

April 8, 2015

Ms. Stacey Fulhorst  
Executive Director  
Ethics Commission  
1010 Second Avenue, Suite 1530  
San Diego, CA 92101

Re: Your Request for Advice  
**Our File No. A-15-035**

Dear Ms. Fulhorst:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

### **QUESTION**

Will city agency employees who are identifying operational efficiencies and participating in a managed competition program, under which certain city services could ultimately be provided by a private contractor rather than city employees, have a conflict of interest under the Act?

### **CONCLUSION**

No. A city employee's participation in an effort to identify operational efficiencies does not constitute a prohibited conflict of interest under the Act, because it is not reasonably foreseeable that the city employee's participation in this effort would have a material financial effect on the employee's personal finances.

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<sup>1</sup> 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.

## FACTS

On behalf of the City of San Diego, you are requesting advice concerning the Act's conflict of interest laws. Specifically, the city would appreciate receiving confirmation that its redesigned managed competition program is not being structured in a manner that will result in city employees violating the Act's conflict of interest laws.

The city uses a managed competition program to determine when city services can be provided more economically and efficiently by an independent contractor than by city employees. The authority for this program is codified in the City Charter, which provides as follows at section 117(c):

“The City may employ any independent contractor when the [Mayor] determines, subject to City Council approval, City services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service while maintaining service quality and protecting the public interest.

...

A City department shall be provided with an opportunity and resources to develop efficiency and effectiveness improvements in their operations as part of the department's proposal.”

If the Mayor ultimately determines that certain city services should be provided by a private contractor rather than city employees, the employees providing the services could be laid off, could find other positions they qualify for within the city, or could be transferred to lower paying positions. In addition, city employees could receive a cash award for achieving cost savings in connection with a department's proposal.

The city is in the process of redesigning the procedures that will be utilized in making a determination under the managed competition program, and anticipates that city employees will be involved in the process in various ways, including the following:

- participating in the development of a scope of work that will be included in a Request for Proposals (RFP);
- reviewing the draft RFP prior to issuance;
- participating in the preparation and submission of a city department proposal in response to the RFP, which may include redesigning business processes, organization structures, technology, and other factors involved in a new service model;
- providing information requested in connection with the evaluation of the department proposal; and
- participating in the development and/or implementation of a plan to ensure an effective transition between the existing and future provision of services.

Finally, under the proposed redesigned procedures for the managed competition process, the city would ensure that no employees who participated on the employee proposal team or who provided information on the statement of work included in the RFP would be allowed to participate in the city's procurement evaluation process for the selection of the contractor.

Accordingly, the city would appreciate receiving advice as to whether the city employees may participate in the managed competition program as described above without violating the Act's conflict of interest laws.

### ANALYSIS

The Act's conflict-of-interest provisions provide that no public official at any level of state or local government shall make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision in which the official knows or has reason to know he or she has a financial interest. (Section 87100.)

The decision you are asking about is city employees participating in the managed competition process and identifying operational efficiencies which could result in functions being performed by government agencies and employees more efficiently, and could also potentially result in contracting out to private employers certain functions currently being performed by government agencies. Applying the Act's conflict of interest rules, we consider whether it is reasonably foreseeable that a city employee's identifying operational efficiencies by participating in the managed competition program would result in a material financial effect on the employee's personal finances.

In determining whether a financial effect is reasonably foreseeable, we turn to newly revised Regulation 18701. In this case, the employee's financial interest in their personal finances is not explicitly involved in the decision under 18701(a), as the employee is not a named party in or the subject of the governmental decision. For financial interests not explicitly involved in a decision, Regulation 18701(b) provides as follows:

“(b) Financial Interest Not Explicitly Involved in Decision: A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. In determining whether a governmental decision will have a reasonably foreseeable financial effect on a financial interest other than an interest described in subdivision (a), the following factors should be considered. These factors are not intended to be an exclusive list of all the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable, but are included as general guidelines.

(1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

(2) Whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

(3) Whether the public official has a financial interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has a financial interest.

(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's financial interest might compromise a public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision.

(6) Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position.”

We apply those factors relevant under Regulation 18701(b) to determine whether a financial effect is reasonably foreseeable in this case. Under the first factor, the occurrence of the potential financial effect is contingent upon multiple intervening events, such as governmental decisions by the Mayor's office and the City Council. These two agencies are not the employee's agency or subject to the budgetary control of the employee's agency. Further, during the managed competition program, it is not predetermined which governmental functions may end up being recommended for contracting out and which functions will remain performed by governmental employees. So under the second factor, an employee participating in the managed competition program would not anticipate an effect on his or her personal finances as a potential outcome under normal circumstances, using appropriate due diligence and care. Under the fourth factor, there is no reasonable inference to be made here that the effects of participating in the managed competition program on the employee's personal finances might compromise the employee's ability to act in a manner consistent with his or her duty to act in the best interests of the public. Permitting City agency employees to help identify operational efficiencies is in the best interests of the public.

For the reasons stated above, a City employee's participation in an effort to identify operational efficiencies does not constitute a prohibited attempt to influence a governmental decision that has a reasonably foreseeable possibility of impacting the employee's personal finances.

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

Sincerely,

Hyla P. Wagner  
General Counsel

HPW:jgl