

OPINION NO. 267

An executive officer of a state program advised us that the program was planning to hire a consultant to conduct an evaluation of one of its projects. This was only one of several such evaluations which were scheduled for the calendar year 1976.

In establishing this program, the legislature also established a task force for the program to be responsible for, among other things, initiating studies and experimental programs. A member of this task force was the executive director of a non-profit organization. That organization had submitted a proposal for the evaluation and the program was interested in entering into a contract on the basis of this proposal. The program was specifically interested in the services of three individuals who were employed by the organization, but the contract would be between the State and the organization, not these individuals. The officer asked the Commission to determine if such a contract would be in violation of the ethics code.

We believed that three sections of the ethics code were applicable to the question he had raised in his request. The major issue raised, however, had to be discussed in terms of the contracts section of ch. 84, HRS §84-15 (Supp. 1975). That section provides:

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.

First, the program was a state agency as that term is defined in HRS §84-3(9). Then, the executive director of the private organization, as a member of a state board, was a state employee for purposes of the ethics code; and, we had held in the past, and continued to believe, that an executive director does have an interest in the business that employs him which is sufficient to control that business. We stated that such an individual is generally charged with the overall operation of the business and from a practical point of view must be considered to be one of the most powerful members of such a business. Further, while the organization was both non-profit and public-spirited in purpose, it was nevertheless a business as that term is defined in HRS §84-3(1). Under that definition the fact that the organization was not operated for profit was not determinative of its status under the ethics code. Finally, while HRS §84-15(c) provides an exception to the contracts section for a personal contract of employment, we noted that three individuals would be providing services under this proposed contract and that the contract was being made with the organization rather than those individuals. The Commission had held in the past that HRS §84-15(c) would be applied even where a contract was between the State and the organization if in fact the contract was essentially for the services of one individual. However, where more than one employee of the business would be providing substantial services, it was our view that HRS §84-15(c) could not be applied.

The Commission, however, had stated in Opinion No. 168 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. We believed that the circumstances he had outlined in his request and in interviews with the Commission staff brought this matter within the coverage of Opinion No. 168. In that opinion we outlined a number of factors which should be taken into consideration in determining whether it would be advantageous to all parties, including the public, to enter into a particular contract. The following factors were pertinent

to this case: 1) whether the bidding procedure under the circumstances would appear to be a meaningless or paper exercise; 2) whether the likelihood of obtaining better terms through a bidding process would be doubtful; 3) whether the cost of a bidding process would outweigh the value of the contract; and 4) whether there was any violation of HRS §84-13, relating to fair treatment in obtaining the contract.

He had stated first of all that the program evaluation analyst followed general guidelines in the seeking of professional consultant services. Those guidelines included the establishment of a list of potential consultants. He also stated that in this particular case these guidelines had been followed and that the program staff had requested names from several sources including the operating agency of the project to be evaluated. Among the names suggested were those of individuals employed by the private organization. Requests for proposals on this particular evaluation had been sent to six different individuals or organizations. Three had declined to submit a proposal and two had not as yet responded. The organization had forwarded a proposal which met the needs of the program in this particular project. In view of these facts, it was our view that the program had followed a procedure which met the spirit if not the actual letter of HRS §84-15(a). To have required a formal bidding procedure at that point would have been a meaningless and costly exercise. Further, such a process would have had no likelihood of obtaining better terms for the program and the State, as the program would be contacting the same individuals who had already been given the opportunity to submit proposals. We also recognized that the cost of a bidding procedure would constitute a significant portion of the value of the entire evaluation contract.

The officer also noted that while the executive director of the organization was a member of the program task force, the task force itself had played no role in the scheduling of or contracting for the services required in the evaluation of the project. Clearly then, he had not used his position with the task force to obtain unwarranted advantages or contracts for his organization. We could find no violation of HRS §84-13, the fair treatment section of the ethics code.

Accordingly, it was our opinion that, after the program had received responses from those individuals for whom requests for proposals were still outstanding, the program might enter into a contract with the organization if it were determined that its proposal was at a fair cost and most closely met the needs of the evaluation project.

We did bring to his and the executive director's attention, however, the requirements of HRS §84-14(a) which provides that an employee shall not take official action directly affecting a business in which he has a substantial financial interest. As we had indicated earlier, the executive director was an employee of the State for the purposes of the ethics code. Further, his position as executive director of the organization gave him a substantial financial interest in that organization. Therefore, he had to be careful to disqualify himself from taking any official action directly affecting the organization, and that would include any action directly affecting a contract for services with the organization in the event that such a contract was indeed executed.

We commended the officer for bringing this matter to our attention and for recognizing the ethical considerations involved.

Dated: Honolulu, Hawaii, August 27, 1976.

STATE ETHICS COMMISSION
Audrey P. Bliss, Chairman
Dorothy K. Ching, Commissioner
Gary B.K.T. Lee, Commissioner
I.B. Peterson, Commissioner

Note: Vice Chairman Paul C.T. Loo was excused from the meeting at which this opinion was considered.