long as the task can be identified as a discrete one.

Testing or Examination Option (Recertification Exam)

If Hawaii institutes an exam option as an equivalent to the ten-hour CE requirement, the testing function for CE could be privatized as a separate, discrete function. This equivalency rule could be instituted by an administrative rule change so that a licensee could renew the license application by successfully passing an equivalency test. In fact, this option is being proposed in the new rules³ and could resemble the Colorado example of passing the state portion of a licensing exam or the Idaho example which involves a challenge exam of 30 questions drawn up by subject matter

³Telephone interview, Calvin Kimura, Supervising Executive Officer, REC, August 11, 1997.

experts, as described in chapter 3. The exact form in which the equivalency test would take is not yet known. There are a number of private examination firms in the country, who would be potential candidates to bid on examination preparation, question development, exam administration, grading, and record maintenance.

Exhibit 5-A

This letter is in response to your inquiry of the Hawaii Association of REALTORS® (HAR) view of privatization. To ensure the quality of CE courses, HAR would like to administer the entire CE process which includes 1) course development, 2) course delivery, and 3) course administration. Listed below are the specific functions HAR would like to ideally carry out.

<u>Course Development</u>	<u>Course Delivery</u>	<u>CE Administration</u>
<ul style="list-style-type: none"> • Certification of CE instructors • Development & approval of CE courses • Instructor and course monitoring. 	<ul style="list-style-type: none"> • Coordinate course scheduling and registration 	<ul style="list-style-type: none"> • Recordkeeping of course attendance • Issue CE certificates of completion

HAR, representing 5,546 members, believes the Real Estate Commission must maintain its regulatory role and responsibility to licensees. This includes determining if licensees comply with the required 10 credit hours, disciplinary hearings and sanctions, and administering the recovery fund.

Source: Letter from Bill Ramsey, Chair, Legislative Committee, Hawaii Association of Realtors, September 23, 1997.

Course Monitoring and Instructor Evaluation

One area of privatization that seems needed and is not being done on a consistent basis for the REC, is the evaluation of courses and instructors. This is a limited, discrete function that if conducted and managed well, would benefit the professionals by providing feedback to improve teaching methods. It would also give the CE program more credibility towards assuring professional competence, given the absence of examinations. This task is also less likely to raise conflict of interest issues because all instructors could be uniformly evaluated in their expertise and performance, and whether the course conformed with what was approved by the commission in terms of timeliness of subject, accuracy of the information, among other things.

Recordkeeping

The tasks which HAR lists under "CE administration, recordkeeping of course attendance and issuing certificates of completion" could constitute an area for privatization. This means that the REC would continue to approve CE courses and instructors, for example, but the paperwork involved in maintaining the 11,000 licensees' records of CE courses taken would be contracted out. In the REC's list of specifications for a Request for Proposal (see Exhibit 4-D), this task is described as "Provide REC with disc of all licensees who completed course, subject to Commission software, within two weeks of course completion, and within two days for courses completed during November and December of an even year." Many licensees try to meet their CE requirements as near the deadline as possible in the even-numbered year (the deadline is the end of the even-numbered year). Contracting out this task alone might help the REC in issuing license renewals in a timely manner.

Part II

Some Concerns About HAR as the Appropriate Organization

Conflict of Interest Issues

Like the REC, the private contractor should not itself teach any course as this would be a conflict of interest, given its duties to approve the courses, instructors, and schools. It would be inappropriate for the HAR to both approve or certify a course and also teach the course for CE. Presumably, it could teach courses for which no CE credit would be granted.

There is also the possibility of conflict if a non-HAR member applies for certification as an instructor (for example) and is denied while a member of HAR might have a similar application approved. The nonmember might (legitimately or not) raise a question whether lack of membership was a factor in denying certification. The member/non-member conflict of interest might be addressed by allowing an appeal after a denial to be made to the REC. Also, a committee on the HAR board might be created to develop the CE administrative standards to reduce charges of conflict of interest.

Current Costs are Already Low

Under the proposed privatization scenario, the difference in privatizing with HAR will be that the REC will be relieved of the administrative duties it currently performs for CE. When a private organization steps into the shoes of the REC to administer the CE program as is being suggested, the expectation is that the service response will be quicker, quality will be at least the same or of a

higher level, and courses shall be brought to the licensees at a lower or at the same cost, among other things.

There is no assurance that contracting out the administrative function of CE to a private party will result in lower real costs and measurable benefits, and produce positive outcomes sufficient to justify the privatization of the administration of CE for real estate professionals. However, there is no contrary evidence to indicate that benefits which cannot be quantified would not accrue to the CE program if by privatizing the administration of CE, learning is enhanced for the individual real estate broker because the instructor selection process is improved, and the REC is able to provide other services to the consumer that it was unable to provide while administering the CE program.

The Bureau found that the administration of the CE function (as limited in the manner described in this chapter) costs the State only a little more than \$27,000 annually which is paid for from part of the biennial \$40 real estate education fund fee from each licensee. That is, of the \$40 collected per licensee, only about \$3.00 (or \$1.50 per licensee per year), goes into the CE program.⁴ This \$27,000 represents the current cost to the REC to maintain the CE program and is admittedly conservative because certain kinds of costs cannot be separated out (a) from existing salaries where the staff member performs other overlapping services, or (b) from overhead costs, and existing equipment like computers and typewriters. Even if these overhead costs might be calculable, can a private organization, like the HAR, administer a CE program for about \$1.50 per licensee per year? When asked, the HAR could not provide any cost estimates to the Bureau on this question. In addition to the REC's estimated outlay of \$27,150, there are about \$5,000 collected per year in fees and deposited into the Professional and Vocational Licensing Division Fund (P&VLD). It is uncertain that P&VLD would give up these fees to a potential contractor. Further, the REC's state goal of redeploying instead of eliminating personnel, part of whose current duties involve CE, means that there will be no "savings" of \$27,000.

Part III

Privatizing CE in Hawaii

Hawaii is Similar to Other States

Cost alone should not determine the choice of privatizing administration of the CE function. Right now Hawaii is similar to nearly all other states in retaining control over the CE administration for real estate brokers and salespersons by approving applications for certification of CE providers, instructors and so on. States contacted by the Bureau reported that the government is usually reluctant to "lose control" over the evaluation of schools and providers. Practitioners in the professional organization of these states expressed concerns over conflicts of interest issues because the professional organization would be approving or disapproving certification of providers of CE.

⁴ The remaining \$38.50 or about \$731,240 (18,281 licensees) is used for other education projects and expenses (the amount budgeted for all education efforts for fiscal year 1996-1997 is \$717,347).

Privatized functions or services among the states are rare to non-existent, except in the area of examinations. The Bureau located one state which has privatized its entire CE administrative function for insurance agents in Wisconsin. Two distinct differences between Wisconsin's privatized program and that being proposed for the Hawaii Association of Realtors should be noted. First, a for-profit private testing company administers the CE function in Wisconsin, having been awarded the contract through an RFP process. Second, privatization was the only option available when mandatory CE was instituted for insurance agents because the insurance department did not have the staff to do this job at the time.

The existence of a privatized CE program for insurance agents in Wisconsin shows that if Hawaii's procurement code is allowed to operate as intended, the administration of CE for real estate brokers and salespersons can be privatized. The procurement code processes would determine whether or not CE administration for real estate professionals can be operated by a for-profit testing agency or by the industry's professional organization like the Hawaii Association of Realtors. The Legislature need not preassign this responsibility by designating a specific organization to do this job. The normal procurement process would assure competition and require the REC to examine whether it: (1) is willing to relinquish the duties of CE administration, (2) has a clear idea of the goals of the contract, (3) is aware of the degree of monitoring involved, (4) can seek out competing bidders, and (5) can operate without part of the moneys now being collected for the REEF. Finally, the procurement process would also require the Professional and Vocational Licensing Division to determine whether it can forego the application fees paid by CE providers, instructors, and courses which amounts to about \$10,000 so far this biennium (1997-1998) which would be paid to the private contractor.

The Procurement Code in Hawaii

The procurement code applies "...to every expenditure of public funds irrespective of their source by a governmental body...under any contract."⁵ There appears to be no reason to exempt the application of the procurement code in privatizing the administration of CE. If the administration of the CE function of the REC is privatized it will most likely fit the contracting out form which is a common form found in many states for providing services. The State's procurement code provides an established mechanism for instituting this function in the form of a request for proposals, although the sole source option may be another method if the department and the attorney general's office agree that certain conditions can be met to justify a sole source contract.

The Legislature said in 1993 that the purpose of the procurement code was to "promote economy, efficiency, and effectiveness in the procurement of goods and services for the State and counties" by among other things:

- (a) Simplifying the procurement law;

⁵Haw. Rev. Stat., §103D-102.

- (b) Ensuring fair and equitable treatment of all persons who deal with the procurement system;
- (c) Fostering broad-based competition;
- (d) Providing safeguards for quality and integrity; and
- (e) Increasing public confidence.⁶

To prevent the appearance of inequity and unfair advantage, the administration of the CE function should be required to meet the provisions of Chapter 103D, Hawaii Revised Statutes. It can do this through the request for proposal method or the sole source method.

Requests for Proposals. Referred to under the acronym "RFPs", competitive sealed proposals could be used for requesting proposals to administer the range of CE services.⁷ Under an RFP the interested offerors would have to be able to meet the specifications as listed by the government agency. These are the "guidelines for oversight by the REC to protect the public interest and assure the improvement of the licensee's competency and professional standards." (See item 7 in Act 289.) These specifications have been identified by the REC in Exhibit 4-D and describes the separate tasks ranging from registering CE schools, certifying instructors, scheduling courses, evaluating instructors, maintaining an 800 number and website, answering questions from licensees and others about CE, and submitting names of licensees who fail to meet CE requirements to the REC.

⁶Act 8, Special Session of Hawaii 1993, Section 1.

⁷Haw. Rev. Stat., §103D-303, provides as follows:

"§103D-303 Competitive sealed proposals. (a) Competitive sealed proposals may be utilized to procure goods, services, or construction designated in rules adopted by the procurement policy office as goods, services, or construction which are either not practicable or not advantageous to the State to procure by competitive sealed bidding. Competitive sealed proposals may also be utilized when the head of a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State.

(b) Proposals shall be solicited through a request for proposals.

(c) Notice of the request for proposals shall be given in the same manner as provided in section 103D-302(c).

(d) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared in accordance with rules adopted by the policy office and shall be open for public inspection after contract award.

(e) The request for proposals shall state the relative importance of price and other evaluation factors.

(f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No

Sole Source. The procurement code also contains a provision described as a sole source contract⁸ which is currently used in the contract with the Hawaii Real Estate Research and Education Center⁹ for the production of Instructor Development Workshops (IDW) and the materials for the Law and Ethics course. The use of a sole source provider is another possibility for CE services if certain conditions apply. The rules¹⁰ provide that to justify a sole source purchase, an agency must establish that:

- (a) The particular service has a unique feature;
- (b) The unique feature is essential for the agency to accomplish its work; and
- (c) The particular service having the unique feature is available from only one source.

A copy of the rule on sole source procurement can be found in Appendix B.

The next chapter presents the Bureau's findings and recommendations.

other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made." [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §§8, 9]

⁸Haw. Rev. Stat., §103D-306 provides as follows:

"§103D-306 Sole source procurement. (a) A contract may be awarded for goods, services, or construction without competition when the head of a purchasing agency determines in writing that there is only one source for the required good, service, or construction, the determination is reviewed and approved by the chief procurement officer, the written determination is posted in the manner described in rules adopted by the policy board, and no objection is outstanding. The written determination, any objection, and a written summary of the disposition of any objection shall be included in the contract file.

(b) The written determination shall contain such information as the rules of the policy board require. Persons may file written objections to the issuance of a contract pursuant to this section. Rules of the policy board shall provide for the disposition of objections, including a written summary of the disposition.

(c) The rules of the policy office shall include a non-exhaustive list of procurements which constitute sole source procurements and criteria for determining when a particular procurement may be determined to be a sole source. The rules shall also prescribe when cost or pricing data must be considered and how they are to be used in establishing the price, terms, and conditions, if any, for a contract awarded pursuant to this section." [L Sp 1993, c 8, pt of §2; am L 1995, c 178, §12]

⁹Telephone interview, Dawn Kubota, Exam branch supervisor, Professional and Vocational Licensing Div., DCCA.

¹⁰Hawaii Administrative Rules, §3-122-81 (Subchapter 9, Sole Source procurement, Conditions for use).

Chapter 6

FINDINGS AND RECOMMENDATIONS

Act 289, Session Laws of Hawaii 1997, directed the Legislative Reference Bureau to determine the feasibility of allowing a private organization to administer the continuing education (CE) program for real estate brokers and salespersons. Specifically, Act 289 asked for an examination of the following issues:

- (1) An evaluation of the existing continuing education program and laws that affect the license renewal of all real estate brokers and real estate salespersons.
- (2) An analysis to determine whether the provision and delivery of continuing education programs by private organizations, such as the Hawaii Association of REALTORS, is more cost-efficient and effective in protecting the public.
- (3) An evaluation of the educational quality and the availability of a sufficient diversity of courses of varying difficulty if the continuing education program is privatized.
- (4) Identifying any public policy issues involved (in the privatization of real estate education programs).
- (5) Determining the most appropriate organization, such as the Hawaii Association of REALTORS, to oversee and conduct the continuing education program.
- (6) A survey of comparable continuing education programs and experiences in other states.
- (7) Recommended guidelines for the oversight of the continuing education program to protect the public interest and assure the improvement of the licensee's competency and professional standards.

Findings

Privatization can produce both positive benefits and negative costs. While in most cases it is hoped that costs to government will decrease by privatizing a service or product, privatization should not be viewed as a panacea for every perceived problem experienced by the consumer or other user. In the specific case examined for this report, some of the perceived problems sought to be solved through the privatization of the administration of CE for real estate brokers and salespersons include:

- The amount of time needed to get courses approved by the REC is thought excessive;

- There is not enough variety of courses especially for the more experienced realtors or for those real estate professionals who work in non-residential sales;
- There is incorrect information being taught to licensees in some instances; and
- Courses could be more interesting or more relevant to the student's needs or more practical and less theoretical by certifying instructors with proven track records.

In addition to surmounting these perceived problems, proponents of privatization apparently believed that the Hawaii Association of REALTORS (HAR), a professional organization, was the best equipped to administer the CE function because it knows its membership and their CE needs, and because the HAR has had experience in delivering quality CE courses to its members. Proponents also appear to believe that all of the moneys available in the Real Estate Education Fund (REEF) and the fees collected from applicants who provide CE services would be available to the private contractor.

The facts are somewhat different. Not all of the moneys collected from licensees for the REEF is applied to the narrow area of CE. The REC estimated about \$27,150 is spent on continuing education administration mainly in the form of salaries for part of two positions and about \$5,000 is collected annually from applicants providing CE which currently goes to the Professional and Vocational Licensing Division. (The \$5,000 represents an annualized amount based on the \$10,000 collected so far in the 1997-1998 biennium.)

There is a question whether savings would occur if the administration of CE is privatized. First with regard to the \$27,150 cost to administer the CE program, if the REC does not cut back its budget by this amount, then there can be no "savings". The REC would continue to expend at least \$27,000, unless positions are eliminated. If privatized, the CE function could cost at least that much again for the State to hire a private contractor. The REC has stated that because the current staff who perform the CE functions also perform other tasks, there are no plans to eliminate positions or to reduce salaries. Therefore, if the Legislature decides to privatize the administration of the CE function, then only an affirmative act to reduce the REC budget or eliminate staff positions in the REC would result in budget savings to offset the cost of the contract for administering CE functions. If this is not done, costs could actually increase by the amount of the contract. When asked if the REC would raise licensee fees to make up for lost revenue, the REC reported that they would be very reluctant to raise fees. If fees must be raised, then it would be only to retain positions and not to curtail programs. In other words, services like those performed by the University of Hawaii's Real Estate Research and Education Center might be the first affected.¹ As to the \$5,000 in application fees, the first question is whether the P&VLD would be willing to forgo that "income". Despite the small amount, if this money is being used for regulatory functions, including conducting investigations of complaints about real estate brokers or salespersons, little savings can be expected because costs will continue to be incurred to perform these investigations and other disciplinary activities.

¹Telephone interview, Calvin Kimura, Supervising Executive Officer, Real Estate Commission, November 24, 1997.

The Bureau's Conclusions:

1. The Bureau has evaluated the existing continuing education program and laws and has determined that the continuing education program for real estate brokers and salespersons correctly follows the rules and laws established for this group of professionals. The Real Estate Commission (REC) sets policy and the staff oversees the continuing education program.

2. The Bureau is of the opinion that it is feasible for a private organization to administer certain specified portions of the CE program. At least one group, the Hawaii Association of REALTORS (HAR) is interested in performing this function, even while acknowledging that it does not know how much it would need to cover the cost of the project. The HAR believes that given its past and current experience in providing instructors and courses to licensees, it can administer the CE program as defined. The HAR already has computer equipment that might reduce some of its start-up costs. There may be some national testing firms willing to tailor a contract to fit the needs of REC as was described earlier for the insurance agents in Wisconsin.

The components of a CE program include: registration of CE schools, certification of CE instructors and courses, monitoring instructors, scheduling courses, registering students for class, keeping records of attendees, issuing CE completion certificates, answering questions from licensees about various aspects of CE, and submitting to the REC names of licensees who have complied with requirements that entitle them to license renewal. Overall responsibility for the CE program, however, should remain with the REC.

The REC has several ideas of how it would deploy its staff to improve services and response time if the CE function were privatized. The REC could use these personnel to speed up responses to letters, phone calls, and walk-ins, and help more licensees and consumers who need information from the REC.

If implemented in 1998, the REC would have perhaps a little less than one year to prepare a Request for Proposals (RFP). A private organization could begin to fulfill the terms of the contract for the two-year biennium, 1999-2000.

3. The Bureau has reviewed the question whether a private organization administering the CE program is more cost-efficient. The Bureau has determined that current costs as identified by the REC is approximately \$27,150 per year which comes from the assets in the Real Estate Education Fund. In addition, the amount of fees collected and deposited to the Professional and Vocational Licensing Division (not to the REC) amount to about \$5,000 per year. These fees accompany applications for CE certification or registration by providers, instructors, and schools. Together, there may be about \$32,000 per year to be spent on CE administration. However, this figure may be conservative because the actual cost including hidden costs are unknown. No private organization was willing or able to provide any cost figures, much less contrary ones, for the Bureau.

Even if a conservative figure, the present cost of administering the CE program is small, with estimated expenditures of only \$27,150 annually and revenues about \$5,000. The REC admits no personnel savings will result because these positions will not be eliminated even if this function is privatized. (Of course, the Legislature could choose to reduce the REC budget by the amount of the

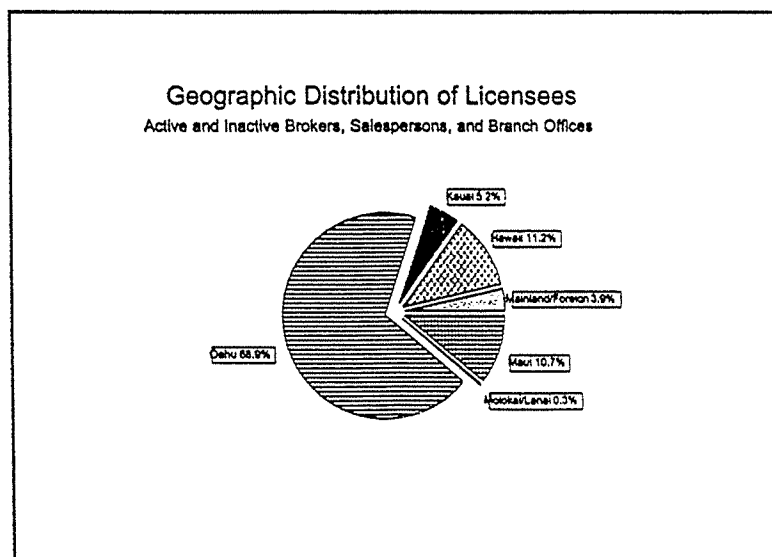
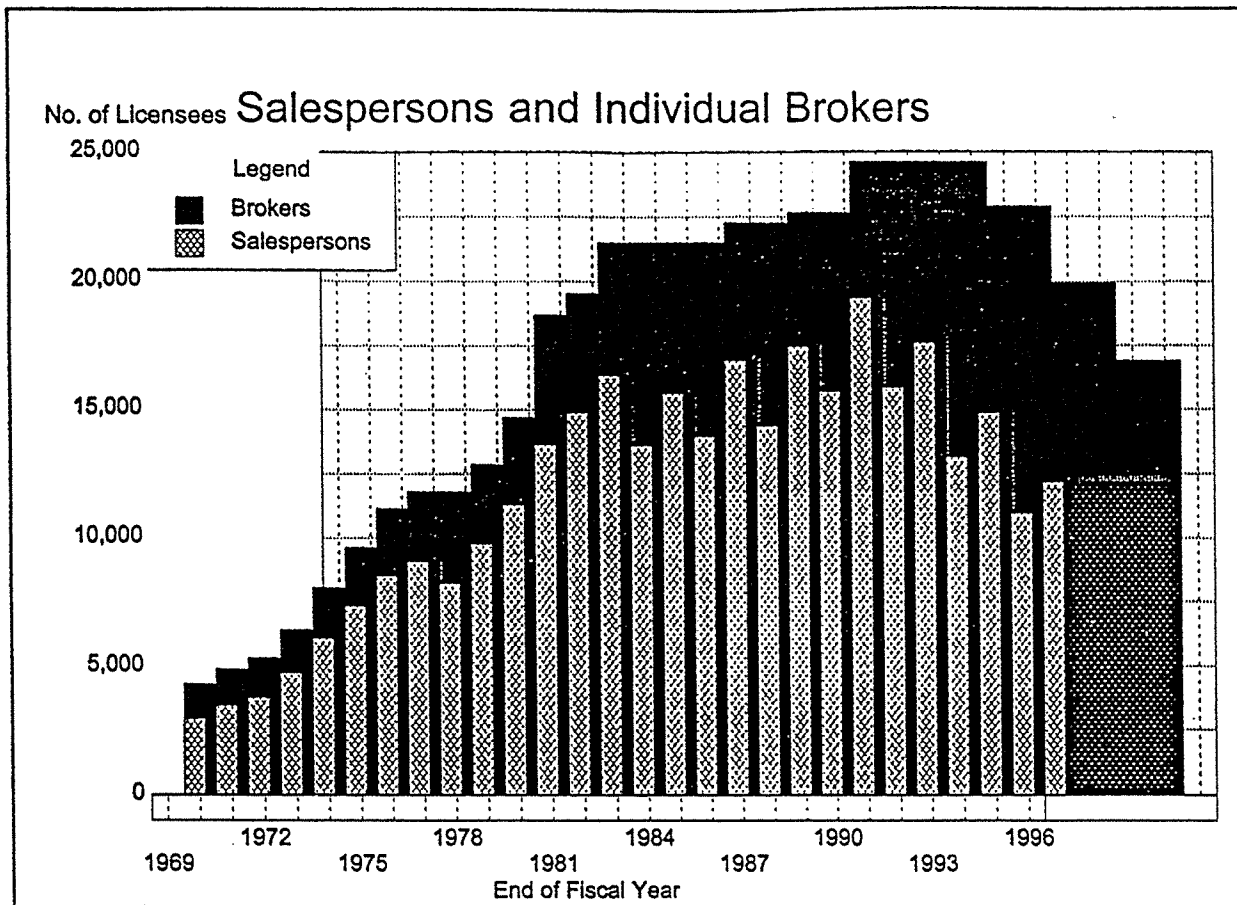
contract.) The point is, if much more than \$27,150 is expended and deep inroads are made into the \$40 REEF fee which is collected every two years, then staff positions which are now being paid for from the REEF could be lost. Also, even assuming that the application fees of \$5,000 is foregone by the Professional and Vocational Licensing Division, there may be other impacts if the \$5,000 is needed for investigation of complaints, hearings, and other related matters. Another factor that should be considered is that the number of licensees has been dropping steadily since 1991, from a high of nearly 25,000 to the current level of 11,000. See Exhibit 6-A (No. of Licensees) for a picture of the developing trend in number of licensees since the 1970s. Therefore, there is no assurance that the number of dollars to be collected for the REEF will continue at the current level or increase in the future.

4. The Bureau has considered the question whether privatization will result in better educational quality of the CE program. The Bureau is of the opinion that educational quality is affected by many factors including instructor's experience in the field, student motivation and interest, and other factors. Privatization in and of itself will not guarantee higher educational quality. Educational quality is best assured through effective course evaluations and monitoring of instructors in the classroom. These are goals which can be specified in a request for proposals at the time a contract is being offered by the State if the administration of CE is privatized. In this way, the private contractor can be held to certain educational standards.

5. The Bureau has considered the question whether privatization will result in a greater availability of diversity of courses in the CE program. In the course of its many interviews, the Bureau found that part of the dissatisfaction with the CE program is the belief among real estate brokers and salespersons that there were not enough courses for more experienced professionals and not enough variety to satisfy those professionals who handled non-residential sales. These factors are a result of the variety of areas in which real estate brokers and salespersons operate, ranging from managing shopping centers to serving as rental agents. The Bureau is of the opinion that privatization of the administration of CE does not on its own necessarily result in greater availability of diversity of courses, because this issue is market driven. Only 3-1/3 hours of CE credit are mandatory for law and ethics issues. The remaining 6-2/3 hours encompass the elective courses in which the "diversity of courses" are available. Even if privatized, there is no guarantee that a wider variety of courses will be available, if there are not enough licensees interested in the areas in which fewer professionals practice.

6. The Bureau has reviewed the question whether the Hawaii Association of REALTORS is the most appropriate organization to oversee the CE program. The Bureau believes that while the HAR is the only professional private organization in Hawaii that expressed interest in administering the CE program, there may be several conflict of interest issues that must be addressed if the HAR is named as the contractor without engaging in the exercise already available in the state procurement code. Furthermore, if the procurement code were allowed to operate as provided by law, the REC might discover several private, for-profit testing companies which may be able to provide the same kind of service at competitive rates. For example, the Bureau described the services provided to the Wisconsin Department of Insurance by Assessment Systems, Inc. that is similar in scope to the CE program proposed herein, except that it is for the area of insurance, not real estate.

Exhibit 6-A



Source: 1996 Annual Report, Hawaii Real Estate Commission.

The REC has not expressed any opposition to relinquishing the administration of the CE function to a private body and accepts the risk that if the contractor fails to perform adequately the REC might be required to step in immediately to re-assume the responsibility of administering the CE function. A transition of this kind is likely to cause some disruption of services to licensees even if the cost of having the REC fill in is unknown at this time. It appears that no other professional organization except the Hawaii Association of REALTORS is willing to be a contractor for administering CE although private for-profit organizations might be interested depending on the specifications developed for the RFP. Because lack of competition could lead to increased costs, it is best to allow the State's procurement process to be used to the fullest extent allowed by law.

7. The Bureau has surveyed comparable CE programs for real estate professionals in other states, and found that Hawaii's program is similar in many respects to those of other states. Hawaii, like other states, has a Real Estate Commission which determines how many credit hours are necessary for license renewal. The REC here and elsewhere also determines whether there are required courses and electives, and in what proportion, in order to assure adequate coverage in topics that may be critical for consumer protection. (Hence, in Hawaii, law and ethics is a required course.) Hawaii also follows the typical state process of certifying instructors, registering schools that provide CE courses, and so on. As of the date of this report, there is no state that has privatized the administration of its CE program for real estate professionals. If Hawaii were to do so, it will be embarking on largely uncharted waters.

8. The Bureau makes this final observation regarding the conduct of the CE. The administration of CE programs for real estate professionals clearly can be privatized. This is a policy decision. The Bureau does not believe it appropriate, however, that a policy study such as this be used as a vehicle to determine which organization is the most appropriate to oversee and conduct the CE program, and to protect the public interest. If the administration of CE for real estate professionals is to be privatized, the Bureau recommends that selections be made through the State's procurement process as established in its procurement code which was created to address just this type of situation.

Recommendation

Based on the foregoing findings, the Bureau can recommend two alternative courses of action to the Legislature. These two courses involve choosing either to privatize, or not to privatize.

If the Administration of CE for Real Estate Professionals is Privatized:

If the Legislature desires to privatize the administration of the CE function for real estate brokers and salespersons, the procurement code should be relied upon in order to produce the fairest examination of the contractors' proposals. Specifications would be developed by the Real Estate Commission to assure quality of courses, availability of courses, reasonable cost of courses, monitoring of instructors, and so on.

If the Administration of CE for Real Estate Professionals is Not Privatized:

On the other hand, if the Legislature determines that privatization of the administration of the CE function is not needed at this time, the Real Estate Commission should be directed to examine ways to improve its CE function to address the perception that there are intractable problems in the way the current administration of the CE program is being handled. Improvements could include shortening the time for approval of a CE course, developing a method for monitoring or evaluating the instructors, and so on. The Bureau suggests that to this end the REC consider the use of a consultant or an advisory panel of real estate experts to advise the REC on how to alleviate the complaints described in Chapter 3. An amendment to the law to create an advisory board is possible, but it would be quicker to simply ask for assistance from the HAR, HARES, and other organizations whose members are genuinely interested in improving the profession and, more likely than not, would be willing to help. It is possible that instead of privatization, the REC's handling of the CE program can be improved with more and better communication and at less cost and disruption to licensees and others.

The Bureau concludes that privatization of the administration of the CE function for real estate brokers and salespersons can be accomplished. The Bureau recommends that any CE administration contractor be selected through the procurement code, which should be allowed to operate as it was intended. All qualified entities can then make their respective proposals as the REC's specifications require. The REC would be required to carefully identify its requirements and the HAR would be required to compete as any other prospective contractor. This is the method most likely to produce the most cost effective selection, with appropriate oversight from government.

Appendix A

ACT 289

THE SENATE
NINETEENTH LEGISLATURE, 1997
STATE OF HAWAII

S.B. NO. 1114
S.D. 1
H.D. 1
C.D. 1

A BILL FOR AN ACT

RELATING TO REAL ESTATE BROKERS AND SALESPERSONS.

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

- 1 SECTION 1. The purpose of this Act is to:
- 2 (1) Add a definition of "continuing education" for real
- 3 estate brokers and salespersons;
- 4 (2) Remove the waivers from continuing education
- 5 requirements for license renewal;
- 6 (3) Eliminate the authority of the real estate commission
- 7 to provide continuing education activities effective
- 8 July 1, 1998, at which time a private organization may
- 9 be allowed to administer the continuing education
- 10 program; and
- 11 (4) Require the legislative reference bureau to conduct a
- 12 study, including developing appropriate legislation to
- 13 propose to the legislature, on the privatization of the
- 14 continuing education program for real estate licenses.
- 15 This Act retains the authority of the real estate commission
- 16 to establish educational requirements for licensure of real
- 17 estate brokers and salespersons.

1 SECTION 2. Section 467-1, Hawaii Revised Statutes, is
2 amended by adding a new definition to be appropriately inserted
3 and to read as follows:

4 "Continuing education" means a course:

5 (1) With a curriculum level above the current minimal
6 competency entry level in any of the following areas:

7 (A) Protection of the general public in its real
8 estate transactions;

9 (B) Consumer protection; or

10 (C) Improvement of the licensee's competency and
11 professional standards and practice; and

12 (2) That is:

13 (A) Approved by the commission and delivered by an
14 approved continuing education instructor;

15 (B) A national course taught by a nationally certified
16 instructor certified by the National Association
17 of REALTORS or its affiliates; or

18 (C) A national course taught by a nationally certified
19 instructor certified by, including but not limited
20 to, the Building Owners and Managers Association,
21 the Community Associations Institute, or other
22 national organization approved by the commission;

1 provided that the continuing education course is offered by an
2 approved continuing education provider. Continuing education
3 courses shall not require an examination."

4 SECTION 3. Section 467-11.5, Hawaii Revised Statutes, is
5 amended by amending subsections (a) and (b) to read as follows:

6 "(a) Prior to the license renewal of a real estate broker
7 or real estate salesperson, the licensee shall provide the
8 commission with proof of having attended ten hours of continuing
9 education or its equivalent as determined by the commission
10 during the two-year period preceding the application for renewal.
11 [Upon individual application and payment of the proper fee, the
12 commission shall waive this requirement for the following
13 reasons:

14 (1) The licensee has, for twenty or more years,:

15 (A) Held a continuously active Hawaii real estate
16 broker's or real estate salesperson's license; and

17 (B) Been employed full-time as a real estate broker or
18 real estate salesperson;

19 including during the three consecutive licensing
20 bienniums immediately preceding the application for
21 renewal;

22 (2) The licensee, as a trustee of a Hawaii charitable
23 trust, has been involved in real estate as a full-time

1 occupation for the past licensing biennium preceding
2 the application for renewal;

3 (3) The licensee, as an active Hawaii licensed attorney or
4 an active Hawaii licensed accountant, has been involved
5 in real estate as a full-time occupation for the past
6 licensing biennium preceding the application for
7 renewal; or

8 (4) The licensee, as a participant in Hawaii public
9 service, has been involved in real estate or real
10 estate laws for the past four consecutive licensing
11 bienniums immediately preceding the application for
12 renewal; provided that a licensee appointed to the
13 commission is excluded.]

14 Failure to satisfy the continuing education requirement by the
15 license expiration date shall result in the license being
16 automatically placed on an "inactive" status.

17 (b) To reactivate a license which has been placed on an
18 "inactive" status, the licensee shall submit to the commission
19 proof of having satisfied the continuing education requirement of
20 this section, a complete application setting forth [such] the
21 information as may be prescribed or required by the commission,
22 and payment of the proper fee. [Continuing education courses, as
23 approved by the commission, may include but are not limited to:

- 1 (1) Protection of the general public in its real estate
- 2 transactions;
- 3 (2) Consumer protection;
- 4 (3) Improvement of the licensee's competency and
- 5 professional standards and practice; and
- 6 (4) A curriculum level above the current minimal competency
- 7 entry level.] "

8 SECTION 4. (a) The legislative reference bureau shall

9 conduct a comprehensive study of the continuing education program

10 for real estate licenses, including the feasibility of allowing a

11 private organization to administer the program.

12 The study shall include but not be limited to:

- 13 (1) An evaluation of the existing continuing education
- 14 program and laws that affect the license renewal of all
- 15 real estate brokers and real estate salespersons;
- 16 (2) An analysis to determine whether the provision and
- 17 delivery of continuing education programs by private
- 18 organizations, such as the Hawaii Association of
- 19 REALTORS, is more cost efficient and effective in
- 20 protecting the public;
- 21 (3) An evaluation of the educational quality and the
- 22 availability of a sufficient diversity of courses of

1 varying difficulty if the continuing education program
2 is privatized;

3 (4) Identifying any public policy issues involved;

4 (5) Determining the most appropriate organization, such as
5 the Hawaii Association of REALTORS, to oversee and
6 conduct the continuing education program;

7 (6) A survey of comparable continuing education programs
8 and experiences in other states;

9 (7) Recommended guidelines for the oversight of the
10 continuing education program to protect the public
11 interest and assure the improvement of the licensee's
12 competency and professional standards; and

13 (8) Any other issue that may surface during the evaluation
14 and study.

15 (b) The following parties shall cooperate with the
16 legislative reference bureau in conducting this study:

17 (1) The real estate commission;

18 (2) The Hawaii Real Estate Research and Education Center;

19 (3) The Hawaii Association of REALTORS;

20 (4) The Hawaii Association of Real Estate Schools;

21 (5) The Building Owners and Managers Association;

22 (6) The Community Associations Institute; and

23 (7) The University of Hawaii.

1 (c) The legislative reference bureau shall submit a report
2 with its findings and recommendations, including proposed
3 legislation to privatize, to the legislature no later than twenty
4 days prior to the convening of the regular session of 1998.

5 SECTION 5. Statutory material to be repealed is bracketed.
6 New statutory material is underscored.

7 SECTION 6. This Act shall take effect upon its approval;
8 provided that the amendments to section 467-11.5(b), Hawaii
9 Revised Statutes, of section 3 of this Act shall take effect on
10 July 1, 1998.

APPROVED BY THE
GOVERNOR ON

JUN 21 1997

Appendix B

SUBCHAPTER 3

SPECIFICATIONS

§3-122-10 Purpose. A specification is the basis for procuring a good, service, or construction item adequate and suitable for the State's needs in a cost effective manner. Purchasing agencies shall seek to procure standard commercial products, if practicable, and obtain the most advantageous prices. All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State's needs. In developing specifications, unique requirements should be avoided. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-405)

§3-122-11 Authority to prepare specifications.

(a) The chief procurement officer, with the assistance of the using agency, shall prepare and approve specifications, and may delegate, in writing, to purchasing or using agencies the authority to prepare and use its own specifications, provided the delegation may be revoked by the chief procurement officer.

(1) The written delegation shall include a determination made by the chief procurement officer that there will be no substantial conflict of interest involved and it is otherwise in the best interest of the State.

(2) Using agencies delegated the authority to prepare specifications may use any of the specifications defined herein.

(b) If a specification for general or common use item or a qualified products list exists for an item to be procured under subchapter 8, for small purchases, it shall be used. If no specification exists, purchasing agencies are hereby granted the authority to prepare specifications for use in such purchases.

(c) In an emergency under subchapter 10, any necessary specifications may be utilized by the purchasing agency without regard to the provisions of

this subchapter. [Eff DEC 1 5 1995] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-402)

§3-122-12 Duties of the administrator. (a) The administrator of the state procurement office shall serve as the central procurement officer to coordinate, guide, and distribute specifications used by purchasing agencies, including specifications on recycled products. This effort will allow for the use of standard specifications by purchasing agencies on purchases for common or general use items or standard commercial products.

(b) The administrator of the state procurement office shall review and establish purchase specifications to guide state and county purchasing agencies in the procurement of recycled products.

(1) The specifications shall:

- (A) Be consistent with applicable current federal specification standards on recycled products incorporated in Presidential Executive Orders No. 12873, dated October 20, 1993, and any subsequent amendments to that order;
- (B) Include minimum standards of recovered material and postconsumer content; and
- (C) Ensure, to the maximum extent economically feasible, the purchase of materials which may be recycled or reused when discarded and avoid the purchase of products deemed environmentally harmful.

(2) The administrator shall periodically review its specifications to determine whether discrimination against procured goods with recycled content exists and shall revise these specifications to eliminate any discrimination.

(3) Purchase specifications shall include, but not be limited to, office paper, printed material, paper products, paper, glass-by-products, plastic products, mulch and soil amendments, tires, batteries, oil, paving materials and base, subbase, and pervious backfill materials. Paving materials to be considered shall include, but are not limited to, asphalt, tires, crushed concrete for base, subbase, and paving

materials. The standards and specifications shall provide for the use of recycled materials and shall not reduce the quality standards for any product or construction. [Eff DEC 1 5 1995] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §103D-401)

§3-122-13 Development of specifications. (a) A specification should provide for the following:

- (1) Identify minimum requirements;
- (2) Allow for a competitive bid;
- (3) List reproducible test methods to be used in testing for compliance with specifications; and
- (4) Provide for an equitable award at the lowest possible cost.

(b) Types of specifications include the following, and may be used in combination when developing the specification:

- (1) Design specification sets the requirements for the product, detailing the characteristics that the item must possess, how the item is to be manufactured;
 - (2) Performance specifications describes the capabilities that the product must meet, use of test or criteria are developed to measure the item's ability to perform as required;
 - (3) Brand name specification commonly referred to as restrictive specifications, may be used upon approval of the chief procurement officer after the purchasing agency makes a written determination that only the identified brand name item will satisfy the state's needs, and it is not practicable to use a less restrictive specification;
 - (4) Brand name or equal specification cites one or more brand names, model numbers, or other designations that identify the specific products as having the characteristics of the item desired; and
 - (5) Qualified or pre-approved products list is a list of goods, services, or construction items, which, prior to the opening of the competitive solicitation, are examined, tested, and determined to meet the applicable specification requirements.
- (c) To the extent practicable, the State may

procure standard commercial products using accepted commercial specifications. Specifications shall emphasize functional or performance criteria which do not discriminate against the use of recycled materials.

(d) The using agency shall submit advice and assistance in the development of specifications or plans pursuant to a request from the purchasing officer.

(e) A contractor or consultant paid for services to develop or prepare specifications or work statements shall be precluded from submitting an offer or receiving a contract for that particular solicitation.

(f) Specifications prepared by architects, engineers, consultants and others for public contracts, shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs and shall not be unduly restrictive.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-401)
(Imp: HRS §§103D-401, 103D-404, 103D-405, 103D-406)

§3-122-14 Exempted items. Purchasing agencies are granted the authority to prepare specifications for goods, services, and construction procured under sections 103D-102 and 103D-304, HRS.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-403)
(Imp: HRS §§103D-102, 103D-304, 103D-403)

§3-122-15 (Reserved).

SUBCHAPTER 5

COMPETITIVE SEALED BIDDING

§3-122-17 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed bidding method of source selection. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-18 Applicability. These rules shall apply to every procurement made by competitive sealed bidding pursuant to chapter 103D, HRS, including single and multi-step sealed bidding. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-19 Dollar thresholds for competitive sealed bids. Expenditures \$10,000 or more for goods and services, or \$25,000 or more for construction shall be made pursuant to this subchapter, except as provided in subchapters 6, 7, 9, and 10. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-20 Conditions for use. (a) Unless otherwise authorized by law, contracts shall be awarded by competitive sealed bidding, except as provided in subchapters 6, 7, 8, 9, and 10.

(b) The competitive sealed bidding method shall not include negotiations with bidders after the receipt and opening of bids. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §§103D-301, 103D-302)

§3-122-21 Preparing a competitive sealed bid. (a) The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include:

- (1) Instructions and information to bidders concerning the bid submission requirements, including:
 - (A) The time and date set for receipt of

- bids;
 - (B) The address of the office to which bids are to be delivered;
 - (C) The maximum time for bid acceptance by the procurement officer issuing the bid; and
 - (D) Any other special information, such as any requirement of intention to bid.
- The time, date, and location of the receipt of bids and the bid opening shall be the same.
- (2) The purchase description, specifications, evaluation factors, delivery or performance schedule, and inspection and acceptance requirements as are not included in the purchase description.
 - (3) The contract terms and conditions, including but not limited to the following, as applicable:
 - (A) Warranty requirement;
 - (B) Bonding or other security requirements pursuant to subchapter 24;
 - (C) Contract extension provisions; and
 - (D) Statement that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the invitation for bids.
 - (4) A bid form which shall include space for the following, but not limited to the following, and which the bidder shall sign and submit along with all other necessary submissions:
 - (A) Bid price;
 - (B) Brand name and model number and packaging for goods; and
 - (C) Information on applicable preferences.
 - (5) Invitation for bids for construction, shall require that the bidder include:
 - (A) The name of each person or firm to be engaged by the bidder as a joint venture, partner or subcontractor in the performance of the contract; and
 - (B) The nature and scope of the work to be

- performed by each.
- (6) Construction bids that do not comply with the requirements in paragraph (5) may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one percent of the total bid amount.
 - (7) Documents by reference may be incorporated provided that the invitation for bids specifies where the documents can be obtained.
- (b) The invitation for bids may require the acknowledgment of the receipt of all amendments issued. Any amendment issued shall be in the form of an addendum. [Eff DEC 1 5 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-302)

§3-122-22 Multi-step sealed bidding. (a)
Multi-step sealed bidding is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtaining the benefits of the competitive sealed proposals procedure through the solicitation of unpriced technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

- (b) Multi-step sealed bidding is a two-phase process consisting of:
- (1) A technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the State based on criteria set forth in the first phase of the invitation for bids; and
 - (2) A second phase in which those bidders whose unpriced technical offers are determined to be acceptable based on criteria set forth in the first phase have their priced bids considered and award of a contract is made to the lowest responsive, responsible bidder.
- (c) The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price and it is desirable:
- (1) To invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirement;

- (2) To conduct discussions for the purposes of facilitating understanding of the unpriced technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
 - (3) To accomplish subparagraphs (1) and (2) prior to soliciting priced bids; and
 - (4) To award the contract to the lowest responsive, responsible bidder in accordance with the competitive sealed bidding procedures.
- (d) A pre-bid conference as contemplated by section 3-122-26 may be conducted by the procurement officer.
- (e) Phase one of multi-step sealed bidding shall be initiated by the issuance of an invitation for bids in the form required by section 3-122-21, except as hereinafter provided, and shall, in addition to the requirements set forth in section 3-122-21, state:
- (1) That unpriced technical offers are requested;
 - (2) Whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, the priced bids shall be submitted in a separately sealed envelope;
 - (3) That it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;
 - (4) That the State, to the extent the procurement officer finds necessary, may conduct oral or written discussions of the unpriced technical offers;
 - (5) That bidders may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data which are to remain confidential; and
 - (6) That the item being procured shall be furnished generally in accordance with the bidder's unpriced technical offer as found to be finally acceptable and shall meet the requirements of the invitation for bids.
- (f) Addenda to the invitation for bids may, after receipt of unpriced technical offers, be issued and distributed only to bidders who submitted unpriced

technical offers.

- (1) Those bidders may respond to the amendments in the form of new unpriced technical offers or amendments to the offers submitted.
- (2) If, in the opinion of the procurement officer, a contemplated addendum will significantly change the nature of the procurement, the invitation for bids shall be cancelled in accordance with subchapter 11, and a new invitation for bids issued.
- (g) The unpriced technical offers shall:
 - (1) Not be opened publicly but shall be opened in front of two or more procurement officials;
 - (2) Be subject to nondisclosure of trade secrets and other proprietary data to unauthorized persons, as requested by bidders, in writing.
- (h) The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the invitation for bids. The unpriced technical offers shall be categorized as:
 - (1) Acceptable;
 - (2) Potentially acceptable, that is, reasonably susceptible of being made acceptable; or
 - (3) Unacceptable. The procurement officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.
- (i) The procurement officer may initiate phase two of the procedure if, in the procurement officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the procurement officer finds that this is not the case, the procurement officer shall issue an amendment to the invitation for bids or engage in technical discussions set forth in subsection (k).
- (j) The procurement officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable unpriced technical offer, subject to the following rules:
 - (1) During the course of the discussions the procurement officer shall not disclose any information derived from one unpriced technical offer to any other bidder.
 - (2) Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its

technical offer at any time until the closing date established by the procurement officer.

The submission may be made:

(A) At the request of the procurement officer, or

(B) Upon the bidder's own initiative.

(k) Upon completion of phase one, the procurement officer shall either:

(1) Open priced bids submitted in phase one, if priced bids were required to be submitted, from bidders whose unpriced technical offers were found to be acceptable; or

(2) If priced bids have not been submitted, technical discussions have been held, or amendments to the invitation for bids have been issued, invite each acceptable bidder to submit a priced bid.

(l) Phase two shall be conducted as any other competitive sealed bid procurement except as specifically set forth in this subsection:

(1) No public notice need be given to phase two, submission of priced bids, because the notice was previously given;

(2) After the contract is signed by all parties, the unpriced technical offers of all bidders shall be open for public inspection and disclosed as follows:

(A) The procurement officer shall examine written request of confidentiality for trade secrets and proprietary data in the technical offer of the bidder to determine the validity of the requests.

(B) If the parties do not agree as to the disclosure of data, the procurement officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that, unless the bidder protests under chapter 3-126, the offer will be so disclosed.

(C) If the parties agree to the disclosure, the unpriced technical offers shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data; and

(m) Mistakes may be corrected or bids may be withdrawn at any time during phase one, provided, during phase two, mistakes may be corrected or

withdrawal permitted only in accordance with sections 3-122-28 and 3-122-31. [Eff DEC 1 5 1995] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-23 Bidding time. (a) A minimum of ten calendar days shall be provided between date of the last legal advertisement of the solicitation and the time and date set for receipt of bids.

(b) Bidders shall have a reasonable time to prepare their bids. [Eff DEC 1 5 1995] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-24 Public notice. (a) Public notice of the solicitation shall be made for the purpose of securing competition.

(b) The public notice of the solicitation shall include the following information:

- (1) A brief description of the good, service, or construction desired;
- (2) Where and when the solicitation will be available;
- (3) How long the solicitation will be available, i.e., the deadline for the responses to the solicitation;
- (4) Other appropriate information, as the payment of a fee or a deposit to receive solicitation and related documents; and
- (5) For a multi-step sealed bid, a description of each step to be used in soliciting, evaluating, and selecting unpriced bids.

(c) The public notice of availability of the solicitation shall be publicized as follows:

- (1) At a minimum, a one-time legal advertisement published either in a newspaper of general circulation within the State or in a newspaper of local circulation in the county, if available, pertinent to the procurement;
- (2) Optionally, and in addition to (1) above, the following may be utilized:
 - (A) Notice by mail to persons on any applicable bidders mailing list, if any;
 - (B) Publication by any public or private telecommunication information network; or
 - (C) Any other method of publication the procurement officer deems effective.

(d) A copy of the solicitation shall be made available for public inspection at the office of the procurement officer issuing the solicitation.
[Eff DEC 1 5 1995] (Auth: HRS §§103D-202, 103D-302)
(Imp: HRS §103D-302)

§3-122-25 Bidders lists. (a) Bidders lists may be compiled to provide the procurement officer with the names of businesses that may be interested in competing for various types of contracts.

(b) Unless otherwise provided, inclusion of the name of a business is discretionary and does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a contract; nor does it guarantee notification of each solicitation.

(c) Businesses that fail to respond to invitations for bids or notices of availability may be removed from the applicable bidders list.

(d) Names and addresses on bidders lists shall be available for public inspection. [Eff DEC 1 5 1995]
(Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-26 Pre-bid conferences. Pre-bid conferences may be conducted to explain the procurement requirements.

- (1) Pre-bid conferences shall be announced to all prospective bidders in the solicitation or if decision to hold a pre-bid conference is made after the issuance of the solicitation, the conference shall be announced in an addendum.
- (2) The conference should be held long enough after the solicitation has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids.
- (3) Nothing stated at the pre-bid conference shall change the solicitation unless a change is made by written addendum as provided in section 3-122-27.
- (4) A summary of the conference shall be supplied to all those prospective bidders known to have received a solicitation, in addition to any addendum issued as a result of the

conference. [Eff DEC 1 5 1995] (Auth:
HRS §103D-202) (Imp: HRS §103D-302)

§3-122-27 Amendments to invitations for bids.

(a) Amendments to invitations for bids shall be identified as addenda and shall reference the portions of the invitation for bids it amends and detail the amendments.

(b) Addenda may be used to:

- (1) Make any changes in the invitation for bids as in quantity, purchase descriptions, delivery schedules, and opening dates;
- (2) Correct defects or ambiguities;
- (3) Furnish to other bidders information given to one bidder if the information will assist the other bidders in submitting bids or if the lack of the information would prejudice the other bidders; and
- (4) Provide any other information or clarification to the invitation for bids that will result in fair competition.

(c) Addenda may require that bidder acknowledge receipt of the addendum issued.

(d) Addenda shall be issued to all prospective bidders known to have received an invitation for bids.

(e) Addenda shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids; however, if the time and date set for receipt of bids will not permit adequate time for preparation, the time shall be increased to the extent possible in the addendum or, if necessary, by fax or telephone and confirmed in the addendum. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-28 Pre-opening modification or withdrawal of bids. Bids may be modified or withdrawn prior to the deadline for submittal of bids by the following documents:

(1) Modification of bids:

- (A) A written notice accompanying the actual modification received in the office designated in the solicitation, stating that a modification to the bid is submitted; or
- (B) A written notice accompanying the actual

modification by facsimile machine pursuant to section 3-122-9 to the office designated in the solicitation; provided bidder submits the actual written notice and modification within two working days of receipt of the facsimile.

- (2) Withdrawal of bids:
 - (A) A written notice received in the office designated in the solicitation; or
 - (B) A notice by facsimile machine pursuant to section 3-122-9, to the office designated in the solicitation.
- (3) The documents shall be made a part of the appropriate procurement file.
[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-302)

§3-122-29 Late bids, late withdrawals, and late modifications. Any notice of withdrawal, notice of modification of a bid with the actual modification, or any bid received at the place designated for receipt and opening of a bid after the time and date set for receipt and opening is late.

- (1) A late bid, late modification, or late withdrawal shall not be considered late if received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity.
- (2) A late bid or late modification that will not be considered for award shall be returned to the bidder unopened as soon as practicable and accompanied by a letter from the procurement activity stating the reason for its return.
- (3) A late withdrawal request shall be responded to with a statement of the reason for non-acceptance of the withdrawal.
- (4) Records of each late bid, late modification, or late withdrawal and any related correspondence shall be made a part of the appropriate procurement file.
[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-302)

§3-122-30 Receipt, opening, and recording of

bids. (a) Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place by the procurement officer until the time and date set for opening. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

(b) Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the invitation for bids.

(1) The name of each bidder, the bid price(s), and other information as is deemed appropriate by the procurement officer or his designated representative, shall be read aloud or otherwise made available. If practicable, the information shall also be recorded at the time of opening; that is, the bids shall be tabulated or a bid abstract made.

(2) The name(s) and address(es) of the required witnesses shall also be recorded at the opening.

(c) The opened bids shall be available for public inspection at the time of opening except to the extent that the bidder designates trade secrets or other proprietary data to be confidential as set forth in subsection (d).

(1) The material so designated as confidential shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid.

(2) The prices, makes and models, or catalogue numbers of items offered, deliveries, and terms of payment shall be publicly available at the time of opening regardless of any designation to the contrary.

(d) The procurement officer, or his designated representative, shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing.

(1) If the parties do not agree as to the disclosure of data, the procurement officer or his designated representative shall inform the bidders present at the opening that the material designated for nondisclosure shall be subject to written determination by the

respective attorney general or corporation counsel for confidentiality.

- (2) If the attorney general or corporation counsel determines in writing that the material so designated as confidential is subject to disclosure, the bidder submitting the material under review and other bidders who were present at the opening shall be so notified in writing and the material shall be open to public inspection unless the bidder protests under chapter 3-126.

(e) The bids shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

(f) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-42(12), HRS.

(g) Bids shall be unconditionally accepted without alteration or correction, except as allowed in sections 3-122-29 and 3-122-31. [Eff DEC 15 1995]
(Auth: HRS §§92F-42, 103D-202) (Imp: HRS §§92F-42, 103D-302)

§3-122-31 Mistakes in bids. (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of other bidders.

(b) A bidder may remedy a mistake in a bid discovered before the time and date set for opening by withdrawing or correcting the bid as provided in section 3-122-28.

(c) Corrections to bids after opening but prior to award may be made under the following conditions:

- (1) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. In case of error in extension of bid price, unit price shall govern.
- (2) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was

made. The procurement officer shall prepare a written approval or denial in response to this request. Examples of mistakes include:

- (A) Typographical errors;
- (B) Transposition errors;
- (C) Failure of a bidder to sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound.

- (3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the government agency or for the fair treatment of other bidders, and the chief procurement officer or the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake.

(d) Withdrawal of bids after opening but prior to award may be made if the mistake is attributable to an obvious error which shall affect price, quantity, quality, delivery, or contractual conditions, provided:

- (1) The bidder requests withdrawal by submitting proof of evidentiary value which demonstrates that a mistake was made; and
- (2) The procurement officer prepares a written approval in response to this request.

If the response to the request is a denial, the procurement officer shall notify the bidder in writing.

(e) Correction or withdrawal of bids after award is not permissible except when the chief procurement officer or head of the purchasing agency makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-302)
(Imp: HRS §103D-302)

§3-122-32 Cancellation of solicitations and rejection of bids. Cancellation and rejection of bids shall be pursuant to subchapter 11.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-33 Bid evaluation and award. (a) The award shall be made to the lowest responsible and

responsive, responsible bidder and shall be based on the criteria set forth in the invitation for bids.

(b) Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the lowest bidder. Examples of those criteria include but are not limited to:

- (1) Discounts;
- (2) Transportation costs; and
- (3) Total or life cycle costs.

(c) Evaluation factors need not be precise predictors or actual future costs, but to the extent possible the evaluation factors shall:

- (1) Be reasonable estimates based upon information the government jurisdiction has available concerning future use; and
- (2) Treat all bids equitably.

(d) No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(e) The invitation for bids shall set forth any evaluation criterion to be used in determining product acceptability:

- (1) The solicitation may require the submission of samples, descriptive literature, technical data, or other material to verify product acceptability.
- (2) The solicitation may also provide for accomplishing any of the following prior to award:
 - (A) Inspection or testing of a product for characteristics as quality or workmanship;
 - (B) Examination of elements as appearance, finish, taste, or feel; or
 - (C) Other examinations to determine whether the product conforms with any other purchase description requirements.

- (3) The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offer is acceptable as set forth in the invitation for bids.

- (4) Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

(f) Nothing in this section shall permit contract award to a bidder submitting a higher quality item than that designated in the invitation for bids if the

bidder is not also the lowest bidder as determined under this section.

(g) The contract shall be awarded with reasonable promptness by written notice to the lowest responsive, responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids.

(h) In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope, to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive, responsible bidder, in order to bring the bid within the amount of available funds. If only one responsive bid was received the provisions of subsection 3-122-35(a) shall apply. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-34 Low tie bids. (a) Low tie bids are bids from responsive, responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the invitation for bids.

(b) At the discretion of the procurement officer, award shall be made in any permissible manner that will resolve tie bids, including but not limited to:

- (1) Award the contract to a business providing goods produced or manufactured in this State or to a business that otherwise maintains a place of business in this State; and
- (2) Award the contract to the bidder offering a low tie bid who received the previous award, and continue to award succeeding contracts to the same bidder so long as all low bids are identical.

(c) If no permissible method will be effective in resolving tie bids and a written determination is made so stating, award may be made by drawing lots.

(d) Records shall be made of all invitations for bids on which tie bids are received showing at least the following information and shall be made a part of the procurement file:

- (1) The identification number of the invitation for bids;
- (2) The good, service, or construction item; and
- (3) A listing of all the bidders and the prices

submitted. [Eff DEC 1 5 1995] (Auth: HRS
§103D-202) (Imp: HRS §103D-302)

§3-122-35 Waiver to competitive sealed bid process. (a) If only one responsive bid is received in response to an invitation for bids, including multi-step bidding:

- (1) An award may be made to the single bidder:
 - (A) If the procurement officer finds that the price submitted is fair and reasonable, and that other prospective bidders had reasonable opportunity to respond; or
 - (B) There is not adequate time for resolicitation.
- (2) The bid may be rejected pursuant to subchapter 11 and new bids or offers may be solicited if the conditions in subparagraphs (A) and (B) are not met.
- (3) The proposed procurement may be canceled; or
- (4) An alternative procurement method may be conducted to include but not be limited to direct negotiations if the procurement officer determines in writing that the need for the good or service continues, but that the price of the one bid is not fair and reasonable and there is no time for resolicitation, or resolicitation would likely be futile.

(b) If for a given request no bids are received or there are no responsive bids to an invitation for bids, the procurement officer may determine that it is neither practicable, nor advantageous to the State to issue a new solicitation.

- (1) When making this determination, consideration shall be given to:
 - (A) Time constraints;
 - (B) Competition in the marketplace; and
 - (C) Whether the additional potential cost of preparing, soliciting, and evaluating competitive sealed bids is expected to exceed the benefits normally associated with the solicitations.
- (2) In the event of this determination, a more cost effective alternative procurement method may be selected to include, but not be limited to, direct negotiations.

(c) Documentation of the alternative procurement method selected shall:

- (1) State the reasons for selection and length of contract period;
 - (2) State why the provisions of subchapters 8, 9, and 10 do not apply;
 - (3) Receive prior approval of the chief procurement officer or a designee; and
 - (4) Be made a part of the contract file upon award by the procurement officer.
- [Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-302)

§§3-122-36 to 3-122-40 (Reserved).

SUBCHAPTER 6

COMPETITIVE SEALED PROPOSALS

§3-122-41 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed proposal method of source selection when it is determined that competitive sealed bidding is neither practicable nor advantageous to the State.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-42 Dollar thresholds for competitive sealed proposals. Expenditures \$10,000 or more for goods and services, or \$25,000 or more for construction shall be made pursuant to this subchapter except as provided in subchapters 5, 7, 8, 9, and 10.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-43 When competitive sealed bidding is not practicable. Competitive sealed bidding is not practicable unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the invitation for bids. Factors to be considered in

determining whether competitive sealed bidding is not practicable include:

- (1) Whether the primary consideration in determining award may not be price;
- (2) Whether the contract needs to be other than a fixed-price type;
- (3) Whether the conditions of the goods, services or delivery conditions are unable to be sufficiently described in the invitation for bids;
- (4) Whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;
- (5) Whether offerors may need to be afforded the opportunity to revise their proposals, including price; and
- (6) Whether award may need to be based upon a comparative evaluation as stated in the request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal.

[Eff DEC 1 5 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-303)

§3-122-44 When competitive sealed bidding is not advantageous. A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the State, even though practicable, to use competitive sealed bidding. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

- (1) If prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and
- (2) Whether the factors listed in subsections 3-122-43(4) through 3-122-43(6) are desirable in conducting a procurement rather than necessary; if they are, then the factors may be used to support a determination that competitive sealed bidding is not advantageous. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-45 Determinations. (a) Pursuant to subsection 103D-303(a), HRS, the procurement policy board may approve a list of specified types of goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of the purchasing agency. The list of specified types of goods, services, or construction when attached to the end of this chapter shall be reviewed biennially for changes.

Although the good, service, or construction is listed, purchasing agencies may use section 103D-302, HRS, competitive sealed bidding.

(b) If the procurement is not listed pursuant to subsection (a), the head of a purchasing agency shall then determine in writing that competitive sealed proposals is a more appropriate method of contracting in that competitive sealed bidding is neither practicable nor advantageous.

(1) The determinations may be made for specified types of goods, services, or construction rather than by individual procurement.

(2) Procurement of the types of goods, services, or construction so designated may then be made by competitive sealed proposals without making the determination that competitive sealed proposals is a more appropriate method of contracting.

(c) When it is determined that it is more practicable or advantageous to the State to procure construction by competitive sealed proposals:

(1) A procurement officer may issue a request for proposals requesting the submission of proposals to provide construction in accordance with a design provided by the offeror; and

(2) The request for proposals shall require that each proposal submitted contain a single price that includes both design and build.

(d) The head of the purchasing agency who made the determination may modify or revoke it at any time and the determination shall be reviewed for current applicability biennially or on the next procurement for these types of goods, services, or construction, whichever occurs later. The head of the purchasing agency may also request that the procurement of the specified types of goods, services, or construction by competitive sealed proposal be added to or deleted from the list in subsection (a). [Eff DEC 15 1995]

(Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-46 Preparing a request for proposals. (a)
The request for proposals is used to initiate a competitive sealed proposal procurement and shall include:

- (1) The specifications for the goods, services, or construction items to be procured;
- (2) All contractual terms and conditions applicable to the procurement;
- (3) A statement as to when and in what manner prices are to be submitted;
- (4) A statement concerning whether the proposal shall be accompanied by a proposal security pursuant to subchapter 24 or other evidence of financial responsibility;
- (5) The term of the contract and conditions of renewal or extension, if any;
- (6) Instructions and information to offerors, including pre-proposal conferences, the location where proposals are to be received, and the date, time and place where proposals are to be received and reviewed;
- (7) Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals. A minimum of thirty calendar days between the date of last legal advertisement of the solicitation and the time and date set for receipt of proposals, unless a shorter time is deemed appropriate for a particular procurement that will allow for adequate competition as determined in writing by the procurement officer;
- (8) The request for proposals shall:
 - (A) Define the performance or benefit required; and
 - (B) Set forth specific evaluation criteria to be used in evaluation of proposals which may include but is not limited to:
 - (i) Technical capability and approach for meeting performance requirements;
 - (ii) Competitiveness and reasonableness of price; and
 - (iii) Managerial capabilities.
- (9) A statement that discussions may be conducted

with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without discussions; and

- (10) A notice that the request for proposals may be canceled and that any and all proposals may be rejected in whole or in part when it is in the best interest of the State.

(b) Public notice for goods, non-professional services, and construction shall be given by a purchasing agency with delegated procurement authority by distributing the request for proposals in the same manner provided for distributing an invitation for bids under section 3-122-24. Public notices for professional services shall be in accordance with section 3-122-64.

(c) Pre-proposal conferences may be conducted in accordance with section 3-122-26.

[Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-47 Multi-step sealed proposals. When it is considered impractical to initially prepare a definitive purchase description to support an award based on listed selection criteria, the procurement officer may issue an expression of interest pursuant to section 3-122-24 requesting the submission of unpriced technical offers, and then later issue a request for proposals. [Eff DEC 1 5 1995] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-48 Amendments to request for proposals. Amendments to requests for proposals may be made by addenda in accordance with section 3-122-27 prior to submission of proposals. After submission of proposals, amendments may be made in accordance with section 3-122-22(g). [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-49 Modification or withdrawal of proposals. Proposals may be modified or withdrawn prior to the established due date in accordance with section 3-122-28. For the purposes of this section and section 3-122-29, the established due date is either the time and date announced for receipt of proposals or

receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only priority listed offerors may submit best and final offers. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-50 Late proposals, late withdrawals, and late modifications. Any proposal, withdrawal request, or modification received after the established due date as defined in section 3-122-49 at the place designated for receipt of proposals is late. They may only be considered in accordance with section 3-122-29. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-51 Receipt and registration of proposals.

(a) Proposals and modifications shall be time-stamped upon receipt and held in a secure place by the procurement officer until the established due date. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

(1) Proposals and modifications shall not be opened publicly, but shall be opened in the presence of two or more procurement officials.

(2) Proposals and modifications shall be shown only to State personnel having legitimate interest in them.

(b) After the date established for receipt of proposals, a register of proposals shall be prepared which shall include for all proposals:

(1) The name of each offeror;

(2) The number of modifications received, if any; and

(3) A description sufficient to identify the good, service, or construction item offered.

(c) The register of proposals shall be open to public inspection only after award of the contract.

(d) An offeror shall request in writing nondisclosure of designated trade secrets or other proprietary data to be confidential. The data shall accompany the proposal and shall be readily separable from the proposal in order to facilitate eventual public inspection of the nonconfidential portion of the proposal.

(e) Proposals shall be open to public inspection as provided in section 3-122-58 after the contract is signed by all parties. [Eff DEC 1 5 1995] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-52 Evaluation of proposals. (a) The procurement officer, or an evaluation committee selected by the procurement officer shall evaluate proposals.

(b) Numerical rating systems may be used, but are not required. When used, the evaluation shall be based only on the evaluation factors set out in the request for proposals. The relative priority to be applied to each evaluation factor shall also be set out in the request for proposals. If numerical rating systems are not used, the procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing. Evaluation factors not specified in the request for proposals may not be considered.

(c) When applicable, cost shall be an evaluation factor.

(d) The proposal with the lowest cost factor must receive the highest available rating allocated to cost. Each proposal that has a higher cost factor than the lowest must have a lower rating for cost. If a numerical rating system is used to evaluate the cost factor, the points allocated to higher-priced proposals must be equal to the lowest proposal price multiplied by the maximum points available for price, divided by the higher proposal price.

(e) An evaluation factor must be included which takes into consideration whether an offeror qualifies for any procurement preferences pursuant to chapter 3-124.

(f) A proposal from a debarred or suspended offeror shall be rejected.

(g) Evaluation meetings may be held by an evaluation committee to discuss the request for proposals, the evaluation process, the weighing of evaluation factors, and proposals received, before evaluation.

(h) Evaluations may not be based on discrimination due to the race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation of the

offeror. [Eff DEC 1 5 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-303)

§3-122-53 Discussions with offerors. (a) Before conducting discussions, a "priority list" shall be generated by the procurement officer or evaluation committee.

- (1) In order to generate a priority list, proposals shall be classified initially as acceptable, potentially acceptable, or unacceptable.
- (2) All responsive, responsible offerors who submit acceptable or potentially acceptable proposals are eligible for the priority list.
- (3) If numerous acceptable and potentially acceptable proposals have been submitted, the procurement officer or the evaluation committee may rank the proposals and limit the priority list to at least three responsive, responsible offerors who submitted the highest-ranked proposals.
- (4) Those responsive, responsible offerors who are selected for the priority list are referred to as the "priority-listed offerors."

(b) Discussions will be limited to only "priority-listed offerors" and are held to:

- (1) Promote understanding of a state agency's requirements and priority-listed offerors' proposals; and
- (2) Facilitate arriving at a contract that will be most advantageous to the State, taking into consideration the evaluation factors set forth in the request for proposals.

The procurement officer shall establish procedures and schedules for conducting discussions and keep a record of the date, place, purpose of meetings and those attending.

(c) Proposals may be accepted on evaluation without discussion.

(d) Priority-listed offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals.

- (1) Any substantial oral clarification of a proposal shall be reduced to writing by the priority-listed offeror.
- (2) If during discussions there is a need for any

substantial clarification or change in the request for proposal, the request for proposal shall be amended by an addendum to incorporate the clarification or change.

(e) Addenda to the request for proposals shall be distributed only to priority-listed offerors.

(1) The priority-listed offerors shall be permitted to submit new proposals or to amend those submitted.

(2) If in the opinion of the procurement officer or the evaluation committee, a contemplated amendment will significantly change the nature of the procurement, the request for proposals shall be canceled and a new request for proposals issued.

(f) The contents of any proposal shall not be disclosed so as to be available to competing offerors during the discussion and negotiation process.

[Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-54 Best and final offers. (a) The procurement officer shall establish a date and time for the priority-listed offerors to submit their best and final offers.

(b) Best and final offers shall be submitted only once; unless,

(1) The chief procurement officer or the head of a purchasing agency or a designee of either officer above the level of procurement officer determines in writing that it is in the State's best interest to conduct additional discussions or change the State's requirements and require another submission of best and final offers; otherwise,

(2) No discussion of or changes in the best and final offers shall be allowed prior to award.

(c) Priority-listed offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

(d) After best and final offers are received, final evaluations will be conducted for an award pursuant to section 3-122-57. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-55 Mistakes in proposals. (a) Proposals may be modified or withdrawn as provided in section 3-122-53.

(b) Mistakes shall not be corrected after award of contract.

(c) Mistakes discovered before award of the contract:

- (1) When the procurement officer knows or has reason to conclude before award that a mistake has been made, the procurement officer should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn pursuant to this section.
- (2) Once discussions are commenced or after best and final offers are requested, any priority-listed offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.
- (3) If discussions are not held, or if the best and final offers upon which award will be made have been received, mistakes shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn.
- (4) If discussions are not held, or if the best and final offers upon which award will be made have been received, an offeror alleging a material mistake of fact which makes a proposal nonresponsive may be permitted to withdraw the proposal if:
 - (A) The mistake is clearly evident on the face of the proposal but the intended correct offer is not; or
 - (B) The offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.

(d) Technical irregularities are matters of form rather than substance evident from the proposal document, or insignificant mistakes that can be waived or corrected without prejudice to other offerors; that is, when there is no effect on price, quality, or quantity.

If discussions are not held or if best and final offers upon which award will be made have been

received, the procurement officer may waive technical irregularities or allow an offeror to correct them if either is in the best interest of the State. Examples include the failure of an offeror to:

- (1) Return the number of signed proposals required by the request for proposal;
- (2) Sign the proposal, but only if the unsigned proposal is accompanied by other material indicating the offeror's intent to be bound; or
- (3) Acknowledge receipt of an amendment to the request for proposal, but only if it is clear from the proposal that the offeror received the amendment and intended to be bound by its terms; or the amendment involved had no effect on price, quality or quantity.

(e) When a proposal is corrected or withdrawn, or correction or withdrawal is denied under this section, the procurement officer shall prepare a written determination showing that the relief was granted or denied in accordance with this section.

[Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-56 Cancellation of solicitations and rejection of proposals. Cancellation and rejection of proposals shall be pursuant to subchapter 11.

[Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-57 Award of contract. (a) The procurement officer shall award a contract under competitive sealed proposals to the responsive, responsible offeror whose proposal is determined in writing to be the most advantageous to the State taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

(b) Pursuant to subchapter 15, cost or pricing data shall be submitted to the procurement officer by the vendor for any contract expected to exceed \$100,000. This requirement may be waived only under the provisions of section 3-122-124.

[Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-58 Public inspection. (a) After the contract is signed by all parties, the proposal, except those portions for which an offeror has made a written request for confidentiality, shall be open to public inspection.

(b) The contract file, including but not limited to the following, shall be opened for public inspection:

- (1) The register of proposals prepared pursuant to section 3-122-52;
- (2) A listing of all vendors to whom copies of the request for proposals were distributed;
- (3) Name of successful offeror and dollar amount of offer;
- (4) The basis on which the award was made;
- (5) A copy of the request for proposals;
- (6) A copy of the successful offeror's proposal; and
- (7) A copy of the unsuccessful offeror's proposal.

(c) If a person requests disclosure of data, for which an offeror has made a written request for confidentiality, the head of the purchasing agency or a designee shall consult with the attorney general or corporation counsel and make a written determination in accordance with chapter 92F, HRS.

(d) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-42(12), HRS. [Eff DEC 1 5 1995] (Auth: HRS §103D-202) (Imp: HRS §§92F-42, 103D-303)

§3-122-59 Waiver to competitive sealed proposal process. (a) If only one responsive proposal is received in response to a request for proposals, including multi-step sealed proposals:

- (1) An award may be made to the single offerer, provided the procurement officer finds that:
 - (A) The price submitted is fair and reasonable; and
 - (B) Other prospective offerors had reasonable opportunity to respond; or there is not adequate time for resolicitation.
- (2) The offer may be rejected pursuant to subchapter 11 and new requests for proposals

may be solicited if the conditions in subparagraphs (A) and (B) are not met.

- (3) The proposed procurement may be cancelled.
- (4) An alternative procurement method may be conducted to include, but not be limited to, direct negotiations, if the procurement officer determines in writing that the need for the good or service continues, but that the price of the one offer is not fair and reasonable and there is no time for resolicitation, or resolicitation would likely be futile.

(b) If no proposals are received in response to a request for proposals, the procurement officer may determine that for a given request it is neither practicable nor advantageous for the State to procure a good or service by again soliciting competitive sealed proposals.

- (1) When making this determination, consideration shall be given to the competition in the marketplace and whether the additional potential cost of preparing, soliciting and evaluating competitive sealed proposals is expected to exceed the benefits normally associated with the solicitations; and
- (2) In the event of this determination, a more cost effective procurement method may be selected, to include but not be limited to, direct negotiations.

(c) Documentation of the alternative procurement method selected shall:

- (1) State the reasons for selection and length of contract period;
- (2) State why the provisions of subchapters 8, 9, and 10 do not apply;
- (3) Receive prior approval of the chief procurement officer or a designee; and
- (4) Be made a part of the contract file upon award by the procurement officer.

[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-303)

§§3-122-60 to 3-122-61 (Reserved).

SUBCHAPTER 9

SOLE SOURCE PROCUREMENT

§3-122-81 Conditions for use. (a) A sole source purchase may be made when there is only one source available from which a particular good, service, or construction may be obtained. This rule shall apply to all sole source expenditures for goods and services that are \$10,000 or more and all construction that is \$25,000 or more, unless the expenditure is expressly exempt from public bidding by law or rule. For expenditures less than the above bid levels, agencies shall follow the procedures for small purchases.

(b) To justify a sole source purchase, an agency must establish that:

- (1) The particular good, service, or construction has a unique feature, characteristic, or capability, e.g.:
 - (A) Proprietary item;
 - (B) Compatibility to existing equipment; or
 - (C) Public utility repair or construction that can only be provided by the utility company;
- (2) The unique feature, characteristic, or capability is essential in order for the agency to accomplish its work; and
- (3) The particular good, service, or construction having the unique feature, characteristic, or capability is available from only one supplier or source.

(c) When a good or service is necessary in a limited quantity for test or evaluation, the purchase of the item or service may be on a sole source basis with the approval of the chief procurement officer.

(d) When an item is referred to by an exact brand, but there are other brands that qualify as "equals," the purchase shall be subject to bidding.

(e) When an item is unique, but is available from more than one supplier, the purchase shall be considered a "restrictive" purchase rather than a sole source purchase and shall be subject to bidding.

(f) The fact that a person or organization is or has been furnishing services to a purchasing agency does not, by itself, render the person or organization the only source for the type of service required.

(g) The potential loss of funds at the end of a fiscal year shall not be a basis for sole source exemption.

(h) The procurement officer should conduct negotiations with the sole source vendor to determine the factors as cost, quality, terms, and delivery.

(i) Pursuant to subchapter 15, cost or pricing

data shall be submitted to the procurement officer by the vendor for any contract expected to exceed \$100,000. This requirement may be waived only under the provisions of section 3-122-124.

(j) If the sole source purchase is approved, the purchasing agency shall, pursuant to section 103D-309, HRS, and subchapter 12, obtain certification that funds are available for the amount of the purchase.

(k) Pursuant to section 103D-306(c), HRS, the procurement policy board shall maintain a list which constitutes sole source procurements that may be procured without obtaining a sole source exemption, pursuant to section 3-122-82. However, the chief procurement officer may request reports from the heads of purchasing agencies on procurements made pursuant to this subsection.

The list of sole source procurements shall be reviewed by the board annually for changes and is attached at the end of this chapter as exhibit titled "Procurements Approved for Sole Source", dated 11/7/95. Purchasing agencies shall cite on the purchase order or on the contract the sole source authority as "Approved for Sole Source Procurement pursuant to Section 3-122-81, (cite sole source number from attached list), Hawaii Administrative Rules". [Eff DEC 1 5 1995]
(Auth: HRS §§103D-202, 103D-306, 103D-312) (Imp: HRS §§103D-306, 103D-309, 103D-312)

§3-122-82 Requesting sole source approval. (a) Forms required to implement the provisions for sole source approval will be distributed by the chief procurement officer.

(b) To obtain sole source approval from the chief procurement officer, the following procedures shall be followed:

- (1) Complete and submit a "Request For Sole Source" to the chief procurement officer. Heads of purchasing agencies shall certify to the best of their knowledge that the information provided is true and correct;
- (2) If a rush review of a request is needed, complete and submit a separate memorandum explaining and justifying the reason for the rush review; and
- (3) Complete and submit a "Notice of Sole Source" which shall serve as a written determination to issue a sole source contract.

(c) The chief procurement officer and the purchasing agency shall post a copy of the "Notice of Sole Source" in an area accessible to the public, at least seven days prior to any approval action.

- (1) Any inquiries shall be directed to the designated contact person of the purchasing agency.
- (2) Any objections to the request for sole source shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the sole source request on hold, review the objection, and provide a written response to the person submitting the objection. All documents relating to the objection, including written summary of the disposition of the objection, shall be kept with the sole source file. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-306) (Imp: HRS §103D-306)

§3-122-83 Amendments to sole source contracts.
Amendments to sole source contracts that would change the original scope of the contract, or increase the original contract price by ten per cent or more, may only be made with the approval of the chief procurement officer. The annual renewal of a sole source contract for services should not be submitted as an amendment. To amend a sole source contract, the following procedures shall be followed:

- (1) Complete and submit a "Notice of Amendment to Sole Source Contract" to the chief procurement officer. Heads of purchasing agencies shall certify to the best of their knowledge that the information provided is true and correct;
- (2) Submit copy of the contract or agreement between the agency and the contractor with the "Notice of Amendment to Sole Source Contract";
- (3) The chief procurement officer and the purchasing agency shall post a copy of the "Notice of Amendment to Sole Source Contract" in an area accessible to the public, at least seven days prior to any approval action;
- (4) Any inquiries shall be directed to the

designated contact person of the purchasing agency; and

- (5) Any objections to the amendments to sole source contracts shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the sole source request on hold, review the objection and provide a written response to the person submitting the objection. All documents relating to the objection, including a written summary of the disposition of the objection, shall be kept with the sole source file.
 [Eff DEC 1 5 1995] (Auth: HRS §103D-202)
 (Imp: HRS §103D-306)

§3-122-84 Record of procurement actions. (a)
 Pursuant to section 103D-321, HRS, the chief procurement officer shall maintain a record by fiscal year of all procurements made under section 103D-306, HRS, for a minimum of five years.

(b) By August 15 of each year, the chief procurement officer shall forward a copy of the record to the administrator. The record shall reflect procurement actions for the prior fiscal year and be in the format prescribed by the administrator.

(c) The administrator shall forward a consolidated report to the legislature by October 1 and provide an information copy to the procurement policy board. [Eff DEC 1 5 1995] (Auth: HRS §103D-202)
 (Imp: HRS §103D-321)

§§3-122-85 to 3-122-87 (Reserved).

HOUSE OF REPRESENTATIVES
NINETEENTH LEGISLATURE, 1998
STATE OF HAWAII

H.B. NO.

A BILL FOR AN ACT

RELATING TO REAL ESTATE BROKERS AND SALESPERSONS.

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

1 SECTION 1. Chapter 467, Hawaii Revised Statutes, is amended
2 by adding a new section to be appropriately designated and to
3 read as follows:

4 "§467- Administration of the Continuing Education
5 Program for Real Estate Brokers and Salespersons. (a) The
6 continuing education function may be administered by a private
7 entity selected pursuant to chapter 103D and shall be self
8 supporting. Employees of the private entity shall not be subject
9 to chapter 76 and 77.

10 (b) The real estate commission shall monitor the private
11 entity through a regular reporting system to assure quality and
12 consistent application of rules and law."

13 SECTION 2. Statutory material to be repealed is bracketed.
14 New statutory material is underscored.

15 SECTION 3. This Act shall take effect upon its approval.

16

17

INTRODUCED BY: _____

Appendix D

COMMISSIONER OF INSURANCE

594-1
Ins 28

Chapter Ins 28

CONTINUING EDUCATION

Ins 28.01	Purpose	Ins 28.06	Requirements for approval of continuing education providers and courses
Ins 28.02	Scope	Ins 28.07	Evidence of attendance for continuing education courses
Ins 28.03	Definitions	Ins 28.08	Correspondence courses
Ins 28.04	Continuing education requirements	Ins 28.09	Recognized programs of study
Ins 28.05	Waiver of continuing education requirements	Ins 28.10	Investigation and review

Note: Chapter Ins 28 applies to all intermediaries licensed in Wisconsin.

Ins 28.01 Purpose. To provide necessary information regarding insurance, insurance ethics and insurance laws, the commissioner of insurance finds that continuing education shall be required of all insurance intermediaries for the major lines of insurance of property, casualty, life, accident and health insurance, and the limited line of automobile.

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.02 Scope. This chapter applies to all insurance intermediary licensees in the state of Wisconsin unless exempted under s. Ins. 28.04 (2) (a) to (c).

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.03 Definitions. In this chapter:

(1) "Certificate of Continuing Education" means a document substantially in the form described in Appendix 1.

(2) "Course" means a program of study submitted to, and approved by, the commissioner under this chapter.

(3) "Credit hour" means a period of study, included as a part of a course, consisting of no less than 50 minutes.

(4) "Provider" means an entity that is approved to teach courses under s. Ins 28.06.

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.04 Continuing education requirement. (1) (a) Each intermediary licensed in any of the major lines of property, casualty, life, or accident and health insurance, and the limited line of automobile shall biennially complete 24 credit hours of continuing education approved by the commissioner in accordance with this chapter. For the initial period ending February 15, 1997, 12 credit hours are required.

(b) Every resident and nonresident intermediary shall, on a biennial basis, on or before February 15 of each odd-numbered year, furnish evidence to the commissioner in a manner prescribed by the commissioner that the continuing education requirements of this section have been satisfied.

(c) Intermediaries may fulfill the continuing education requirements by earning the required credit hours from courses taught in any or all of the major lines and the limited line of automobile.

Register, November, 1995, No. 479

(d) Excess credit hours accumulated during any biennium may not be carried forward to the next biennium.

(e) An instructor of an approved continuing education course may receive the same number of credit hours as a person enrolled in the course for the purpose of meeting the requirements of this section. Intermediaries and instructors may receive credit hours for attending or teaching the same course only once during any biennium.

(f) Not less than 60 days prior to the reporting date set forth in par. (b) of each odd-numbered year, the commissioner shall notify each intermediary, who the commissioner's records indicates is lacking the necessary continuing education credit hours, of the number of continuing education credit hours needed to comply with this section. Notice shall be mailed to the intermediary's residence address on file with the commissioner.

(g) If the credit hours deficiency is not remedied by the reporting date set forth in par. (b), the license of the intermediary shall be suspended with a notice to the agent. If the required hours are completed and reported during the suspension period, the license shall be reinstated.

(h) The intermediary's license shall be revoked if the required credit hours are not completed and reported within 60 days after notice of suspension issued under par. (g).

(i) Any individual intermediary whose license has been revoked for failure to fulfill the continuing education requirement, shall, in order to be relicensed, satisfy the prelicensing education, examination and licensing requirements established by s. Ins 6.59.

(2) Continuing education requirements shall not apply to the following:

(a) Any intermediary exclusively holding a limited line insurance license in the following lines: credit life, credit accident and health, managing general agent, and title insurance.

(b) Any resident intermediary who has completed the prelicensing education requirement for original licensure during the biennial reporting period. This exemption does not include those intermediaries adding one or more lines to an existing license.

(c) A nonresident intermediary who furnishes an original letter of certification not more than 60 days old when received by the commissioner, which provides evidence of compliance with continuing education requirements in his or her state of residence, provided that the state of residence grants similar exemptions to Wisconsin residents who have satisfied Wisconsin's continuing education requirements under this section.

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.05 Waiver of continuing education requirements. The requirements of this section may be waived in writing by the commissioner for good cause shown. 'Good cause' includes long-term illness or incapacity, serving full-time in the armed forces of the United States of America on active duty outside of the state of Wisconsin during a substantial part of the biennium, and other emergency situations deemed appropriate by the commissioner. Requests for waivers of continuing education requirements shall be made in writing in a form and manner prescribed by the

Register, November, 1995, No. 479

commissioner, and shall be submitted to the commissioner no later than 90 days prior to the end of the biennium for which such waiver is requested. Within 30 days of receipt, the commissioner shall act upon the waiver request and provide written notice of the decision to the applicant. Any waiver granted pursuant to this section shall be valid only for the biennium for which waiver application was made.

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.06 Requirements for approval of continuing education providers and courses. (1) **LICENSING OF CONTINUING EDUCATION PROVIDERS.** An entity or individual seeking initial approval or reapproval from the commissioner as a continuing education provider shall submit a notarized application on forms provided by the commissioner. The commissioner may require the following information and materials:

(a) Evidence of prior accreditation by the Wisconsin educational approval board, if required by s. 38.51, Stats.;

(b) A description of the experience and education that the applicant believes qualifies the applicant to be a provider;

(c) A description of the provider's organizational structure, registration policies, fee schedules, and promotional materials;

(d) A description of the provider's student record systems including a description of the methods for documenting attendance;

(e) The method used by the provider for evaluating instructors;

(f) An original signature of the person or persons authorized to sign certifications;

(g) A certificate format that the applicant proposes to use to comply with Appendix 1; and

(h) Other information as specified by the commissioner.

(2) **CRITERIA FOR APPROVAL.** In order to be approved, continuing education providers shall:

(a) Comply with state or federal laws, including but not limited to laws regarding discrimination on the basis of sex, race, religion, age, physical disability, sexual orientation, or national origin in their educational programs;

(b) Certify that instructors will be experienced and qualified in insurance and satisfy at least one of the following criteria:

1. Is or has been engaged in the insurance industry or the practice of teaching insurance courses for the last three years;

2. Is a properly licensed insurance intermediary for the past 5 years and demonstrates to the commissioner that he or she is of good character and has the knowledge and breadth of experience in the subject area for which he or she will be providing instruction;

3. Holders of any of the designations identified in s. Ins. 28.09;

4. Is a member of the state bar in a state or the District of Columbia and is engaged in the field of insurance-related law; or

Register, November, 1995, No. 479

5. Is a certified public accountant licensed in a state or the District of Columbia and engaged in insurance-related practice.

(c) Show that information provided to comply with sub. (1) is likely to support a comprehensive and accurate treatment of the subjects required in each section.

(3) PROVIDER APPROVAL FEES. (a) The initial application fee to be paid by each licensed provider will be set through a competitive bid process not to exceed limits identified in s. 601.31 (1) (x) 1, Stats. The biennial regulation fee paid by each licensed provider will be set through a competitive bid process not to exceed limits identified in s. 601.31 (1) (x) 2, Stats. Wisconsin governmental bodies, such as universities and technical colleges, shall be exempt from these fees.

(4) APPLICATION APPROVAL AND EXPIRATION OF APPROVAL. Upon receipt of an application for approval of a provider and the appropriate fee, the commissioner shall determine if the application meets the requirements and if the program provides for instruction of courses in a manner required by this chapter. The commissioner shall issue a decision on approval of an application no later than 60 days following the receipt of the completed application and all required information. Provider approval shall expire on July 31 of the next even-numbered year after approval. Each provider shall submit a renewal application for approval for the next period to the commissioner on or before June 1 of each even-numbered year.

(5) COURSE APPROVAL. (a) Upon receipt of an application for approval of a course from an approved continuing education provider and the appropriate fee, the commissioner shall determine if the course meets the requirements set forth in sub. (6). The commissioner shall issue a decision approving or denying approval of a course no later than 30 days following the receipt of the completed application. Course approval shall expire 2 years from the date the course was approved by the commissioner.

(b) Credit will not be awarded to intermediaries for courses completed prior to the date approved by the commissioner.

(c) The following information shall be furnished with the request for approval of a continuing education course:

1. Name, license number, and address of provider;
2. Name of the instructor;
3. Name, telephone number, and signature of the contact person for the provider;
4. Course title;
5. The date the course will initially be offered;
6. The location where course will initially be offered;
7. Whether the course is new, repeat, revised, or offered live or by interactive video teleconference;
8. If it is a repeat course or a revised course, the course number;

Register, November, 1995, No. 479

9. An outline including a schedule of times when topics will be presented; the topics covered in the course, listed individually; and a summary of the instruction given and the material covered for each topic;

10. Number of credit hours requested; and

11. A description of the qualifications of each instructor and the subject matter the instructor will be teaching.

(d) Instructors of continuing education programs shall be approved by the commissioner. Instructors shall meet the criteria set forth in sub. (2)

(b). Submitted instructors may be replaced by other approved instructors with equal qualifications on an emergency basis.

(e) The course shall be conducted in accordance with the course outline and summary materials approved by the commissioner. After the provider has been notified of any deficiency, failure to correct the deficiency shall automatically void the course approval for any course held after notice.

(f) A provider shall give the commissioner written notice at least 10 days in advance of offering an approved course on a date or at a place other than, or in addition to, the date and location provided in the initial request for approval.

(6) COURSE CONTENT GUIDELINES. (a) The following course topics are examples of subjects that qualify for approval under sub. (5):

1. Principles of property insurance
2. Principles of casualty insurance
3. Principles of life insurance
4. Principles of accident and health insurance
5. Estate planning/taxation
6. Ethics in insurance
7. Legal, legislative, regulatory matters in insurance
8. Wisconsin insurance code and administrative rules
9. Insurance policy contents
10. Proper use of insurance products
11. Accounting/actuarial considerations in insurance
12. Principles of risk management
13. Provisions/differences in insurance policy contracts
14. Tax laws (specifically related to insurance)
15. Wills and trusts

(b) The following course topics are examples of subjects that do not qualify for approval:

1. Sales

2. Motivation
3. Prospecting
4. Psychology
5. Communication skills
6. Supportive office skills (typing, filing, telephone, computers)
7. Personnel/agency management
8. Recruiting
9. Time management
10. Other subjects not related to the insurance industry

(7) **COURSE APPROVAL FEES.** (a) The fee to be paid for each course submission by each provider shall be set through a competitive bid process not to exceed statutory limits identified in s. 601.31 (1) (x) 3, Stats.

(8) **NOTIFICATION.** Within 10 days of a change to an approved course, approved providers shall notify the commissioner of any course information as required in sub. (5) (c) that has changed since filing (and on which course approval was based) with the commissioner.

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.07 Evidence of attendance for continuing education courses. (1) (a) Providers shall provide an original certificate of continuing education to each intermediary within a reasonable period after completion of a continuing education course. One additional original individual certificate of continuing education shall be provided to a student upon request and at no additional charge. Every intermediary shall maintain a record of all courses attended by keeping the original certificates of completion for 4 years after the end of the year of attendance.

(b) Certificates of continuing education shall contain the information specified in Appendix 1 and shall be printed in a form acceptable to the commissioner.

(c) Certificates of continuing education shall be signed by authorized provider representatives whose signatures are on file with the commissioner.

(d) The date indicated on the certificate of continuing education shall be the date of the class attended by the student, or on the date which the intermediary successfully completed an examination for courses identified in s. Ins 28.09.

(e) Intermediaries shall not claim credit for any course which they did not attend all required credit hours or complete all requirements.

(2) Providers shall submit to the commissioner a computerized list of course attendees, which includes the intermediary's name, Wisconsin license number, date of birth, social security number, course number, course title, date and location of the course, and number of credit hours for which the course has been approved in a format specified by the commissioner, of all persons satisfactorily completing continuing education programs. Accompanying the computerized list shall be a letter signed by a person authorized to sign certificates of continuing education certi-

Register, November, 1995, No. 479

ifying that the students listed personally attended the reported classroom instruction. The computerized list shall be furnished to the commissioner within 30 days following the date of completion of continuing education programs, except during the period January 1 through May 1 of each odd-numbered year, at which time computerized lists shall be furnished to the commissioner within 10 days following the date of completion of the programs.

(3) The provider of a continuing education program shall maintain attendance records for 4 years.

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.08 Correspondence courses. Except as provided in s. Ins. 28.09, correspondence and self-study courses will not be approved as courses.

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.09 Recognized programs of study. Programs of study leading to and maintaining any of the following designations may be approved by the commissioner under s. Ins 28.06 (5) as a course: Chartered Financial Consultant (ChFC); Certified Insurance Counselor (CIC); Chartered Property and Casualty Underwriter (CPCU); Registered Health Underwriter (RHU); Chartered Life Underwriter (CLU); Life Underwriter Training Council Fellow (LUTCF); Certified Employee Benefit Specialist (CEBS); and Fraternal Insurance Counselor (FIC).

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

Ins 28.10 Investigation and review. (1) The commissioner, or a duly appointed representative, shall investigate and review all provider and course applications and may investigate or examine previously approved providers, courses, and instructors. The method and timing of the reviews shall be determined by the commissioner in each case and may consist of any of the following:

(a) Consideration of information available from state, federal, or local agencies, private organizations or agencies, or interested persons.

(b) Conferences with officials, representatives, and former students of the provider involved.

(c) A public hearing respecting the program, course, or instructor involved, with adequate written notice to the provider, instructor, or both.

(d) Investigation by visitation without notice to the provider.

(e) Information furnished by the applicant with any application for approval.

(f) Any other information the commissioner or representative deems relevant to the investigation.

(2) The commissioner may also investigate or examine any provider, course or instructor upon receipt of a complaint from any person.

(3) The commissioner may examine the provider under ss. 601.43 and 601.44, Stats., and bill the reasonable costs of the examination to the program under s. 601.45, Stats.

(4) If, after investigation or examination, the commissioner denies or withdraws approval of any program, course, or instructor, written noti-

Register, November, 1995, No. 479

cation shall be given with reasons for such action. The denial or withdrawal constitutes an order pursuant to s. 601.62 (3) (a), Stats., and the provider or instructor may request a hearing before the commissioner under that section.

Note: This chapter requires use of forms which may be obtained from the Office of the Commissioner of Insurance, 121 East Wilson Street, P. O. Box 7872, Madison, Wisconsin 53707-7872.

History: Cr. Register, November, 1995, No. 479, eff. 12-1-95.

APPENDIX I

CERTIFICATE OF CONTINUING EDUCATION

I hereby certify that _____ (name) _____,
_____ (Wisconsin license #) _____, _____ (social security #) _____,
has completed a continuing education course entitled (course title and #)
on _____ (date) _____ approved for _____ (# of hours) _____ credit hours which
complies with the requirements in ch. Ins 28, Wis. Adm. Code.

Authorized Representative

Date

Name of Provider

Provider License No.

CHAPTER 1 PROVIDERS

Minimum requirements for submission, review and approval of application by potential providers other than Wisconsin governmental bodies

1. Questions Contractor shall address in application.

a. Determine applicant's satisfaction of requirements in Chapter **Ins 28.06(1)**.
Applicant shall:

(1) Provide a description of the experience and education that the applicant believes qualifies the applicant to be a provider [**Ins 28.06(1)(b)**]. Applicant shall:

- (a) List one or two most recent experiences as a provider.
- (b) Provide general statement about applicant's educational qualifications.

(2) Applicant shall provide a description of the applicant's organizational structure, registration policies, fee schedules and promotional materials [**Ins 28.06(1)(c)**]. Applicant shall:

(a) Submit organization chart, list of officers and employees and information as to corporate status, sole proprietorship, etc.

(b) Submit statement of registration policies.

(c) Submit fee schedules.

(d) Submit promotional materials.

(1) Cannot be used until applicant is approved and courses are approved for use in Wisconsin.

(2) Must include a reference about use in the state of Wisconsin.

(3) Need mechanism for Contractor to refer materials which contain misrepresentations to appropriate OCI staff for review.

(4) Providers must identify that students will not be awarded credit for any course which they did not attend all required credit hours or complete all requirements [**Ins 28.07(1)(e)**].

(5) Credit will not be awarded for courses completed prior to the date approved [**Ins 28.06(5)(b)**].

(3) Applicant shall provide a description of the applicant's student record systems including a description of the methods for documenting attendance [**Ins 28.06(1)(d)**].
Applicant shall:

(a) Attach sample of student records.

(b) Describe methods of documenting attendance.

- (c) Certify that it has the capability to transmit computerized list required by **Ins 28.07(2)**.
- (4) Applicant shall describe the method(s) used by the applicant for evaluating instructors **[Ins 28.06(1)(e)]**.
- (a) Student evaluations may be required by Contractor. See OCI proposed format, attached.
- (5) Applicant shall provide an original signature of the person or persons authorized to sign certifications **[Ins 28.06(1)(f)]**.
- (6) Applicant shall provide a certificate format that contains the information specified in **Appendix 1 of Chapter Ins 28.06** and that is printed in a form acceptable to the Commissioner. **[Ins 28.06(1)(g)]**
- (a) University of Wisconsin system and the state technical college system student grade reports shall be acceptable certifications.
- (7) Applicant shall furnish certification of compliance with state or federal laws including, but not limited to, laws regarding discrimination on the basis of sex, race, religion, age, physical disability, sexual orientation, or national origin in their educational programs. A yes/no check-off will be used in indicating compliance. **[Ins 28.06(2)(a)]**
- (8) Applicant shall certify to compliance with provisions of the Americans with Disabilities Act (ADA) **[Ins 28.06(2)(a)]**.
- (9) Applicant shall certify that instructors will be experienced and qualified in insurance and satisfy at least one of the following **[Ins 28.06(2)(b)]**:
- (a) Is or has been engaged in the insurance industry or the practice of teaching insurance courses for the last three years **[Ins 28.06(2)(b)1]**.
- If applicant has a list of instructors on staff, the list must be submitted.
- (b) Is a properly licensed insurance intermediary for the past five years and demonstrates to the Commissioner that he or she is of good character and has the knowledge and breadth of experience in the subject area for which he or she will be providing instruction **[Ins 28.06(2)(b)2]**.
- (c) Holders of any of the designations in **Ins 28.09** (ChFC, CIC, CPCU, RHU, CLU, LUTCF, CEBS, FIC) **[Ins 28.06(2)(b)3]**.
- (d) Is a member of the state bar in a state or the District of Columbia and is engaged in the field of insurance-related law **[Ins 28.06(2)(b)4]**.
- (e) Is a certified public accountant licensed in the state or the District of Columbia and engaged in insurance related practice **[Ins 28.06(2)(b)5]**.

(10) Applicant shall show that information provided to comply with 1 through 6 is likely to support a comprehensive and accurate treatment of the subjects required in each [Ins 28.06(2)(c)].

(Contractor suggestion needed here as to guidance to applicants to show how this requirement may best be responded to by the applicant).

(11) Application must be notarized [Ins 28.06(1)].

(12) Pay the provider approval fee [Ins 28.06(3)].

(a) The Contractor is authorized to initiate a credit check of individual agents/entrepreneurs seeking provider status. Notice of such is to appear on application [Ins 28.10].

(b) The Contractor is authorized to request the applicant to certify (yes/no) that the applicant is in good standing as an agent, a company, a securities dealer, etc., with other regulatory or enforcement agencies including, but not limited to, state insurance and justice departments, consumer protection agencies, the National Association of Securities Dealers (NASD), etc. [Ins 28.10]

For Contractor: Can pending actions be utilized in the evaluation process?

2. Decision shall be rendered no later than 60 days following receipt of completed application and all required information. [Ins 28.06(4)]

a. Notification of approval shall include a statement asserting the lawful right of the Commissioner to conduct audits of any facet of the continuing education program authorized the provider by the Commissioner and that the Contractor is authorized as Commissioner's delegate. [Ins 28.10]

b. Approval letter shall notify a provider of state's authority to impose forfeitures on provider for any misrepresentations identified during the review process or during implementation of a program offered by an approved provider.

c. Provider approval shall expire on July 31 of the next even-numbered year after approval. [Ins 28.06(4)] The provider is issued a letter of approval which includes the provider identification number and expiration date.

3. Denial of approval.

a. The Contractor shall develop a format for a notification of denial of an application for approval.

(1) The notification shall state the reason(s) for denial.

(2) The notification shall state the review processes that are available to the applicant, including the applicant's right to an administrative hearing, which is to be provided within 30 days from receipt by OCI of a hearing request. [Ins 28.10(4)]

The Contractor will develop a file of information which may be used to sustain a judgment of denial.

4. Renewing provider approval.

- a. Minimum standards for renewal
 - (1) Renewal applications for provider-approval due to the Commissioner on or before June 1 of each even-numbered year. [Ins 28.06(4)]
 - (2) Provider shall certify: [Ins 28.06(1)(h)]
 - (a) that it has neither experienced nor authorized any changes affecting its business practices that would jeopardize its good standing asserted in the previous application;
 - (b) that the responses in the previous application are materially unchanged, and if there are significant changes they are to be made known in an attachment to the renewal application. Provider shall include a copy of the original application.
 - (c) the application must be notarized.
- 5. **Decision shall be rendered no later than 60 days following receipt of completed application for renewal and all required information. [Ins 28.06(4)]**
- 6. **Denial of renewal application.**
 - a. The Contractor shall develop a format for the renewal application to reflect changes, such as enforcement or regulatory actions, loss of key instructional personnel, business reversals that might affect the provider's ability to continue.
 - (1) The Contractor will develop a file of information which may be used to sustain a judgment of denial of renewal.
 - b. The Contractor will develop a format for a notification of denial of an application for renewal.
 - (1) The notification shall state the reason(s) for denial.
 - (2) The notification shall state the review processes that are available to the applicant, including the applicant's right to an administrative hearing, which is to be provided within 30 days from receipt by OCI of a hearing request. [Ins 28.10].
- 7. **Application procedures for Wisconsin governmental bodies.**
 - a. The Contractor shall develop an application form germane for these entities. It shall state that these entities are exempt from the fees required by Ins 28.06(3). It shall also include all other requirements that are to be fulfilled by governmental bodies.
 - b. The application shall state that University of Wisconsin System and state Technical College System student grade reports shall be acceptable certifications, as required by Appendix I of Ins 28.06.

CHAPTER 2 COURSES

Minimum requirements for review and approval

(1) Contain substantive and procedural knowledge relative to insurance field. Course topics which do not qualify for approval: sales, motivation, prospecting, psychology, communication skills, supportive office skills (typing, filing, telephone and computers), personnel/agency management, recruiting, time management, and other subjects not related to the insurance industry [Ins 28.06(6)(b)]. Course topics which qualify for approval [Ins 28.06(6)(a)]:

- (a) Principles of property insurance
- (b) Principles of casualty insurance
- (c) Principles of life insurance
- (d) Principles of accident and health insurance
- (e) Estate planning/taxation
- (f) Ethics in insurance
- (g) Legal, legislative, regulatory matters in insurance
- (h) Wisconsin insurance code and administrative rules
- (i) Insurance policy contents
- (j) Proper use of insurance products
- (k) Accounting/actuarial considerations in insurance
- (l) Principles of risk management
- (m) Provisions/differences in insurance policy contracts
- (n) Tax laws specifically related to insurance
- (o) Wills and trusts

(2) Satisfaction of standards in Ins 28.06(5):

(a) Credit will not be awarded for courses completed prior to the date approved by the Commissioner [Ins 28.06(5)(b)].

(b) Information to be furnished with the request for approval [Ins 28.06(5)(c)]:

- (1) Name, license number, and address of provider.
- (2) Name of the instructor assigned (if more than one, provider must furnish required information on each).
- (3) Name, telephone number, and signature of the contact person for the provider.
- (4) Course title.
- (5) The date the course will initially be offered.
- (6) The location where the course will initially be offered.
- (7) Whether the course is new, repeat, revised or offered live or by interactive video teleconference.
- (8) If it is a repeat course or a revised course, the course number.
- (9) An outline including a schedule of times when topics will be presented, the topics covered in the course, listed individually, and a summary of the instruction given and the material covered for each topic. (Negative topics pertaining to how to get around insurance laws and rules or other inappropriate presentations cannot be approved.)
- (10) Number of credit hours requested.

- (11) A description of the qualifications of each instructor and the subject matter the instructor will be teaching.
 - (12) Pay the course approval fee [Ins 28.06(7)].
- (c) Decision to approve or deny no later than 30 days following receipt of completed application and required information [Ins 28.06(5)(a)].
- (d) Programs of study leading to and maintaining any of the following designations may be approved by the Commissioner: ChFC, CIC, CPCU, RHU, CLU, LUTCF, CEBS and FIC [Ins 28.09].
- (3) The Contractor shall develop a letter of approval and forward it to the provider and instructor if all requirements are met.
- (a) Course approval shall expire two years from the date the course was approved by the Commissioner [Ins 28.06(5)(a)].

The letter will state the lawful right of the Commissioner to conduct audits of any facet of the continuing education program approved by the Commissioner and that the Contractor is the Commissioner's delegate. It will also notify a provider of state's authority to impose forfeitures for any misrepresentations identified during the review process or during implementation of a course that has been approved [Ins 28.10].

- (4) Assigning credit hours to courses and programs: 50 minutes of instruction in a classroom setting is equivalent to one credit hour [Ins 28.03(3)].

Breaks, introductions, lunches, announcements or other non-instruction time is to be excluded in calculating credit hours requested and, ultimately, awarded.

- (5) No course credit may be granted agents for any course which they did not attend all required credit hours or complete all requirements [Ins 28.07(1)(e)]. And no partial credit may be awarded, including to those dropping out for whatever reasons.

Missing a class or persistent tardiness can be used as reasons for denying credit. The attendance data should reflect this.

Denial of course approval

- (1) Courses which fail to meet the requirements of this chapter shall be denied.
- (2) The Contractor will develop a format for a notification of denial of an application for course approval.
- (3) The notification of denial shall state the reason(s) for denial.
- (4) The notification shall state the administrative review processes available to the applicant, including right to an administrative hearing [Ins 28.10], which is to be provided within 30 days from receipt of a hearing request.

CHAPTER 3 AUDITS

Monitoring attendance and quality and compliance of courses - Conducting audits on schedules approved by OCI It is the lawful right of the Commissioner to conduct audits of any facet of the continuing education program authorized by the Commissioner and the Contractor is the Commissioner's delegate. **[Ins 28.10]**.

- (1) Submitted instructors must only be replaced by other approved instructors with equal qualifications on an emergency basis. **[Ins 28.06(5)(d)]**
- (2) Course shall be conducted in accordance with course outline and summary materials approved by the Commissioner. **[Ins 28.06(5)(e)]**
- (3) Deficiency notifications. Failure to correct the deficiency shall automatically void the course approval for any course held after the notice. The letter of deficiency notification must have the right to hearing language: "if you desire a hearing to contest this determination, we must receive a written request from you within 20 days of your receipt of this letter." *Format of deficiency notification? Who sends it?* **[Ins 28.06(5)(e)]**
- (4) At least ten days advance written notice to the Commissioner from provider is required in the event an approved course is offered on a date or at a place other than, or in addition to, the date and location provided in the initial request for approval. **[Ins 28.06(5)(f)]**
- (5) Within ten days of a change to an approved course, approved provider shall notify the Commissioner of any course information that has changed since filing with the Commissioner. **[Ins 28.06(8)]**
- (6) The Contractor, in letters of approval to providers, will state that the Contractor is authorized as the Commissioner's delegate to conduct audits of any facet of the continuing education program authorized the provider by the Commissioner. **[Ins 28.10]**
- (7) The Contractor will submit an audit plan, including a reporting format, to the Commissioner and obtain her approval. **[Ins 28.10]**
- (8) The Contractor will conduct on-site audits, as it determines the need therefor, either irregular or unscheduled in response to complaints.

The Contractor will also utilize desk audits in ascertaining facts and is authorized to survey course attendees in seeking information. **[Ins 28.10]**

The Contractor will develop criteria for triggering audit activity in the areas of complaints, targeted subject matter areas, and training activities of companies.

- (9) A sample course evaluation form follows:

REVIEW OF INSTRUCTOR QUALIFICATIONS

Minimum requirements for review

- (1) Instructor approval is contingent upon being associated with an approved provider and an approved course.
- (2) Certification that an individual is experienced and qualified in insurance and satisfies at least one of the following [Ins 28.06(2)(b)]:
 - (a) Is or has been engaged in the insurance industry or the practice of teaching insurance courses for the last three years [Ins 28.06(2)(b)1];
 - (b) Is a properly licensed insurance intermediary for the past five years and demonstrates to the Commissioner that he or she is of good character and has the knowledge and breadth of experience in the subject area for which he or she will be providing instruction [Ins 28.06(2)(b)2];
 - (c) Holder of any of the designations in Ins 28.09 (ChFC, CIC, CPCU, RHU, CLU, LUTCF, CEBS or FIC) [Ins 28.06(2)(b)3];
 - (d) Is a member of the state bar in a state or the District of Columbia and is engaged in the field of insurance-related law [Ins 28.06(2)(b)4]; or
 - (e) Is a certified public accountant licensed in a state or the District of Columbia and engaged in insurance-related practice [Ins 28.06(2)(b)5].

The contractor may seek verifications for (a) through (e).
- (3) We have authority to disqualify an instructor if there are pending actions against him or her. A computer check should be made against the current OCI Agent Licensing database to determine status. [Ins 28.10].

Instructors may receive continuing education credit

- (1) Ins 28.04(1)(e) permits an instructor of an approved continuing education course to receive the same number of credit hours as a person enrolled in the course for the purpose of meeting the continuing education requirement for intermediaries. Agents and instructors may receive credit hours for attending or teaching the same course only once during any reporting period.
- (2) The Contractor shall maintain a separate file on these instructor/credit-earner persons.

COURSE EVALUATION FORM

Date _____ Course _____

Instructor's Name _____ Location _____

Continuing Education Provider _____

Your Name (optional) _____

Instructions: Rate the following using a scale of 1 to 10 (1 being the lowest and 10 being the highest). If you give a rate of 6 or less, please use the space on the right for constructive comments.

The Instructor

- _____ Prepared and organized
- _____ Knowledgeable about the topic
- _____ Presented material clearly and understandably
- _____ Responsive to questions and needs

The Content and Materials

- _____ Were well organized
- _____ Met my expectations
- _____ Were useful

The Facility

- _____ Was conducive to learning
- _____ Access was satisfactory

The Process

- _____ Registration/scheduling, directions well done

Other:

Would you take another course from this instructor? _____ yes _____ no

Would you take another course from this provider? _____ yes _____ no

Additional Comments:

CHAPTER 4 COMPLAINTS

Investigating complaints on approved courses and instructors and reporting results to OCI

- (1) The Contractor acts as the Commissioner's designee, pursuant to Ins 28.10(1). This should be made clear early in a reporting period to providers and intermediaries through communication by the Contractor, including an explanation of all due process rights and responsibilities.
- (2) Complaints about the Contractor should be referred to OCI.
- (3) The Contractor may establish a standard investigative procedure germane to continuing education situations, but consonant with ss. 601.43 and 601.44, Stat.
- (4) The rule is silent as to when a decision on a complaint about a program, course or instructor will be rendered. Therefore, time frames will be similar to those used by Market Regulation in conducting its complaint process.
- (5) All letters responding to complaints against the Contractor will be signed by OCI. All other letters responding to complaints about other aspects of the program, to include providers, instructors and courses, will be signed by a duly appointed representative of the Contractor.

CHAPTER 5 WAIVERS

(1) A standard form is needed to process waiver requests (see attached). The required form and supporting documents must be submitted no later than 90 days prior to the end of the reporting period for which the waiver is requested. **[Ins 28.05]**

Within 30 days of receipt, the Commissioner shall act upon the waiver request and provide written notice of the decision to the applicant. A form letter covering approval or denial shall be developed by the Contractor, who will be the signatory. The letter shall state that an approved request shall be valid only for the biennium for which waiver application was made. **[Ins 28.05]**

(2) OCI will permit late filing by those who become terribly injured or critically ill AFTER the 90 days deadline, and consideration will be given to those applications by the Commissioner.

(3) "Good cause" issues leading to granting a waiver include: **[Ins 28.05]**

(a) Long-term illness or incapacity - need doctor certification.

(b) Serving full-time in the armed forces of the USA on active duty outside of Wisconsin during a substantial part of the biennium ("substantial part" is to be determined by OCI and the Contractor).

(c) Other emergency situations deemed appropriate by the Commissioner.

(4) The Contractor will develop a format for a notification of denial of an application for waiver.

(5) The notification of denial shall state the reason(s) for denial. It shall also state the review processes that are available to the applicant, including the applicant's right to an administrative hearing **[Ins 28.10]** which is to be provided within 30 days from receipt of a hearing request.

(6) The Contractor will develop a file of information which may be used to sustain a judgment of denial.

CHAPTER 6 RESIDENCY

- (1) The rule is clear that non-resident intermediaries, in addition to resident intermediaries, are responsible for meeting the requirements of Wisconsin's continuing education program. Approximately 19,000 agents showing residency in other states possess a non-resident license in Wisconsin. **[Ins 28.04]**
- (2) Residency requirements here for intermediaries from other states who desire to change from nonresident to resident status will be no barrier to their meeting Wisconsin requirements, because they will be required to enroll in Wisconsin's preclicensing education program to obtain their new Wisconsin license. The preclicensing status makes them exempt from CE requirements during that reporting period. **[Ins 28.04(2)(b)]**
- (3) A nonresident intermediary can become exempted from Wisconsin requirements if he or she furnishes an original letter of certification, not more than 60 days old when received by the Commissioner, which provides evidence of compliance with CE requirements in his or her state of residence (provided that the state of residence grants similar exemptions to Wisconsin residents who have satisfied Wisconsin's continuing education requirements). A list of those states who have signed a reciprocal agreement, as well as a sample agreement is attached. **[Ins 28.04(2)(c)]**
- (4) The Contractor will make known as soon, and as widely as possible, those states with which Wisconsin has executed reciprocal agreements.
- (5) Nonresident agents residing in non-reciprocal states must complete Wisconsin's CE requirements. **[Ins 28.04]**
- (6) Procedurally,
 - (a) The flow of communications between non-resident agents in other states who wish to comply by letter of certification, will remain with OCI.
 - (c) The Contractor will manage the communications flow between non-resident agents whose states of residence have no reciprocity agreement with Wisconsin.