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October 25, 2006

Honorable Gloria Romero
Room 313, State Capitol

DEPARTMENT OF CORRECTIONS AND
REHABILITATION: CIVIL SERVICE - #0619323

Dear Senator Romero:

You have asked whether Section 1 of Article VII of the California Constitution would be violated if the state contracts with private entities for security and public safety services traditionally performed by the Department of Corrections and Rehabilitation (hereafter the department). We have not been presented, and do not consider, any specific factual situation or legislative proposal.¹

Section 1 of Article VII of the California Constitution provides as follows:

"SECTION 1. (a) The civil service includes every officer and employee of the State except as otherwise provided in this Constitution.

"(b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination."

Thus, this section generally requires that officers and employees of the state, except as otherwise provided in the California Constitution,² be appointed through the civil service system based on merit. Decisional law interprets Article VII of the California Constitution as a restriction on the "contracting out" of state activities or tasks to the private sector (*California State Employees' Assn. v. State of California* (1988) 199 Cal.App.3d 840, 844). The restriction does not

¹ In this regard, we do not address in this opinion the Governor's proclamation of October 4, 2006, declaring a state of emergency in the prisons as a result of overcrowding, or any legislative proposal to permit the state to contract with other states for the confinement of persons convicted of criminal offenses in this state (see, for example, Senate Bill No. 12 (2005-06 2nd Ex. Sess.)).

² For example, Article XXII of the California Constitution, added to the California Constitution by the approval of Proposition 35 at the November 7, 2000, statewide general election, authorizes state and local agencies to contract with private entities for architectural and engineering services.

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arise from the express language of the constitutional provision, but "it emanates from an implicit necessity for protecting the policy of the organic civil service mandate against dissolution and destruction" (*California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, 397).

The courts, however, have recognized certain exceptions to the restriction on contracting out. In *California State Employees' Assn. v. Williams*, supra, at pages 400 and 401, the court held that in certain limited instances state business may be conducted through personal services contracts pursuant to legislative direction and authority where a new state function not previously conducted by any state agency is performed. Under the "new state function" test, courts will ask whether the contracted services displace existing state civil service functions or, instead, embrace a new state activity or function (see *Professional Engineers v. Department of Transportation* (1993) 13 Cal.App.4th 585, 593).

Inasmuch as laws governing state penal institutions date back to 1851,³ there is no indication that correctional safety or security can reasonably be characterized as a new state function.

Other permissible exceptions to the prohibition against contracting out state activities include services to be performed that are of a nature that they cannot be adequately, satisfactorily, or competently performed by civil service employees (*Burum v. State Compensation Ins. Fund* (1947) 30 Cal.2d 575, 580, 582; *State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 135), commonly referred to as the "nature of the services" test. The "nature of the services" test involves an inquiry into whether persons performing tasks or exercising skills under the contract are or can be employed through civil service methods (*California State Employees' Assn. v. Williams*, supra, at p. 396).

In addition, Section 19130 of the Government Code establishes standards for the use of personal services contracts by the state. Section 19130 of the Government Code reads as follows:

"19130. The purpose of this article is to establish standards for the use of personal services contracts.

"(a) Personal services contracting is permissible to achieve cost savings when all the following conditions are met:

"(1) The contracting agency clearly demonstrates that the proposed contract will result in actual overall cost savings to the state, provided that:

"(A) In comparing costs, there shall be included the state's additional cost of providing the same service as proposed by a contractor. These additional costs shall include the salaries and benefits of additional staff that would be needed and the cost of additional space, equipment, and materials needed to perform the function.

"(B) In comparing costs, there shall not be included the state's indirect overhead costs unless these costs can be attributed solely to the function in question and would not exist if that function was not performed in state service. Indirect

³ Crouch and McHenry, *California Government* (1949), at page 335.

overhead costs shall mean the pro rata share of existing administrative salaries and benefits, rent, equipment costs, utilities, and materials.

"(C) In comparing costs, there shall be included in the cost of a contractor providing a service any continuing state costs that would be directly associated with the contracted function. These continuing state costs shall include, but not be limited to, those for inspection, supervision, and monitoring.

"(2) Proposals to contract out work shall not be approved solely on the basis that savings will result from lower contractor pay rates or benefits. Proposals to contract out work shall be eligible for approval if the contractor's wages are at the industry's level and do not significantly undercut state pay rates.

"(3) The contract does not cause the displacement of civil service employees. The term "displacement" includes layoff, demotion, involuntary transfer to a new class, involuntary transfer to a new location requiring a change of residence, and time base reductions. Displacement does not include changes in shifts or days off, nor does it include reassignment to other positions within the same class and general location.

"(4) The contract does not adversely affect the state's affirmative action efforts.

"(5) The savings shall be large enough to ensure that they will not be eliminated by private sector and state cost fluctuations that could normally be expected during the contracting period.

"(6) The amount of savings clearly justify the size and duration of the contracting agreement.

"(7) The contract is awarded through a publicized, competitive bidding process.

"(8) The contract includes specific provisions pertaining to the qualifications of the staff that will perform the work under the contract, as well as assurance that the contractor's hiring practices meet applicable nondiscrimination, affirmative action standards.

"(9) The potential for future economic risk to the state from potential contractor rate increases is minimal.

"(10) The contract is with a firm. A "firm" means a corporation, partnership, nonprofit organization, or sole proprietorship.

"(11) The potential economic advantage of contracting is not outweighed by the public's interest in having a particular function performed directly by state government.

"(b) Personal services contracting also shall be permissible when any of the following conditions can be met:

"(1) The functions contracted are exempted from civil service by Section 4 of Article VII of the California Constitution, which describes exempt appointments.

"(2) The contract is for a new state function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors.

"(3) The services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system.

"(4) The services are incidental to a contract for the purchase or lease of real or personal property. Contracts under this criterion, known as 'service agreements,' shall include, but not be limited to, agreements to service or maintain office equipment or computers that are leased or rented.

"(5) The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system. Contracts are permissible under this criterion to protect against a conflict of interest or to insure independent and unbiased findings in cases where there is a clear need for a different, outside perspective. These contracts shall include, but not be limited to, obtaining expert witnesses in litigation.

"(6) The nature of the work is such that the Government Code standards for emergency appointments apply. These contracts shall conform with Article 8 (commencing with Section 19888) of Chapter 2.5 of Part 2.6.

"(7) State agencies need private counsel because a conflict of interest on the part of the Attorney General's office prevents it from representing the agency without compromising its position. These contracts shall require the written consent of the Attorney General, pursuant to Section 11040.

"(8) The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

"(9) The contractor will conduct training courses for which appropriately qualified civil service instructors are not available, provided that permanent instructor positions in academies or similar settings shall be filled through civil service appointment.

"(10) The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

"(c) All persons who provide services to the state under conditions the board determines constitute an employment relationship shall, unless exempted from civil service by Section 4 of Article VII of the California Constitution, be retained under an appropriate civil service appointment."⁴

⁴ In *California State Employees' Assn. v. State of California*, supra, the plaintiffs contended that subdivision (a) of Section 19130 of the Government Code violated Article VII of the California Constitution.

Thus, to summarize, subdivision (a) of Section 19130 of the Government Code permits personal services contracting in order to achieve cost savings if, among other things, the contracting agency demonstrates that the proposed contract will result in actual overall cost savings to the state, the contractor's wages are at the industry's level and do not significantly undercut state pay rates, the contract does not cause the displacement of civil service employees, the contract does not adversely affect the state's affirmative action efforts, the amount of savings will be large enough to ensure that the savings will not be eliminated by cost fluctuations that could normally be expected during the contract period, the amount of savings clearly justify the size and duration of the contract, the contract is awarded through a publicized, competitive bidding procedure, and the contract includes specific provisions pertaining to the qualifications of the staff who will perform the work (paras. (1) to (8), incl., subd. (a), Sec. 19130, Gov. C.).

The courts have acknowledged that the criteria expressly set forth in subdivision (a) of Section 19130 of the Government Code are not exclusive and an implicit part of that subdivision is the "nature of the services" test (*California State Employees' Assn. v. State of California*, supra, at pp. 851-853). Hence, we think that the merit employment principles contained in Article VII of the California Constitution require services that are contracted out by the state to private parties pursuant to subdivision (a) of Section 19130 of the Government Code to be services that cannot be performed adequately, competently, or satisfactorily by state civil service employees.

Subdivision (a) of Section 19130 of the Government Code codifies the State Personnel Board's standards concerning the award of contracts to private firms in order to achieve cost savings, and subdivision (b) of that section codifies the judicially imposed conditions on the award of personal services contracts outside the civil service system (*Id.*, at pp. 844-845).

The "new state function" test (*California State Employees' Assn. v. Williams*, supra, at pp. 400-401), as previously discussed, has essentially been codified in paragraph (2) of subdivision (b) of Section 19130 of the Government Code to permit the state to contract out personal services if the services to be performed are for a new state function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors. The "nature of the services" test (*Burum v. State Compensation Ins. Fund*, supra, at pp. 580 and 582; *State Compensation Ins. Fund v. Riley*, supra, at p. 135) has essentially been codified in paragraph (3) of subdivision (b) of that section to permit the state to contract out personal services if the services to be performed are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service.

As noted above, the courts have acknowledged that the cost savings provisions of subdivision (a) of Section 19130 of the Government Code are not exclusive, and implicit in this subdivision is the "nature of the services" test, which arises from the restrictions of Article VII of

(...continued)

Constitution. The Court of Appeal rejected that contention and upheld the facial constitutionality of the provision (*Id.*, at p. 853).

the California Constitution and the need to maintain the civil service mandate against dissolution and destruction (*California State Employees' Assn v. State of California*, supra, at 851-853). While the "goal of maintaining the civil service must be balanced with the goal of a fiscally responsible state government" (Id., at p. 853), courts generally have concluded "that Article VII of the California Constitution forbids the state from contracting for private companies to perform services of the kind that persons selected through civil service could perform 'adequately and competently'" (*Consulting Eng'rs. & Land Surveyors of Cal., Inc. v. Professional Eng'rs. in Cal. Gov't.* (2006) 140 Cal.App.4th 466, 471). Thus, in 1997, the California Supreme Court held that statutory amendments expanding the authority of the Department of Transportation to contract with private entities for state work violated Article VII of the California Constitution because the work historically and customarily had been performed by state employees and the Legislature failed to make any findings showing that the work could not be performed adequately and competently by state employees (Id., at p. 472). In the 1997 decision, the court noted that private contracting is permitted "if cost savings justify it and other applicable civil service standards are met" (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 567; emphasis added). The court further noted that the law permitted an existing state function to be totally withdrawn and privatized or privatized on an experimental basis, but concluded the provisions at issue did not withdraw a state function and were too far-reaching to qualify as an experiment (Id., at p. 568). The court in this case was critical of broad, confusing, and factually unsupported legislative findings, including assertions of cost-savings, that purported to justify the disregard of constitutional restrictions on private contracting (Id., at pp. 569-574). With that background, Article XXII was added to the California Constitution to expressly permit state and local agencies to contract with private entities for architectural and engineering services (*Consulting Eng'rs. & Land Surveyors of Cal., Inc. v. Professional Eng'rs. in Cal. Gov't.*, supra, at p. 472). The provisions of that article are limited to those specific services, and no analogous constitutional provision provides an exception for the contracting out for security and public safety services traditionally performed by the department.

While the decision in *Professional Engineers v. Department of Transportation*, supra, stands for the continued validity of the California constitutional prohibition on private contracting of services that are otherwise adequately provided through the civil service, the court expressly recognizes that private contracting may be permissible depending on the facts and circumstances of a case, and that the department might justify specific private contracts on the basis that they are needed "to assure timely project delivery unobtainable through the state civil service" (*Professional Engineers v. Department of Transportation*, supra, at p. 572). Statutory authority for this point is present in paragraph (6), regarding emergency work, and paragraph (10), regarding and urgent, temporary, and occasional work, of subdivision (b) of Section 19130 of the Government Code.⁵ With regard to paragraph (10) of subdivision (b) of Section 19130 of the Government Code, the

⁵ In this regard, see also Section 8658 of the Government Code providing for removal of inmates from a correctional institution in time of emergency endangering their lives.

court in *People ex rel. Dept. of Fish & Game v. Attransco, Inc.* (1996) 50 Cal.App.4th 1926, 1936-1937, cites that paragraph as valid authority for personal services contracts for private attorneys in complex litigation, in which the "delay incumbent" in the implementation of civil service procedures would frustrate the purpose of the agency needing those services. In sum, while Article VII of the California Constitution restricts contracting out of civil service activities to the private sector, Section 19130 of the Government Code, authorizes private contracting under certain circumstances that have been deemed by the courts to be constitutional, including in the case of emergencies or for urgent, temporary, and occasional work.

Consequently, whether the state may contract out for security and public safety services as a general rule will begin with an analysis of whether the "nature of the services" test would apply. In other words, a court would determine whether security and public safety services otherwise performed by employees of the department would be services that cannot be performed adequately, satisfactorily, or competently by civil service employees (*Burum v. State Compensation Ins. Fund*, supra, at pp. 580 and 582; *State Compensation Ins. Fund v. Riley*, supra, at p. 135). The court would then turn to the particular facts of the case to determine if they fall within one of the permissible exceptions to contracting out of state services. We have not been provided with any specific tasks or functions that would be proposed to be contracted out to private entities in connection with your inquiry.

* Therefore, in the absence of facts that would support one or more of the criteria for bringing contracts to perform security and public safety services within one of the permissible exceptions to the constitutional restriction on contracting out of state services, it is our opinion that the state would violate Section 1 of Article VII of the California Constitution by contracting with private entities for security and public safety services traditionally performed by the Department of Corrections and Rehabilitation.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

By *Russell H. Holder*
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