

## ADVISORY OPINION NO. 2017-5

November 20, 2017

The Hawai'i State Ethics Commission ("Commission") received a request from a state agency ("Agency") for an advisory opinion as to whether the State Ethics Code, Hawai'i Revised Statutes ("HRS") Chapter 84, prohibits the Agency from contracting with certain entities for the sale of agency inventory. Based on the facts in this case, the Commission concludes as follows: if an employee of the Agency participates in matters relating to the sale of the inventory, and the employee subsequently leaves State employment and assists or represents a person or business in bidding on the same inventory, then HRS § 84-15(b) prohibits the Agency from selling the inventory to that person or business.

### **I. Facts**

Having reviewed the information provided by the Agency, the Commission understands that the Agency originally decided to sell the inventory in 2012. An employee of the Agency worked on matters related to the proposed sale and prepared a Request for Proposals ("RFP") in draft form ("Draft RFP"). The proposed sale was then deferred. The employee left his employment with the Agency in 2016 (hereinafter, the employee shall be referred to as the "Former Employee").

The Former Employee terminated his state position with the Agency before the RFP in final form ("Final RFP") was published and started working for a private company ("Company A"). After the Final RFP was published, the Former Employee began communicating with the Agency about the sale and was granted access to the Agency's online RFP materials and data room. The Former Employee also participated in several inventory inspections and emailed the Agency a list of RFP-related questions. The questions were detailed in nature, and were seemingly based on the Former Employee's prior knowledge of the inventory and the Draft RFP he had previously worked on during his employment with the Agency. However, there is no indication that the questions relied upon confidential information that the Former Employee could not have obtained from public documents.

The Former Employee then terminated his employment with Company A and began assisting and/or representing other prospective bidders in the inventory sale. The Former Employee also requested permission from the Agency to access the Agency's online RFP materials and data room.

The Agency received several proposals in response to the Final RFP. The companies that submitted bids included a company that is affiliated or controlled by Company A, as well as another private company ("Company B"), which named the Former Employee as a consultant and as one of its key personnel in its bid proposal documents.

### **II. Issue Presented**

The issue before the Commission is whether HRS § 84-15(b) prohibits the Agency from contracting with Company A (or any of its affiliated entities), Company B (or any of its

affiliated entities), and any other entity that was personally assisted or represented in the Final RFP and inventory sale by the Former Employee.

### III. Application of the State Ethics Code

The purpose of the State Ethics Code is to prescribe a code of ethics for elected officers and employees of the State as mandated by Article XIV of the State Constitution. The Commission is charged with the responsibility of administering the ethics code so that public confidence in public servants will be preserved.<sup>1</sup>

HRS § 84-15 pertains to the award of state contracts by state agencies. HRS § 84-15(b) prohibits a state agency from contracting with any person or business that is represented or assisted personally in the matter by someone who: (1) has been an employee of the contracting state agency within the preceding two years, and (2) participated while in state office or employment in the matter with which the contract is directly concerned.<sup>2</sup>

These provisions are intended to prohibit the appearance of impropriety that is likely to arise when a state employee has participated in a matter as a state employee and thereafter assists or represents a business in its attempt to secure a contract directly related to that matter. Adv. Op. No. 88-7, 1988 WL 1722554, at \*2 (1988).

As the Commission has previously explained, such situations raise the appearance or danger of impropriety because the contracting entity would likely receive an unwarranted advantage over other potential bidders based on the former state employee's special access to information or contacts within the former agency. *Id.* In addition, the former state employee could improperly benefit by trading on his or her "insider knowledge" to secure future employment or business opportunities after leaving the state. *Id.*

Based on the facts in this case, the Commission concludes that the Agency is prohibited by HRS § 84-15(b) from contracting with any person or business that was represented or assisted personally by the Former Employee on the matters related to the Final RFP and inventory sale.

First, the Former Employee was employed by the Agency during the preceding two years, thus the two-year prohibition period under HRS § 84-15(b) remains in effect.

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<sup>1</sup> Preamble, HRS chapter 84.

<sup>2</sup>HRS § 84-15(b) states in relevant part:

(b) A state agency shall not enter into a contract with any 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.

Second, the Former Employee, while employed by the Agency, participated in the matter with which the Final RFP and inventory sale is directly concerned. As part of his state duties he managed the inventory. More significantly, he was involved in the Draft RFP and other decision-making matters related to the inventory sale. See Adv. Op. No. 88-7, 1988 WL 1722554, at \*2 (1988) (holding that an agency would be prohibited from entering into a settlement agreement with a business if the business was assisted by a former employee that had participated on the underlying contract).

Third, the Former Employee assisted and/or represented Company A and Company B in bidding on the Final RFP. As Company A's representative, the Former Employee obtained access to the Agency's online RFP materials and data room and submitted a list of questions to the Agency regarding the sale. Furthermore, as a consultant to Company B, the Former Employee assisted Company B in developing a portion of its bid proposal. In the Commission's opinion, these actions establish that the Former Employee represented and assisted Company A and Company B in their respective attempts to purchase the inventory from the Agency – that is, the Former Employee's former state agency.

#### **IV. Conclusion**

Based on the foregoing, the Commission concludes that HRS § 84-15(b) expressly prohibits the Agency from contracting with Company A, Company B, and any other entity that has been personally assisted or represented by the Former Employee in the Final RFP and inventory sale.

The Commission thanks the Agency for seeking guidance on this issue and demonstrating a commitment to high ethical standards.

Dated: Honolulu, Hawaii, November 20, 2017.

#### **HAWAII STATE ETHICS COMMISSION**

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