

OPINION NO. 250

The administrator of a state division requested an advisory opinion concerning the position of an employee whose private business provided certain services to the division and who, in his state position, participated in the requisition of these same services.

The employee was engaged as principal investigator in an experimental program. In carrying out his responsibilities, he was required to visit a remote area. He usually remained in the area for from ten days to two weeks.

The employee was also the sole owner of a company whose principal asset was an especially equipped airplane which he used in travelling to the area. After conferring with the staff of the Commission in late 1973, the administrator decided to publicly advertise for bids from companies interested in providing this air service to the division. Bids were received and duly opened and the employee's company was the successful bidder. Its estimate was less than one-half of that submitted by the only other bidder. The division then entered into a contract with the company to provide these air services. The annual cost for these services was in excess of \$10,000. The division had not again put this matter out to bid.

When the division first became involved in this project, another employee was the principal investigator in the program. Subsequently, the project was broken into two parts and this employee then became responsible for his portion of the program; this put him in the position, as a principal investigator, of requisitioning his own company's services.

The administrator was concerned about the application of HRS §84-15(a) and §84-15(b) to the circumstances of this case.

HRS §84-15(a) (Supp. 1975) provides that:

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

In reviewing the original bid specifications, we noted that the employee's bid was basically for providing the plane alone, while we understood that the price submitted by the other bidder was for a plane and a pilot. We were advised that the employee provided his services as a pilot at no extra charge and based his charge for the plane on fees charged by companies providing local air taxi service. The administrator advised us that air taxi companies usually charge a much higher hourly rate for the long-distance travelling that the work on this project required.

The administrator stated that the other bidder in late 1973 had now gone out of business, and the especially equipped aircraft owned by that company was operated by an individual who was not interested in making flights to the area. He also indicated that the employee's charges were solely for the use of the aircraft in flying to and returning from the area and for any additional use of the aircraft while at the site. Should the division be required to use another company's equipment, that company would of necessity be required to charge for the down time between the employee's arrival and departure.

We stated that awarding of a contract to the employee's company without a competitive bidding procedure would constitute a violation of HRS §84-15(a). We noted, however, that in Opinion No. 168 the Commission had held that it might be reasonable under certain limited circumstances for a state agency to enter into such a contract. We had stated there 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.

In this particular case we noted that no other business was presently providing a comparable service; therefore it appeared that a bidding procedure would be a meaningless exercise. Even if a similar service were available, we did not believe that a bidding procedure would bring the State this service on terms nearly as favorable as those offered by the employee's company. Further, we did not see from the facts before us any indication that the employee had used his position to gain unfair advantage in this matter. We were of the opinion that entering into a contract with this company without further competitive bidding would not seriously undermine public confidence in public servants. Accordingly, we advised the administrator that should the division choose to enter into a contract with the employee to provide airplane services to the program we would not proceed to find a violation of HRS §84-15(a).

He had stated that he kept abreast of developments in the area of services and products that the division required. We advised him that should a private business acquire the capacity to provide adequate service to this project, it should be given the opportunity to compete for this business.

HRS §84-15(b) also had application to this matter. That section provides that a state agency shall not enter into a contract with a 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. Clearly the employee's company had been represented in this matter by the employee and, as an employee of the agency, he had participated in this matter by virtue of the fact that he had been involved in requisitioning the services of his own company. While the structure of the program had recently changed such that the employee was now the principal investigator in his part of the program, he had participated in requisitioning the services of his company from the beginning of the project. The administrator suggested a procedure under which another administrator would make the formal requisition for the services of the aircraft. While this would have removed the employee from the position of formally requisitioning the services of his own company, and while we believed that this might be beneficial from the point of view of maintaining public confidence, it was clear that the employee would of necessity continue to be involved in the requisitioning of his aircraft. Because the employee was the owner of the only aircraft available for the project and was also the principal investigator of this aspect of the project, we found that a violation of HRS §84-15(b) would be unavoidable.

As in our discussion of HRS §84-15(a), however, we were of the opinion that the employee had not used his position to gain an unwarranted advantage. The administrator stated that the program was of considerable value to the State and the nation, and we were persuaded that the program could not continue effectively without the participation of the employee and his aircraft. Accordingly, we found that it would not be in the best interest of the State to proceed to find a violation of HRS §84-15(b) under the facts he had presented. We stated that the employee might continue to participate in decisions relating to the requisition of his aircraft.

We commended him for bringing this matter to the attention of the Commission and for his continued concern for ethics in government.

Dated: Honolulu, Hawaii, April 20, 1976.

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