

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 95-24**

June 27, 1995

RE: Is it a violation of the ethics law for an agency to contract with the employer of a member of the agency's board of directors?

DEISION: No.

This opinion is in response to your May 15, 1995, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the June 27, 1995, meeting of the Commission, and the following opinion is issued.

You state relevant facts as follows. The Kentucky Higher Education Assistance Authority (KHEAA) seeks to procure employment-related practice and lawyer's professional liability insurance. The Department of Insurance, in conjunction with the Division of Purchases within the Facilities and Administration Cabinet, has developed and sent out specifications for bid. Only one response, from Powell-Walton-Milward, Inc., was received. Powell-Walton-Milward is the employer of a member of KHEAA's board of directors. Your understanding from the Department of Insurance is that there are no other available markets for the insurance. You ask for an opinion as to whether contracting with Powell-Walton-Milward, Inc. for liability insurance would be a violation of the ethics law.

KRS 11A.040(4) provides:

(4) No public servant shall knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by any state agency. This provision shall not apply to a contract, purchase, or good faith negotiation made pursuant to KRS Chapter 416 relating to eminent domain or to agreements which may directly or indirectly involve public funds disbursed through entitlement programs.

No public servant through any company of which he owns at least a 5% interest may contract with a state agency. However, in Advisory Opinion 93-53, the Commission concluded that per diem members of boards and commission are not public



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servants, or subject to the Executive Branch Code of Ethics. Thus, there is no prohibition in KRS Chapter 11A which prohibits your agency from contracting with Powell-Walton-Milward, Inc., or the board member through Powell-Walton-Milward, Inc.

The board member should comply with the provisions of the Model Procurement Code detailed in pertinent part below:

KRS 45A.340(2):

No officer or employee of an agency or member of a state board or commission, may be in any manner interested, either directly, or indirectly, in how own name or in the name of any other person, association, trust, or corporation, in any contract for the performance of any work in the making or letting or administration of which such officer or employee may be called upon to act or vote. No such officer or employee may represent, either as agent or otherwise, any person, association, trust, or corporation, with respect to any application or bid for any contract or work in regard to which such officer or employee may be called upon to act or vote. Nor may any such officer or employee take, solicit, or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void. For the purposes of this section the holding or less than five percent (5%) of the stock of a corporation is not considered an interest.

Although not subject to its jurisdiction, the Commission offers its opinion to the board member. The Commission believes Powell-Walton-Milward, Inc. may contract with your agency if the board member owns less than 5% of the company, and if he refrains from involvement in the decision to award the contract.

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BY: Livingston Taylor, Chairman