

## OPINION NO. 314

The superintendent of an experiment station operated by a state department was responsible for purchasing the material that was to undergo experimentation. In his private capacity, he was also the treasurer and the owner of 23% of a company that produced the material.

He had raised a question in a request for an advisory opinion which concerned the most recent experiment conducted under his supervision. This experiment was nearing completion. In the course of purchasing the material for this experiment he had approached the board of directors of his company and had requested that the board offer for sale to the program 20 units of the material. It was our understanding that a citizen had raised a complaint about this sale; the employee had come to us for a determination of the application of the ethics code to his actions in procuring the sale.

In early January of 1977 he had obtained bid proposals for the sale of 128 units of the material. He found two suppliers who were able to supply the necessary material. However, when the proposals were examined by the business office of the department, the director of that office determined that a formal bidding procedure should have been instituted rather than the informal procedure that he had used.

The business office then prepared a formal bid proposal package which was published statewide. There were only two responses to this request for bids, and only one was a qualified bid. However, the price offered in that bid was in excess of the funds available to the program and, therefore, was unacceptable.

It was then decided that the material should be purchased from several suppliers rather than from one. By following this procedure, the contract price for each lot would be less than \$4,000.00 and, under the Hawaii statutes applicable to bidding procedures, formal bidding would not be necessary.<sup>†</sup> Consequently, requests for bids were made to several suppliers in lots of 20 units. At this point he had pared his solicitation from 128 units to 100. However, only three bids were received at the bid deadline. He had received a verbal promise for another bid which was received shortly after the deadline and was accepted.

He had been advised that funds for this program would expire on December 31, 1977. Because the experiments had to proceed for several months in order to provide valid results, he felt it imperative to purchase the material needed immediately. He had been under the impression that if there were any further delay the experiment would have to be canceled. He had also been of the view that there was no other material available for the experiment as he had not received bids by the deadline date. It was at this point that he contacted the board of directors of his company. The board agreed to sell 20 units to the experiment station at 30 cents per pound. The figure of 30 cents was the mean between the lowest and the highest bids that had been received during the course of the various phases of bidding. Of the other four bids finally received, two were at 30 cents a pound, one was at 31 cents a pound, and the last at 33 cents a pound.

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<sup>†</sup>Note however, that a contract between a State agency and a business in which a State employee has a controlling interest must be formally bid if the value of the contract is in excess of \$1,000.00 (HRS §84-15(a)). This will be discussed later in this opinion.

He asked us to determine if his role in securing this sale by his company was in violation of the statute.

HRS §§84-12, 84-13, and 84-14 had application to his conduct in this matter. In addition, HRS §84-15 was of concern with respect to the department's action in entering into this contract. HRS §84-12 (Supp. 1975) provides:

No ... employee shall disclose information which by law or practice is not available to the public and which he acquires in the course of his official duties, or use the information for his personal gain or for the benefit of anyone.

The bids submitted by the various suppliers constituted confidential information as these prices had naturally not been available to the other bidders. This was, of course, an essential part of the bid process. Moreover, the bid prices that were submitted were used as a basis for determining the price of the material that would be sold to the State by his company. Since we had to assume that the price at which this material was sold was to bring a profit to his company, we could reach no other conclusion than that his conduct had been in violation of this section when he discussed the bidding with his company's board of directors.

HRS §84-13 provides that a state employee may not use his position to grant unwarranted advantages, treatment, or contracts for either himself or anyone else. This proscription specifically includes a situation in which a state employee uses his position to gain a contract for himself. Here again, we had to conclude that his action had been in violation of this statutory provision. There could be no doubt that the contract between his company and the State was the result of his official action as a state employee in contacting the board of his company.

HRS §84-14(a) (Supp. 1975) provides:

No employee shall take any official action directly affecting ... [a] business or other undertaking in which he has a substantial financial interest.

His status as a department employee included him within the body of state employees that were subject to the state ethics code. Further, his interest in his company was a financial interest as that term is defined in HRS §84-3(6)(A) of the code. Then, because it was an interest that was sufficient in size to influence him in decisions he made concerning it, it was a substantial financial interest for the purposes of interpreting HRS §84-14(a). When he had contacted the other directors of the company to determine if they would submit a bid for the sale of the material to the State, he had acted in an official capacity. That action directly affected his company. Accordingly, his action in this regard was in violation of this section.

Finally, we brought to his attention the language of HRS §84-15(a) and HRS §84-15(b). These sections concern contracts that arise between a state employee and a state agency. While such contracts are permissible, certain guidelines must be followed before state agencies may enter into such agreements. HRS §84-15(a) requires that when a contract is in excess of \$1,000 and is between a business in which a state employee has a controlling interest and a state agency the contract may be entered into only after public notice and competitive bidding. In this case, the contract between the State and his company could not be said to have been entered into as a result of a competitive bidding process. The bid had been solicited by him and had not been sent pursuant to a public notice. Accordingly, the State had been in violation of

the statute when it entered into this agreement. We noted that he was the representative of the department and that his superiors were not specifically made aware that his business was submitting a bid.

The second part of this contracts provision, HRS §84-15(b), prohibits a state agency from entering into a contract with a business which is represented or assisted by a state employee who has participated in the subject matter of the contract. The provision provides essentially that one individual may not be involved in the same contract in both a state capacity and a private capacity. Here, he had acted in a state capacity when he had contacted his company to submit a bid. He had also been responsible for the solicitation of bids and for drawing up the specifications for the bidders. In addition, when he contacted the directors he was also acting as a board member in discussing the bid proposal with them. Here again, then, the State had been at least technically in violation of the statute when it entered into this contract. And, of course, he was the representative of the State and, again, his superiors were not advised in advance of the fact that he was purchasing material from his company.

The Commission's staff discussed this matter with the associate director of the program. It was his view that in making the decision to purchase the material from his company this employee had made a decision in what was essentially an emergency situation. He felt that he had been legitimately concerned that if the material were not purchased immediately the experiment would have to be canceled and the information gained from such an experiment lost. It was his further view that he had acted honestly and in what he felt to be the best interests of the State and had not attempted to make a financial gain for himself.

We had no doubt of the importance of this kind of experiment for the State's economy and could appreciate the urgency he felt in getting the experiment underway. Further, we were persuaded that he had operated under difficult circumstances. The bidding procedure used at the time his company had submitted its proposal was the third stage of his attempt to purchase this material. The first attempt had begun in January and the procedure had dragged on for a considerable period. We also noted that his company had not been approached to submit a bid in either of the earlier proposals. In our view this was evidence of good faith on his part. However, we could not ignore the fact that he had failed to make specific disclosure of what he was doing prior to the time that he had contacted his company. Such disclosure would have permitted this Commission to have entered into the matter at a time when the difficulties that had arisen could have been avoided. This is a message that the Commission had been communicating to departments for some time. Disclosure of situations in which employees have a private as well as a state interest must be made at the earliest possible time, particularly where a potential for conflict appears. The extenuating circumstances we had noted in this case could not excuse the employee's failure to have made disclosure at an appropriate time.

In his testimony before the Commission he had noted that the low and high bids received during the period of time from January to the date of the closing of bids were 27 and 36 cents a pound respectively. He had indicated that the 30 cents per pound bid proposed by his company was the mean between these two bids. While it was clear that the material could not be returned and the contract rescinded because of the damage that this would do to the study, we believed that the purchase price should be changed so as to accord with the lowest bid price received during the course of the various bidding procedures.

We recognized that he had taken the step of requesting this opinion, and we commended him for his frank presentation of the facts at the Commission meeting at which he had appeared to testify.

Dated: Honolulu, Hawaii, October 5, 1977.

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

Note: Vice Chairman I.B. Peterson was excused from the meeting at which this opinion was considered.