

OPINION NO. 254

The director of an office within the State who was required to review and approve contracts negotiated by other departments within his organization before payment could be made had received two contracts which he felt were violative of HRS §84-15(a). He requested that the Commission not proceed to find a violation of the ethics code if his office ratified the contracts. He had submitted a written justification in support of his request.

The facts presented by him were as follows:

1. On April 5, 1976, his office had received two contracts negotiated by a department which required his approval for ratification. Both contracts were with a local company whose president was a state employee. The contract amounts were \$1,800 and \$3,060. The services detailed under the contracts had been performed during the period of February 2 through March 15, 1976.
2. Because the services provided by the company seemed to be competitive, he had requested that the director of the contracting department provide a written justification for selection of this company's services over other available vendors of the same type of services. The justification concluded that this company had been chosen because it had been requested by those wanting the services, the company was open to giving special rates to those persons (a maximum fee of \$180 per participant v. a normal fee of approximately \$300 per participant), it could provide the services at times convenient to those persons, and it had a nationally known reputation and significant success ratio. No other vendors had been contacted by the contracting department. A member of the department had been approached by a company representative who had offered the special rates.
3. The director's office had then checked other firms listed under the same heading as the contracting company in the yellow pages and found five firms listed, one of which was the contracting company. The phone was not in service at one of the firms; the other three firms basically structured their services to individual needs rather than to general group needs as the contracting company had.

The director's letter of justification for the contract was based upon the fact that the work had already been completed and that there had been no other firms available offering similar services.

As he had noted, HRS §84-15(a) (Supp. 1975) had direct application in this matter. That section states in part that:

A state agency shall not enter into any contract ... 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.

The initial question to be resolved was whether the employee who was an officer in the contracting company had a "controlling interest" in the company. 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." The employee was not only an officer of the corporation, but we found he was a major stockholder as well. In addition his wife was an officer in the company and was also a major stockholder. Under HRS §84-3(6), the spouse's interest is

imputed to the employee. We held, therefore, that the employee had a controlling interest in the company. As both of the contracts with the company were in amounts exceeding \$1,000 and were made without competitive bidding, they fell squarely within the proscription of HRS §84-15(a).

The Commission had in a prior opinion (Opinion No. 168) indicated that, since contracts which are prohibited by HRS §84-15(a) are, if entered into, voidable, it might be reasonable under certain limited circumstances for the State to enter into such contracts. Opinion No. 168 had outlined some factors which should be taken into consideration in determining whether it would be advantageous to all parties, including the public, to enter into such contracts. The following factors were pertinent to this case: (1) the bidding procedure under the circumstances would appear to be a meaningless exercise; (2) the likelihood of obtaining better terms through the bidding process was highly doubtful; (3) the cost of the bidding process would seemingly outweigh the value of the contract; and (4) the presence or absence of any violation of HRS §84-13, relating to fair treatment in obtaining the contract.

First, since the contracting company was the only company offering the desired service in the State, a bidding process would have been a mere paper exercise. Secondly, the price obtained for the service was lower than that usually charged by this company. Thirdly, the cost of a formal bidding process would have far outweighed any value that such a process would have brought to the department under the circumstances in this matter. And, finally, we saw no indication that the state employee had used his position to gain these contracts. We therefore concluded that no useful purpose would be served by our proceeding to find a violation in this matter. To do so would have meant that the contractor would suffer rather than those employees who had entered into contract negotiations and accepted the services on behalf of the State without first complying with the principles of ch. 84.

The Commission stated that it was strongly opposed to making "after the fact" exemptions for contracts or actions which clearly violate the letter and intent of ch. 84. In making this decision we were mindful of the fact that the director had indicated to us that he was taking steps to eliminate the internal processing problems with contract formulation in the department involved.

We commended him for his continued interest in the ethics of state employees and the integrity of the contracting process.

Dated: Honolulu, Hawaii, May 19, 1976.

STATE ETHICS COMMISSION
Audrey P. Bliss, Chairman
Paul C.T. Loo, Vice Chairman
Dorothy K. Ching, Commissioner

Note: Commissioner Gary B.K.T. Lee disqualified himself from consideration and preparation of this opinion. Commissioner I.B. Peterson was excused from the meeting at which this opinion was considered.