

January 27, 2014

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Re: Your Request for Informal Assistance
Our File No. I-13-145

Dear Ms. Skelton:

This letter responds to your request for informal assistance regarding campaign provisions of the Political Reform Act (the "Act").¹ Because you seek general guidance, we are providing informal assistance, rather than formal advice. Informal assistance may be requested by any person with a duty to advise other persons relating to their duties or actions under the Act and does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

FACTS

As part of your legal services for your California campaign contribution clients, you review whether Section 84308 will create any issues regarding a proposed campaign contribution where the candidate sits on an appointed board or commission. Over the past few years, multiple issues have been posed by various clients regarding aggregation of contributions under Section 84308.

Common questions include (1) whether contributions will aggregate between named parties, including business entities partnered in a joint venture, a prime contractor and

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

subcontractors submitting a bid (including where a subcontractor is a named party and where a subcontractor is not a named party, but instead an “agent” of the prime), and (2) fundraising activities of parties and agents, including hosting candidate fundraisers and providing employee lists for contribution solicitation purposes.

Jurisdictions that frequently come up include transportation authorities, including the Orange County Transportation Authority (“OCTA”). It recently came to your attention that the OCTA Board had been advised that under Section 84308, campaign contributions from a prime contractor and its subcontractors would not aggregate, even if the separate parties are part of one bid proposal. You seek clarification on this point.

In addition, you seek clarification of aggregation issues related to fundraising. You have previously advised clients and plan to advise in the future that business entity involvement in soliciting contributions of other members of a contracting team, including joint venture partners, subcontractors and vendors, on behalf of a candidate will aggregate the solicited contributions with the company’s pursuant to Section 84308. To avoid such aggregation, you have advised that business entities should not be involved with making any solicitations for contributions to candidates by business entity employees, subcontractors and/or vendors, as well as employees of such subcontractors and/or vendors, where Section 84308 is implicated.

APPLICABLE LAW

A. Section 84308.

A law aimed at preventing pay-to-play, Section 84308 prohibits a party seeking a contract (other than competitively bid), license, permit, or other entitlement for use from making a contribution of more than \$250 to an officer of the agency.² Statutes such as Section 84308 aim to maintain the integrity of the contracting process and to prevent a culture where bidders or applicants come to believe it is necessary to make political contributions to receive government contracts or permits. Pay-to-play statutes aim to prevent corruption and promote transparency in government contracting.

Section 84308 was enacted in 1982 in specific response to reports in the *Los Angeles Times* that several coastal commissioners had solicited and received large campaign contributions from persons who had applications pending before them. The purpose of the statute is to assure that appointed members of boards or commissions are not influenced by the receipt of campaign contributions from the persons appearing before them, and are not able to

² Section 84308(a)(4) defines “officer” as any elected or appointed officer of an agency, or their alternate, and any candidate for elective office in the agency. Section 84308(a)(3) defines “agency” to include any state or local government agency but exempts from this definition “the courts or any agency in the judicial branch of government, local governmental agencies whose members are directly elected by the voters, the Legislature, the Board of Equalization, or constitutional officers.” However, Section 84308(a)(3) qualifies this exemption, providing that “any person who is a member of an exempted agency but is acting as a voting member of another agency” is subject to Section 84308.

use their position of authority to unduly influence applicants to make contributions to their campaigns. Section 84308 contains three distinct restrictions.

1. Party seeking license, permit, or other entitlement for use *may not contribute more than \$250 to an officer of the agency.* Section 84308(d) states “[n]o party or his or her agent, to a proceeding involving a license, permit, or other entitlement for use pending before any agency and no participant, or his or her agent, in the proceeding shall make a contribution of more than two hundred fifty dollars (\$250) to any officer of the agency during the proceeding and for three months following the date a final decision is rendered by the agency in the proceeding.”

2. Officer of agency *may not solicit a contribution of more than \$250 from a party to a proceeding.* Section 84308(b) states “[n]o officer of an agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars (\$250) from any party, or his or her agent, or from any participant, or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the officer has reason to know that the participant has a financial interest . . .”

3. Officer of agency *may not participate in a decision on a license, permit, or other entitlement for use if officer has received a contribution of more than \$250 from a party.* Section 84308(c) provides: “[n]o officer of an agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than two hundred fifty dollars (\$250) within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the decision . . .” However, if the officer receives a contribution that would otherwise require the officer’s disqualification, he or she may return the contribution within 30 days from the time he or she knows or should have known about the contribution and the proceeding, and then is permitted to participate. (Section 84308(c).)

B. Section 84308 Definitions.

1. Party, participant, or agent. A “party” is “any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.” (Section 84308(a)(1).) A “participant” is “any person who is not a party who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision . . .” (Section 84308(a)(2).) A person “actively supports or opposes a particular decision” if the person “lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency.” (*Id.*)

Moreover, a person is the “agent” of a party to, or a participant in, a proceeding involving

a license, permit, or other entitlement for use if the person represents the party, or participant, in connection with the proceeding. (Regulation 18438.3(a).) Activities including calling, writing a letter to, or testifying before a member of a governing board can create an agency relationship for the purposes of Section 84308. (*Petzold* Advice Letter, No. A-03-094; *Steiner* Advice Letter, No. A-02-195.)

2. Proceeding involving a license, permit, or other entitlement for use. Section 84308 only applies to contributions from a party or participant, or an agent thereof, in a proceeding involving a license, permit, or other entitlement for use. Section 84308(a)(5) defines “licenses, permits, or other entitlement to use” to mean proceedings on all business, profession, trade, and land use licenses and permits, and other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor or personal employment contracts), and all franchises. This includes any actions to grant, deny, revoke, restrict, or modify a license, permit, or other entitlement for use. (Regulation 18438.2.)

3. Financial interest. Section 84308 only applies to contributions from a party or participant, or an agent thereof, if the officer knows or has reason to know that the person has a financial interest in the proceeding. Regulation 18438.7(a) provides: “An officer knows or has reason to know that a person has a financial interest in the decision in a proceeding if: (1) The person is a party; or (2) The person is a participant and reveals facts in his or her written or oral support or opposition before the agency which make the person’s financial interest apparent.”

C. Aggregation of Contributions under Section 84308.

Under certain circumstances, contributions made by two or more persons are aggregated for purposes of Section 84308’s \$250 limit. Aggregation rules specific to Section 84308 are set forth in Regulation 18438.5 (related business entities), Section 84308(d) (majority shareholder and closed corporation), and Regulation 18438.3 (agents). In addition, in interpreting Section 84308 we consult the Act’s general rules for aggregating contributions. These use the “direction and control,” standard and are found in Regulation 18215.1.

1. Contributions made by an entity that is a parent, subsidiary or otherwise related business entity of another are automatically aggregated. For purposes of Section 84308, Regulation 18438.5 provides a stricter rule for aggregating contributions by related business entities than the general aggregation rule for business entities in Regulation 18215.1. Where Regulation 18215.1 requires “direction and control” before aggregating contributions made by parents, subsidiaries and otherwise related business entities, Regulation 18438.5 automatically aggregates such contributions.

Regulation 18438.5 provides:

“For purposes of Government Code section 84308: Notwithstanding the provisions of 2 Cal. Code Regs. Section 18215.1, to determine whether a contribution of more than \$250 has been made by any party to a proceeding, contributions made by a party’s parent, subsidiary, or otherwise related business entity, (as those relationships are defined in 2

Cal. Code of Regs. section 18703.1(d)) shall be aggregated and treated as if received from the party for purposes of the limitations and disclosure provisions of Government Code Section 84308.”³

2. Contributions of closed corporation are aggregated with those of majority shareholder. The contributions of a party or participant that is a closed corporation are aggregated with those of its majority shareholder. Section 84308(d) states that when a “closed corporation is a party to, or a participant in, a proceeding involving a license, permit, or other entitlement for use pending before an agency, the majority shareholder is subject to the disclosure and prohibition requirements specified in subdivisions (b), (c), and this subdivision.

3. Contributions of a party or participant are aggregated with those of their agents. Under Section 84308 (b), and Regulation 18438.3, contributions made by a party and the party’s agent are aggregated. “Agent” is defined in Regulation 18438.3(a) as a person that represents a party or participant in connection with a proceeding involving the license, permit or entitlement for use.

4. Contributions of a sponsor are aggregated with those of its sponsored PAC. The political contributions of a committee sponsored by a corporation are aggregated with contributions of the sponsor for purposes of Section 84308. (*Breckenridge Advice Letter*, No. I-94-126.)

5. General aggregation rules - directs and controls. Using language derived from the Commission’s opinions in *In re Lumsdon*, 2 FPPC Ops. 140, and *In re Kahn*, 2 FPPC Ops. 151, Regulation 18215.1 contains the Act’s general aggregation rules for contributions. It states:

“(a) Definitions. For purposes of determining when contributions are aggregated under the provisions of this title:

“(1) ‘Entity’ means any person, other than an individual;

³ Regulation 18703.1(d) defines “parent-subsidiary” and “otherwise related business entity” as follows:

“(1) Parent-subsidiary. A parent-subsidiary relationship exists when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting power of another corporation.

“(2) Otherwise related business entity. Business entities, including corporations, partnerships, joint ventures and any other organizations and enterprises operated for profit, which do not have a parent-subsidiary relationship are otherwise related if any one of the following three tests is met:

“(A) One business entity has a controlling ownership interest in the other business entity.

“(B) There is shared management and control between the entities. In determining whether there is shared management and control, consideration should be given to the following factors:

“(i) The same person or substantially the same person owns and manages the two entities;

“(ii) There are common or commingled funds or assets;

“(iii) The business entities share the use of the same offices or employees, or otherwise share activities, resources or personnel on a regular basis;

“(iv) There is otherwise a regular and close working relationship between the entities; or

“(C) A controlling owner (50% or greater interest as a shareholder or as a general partner) in one entity also is a controlling owner in the other entity.”

“(2) ‘Majority owned’ means an ownership of more than fifty percent.

“(b) The contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual;

“(c) If two or more entities make contributions that are directed and controlled by a majority of the same persons, the contributions of those entities shall be aggregated;

“(d) Contributions made by entities that are majority owned by any person shall be aggregated with the contributions of the majority owner and all other entities majority owned by that person, unless those entities act independently in their decision to make contributions.”

Section 85311 of the Act uses identical language as Regulation 18215.1 to determine when contributions are aggregated for purposes of the limits on contributions to state candidates. We apply the aggregation rules to your questions below.

QUESTIONS AND ANSWERS

At the outset, we observe that a subcontractor named in a bid is “the subject of” a proceeding and therefore a “party” under Section 84308. Many of the questions you ask about relate to contractors and subcontractors. It is your understanding that OCTA request for proposals (RFP’s) require those submitting proposals to name all subcontractors in the proposal. You note that by requiring subcontractors to be named in proposals, OCTA has made subcontractors a “party” for purposes of Section 84308.

Under Section 84308 a “party” means “any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.” We concur with the conclusion that a subcontractor named in a bid is a “party” under Section 84308 as they are the subject of the proceeding. Therefore, the restrictions of Section 84308 apply to an officer accepting a contribution from a prime contractor or from subcontractors named in the bid, as they are “parties” to the proceeding.

We note that the *Kapur* Advice Letter, No. A-92-031, reached the opposite conclusion concerning whether a subcontractor named in a bid was a “party” to the proceeding. *Kapur* stated that “a subcontractor named in a contract proposal before an appointive board would not be deemed a ‘party’ or a ‘participant’ to a proceeding unless the subcontractor actively supports or opposes a particular decision.” *Kapur* concluded that Section 84308 would only apply to contributions from subcontractors who were specifically named in a contract proposal before the Los Angeles County Transportation Commission, if the subcontractor made a contribution at the request of, or in coordination with, the contractor. However, when a subcontractor is *specifically*

named in a contract proposal, the subcontractor becomes a subject of the proceeding regardless of the level of participation in the decision and, therefore, a “party” to the proceeding under Section 84308. Therefore, that portion of the *Kapur* advice letter which states otherwise is superseded.

1. Will contributions of parties that are part of one bid proposal before an appointed board or commission aggregate for purposes of Section 84308?

No. The restrictions of Section 84308 apply to each of the parties that are part of one bid proposal before an appointed board or commission, but the contributions of these entities are not automatically aggregated for purposes of Section 84308. Thus each party is subject to the \$250 limit of Section 84308. The contributions of multiple parties that are part of one bid proposal would be aggregated under the statute and regulations discussed above if one party directs and controls the contributions of the other, if the parties are related business entities, including joint venture partners,⁴ or if one party is the agent of the other party. Accordingly, the contributions of multiple parties that are part of one bid proposal would also be aggregated if one party conducts fundraising for an officer of a board or commission, or otherwise requests that other parties involved in the bid make contributions to the officer.

2. Will subcontractor contributions aggregate pursuant to Section 84308 with a party or participant if the subcontractor makes a contribution at the direction of a party or participant?

Yes. Under the Act’s general aggregation rules, if a subcontractor makes a contribution at the direction of a party or participant it will be aggregated with contributions made by the party or participant for purposes of Section 84308, as the “direction and control” test of Regulation 18215.1 is met. Aggregation in these circumstances would apply to subcontractors who are named parties in the bid as well as other subcontractors who are not named in the bid, but contribute at the direction of a party or participant. Aggregation of contributions under such circumstances directly advances the above-noted purposes underlying Section 84308.

3. Will contributions of an employee of a party or participant aggregate with a party or participant where the decision to contribute is made as a result of a request to contribute by a party or participant and/or where the party or participant holds a fundraiser and the contribution is made pursuant to the fundraiser solicitation?

Yes. The *Stergakos* Advice letter, No. I-04-149 addressed under what circumstances separate contributions from a business entity and an individual employee of that business will be aggregated to reach the disqualification threshold of Section 84308. Applying the Act’s general aggregation provisions, the letter concluded that “contributions from a business entity and an individual employee of that business will be aggregated together . . . *when one of these parties directs and controls the contribution of the other.*”

⁴ The *Fesler* Advice Letter, No. A-88-148, stated that the contributions of two entities would have to be aggregated for purposes of Section 84308, since the entities had submitted a joint venture proposal to the Coliseum Commission for management of the Los Angeles Coliseum.

In discussing the factual situations where contributions from a business entity and an employee will be aggregated for purposes of Section 84308, the *Stergakos* letter stated:

“If the employee made the contribution at the instance or suggestion of the employer, for example, we would likely conclude that the employer directed and controlled the contributions such that the contributions would be aggregated together to disqualify commissioner Foley. If the person who made the contribution decision for the company *also* happened to be the employee whose individual contribution was at issue, we would most likely reach the same conclusion – as the final sentence of Section 84308(d) provides in similar cases. But if employer and employee act completely independently of each other in making their contributions, we would conclude that the contributions should not be aggregated.”

In the situations you described, the contributions of an employee of a party or participant aggregate with a party or participant where the decision to contribute is made as a result of a request to contribute by a party or participant and/or where the party or participant holds a fundraiser and the contribution is made pursuant to the fundraiser solicitation. Contributions made by an employee at the request or solicitation of his or her employer are deemed to be directed and controlled by the employer and, therefore, are aggregated with the employer’s contributions.

4. Will contributions of a subcontractor and/or a subcontractor’s employees aggregate with a party or participant where the decision to contribute is made as a result of a request to contribute by a party or participant and/or where a party or participant holds a fundraiser and the contribution is made pursuant to the fundraiser solicitation?

Yes. Similar to the analysis in question 3 above, if a party or participant seeking a contract conducts fundraising for an officer of a board or commission and requests that a subcontractor and the subcontractor’s employees contribute to the officer, contributions by the subcontractor or the subcontractor’s employees will be aggregated with those of the party or participant.

We also confirm our informal advice that if an employer were to engage in fundraising activities (including soliciting contributions) on behalf a candidate, any employees, subcontractors, vendors and/or subcontractor/vendor employees who contributed to that candidate as a result of the solicitation would be considered to have made a contribution “at the suggestion of” the employer (see *Stergakos* Advice letter, No. I-04-149). Accordingly, any contributions made by business entity employees, subcontractors, vendors, or subcontractor/vendor employees who were solicited by that business entity or another member of the contracting team (a joint venture partner, a subcontractor, etc.) would aggregate with the business entity for purposes of Section 84308.

5. *Will personal campaign contributions of an employee of a party or participant aggregate with the party or participant where the employee directs and controls the contributions of the party or participant?*

Yes, the *Stergakos* Advice Letter, *supra*, correctly advised that the personal campaign contribution of an employee who makes contribution decisions for the company he works for would most likely be aggregated with those of the company. Under Section 84308, if a business entity employee, on his or her own personal time, solicits contributions on behalf of a candidate, the contributions would aggregate with the company's if the solicitation requests were made at the direction or control of the company or if the employee is directing and controlling the company's campaign contributions. However, if an employee's fundraising for a candidate was completely independent of the company, the contributions would not aggregate.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Hyla Wagner
Senior Counsel, Legal Division

HW:jgl