

## OPINION NO. 172

A researcher of a state agency inquired whether the agency of which he was an official might purchase some equipment from a local company. The question arose because a former employee of the agency was an officer and employee of the local company. The relevant facts were as follows:

### 1. **Purchases.**

The state agency wished to make two purchases from the local company on a sole source basis based on the company's present position as local distributor of a mainland company. The first item of equipment was the second increment of a purchase which had been approved earlier in 1973. Purchase of this increment was postponed until further funding had been obtained. The researcher indicated that he favored the purchase from the local distributor because the agency had been guaranteed quick delivery and local service support. The quotations from the mainland company and the local company were approximately the same. He also indicated by telephone that the mainland manufacturer would not bid against its local distributor in the event a bid were requested. The second item of equipment was designed and manufactured by the local company. It was our understanding that this particular equipment was available nowhere else.

### 2. **Employee A's Past Employment by the State Agency.**

Employee A had been employed by one of the units of the state agency. Although he had at times assisted in administrative work for the unit that was interested in the purchases, he informed us that he had, not participated in the selection of the proposed equipment. The researcher advised us that the selection was based on a study made by another research group and that his agency's final choice was based upon technical reasons advanced by the members of the project. It was our understanding that the researcher initiated contact with the local company and that no solicitation had been made by Employee A.

### 3. **Employee A's Affiliation with the Local Company.**

Employee A informed us that the local company had been organized prior to his employment by the state agency. He owned over 10% of the authorized stock and was the vice president, secretary-treasurer and a director of the corporation. We were further informed that the chief officer of the corporation (the president, chairman and director of the board, and controller) and a major shareholder, Employee B, was an employee in another division of the state agency.

## **Contract Provisions of the Ethics Law**

The provisions of the ethics code which were applicable in this case were HRS §84-15(a) and (b), and §84-18(c).

### 1. **Considerations Under §84-15(a).**

HRS §84-15(a) states that:

A state agency shall not enter into any contract with a legislator or an employee or with a business in which a legislator or an 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.

Because Employee B, president of the corporation, had an employee relationship with the State of Hawaii, we considered the application of this provision to this case. The immediate question was whether Employee B's management capacity was a "controlling interest" under the statute. HRS §84-3(3) defines "controlling interest" as "an interest in a business or other undertaking which is sufficient in fact to control, whether the interest be greater or less than fifty per cent."

In determining whether a state employee has a controlling interest in a business, the Commission looks at ownership interest in the corporation and management control. Employee B owned approximately 10% of the authorized stock of the company. He was also the chief officer of the corporation; he was the president, chairman of and a director of the board, and the controller. We ruled that in this case Employee B had a "controlling interest" in the local company. Therefore, HRS §84-15(a) was applicable in this instance.

We advised the researcher that HRS §84-15(a) prohibited the state agency from entering into the contract with the local company unless the contract was made after public notice and competitive bidding. However, we pointed out that in a prior Commission opinion (Opinion No. 168), we had held that since contracts which were prohibited by HRS §84-15(a), if entered into, were voidable, it might be reasonable under certain limited circumstances for a state agency to enter into such contracts. In Opinion No. 168, we had stated that we believed that such a situation should not occur frequently and should occur only when it was in the best interest of the State and when there was little likelihood of undermining public confidence in public servants. The factors which are considered are listed in Opinion No. 168.

In this case, there were some facts before us which suggested that it might be in the State's interest to enter into the contract without bidding procedures. The Commission noted that the second item of equipment was made only by the local company and that the mainland company which provided the first item did not intend to bid against its authorized local distributor and in fact referred all inquiries for its supplies to the local company; that the agency would have earlier purchased the first item but for the fact that the agency had lacked sufficient funds at the time; and that the agency now wished to purchase through the local dealer because of the advantage of having local contact and a local service agent. We further noted that while Employee B was a state employee, he was not connected to the project in a state capacity. We, therefore, recommended that if the state agency upon evaluation of the facts, determined that it was in the State's interest to execute the contract, the agency should prepare a justification letter discussing the considerations listed in Opinion No. 168 subject to approval by this Commission. The Attorney General cannot initiate, pursuant to HRS §84-16, legal action to void a transaction until the Ethics Commission has determined that there has been a violation of the ethics law. Our approval of the justification sheet would serve as an intention by the Commission to not proceed with a charge of violation because of extenuating circumstances.

We emphasized that Commission review of a contemplated contract or approval of a justification sheet was limited to considerations under the ethics law only. We make no determinations under other bidding statutory provisions of the Hawaii Revised Statutes. The Department of the Attorney General has the responsibility to determine whether these other bidding statutory provisions prohibit a state agency from entering into a contract without competitive bidding.

**2. Considerations Under §84-15(b).**

HRS §84-15(b) states that:

A state agency shall not enter into a contract with any person or business which is represented or assisted personally in the matter by a person who has been an employee of the agency within the preceding two years and who participated while in state office or employment in the matter with which the contract is directly concerned.

We noted that although Employee A was previously an employee of the state agency, he had not been involved in any way in the recommendation or opinion or other discretionary activity in the decision to purchase the two items of equipment. Therefore, there was no probable violation of this provision.

**3. Considerations Under §84-8(c).**

HRS §84-18(c) states:

No former legislator or employee shall, within twelve months after termination of his employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters involving official action by the particular state agency or subdivision thereof with which he had actually served.

The facts before us indicated that an unintentional violation of the provision did occur. This was because Employee A had been representing the local company on the negotiations of this contract which would involve discretionary action on the part of the state agency. We advised Employee A not to represent further the local company in matters before the state agency for a twelve month period from termination of employment.

The agency also requested some guidelines on a "continuing 'service support' relationship" with the local company. We advised the researcher that if he should file a justification sheet and if it should be approved by this Commission, he could obtain services and replacement items from the local company. However, items that cost over \$1,000 and which may be replaced by items of other companies should not be obtained without Commission review.

The Commission thanked the researcher for his concern for ethics in government.

Dated: Honolulu, Hawaii, December 4, 1973.

STATE ETHICS COMMISSION  
Vernon F.L. Char, Chairman  
Gwendolyn B. Bailey, Vice Chairman  
Audrey P. Bliss, Commissioner

Note: Commissioner Walters K. Eli was absent from the meeting at which this summary agreement was considered. There was one vacancy on the Commission.