

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

December 14, 1995

Christopher B. Neils
Sheppard, Mullin, Richter & Hampton
501 West Broadway
San Diego, CA 92101-3598

Re: Your Request for Advice
Our File No. A-95-380

Dear Mr. Neils:

This is in response to your request for advice on behalf of your client, Hillman Properties West, Inc., under the conflict-of-interest provisions of the Political Reform Act.^{1/} The facts outlined in this response were provided in your November 13, 1995, letter, as well as in our subsequent November 20, 1995, telephone conversation.

QUESTION

If Hillman Properties West, Inc., prevails in its bid for the contract to construct and operate a municipal golf course for the City of Carlsbad, will D. Harry Clemens, the vice-president of the corporation, meet the definition of a "consultant" under the Act?

CONCLUSION

Provided Clemens does not serve in a staff capacity performing duties otherwise performed by an individual holding a position specified in the City's conflict of interest code and provided the proposal by Hillman is structured so that the City retains final approval on contracts and Clemens may not enter into

^{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, Sections 18000-18995. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

contracts on behalf of the City, Clemens would not be making governmental decisions, and thus, would not be a "consultant" under the Act.

FACTS

The City of Carlsbad (the "City"), has determined to cause the construction and subsequent operation of a public golf course to be located on property within the City limits of Carlsbad and owned by the City. The City sent out a request for qualifications to parties who had expressed an interest in being considered for the project, tentatively named by the City as the "Carlsbad Municipal Golf Course" project. The City notified Hillman Properties West, Inc., ("Hillman"), that it is one of four firms selected by the City to continue on in the selection process.

If Hillman is awarded the contract, D. Harry Clemens, Hillman's vice-president, will have a supervisory role regarding the responsibilities of Hillman under the contract with the City. It is anticipated that under the proposal his duties will not include approval of any City plans, designs or reports. Moreover, the contract does not involve the development of policies, standards or guidelines.

The assistant city attorney in Carlsbad initially raised questions regarding potential conflicts of interest as to Hillman and to Clemens. Hillman has another golf course project in construction in the City and has made a bid to purchase property which, if the bid to purchase is accepted, Hillman would develop into residential housing. Clemens, on behalf of Hillman, would be making appearances before the City at various stages of planning and development for each of these projects. If Hillman is awarded the contract to construct and operate the municipal golf course, and if Clemens is a "consultant" under the Act, the assistant city attorney felt Clemens, as a public official, could not appear before the City representing Hillman on its other projects.

During our November 20, 1995, telephone conversation, you stated that the assistant city attorney has deferred this question to the Commission for advice.

The general proposal for the golf course construction and operation is as follows:

1. The applicant, Hillman, proposes to enter into a definitive agreement with the City for the design, construction and operation of a municipal golf course. It is anticipated that said agreement will provide for, and require, City approval at various significant stages during the incremental development of the project, from basic concept to completion and operation. Those approval decisions by the City would include, without limitation: approval of the design and layout of the golf course; approval of the actual construction contract and the contractor; and approval of the specific operating agreement.

2. It is anticipated that many of the provisions of those definitive agreements will be mandated by existing City policies dealing with such types of contracts. It is further anticipated that the operating agreement for the golf course, following completion of construction, will contain certain mandatory requirements related to the operation and that failure to comply with such requirements would be a default under the agreement. It is further anticipated that the City will have various rights, including the right of termination, should the successful applicant be in default of significant obligations under such agreements.

3. The City will insist on normal protections against liabilities arising from the activities of the applicant under its agreements, whether related to the design, construction or operation. There likely will be related insurance requirements. The agreements will specify that the actions "on the project" are those of the applicant, not the City, and that the City should be protected against liability.

It is anticipated that the City land in question will be leased to the applicant as part of the package of documents necessary to the contractual arrangement for design, construction and operation.

4. Actual construction and operation of the golf course project would require, among other things, land use entitlement permits and building permits, as well as grading permits, from the City. It is anticipated that such permits would be processed in the manner normal to the City for such entitlements, including scrutiny under the applicable provisions of the California Environmental Quality Act.

In our telephone conversation, you provided additional information which is pertinent to the question posed.

You indicated that all costs for the project would be absorbed by the applicant. There would be no reimbursement or up-front initial outlay from the City to the prevailing applicant. You further stated that once the golf course is operational, the prevailing applicant would hold the operational lease on the golf course. The City would be entitled to either a certain percentage of the profits, or would require an annual lease payment from the applicant, but that the specifics of the operational agreement have yet to be worked out.

ANALYSIS

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 he knows or has reason to know he has a financial interest. (Section 87100.)

A public official has a financial interest in a decision within the meaning of Section 87100 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, a member of his or her immediate family, 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).)

The term "public official" means every member, officer, employee or consultant of a state or local government agency. (Section 82048, emphasis added.)

Accordingly, if Clemens is a "consultant" within the meaning of the Act, he could not make, participate in making or in any way attempt to use his official position to influence a governmental decision before the City of Carlsbad. As noted by the assistant city attorney, Mr. Clemens would not be able to represent Hillman before the City on other Hillman projects.

The Commission has defined "consultant" to mean an individual^{2/} who, pursuant to a contract with a state or local government agency:

^{2/} In your letter, you stated that since the contract is with Hillman, which is a business entity, not an individual, that the consultant provision did not apply. Realistically, a business entity does not make the decisions, but rather the principals or partners do. Logically, then, the consultant must be the individual within the entity who makes decisions.

(A) Makes a governmental decision to:

1. Approve a rate, rule, or regulation;
2. Adopt or enforce a law;
3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract with requires agency approval;
5. Grant agency approval to a contract which requires agency approval and in which the agency is a party or to the specification for such a contract;
6. Grant agency approval to a plan, design, report, study or similar item;
7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

(B) Serves in a staff capacity with the agency and in that capacity performs the same as substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code.

(Regulation 18700(a)(2).)

Applying the criteria of Regulation 18700(a)(2) to the proposed contract between the City and Hillman, which Clemens will supervise on behalf of Hillman for the design and operation of the golf course:

1. The contract will not provide for the development of rates, rules or regulations. (Regulation 18700(a)(2)(A)(1).)
2. The contract will not provide for the adoption or enforcement of any law. (Regulation 18700(a)(2)(A)(2).)
3. As part of the role of city government in general, the City approves, issues or denies land-use permits, building permits, grading permits, as well as other approval processes relevant to any land-use application. The City does not intend to transfer this role to Clemens for the golf course project. (Regulation 18700(a)(2)(A)(3).)

4. Clemens will be in a supervisory role regarding the responsibilities of Hillman under its agreements with the City. There is nothing in the facts to indicate that Clemens will be authorizing the City to enter into contracts. (Regulation 18700(a)(2)(A)(4).)

5. You indicated that the City, not Clemens, will approve all contracts. (Regulation 18700(a)(2)(A)(5).)

6. Clemens will not be approving any plans, designs or reports. You anticipate that the City will retain that right. (Regulation 18700(a)(2)(A)(6).)

7. The contract will not provide for the development of policies, standards or guidelines. (Regulation 18700(a)(2)(A)(7).)

Therefore, it does not appear that Clemens would be making governmental decisions pursuant to Regulation 18700(a)(2)(A). Moreover, if the conflict of interest code for the City does not contain a position for an individual who is in a staff capacity similar to that of Clemens, Regulation 18700(a)(2)(B) would not apply. Consequently, should the contractual relationship between the City and Hillman be structured so that decision-making authority is not conveyed to Clemens as provided in either Regulation 18700, subdivisions (a)(2)(A) or (a)(2)(B), Clemens would not be considered a "consultant" within the meaning of the Political Reform Act.

However, a final determination on this issue is necessarily dependent on the actual contractual agreement between the City and the successful applicant and the specific duties Clemens would perform. It is recommended that you contact this office for further advice should Hillman be awarded the contract.

I hope this answers your questions sufficiently. If you need further assistance, please do not hesitate to contact this office at (916) 322-5901.

Sincerely,

Steven G. Churchwell
General Counsel



By: Jeanette E. Turvill
Political Reform Consultant
Legal Division

SGC/JET/jt