



FAIR POLITICAL PRACTICES COMMISSION

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August 7, 2003

John M. Rea, Chief Counsel
Department of Industrial Relations
Post Office Box 420603
San Francisco, CA 94142

**Re: Your Request for Advice
Our File No. A-03-107**

Dear Mr. Rea:

This letter is in response to your request for advice on behalf of the Department of Industrial Relations regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ The Commission does not provide advice relating to past conduct. (Regulations 18329(b)(8)(A) and (c)(4)(A).) Also, please note that the Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71, 77.)

QUESTION

Are third party contractors, including Roebbelen Management, Inc., hired to initiate and enforce the labor compliance programs (LCP's) for the Department of Industrial Relations (DIR) and its subdivision, the Division of Labor Standards Enforcement ("DLSE"), consultants under the Act?

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

CONCLUSION

Yes, the third party contractors, including Roebbelen Management, Inc., hired to initiate and enforce the LCP's for the DIR and DLSE are consultants under the Act because they make governmental decisions.

FACTS

Recently enacted Labor Code section 1771.7 provides that an awarding body that uses funds from the Kindergarten-University Public Education Facilities Bond Act of 2002 or Kindergarten-University Public Education Facilities Bond Act of 2004 shall initiate and enforce, or contract with a third party to initiate and enforce, a labor compliance program ("LCP") as described in Labor Code section 1771.5, with respect to that public works project. As a result of this legislation, private parties have been submitting their LCP's for approval to the Division of Labor Standards Enforcement ("DLSE") as the third party with whom contracts may be made. Some entities seeking approval of LCP's have overlapping interests and relationships with other entities who will be bidding and working on public works contracts subject to LCP enforcement.

You ask whether the third party LCP contractors are consultants. Specifically, you ask if Roebbelen Management, Inc. is a consultant to DIR and DLSE. Roebbelen has applied for and been awarded the LCP contract. All LCP contractors function with the same governmental authority to enforce the labor compliance laws and regulations. Also, they all use the same handbook and follow the same procedures to accomplish this goal. The ultimate enforcement decisions are reviewable only by the Director of DIR. And, the individuals who regularly enforce the state's prevailing wage laws for DLSE are deputy labor commissioners and labor standards investigators.

ANALYSIS

Many public officials, including elected state and local officers, judges, members of planning commissions, boards of supervisors and city councils, are specifically required under the Act to publicly disclose their financial interests. (Section 87200.) Other public officials, such as employees or consultants of a state or local government agency, disclose their financial interests as may be required by the conflict of interest codes developed by their various agencies under the mandate of sections 87300-87313.

A conflict of interest code is a rule or regulation adopted by a government agency which designates those persons within the agency who "make," "participate in making," or may use their official position to "influence" governmental decisions. A conflict of interest code requires designated persons (or "positions") to disclose their investments, interests in real property, sources of income and business positions which may materially affect their decisionmaking. (Sections 87100 and 87302.)

Regulation 18730, promulgated by the Commission to interpret and implement the conflict-of-interest provisions of the Act, provides guidance as to those positions in the agency that must be included in a conflict of interest code. Subdivision (b)(2) of this regulation provides that persons to be designated in an agency's conflict of interest code include those who make or participate in making governmental decisions which may foreseeably have a material effect on financial interests.

Agency conflict of interest codes support the Act's general prohibition against decisionmaking on matters that might pose conflicts of interest, stated at section 87100:

"No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Section 82048 and regulation 18701(a) provide definitions of the term "public official," to mean a "member, officer, employee, or *consultant* of a state or local government agency...." (Emphasis added.) Regulation 18701(a)(2) defines "consultant" as:

"...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."

As the statute and regulation make clear, one who qualifies as a consultant under the foregoing criteria is a "public official" governed by, among other provisions, section 87100. Public officials who "participate" in governmental decisions, including consultants, must be designated in conflict of interest codes along with those who actually "make" the decisions.

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" or "performs the same or substantially all the same duties for the agency that would otherwise be performed by [a staff member]" under subsection (a)(2)(B).²

Based upon the facts presented in your advice request, third party contractors will be performing the actions described in regulation 18701(a)(2)(A)(1) - (7). They will be adopting or enforcing a law as described in subdivision (a)(2)(A)(2). An individual³ under contract to make even a single governmental decision may be a consultant by virtue of regulation 18701(a)(2)(A). Persons who do not make, but who participate in governmental decisions under contract, may be classified as consultants only if they serve in an agency staff capacity or perform substantially all the same duties for the agency that would otherwise be performed by a staff member. (*Cronin Advice Letter*, No. I-98-155.)

The dispositive question, for persons who "participate in" but do not "make" governmental decisions, is the *extent* of the services provided to the agency. However, the only criterion for determining whether the third party contractor who "makes" decisions is a consultant, is if that contractor performs any of regulation 18701(a)(2)(A)(1) - (7) actions in at least a single decision for the agency. In this case, the third party contractors "make" decisions because they initiate and enforce LCP's for enforcement of labor laws. These findings are final decisions and the affected contractor or subcontractor has the right to appeal the decision to the director for a hearing on the finding. (Labor Code sections 1742(a) and 1771.6(b).) Therefore, these third party

² If a contractor serves in staff capacity because of his or her "participation" in the decision-making of the agency, a test for a level of significant intervening substantive review is applied to determine if a reviewer routinely considers, modifies or rejects the contractor's recommendations to determine if the contractor is actually participating in the final decision. This test does not apply to contractors who "make" decisions. (Regulations 18702.1 and 18702.2.)

³ A public official must be a natural person. (Section 82048.)

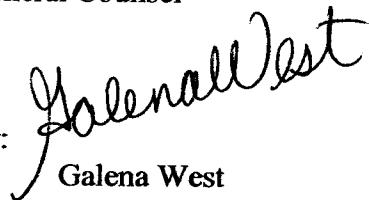
contractors, including Roebbelen Management, Inc, are consultants to DIR and DLSE under the Act and must be included in the agency conflict of interest code.

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

Sincerely,

Luisa Menchaca
General Counsel

By:



Galena West
Counsel, Legal Division

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