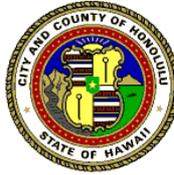


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091
Phone: (808) 527-5573 \$ Fax: (808) 527-6936 \$ EMAIL: ethics@honolulu.gov
Internet: www.honolulu.gov/ethics



MUFI HANNEMANN
MAYOR

CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

Advisory Opinion 2006-3

May 16, 2006

Via Hand-Delivery

Honorable Charles Djou
Chair, Executive Matters and Legal Affairs Committee
City Council
City and County of Honolulu
Honolulu, Hawaii 96813

Re: Your request for advice concerning Wayne Hashiro, EC No. 06-047(w)

Dear Councilmember Djou:

This responds to your letter dated April 27, 2006, wherein you request an opinion from the Ethics Commission ("Commission") regarding whether Acting Managing Director Wayne Hashiro may have violated the ethics laws. At its meeting today, the Commission approved this response. The concerns stated in your letter stem from possible action taken by Mr. Hashiro when he was the Director of the Department of Design and Construction ("DDC") in 2005 relating to contracts with companies where his son was an employee and his friend a principal.

I. Summary

There is no evidence to conclude that Mr. Hashiro violated the ethics laws regarding either the Kalaheo Avenue Sewer Reconstruction Project ("Kalaheo Avenue Project") or the Ward Avenue Sinkhole Investigation ("Ward Avenue Project").

In his role as Director of DDC, Mr. Hashiro signed four documents related to a contract for construction management of the Kalaheo Avenue Project between the city and a consulting firm in which his friend was a principal and Mr. Hashiro's son was an employee. The issues raised were whether Mr. Hashiro had attempted to obtain an unwarranted benefit for his friend or his son or had acted in a matter in which he had a conflict of interest.

After investigation, it is evident that several city departments determined the need for the consultant work prior to Mr. Hashiro working for the city. In addition, a panel of civil service employees selected the consultant firm before Mr. Hashiro came on board. The four documents reflected decisions that had been previously made by city agencies. The documents he signed included no contracts or amendments or other document that created the terms of any contract. No attempt to influence or secure an unwarranted benefit for the firms in question was found. Similarly, no conflict was created or acted on. The Commission, however, notes that Mr. Hashiro could have avoided even the appearance of impropriety or conflict of interest had he not signed the documents that involved his son's employer.

II. Facts

A. The Kalaheo Avenue Project

In early 2005, the city undertook the Kalaheo Avenue Sewer Reconstruction Project ("Kalaheo Avenue Project") to rehabilitate the sewer lines running along Kalaheo Avenue and upgrade the water mains for a total estimated cost of \$3,500,000. Various city departments believed it would be most efficient if the city reconstructed the water lines in the same area at the same time. The reason for combining the water and sewer projects was to avoid multiple road closures and traffic disruptions along Kalaheo Avenue. A Memorandum of Understanding ("MOU") to this effect was executed by the heads of DDC (by Mr. Hashiro), the Department of Environmental Services ("ENV") and the Board of Water Supply ("BWS"). ENV and DDC were responsible for preparing the plans and administering the design and construction contract for the project. MOU at paras 1-3.

This part of the Kalaheo Avenue Project required hiring a consultant as a project manager to oversee and manage the work of the contractor that would reconstruct the sewer and water lines. Procurement of the construction management consultant was done on an emergency basis because the construction contract was itself emergency work. The Kalaheo Avenue sewer line presented a threat to public safety and health due to the possibility of collapse and resulting damage to persons and property from the sewage. In addition, there was an immediate need to replace the leaking, 45-50 year old the water lines. November 30, 2004 memorandum from DDC and ENV to BFS.

As an emergency project, the state procurement laws do not require that the contractor be selected by competitive bid. Instead, the city may turn to a list of pre-qualified contractors. In 2004 (before Mr. Hashiro took his city position in January 2005), a selection committee made up of civil service engineering employees from DDC and ENV ranked by quality the top 5 engineering firms that offered to provide construction management services to the city for the Kalaheo Avenue Project emergency work. URS Corporation ("URS") was ranked number 1. One of the principal engineers at URS was David Yogi, Jr., and one of the engineers employed by URS was Wayne Hashiro's adult son.

The city and URS originally estimated that the construction management contract would require services in the total amount of \$1,150,000. This estimate was increased to \$1,430 in October 2005. However, the ENV and DDC representatives knew that the management services contract would be needed over more than one fiscal year. Because the funding for the services would be available on a fiscal year basis, the city entered into a construction management contract with URS on January 26, 2005 between the city and URS for \$530,000. This reflected the estimated cost of construction management through fiscal year 2005.

Timothy Steinberg, the DDC director, Eric Takamura, ENV director and Mary Pat Waterhouse, Acting Director of the Department of Budget and Fiscal Services (“BFS”) signed the contract on behalf of the city and David R. Yogi, Jr. signed on behalf of URS. James Kwong, PhD., acted as the principal construction manager and Jeff Kalani was the resident engineer on the project for URS. The project engineer for DDC and the city was Myron Fujimoto, P.E., a veteran wastewater engineer in the Construction Branch, Wastewater Division of DDC. Mr. Fujimoto also negotiated the contract and amendment with URS.

On December 30, 2005, the city amended the contract with URS that brought the total for the construction management contract to \$1,430,000. The same directors signed for the city, except the deputy director, Eugene Lee, signed for DDC. The increased contract amount funded by fiscal year 2006 monies. It appears that the portion of the consultant management work associated with the added water line reconstruction was \$71,509. MOU at para 5.

In April 2005, Mr. Yogi and Dr. Kwong left URS and formed Yogi Kwong Engineers, LLC (“YKE”). At least two other URS employees moved to YKE, Jeff Kalani and Mr. Hashiro’s son. Because Dr. Kwong and Mr. Kalani were the key managers for the Kalaheo Avenue Project emergency work, URS subcontracted the work to YKE.

Mr. Fujimoto stated that he became aware that Mr. Hashiro’s son worked for URS at the time Mr. Fujimoto went out to inspect the Kalaheo Avenue Project. Mr. Fujimoto stated that neither Mr. Hashiro nor anyone else either directly or indirectly suggested that he treat URS or its staff any differently than any other construction management consultant, whether in contract negotiation or work performance. Mr. Fujimoto also stated that Mr. Hashiro never asked him, or anyone else to his knowledge, about the contract terms, quality of work or schedule regarding the URS contract.

Both Mr. Fujimoto and Mr. Hashiro noted that the needs assessments, contracts, estimates, notices to proceed, memoranda of understanding, and status letters are prepared by staff and not by the director or deputy director of DDC. The volume and complexity of the projects make detailed review of projects impossible for these officers.

Mr. Hashiro signed four documents relating to the Kalaheo Avenue Project and the URS contract. He signed the “Notice to Proceed” letter for URS dated February 3, 2005. A notice to

proceed is required under city contracts and protects both parties. It ensures that BFS has allocated the funding for the project so that construction may begin.

Also on February 3, 2005, Mr. Hashiro signed a request to BFS supporting BWS's request to include the reconstruction of the water lines in the Kalaheo Avenue Project because of the emergency condition noted above. (A BWS memorandum shows that BWS wanted to include the water main work with the sewer work as early as December 2004.) On November 21, 2005, Mr. Hashiro and the directors of ENV, BWS and BFS signed the MOU to reconstruct the water mains at the same time as the sewer lines.

The fourth document signed by Mr. Hashiro was a letter to Councilmember Ann Kobayashi, Chair of the Committee on Budget, dated May 25, 2005. This letter touched generally on the desire to combine the water and sewer main work and whether it was practical to include the total construction cost in one fiscal year instead of two.

B. The Ward Avenue Project

In October 2005, DDC and ENV were alerted to a large sinkhole next to a sewer line on Ward Avenue. The departments sought permission to investigate the cause of the sinkhole. This contract was let on an emergency basis because of the concern that the sinkhole could open and cause injury to people and property. Memorandum dated October 19, 2005 from DDC and ENV to BFS. The memorandum noted that DDC did not have a geotechnical engineer on staff to examine the sinkhole and that YKE specializes in geotechnical engineering, as well as foundation engineering and construction management. Mr. Fujimoto recommended that the city contract with YKE because of its superior expertise when compared to another firm that could have been used. The city entered into the contract in December 2005 for \$50,000.

As with the Kalaheo Avenue Project, Mr. Fujimoto stated that he was never asked by Mr. Hashiro or anyone else to give special treatment to YKE or its staff regarding this project. Mr. Hashiro did not know that YKE had been awarded the contract until his interview with Commission staff.

C. Mr. Hashiro

Before his appointment to DDC, Mr. Hashiro worked in various supervisory positions for the United States Army Corp of Engineers ("Corp"). Mr. Hashiro became the Deputy Director for DDC on January 3, 2005, the Acting Director on January 31, 2005 and was confirmed by the Council as the Director on April 6, 2005.

During his years with the Corp, Mr. Hashiro received ethics training on an annual basis. Corp ethics rules required its administrators to avoid even the appearance of a conflict of interest. As a result, when Mr. Hashiro was on the Corp contract selection committees, he would remove himself from any contract reviews where Mr. Yogi or other friends' firms were involved.

At DDC, Mr. Hashiro reported he did not discuss the qualifications, ranking or selection of contractors with members of the ENV/DDC selection committee. He also stated that he was only involved in contract performance if a member of the public complained to him and limited his participation to passing the information on to the responsible project engineers in DDC. Mr. Hashiro stated that he never tried to influence anyone at DDC or the city to give URS or YKE contracts or to treat URS or YKE differently than any other contractor. Mr. Hashiro was not involved in the negotiation of the Kalaheo Avenue Project contract or its amendment or the Ward Avenue Project contract.

As Acting Managing Director, Mr. Hashiro, reviews DDC construction documents in order to follow the status of critical infrastructure projects. In this role, he has no input on the terms of any contract or who performs the work.

D. Mr. Hashiro and his son

Mr. Hashiro did not advise his son to work for either URS or YKE. Mr. Hashiro's son began his employment as an entry-level engineer with URS in 2001 and moved to YKE in June 2005. He had no ownership interest in URS and has none in YKE and has not been an officer in either company. URS and YKE state that neither firm bases salary, bonuses or promotions on the ability of an employee of the son's level to bring clients or projects to the firm. Mr. Hashiro's son does participate in some of the weekly status meetings on the Kalaheo Avenue Project along with more senior YKE engineers because he works on site from time-to-time. The project's principal construction engineer remains Dr. Kwong and Mr. Kalani is the on-site engineer.

Mr. Hashiro and his son have no financial interests or business activities in common other than a joint savings account.

E. Mr. Hashiro and Mr. Yogi

Mr. Hashiro and Mr. Yogi have been friends since they attended college together. In 2000, Mr. Hashiro's employment with the Corp took him to the Mainland. Since late 2004, they meet socially every few months.

III. Questions presented

The first issue presented is whether Mr. Hashiro obtained special treatment or an unwarranted advantage for URS or YKE. The second question is whether Mr. Hashiro acted on a conflict of interest because his son was employed by URS and YKE.

IV. Discussion and analysis

- A. There is insufficient evidence to show probable cause that Mr. Hashiro misused his position at DDC to obtain unwarranted treatment for URS, YKE or his son

Revised Charter of Honolulu (“RCH”) Section 11-104 states:

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.

Violations of this law occur when city officials misuse city resources for their own benefit (*e.g.*, Advisory Opinion No. 2001-1, councilmember used her city staff while on city time to conduct her political fundraising) or for the benefit of others (*e.g.*, Advisory No. 2005-2, city employee selected contractors based on their family relationship and as a reward for their political support).

Mr. Hashiro signed four documents relevant to the URS and YKE work on the Kalaheo Avenue Project contract and amendment with URS. The first was the February 3, 2005 Notice to Proceed for URS to begin work. The Notice to Proceed is an important document because it notifies the contractor that funds are available to pay monies due under the contract and to begin work.

Mr. Hashiro also signed a February 3, 2005 request to BFS supporting BWS’s request to combine the emergency water main work with the sewer work. Similarly, the May 25, 2005 letter to Councilmember Kobayashi generally discussed the need to and efficiency in reconstructing the dilapidated water lines along with the sewer lines.

Finally, Mr. Hashiro signed the MOU dated November 21, 2005, which added the reconstruction of the water lines along with the of the sewer lines. This document noted an increase in the construction management contract of \$71,509, which would benefit of URS and YKE. However, the increase resulted from incorporating the water line repairs with the sewer reconstruction. This had been requested by BWS as early as December 20, 2004 and was not initiated by Mr. Hashiro or DDC.

Based on the foregoing, there is insufficient evidence to find probable cause that Mr. Hashiro provided special treatment to URS, YKE or his son. The request for the original emergency contract for the Kalaheo Avenue Project resulted from the deterioration of the sewer lines and water mains. Mr. Hashiro did not begin work at DDC until January 3, 2005. By that time URS had already been selected by employees of ENV and DDC as the top-ranked engineering firm to work on the Kalaheo Avenue Project. Mr. Hashiro appears to have had no discussion with any staff members regarding the terms or performance of the URS construction

management contract or its amendment. DDC's deputy director or staff on behalf of the director executed all documents regarding the contractor selection and the contracts.

The Notice to Proceed simply informed URS that it should commence work under the contract. The other documents signed by Mr. Hashiro were generated by the DDC, ENV and/or BWS staff responsible for the projects and reflected the immediate need to combine the sewer and water line repairs. The fact that Mr. Hashiro signed these documents is insufficient alone to show that he was attempting to secure some special consideration for URS, YKE or his son, especially given the fact that the need for reconstruction had been decided and the reconstruction contract management consultant had been selected before Mr. Hashiro was aboard at DDC. Neither the interviews conducted by Commission staff nor any of the documents examined reflect an attempt to sway or influence any staff member to give an unwarranted benefit to URS or YKE.

Turning to the YKE contract for emergency inspection of the sinkhole, Mr. Hashiro had no input into the selection of YKE contract or its performance and signed none of the documents related to it.

B. There is insufficient evidence to show that Mr. Hashiro acted on a conflict of interest involving his son or Mr. Yogi

A city officer or employee is prohibited from having a financial interest or business activity that may tend to interfere with properly carrying out his or her duties.¹ If Mr. Hashiro had a business or financial relationship, such as a loan to his son, that depended on the secure financial stability of his son one could argue that the relationship might interfere with Mr. Hashiro's discharge of his duties as director of DDC because of the potential financial benefit to Mr. Hashiro. However, the only financial relationship we know of his the joint savings account with his son. The value of the joint account is not dependent on his son's employment. As a result, there is no evidence of a financial or business relationship that would result in a conflict of interest violating RCH Sec. 11-102(c).

On occasion the Commission has found that a social or family relationship may be so close as to create a personal conflict of interest. For example, in Advisory Opinion No. 184, the Commission found that a board member who was the frequent social companion and co-host of civic and cultural events with a licensee of the board should not hear or vote on the friend's matters before the board.

¹ **Section 11-102. Conflicts of Interest --**

No elected or appointed officer or employee shall:

(c) Engage 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.

In contrast to the facts in Advisory Opinion No. 184, Mr. Hashiro's friendship with Mr. Yogi was casual and they socialized infrequently. Therefore, Mr. Hashiro did not have a personal conflict of interest in executing the four documents described above. As noted above, none of those documents selected the consultant or set the terms of the contracts.

- C. To avoid even the appearance of impropriety or conflict of interest, Mr. Hashiro should have refrained from matters involving his son's employer.

Mr. Hashiro did not violate the ethics laws. Yet, as this matter illustrates, the business and personal associations of high-level city officers are often carefully scrutinized. The Commission recommends that such officers remove themselves from participating in contract, permit or regulatory matters that affect their immediate family members. Not only should this spare all involved from the inquiries into their official actions, it will help foster public confidence in government integrity. Had Mr. Hashiro, in his role at DDC, requested advice from the Commission, it would have recommended that he remove himself from participation in matters affecting his son's employer and delegate the decision making to his deputy director or other appropriate official. Removal and delegation would have avoided even the appearance of impropriety or a conflict of interest.

V. Conclusion

Based on the foregoing, there is insufficient evidence to find probable cause that Mr. Hashiro violated the fair and equal treatment policy or acted on a conflict of interest regarding URS, YKE or his son.

Should you or any member of your committee have any questions regarding this matter, please contact me.

Sincerely,

/S/ _____
CHARLES W. TOTTO
Executive Director and Legal Counsel

CWT:nmf

cc: Wayne Hashiro, Acting Managing Director