

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

November 22, 1995

Myra Prestidge
Office of the City Attorney
City of Mountain View
P.O. Box 7540
Mountain View, CA 94309-7540

Re: Request for Advice
Our File No. A-95-323

Dear Ms. Prestidge:

This is in reply to a request for advice on behalf of City of Mountain View Councilmember Joe Kleitman regarding his responsibilities under the conflict-of-interest provisions of the Political Reform Act ("the Act").¹

QUESTIONS

1. Is the Defense Consortium considered a "local government agency" under the Act such that Councilmember Kleitman may be subject to disqualification under the conflict-of-interest provisions of the Act with respect to consortium decisions?

2. If Mesa Technologies, which is owned by Councilmember Kleitman, contracts with the Defense Consortium, would Councilmember Kleitman have a conflict-of-interest for purposes of the Act?

CONCLUSIONS

1. No. The Defense Consortium is not considered a "local government agency" under the Act. Therefore, decisions of the consortium which pertain solely to that entity are not considered

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 - 18995. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

governmental decisions which may subject the councilmember to the disqualification provisions of the Act.

2. No. However, Councilmember Kleitman is prohibited from making, participating in, or using his official position to influence any governmental decision, including the decisions of the city council or other government agency, in which he knows or has reason to know that he has a financial interest.

FACTS

Councilmember Joe Kleitman has been appointed by the City of Mountain View's Mayor to serve as the city's representative on the Board of the Defense Consortium, a nonprofit agency formed under IRS Code Section 501(c)(6). The appointment was made in response to the Defense Consortium's request for public agency participation. The Board of the Defense Consortium includes primarily private sector representatives (37 members) and a few (4) governmental representatives.

The purpose of the Defense Consortium is for government and business to work together cooperatively to create opportunities for economic development in the area. The Defense Consortium was formed to assist businesses to transition out of the defense industry into other areas of focus. According to the information provided, the Defense Consortium, is a "mission-driven organization of defense, space, and commercial firms; education, research, and community organizations; local government agencies promoting the transition and continuing vitality of Silicon Valley's defense/space industry and workforce."

The primary functions of the Defense Consortium include: (1) supporting education, training/retraining, and job placement services focused on both the currently employed and the displaced defense workforce; (2) organizing conferences, educational courses, and workshops in areas of urgent interest, such as marketing and dual-use and commercial product development; (3) providing information and guidance on federal and state conversion funding and local sources of conversion assistance and financing; (4) publication of a monthly newsletter concerning the Silicon Valley's defense/space community; and (5) assisting commercial partners to form alliances to form a network of industry clusters.

The Defense Consortium was not formed by the government, and there is no enabling legislation that created the agency. Full membership fees to join the Defense Consortium for companies, organizations and public/private research agencies range from \$500 to \$2,000 annually, depending on the entity's annual revenues. Individual membership is \$50, and affiliate membership for community-based groups and local government organizations is either \$50 or \$100.

The Defense Consortium is a subgrantee of the Joint Venture Silicon Valley (the "JVS"), another nonprofit agency formed under

IRS Code Section 501(c)(6) to develop public/private partnership for economic development in the Silicon Valley area. Under a memorandum of understanding with the Joint Venture Silicon Valley, the Defense Consortium receives federal funds from the Economic Development Administration. The Defense Consortium receives some private funding, but its primary source of funding is the federal grant.

As part of its work, the Defense Consortium conducts workshops for businesses transitioning out of the defense industry and matches developing companies with other businesses that may have the resources to assist with the growth of the developing companies. Companies pay a fee to the Defense Consortium, which may include a percentage of the future profits of the company, for these services. According to Councilmember Kleitman, the Board of the Defense Consortium rarely takes any action on contracts for services between the Defense Consortium and a business.

Councilmember Kleitman is the vice president and a stockholder of Mesa Technologies, Inc., a business entity. As part of Mesa Technologies, Inc., Councilmember Kleitman is working with persons in Russia who are transitioning out of the Soviet defense industry to develop new technology which could later be marketed in the United States. Councilmember Kleitman would like to contract with the Defense Consortium for consultant services. The Defense Consortium, in providing such services, would help arrange a connection between Mesa Technologies, Inc. and other persons or businesses that could provide resources to assist with the development of Mesa Technologies, Inc. Councilmember Kleitman would be directly working with Defense Consortium staff on this matter.

According to the information you provided on November 17, 1995, the provisions of the Brown Act, specifically Government Code Section 54952(c)(2), are not applicable to the Defense Consortium at this time. Section 54952(c)(2) requires an entity to follow the Brown Act if the entity receives local government funds.

ANALYSIS

I. Conflicts of Interest, Generally

Section 87100 of the Act provides 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. As a councilmember for the City of Mountain View, Mr. Joe Kleitman is a public official under the Act. (Section 82048.)

A. Local Government Agency

The first issue that arises is whether the Defense Consortium is a "local government agency," subjecting Councilmember Kleitman to the disqualification provisions of the Act with respect to decisions of the consortium.

Section 82041 defines "local government agency" to mean:

...a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.

Based on the information provided, it does not appear that the Defense Consortium functions as a department or agency under the general jurisdiction of City of Mountain View or other governmental entity.² However, this does not end our analysis. To assist in this type of analysis, we apply a four-part test to determine if an entity is a "local government agency." (In re Siegel, (1977) 3 FPPC Ops. 62, and In re Leach, (1978) 4 FPPC Ops. 48.)

In Siegel, the Commission determined that a nonprofit corporation formed to acquire, maintain and operate a water system was a local government agency under the Act. By contrast, in a later opinion, the Commission used the same criteria to determine that a downtown business association, a nonprofit corporation, was not a government agency. (In re Leach supra.) The city contracted with the association to provide administrative services to a business promotion district formed by the city. The Leach opinion also applied the Siegel criteria to determine that a contract between the city and the chamber of commerce to operate a convention bureau did not result in the chamber of commerce becoming a government agency.

The four-part test has been applied to your facts and is discussed below.

² We note that you have not been authorized to request advice on behalf of the JVSV. Therefore, for purposes of this analysis, we assume the JVSV is not a "local government agency" within the meaning of Section 82041. To the extent that the JVSV may be considered a "local government agency" for purposes of the Act, our conclusion may differ. However, in determining whether the JVSV is a "local government agency," the same analysis would apply to the JVSV as to the Defense Consortium.

1. Is the impetus for formation of the entity a government agency?

Generally, the first factor has been met where an entity is created by statute or ordinance, or by some official action of another local government agency. You have indicated that there is no statute or ordinance which established the Defense Consortium, nor was it formed by action of a governmental entity.³ Therefore, this factor is not met.

2. Is the entity substantially funded by, or is its primary source of funds, a government agency?

In Siegel, the city in question was a certain, continuing source of capital to the corporation. In this case, the Defense Consortium receives federal funds, as a subgrantee of the JSV, and some private funds.

We have previously advised that this factor is met where funding for a project was primarily derived from federal block grant monies. (Schofield Advice Letter, No. A-89-540.) Therefore, it appears to be met with respect to the Defense Consortium which is primarily funded by federal monies.

3. Is one of the principal purposes for which it is formed to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed?

In the Siegel opinion, it was considered significant that the corporation in question provided a service commonly provided by municipalities in their public capacities, the operation of a water system. Therefore, the corporation in Siegel was clearly involved in a traditionally public activity--the operation and maintenance of a water system.

In the Leach opinion, with respect to whether a business association and a Chamber of Commerce constituted government agencies, the Commission stated:

... [A]lthough promotion of the downtown business district, promotion of the City and the operation of the Convention Bureau are activities sometimes performed by cities, they are performed by nongovernmental entities equally as often. Thus, the Association and the Chamber are performing services which benefit the public,

³ According to our telephone conversation of November 8, 1995, the idea of building public/private partnerships in the defense area stemmed from a study commissioned by a Chamber of Commerce in the area which examined the feasibility of forming groups to build such public/private economic partnerships.

although, more specifically, they benefit the downtown business area and retail stores, restaurants and hotels located throughout the City. In this respect, the services are rendered as less public in nature than the providing of a public water supply.

... [A]lthough it is true that both the Association and the Chamber perform certain functions for the City which presumably are beneficial to the public, we do not think that these activities raise otherwise private entities to the level of public agencies....

In the Giuffre Advice Letter, No. A-89-066, we advised that a nonprofit organization formed to solicit and promote conventions and gatherings to the City of Bakersfield did not meet this criterion. The services performed by the organization would benefit hotels, motels and restaurants, and therefore, could be construed to benefit private rather than public interests.

However, some of the activities of the Defense Consortium can be viewed as benefiting businesses and government equally. For example, we note that one of its activities is to support education, training, and placement of displaced defense workforce. Presumably, this includes employees in both public and private entities. They may, therefore be viewed as activities which a public agency is legally and traditionally authorized to perform. Therefore, this requirement is met.

4. Is the entity treated as a public entity by other statutory provisions?

The final factor which is considered in evaluating its status under the Act is whether the entity is treated as a public entity by other provisions of law. Your facts do not indicate that the Defense Consortium enjoys benefits different from similar business associations. In addition, the entity is not subject to Brown Act requirements.

Having considered all of these factors, we believe that we must reach a result similar to the Leach opinion. Although it is true that the Defense Consortium activities perform certain functions to ensure the economic vitality of the Silicon Valley, and specifically, Mountain View, which are beneficial to the public, we do not think that every public/partnership which may benefit government raises the controlling entities to the level of public agencies. This would be particularly true, as in this case, where private sector members control the decisions of the organization (only four board members of a total of 41 are public sector members). Therefore, we conclude that the Defense Consortium is not a "local government agency."

B. Governmental Decisions

We next address the issue of whether the consortium decisions affecting a potential contract with the councilmember's business are governmental decisions. Since the Defense Consortium is not considered a local government agency, the decisions of the Defense Consortium are not governmental decisions within the meaning of the Act subjecting him to disqualification in his capacity as a board member for the Defense Consortium. However, if a Defense Consortium decision is submitted to any public agency for consideration for approval or other action, that decision would be within the Act's purview and the councilmember may have a conflict of interest. (Regulations 18700 and 18700.1, copy enclosed.)

As noted above, Section 87100 prohibits public officials from making, participating in, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest.

For purposes of Section 87100, a public official:

1. Makes a governmental decision whenever the public official votes on a matter, commits the agency to a course of action, or enters into any contractual agreement on behalf of the agency. (Regulation 18700(b).)

2. Participates in a governmental decision when, acting within the authority of his or her position, the public official negotiates, without significant substantive review, with a governmental entity or private person regarding the governmental decision or advises or makes recommendations to the decisionmaker, either directly or without significant intervening substantive review. (Regulation 18700(c).)

3. Attempts to influence a decision where the official:

(a) Contacts or appears before any member, officer, employee of the official's agency or any agency under the appointive or budgetary control of the official's agency (Regulation 18700.1(a).)

(b) Attempts to use his or her official position to influence a governmental decision of an agency,⁴ other than that of the official's own agency, where the official acts or purports to act on behalf of, or as the representative of, his or her own agency to any member, officer, employee or consultant of the agency making the decision (Regulation 18700.1(c)).

⁴ "Agency" means any state agency or local government agency. (Section 82003.)

Therefore, for example, if the contract decision concerning Mesa Technologies is brought before the city council, or other government agency, for discussion or approval, the councilmember would be deemed to be participating in a governmental decision or influencing a governmental decision. Therefore, a conflict-of-interest may exist. (Sections 87103(a) and (d).)

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Luisa Menchaca
Counsel, Legal Division

Enclosures