



California Fair Political Practices Commission

April 12, 1990

James P. Corn
Turner and Sullivan
1000 G Street, Suite 300
Sacramento, CA 95814

Re: Your Request for Informal Assistance
Our File No. I-89-433

Dear Mr. Corn:

This is in response to your request for advice on behalf of the California Council of Civil Engineers regarding the responsibilities of civil engineers under the conflict-of-interest provisions of the Political Reform Act (The "Act").¹ You have asked a series of hypothetical questions. While the Commission does not answer hypothetical questions, we can provide informal assistance pursuant to Regulation 18329(c) (copy enclosed).²

QUESTIONS

Under what circumstances will a civil engineer, who is providing civil engineering services under contract to a local government agency for an assessment district, have disqualification obligations with respect to clients who are property owners in the district.

CONCLUSIONS

A civil engineer who qualifies as a "consultant" within the meaning of the Act may not participate in any decision which will

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c) (3).)

have a reasonably foreseeable material financial effect on his or her engineering firm, or on a client who has been a source of income to the civil engineer of \$250 or more in the 12 months preceding the decision.

ANALYSIS

Section 87100 prohibits any public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. The term "public official" includes any consultant of a state or local government agency.

(Section 82048.) An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his immediate family,³ or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

* * *

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103 (a), (c), and (d).

Thus, a civil engineer who qualifies as a "consultant" within the meaning of the Act may not participate in any decision which will have a reasonably foreseeable material financial effect on the engineering firm, or on any client who has been a source of income to the engineer of \$250 or more in the 12 months preceding the decision.

³ An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

Your questions focus on determining when a civil engineer qualifies as a consultant, and when the civil engineer is participating in the making of a governmental decision.⁴

PUBLIC OFFICIAL

Regulation 18700(a) (copy enclosed) states that a public official includes a consultant of a state or local governmental agency. Subdivision (a)(2) of Regulation 18700 defines a consultant to include:

[A]ny 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

⁴ Your hypothetical questions ask us to assume that a private civil engineering firm ("firm") is performing civil engineering services pursuant to a contract for a public entity regarding an assessment district; that within a one year period prior to the firm's involvement in making decisions regarding the assessment district, the firm represented one or more of the property owners within the district and received more than \$250 for such services. Your questions further assume that the firm acts as a subconsultant to a city engineer or other public employee engineer or consultant engineer for a public agency (hereafter "public agency engineer"), and provides one or more of the following services:

(a) The design for the improvements which are the subject of the benefit assessment

(b) The estimated costs of the proposed improvements

(c) The methodology for spreading the benefit within the assessment district

(d) The calculations implementing the methodology for spreading the assessment within the district.

Your questions also assume that the public agency engineer was the engineer of work for the improvements which are the subject of the benefit assessment.

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

Regulation 18700(a)(2)
(emphasis added).

In In re Maloney (1977) 3 FPPC Ops. 69 (copy enclosed), with respect to a contract county surveyor-engineer, the Commission stated:

Our regulation defining the term "consultant" ... excludes a person who does no more than provide advice, information, recommendation or counsel to an agency and whose advice is provided independent of the agency's control or discretion. 2 Cal. Adm. Code Section 18700(a)(2). The preparation of surveys and engineering studies would appear to fall within this exclusion. When performing these services, the county surveyor-engineer is not involved in any official decision making. He is merely carrying out the terms of a contract just as any vendor of goods or services to the county might. He is not subject to the control or discretion of the county when he performs his work, but is governed only by the provisions of his contract.

In re Maloney, supra, at 71
(emphasis added).

In response to the question whether that county surveyor-engineer may approve land levelling and drainage permits for a job where the county surveyor-engineer's private firm contracted to provide surveying services, the Commission stated:

In deciding upon applications for permits, the county surveyor has discretion ... to determine what information must accompany the application. The information he may require includes topographical plats and maps which would require the employment of a surveying crew for preparation. Thus, the decision the county surveyor makes in his official capacity could have a direct and immediate effect on the amount of work his private firm performs in connection with this permit application, and therefore, the amount of income it receives. The obvious potential for bias in this situation impels us to conclude that it is reasonably foreseeable that the effect of this

decision will be material to the county surveyor's firm, and that disqualification is required.

In re Maloney, supra, at 73
(footnote omitted).

Therefore, in such circumstances, the contract county surveyor-engineer is deemed to be a "consultant" and, therefore, a public official subject to the disqualification provisions of the Act.

You have framed your questions in connection with a civil engineering firm. The conflict-of-interest provisions of the Act define the responsibilities of individuals who are involved in making governmental decisions. Regulation 18700(a)(2) defines a "consultant" as a "natural person." Thus the firm itself is not a consultant. It is the personnel who actually perform the work who may be the consultants and, therefore, may be deemed public officials within the meaning of the Act.⁵

You have asked us to assume that the firm has received \$250 or more within the previous 12 months from one or more of the property owners within the district. For purposes of this discussion, we will further assume that the engineer performing the services for the public entity is also the owner of the engineering firm. The sources of income to the firm, (i.e., clients) are then sources of income to the engineer.

In providing the design for the improvements which are the subject of the benefit assessment, the engineer may work independent of the control and direction of the public agency engineer governed only by the terms of the contract. In such circumstances, the engineer is not deemed to be a consultant and is not, therefore, subject to the conflict-of-interest provisions of the Act. Similarly, while estimating the costs of the proposed improvements, and developing the methodology for spreading the benefit within the assessment district, the engineer may be working independent of the control and direction of the public agency engineer and would not be deemed a consultant within the meaning of the Act.

On the other hand, in providing the design for the improvements which are the subject of the benefit assessment, if the engineer works with and discusses the proposed design with the public agency engineer, thus giving the public agency engineer the opportunity to comment upon, and provide input regarding, the

⁵ In this regard it should be noted that income to a firm from a client is attributed only to those persons who have a 10% or greater ownership interest in the firm. (Section 82030.) Thus, engineers who have less than a 10% ownership interest in a firm will have disqualification obligations only with respect to decisions which will have a material financial effect on the firm itself, rather than clients of the firm.

proposed design for the improvements, the engineer would be deemed a consultant.⁶ Under these circumstances the engineer is not working independent of the control and direction of the public agency engineer within the meaning of Regulation 18700(a)(2)(A). Similarly, when the engineer is determining the estimated costs of the proposed improvements, and when he is developing the methodology and performing the calculations for spreading the benefit within the assessment district, the engineer is not working independent of the control and direction of the public agency engineer if he is seeking input and comments from the public agency engineer regarding those tasks. Under such circumstances, the engineer is acting much like an employee of the agency who is under the supervision of the public agency engineer. In that situation, the engineer is deemed a consultant and, therefore, a public official within the meaning of the Act.

One of the issues you raised in your letter was the inclusion of a provision in the contract between the firm and the public agency engineer which states that the subconsultant arrives at conclusions with respect to his or her rendition of information, advice, recommendation, or counseling, independent of the control and direction of the agency other than normal contract monitoring. As discussed above, Regulation 18700(a)(2) excludes, from the definition of a consultant any 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)(A) and
(a)(2)(B).

⁶ An engineer who only requests factual information from the public agency engineer to comply with the terms of a contract to perform design or other discrete engineering services for a specific project or study, is not thereby deemed to be a consultant within the meaning of Regulation 18700(a)(2). However, an engineer who does not merely offer his professional opinion on specific questions or request information on specific factual issues, but appears to participate in meetings and discussions where he plays a key role in the actual decision-making process, is a consultant within the meaning of the Act; while participating in the meetings and discussions the engineer is essentially performing the terms of the contract subject to the control and direction of the public agency engineer. (See Criss Advice Letter, No. A-82-029, copy enclosed.)

The fact that a contract contains language essentially incorporating these subdivisions of the regulation would imply that the engineer is working independent of the control and direction of the public agency engineer. The contract language you have referred to in your question contains language from subdivision (a)(2)(A) of Regulation 18700, but does not include language from subdivision (a)(2)(B) of Regulation 18700. Both subdivisions would have to be incorporated into the contract for the exclusion to apply. However, despite inclusion of such language in the contract, the exclusion would not apply if the subconsultant, in fact, is subject to the control and direction of the public agency engineer.

PARTICIPATING IN A GOVERNMENTAL DECISION

A public official may not participate in the making of a decision in which he has a financial interest. (Section 87100.) Subdivision (c) of Regulation 18700 provides as follows:

(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:

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

You have questioned whether a subconsultant makes or participates in a decision when he or she provides one or more of the following services:

- (a) The design for the improvements which are the subject of the benefit assessment
- (b) The estimated costs of the proposed improvements
- (c) The methodology for spreading the benefit within the assessment district
- (d) The calculations implementing the methodology for spreading the assessment within the district.

Your question assumes that the public agency engineer is the engineer of work for the improvements which are the subject of the benefit assessment.

In providing the design for the improvements which are the subject of the benefit assessment the subconsultant is essentially submitting a "report, analysis, or opinion ... which requires the exercise of judgment on the part of [the subconsultant] and the purpose of which is to influence the decision" regarding the assessment district. Similarly, the subconsultant is essentially preparing a report or analysis, requiring the exercise of judgment on his part, when he estimates the cost of the project and develops the methodology for spreading the benefit within the assessment district. Therefore, in performing these tasks, the subconsultant is participating in the making of a governmental decision, unless the tasks performed by the subconsultant are subject to a significant intervening substantive review.

This exception, based on a significant intervening substantive review, has been interpreted narrowly by the Commission. (See Kaplan Advice Letter, No. A-82-108, copy enclosed.) It is our interpretation that the subconsultant participates in the making of a governmental decision, even if his report or analysis is "reviewed" by the engineer of work, if the engineer of work relies on the data or analysis prepared by the subconsultant without checking it independently, if the engineer of work relies on the professional judgment of the consultant, or if the subconsultant in some other way actually influences the final decision. (Kaplan Advice Letter, supra.) Therefore, a subconsultant who performs services for a public agency, where the public agency engineer is the engineer of work, is not thereby automatically relieved of the disqualification obligations imposed

by the conflict-of-interest provisions of the Act.⁷ Whether the Act's conflict-of-interest provisions apply would depend on the extent of review performed by the public agency engineer.

Performing the computations implementing the methodology may well be a ministerial task if there is no discretion as to the outcome (or at least no discretion as to any part of the result which could influence the governmental decision). An example of this would be a complex calculation for which there is a single "right" answer. (See Kaplan Advice Letter, supra.) The subconsultant is not participating in a governmental decision when performing such ministerial tasks. (Regulation 18700(d)(1)).

Your questions focus on different combinations of tasks performed by the subconsultant, subject to a significant intervening substantive review by the engineer of work regarding the methodology and computations for spreading the assessment within the district. If the engineer of work conducts a significant intervening substantive review of the subconsultant's methodology and computations for spreading the assessment within the district, the subconsultant is not participating in a governmental decision when he is performing those tasks. However, since the subconsultant provides the design for the improvements and prepares the estimates for such improvements, he participates in the making of a governmental decision when he is performing these tasks. Accordingly, when the subconsultant is performing these tasks, he must disqualify himself from participating in decisions in which he has a financial interest.

You can apply the above-discussed general principles to the other issues you have outlined in your letter to determine whether the subconsultant is participating in the making of a governmental decision when performing the tasks described in those situations.

⁷ At the April 4, 1990 seminar in Sacramento on Assessment Districts and Infrastructure Financing, sponsored by the California Council of Civil Engineers and Land Surveyors, Mr. Stephen R. Casaleggio appeared to imply that the mere fact that a subconsultant contracts with a public agency to work on a project where the public agency engineer is the engineer of work, and the subconsultant submits his work to the engineer of work, is sufficient to relieve the subconsultant of any disqualification obligations under the conflict-of-interest provisions of the Act. As discussed here, this occurs only if the subconsultant's work is subject to a significant intervening substantive review. If a subconsultant's work is not subject to a significant intervening substantive review by the engineer of work, the subconsultant is participating in the making of a governmental decision and is, therefore, subject to disqualification under the conflict-of-interest provisions of the Act.

FINANCIAL INTEREST

If the engineer is deemed a public official he must disqualify himself from making, participating in, or using his official position to influence a governmental decision which will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on his source of income.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Comm. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest, it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's financial interest in a decision is "material" as required by Section 87103. If the official's financial interest is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality. If on the other hand, the official's interest would be indirectly affected by the decision, then Regulations 18702.2 through 18702.6 (copies enclosed) would apply to determine whether the effect of the decision is material.

Public Generally

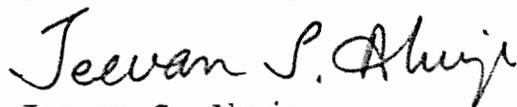
Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87100.) If the decision does not affect all members of the public in the same manner, disqualification may be required unless the effect of the decision on the source of income is the same as the effect on a significant segment of the public. (Regulation 18703, copy enclosed.)

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I trust this letter has provided you with the guidance you requested. If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

A handwritten signature in cursive script that reads "Jeevan S. Ahuja".

Jeevan S. Ahuja
Counsel, Legal Division

KED/JSA/aa

Enclosures

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July 19, 1989

Kathy Donovan, General Counsel
Fair Political Practice Commission
428 "J" Street, Suite 800
Sacramento, CA 95804-0807

Re: Opinion Request
Our File No. 157-88-30

Dear Ms. Donovan:

This firm represents the California Council of Civil Engineers & Land Surveyors, a professional association of civil engineers and land surveying firms located throughout the state of California. On their behalf, we are requesting advice regarding the conflict of interest provisions of the Political Reform Act.

By opinion letter dated December 21, 1988, your office provided informal advice regarding the responsibility of a civil engineering firm performing civil engineering services for an assessment district, when the same engineer had performed engineering services for three of the eleven property owners in the district.

Our concern is that the conclusions of the prior opinion letter create substantial problems for engineers in this state. We, therefore, seek your written opinion regarding the ways that engineers could structure their legal relationships both with their clients as well as public entities that cause assessments to be imposed. Specifically, we request your comments and opinion regarding the following questions.

All six of the following questions assume that the private civil engineering firm has within a one-year period prior to the decision making by the public entity, represented one or more of the property owners within the district and received more than \$250 for such services.

1. If a private civil engineering firm acted as a subconsultant to a city engineer or other public employee engineer or consultant engineer for a public agency, and provided the design for the improvements which are the subject of the benefit assessment, the estimated costs of the proposed

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improvements, the methodology for spreading the benefit within the assessment district and the calculations implementing the methodology for spreading the assessment within the district, but the public employee engineer was the engineer of work for the assessment, would there be a violation of the conflict of interest provisions in the Political Reform Act?

2. Assuming the same operative facts as question no. 1, except that the subconsultant private civil engineering firm only provided the design work and the cost estimates for the improvements but did not provide the methodology or computation for spreading the assessment within the district, would the result be the same?

3. Question no. 3 assumes the same operative facts as question no. 1 except the private subconsultant civil engineering firm provided the design work and cost estimates for the improvements but did not provide the methodology for spreading the assessment within the District but did prepare the computations for spreading the assessment pursuant to the direction of the engineer of work, would the result be the same?

4. Question no. 4 assumes the same operative facts as question no. 1 except that the subconsultant private civil engineering firm only provide the design work and cost estimates for the improvement but did neither the methodology for spreading the assessment nor the computations implementing the methodology, will the result be the same?

5. Assuming the same operative facts contained in questions numbered 1 through 4, if the subconsultant agreement between the private civil engineering firm and the public agency engineer of work contains provisions that the subconsultant only advises or makes recommendations to the engineer of work and the engineer or work conducts a significant intervening substantive review regarding the methodology and computations for spreading the assessment within the district, does that influence the result.

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6. Does the result change if the contract contains a provision that says the subconsultant arrives at conclusions with respect to his or her rendition of information, advice, recommendation, or counseling, independent of the control and direction of the agency other than normal contract monitoring?

We very much appreciate your willingness to work with us in this matter, and please do not hesitate to contact the undersigned if I need to further clarify the operative facts or the questions to be answered.

Very truly yours,

TURNER & SULLIVAN
A Professional Corporation



JAMES P. CORN

JPC/ser

D0157-3.LTR



California Fair Political Practices Commission

July 25, 1989

James P. Corn
Turner & Sullivan
1000 G Street, Suite 300
Sacramento, CA 95814

Re: Letter No. 89-433

Dear Mr. Corn:

Your letter requesting advice under the Political Reform Act was received on July 24, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeevan Ahuja 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,

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

Kathryn E. Donovan
General Counsel

KED:plh