

## OPINION NO. 239

A resident of the State filed a complaint with the Governor alleging that two state agencies had not properly considered his company when they had entered into contracts for the providing of certain services. The state agencies had contracted instead with a company owned by an employee of one of the agencies. The resident questioned whether this involved a conflict of interest. The Governor referred the letter of complaint to the Commission to consider the ethics questions the resident had raised. The two state employees responsible for executing the contracts in question then requested that the Commission issue an advisory opinion to determine the merits of the complaint and to provide each of them with guidelines as to how they should proceed in such matters in the future.

The state employee with whom the agencies had contracted for services had been employed since the fall of 1974. He had been doing business with the agencies for approximately four years, first as an employee of the company and then, from October of 1974, as owner. The contracts had been renewed on an annual basis. The services he had provided included the annual inspection of certain equipment owned by the two agencies and servicing, where necessary. A number of equipment units had also been purchased from his company on an as-needed basis.

The contracts with "Agency A" had been of a value of somewhat less than \$500. The services with "Agency B" had been of a value in excess of \$2,000 per year.

The resident had been in this particular business for approximately three and a half years--the last year and a half as sole owner of the company. He stated that he had approached both agencies on a number of occasions to determine the possibility of his acquiring state business. He indicated that the agencies had never requested that he submit a proposal for a contract.

The state employees stated that they had not requested proposals from the resident in the past because his company could not provide same-day service, particularly with regard to a somewhat unique testing service. The resident conceded that he had only recently acquired the capacity to provide this testing service on a same-day basis but contended that he had continually been able to provide same-day service in all other areas. He also indicated that he could have provided two- or three-day service while providing substitutes for the equipment requiring the special testing.

At the outset, we pointed out that a state employee may have private business interests and may have contracts with state agencies. We noted that these contracts are subject to certain requirements under the ethics code.

HRS §84-14(a) (Supp. 1974) provides, in part, that "[n]o employee shall take any official action directly affecting ... [a] business ... in which he has a substantial financial interest." As owner, the state employee had a substantial financial interest in his company. However, in his state capacity, he did not take action that was related to contracts between his private company and the agencies. Thus, his contracts with the agencies did not involve a conflict of interest under HRS §84-14(a).

We also discussed the application of HRS §84-15(a). HRS §84-15(a) regulates agency contracts with state employees. It provides the following:

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.

Thus, the contracts between the employee's company and Agency A were not subject to the requirements of this section as, in the past, they had not exceeded the threshold amount of \$1,000. This section did apply, however, to those contracts involving Agency B as the services to that agency had been of a value in excess of \$1,000.

It appears that Agency B did not consider putting the contracts out to bid because the employee's company was the only company that could meet its requirement of same-day service. We took note of the resident's statement that he could have provided substitute equipment for those units he could not test on a same-day basis. This service procedure appeared reasonable to us. However, we stated that it was the agency's responsibility to determine the specifications of the services it requires; that determination, however, must be a reasonable one.

We noted that in a very limited number of past cases, the Commission had informed a state agency that the Commission would not proceed to find a violation of HRS §84-15(a) even if the requirements of this section were not complied with. For example, where only one vendor was able to provide a product such that a request for bids or proposals would merely be a paper exercise, the Commission advised the state agency that the Commission would not proceed to find a violation of HRS §84-15(a) even if the agency did not put the contract out for bids.

In the instant case, we stated that Agency B should have brought this matter to the Commission's attention. If the state employee's company was indeed the only company that could meet the agency's requirements, we would, in all likelihood, have informed the agency that we would not proceed to find a violation of HRS §84-15(a) even if the contracts were not put out to bid.<sup>†</sup> Because the facts indicated that bidding would have been a mere paper exercise, we did not proceed to find a violation of HRS §84-15(a).

We advised the state employees that the resident's company appeared capable of providing all the services that the agencies deemed necessary for the maintenance of fire safety. Accordingly, we stated that where a contract would involve amounts greater than \$1,000, this company, as well as any others similarly situated, should have the opportunity to participate in some sort of bidding competition. We stated further that failure to provide such an opportunity, without justification presented to the Commission beforehand, would probably result in a finding of an HRS §84-15(a) violation.

While HRS §84-15(a) does not apply to contracts of \$1,000 or less, we noted that there might be occasions where in the interest of promoting public confidence in state employees and in state government, the requirements of HRS §84-15(a) should be followed voluntarily. With

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<sup>†</sup>HRS §84-15(a) had no application to contracts between Agency B and the state employee entered into prior to the time that he became a state employee.

regard to the awarding of future contracts in this area, the Commission recognized that Agency A must make the determination on the basis of the lowest prices and best services available. However, we stated that the agency should not be insensitive to the issue raised by the fact that the owner of the company contracted with was himself a state employee. In the event that the agency determined that prices and services submitted in response to proposals were similar, the agency might consider awarding the contract on a rotating basis.

We stated that one of the Commission's primary functions was to assist state employees in following the requirements of the ethics code. We advised the employees that whenever ethical questions within their province should arise, they should feel free to request the assistance of the Commission.

We commended them for requesting an advisory opinion in this matter.

Dated: Honolulu, Hawaii, December 31, 1975.

STATE ETHICS COMMISSION  
Vernon F.L. Char, Chairman  
Paul C.T. Loo, Commissioner  
I.B. Peterson, Commissioner

Note: Commissioner Audrey P. Bliss was excused from the meeting at which this opinion was considered. There was one vacancy on the Commission.