

OPINION NO. 466

The Commission received a request for an advisory opinion from the chairperson of a state board which was responsible for the development of a project. In planning the development, the board had decided to follow a two-step process. The board intended to first retain a consultant to provide it with pre-development assistance. Secondly, after reviewing the consultant's recommendations, the board planned to solicit proposals from developers who wished to compete for the contract to develop the project. At the time of the request, the board had been in the process of choosing its planning consultant.

When considering the several planning consultants who had submitted proposals, the board had become aware of the possibility of potential conflicts of interests. The board discussed this possibility with our staff during one of its meetings. After the discussion, the board decided to pose the following questions to the Commission:

1. Would there be a conflict of interest if a member (either an individual or an organization) of the selected planning consultant team were to become a member of the selected developer team?
2. If a member of the selected planning consultant team is a subsidiary of a development company, should that development company be precluded from being considered as a prospective developer?
3. If there is a conflict of interest, does the conflict arise from any specific task or tasks to be assigned the planning consultant or does it apply to all tasks?

The board advised us that it would require an answer to its questions within two weeks because of the timetable that had been set earlier by the board. The Commission met to discuss the board's request and certain board and staff members appeared at the meeting to present the board's perspective and concerns regarding this situation. At that meeting, the board's chairperson reiterated the necessity for a determination by the end of the week.

During the Commission's meeting, the board members asserted that it was their responsibility to secure those who would do the best job in developing the project. The Commission noted that it was this Commission's responsibility to see that the project proceeded in accord with the provisions and philosophy of the ethics law. We also pointed out that the Commission was mandated by HRS §84-1 to liberally construe the State Ethics Code to promote high standards of ethical conduct in state government. The Commission's analysis and discussion of the possible applications of the ethics code focused on the application of two sections of the ethics code, HRS §84-14(a), relating to conflicts of interests, and HRS §84-13, relating to fair treatment.

After reviewing the written material submitted by the board and hearing the testimony presented by the board members and the board's staff, this Commission agreed that there were serious questions with respect to conflicts of interest which were appropriate for our consideration. However, based on the limited information that we had received and the short period of time that we had had to review the information, we did not feel that we could make a definitive determination as to the application of the State Ethics Code to the board's

questions. We did, however, point out the specific areas of our concern and advised the board about the general guidelines we had followed in the past when applying the law.

First of all, the Commission noted that the individuals who served as members of the board were included as "employees" by HRS §84-3(4) for purposes of the ethics code. As such, the board members were charged by HRS §84-13 not to use their positions to secure unwarranted advantages for themselves or others. Accordingly, the Commission stated that it was their responsibility, when carrying out their responsibilities as state board members, to avoid situations where individuals or organizations might gain unfair benefits.

The primary question presented by the board was "Would there be a conflict of interest if a member (either an individual or an organization) of a selected planning consultant team were to become a member of a selected developer team?" The Commission noted that the board, in reaching its decision to hire a planning consultant, had determined that individual board members and the board's staff did not possess the time or expertise required to perform the tasks. The Commission also was aware that, initially, the board, out of a concern for obtaining those who possessed the best skills in planning and development, had deliberately separated the two functions. The Commission remarked that it seemed to be contradictory that the board would thereafter consider integrating the processes by allowing its consultant to participate in the second phase as a part of the developer's team.

In the Commission's opinion, this first question was likely to give rise to the most serious problems. The scope of services to be provided by the planning consultant included, but was not limited to: preparing the developer's package, including the developer's agreement; preparing the developer's selection criteria and process; and assisting the board in negotiating a contract with the selected developer. The board noted that it intended to include the standard provisions of certain state contracts in its contract with the consultant. In our opinion, however, these provisions were not sufficient to guard against a conflict of interest arising under the State Ethics Code.

HRS §84-14(a) states:

No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest; or
- (2) A private undertaking in which he is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.

Given the specific tasks that the board intended to assign to its planning consultant, it was our view that conflicts of interest, as noted in the board's staff's analysis, would have been almost impossible to avoid if the planning consultant or a member of the planning consultant's team were allowed to become a member of the developer's team. For example, the Commission commented that a conflict of interest would exist if the consultant were also a developer who planned to submit a development proposal to the board for its consideration. If this were to occur, all action taken by the consultant would have a direct effect on his

business. In conjunction with the third question posed by the board, the Commission understood that the board had considered deleting from the consultant's responsibilities the task of assisting in the negotiation of a contract with the selected developer. That deletion would have lessened the possibility of one potential conflict arising; nevertheless, the Commission believed that the preparation of the developer's package and the selection criteria may also have posed difficulties.

The Commission also discussed the possible fair treatment problems that could arise from this question. The board presented a theoretical timetable wherein the consultant process was entirely separated from the development portion of the process. We were told that the board planned to hire a consultant who would spend from six months to a year on pre-planning tasks. Thereafter, the board intended to review the recommendations of its consultant and terminate its relationship with the consultant. Thereafter, the board planned to solicit proposals from potential developers. We were also told that, in accord with common industry practice, the developer would select the members of his development team after being selected by the board as the developer. Further contractual negotiations would then ensue until a final agreement between the board and the developer was reached. The Commission noted that this version of the timetable differed somewhat from its understanding of industry practice and that it did not seem to be reflected in the board's staff analysis.

The Commission was not certain that the process actually could be carried out so as to completely separate the planning step from the development step. In our opinion, it may have been almost inevitable, given our understanding of the practices of the industry, that an overlapping of the two time periods would occur. An overlapping of the two time periods would, of course, have created a clear conflict of interest because developers might negotiate with potential members of their development teams during the time period when proposals were being solicited.

The Commission noted that other problems might arise even if the proposed timetable were followed. HRS §84-13(1) prohibits employees from seeking other employment or a contract for services for themselves by the use of their positions. In the Commission's opinion, if the consultant contemplated becoming a part of the developer's team, it might be difficult for the consultant to avoid violating this section of the code, particularly if the interval between the planning step and the development step were a short one. If it were known that the consultant or members of the consultant team would be allowed to participate later as members of developer teams, in our view, there might be communication between members of the consultant team and potential developers while the consultant team still served the board. Naturally, the tighter the timetable the more likely it would be that such a situation might arise.

Finally, the Commission also was concerned that the consultant might be tempted to violate the provisions of HRS §84-13 by taking action that might increase the chances of being selected as a member of the developer's team. It was the Commission's view that the alternatives as set out by the board's staff with respect to this question clearly laid out the potential conflict-of-interest problems. In light of the information that we had received, we noted that "Alternative A" of the board's staff report was the only plan under consideration with which we found no potential for conflicts of interest. Because of the limited information

available to us at that time, we were unable to make a determination with respect to the other alternatives presented.

The second question posed by the board was "If a member of the selected planning consultant team is a subsidiary of a development company, should the development company be precluded from being considered as a prospective developer?" The Commission had the same concerns as discussed in the question above. Again, HRS §84-14(a), relating to conflicts of interests, was the most applicable code provision here. In Advisory Opinion No. 434, the Commission found the interests of parent companies and their subsidiaries to be essentially the same because the benefits gained by or through subsidiaries ultimately flow to the parent companies. Accordingly, the Commission advised the board that employees of a subsidiary are generally prohibited from taking state action which directly affects the parent company. The Commission was aware that the consultant's tasks were likely to have a significant effect on the development proposals submitted by potential developers. We were, however, unable to make a determination as to the effect this may have had on a parent company if its subsidiary served as the board's planning consultant.

The Commission recognized that because we were not able to come to clear conclusions regarding the questions, the board was placed in a difficult position. The Commission hoped that the guidelines set out in the opinion would be of assistance to the board. The Commission observed that we found ourselves in the uncomfortable position of having been presented questions that were appropriate for our review and determination, without having been given sufficient information or time to give a complete response. Consequently, we had determined that we could only point out our concerns and suggest guidelines for the board to follow. Under those circumstances, the Commission stated that if questions were raised in the future, the responsibility of illustrating that the provisions of the code had not been violated would lie with the board and not with this Commission. We expressed our regret that the Commission was unable to respond more specifically because of the time constraints imposed by the board's schedule. Finally, we noted that with additional time and information, if the board requested a more expansive opinion, the Commission, naturally, would make a determination as to the specific applications of the code.

We appreciated the sensitivity shown by the board and its staff to the ethical considerations involved in this matter.

Dated: Honolulu, Hawaii, May 10, 1982.

STATE ETHICS COMMISSION
Edith K. Kleinjans, Chairperson
Dorothy K. Ching, Commissioner
Gary B.K.T. Lee, Commissioner
Robert N. Mitcham, Commissioner

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