

REPORT BY THE
AUDITOR GENERAL
OF CALIFORNIA

**IMPROVEMENTS NEEDED IN THE
ADMINISTRATION OF STATE CONTRACTS
FOR CONSULTANT SERVICES**

REPORT OF THE
OFFICE OF THE AUDITOR GENERAL
TO THE
JOINT LEGISLATIVE AUDIT COMMITTEE

016.2

IMPROVEMENTS NEEDED IN THE ADMINISTRATION
OF STATE CONTRACTS FOR CONSULTANT SERVICES

APRIL 1981



California Legislature

Joint Legislative Audit Committee

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016.2

The Honorable Speaker of the Assembly
The Honorable President pro Tempore of the Senate
The Honorable Members of the Senate and the
Assembly of the Legislature of California

Members of the Legislature:

Your Joint Legislative Audit Committee respectfully submits the Auditor General's report concerning improvements needed in the system for overseeing the administration of consultant contracts. The report indicates that the present system for overseeing these contracts is insufficient. The Auditor General recommends that the Legislature require the three responsible control agencies--the Department of Finance, the Department of General Services, and the State Personnel Board--to formulate a plan for restructuring this system. The Auditor General also recommends specific State Administrative Manual revisions and provide information on the use of present and former state employees as consultants.

Respectfully submitted,

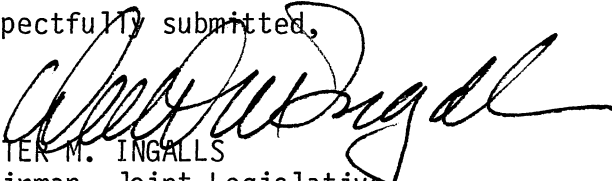

WALTER M. INGALLS
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SUMMARY

We have reviewed the State's system for managing and overseeing contracts with consultants. In administering their programs, state departments are authorized to enter into contracts with consultants who provide expertise in specialized areas such as management training or ecological studies. However, deficiencies in the State's system for contract oversight and management have reduced the benefits agencies receive from consultant contracts and have increased their costs.

Our review indicated that the present system for administration of consultant contracts is insufficient. To be specific, the three control agencies--the Department of Finance, the Department of General Services, and the State Personnel Board--have not coordinated a system for comprehensively reviewing and approving contracts. The system also lacks a training program in contract management. Further, the control agencies do not conduct comprehensive post-audits of departments' contracting practices.

System weaknesses have, in part, resulted from inadequate state contracting procedures. For instance, present State Administrative Manual procedures do not ensure that

contracting departments (1) secure adequate competition for contract awards, (2) review and negotiate contract costs, and (3) thoroughly analyze the need for consultant services.

Furthermore, contracting departments have not fully complied with provisions in the State Administrative Manual that, if followed, could assist agencies in managing contracts effectively. Specifically, contracting departments have not adequately specified contract tasks and products, ensured that contracts were approved before allowing contractors to begin work, or withheld at least 10 percent of progress payments pending contract completion. Neither have departments actively participated in consultant projects or evaluated the performance of contractors. Consequently, contracting departments have not sufficiently managed the activities of the contractor and thus are unable to fully benefit from the services consultants offer.

To improve the State's management of consultant contracts, we recommend that the Legislature consider requiring the three control agencies to formulate a plan for restructuring the present system for contract oversight.

In addition, the Department of General Services and the Department of Finance, in cooperation with the State Personnel Board, should revise the State Administrative Manual

to ensure that contract managers justify the need for consultant contracts, increase competition for contract awards, and review and negotiate contract costs.

We also provide information on the use of present and former state employees as consultants to state agencies. As a policy matter, the Legislature may wish to specify under what circumstances this practice may be allowed.

INTRODUCTION

In response to a request of the Joint Legislative Audit Committee, we have reviewed the practices employed by seven state departments in contracting for consultant services. This review was conducted under the authority vested in the Auditor General by Sections 10527 and 10528 of the Government Code. The contracting practices of the California Energy Commission, the California Exposition and State Fair (Cal Expo), and the Department of Rehabilitation have been the subject of previous Auditor General reports.*

In administering their programs, state departments are authorized to enter into contracts with consultants to obtain specialized services or products. The departments, for example, may contract with individuals having expertise in areas such as management training, public relations work, wildlife studies, pollution monitoring, or systems development. Although there is no comprehensive listing of the number or costs of consultant contracts awarded each year, a partial

* These previous reports include: Improvements Needed in Controlling Contracts Awarded by the California Energy Commission, Report P-814.2, December 1978; A Review of Cal Expo Operations, Report P-810, January 1979; and A Program Review of the Department of Rehabilitation, Report P-839, June 1979.

listing maintained by the Department of General Services (DGS) discloses that in fiscal year 1978-79 the State entered into 1,432 consultant contracts valued at \$102.8 million.

Three control agencies oversee the management of consultant contracts--the Department of Finance (DOF), the Department of General Services, and the State Personnel Board (SPB). These agencies control state contracting primarily by reviewing consultant contracts before they become effective. More specifically, the Department of Finance determines whether the contract costs are included in the approved budget for that program. Likewise, the SPB examines contracts to assure that the contract work cannot be accomplished within civil service. Finally, the DGS conducts a legal review to assure that the contract complies with all relevant laws and that it is in the best interest of the State.

Procedures governing contracting are given both in the State Administrative Manual (SAM) and in contracting guidelines maintained by some departments. Procedures for personal services contracts are contained in Section 1200 et seq. of the SAM. The Department of Finance and the Department of General Services are responsible for publishing these provisions, which incorporate State Personnel Board policies governing contracts outside the civil service system. Sections 1241 through 1247 of the SAM specifically address

procedures for developing consultant contracts by including guidelines for selecting a contractor and for processing, approving, and monitoring contracts. Contracting departments are responsible for adhering to these provisions. Further, five of the seven departments we reviewed maintain written contracting procedures. These generally reiterate the SAM guidelines, specify in-house review and approval procedures, and detail agency policy. A flow chart describing state contracting procedures appears as Appendix A of this report.

Limitations of Review

Because of the diversity of consultant contracts, we restricted our review to short-term contracts developed to meet a unique, nonrecurring need within an agency. This restriction omits, for example, consultant contracts that provide for regular medical services to prisons or hospitals.

Scope and Methodology of Review

We focused upon reviewing the State's system for managing and overseeing the use of consultant contracts. We examined the systems for supervising these contracts and analyzed State Administrative Manual procedures as well as other comparative contract management criteria.

To evaluate whether consultant contracts were managed effectively, we analyzed 50 contracts at seven state departments representing various sectors of state government.* From each department, we selected a judgement sample of contracts for fiscal years 1978-79 and 1979-80 that comprised a variety of services and products as well as a range of high and low dollar amounts. As illustrated in the table following, we examined contracts valued at approximately \$2.76 million.

TABLE 1
SUMMARY OF SAMPLE CONTRACTS

<u>Department</u>	<u>Total Contract Value</u>	<u>Number per Agency</u>	<u>Number over \$7,000</u>	<u>Number under \$7,000</u>
Air Resources Board	\$1,371,620	14	12	2
California Highway Patrol	372,497	6	4	2
Corrections	579,276	8	5	3
Developmental Services	132,838	5	4	1
Economic and Business Development	65,800	3	2	1
Employment Development	40,938	6	2	4
Fish and Game	<u>193,934</u>	<u>8</u>	<u>7</u>	<u>1</u>
Total	<u>\$2,756,903</u>	<u>50</u>	<u>36</u>	<u>14</u>

* Our selection of sample departments also reflected that the Auditor General is now examining the contracting practices of the Department of Social Services and the California Energy Commission.

Further, we researched appropriate statutes and policies covering consultant contracts, inspected department accounting and contract files, reviewed program records, and interviewed department contract managers. We examined (1) the purpose of each of the sample contracts, (2) contractor selection, (3) contract monitoring, and (4) the use of contract products. Additionally, we reviewed each department's contracting system and control agency oversight of sample contracts.

Finally, we looked at the policies of the University of California and the California State University and Colleges governing professors consulting services to state departments. We also requested a Legislative Counsel opinion to clarify the general policies for using present and former state employees as consultants. (This opinion is contained in Appendix B.)

CHAPTER I

THE SYSTEM TO OVERSEE AND MANAGE STATE CONSULTANT CONTRACTS IS INSUFFICIENT

The system for administering consultant contracts is insufficient. Specifically, it does not provide for coordinated and comprehensive oversight in these areas:

- Formulation of state contracting policies;
- Review and approval of contracts;
- Training of contract managers;
- Post-audit of departmental contracting activities.

Contributing to system weaknesses are inadequacies in state contracting procedures. For example, no clear procedures ensure that departments (1) secure competition for all consultant contracts, (2) determine that contract costs are reasonable, or (3) thoroughly evaluate the need for consultants' services.

Further, even though the present system includes some procedures for administering consultant contracts, the control agencies have not assured that contracting departments adhere to these procedures. During our review, we found that

departments did not always observe procedures for specifying contract products or for managing the work and payment of the consultant. Likewise, departments did not participate in consultant projects or evaluate the performance of contractors. These instances of noncompliance limit the benefits agencies derive from consultants as well as increase contract costs.

The deficiencies we noted did not include any instances of fraud. Instead, problems we found were related to the responsibilities of state contract administrators. We questioned one or more aspects of every contract we reviewed.

LACK OF COORDINATED AND
COMPREHENSIVE CONTRACT OVERSIGHT

During our review, we isolated these four elements of managing and overseeing consultant contracts:

- Formulation of state contracting policies;
- Review and approval of contracts;
- Training of contract managers;
- Post-audit of departmental contracting activities.

In applying these functions to the control agencies, we found no comprehensive system for reviewing and approving contracts even though the agencies concentrate on this function.

Additionally, training in contract management is not generally available to state personnel. We also noted that control agencies do not conduct comprehensive post-audits of departments' contracting practices to ensure compliance. Finally, other reports on state contracting activities have emphasized these problems.

As stated in the Introduction, the Department of Finance, the Department of General Services, and the State Personnel Board share the oversight of consultant contracts, each focusing on different law and policy considerations. These agencies concentrate on initial review and approval of proposed contracts. Although all three agencies would probably review unique and high cost consultant contracts, the criteria that could exempt these contracts from review differ at each control agency.

For example, criteria for general monetary limits on contract amounts vary at each of the control agencies. Under the limits effective during the 1979-80 fiscal year, the Department of General Services would ordinarily review a \$7,500 consultant contract, but the Department of Finance would not. The State Personnel Board would usually review this contract if it provided training but not if it provided licensed or certified professional services.

Further, studies conducted in previous years have noted deficiencies in control agencies' review of contracts. An Auditor General's report issued in 1971 concluded that "No meaningful review is made regularly of consulting contracts by any of the State's control agencies."* And in 1979, a report of the Commission on California State Government Organization and Economy criticized the State's multiple agency contract approval process.** It recommended establishing clear accountability to replace the present control agency approval process.

During our review, none of the seven contracting officers we interviewed had received formal training in contract management. However, the officers believed that such training is desirable for office and program staff who manage consultant contracts. The control agencies do not offer regularly scheduled training courses in this area. As a result, contract management training is not generally available to state agency personnel.

* Report No. 070.4, entitled Report on State Agencies' Contracts for Consulting Services, issued October 1971.

** Personnel Management in the State Service, by the Commission on California State Government Organization and Economy, issued August 1979.

The need for this training was emphasized by a study panel created in 1977 by the Director of the Department of General Services. This panel, which consisted of 15 members with backgrounds in public sector procurement, reviewed California's procurement system and made various recommendations, one of which applied to training. Specifically, the panel made this suggestion:

A program should be created to provide on-going research and training in government procurement law and procedures; ...those whose principal function is devoted to state procurement should be subject to continuing education for the maintenance and improvement of the individual's procurement skills.*

Finally, in reviewing existing post-audit activities, we noted that each control agency examines only its narrow spectrum of the law and policy issues. Thus, the oversight system does not provide for comprehensive post-audits of departments' contracting practices to ensure compliance with all state contracting laws and policies.

Table 2 following summarizes the four major management and oversight functions of the three control agencies and the contracting departments.

* California Public Contract Project-Report of the Study Panel, issued June 1978, pg. 13.

TABLE 2

CONSULTANT CONTRACT MANAGEMENT AND OVERSIGHT FUNCTIONS OF CONTROL AGENCIES AND CONTRACTING DEPARTMENTS

	<u>Department of Finance</u>	<u>Department of General Services</u>	<u>State Personnel Board</u>	<u>Contracting Departments</u>
Authority and Procedures Used	Authority to supervise all state financial and business policies - Government Code Section 13070. Also internal procedures for contract review are used to check consistency with approved program and budget.	Authority to supervise specific state financial and business policies - Government Code Section 14615. Reviews are conducted to determine compliance with all appropriate laws and regulations.	Authority to oversee civil service system - State Constitution, Article VII; Government Code Section 18590. Policy memorandums are used to determine that the work cannot be accomplished within civil service.	Applicable authority to administer agency programs, including contracting authority. Agencies are subject to SAM guidelines; some agencies have adopted specific internal contracting procedures, yet others have no such procedures.
Contract Review and Approval*	Budget analysts review personal services contracts over \$16,500 and other specific types of contracts. Analysts are also responsible for state budget preparation and review.	Legal office attorneys give approval to contracts over \$7,000 and other specific types of contracts. Attorneys also provide other legal services to certain other state agencies.	Departmental Services Division personnel analysts approve training contracts above \$5,000; licensed and certified professional services contracts over \$10,000; and other specific types of contracts. Analysts also provide a full range of personnel services to their assigned state agencies.	Contract officers coordinate internal contract review according to agency policy. Agencies send contracts to control agencies for review when this is required. Smaller contracts can be approved within the agency. Contract officer classifications range from Management Services Technicians to Staff Services Managers, and may include responsibilities for other business services functions.
Training of Contract Managers	No formal training programs offered.	No formal training programs offered.	No formal training programs offered.	Some agencies have designed and conducted contract management training courses for their own staff. No statewide training package is available.
Post-Audit Activities	No ongoing contract audit function. Financial and Performance Accountability Unit auditors sometimes include contract reviews as special projects.	Program and Compliance Evaluation Division auditors review contracts of selected departments for compliance and also respond to specific audit requests.	Audit and Control Unit analysts review a sample of contracts for compliance with civil service issues as part of their general review of delegated personnel management functions.	Some agencies have internal audit units which may respond to specific audit requests.

* Monetary limits for control agency contract review are from fiscal year 1979-80. These limits are adjusted periodically.

PROCEDURES FOR MANAGING
CONSULTANT CONTRACTS
ARE INADEQUATE

Our review disclosed that the weaknesses in managing and overseeing consultant contracts could be partially attributed to inadequate state contracting procedures. As noted previously, the State Administrative Manual and departmental policy outline procedures governing contracting practices. However, our review of 50 sample contracts indicated that these procedures do not guide contracting departments in (1) securing greater competition in the award of consultant contracts, (2) determining whether contract costs are reasonable, or (3) thoroughly evaluating the need for consultant services. As a result, contracting departments could incur unnecessary costs.

Insufficient Procedures for
Securing Competition for Contracts

Sections 1204, 1213, and 1242 of the State Administrative Manual provide that departments should secure at least three qualifying proposals on all consultant contracts except in rare instances. But the SAM does not suggest how the contract manager should locate consultants who may be interested in bidding on a contract.

The manual recommends that contracting departments secure competition through the Request for Proposal (RFP) method. Using this method, departments send requests to prospective bidders notifying them of contracting opportunities. Yet, for most of the contracts we reviewed, contracting departments did not use the RFP process. In fact, contracting departments awarded 39 of the 50 contracts sampled without formal competitive bidding. In 25 of these instances, contract managers located only one potential consultant or firm before awarding the contract.

Although the SAM encourages competition for all consultant contracts, it does not suggest how contract managers may identify potential contractors for a project. Thus, we found that contract managers locate consultants by referring to a variety of sources including state agencies, universities, professional associations, and the telephone book. Additionally, only one of the seven departments maintains an updated list of potential contractors.

The report of the Department of General Services' study panel mentioned in the preceding section also recognized the need for improved procedures to secure competition for consultant contracts.* It pointed out that the State

* California Public Contract Project-Report of the Study Panel, issued June 1978, pg. 33.

Administrative Manual does not require departments to publish a notice of pending procurement to attract potential contractors. The report then recommended that departments publish notices of consultant services needed before initiating any personal service contracts.

Inadequate competition for consultant contracts inhibits the State's ability to select the most advantageous contractor and thus realize the benefits of price competition. For example, in one of the sample contracts we examined, the California Highway Patrol (CHP) may have incurred unnecessary contract costs because it could not locate competitors for a contract. The CHP contracted for counseling services for its employees who have had problems handling stress. The contract manager could only identify one possible contractor and the CHP approved the contract at a cost of \$7.50 per employee. The following year, the manager identified additional competitors and competitively bid the contract. The same firm again received the contract but this time the fee was \$6.45 per employee. Had the \$6.45 rate been in effect the first year, the CHP would have saved \$1.05 per employee or approximately \$9,500 -- 14 percent of the cost of the first contract.

Inadequate Guidelines for Reviewing Contract Costs

Contracting provisions of the SAM do not contain adequate criteria to guide state departments in determining whether the costs of consultant contracts are reasonable. Such review is especially important since we found that contracting departments award most contracts without competitive bidding. In a formally advertised contract, the SAM provides that prospective contractors supply detailed cost data so that departments can evaluate competing proposals. But the SAM does not require departments to obtain and review projected costs for sole-source contracts--those bid by only one competitor.

Contrary to state contracting procedures, federal Armed Services Procurement Regulations require contract managers to analyze the projected costs of contracts awarded without formal advertising. These regulations also suggest several methods for reviewing the contract costs, including:

- Comparing the proposed contract price with prices found reasonable on similar contracts;
- Comparing the proposed contract price with independent cost estimates; or
- Reviewing each cost element within a proposed contract price to assure that each is necessary and reasonable.

Again, this review of contract costs is supported by the report of the DGS study panel. The report stated that advance cost estimates "serve as a useful fiscal control against excessive contract rates for services." Further, the report concluded that these estimates "should be prepared for any personal services contract as a price objective and any award should be made in consideration of the estimate."* However, this recommendation had not been implemented at the time of our review.

Without a thorough review of proposed contract costs, state departments may incur unnecessary costs. For example, the Employment Development Department (EDD) may have incurred excessive costs for training consultants. The EDD hired a consultant for \$800 to make a four-hour presentation on "The Power of Persuasion" at an EDD staff training seminar. Although this was the highest pay rate we noted during our review, the contract manager had not obtained the consultant's resume and was not familiar with her qualifications. Moreover, two other consultants received \$500 and \$600 for similar presentations. Reviewing each consultant's qualifications could have provided some basis for negotiating lower consultant fees.

* California Public Contract Project-Report of the Study Panel,
pg. 36.

Our examination of another contract awarded by the Air Resources Board (ARB) suggested that some cost items required further review. The ARB awarded a contract to a consulting firm to measure pollutants emitted from oil production operations. One purpose of these measurements was to serve as a basis for regulatory decisions. The ARB based its selection on the technical merits of the firm's proposal even though the cost of this proposal exceeded that of the other four bidders. The ARB received a low bid of \$192,457 on this contract. In contrast, the contractor's proposed costs totaled precisely \$250,000--the maximum funding available for this project.

Although we did not judge the reasonableness of the costs of the contract, we believe that ARB staff should have analyzed several cost elements more thoroughly. For instance, the prime contractor charged the ARB \$18,555 for overhead and profit related to subcontracts. Some of these costs might have been avoided had the ARB contracted directly with the subcontractors. Further, we noted that the contractor charged the ARB for obtaining a computer tape from another state agency--a task that easily could have been accomplished by the ARB staff.

Lastly, the text of the proposal indicated that one of the subcontractors (a highly qualified consultant) would employ two assistants during the project. The contract budget, however, did not specify how much time each would spend on the work. Our review indicated that the ARB contract managers did not fully analyze the costs of this contract but merely accepted the consultant's proposal. Had the SAM included specific guidelines for assessing reasonable contract costs, departments may have identified questionable cost elements and possibly avoided unnecessary expenditures.

Incomplete Procedures for Evaluating the Need for Consultant Services

Generally, state contracting procedures detailed in the SAM or within departmental policies do not guide contract managers in assessing the need for consultant services before beginning the contracting process. In at least two instances, we questioned the necessity of consultant contracts awarded by departments. These instances occurred because neither the sample departments nor the control agencies have established sufficient procedures to assure that the services of a consultant are needed before contracting.

In addition to state contracting procedures, five of the seven departments we reviewed have established internal contracting procedures. However none of these sufficiently

guides contract managers in assessing the need for the contract work itself. Instead, these procedures merely require that contract managers justify the need for services on the contract transmittal document.

But some state departments, including the Department of Transportation and the California Energy Commission, have established more thorough procedures for justifying the need for consultant services. For example, the contracting procedures of the Department of Transportation's Division of Mass Transit suggest that project managers answer the following questions when hiring a consultant:

- Why is this contract necessary?
- Can these needs be met another way?
- What specific problems will this contract work answer?
- When will management need these answers? How much are the answers worth to management and to others who need answers to similar research problems?

The California Energy Commission also outlines steps that contract managers should follow; these steps include the preparation of a contract request memorandum that features these sections:

- A description of what the agency will accomplish through the contract and the impact this accomplishment will have on existing departmental programs, and

- A survey of the existing state of the art related to the proposed contract work. Preparing this section ensures that the proposed work is not in progress or already completed elsewhere.

In studying contracting practices of departments that have not established similar procedures, we found a questionable need for some consultant services. To illustrate, the Air Resources Board contracted for services without determining that it needed a consultant until after receiving the consultant's proposal. The board entered into two consecutive contracts totaling \$8,000 with a Japanese air pollution control expert after receiving his unsolicited proposal. The expert submitted this proposal after meeting with a branch chief of the ARB who was touring Japan. Under these contracts, the consultant was to provide reports on Japanese air pollution control technology. However, ARB staff had not considered such information essential to their operations until after the consultant made his proposal.

In another instance, the Department of Corrections awarded a \$3,500 contract to a safety engineer to study the hazards of butane cigarette lighters in prisons. However, allegations that the lighters were dangerous were later found to be unsubstantiated. The contract was signed after the department's Health and Safety Coordinator could not obtain this information from government sources in response to a prison superintendent's concern.

Before the contract began, however, another superintendent contacted the manufacturer of the lighters and learned there was a hoax involving the alleged dangers. Subsequently, the department issued a memorandum to all institutions to inform them of the hoax. But the Health and Safety Coordinator did not receive this information until after the consultant had completed the study, which concluded that there was no significant hazard from the lighters. Had the need for this study been adequately investigated, the State could have saved an unnecessary expenditure of \$3,500.

In summary, we found that state contracting procedures do not guide contract managers in obtaining greater competition in the award of consultant contracts, in assessing whether contract costs are reasonable, or in evaluating the need for consultant services. Consequently, the State is incurring unnecessary costs in contracting with consultants.

AGENCIES HAVE NOT COMPLIED
WITH CONTRACTING PROCEDURES

Even though the State Administrative Manual contains inadequacies, it also gives procedures that assist contracting departments in effectively managing their consultant contracts. Yet, we found that departments do not fully comply with these provisions. Specifically, we noted instances in which contracting departments did not:

- Adequately specify contract tasks and products;
- Ensure that contracts are approved before allowing contractors to begin work;
- Withhold at least 10 percent of progress payments pending contract completion;
- Actively participate in consultant projects;
- Evaluate the performance of contractors.

As a result of these instances of noncompliance, contracting agencies are not sufficiently controlling the activities of the contractor and thus are unable to fully benefit from the services offered by consultants.

Poor Specification
of Contract Products

Agencies receive the greatest benefit from consultants when they plan the role of the consultant in advance. Section 1242 of the State Administrative Manual directs the contracting agency to "specifically identify in realistic terms what the consultant is to accomplish." In addition, Section 1212.2 of the SAM provides that contracts shall include a "clear and complete statement of the work, service, or product to be performed, rendered, or provided."

However, we found that departments did not always meet this requirement. As an example, one contract awarded by the California Highway Patrol did not adequately detail the criteria that the resulting product should meet. The CHP had to develop physical performance standards to implement physical fitness requirements for traffic officers. The department signed a \$5,110 contract with a physiologist, who supplied the standards as specified in the contract. But when reviewing the consultant's product, the CHP Planning and Analysis Division and the State Personnel Board staff found standards could not be statistically validated as job-related and thus might not have withstood legal challenges. Consequently, the CHP entered into a second contract which specified that the resulting performance standards be job-related. This second contract, totaling \$9,000 was again awarded to the physiologist.

This situation resulted in part because the contract manager did not have expertise in personnel standards or physiology and was not trained in contract management. As a result, implementation of these standards designed to reduce disability costs, improve the health of traffic officers, and enable the CHP to better serve citizens was delayed by at least 15 months. In addition, the CHP entered into a second contract worth \$9,000 because it did not precisely define the standards required within the first contract.

Starting Work Before
Contract Approval

Both the Government Code and the SAM require that contracts be approved before contractors commence work. To be specific, Sections 14780 and 14784 of the Government Code note that state contracts are not effective until they are approved by the Department of General Services or the contracting agency (if the contract is exempt from DGS review). Also, Section 1204 of the SAM reads in part,

Except in emergency cases...agencies must submit each contract in time for the Department of General Services to approve it prior to commencement of work.

Despite these explicit mandates, we found that the contractor was allowed to begin the work before the contract was fully approved in 28 of the 50 contracts we examined. Moreover, for six of these contracts, the contract work was completed before the contract was approved.

When these regulations are ignored, control agencies may feel obligated to approve a contract which may not have ordinarily passed their review. For example, we noted an instance in which the Office of Economic Opportunity (OEO) within the Employment Development Department approved a contract 11 months after the contractor had begun work. The OEO awarded a sole-source contract for community agency staff training to a regional training center. OEO staff allowed the contractor to begin holding the training classes while the contract was being processed for approval. Shortly afterwards, the contract administrator left for a new job. When her position was filled, the new administrator found that the contract had been lost and that the contractor was submitting invoices which could not be paid until the contract was approved.

When the new administrator resubmitted the contract for processing, both EDD and DGS contract reviewers questioned the lack of competitive bidding. However, they finally

approved the contract 11 months after work had begun because they felt disapproval would have created a hardship for the contractor who had begun working in good faith.

Withholding Progress Payments
Pending Contract Completion

Section 1244 of the SAM requires agencies to withhold at least 10 percent of progress payments to the contractor pending satisfactory completion of the entire contract. This regulation gives the State the leverage to ensure that consultants will perform all contract tasks. However, agencies often relinquish this control over consultant contracts. In 21 of the 37 contracts where progress payments were made, agencies did not withhold this amount.

In several instances, contract managers stated that they were unaware of this requirement. In 13 instances, the DGS approved contracts that omitted provisions for withholding this percentage of payments. Noncompliance with this requirement could increase the chances that contractors fail to perform contract specifications.

Inadequate Participation in Consultant Projects

The SAM requires agencies to be active participants in consultant contracts. Section 1246 of the manual points out that agencies receive the greatest benefits from consultants when the engagement is considered a joint undertaking and agency personnel are active participants. The manual further states that agency personnel working with the consultant can give the project continuity at the operating level in subsequent months. Despite this requirement, we found instances where departments did not require their staff to adequately participate or follow up on consultant projects they approved.

The Employment Development Department (EDD), for example, paid a consultant for a product they never used. The EDD contracted with a personnel expert to revise their "Management Aids" handout for employers. This consultant was to update the handout and eliminate sexist references. The EDD later received the materials and paid the consultant.

The consultant's product needed only editorial changes to prepare it for printing and distribution. However, at the time of our review 11 months later, the handout still

was not ready for distribution although an EDD official had earlier responded to a letter from an employer objecting to the materials by informing her that they would soon complete the project.

Because the EDD did not follow up and make use of the consultant's product, the department had not benefited from this \$999 contract at the time of our review. In addition, materials objectionable to employers are still in use.

Evaluation of Contractors' Performance

The SAM has required agencies to complete a form evaluating consultants' performance within 30 days after completion of contracts over \$7,000.* The manual also designates that the DGS Legal Office shall maintain a central file of these forms to enable other agencies to review a contractor's previous record.

Yet our review disclosed that departments had completed evaluation forms for only 2 of the 21 sample contracts where evaluations were required. Additionally, we found that departments seldom consult the file of performance

* Effective in July 1980, this was revised to apply to contracts over \$10,000.

evaluations. Only two contract managers we interviewed stated they had referred to the central file of these forms prior to selecting a contractor. According to the clerk in the DGS Legal Office who maintains the file, the office receives only one or two requests for contractor evaluations each month. Generally, when such queries are received, no information is available either because agencies have not submitted the forms or because the contractor has never done business with the State.

As a result, the DGS central file has not provided departments with information on a contractor's previous performance.

CONCLUSION

We found that the present system of contract oversight is not sufficient, and contracting departments have not always managed consultant contracts properly. Under the present system of oversight, control agencies do not comprehensively review and approve contracts nor do they comprehensively monitor contracting through post-audit activities. Training is not generally available to contract managers. Inadequate state contracting procedures have contributed to weaknesses in management. Specifically, present State

Administrative Manual procedures do not ensure that departments (1) secure adequate competition for contract awards, (2) review and negotiate contract costs, or (3) thoroughly analyze the need for consultant services. As a result, the State may have incurred unnecessary costs in contracting for consultant services.

Further, even though certain state provisions can assist contracting departments in managing contracts efficiently, departments have not always adhered to them. For example, departments have not complied with SAM requirements that they adequately specify contract tasks and products, obtain contract approval before directing contractors to begin work, or withhold at least 10 percent of progress payments pending contract completion. Further, departments have not participated in consultant projects or evaluated the performance of contractors. Unless these requirements are observed, contracting departments are unable to control the activities of the contractor and thus are unable to fully benefit from the services offered by consultants.

RECOMMENDATION

To improve the State's management of consultant contracts and to increase compliance with contracting procedures, the Legislature may wish to consider requiring the three control agencies to formulate a plan for restructuring the present system for contract oversight. Specifically, this plan should

- Establish specific and comprehensive contract management procedures, including minimum requirements for agency contract manuals, contracting checklists, or flow charts;
- Coordinate contract review and approval;
- Develop a training program in contract management available to agency contract administrators;
- Establish a comprehensive program for auditing state agency contracting practices.

To accomplish these goals, the plan should analyze alternative organizational structures that would improve contract oversight, including these options:

- Designating one organizational unit to have central responsibility for overseeing all contract management functions or selected functions. The unit could report to one or more control agencies (if coordination can be ensured) or could operate independently;
- Establishing an interagency committee with responsibility for coordinating present control agency functions.

The plan should also include suggestions for changes in law or policy necessary to implement its recommendations.

Additionally, the Department of General Services and the Department of Finance, in cooperation with the State Personnel Board, should revise the State Administrative Manual to improve the usefulness of state contracting procedures. These revisions should require contract managers to follow these steps:

- Justify the need for each consultant contract by asking: (1) Did the contract result from an unsolicited proposal?

(2) Why is it essential to the department's function? (3) How will the department use the contract product? and (4) Are there any alternative sources of the information needed?

- Increase competition for contract awards by establishing and publishing a central register of available consultant contracts throughout state government and by listing a variety of potential sources of consultant referrals in the SAM. Such sources may include other state agencies, private industry, professional associations, or the telephone book.

- Review cost elements for all contracts, whether competitively bid or sole-source, by including a specific description of each consultant's qualifications and the amount of time each will spend on the contract as well as a justification of each consultant's rate of pay. This justification should include rates paid by other employers in the past. Other contract costs such as travel expenses, equipment, overhead, and profit should also

be specifically described and justified. Contract managers can use this analysis to negotiate sole-source contract costs. They should also consider cost factors when deciding whether to select a contractor or reject all proposals for competitively-awarded contracts.

CORRECTIVE ACTION TAKEN

Some of the agencies we reviewed have acted to improve their contracting systems.

- The Department of General Services has developed a proposal to implement a central register of state contracting opportunities. Current plans are to begin bi-monthly publication of this register in June 1981.
- The State Personnel Board is revising its policies on contracting for personal services.
- The California Highway Patrol is drafting its first contracting procedures.
- The Department of Corrections is designing new contracting procedures and training courses for contract administrators.

- The Employment Development Department is planning to develop guidelines for training consultant compensation rates.

CHAPTER II

OTHER PERTINENT INFORMATION

THE USE OF PRESENT AND FORMER
STATE EMPLOYEES AS CONSULTANTS

In 18 of the 50 contracts we sampled, present or former state employees performed consultant services for state departments. This practice is generally permissible under present law, and departmental administrators believe that these consultants often possess valuable expertise gained during their employment with the State. Table 3 below illustrates the number of sampled contracts in which present and former civil servants or employees of either the University of California (UC) or the California State University and College System (CSUC) were involved.

TABLE 3

NUMBER OF CONSULTANT CONTRACTS
INVOLVING PRESENT OR FORMER STATE EMPLOYEES^a

	<u>Civil Service</u>	<u>UC or CSUC</u>	<u>Total</u>
Present employees	1	7	7
Former employees	<u>9</u>	<u>9</u>	<u>15</u>
Total	<u>9</u>	<u>12</u>	<u>18</u>

^a In some contracts, more than one present or former state employee was involved. Therefore, columns and lines do not total.

However, in a recent study of federal consultants, the U.S. General Accounting Office raised questions concerning:

- Objective evaluation of contract proposals which use present and former employees;
- Circumvention of civil service regulations including those governing the use of in-house capabilities.

Our review disclosed cases that related to the findings of the General Accounting Office. In one case the Air Resources Board entered into a consultant contract with a former employee to review research proposals. Later, this individual worked on a subcontract for a firm which was awarded a research contract.

Although this individual resigned his ARB civil service position to become a state college professor, he continued to work for the board on a consultant contract. Under this contract, he was to perform a variety of tasks including review of socioeconomic research proposals for the Research Division. During this time, the division reviewed an unsolicited socioeconomic research proposal from another consulting firm. After the ARB decided to contract for this research, the former employee was hired by the firm to assist in their efforts. However, according to contract invoices and

the ARB socioeconomic research manager, the former employee had not participated in the decision to approve the firm's proposal.

And in another case, we found the supervisor of a researcher for the Department of Corrections circumvented the State Personnel Board rules to retain the services of the researcher. The Department of Corrections applied for and received an Office of Criminal Justice Planning grant to produce a film depicting prison gang violence. An individual working under a temporary nine-month civil service appointment conducted research for the grant and for the film. His supervisor selected a motion picture production company to make the film.

As filming was to begin, the researcher's temporary appointment expired. The supervisor then arranged a second contract with the film company under which this company paid the researcher to continue work on the project. The State Personnel Board approved this second contract, which did not specifically identify the individual involved nor explain that he could not continue his civil service position. SPB staff stated they probably would not have approved the contract had they been aware of this information.

The supervisor acknowledged that this arrangement had been made to avoid personnel regulations. However, he stated it had been essential to complete the film in a short period of time to avoid possible retaliation from gang members. The researcher's services were necessary to the project, and the supervisor believed it was not possible to establish civil service eligibility within the time allowed for the project.

We also noted many instances in which academic and professional employees of the University of California and the California State University and College System performed consultant services for state agencies. Under University of California policy, professors are expected to perform professional and public service activities which do not interfere with their teaching and research obligations to the University. The UC is concerned about the time its faculty devotes to outside activities, not about their compensation for such activities. Starting with fiscal year 1979-80, faculty must report general information annually on outside professional activities by type of organization and service.

The primary duty of the California State University and Colleges faculty is teaching. There is no limitation on outside activities performed independently. However, faculty members who engage in research or consulting projects through the college itself cannot receive additional compensation which

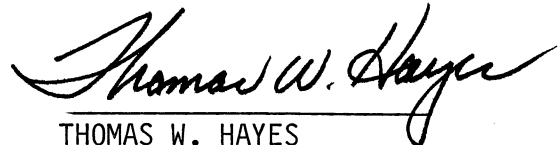
exceeds 125 percent of their regular salary. Individual campuses may set additional policies and enforcement procedures for their own college.

We requested an opinion from the Legislative Counsel on this issue. (The opinion is given in Appendix B.) According to the Legislative Counsel, it is generally permissible for agencies to use present and former employees as consultants. In addition, there is no limitation on how much agencies may pay such individuals in relation to regular state pay rates. There are, however, specific laws which restrict the use of former employees on certain types of contracts.

State employees are also subject to provisions of agencies' conflict of interest codes. These may designate consultant contracts with state agencies as incompatible with the employee's primary duties.

As a policy matter, the Legislature may wish to consider the circumstances under which present and former state employees should perform consultant services for state agencies.

Respectfully submitted,



THOMAS W. HAYES
Auditor General

Date: April 2, 1981

Staff: Eugene T. Potter, Audit Manager
Steve Hendrickson
Andrew P. Fusso
Jacques M. Barber

AGENCY RESPONSES TO THE
AUDITOR GENERAL'S REPORT

We solicited comments on our report from the Department of Finance, the Department of General Services, and the State Personnel Board. The State Personnel Board chose not to respond to the report; the responses of the other two agencies follow.

Memorandum

Date : March 30, 1981

File No. :

To : Thomas W. Hayes
Auditor General
925 "L" Street, Suite 750

Subject :

From : **Department of General Services**

We have reviewed your report, "Improvements Needed in the Administration of State Contracts for Consultant Services", and concur with most of your findings. The system does indeed need improvement, both at the contract administration level and that of oversight as well. As you point out in your report we are, through the State Register, moving toward increased competition in consultant contracts. The remainder, however, require further legislative guidance before changes are implemented.

I have come to fully appreciate that the role of the control agencies in a scheme of checks and balances is significant to effective contracting and the supervision of contract performance. I wish to compliment your office on conducting a thorough review of a very complicated subject and for identifying significant areas of improvement. I fully support such efforts to improve government contracting. My following comments are intended to be constructive and supportive of the theme for improvement postulated in the report.

The report fails, perhaps intentionally, to acknowledge the significance of the fact that the Legislature has placed the authority for executing a contract and contract administration in program agencies. Decentralization allows State personnel at grassroots level to inject their expertise in the contract process of obtaining consultant services to implement their programs. The recommendation in the report to designate "one organizational unit to have central responsibility for overseeing all contract management functions..." might jeopardize that valuable resource so needed in our multipurpose State contract program. I feel that the report should clearly identify the valuable role of the contract manager in the program agency and, as a corollary, emphasize the responsibility of the contract managers to abide by and implement the procedures, standards, and policies enunciated by the control agencies.

The statement in the report that "the present system for overseeing the administration of consultant contracts is insufficient" must necessarily involve legislative consideration. We agree with the concepts of justifying the need for contracts before they are signed, of improving the ability of State program agencies to obtain optimum performance from consultant contractors, and of more carefully measuring costs. There is good reason for the control agencies to formulate a plan for restructuring the present system for contract oversight only after the Legislature clarifies the role that it wants those agencies to perform.

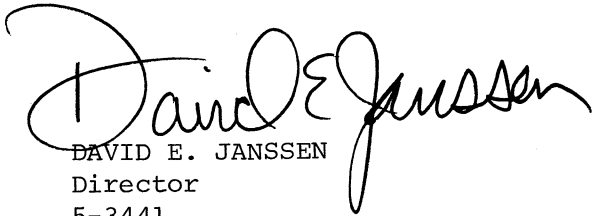
Thomas W. Hayes

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March 30, 1981

Further, we agree that additional training of contract managers and additional postaudit capability could improve the contract management function performed by agencies. However, legislative direction is also needed in this area if the necessary additional resources are to be made available for this purpose.

If we may be of further assistance in your pursuit of this difficult subject, please let me know.

A handwritten signature in cursive script that reads "David E. Janssen". The signature is written in black ink and is positioned to the right of the typed name and title.

DAVID E. JANSSEN

Director

5-3441

DEJ:gay

Memorandum

Date : March 30, 1981

To : Thomas W. Hayes
Auditor General

From : **Department of Finance**

Subject: Draft Report Entitled, "Improvements Needed in the Administration of State Contracts for Consultant Services"

The following is our response to subject report which was transmitted to us by a letter dated March 25, 1981.

This report addresses, as stated in the title, improvements which you recommend be made in the administration of State contracts for contracting services. In summary, the report makes the following observations:

1. There are deficiencies in the State's contract oversight system which reduces benefits received from consultant contracts and increases costs.
2. The State lacks a training program for the management of consultant contracts.
3. The State control agencies do not conduct comprehensive post-audits of the Departments' contracting practices.
4. There is a need to review and update the State Administrative Manual's (SAM) contracting procedures to insure that,
 - a. there is competition in awarding contracts,
 - b. that the costs are properly negotiated, and
 - c. that the need for the contract is thoroughly analyzed.

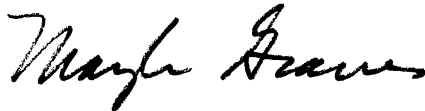
As we understand it, there are three major recommendations, two of which can be addressed by state agencies, and the third subject to legislative review. These are:

1. That the three control agencies, the Department of Finance, the Department of General Services, and the State Personnel Board, be required by the Legislature to formulate a better plan covering proper oversight of State consultant contracts.
2. That the Department of General Services and the Department of Finance, in consultation with the State Personnel Board, revise the State Administrative Manual (SAM).

3. That the Legislature review the findings regarding use of former State employees as consultants, utilizing current findings and the Legislative Council Opinion.

It is always our position that improvements should be made where identified in the administration of State funds. It is my intention to work closely with the other two control agencies to revise the State Administrative Manual where deficiencies might exist and to review the possibility of establishing a training program for contract management. We feel that these actions would address the first two recommendations presented. These changes would be accompanied by an expanded review of the contract procedures within individual State agencies by our FPA unit and individual department internal auditors. As you know, we are now proceeding to review internal controls including compliance with SAM within the major departments in a two-year cycle. We believe this review would address your question of post-audit practices.

We appreciate the opportunity to respond to this draft report.



MARY ANN GRAVES
Director of Finance
(916) 445-4141

cc: David Jansen, Director, Department of General Services
Ron M. Kurtz, State Personnel Board

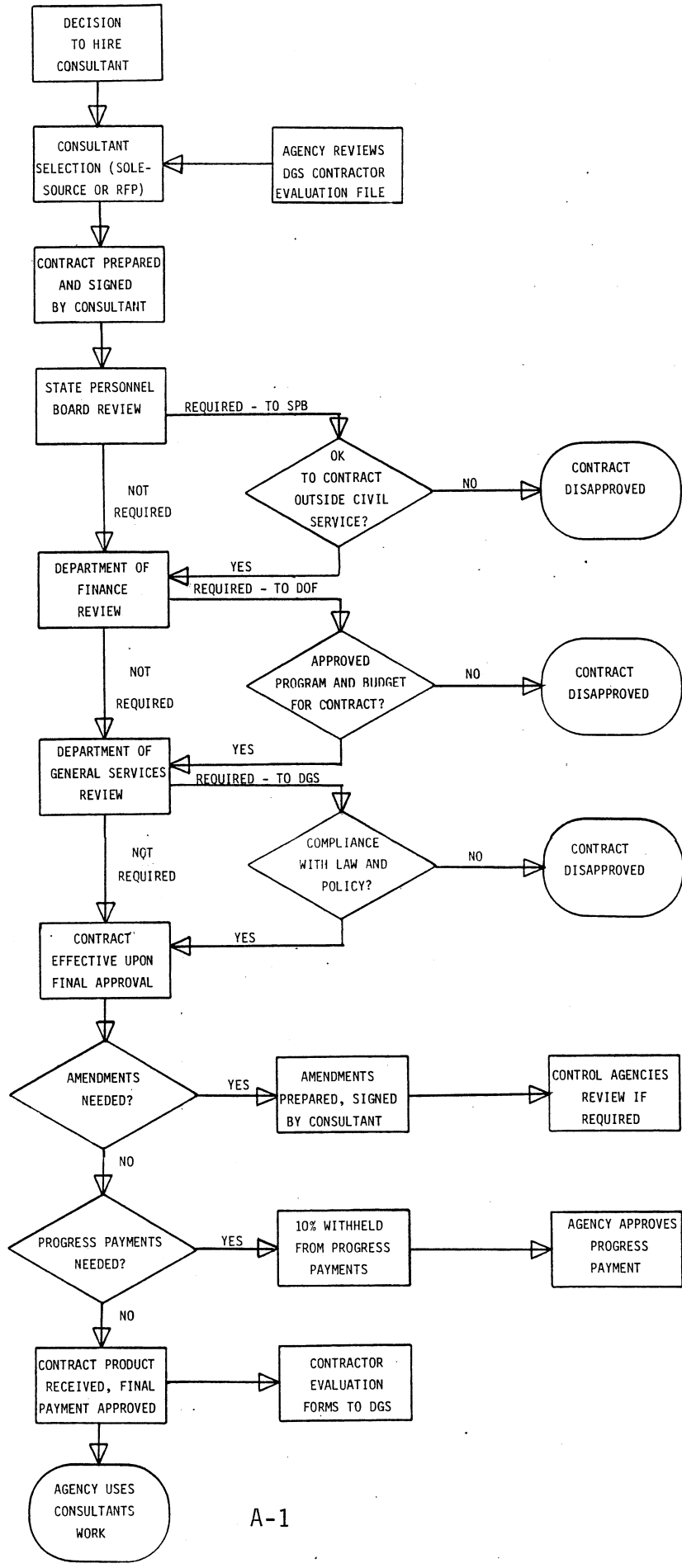
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FLOW CHART OF CONSULTANT CONTRACTING PROCEDURES

CONTRACTING AGENCY
CONTRACT PREPARATION

CONTROL AGENCIES
REVIEW AND FINAL APPROVAL

CONTRACTING AGENCY
CONTRACT ADMINISTRATION



OWEN K. KUNS
RAY H. WHITAKER
CHIEF DEPUTIES

JERRY L. BASSETT
KENT L. DECHAMBEAU
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EDWARD K. PURCELL
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Legislative Counsel of California

BION M. GREGORY

Sacramento, California
March 12, 1981

Mr. Thomas W. Hayes
Auditor General
925 L Street, Suite 750
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Conflicts of Interest: Present and Former
State Officials and Employees Performing
Consultant Services for the State - #16113

Dear Mr. Hayes:

You have asked a number of questions regarding the propriety under state law of present and former state employees performing consulting services for the state or being employed by a consulting firm which performs consulting services for the state.

In our analysis we have consolidated the first three questions dealing with the employment of former state employees.

In addition, you have informed us that three areas of consideration are to be excluded from our analysis of the questions presented:

(1) Any consideration of the constitutionality of any statutory provisions which purport to govern the employment of former state employees by contractors or subcontractors of the state.

(2) Any consideration of the application of state constitutional and statutory provisions regulating the letting of state contracts and the use of civil service employees, whenever possible, for the performance of services for the state.

GERALD ROSS ADAMS
DAVID D. ALVES
MARTIN L. ANDERSON
PAUL ANTILLA
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RICHARD B. WEISBERG
DANIEL A. WEITZMAN
THOMAS D. WHELAN
CHRISTOPHER ZIRKLE
DEPUTIES

(3) Any consideration of the law, if any, regulating present or former state legislative employees.

QUESTION NO. 1

As a general proposition, does state law, operative either prior to or on and after January 1, 1981, preclude, or limit, the receipt of compensation by a former state employee from a state entity for the performance of consultant services as an individual or as an employee of or subcontractor to a consulting firm under contract to the state if the contract is made with his former organizational unit within a state agency, with his former agency, or with another state agency?

OPINION NO. 1

As a general proposition, state law, operative both prior to and on and after January 1, 1981, does not preclude a former state employee's receipt of compensation from a state entity for the performance of consultant services, either as an individual or as an employee of or as a subcontractor to a consulting firm under contract to the state, regardless of whether the contract is made with his former organizational unit within a state agency, with his former state agency, or with another state agency.

However, as discussed below, there are specific statutory provisions affecting Medi-Cal fiscal intermediary contracts and prepaid health plan or pilot program contracts which create exceptions to the above general proposition regarding certain former state employees.

ANALYSIS NO. 1

Although state law contains numerous examples of statutory provisions which prohibit an officer or employee of a specific state entity from having financial interests in contracts or transactions involving the state entity employing him or in any organization subject to regulation by the state entity employing him (see, e.g., Secs. 450.3, 2101, 3011, 3012, 7602, and 23060, B. & P.C.; Sec. 5209, Fin. C.; Sec. 15625, Gov. C.; Sec. 441.4, H. & S.C.; Sec. 737, P.R.C.; and Sec. 303, P.U.C.), there are no statutory provisions of general application which specifically govern the contractual performance of consultant services for a state entity by a former state employee.

Thus, as a general proposition, state law does not preclude in any manner the receipt of compensation by a former state employee from a state entity for the performance of consultant services, either as an individual or as an employee of or a subcontractor to a consulting firm under contract to the state.

Therefore, it follows that, for purposes of state law generally, it is immaterial that the contract for consultant services to be performed by a former state employee is made with his former organizational unit within a state agency, with his former state agency, or with another state agency. Likewise, it is also immaterial that the compensation to be received is for consultant services either directly related or wholly unrelated to the tasks or programs in which the former state employee was involved.

Just as state law is generally silent on the matter of a former state employee's right to receive compensation from a state entity for the contractual performance of consultant services, state law also contains no provisions of general application which limit the rate of compensation which may be received under a contractual arrangement of this type.

Therefore, as a general proposition, state law does not place any limitation upon the rate of compensation which a former state employee may receive from a state entity for the contractual performance of consultant services based upon the rate of compensation which he previously received as a state employee. Accordingly, the rate of compensation would be that rate agreed to by the parties to the contract governing those services.

Finally, state law contains no provisions of general application which govern the employment of former state employees by consulting firms contracting with the state.

Thus, as a general proposition, state law does not preclude a former state employee from working for a consulting firm under contract to the state even if the former state employee, while a state employee, was involved in any decision by the state to contract with the firm.

Therefore, it follows that, for purposes of state law, it is immaterial whether the former state employee performs services for the consulting firm under that contract or performs services related to other activities of the firm.

Notwithstanding our previous general conclusions, it should be mentioned that there are specific statutory provisions affecting Medi-Cal fiscal intermediary contracts and prepaid health plan or pilot programs which create specific exceptions to those general conclusions with regard to certain former state employees.

Specifically, Sections 14104.6¹ and 14479 of the Welfare and Institutions Code provide, in part, as follows:

"14104.6. * * *

"(e) No Medi-Cal fiscal intermediary contract shall be approved, renewed, or continued if a state employee is employed in a management, consultant or technical position by the contractor or a subcontractor to the contractor within one year after the state employee terminated state employment.

"For purposes of this section, 'state employee' means any appointive or civil service employee of the Governor's Office, the Health and Welfare Agency, the State Department of Health Services, the Controller's Office, the Attorney General, or the Legislature who, within two years prior to leaving state employment, had responsibilities related to development, negotiation, contract management, supervision, technical assistance or audit of a Medi-Cal fiscal intermediary.

* * * " (Emphasis added.)

¹ Section 14104.6 of the Welfare and Institutions Code was added by Chapter 1129 of the Statutes of 1980 and became operative on September 26, 1980, as an urgency statute.

"14479. (a) No prepaid health plan or pilot program contract shall be approved, renewed or continued by the department if a state officer or state employee is employed in a management or consultant position by the contractor or a subcontractor to the contractor within one year after the state officer or state employee terminated state employment.

"(b) For purposes of this section, 'state employee' means any appointive or civil service employee of the department or of the Health and Welfare Agency who, within two years prior to leaving state employment, was responsible for development, negotiation, contract management, or supervision of a prepaid health plan or prepaid health plan contract." (Emphasis added.)

The above statutory provisions expressly provide that a Medi-Cal fiscal intermediary contract or a prepaid health plan or pilot program contract may not be approved, reviewed, or continued if the following factors are present:

(1) A former state employee is employed in a consultant position by a contractor or a subcontractor to a contractor with the state within one year after the state employee terminated state employment.

(2) The state employee was an employee of a designated state entity.

(3) The state employee, within two years prior to leaving state employment, was responsible for, or had responsibilities related to, development, negotiation, supervision, technical assistance, audit, or certain contract management functions in connection with an affected contract or contractor.

If each of those factors is present, Sections 14104.6 and 14479 of the Welfare and Institutions Code, by prohibiting the approval, renewal, or continuation of affected contracts, in effect, preclude affected contractors or their subcontractors from employing as a consultant a former state employee who meets those factors. Accordingly, such a former state employee would be effectively precluded from receiving any compensation whatsoever for the performance of consultant services.

Inasmuch as those factors also include some of the factors previously considered in reaching our general conclusions, our conclusions regarding the materiality of those factors under state law generally are subject to an exception as applied to those former state employees affected by the provisions of Sections 14104.6 and 14479 of the Welfare and Institutions Code.

As to those former state employees, the presence or absence of the above enumerated factors is determinative of the question of whether they are precluded from being employed as, and from receiving compensation for, consultant services performed for contractors or subcontractors of contractors in connection with Medi-Cal fiscal intermediary and prepaid health plan or pilot program contracts.

As of January 1, 1981, additional statutory provisions became operative which regulate the financial interests of a present state employee in contracts to which his employing state entity is a party (see Ch. 110, Stats. 1980 (S.B. 1256)) and the financial interests of a former state employee in representing any other person in specified proceedings in which the state is a party or has a direct or substantial interest and in which the former state employee participated (Ch. 66, Stats. 1980 (A.B. 1048)).

However, an examination of Chapters 66 and 110 of the Statutes of 1980 clearly indicates that neither chapter concerns itself with the regulation of consultant services performed for the state by former state employees.

QUESTION NO. 2

Does state law generally preclude an officer or employee of the University of California, the California State University and Colleges, or any other state entity from contracting with another organizational unit of the state entity of which he is an officer or employee or with any other state entity for the performance of consultant services?

OPINION NO. 2

Except for distinct statutory prohibitions applicable to officers and employees of specific state entities which are discussed below, state law does not generally preclude an officer or employee of the University of California, the California State University and Colleges, or any other

state entity from contracting with another organizational unit of the state entity of which he is an officer or employee or with any other state entity for the performance of consultant services, as long as those contracts do not violate those provisions of state law which regulate conflicts of interest and incompatible activities of public officers and employees.

ANALYSIS NO. 2

Initially, it should be mentioned, as previously noted in Analysis No. 1, that state law contains specific examples of statutory provisions which prohibit state officers and employees of designated state entities from having any financial interests in contracts or transactions involving the state entity of which they are members or employees (see, e.g., Sec. 3012, B. & P.C.; Sec. 15625, Gov. C.; and Sec. 737, P.R.C.).

Also included within this particular type of statutory prohibition are those provisions which prohibit officers and employees of the California State University and Colleges who are members of the governing board of an auxiliary organization from being financially interested in any contract or transaction entered into by the board (Secs. 89901, 89906, Ed. C.), including any contract between an auxiliary organization and a member of its governing board or a partnership or unincorporated association of which the member is a partner or an owner or holder of a proprietary interest (Sec. 89908, Ed. C.).

Thus, initially, with respect to officers or employees of specific state entities and specific officers and employees of the California State University and Colleges, state law prohibits those officers and employees from contracting with the entity of which they are members or employees and, presumably, any organizational unit of that entity, for the performance of consultant services.

However, none of the statutory provisions mentioned above deal with the validity of contracts between public officers and employees generally and either other organizational units of the state entity of which they are members or employees or other state entities.

Provisions governing conflicts of interest of public officials are contained in the Political Reform Act of 1974 (see Ch. 7 (commencing with Sec. 87100, Title 9, Gov. C.)). Section 87100 of the Government Code contains broad language which prohibits a public official,² including, in our opinion, a public official of the University of California (see Ishimatsu v. Regents of the University of California, supra) and of the California State University and Colleges, from making, participating in making, or in any way attempting to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. Under Section 87103 of the Government Code, an official has a financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on any of the interests listed under that section (see subds. (a) through (d), Sec. 87103, Gov. C.).

Inasmuch as the purposes of the conflict-of-interest provisions discussed above are to insure that public officials render absolute loyalty and undivided allegiance to the best interest of the governmental entity they serve, and to remove all real and potential direct and indirect influence of interested officers on decisions affecting their personal financial interests (see Witt v. Morrow, 70 Cal. App. 3d 817, 822-823; Fraser-Yamor Agency, Inc. v. County of Del Norte, 68 Cal. App. 3d 201, 215), we are of the opinion that those provisions do not preclude public officers and employees from entering into contracts either with another organizational unit of the state entity of which they are officers or employees or with other state entities for the performance of services, so long as those officers and employees are unable by their official positions either to make those contracts on behalf of the contracting organizational unit or state entity or to influence, directly or indirectly, the decision of the organizational unit or state entity in making those contracts.

² Section 82048 of the Government Code defines a "public official" as every member, officer, employee, or consultant of a state or local government agency.

In addition to the limitation, imposed upon public officers and employees by the conflict-of-interest provisions, state law also places limitations upon the activities of certain public officers and employees which are deemed to be inconsistent, incompatible, or in conflict with their duties as public officers and employees.

The State Civil Service Act (Pt. 2 (commencing with Sec. 18500), Div. 5, Title 2, Gov. C.) prohibits state officers and employees, including officers and employees of the California State University and Colleges (see Slivkoff v. Board of Trustees, 69 Cal. App. 3d 394, 401), from engaging in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to the officer's or employee's duties or the duties, functions, or responsibilities of the agency by which he is employed. The agency is required to determine, subject to approval of the State Personnel Board, those activities which are inconsistent, incompatible, or in conflict with the duties of the employees under its jurisdiction and is directed to give consideration to employments and activities which, among other things, involve the performance of an act by the employee in other than his capacity as a state officer or employee when that act may later be subject directly or indirectly to the control, inspection, review, enforcement, or audit by the officer or employee or by the agency by which he is employed. The board is authorized to adopt rules governing the application of these provisions which may include provision for notice to employees prior to the determination of proscribed activities and for appeal by an employee from such a determination and from its application to the employee (Sec. 19251, Gov. C.).

In view of the provisions of Section 19251 of the Government Code, we are of the opinion that state entities, including the Board of Trustees of the California State University and Colleges, could preclude their officers or employees from contracting with another organizational unit of the same entity or with another state entity for the performance of services where those contracts are inconsistent, incompatible, in conflict with, or inimical to their duties or the duties, functions, or responsibilities of the state entity by which they are employed.

Of course, whether or not contracts for consultant services are deemed to be properly proscribed activities of those officers and employees subject to the provisions of Section 19251 would necessitate an examination of the individual statements of incompatible activities, if any, of each employing state entity.

In addition, insofar as Section 19251 of the Government Code also requires that each state officer or employee, during his hours of duty as a state officer or employee, devote his full time, attention, and efforts to his state office or employment, an officer and employee whose consulting contract does not involve a conflict of interest or a proscribed incompatible activity would still be required to perform that contract outside his hours of duty as a state officer or employee.

Although the provisions of Section 19251 of the Government Code do not apply to officers and employees of the University of California, we have been informed by the university that there are 19 different policy statements which proscribe the performance of services by university officers and employees which are specified in those policy statements as incompatible with their employment by the university.

In view of all of the foregoing, we conclude that state law does not generally preclude an officer or employee of the University of California, the California State University and Colleges, or any other state entity from contracting with another organizational unit of the state entity of which he is an officer or employee or with any other state entity for the performance of consultant services as long as these contracts do not violate those provisions of state law or those policy statements of the University of California which regulate conflicts of interest and incompatible activities of officers and employees.

QUESTION NO. 3

Do the provisions of state law which govern inter-agency agreements require that consultant services furnished to a state entity by a state employee employed by another state entity, including the University of California or the California State University and Colleges, be furnished pursuant to an interagency agreement rather than pursuant to a contract between the state entity receiving such services and the state employee or the consulting firm of which the state employee is an employee or a subcontractor?

OPINION NO. 3

The provisions of state law which govern inter-agency agreements do not require that consultant services furnished to a state entity by a state employee employed by another state entity, including the University of California or the California State University and Colleges, be furnished pursuant to an interagency agreement rather than pursuant to a contract between the state entity receiving those services and the state employee or the consulting firm of which the state employee is an employee or a subcontractor.

ANALYSIS NO. 3

As previously concluded in Analysis No. 2, state law, with certain limited exceptions, does not preclude officers or employees of the University of California, the California State University and Colleges, or any other state entity from contracting with any other organizational unit of the state entity of which he is an officer or employee or with any other state entity for the performance of consultant services, as long as those contracts do not violate those provisions of state law which regulate conflicts of interest and incompatible activities of public officers and employees.

Chapter 3 (commencing with Section 11250) of Part 1 of Division 3 of Title 2 of the Government Code generally governs interagency services and transactions. Sections 11253 and 11256 of the Government Code provide, in relevant part, as follows:

"11253. Upon written request approved by the Department of General Services, a department shall furnish to another department such assistance as it is able to render without detriment to its administration, including the deputizing of agents and inspectors, when consistent with law, and the temporary reassignment of employees.

* * *

"11256. Subject to approval of the Director of General Services, state agencies may furnish services, materials or equipment to, or perform work for, other

state agencies upon such terms and conditions and for such considerations as they may determine and, subject to such approval, may enter into agreements for such purpose.

. . .

* * * (Emphasis added.)

The language of the above sections clearly indicates that state agencies are authorized, but are not required, to contract with one another for the performance of services by one agency for another, including a loan of employees.

In view of the permissive nature of the provisions of Sections 11253 and 11256 of the Government Code, we are of the opinion that the provisions of state law which govern interagency agreements do not require that consultant services furnished to a state entity by a state employee employed by another state entity, including the University of California or the California State University and Colleges, be furnished pursuant to an interagency agreement rather than pursuant to a contract between the state entity receiving those services and the state employee or the consulting firm of which the state employee is an employee or a subcontractor.

QUESTION NO. 4

Does state law contain any statutory provisions or administrative regulations relating to vacation time and leaves of absence of officers and employees of the University of California, the California State University and Colleges, or any other state entity which limit their use by officers and employees for the performance of contracts for consultant services made with any of the above state entities?

OPINION NO. 4

There are no statutory provisions or administrative regulations relating to vacation time of officers and employees of the University of California, the California State University and Colleges, or any other state entity which would limit the use of vacation time by these officers and employees for the performance of contracts with state entities for consultant services.

Similarly, there are no statutory provisions limiting the use of leaves of absence by the above employees for the performance of contracts with state entities for consultant services.

However, as is discussed below, there are administrative regulations governing leaves of absence for certain officers and employees which would limit the use of leaves of absence for the performance of contracts with state entities for consultant services.

ANALYSIS NO. 4

State law and administrative regulations governing vacation time for state officers and employees, whether or not they are subject to civil service, and including officers and employees of the California State University and Colleges, make no provision regarding how their vacation time is to be spent (see Sec. 89500, Ed. C.; Ch. 2 (commencing with Sec. 18050), Div. 5, Title 2, Gov. C.; 2 Cal. Adm. C. 381 et seq.; 5 Cal. Adm. C. 42900 et seq.).

Similarly, state law relating to officers and employees of the University of California makes no provision regarding how the vacation time of its officers or employees is to be spent (see Sec. 92610, Ed. C.).

Thus, there are no statutory provisions and no administrative regulations in state law relating to the vacation time of officers and employees of the University of California, the California State University and Colleges, or any other state entity which would limit the use of vacation time by these officers and employees for the performance of contracts with any state entity for consultant services.

State statutory provisions relating to leaves of absence, with or without pay, for state officers and employees, whether or not they are subject to civil service, and including officers and employees of the California State University and Colleges, make no provision regarding the granting or denial of a leave of absence for the pursuit of outside employment generally (see Sec. 89500, 89510, Ed. C.; Art. 3 (commencing with Sec. 19330), Ch. 7, Div. 5, Title 2, Gov. C.).³

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Section 19330.5 of the Government Code does permit the granting of a leave of absence without pay for service in a technical cooperation program as a temporary employee of another governmental agency, a nonprofit corporation, or a recognized college or university.

Similarly, administrative regulations relating to leaves of absence without pay for officers and employees of the California State University and Colleges make no provision regarding the granting or denial of a leave of absence for the pursuit of outside employment.

However, there are administrative regulations of the State Personnel Board and the Board of Trustees of the California State University and Colleges which, we think, have a direct bearing on the use of leaves of absence by certain state officers and employees for the performance of contracts for consultant services made with state entities.

Section 361 of Title 2 of the California Administrative Code precludes granting an officer or employee subject to civil service a leave of absence to enter other employment unless the leave of absence is without pay and the other employment is for the performance, on a loan basis, of a specific assignment for another governmental agency or is during a layoff situation or by way of lessening the impact of an impending layoff.

Title 5 of the California Administrative Code permits the granting of leaves of absence with pay to certain officers and employees of the California State University and Colleges for the purpose of permitting study or travel which will benefit the California State University and Colleges (5 Cal. Adm. Code 43000) and permits the granting of special leaves of absence with pay for research or creative activity, in accordance with eligibility standards established by the Chancellor (5 Cal. Adm. Code 43050, 43051).

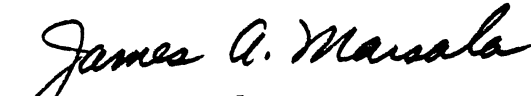
In view of the foregoing regulations, we are of the opinion that officers and employees subject to civil service would be precluded from using leaves of absence for the purpose of pursuing other employment which would involve the performance of private contractual consultant services for state entities. In addition, since this type of outside employment is directed principally to the purpose of pursuing private financial interests rather than the purposes of pursuing study, travel, research, or creative activity, we are also of the opinion that officers and employees of the California State University and Colleges would be precluded from using leaves and special leaves of absence with pay for the purpose of pursuing the performance of private contractual consultant services for state entities.

Mr. Thomas W. Hayes - p. 15 - #16113

Finally, we have been informed by the University of California that there are extensive policy guidelines which in particular instances may govern the use of leaves of absence by officers and employees of the university for the aforementioned purpose.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By 
James A. Marsala
Deputy Legislative Counsel

JAM:kca

cc: Walter M. Ingalls, Chairman
Joint Legislative Audit Committee

cc: Members of the Legislature
Office of the Governor
Office of the Lieutenant Governor
Secretary of State
State Controller
State Treasurer
Legislative Analyst
Director of Finance
Assembly Office of Research
Senate Office of Research
Assembly Majority/Minority Consultants
Senate Majority/Minority Consultants
California State Department Heads
Capitol Press Corps