

OPINION NO. 88

An employee in a State department who is also a licensed specialty contractor was recently invited to submit a bid proposal for a job to be done for another State department. He was the lowest bidder and was, therefore, awarded the contract. Various individuals had questioned the propriety of his participation in the bidding process and of his being awarded the contract. His performance on this contract was delayed pending a decision by the State Ethics Commission.

This Commission interviewed representatives of the complainant and the contracting agency, in addition to the employee and his employee union representative.

The complainants had voiced a concern of possible favoritism to a State employee on the part of the contracting agency. They further stated that they doubted that a full-time public employee could properly perform the contract without necessarily interfering with other State functions. Public inspectors, for example, would have to inspect the job site on weekends or evenings, thus requiring additional wage expenses, unless this employee were to take vacation time, which may interfere with the work schedule within his own department.

The contracting officer has informed this Commission that the government estimate of the job was approximately \$4,000. Therefore, informal proposals were requested in a Notice to Bidders published pursuant to law. Several contractors were personally invited by letter to participate in the bidding process because of prior work done for that department. Those personally invited included this employee and the complainant. Other contractors who received notice only by publication also submitted bids. The contracting officer indicated that he did not know that this individual was a public employee and that he did not know him personally except for a brief meeting two years ago.

The contracting agency has further indicated that this particular contract could be performed at any time because this department is manned 24 hours a day and has inspectors available at all times. Therefore, no special arrangement would need to be made if this employee were to perform the contract on evenings or weekends.

The employee has indicated that he uses his own equipment and materials on these outside jobs and that he normally performs these jobs in the evenings or on weekends. He has indicated that on the particular job in question he plans to use vacation time to perform the job and that he will be assisted by his son who is also employed by a division of his employing department and by a third person who is not a State employee.

This Commission is cognizant of Hawaii Revised Statutes, section 76-106 which generally permits the outside employment of civil service personnel. This law has not been nullified by the ethics law, Chapter 84, Hawaii Revised Statutes. The fact that the outside employment is a public contract does not in itself create a conflict of interest. In our opinion such employment becomes improper when the employee in order to perform upon the contract, uses State time and property to perform the job; interferes with his regular departmental functions because he must take vacation leave without adequate coverage; or he must perform the contract when inspectors are not normally available to inspect his performance. The contract, however, would be voidable unless made in accordance with HRS, §84-16(a), which states that "A State agency shall not enter into any contract with a legislator or employee or with a business in which a legislator or employee has a controlling interest, involving services or property of a value in excess of \$1,000 unless the contract is made after public notice and competitive bidding." We recognize that this test is stricter than the

provisions found in Chapter 103, HRS, relating to the expenditure of public money and public contracts.

Because this contract exceeds in value more than \$1,000 it is properly a contract to be considered under this provision of the ethics law. We interpret this provision to mean that no employee may enter into a contract in excess of \$1,000 unless there has been public notice and competitive bidding.

Public notice and competitive bidding were made regarding this particular contract and, therefore, was made in accordance with the requirements of the State ethics law. Had there been no public notice the contract would have been voidable pursuant to HRS, §84-17 and this Commission would have made a contrary finding and ruling.

We note further that the particular contract involves a job which is 80% federally funded. There is no question that this job is nonetheless a State contract administered by a State agency and which is subject to the provisions of the ethics law.

Our investigation indicates that there was no impropriety on the part of the contracting parties and that no confidential information was given to the employee or that he used or attempted to use his State position to obtain unwarranted treatment.

We note that at no time did he inform the contracting agency that he was a State employee. We advise that on future contracts he should initially disclose the fact of his public employment when his bid proposal is being submitted to another State agency. This will enable that State agency to make a proper determination of eligibility in entering into the contract.

Lastly, we advise him to inform his superiors of his intention to take vacation time in order to perform this contract. In the event timing of this vacation will not interfere with the requirements of his department and his ability to perform his normal duties adequately, we find no violation of the ethics law by his proceeding upon this contract. In the future, we suggest that he inform his department before entering into contracts or tendering bids if he plans to take vacation leave.

Dated: Honolulu, Hawaii, October 19, 1970.

STATE ETHICS COMMISSION
James F. Morgan, Jr., Chairman
S. Don Shimazu, Vice Chairman
Vernon F.L. Char, Commissioner

Note: Commissioner Walters K. Eli was excused from the meeting at which this opinion was considered. The vacancy left by the resignation of The Very Reverend John J. Morrett had not been filled.