



FAIR POLITICAL PRACTICES COMMISSION

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Benjamin T. Rice
Assistant Secretary
Office of Legal Affairs
California Department of Corrections and Rehabilitation
P. O. Box 942883
Sacramento, CA 94283-0001

Re: Your Request for Advice
Our File No. A-08-183

Dear Mr. Rice:

This letter responds to your request for advice on behalf of the California Department of Corrections and Rehabilitation ("CDCR") under the conflict of interest provisions of the Political Reform Act (the "Act").¹ Specifically, you ask whether the Division of Adult Parole Operations ("DAPO"), which is a division of CDCR, may approve pending contracts with, and accept future bids from, Sharper Future, a company partly owned by Dr. Tom Tobin, a member of the CDCR's Sex Offender Management Board ("SOMB").

Please be advised that the Commission only provides advice that is prospective in application and does not address issues concerning prior conduct. (Regulation 18329.) We also base this letter on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Additionally, please note that our advice is based solely on the provisions of the Act. We do not address the applicability, if any, of other conflict-of-interest laws such as common law conflict-of-interest or Government Code Section 1090.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

QUESTIONS

(1) May DAPO approve pending contracts with Sharper Future, a company partly owned by Dr. Tobin, a member of the CDCR's Sex Offender Management Board ("SOMB")?

(2) May DAPO allow Dr. Tobin's company to bid on future sex offender treatment contracts?

CONCLUSION

(1) Nothing in the Act prohibits an agency from approving or entering into contracts. However, as discussed below, these contracts may be voidable pursuant to Section 91003(b), which provides that a court may set aside an official action if "it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved." The official actions covered under Section 91003 include, but are not limited to orders, permits, resolutions and contracts.

(2) Nothing in the Act requires an agency to deny or prohibit bids from any potential vendor. However, as discussed below, if the bids are ultimately approved, and the approval might not otherwise been made but for specified actions in violation of the Act, the resulting contracts may also be voidable pursuant to Section 91003.

FACTS

Dr. Tom Tobin is a member of the SOMB, and CEO of Sharper Future, a low bid awardee of CDCR's sex offender management contracts. DAPO, a division of CDCR, is involved in administering these contracts because they involve parolee programs.

Assembly Bill 1015, which was signed into law in 2006, mandated creation of SOMB under the purview of CDCR. The SOMB is located within DAPO. CDCR Senior Staff Counsel Mike Davis stated in a November 26, 2008, telephone call that three staff positions were created to support the SOMB. The staff members are located in and work within DAPO. In addition, a DAPO employee in charge of coordinating the administration of the SOMB (as well as another CDCR official), conducted interviews and hired the staff that supports the SOMB.

The 17 member SOMB was appointed by various state agencies including, the Governor's office, the Legislature and CDCR. Dr. Tobin was appointed by the Legislature. The SOMB's first charge was to prepare a report and submit it to the Legislature and the Governor by January 2008. The report reviewed nationwide best practices for outpatient sex offender treatment and analyzed the gap between best practices and California's current practices. Based on the findings of the report, the SOMB is to then develop recommendations to improve California management practices of adult sex offenders in the community. The SOMB is to report its progress to the

Governor in January 2009 and provide its recommendations to the Legislature and the Governor in January 2010, at which time the Board will be disbanded.

The SOMB first met in June of 2007. The January 31, 2008, report was initially released only to the Governor and the Legislature. After the SOMB was informed the report was satisfactory, it was made publicly available on the CDCR's website.

Dr. Tobin is CEO of Pacific Forensic Psychology Associates, Inc. ("PF"). PF is the parent company of Sharper Future, of which Dr. Tobin is a co-owner and also CEO. CDCR currently has 22 contracts for treatment of outpatient parolee sex offenders. Sharper Future holds seven of the contracts. The development of the scope of work for these seven contracts pre-dated Dr. Tobin's invitation to the SOMB.

In the fall of 2007, DAPO prepared seven new Information for Bid ("IFB") proposals for sex offender treatment programs. These proposals were released in November 2007 and the original bid opening was January 3, 2008. The bid opening had to be extended to March 13, 2008, due to bidders' questions and the length of time it took DAPO to respond to questions. Four IFB contracts were tentatively awarded on March 13, 2008. Sharper Future was the lowest bidder in three of those contracts. The value of these three tentative contracts is \$34,909,476.18, with a total value of all contracts awarded to Sharper Future of \$37,403,971.18. CDCR is unaware of any evidence connecting the on-going work of the SOMB in the fall of 2007 with DAPO's development of the IFB proposals.

Sharper Future submitted a bid proposal that included a document with Dr. Tobin's name, title (as CEO of Sharper Future), and signature. He was clearly identified as a principal of the company.

DAPO and CDCR's office of business services worked together during the bidding process. Staff from both divisions reviewed resumes (including Dr. Tobin's), compared rate sheets, and had numerous discussions during the bidding process. Both divisions had input in the process of choosing whom to award the contracts.

In May 2008, Sharper Future was instructed to withhold action on the three new contracts while the Office of Inspector General ("OIG") investigated Government Code 1090 conflict of interest allegations. In October 2008, the OIG completed its investigation of a potential 1090 conflict of interest related to Dr. Tobin and his company's participation in sex offender treatment contracts. The OIG concluded that Dr. Tobin's activities to date did not create a 1090 conflict of interest but that it may create a conflict for him in the future.

Accordingly, the OIG recommended CDCR seek written advice from the FPPC regarding whether or not Dr. Tobin has a conflict of interest under the Act with respect to the pending contracts his company was tentatively awarded in March 2008, and whether,

based on his SOMB membership, his company should be foreclosed from bidding on any future sex offender treatment contracts.

ANALYSIS

Conflict of Interest Under Section 87100:

The Act's conflict-of-interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) The Act generally does not prohibit public officials from holding employment with private entities. Section 87100, however, 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.

The Commission has adopted an eight-step standard analysis to decide whether an official has a disqualifying conflict of interest. (Regulation 18700(b)(1)-(8).) The general rule, however, is that a conflict of interest exists whenever a *public official* makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

"Public Official" is defined in Section 82048 and Regulation 18700(a)(1) to *include members of boards and commissions with decision making authority*. A board or commission possesses decision-making authority whenever:

"(A) It may make a final governmental decision;

"(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

"(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency." (Regulation 18700(a)(1).)

According to the information provided, members of the SOMB do not make final governmental decisions and do not have the power to compel decisions or to veto them. Therefore, the SOMB is an advisory body and the SOMB's members are not "public officials"² as defined in Section 82048 and Regulation 18700(a)(1). Consequently, members of SOMB are not subject to the conflict-of-interest provisions under Section 87100 of the Act.

² However, if SOMB's substantive recommendations are regularly approved without significant amendment or modification over an extended period of time, then the members of SOMB will qualify as public officials pursuant to Regulation 18700(a)(1)(C). At that time the disclosure and disqualification requirements of the Act would apply.

Conflicts of Interests Under Section 87104:

Because we find that SOMB is an advisory committee, your questions implicate Section 87104, which applies to members of advisory bodies and provides:

“(a) No public official of a state agency shall, for compensation, act as an agent or attorney for, or otherwise represent, any other person by making any formal or informal appearance before, or any oral or written communication to, his or her state agency or any officer or employee thereof, if the appearance or communication is for the purpose of influencing a decision on a contract, grant, loan, license, permit, or other entitlement for use.”

Section 87104(b) provides a broader definition for “public official” for purposes of this section. A “public official” is any person defined in Section 82048, *and* every member of any advisory committee of a state agency, whether the committee is created by statute or otherwise.

One of the primary purposes of Section 87104 is to prohibit conflicts of interest by members of state advisory committees. (See generally, Legislative Counsel’s Digest of Senate Bill 1705, filed with the Secretary of State on September 1, 1994.) This statute was adopted because persons on advisory committees are not subject to the conflict of interest rules in Section 87100-87103. Another primary purpose for Section 87104 is to bring within its purview the conduct of such state advisory committee members when they are paid by private parties to lobby their agency.

Thus, for purposes of Section 87104, Dr. Tobin is a public official subject to this section’s prohibition. Therefore, Section 87104 limits the conduct of Dr. Tobin, and other SOMB members. For instance, Dr. Tobin would be prohibited from acting as an agent or attorney for, or otherwise representing, any other person by making any formal or informal appearance before, or by making any oral or written communication to DAPO, a division of CDCR or any officer or employee of DAPO, if the appearance or communication is made to influence the agency’s action on a contract, grant, loan, license, permit, or other entitlement for use.

The prohibition in Section 87104 applies to situations where the member will be compensated by some third party. Therefore, if the member received compensation from any other person to act as an agent or attorney for, or otherwise represent any other person (by making an appearance or oral or written communication to the member’s panel or agency, or any employee thereof) to influence the actions of the agency regarding a contract, grant, loan, license, or permit, or other entitlement for use, it would fall within the prohibition. (Section 87104; *Grandy* Advice Letter, A-97-361.)

Note that "person" is broadly defined in Section 82047 to include any individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert.

Compensation received by Dr. Tobin from Sharper Future, a partnership, would be considered income from another person for purposes of Section 87104.

Therefore, Dr. Tobin, a member of SOMB, may not appear on behalf of his company, or make any oral or written communication to his state agency or any officer or employee of his agency, for the purpose of influencing DAPO's decision on a contract. (Section 87104, *Grandy* Advice Letter, *supra*; *Geismar* Advice Letter, A-95-407; *Travis* Advice Letter, A-96-021.)

Your facts indicate that Sharper Future submitted a bid proposal that included a document bearing Dr. Tobin's signature and that clearly identified him as a principal of the company. Furthermore, DAPO and CDCR's office of business services worked closely together during the bidding process. Both departments shared information (including reviewing resumes that included Dr. Tobin's) and had numerous discussions regarding whom to award the contracts.

We have advised—in the context of the Act's post-governmental employment restrictions colloquially known as "revolving door" rules—that the identification of a former official in bid documents submitted to the official's former agency is sufficient to constitute a prohibited appearance or communication. (*Roberts* Advice Letter, A-02-190; See also *Baker* Advice Letter, No. A-02-151, where former agency official prohibited from appearing before or communicating with former agency to obtain a new contract.)

This advice is analogous to restrictions in Section 87104, which essentially prohibit a current member of an advisory committee from lobbying his or her own agency, while the Act's "revolving door" rules prohibit such actions after an official has left the agency.

This analysis is also consistent with the plain reading of Section 87104, which refers to "any" written communication by the advisory committee member that is made for the purpose of influencing a decision on a contract, grant, loan, license, permit, or other entitlement for use.

Turning to the circumstances you describe, we conclude that the identification of Dr. Tobin in the bid proposal submitted by Sharper Future to DAPO is a prohibited communication under Section 87104.

This communication is particularly significant in light of the fact that DAPO, which is Dr. Tobin's agency, was extensively involved in reviewing the bids and deciding whom to award the contracts. Therefore, we consider the

document identifying Dr. Tobin as a principal of Sharper Future as a "communication . . . for the purpose of influencing a decision on a contract . . ." (Section 87104.)

Please note that contracts in violation of Section 87104 may be voidable pursuant to Section 91003(b), which provides that a court may set aside an official action if "it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved." The official actions covered under Section 91003 include, but are not limited to orders, permits, resolutions, and contracts.

May CDCR allow PH or Sharper Future to negotiate or bid on a future contract with CDCR?

The conflict-of-interest rules in Section 87104 are personal to the public official in question. The activities of Dr. Tobin's company or other employees of the company are not regulated by the Act's conflict-of-interest rules. Thus, while Dr. Tobin himself cannot influence CDCR or DAPO with regard to contract bids, his company may have other employees communicate with the agency about a contract, so long as he is not identified in the communication.

However, if the bids are ultimately approved (and the approval would not otherwise have been made but for actions in violation of the Act) the resulting contracts may also be voidable pursuant to Section 91003(b).

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

Sincerely,

Scott Hallabrin
General Counsel



By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl