



California Fair Political Practices Commission

June 21, 1989

Robert E. Leidigh
Olson, Connelly, Hagel & Fong
300 Capitol Mall, Suite 350
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-89-320

Dear Mr. Leidigh:

You have requested advice on behalf of your client Computer Management Services, Inc. ("CMSI") and its employee Charles Kribs regarding their obligations under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/}

QUESTIONS

CMSI is currently providing services to the County of Mendocino under a short-term agreement. CMSI and the County of Mendocino are considering entering into a long-term contract for those services. You have asked the following questions:

1. Is CMSI a "consultant" within the meaning of the Act when providing services under the short-term agreement or the long-term contract?
2. Are or will any of CMSI's employees be considered "consultants" under the Act when providing services under the short-term agreement or the long-term contract?
3. Is there any legal bar under the Act to the county and CMSI entering into the long-term contract as proposed?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

4. If the answer to question 2 is in the affirmative, does the proposed long-term contract provide for "significant intervening substantive review" by the county so that CMSI employees or officers may make recommendations concerning contract implementation or modification without "participating in the making of a governmental decision"?

CONCLUSIONS

1. CMSI is not a "consultant" within the meaning of the Act.
2. CMSI employees who participate in decisions which may have a reasonably foreseeable material financial effect on their economic interests are "consultants" within the meaning of the Act.
3. The Act solely requires public officials to refrain from participating in decisions in which they have a financial interest. Accordingly, it does not prohibit CMSI and the county from entering into the proposed long-term contract.
4. CMSI employees or officers who make recommendations concerning contract modification or implementation are participating in a governmental decision.

FACTS

CMSI is a private, for-profit corporation. Among its customers are numerous public entities, both in California and in other states. CMSI provides services to its customers in the management of the customers' computer systems. Contracts vary from customer to customer. Generally, CMSI provides personnel, software and hardware, pursuant to the contract.

In May 1988, CMSI and the county of Mendocino entered into a 9-month agreement for CMSI to provide on-site management of the county's data processing facility. This contract has been extended pending final execution of a long-term contract between the parties. This short-term agreement includes day-to-day management and staffing of the county's data processing facility by CMSI. It also required the development of a long-range planning and needs assessment for the county's data processing operation.

The formulation of the long range plan was reached after extensive meetings between all county department heads, county supervisors and CMSI. An ad hoc committee composed of department heads representing key user groups provided ongoing input into formulation of the long range plan. The long range plan presents a broad policy framework in which to consider future county data processing decisions; it is not a proposal for specific procurement decisions. Nor did the plan recommend use of CMSI to implement the long range plan.

The short-term agreement also includes a provision that upon the favorable recommendation of the county data processing committee, the county and CMSI would begin negotiations toward a long-term management contract. The short-term agreement required conclusion of negotiations 45 days from their commencement. The negotiated agreement was then to be submitted to the board of supervisors for final approval.

The county data processing committee, composed of the following voting members, made the recommendation to the board of supervisors that negotiations toward a long-term contract commence: two supervisors, the county administrative officer or his designee, and the auditor-controller. The non-voting member of the committee was the data processing manager who during that period of time was Rod Olson, senior vice president of CMSI. Mr. Olson made no recommendations to the committee concerning an extended agreement between the county and CMSI.

The same ad hoc committee which monitored and advised on the long-range plan also provided its recommendation to the county data processing committee and to the board of supervisors to pursue a long-term contract with CMSI.

The committee system has since been altered to provide more user input for future data processing decision-making. The ad hoc committee referred to above has been formalized. It is now known as the information services planning committee. It consists of the following county department heads: social services, clerk-records, planning director, assessor and auditor-controller, and sheriff. The county data processing committee has been renamed the information services steering committee.

User requests are first screened by the information services planning committee with recommendations being made by that committee to the steering committee. The steering committee is then empowered to take action on these requests. Some actions, such as on personal services contracts, must proceed to the board of supervisors for final approval. CMSI's designated information services manager, Chuck Kribs, serves as a staff member to both committees.

During the short-term contract and pursuant to its provisions, and the directives of the county data processing committee and the board of supervisors, negotiation commenced toward a long-term facilities management contract. This contract was negotiated by the county team composed of the auditor-controller, the county administrative officer, the county counsel, and two members of the law firm of Irell and Manella. The CMSI team consisted of Art Kayser, Chief Operating Officer of CMSI; George Tamas of CMSI; and Jack Russo of the law firm of Nelson and Russo.

The CMSI personnel who negotiated the long-term contract did not perform any of the services specified in the short-term agreement. The long-term contract has been negotiated and is currently

awaiting final execution by the board of supervisors pending advice from the Commission regarding the questions addressed by this letter.

The long-term contract will run for 87 months. During that time period, CMSI will provide personnel to assist in operating the county's data processing and computer systems. In addition, CMSI will work with the county's project manager and both will assist the county in selecting appropriate software and hardware systems to meet the county's changing needs. The software may be either "public domain," "other publicly available", "third-party commercial," or "custom developed" by CMSI.

The long-term contract provides for a fixed price over the term of the contract. The price includes provision of some term of the contract. The price includes provision of some term of the contract. The price includes provision of some software. However, annual inflation adjustments may be made, tied to the cost-of-living adjustments for "civilian service workers in Mendocino County."

Any change in the contract price for "supplemental services" must be approved by the county board of supervisors. Prior to going to the board of supervisors, requests for supplemental services must go through the following approval process:

Requests must first go to the information services planning committee. That committee makes a recommendation to the information services steering committee which, in turn makes its recommendation for final action to the county board of supervisors.

Day-to-day contract administration rests with CMSI's on-site information services manager, Charles Kribs, with oversight by the county's project manager. The county's project manager will be either a county employee or another consultant retained by the county for that purpose. That person will not be employed by CMSI.

Any disputes within the scope of the contract will be resolved by use of arbitration, if an internal dispute resolution process is unsuccessful.

The contract expressly provides that the parties are independent contractors and that neither party has any authority to act on behalf of the other party, except as expressly set forth in the contract. The long-term contract also contains a "conflict of interest disclosure" provision which relates to any CMSI recommendation regarding the purchase or licensing of software from a third-party by the county.

ANALYSIS

Section 87100 prohibits a public official from making or participating in a governmental decision in which he knows or has

reason to know he has a financial interest. The term "public official" includes any "member, officer, employee or consultant" of a state or local government agency. (Section 82048.) In the present situation, the question is whether CMSI or any of its employees are "consultants."

The term "consultant" is defined by Commission Regulation as follows:

(2) "Consultant" shall include any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that "consultant" shall not include a person who:

(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and

(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.

Regulation 18700(a)(2).

Since CMSI is not a "natural person," it is not a consultant. (Hayden Advice Letter, No. A-84-319, copy enclosed.) The question is whether any of its employees are consultants.

Both the short-term agreement and the long-term contract call for CMSI employees to provide, under contract, information, advice, recommendations or counsel to the county. As indicated in the analysis you provided, where an outside individual becomes involved on an ongoing basis in the decision-making process, he or she may become a consultant. Here, CMSI is required to provide staff on an ongoing basis to manage the county's data processing and information services. Some CMSI employees will essentially function as additional county staff.^{2/} Those individuals are consultants within the meaning of Section 87100. (Kaplan Advice Letter, No. A-82-108, copy enclosed.)

We do not have sufficient information to identify exactly which employees of CMSI qualify as consultants. Certainly we believe that Mr. Kribs is a consultant. Furthermore, other employees who participate in decisions which may have a reasonably

^{2/} In fact, the long-term contract provides for CMSI to hire a number of the county's current data processing employees. (Section 3.6 of the Long-Term Contract.)

foreseeable material financial effect on their financial interests are consultants.^{3/} On the other hand, employees who perform functions which are solely ministerial, secretarial, manual or clerical are not consultants. (Regulation 18700(d)(1).)

Decisions on Contract Modification

Since certain CMSI employees are public officials within the meaning of the Act, they will be prohibited from participating in decisions which will have a reasonably foreseeable material financial effect on CMSI. (Section 87103(c) and (d).) You have specifically asked whether CMSI employees or officers may make recommendations concerning contract implementation or modification without "participating in the making of a governmental decision."

Regulation 18700(c) provides:

(c) A public official or designated employee "participates in the making of a governmental decision" when, acting within the authority of his or her position, he or she:

(2) Advises or makes recommendation to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

You have raised the point that decisions which will result in additional revenues being received by CMSI require review and recommendations by the county's project manager, the county's information services steering committee, the county information services planning committee and the board of supervisors. You

^{3/} If they are not already covered by Mendocino County's conflict of interest code, the code should be amended to cover these persons.

have asked whether this constitutes "significant intervening substantive review." We do not believe so.

The most extensive discussion of "significant intervening substantive review" can be found in the Kaplan Advice Letter, No. A-82-108 (copy enclosed). The Kaplan letter dealt with the issue of whether there was significant intervening substantive review of the actions of consultants for the Sacramento Metropolitan Utility District (SMUD). In the letter it is pointed out that the Commission has interpreted this exception narrowly. The letter further states:

It is our interpretation that a consultant participates in a decision, even if it is "reviewed" by several of his superiors, if those superiors rely on the data or analysis prepared by the consultant without checking it independently, if they rely on the professional judgment of the consultant, or if the consultant in some other way actually may influence the final decision. Finally, I pointed out that although Ebasco consultants at most only participate in recommendations to the SMUD Board, which makes the final decision, they still may be participating in the Board's decision. Making recommendations to the final decision-makers, either directly or indirectly, is exactly what participating in a governmental decision means.

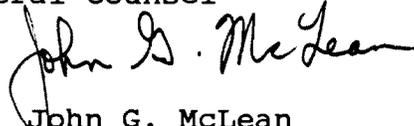
Clearly, issues which relate to modification of CMSI's contract will involve matters on which the decision-makers must rely on CMSI's professional judgment. With the current structure of the county's data processing operations, much of this information may be impossible to check independently. In such circumstances, CMSI employees will be considered to participate in the governmental decisions on modification of the contract. However, as pointed out in the Workman Advice Letter, No. I-87-078, the Act does not prohibit CMSI's employees from negotiating the contract with the county, so long as they do so while acting solely in their private capacity. The contracting decisions on the part of the county must be made by county officials. Furthermore, if the decision-making structure is modified to provide for an independent substantive review and analysis of CMSI's recommendations by personnel with the expertise to do so, we believe the system will provide a "significant intervening substantive review." (See, Rose Advice Letter, No. A-84-306. copy enclosed.)

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I trust this answers your questions. If you have any further questions, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

A handwritten signature in black ink, appearing to read "John G. McLean". The signature is written in a cursive style with a large initial "J".

By: John G. McLean
Counsel, Legal Division

KED:JM:ld

Enclosure

Law Offices of
OLSON, CONNELLY, HAGEL & FONG

May 23, 1989

May 23 11 40 AM '89

HAND DELIVERED

Kathryn E. Donovan
General Counsel
FAIR POLITICAL PRACTICES COMMISSION
P.O. BOX 807
Sacramento, CA 95804-0807

Dear Ms. Donovan:

I am counsel for Computer Management Services, Inc. (hereafter "CMSI"). I have been asked by my client and its employee Charles Kribs to make this request for formal written advice.

An issue has been raised as to whether the company has a conflict of interest under the Political Reform Act which would disqualify it from entering into a long-term contract with the County of Mendocino. I and my clients do not believe this to be the case and we are writing to the Fair Political Practices Commission to seek formal written advice in that regard. The County Counsel of Mendocino County, H. Peter Klein, joins in this request as well. The execution of the long-term contract is being held in abeyance pending your response.

QUESTIONS

1.) Is CMSI a "consultant" within the meaning of the Political Reform Act when providing services under (a) the short-term agreement or (b) the pending long-term contract?

2.) Are or will any of CMSI's employees be considered "consultants" under the Political Reform Act when providing the services called for under the short-term agreement or long-term contract? If so, which ones?

3.) Is there any legal bar under the Political Reform Act to the County and CMSI entering into the long-term contract as proposed?

4.) If the answer to question 2 is in the affirmative, does the proposal for the 87-month, long-term contract provide for "significant intervening substantive review" by the County so that CMSI employees or officers may make recommendations concerning contract implementation or modification without "participating in the making of a governmental decision"?

LANCE H. OLSON
BRUCE J. HAGEL
LEROY Y. FONG
ROBERT E. LEIDIGH

OF COUNSEL
LLOYD G. CONNELLY, *Member*
California State Legislature

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5.) Even if any of CMSI's employees are considered "consultants" under the Political Reform Act, are they "participating in making a governmental decision" when negotiating any modification of an existing contract which may result in an increase in the contract amount and therefore result in a financial effect upon CMSI?

FACTS

CMSI is a private, for-profit corporation. Among its customers are numerous public entities, both in California and in other states. CMSI provides services to its customers in the management of the customers' computer systems. Contracts vary from customer to customer. Generally, CMSI provides personnel, software and hardware, pursuant to the contract.

In May 1988, CMSI and the County entered into a 9-month agreement for CMSI to provide on-site management of the County's data processing facility. This contract has been extended pending final execution of a long-term contract between the parties. This short-term agreement includes day-to-day management and staffing of the County's data processing facility by CMSI. It also required the development of a long-range planning and needs assessment for the County's data processing operation.

The formulation of the Long Range Plan was reached after extensive meetings between all County Department Heads, County Supervisors and CMSI. An ad hoc committee composed of department heads representing key user groups provided ongoing input into formulation of the Long Range Plan. The Long Range Plan presents a broad policy framework in which to consider future county data processing decisions; it is not a proposal for specific procurement decisions. Nor did the Plan recommend use of CMSI to implement the Long Range Plan.

The short-term agreement also includes a provision that upon the favorable recommendation of the County Data Processing Committee, the County and CMSI would begin negotiations toward a long-term management contract. The short-term agreement required conclusion of negotiations 45 days from their commencement. The negotiated agreement was then to be submitted to the Board of Supervisors for final approval.

The County Data Processing Committee, composed of the following voting members, made the recommendation to the Board of Supervisors that negotiations toward a long-term contract commence: 2 supervisors, the County Administrative Officer or his designee,

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and the Auditor-Controller. The non-voting staff member of the Committee was the Data Processing Manager who during that period of time was Rod Olson, Senior Vice President of CMSI. Mr. Olson made no recommendations to the Committee concerning an extended agreement between the County and CMSI.

It should further be noted that the same ad hoc committee which monitored and advised on the Long-Range Plan also provided its recommendation to the County Data Processing Committee and to the Board of Supervisors to pursue a long-term contract with CMSI.

The committee system has since been altered to provide more user input for future data processing decision-making. The ad hoc committee referred to above has been formalized; it is now known as the Information Services Planning Committee. It consists of the following county department heads: Social Services, Clerk-Records, Planning Director, Assessor and Auditor-Controller, and Sheriff. The County Data Processing Committee has been renamed the Information Services Steering Committee.

User requests are first screened by the Information Services Planning Committee with recommendations being made by that committee to the Steering Committee. The Steering Committee is then empowered to take action on these requests. Some actions, such as on personal services contracts, must proceed to the Board of Supervisors for final approval. CMSI's designated Information Services Manager, Chuck Kribs, serves as a staff member to both Committees.

During the short-term contract and pursuant to its provisions, and the directives of the County Data Processing Committee and the Board of Supervisors, negotiations commenced toward a long-term facilities management contract. This contract was negotiated by the County team composed of Dennis Huey, the Auditor-Controller; Mike Scannell, Assistant County Administrative Officer; H. Peter Klein, County Counsel; and Richard Bernacchi and Claire Deffense of the law firm of Irell and Manella. The CMSI team consisted of Art Kayser, Chief Operating Officer of CMSI, George Tamas of CMSI and Jack Russo, Esq., of the law firm of Nelson and Russo.

The CMSI personnel who negotiated the long-term contract did not perform any of the services specified in the short-term agreement. The long-term contract has been negotiated and is currently awaiting final execution by the Board of Supervisors pending advice from the Commission regarding the questions addressed by this letter.

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The long-term contract will run for 87 months. During that time period, CMSI will provide personnel to assist in operating the County's data processing and computer systems. In addition, CMSI will work with the County's Project Manager and both will assist the County in selecting appropriate software and hardware systems to meet the County's changing needs. The software may be either "public domain," "other publicly available", "third-party commercial," or "custom developed" by CMSI.

The long-term contract provides for a fixed price over the term of the contract. This price includes provision of some software. However, annual inflation adjustments may be made, tied to the cost-of-living adjustments for "civilian service workers in Mendocino County."

Any change in the contract price for "supplemental services" must be approved by the County Board of Supervisors. Prior to going to the Board of Supervisors, requests for supplemental services must go through the approval process as outlined above:

1) Requests must first go to the Information Services Planning Committee. That Committee makes a recommendation to 2) the Information Services Steering Committee which, in turn makes its recommendation for final action to 3) the County Board of Supervisors.

Day-to-day contract administration rests with CMSI's on-site Information Services Manager (Charles Kribs) with oversight by the County's Project Manager. The County's Project Manager will be either a county employee or another consultant retained by the County for that purpose. That person will not be employed by CMSI.

Any disputes within the scope of the contract will be resolved by use of arbitration, if an internal dispute resolution process is unsuccessful.

The contract expressly provides that the parties are independent contractors and that neither party has any authority to act on behalf of the other party, except as expressly set forth in the contract. The long-term contract also contains a "conflict of interest disclosure" provision which relates to any CMSI recommendation regarding the purchase or licensing of software from a third-party by the County.

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DISCUSSION

I have reviewed various statutes, regulations, and advice letters issued by the Commission in preparation of this advice request. I offer the following discussion for your benefit.

The conflict-of-interest provisions of the Political Reform Act (the "Act") are designed to prohibit any public official from making, participating in making or using his or her official position to influence the making of a governmental decision in which he or she has a financial interest. (Government Code Section 87100; all subsequent statutory references are to the Government Code, unless otherwise indicated.)

Key aspects of the law are that it affects only public officials, acting in their official capacity, making governmental decisions in which they have a financial interest.

Public Official/Consultant Issue

The Act defines "public official" as a member, officer, employee or consultant of a state or local government agency. (Section 82048.) Here, there is a contract for providing certain services to the county by an outside entity. The contract specifically provides that the parties are independent contractors and that no employment relationship is created by the contract. Hence, none of the CMSI employees performing the contract work will be county employees. (Some county employees will be assigned to the project and will work under the direction of CMSI's Information Services Manager).

Consequently, the issue is whether the CMSI employees will be considered "consultants" within the meaning of the Act. If so, they would be "public officials" subject to the Act's conflict-of-interest provisions. The Commission has adopted a regulation which addresses this question. (2 Calif. Code of Regs. Section 18700; hereafter references to Commission regulations will be cited as "Regulation".)

Regulation 18700 sets forth the test for determining whom is a consultant. (Regulation 18700(a)(2).) First, the regulation limits the term's application to only "natural persons." Since the Act's conflict-of-interest provisions apply only to "public officials," this is an appropriate limitation. Consequently, only the employees of CMSI, not CMSI itself, can possibly be considered "consultants" under the Act.

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The regulation goes on to define a "consultant" as a natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency. The regulation then states that "consultant" shall not include a person who:

(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and

(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.

Fundamentally, this means that a consultant who provides a finished work product based upon the consultant's own research and makes no decisions regarding implementation of the recommendations contained therein is not a "consultant" within the meaning of the Act. However, generally, a consultant who interacts on an ongoing basis with county employees and officials, or who actually makes county decisions is considered a "consultant" for purposes of the Act.

The Commission has generally held that where someone is brought in to do a "one-shot" project, that does not make them a "consultant" under the Act. For instance, if the county retained a private attorney for a specific project (such as it did here with Irell & Manella) that attorney would not become a "consultant" merely because of that fact. This is true even though the attorney may make decisions (or recommendations) which result in affecting the amount of work which the attorney will do (and hence the money to be made) under the contract. (See Hoefling Advice Letter, No. I-87-246; Torres Advice Letter, No. A-86-245; Gifford Advice Letter, No. A-85-134; and Clifford Advice Letter, No. A-83-103.)

However, if the county decided to contract with an attorney to provide it with ongoing services as county counsel, that person would be considered to be a public official, even if the county's work constituted only a portion of his or her practice. (See Albuquerque Advice Letter, No. A-85-244.)

The difference between these two situations is obviously one of degree. However, the difference is important. When an outside individual contracts to provide a particular service or services, which are specified in the contract and limited in scope, the

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person normally will not be considered to be a public official, even if the services will be extensive. (See Torres Advice Letter).

However, where the outside individual becomes involved on an ongoing basis in the decision-making process, he or she may cross that line, especially where the decisions involved may affect the amount of work which he or she will perform. (See Maloney Opinion, 3 FPPC Opinions 69, No. 76-082, Aug. 18, 1977; and Criss Advice Letter, No. A-82-024.)

Contrasting the Torres letter, with the Workman Advice Letter, No. I-87-078, illustrates the difference. In the Torres letter, three firms were doing extensive consulting for the Southern California Rapid Transit District. However, the work being performed was pursuant to specific contract language. There, the firm's employees were held not to be "consultants."

In the Workman letter the consultants were going to directly assist in development of bid specifications for RFP's to be issued by the county. Furthermore, they were going to be involved in evaluating the bids received and might bid on the work themselves. Development and evaluation of bids is a governmental decision. Thus, in Workman, the consultants were determined to be "consultants" within the meaning of the Act. Consequently, an intervening substantive review by independent county employees was suggested.

In the instant case, CMSI's Information Services Manager falls somewhere in between. He does interact with the County's Project Manager on a regular basis. Most of his day-to-day management decisions are clearly defined in the scope of the contract's specifications. Yet he also makes recommendations to the County's Project Manager and to the County Data Processing Committee and the County Information Services Planning Committee.

However, in those situations where the scope of the contract may change, his recommendations go through two levels of intervening substantive review before they reach the ultimate decision-makers, the County Board of Supervisors.

Given the length and the extent of the services which CMSI's employees will provide to the county under the contract, there is the likelihood that the CMSI Information Services Manager will be considered a "consultant" under the Act. Those CMSI employees who perform basically clerical or technical functions will not be

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considered "consultants" because they do not provide information, advice or recommendations or make governmental decisions.

Having concluded that at least one employee of CMSI (Mr. Kribs) could be a "consultant," I have proposed to the county that he be covered by the county's conflict-of-interest code. His inclusion and his disclosure categories should be comparable to those for county employees who have held or who currently hold comparable positions. CMSI concurs in this assessment and joins in the proposal (which is acceptable to the county) in the event that you determine it to be necessary. (See addendum to long-term contract at p. 37A).

Conflict-of-Interest Disqualification

I turn now to the issue of the potential for disqualification by CMSI employees. A public official "makes" a governmental decision when he or she, acting within the authority of his or her office:

- . . . (1) Votes on a matter;
- (2) Appoints a person;
- (3) Obligates or commits his or her agency to any course of action;
- (4) Enters into any contractual agreement on behalf of his or her agency; . . .

Regulation 18700(b).

From the contract, it appears that CMSI employees will not engage in any of the foregoing activities. They will provide computer and management services; however, decisions to commit the county to any course of action will be made by county officials.

The contract provides specific parameters for the performance of services by CMSI. Additional services beyond that scope will be subject to review by the county's committees, with ultimate decision-making by the County Board of Supervisors. Therefore, CMSI employees will not "make" decisions under the Act.

However, the Act also prohibits "participating" in making decisions. Regulation 18700 also defines when a public official "participates in the making of a governmental decision." This occurs when the official, acting within the scope of his or her position:

- . . . (1) Negotiates, without significant substantive review, with a governmental entity or private person

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regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(c).

The distinction between a public official who "makes" decisions and one who merely "participates" is important. The latter may be insulated from any conflict-of-interest disqualification if there is intervening substantive review between the public official and the ultimate governmental decision-maker. (See Rose Advice Letter, No. A-84-306, A-84-299; and Hayden Advice Letter, No. A-84-319.)

In the instant case, the decisions which would result in a financial effect on CMSI all require (1) review and concurrence by the county's Project Manager and (2) by the county's committees, which ultimately make the recommendation to the County Board of Supervisors, which, in turn, makes the actual decision.

In order to ensure that in each of these instances there will be no conflict-of-interest issue, I have proposed to the county that the relevant CMSI employee (Mr. Kribs) disqualify himself from any possible direct involvement in the decision of the committees in making their recommendations to the County Board of Supervisors. CMSI believes that this is feasible under the structure set up in the contract. An officer of CMSI who is not otherwise involved in the performance of the contract would then act on CMSI's part in any subsequent negotiations which might arise over contract modifications.

However, I would ask that you specifically advise whether this is necessary. Given that the decisions in question are actually

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modifications to the "public officials'...contract."¹

In those rare circumstances where technical issues require evaluation going beyond review and concurrence by the Project Manager and review by the county committees, it may be necessary to have independent expert advice from outside. A separate consultant could be brought in for that purpose as was done in the Rose letter and as was also recommended in the Hayden letter.

CMSI has authorized me to propose that the contract language be modified to provide for coverage of the appropriate employee by the county's conflict-of-interest code and for disqualification from any participation in relevant committee decisions. In addition, provision could be made for use of an outside consultant on those rare occasions when that becomes necessary. The County is already considering this approach in any event.

Keep in mind that in the instant case, decisions which will result in additional revenues being received by CMSI require review and recommendations by first, the county's Project Manager; second, the County Information Services Steering Committee; third, the County Information Services Planning Committee; and fourth, ultimate approval by the County Board of Supervisors.

Decisions within the parameters of the contract as to purchase of particular hardware or software which is within the fixed price is no different than the decision by a paving contractor to purchase the needed asphalt or gravel from one vendor or another or to produce it themselves. Those decisions do not become "governmental decisions."

¹ I should point out at this juncture that Regulation 18700 specifically excludes from the definition of "participating" in a decision:

. . . Actions by public officials employees, or employee representatives relating to their compensation or the terms or conditions of their employment or contract.

Regulation 18700(d)(3).

See also, the Workman Advice Letter at page 7, first full paragraph. As a consequence, my proposal may be more than is required by law, but it is designed to resolve any questions of "appearance" which have arisen regarding the contract.

Kathryn E. Donovan
May 23, 1989
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Because of the fixed-price nature of the instant contract and the dispute resolution process (arbitration) as well as the procedure involved in any decision which would expand the scope of services and result in additional revenues to CMSI, this contract does not appear to pose those concerns.

CONCLUSION

Let me close by reiterating that it is my view that CMSI in no way has a conflict of interest under the Act with respect to the contract. CMSI is not a natural person, it is a corporation, a "business entity" under the Act. Consequently, CMSI cannot be a "public official" and hence cannot have a conflict of interest under the Act.

I have proposed in this letter a solution to any possible conflict-of-interest situations which might arise for CMSI's employee, Mr. Kribs, if he falls within the purview of the Act because he qualifies as a "consultant."

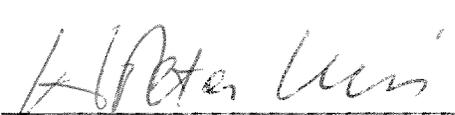
Because time is of the essence, I ask that you review this letter and provide your response as soon as possible. I would be more than willing to meet with the staff attorney assigned to this request to discuss the issues and facts in order to facilitate matters.

Very truly yours,

OLSON, CONNELLY, HAGEL & FONG


ROBERT E. LEIDIGH

I concur in this request for advice on behalf of the County of Mendocino.



H. PETER KLEIN
County Counsel

cc: Art Kayser, CMSI
Jack Russo, Nelson & Russo
Peter Klein, Mendocino County Counsel
Charles Kribs, 175 School St., Ukiah, California 95482



California Fair Political Practices Commission

May 24, 1989

Robert E. Leidigh
Olson, Connelly, Hagel & Fong
300 Capitol Mall, Suite 350
Sacramento, CA 95814

Re: Letter No. 89-320

Dear Mr. Leidigh:

Your letter requesting advice under the Political Reform Act was received on May 23, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John McLean an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,


Kathryn E. Donovan
General Counsel

KED:plh