



California Fair Political Practices Commission

January 2, 1992

Ronald L. Thompson
Executive Director
Orange Redevelopment Agency

Robert O. Franks
General Counsel
Orange Redevelopment Agency
City of Orange
Orange Civic Center
300 E. Chapman Avenue
Orange, CA 92666-1591

Re: Your Request for Advice
Our File No. A-91-509

Dear Mr. Thompson and Mr. Franks:

You have requested advice on behalf of the City of Orange (the "city") and the Orange Redevelopment Agency (the "agency") regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note that our advice only pertains to future conduct and decisions; we do not evaluate any conduct that has already occurred. In addition, our advice is limited only to provisions of the Act. We cannot provide advice about other conflict-of-interest laws which may apply to your situation, such as Government Code Section 1090 and the doctrine of incompatible offices or activities. Please contact the Attorney General's office for advice with respect to these areas of the law.

QUESTION

May the principal special counsel participate in the agency's decision to hire bond counsel?

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.

CONCLUSION

The principal special counsel may not participate in or attempt to influence a general agency decision concerning whether to hire bond counsel if there will be a material financial effect on his law firm. Under Regulation 18702.1(a)(1), he may not participate in or attempt to influence a specific agency decision to hire his firm as bond counsel.

FACTS

The City of Orange has established the Orange Redevelopment Agency in order to plan and implement various redevelopment projects in the city. The agency currently contracts with a particular law firm (the "firm") to serve as special counsel to the agency. One of the partners in the firm has principal responsibility within the firm to render legal services to the agency. That attorney (the "principal special counsel") is compensated only by the firm.

Customarily, the agency has contracted with the firm to serve as bond counsel. At the present time, the agency has issued a request for proposals ("RFP") for bond counsel for an upcoming bond issue. The agency has distributed the RFP to a staff-prepared list of twelve law firms, including the firm. It is your understanding that the firm intends to answer the RFP and submit a proposal to act as bond counsel for the agency, either pursuant to the terms of the existing contract or pursuant to an amended or new contract.

The decision to issue bonds was made without consultation with, the rendering of advice, or any other form of participation by the principal special counsel. Neither the firm nor the principal special counsel will participate in or otherwise attempt to influence the criteria, the evaluation or the selection of the bond counsel.

The principal special counsel is a partner in the firm, with a less than 10% ownership interest in the firm. Any decisions made pursuant to the existing agency/firm contract for attorney services will not affect other firm clients.

ANALYSIS

On February 8, 1991 we issued Advice Letter I-90-686 to Mr. Luis Rodriguez, who also requested advice on behalf of the city and the agency. That letter concluded that the principal special counsel is a public official under the Act. The letter also evaluated the conflict-of-interest provisions that pertain when the principal special counsel's firm contracts with the

agency to serve as bond counsel. Much of the advice rendered in the Rodriguez letter also pertains to your current questions, which are:

1. "May the agency contract with the firm for bond counsel services if the principal special counsel does not make, participate in the making or otherwise attempt to influence the agency's selection of the firm?"

2. "May the agency ask the firm to serve as bond counsel within the parameters of the existing agency/firm contract for attorney services?"

The questions you have posed are not within the jurisdiction of the Act. The conflict-of-interest provisions of the Act only provide guidance with respect to whether a public official may participate in governmental decisions; it does not determine the ability of an agency² to make decisions or contracts. Therefore, we have rephrased your question within the parameters of the Act and answered accordingly.

The Act prohibits a 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. (Section 87100.) A public 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 or on, among other things:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1000) 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.

² However, a public official of the agency who has a conflict of interest under the Act, may not participate in or attempt to influence any agency decision regarding the particular matter in which he is disqualified.

(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)-(d).

Since the principal special counsel is a partner in the firm, he is required to disqualify himself from participating in any governmental decision which will foreseeably and materially affect the firm.

Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required; however, an effect that is merely a possibility is not reasonably foreseeable. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal.App.3d 983; In re Thorner (1975) 1 FPPC Ops. 198.)

Materiality

The Commission has adopted several regulations which define material financial effect. Regulation 18702 sets forth the general 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, Regulation 18702.1 applies to determine materiality. If the official's financial interest is indirectly affected by the decision, Regulations 18702.2 through 18702.6 apply to determine whether the effect of the decision is material.

The question regarding the principal special counsel's participation has both a broad and narrow application. If the general question concerns his participation in an agency decision to hire bond counsel, his firm will be indirectly affected by the decision and Regulation 18702.2 applies. This regulation, which defines material financial effect on a business entity indirectly involved in a decision, is very fact specific and is based on dollar threshold amounts of net tangible assets, pre-tax income, gross revenues and expenses. Since we do not have any financial information about the firm, we do not know which subdivision of Regulation 18702.2 applies to this situation. Therefore, it is incumbent upon you to analyze this regulation accordingly.


If the specific question concerns the principal special counsel's participation in an agency decision to hire his firm as bond counsel, Regulation 18702.1 applies. This regulation, which

defines material financial effect when an official's economic interest is directly involved in a decision, was discussed in the Rodriguez letter. In summary, under 18702.1(a)(1), the effect of a decision is deemed material if a source of income of \$250 or more in the preceding 12 months is directly involved in a decision before the official's agency. Since the firm is answering the RFP and is one of the candidates for bond counsel, they are directly involved in the agency's decision. Therefore, the principal special counsel may not participate in or attempt to influence the decision of the agency regarding the selection of bond counsel.

We realize that this letter has not answered your specific questions, which are not under our jurisdiction, but hope that we have provided necessary guidance. If you have further questions, please contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel


By: Jill R. Stecher
Counsel, Legal Division

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