



FAIR POLITICAL PRACTICES COMMISSION

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October 18, 2002

Michael F. Harris, Deputy Director Administration
Department of Fish and Game
Post Office Box 944209
Sacramento, CA 94244-2090

**Re: Your Request for Advice
Our File No. A-02-239**

Dear Mr. Harris:

This letter is in response to your request for advice on behalf of Frank Otto regarding the provisions of the Political Reform Act (the "Act").¹

QUESTION

Does Mr. Otto qualify as a "consultant" such that he must file a Form 700 with the state in his work for the Department of Fish and Game in technical requirements for components of a request for proposal (RFP)?

CONCLUSION

No. Based on the information you have provided, Mr. Otto is not considered a "consultant" and therefore is not obligated to file a Form 700. In the event Mr. Otto's duties change, however, we advise you to seek further advice.

FACTS

The Department of Fish and Game (Department) plans to procure Information Technology (IT) services from a vendor (system integrator) through the competitive procurement process to develop, implement and operate the Automated License Data System (ALDS). The ALDS will replace the Department's current manual paper-based licensing system with an automated system. Licenses are sold at 11 Department of Fish and Game offices and by a network of 1,300 license agents with more than 2,350 locations throughout California and bordering states, generating approximately \$70

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

million in revenue annually. The ALDS procurement will result in a contract with a value of approximately \$20 million over a five to six year period.

The Department has an approved feasibility study report for the ALDS project and had an approved sole source exemption to purchase the State of Michigan's automated licensing system and to contract with Electronic Data System (EDS) to modify, implement, operate and maintain an ALDS. The Department is redirecting its efforts on the ALDS project and will develop an RFP using the existing technical requirements, developed in conjunction with EDS, to competitively bid the ALDS project.

The Department does not have the in-house expertise to independently develop an RFP for such a complex and large statewide IT project. Therefore, the Department seeks to contract with an independent consulting service to assist in re-writing certain portions of the technical requirements for the ALDS to be incorporated into the RFP. The Department has identified a consultant, Mr. Frank Otto, who has technical expertise in large-scale state IT projects with demonstrated knowledge and experience working for two different large systems integration corporations. (Mr. Otto previously worked for MCI and EDS in the IT field.)

Mr. Otto is partial owner of NexLevel Information Technology Inc., a 15-person, privately held, consulting corporation. The corporation works for the State of California on several CMAS agreements, and is a California Certified Small Business. Some of the work Mr. Otto's corporation performs is under contract with several large system integrators. One or more of these large system integrators may, or may not, bid on the ALDS RFP.

In addition, Mr. Otto worked with the Department in a project oversight role during contract negotiations with EDS for the ALDS project. During this time, Mr. Otto gained valuable knowledge of the Department's business rules and processes that would be a tremendous asset to the Department in the development of the technical-requirements portion of the RFP.

The Department plans to utilize Mr. Otto during the RFP development for an average of 50 to 100 hours per month. Therefore, you would not consider Mr. Otto a full-time staff member on the project; nor has he or will he work on other projects in the foreseeable future for the Department. As a member of the ALDS Project Team, Mr. Otto's duties will include the following tasks:

- Develop recommendations for operational Service Level Agreements (SLA) to be included in the RFP. These SLAs will bind the ALDS vendor to industry standard metrics for service delivery (up-time, response-time, average speed to answer, etc.).
- Provide assistance in converting our existing, 270-plus page, technical requirements document into a Statement of Work for the ALDS RFP. This

document will provide the RFP with all the requirements of the new ALDS application (functions, features, etc.).

- Review the RFP technical sections - additional review and validation of all the technical sections of the ALDS RFP. His experience will help minimize the opportunity for a vendor to bid a compliant, but undesirable solution.

Mr. Otto will not be involved in any of the following tasks:

- Making procurement decisions - all decisions during the procurement process phase will be made by the Department. DGS will conduct the competitive procurement bid process under existing guidelines.
- Evaluation criteria - Mr. Otto will not have input into the evaluation criteria. Only Department, DGS and possibly another consultant (who has already filed a Form 700) will have input into the evaluation criteria.
- Writing the RFP - Mr. Otto will be asked to review the current technical requirements and make recommendations and assist in re-writing them, if necessary. Department and DGS staff will be assigned to review and edit all of Mr. Otto's work; before it is included in the RFP. Our in-house technical experts will review the sections to ensure they clearly communicate Department's requirements and that the sections promote open competition.

The Department anticipates the ALDS project will require 12 to 16 months to design, develop and implement. During that time frame, you need expertise in managing a large outsource vendor. Mr. Otto's expertise will ensure that the Department receives the maximum value for the services procured and that the vendor performs under the terms and conditions of the contract. The Department does not view this type of contracting as follow-on work to the development of the RFP.

ANALYSIS

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. In addition, the Act requires every public official to disclose all his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (§§ 81002, subd. (c), 87200-87313.)

“Public official” is defined in section 82048 to include consultants. In April 1994, the Commission adopted a new definition of “consultant.” “Consultant” is defined by regulation 18701(a)(2), largely by specifying responsibilities typical of “public officials;”

“(2) 'Consultant' means *an individual* who, pursuant to a contract with a state or local government agency:

“(A) Makes a governmental decision whether to:

“1. Approve a rate, rule, or regulation;

“2. Adopt or enforce a law;

“3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;

“4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

“5. Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

“6. Grant agency approval to a plan, design, report, study, or similar item;

“7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

“(B) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Government Code Section 87302.”

The test established in regulation 18701, subdivision (a)(2)(B), is a two-fold test, both of which must be satisfied for an individual to qualify as a consultant. A staff memorandum to the Commission discussed the intent of the “staff capacity” language in this regulation:

“[T]he Commission wishes to include within the scope of the regulation only those individuals who are performing [substantially all the same] tasks that normally would be performed by one or more staff members of a governmental entity. The first prong, the 'staff capacity' language, eliminates in most cases from the scope of

the regulation those individuals who work on one project or a limited range of projects for an agency. In addition, there is a temporal element to the qualifier. For example, an individual who contracted with a city to study noise at a specified intersection normally would not be serving in a staff capacity if he or she took the measurements in one day and issued a report to the planning commission before its next meeting. If, however, a firm's contract provided that it would provide all plan checking services for a city for five years, it is much more likely that individuals performing these services would be in a quasi-staff capacity." (March 28, 1994 memorandum to the Commission regarding Regulation 18700, pages 3 and 4.)

Regulation 18701, subdivision (a)(2), establishes two criteria for qualification as a consultant; an individual who satisfies *either* criterion is a consultant for purposes of the Act. First, an individual may be a "consultant" if he/she performs, pursuant to contract, any of the actions described in subsections (a)(2)(A)(1)-(7). Alternatively, an individual may be a consultant if he/she "serves in a staff capacity with the agency" under subsection (a)(2)(B).

Based upon the facts presented in your advice request, it does not appear that the contractor will take any of the actions described in regulation 18701(a)(2)(A)(1)-(7). While Mr. Otto will make recommendations based upon his evaluation of what should be the technical requirements of portions of the RFP, the final decisions will rest with the Department of Fish and Game, who will review and edit Mr. Otto's work and make independent judgments. Mr. Otto will not make procurement decisions nor will he have input into the evaluation criteria.

The second prong of the test adds an additional condition: the tasks of the quasi-staff member over this period of time must be substantially the same as one of the individuals whose position at the agency is described in the conflict of interest code.

The critical issue thus narrows further to whether Mr. Otto will qualify as a consultant because he "serves in a staff capacity." Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. The standard does not include individuals who work on one project or a limited range of projects for the agency. (*Parry* Advice Letter, No. I-95-064; *Randolph* Advice Letter, No. A-95-045; *Travis* Advice Letter, No. A-96-053; *see also* March 28, 1994, Memorandum to the Commission regarding Regulation 18700, page 4).

Here, Mr. Otto will work on one project for the agency. You indicate that at the completion of the project, in 12 to 16 months, the relationship between Mr. Otto and the agency will terminate. No on-going relationship between the parties is contemplated. Therefore, Mr. Otto will not be serving in a staff capacity when performing the work

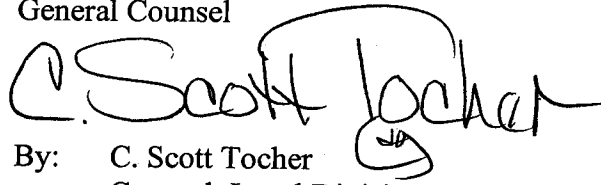
called for in the contract.² (*Parry, supra; Randolph, supra; Travis, supra.*) We have advised in the past that projects that have taken as long as 10 months, or even two years, do not always lead to the conclusion that there is a staff relationship. (*See Sanchez Advice Letter, A-97-438, Travis Advice Letter, A-96-053.*)

However, if over time the nature of the services that Mr. Otto performs become regular and the same or substantially the same as duties which would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code, Mr. Otto would be considered a consultant. You should contact us for advice if the relationship changes in the future.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel


By: C. Scott Tocher
Counsel, Legal Division

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² An important consideration in reaching this conclusion is the duration of the contractual relationship, which will be over two years. However, in context, this duration is not indicative of an ongoing relationship which might otherwise lead to the conclusion that there is a staff relationship. (*See, e.g., Parry, supra.*) There is a definite beginning and ending point to the contractual relationship. Also, although the term of the contract is over two years, this duration is attributable to the need for periodic monitoring, not to perform continuous work during that time. Under the described circumstances, the duration of the contractual relationship does not preclude the conclusion reached above.