

ATTACHMENT 6

TO: KAREN DOUGLAS, Chairman
FROM: Arlene L. Ichien, Assistant Chief Counsel
DATE: March 19, 2010
RE: PECE Contract Award

Question Presented

Did Bill Pennington or Norm Bourassa of the Energy Commission have a conflict of interest in the selection of Portland Energy Conservation Inc. (PECE) for a contract award under the Municipal and Commercial Building Targeted Retrofit Program?

Short Answer

No. Based on the Political Reform Act, the prohibition against self-dealing under Government Code section 1090, and the prohibition against incompatible activities, neither Mr. Pennington nor Mr. Bourassa had a conflict of interest in the selection of PECE.

Discussion

A. Facts

Mr. Pennington is a member of the Board of Directors of the California Commissioning Collaborative (CCC), a nonprofit organization to which the Energy Commission contributes \$50,000 a year for membership. The Board is comprised of representatives from Southern California Edison Company, Southern California Gas Company, San Diego Gas and Electric Company, the Sacramento Municipal Utility District, the California Department of General Services, and the California Energy Commission. Mr. Pennington has served on the Board at the request of the former Energy Commission chairman, but has not attended a board meeting since July 10, 2006, due to other workload demands. Mr. Bourassa has served on the Board's Advisory Committee. Neither he nor Mr. Pennington receives any income or reimbursement from the CCC for their services. PECE was chosen by the CCC Board to provide it with technical and administrative staff due to its nationally known expertise in building commissioning.

PECI's decision to submit a proposal for a contract under the Municipal and Commercial Building Targeted Retrofit Program solicitation was an activity independent of PEGI's role on the CCC. Neither Mr. Pennington nor Mr. Bourassa assisted or advised PEGI in the preparation of its grant proposal. Neither gentleman has ever received any income or gift from PEGI.

Mr. Pennington was one of three members of the Evaluation Committee who scored all proposals, including PEGI's, which were competing for contracts under the Municipal and Commercial Building Targeted Retrofit Program. The reviewers scored proposals based on specific evaluation criteria. Mr. Bourassa did not review any of the proposals for that solicitation.

B. Political Reform Act

The Political Reform Act (Govt. Code, § 81000 et seq.) prohibits public officials, including state employees (Govt. Code, § 82048), from making, participating in, or in any way using their official positions to influence a governmental decision in which they have a financial interest. (Govt. Code, § 87100.) A public official has a financial interest in a decision if it is "reasonably foreseeable that the decision will have a material financial effect ... on the official" or on any of a number of listed items. (Govt. Code, § 87103.) Among the listed items are:

[a]ny source of income ... aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made ... [or] any donor of ... a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

(Govt. Code, § 87103, subd. (c) and (e).) In accordance with Government Code section 87103(e), the \$250 gift threshold has been adjusted to \$420 dollars, effective through December 2010. (Cal. Code Regs., tit. 2, § 18940.2.)

A public official can participate in a governmental decision in any one of several ways. Participation includes a range of activities from negotiating with a governmental entity or private person, conducting research, investigating, or preparing any report, analysis, or opinion for the decision maker without significant intervening substantive review. (Cal. Code Regs., tit. 2, § 18702.2.)

In the current case, the governmental decision was the selection of winning proposals for contracts under the Energy Commission's Municipal and Commercial Building Targeted Retrofit Program. In the solicitation conducted for that Program, Mr. Bourassa

did not review any of the proposals. Nor did he serve in any other role to investigate, research, or prepare an opinion with the intent to influence the outcome. He, therefore, did not participate in the decision-making process that resulted in a contract with PECl.

Mr. Pennington did review and score proposals in the solicitation. He, therefore, participated in the decision-making process by providing his assessment of the merits of each proposal. He lacked a financial interest in any of the proposals, though, in that none of the proposers are a source of income or gift to him. He, therefore, did not have a financial interest in the decision and was not required under the Political Reform Act to disqualify himself from the review of proposals.

C. Government Code Section 1090

Government Code section 1090 enacts the common law prohibition against “self-dealing” in any contract entered into by a public official’s agency or board. In pertinent part, section 1090 provides, “[E]mployees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” (Govt. Code, § 1090.) The section does not define when a public official is financially interested in a contract, but the courts have interpreted the prohibition broadly.

Regardless of the breadth of interests under section 1090 that may give rise to a financial interest, neither Mr. Pennington nor Mr. Bourassa had any financial interest, direct or indirect, in the contract with PECl. Neither receives any income from PECl or is connected financially in any way with the contractor. Mr. Bourassa did not even participate in the selection process. In the absence of any evidence of a financial interest in the contract, there was no violation of section 1090.

D. Incompatible Activities

Government Code section 19990 prohibits state employees from engaging “in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state ... employee.” (Govt. Code, § 19990.) Each state agency is directed to adopt a statement of incompatible activities for its employees. (*Ibid.*) Indeed, a court has held that the prohibition can only be exercised through the adoption of an incompatible activities statement by a state agency that determines those activities considered to be inconsistent, incompatible, or in conflict with the duties of the agency’s employees. (*Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141.)

The Energy Commission adopted its incompatible activities statement on March 13, 1981. (“Statement of Activities that are Inconsistent, Incompatible, or in Conflict with

Duties as a Member or Employee of the California Energy Commission,” May 13, 1981, hereafter referred to as “Statement.”) There are two prohibited activities of note. The first is the prohibition against an employee “who exercises discretionary authority” from acquiring “any gift, income, discount, loan, or other reportable interest ... in or from any entity or person (1) which is under the Commission’s jurisdiction; or (2) whose goods or services are assessed, tested, or otherwise evaluated by such employee in the course of his/her duties at the Commission.” (Statement, p. 3.)

The second prohibition is against an employee participating “in the preparation, selection, award, or administration of a contract if a conflict of interest would arise.” (Statement, p. 4.) The comments in the Statement explain that a reportable interest is essentially one that is reported on one’s annual economic interest statement, for example, income and gifts. The primary purpose, as stated in the comments, is to “disallow ... an employee from acquiring an economic interest in or from receiving a personal favor or special treatment, not otherwise available to the public, from a body or individual who comes ‘under the Commission’s review or regulatory powers.’” (Statement, p. 4.)

In addition, section 19990 deems certain activities to fall within the categories of incompatible activities. Among these is, “Performance of an act in other than his or her capacity as a state ... employee knowing that the act may later be subject, directly or indirectly to the control, inspection, review, audit, or enforcement by the ... employee.” (Govt. Code, § 19990, subd. (e).)

Neither Mr. Pennington nor Mr. Bourassa violated any of these prohibitions. Neither received any gift or income from the contractor or had any financial connection that would give rise to a conflict of interest. Neither assisted PECl in the preparation of its proposal to the Energy Commission and, thus, avoided the prohibition of acting in other than their capacity as a state employee in a matter that would later be reviewed by them.

E. Conclusion

Based on the facts, Mr. Pennington and Mr. Bourassa did not have a financial conflict of interest in the PECl contract under the Political Reform Act or under Government Code section 1090. Neither did they violate the Energy Commission’s Statement of Incompatible Activities.