

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**



ADVISORY OPINION NO. 172

This advisory opinion concerns whether an engineering firm owned by an appointed City employee in a City agency may be a subconsultant for a City construction project.

The Ethics Commission [Commission] believes that the employee's firm may do so because it became a subconsultant one year before he became a City employee. The Commission does not believe, however, that his firm may become a contractor or subcontractor for any City projects until one year after his City employment is terminated.

The Commission understands the facts to be as follows:

The employee was appointed to the Department of Public Works about (date). His official duties include recommending to the director of his agency which bidders should be awarded City contracts. He may base such recommendations on written bids, which include the names of intended subcontractors such as subconsultants.

The employee also owns XYZ Services, Inc. [XYZ], which became a subconsultant to the prime consultant for a City construction project before he became a City employee.

The ethical questions are whether an engineering firm may continue as a subcontractor for City projects under 1) current and 2) possible future contracts with the City after the owner of the subcontracting firm becomes a City official with duties relating to the selection of contractors.

The general rule is that no business in which a City employee has a substantial financial interest may obtain a City contract because doing so would violate or appear to violate the City's standards of conduct. This rule is the result of a two-part analysis of several standards of conduct. First, the City cannot enter into a contract with a business in which a City employee has a substantial financial interest unless the contract is made after competitive bidding.¹ Second,

¹ No officer or employee of the City ... shall ... [e]nter into any contract in behalf of the City with an officer or employee or with a business in which an officer or employee has a controlling or substantial financial interest, involving the furnishing of services, materials, supplies, and equipment unless the contract is made after competitive bidding Section 6-1.2(5), Revised Ordinances of Honolulu 1978 (1983 Ed.) [ROH].

"Business" includes (A) a corporation; (B) a partnership; (C) a sole proprietorship; (D) institutions; (E) trusts; (F) foundations; or (G) any other individual or organization carrying on a business, whether or not operated for profit. Section 6-1.1(2), ROH.

where a business in which an officer has a substantial financial interest does submit a bid under competitive bidding and where the employee has official duties that relate to the competitive bid, the employee is susceptible to allegations that 1) his business submitting a bid is incompatible with his official duties;² 2) he has used his official position to secure special consideration on behalf of his business;³ or 3) he has participated in an official action directly affecting a business in which he has a substantial financial interest.⁴

In this situation, any business in which the employee in question may have a substantial interest should not obtain a City contract without competitive bidding. However, a real or apparent conflict of interest would arise if XYZ submits a bid or is named as an intended subconsultant on another firm's bid because his official duties include recommending who should receive City contracts. Therefore, XYZ should not seek work as a prime consultant or subconsultant for any City projects because the employee would be susceptible to allegations that doing so is incompatible with his official duties, that he secured special consideration for XYZ, or that he participated in selecting his firm as a City consultant or subconsultant.

XYZ may, however, continue as a subconsultant for the first increment of the project because it began as such one year before he became a City employee.

In conclusion, when a City employee has a substantial or controlling interest in a business, the business may not receive City contracts without competitive bidding. When an employee's duties include selecting who receives City contracts, real or apparent conflicts of interest may arise under several standards of conduct should an employee's business seek any City work, whether as a consultant or subconsultant. However, any City work begun before an employee assumed official duties may be completed because there was no connection at the time between the business and the City.

"Financial interest" means an interest held by an individual, the individual's spouse, or minor children which is: (A) an ownership interest in a business; (B) a creditor interest in an insolvent business; (C) an employment, or prospective employment for which negotiations have begun; (D) an ownership interest in real or personal property; (E) a loan or debtor interest; or (F) a directorship or officership in a business. Section 6-1.1(6), ROH.

² No elected or appointed officer or employee shall ... [e]ngage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties. Section 11-102.3, Revised Charter of the City and County of Honolulu 1973 (1984 Ed.) [RCH].

³ Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person. Section 11-104, RCH.

⁴ No officer or employee of the City ... shall ... [p]articipate, as an agent or representative of a City agency, in any official action directly affecting a business or matter in which ... he has a substantial financial interest Section 6-1.2, ROH.

Dated: June 18, 1987

JANE B. FELLMETH
Chair, Ethics Commission