

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

April 2, 1996

Charles K. Tenborg
427 Plomo Court
Arroyo Grande, CA 93420

Re: Your Request for Advice
Our File No. A-96-079

Dear Mr. Tenborg:

This is in response to your letter requesting advice regarding your responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note that nothing in this letter should be construed to evaluate any conduct which may have already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.) Moreover, our advice is limited to the provisions of the Political Reform Act. We cannot advise on other laws that may apply to you as a public official, such as Government Code Section 1090 or the doctrine of incompatible offices. You should contact your county counsel for advice on these matters.

QUESTION

Does the Act prohibit your business from contracting with the Integrated Waste Management Authority (IWMA), a joint powers authority comprised of the county and cities within the county, where you are also a county employee?

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.

CONCLUSION

The Act would not prohibit you bidding on a contract with IWMA or having a contract with the IWMA in your private capacity. However, you could not make, participate in making or influence any decision that would have a material financial effect on your business.

FACTS

You are employed by the San Luis Obispo County Public Health Department, Division of Environmental Health as a Senior Environmental Health Specialist. Your responsibilities include regulating businesses that handle hazardous waste and operate underground storage tanks.

In your private capacity you operate an environmental consulting businesses called "Eco Solutions." You operate the business as a sole proprietorship and consult with clients about waste minimization and mitigation of hazardous waste sites.

Recently, IWMA contracted with the county with respect to household hazardous waste collection events. You stated that the IWMA is an independent joint powers agency comprised of the county, and all the cities in the county. The board of directors of IWMA consists of the five county supervisors and a representative of each city in the county. You are considering bidding to provide these services to IWMA once the county contract ends.

ANALYSIS

A. Economic Interests

The Act was adopted by the voters in California in 1974. The purpose for the conflict-of-interest provisions of the Act was to ensure that public officials, whether elected or appointed, would perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).)

In furtherance of this goal, Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A "public official" is defined in Section 82048 and Regulation 18700 as every natural person who is a member, officer, employee, or consultant of a state or local government agency.

Section 87103 specifies that 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 the effect on the public generally, on the official or 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.

According to your facts, you have an economic interest in your business Eco Solutions.² Consequently, you may not make, participate in making or influence any decision that will reasonably foreseeably have a material financial effect on Eco Solutions.

B. Foreseeability and Materiality

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

In addition, the foreseeable effect on your source of income must also be material to require disqualification. The Commission has adopted differing guidelines to determine whether an effect is material, depending on the specific circumstances of each decision. For example, where your business is directly before the county, as an applicant or the subject of the decision, Regulation 18702.1(a) provides that the effect of the decision on a source of

² In addition, Section 82030 provides that the income of an individual also includes a pro-rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater. Thus, all your clients are also economic interests for purposes of the conflict-of-interest provisions of the Act.

income is deemed material and disqualification is required.³ This would be the case where the decision concerned a contract with your business.

Where your business is not directly before the county, but may be indirectly affected, Regulation 18702.2 (copy enclosed) applies. Regulation 18702.2 provides differing standards of materiality depending on the financial size of a business entity. Regulation 18702.2 provides that for a relatively small business entity, the indirect effect of a decision is material where:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in the increase or decrease in the value of assets or liabilities of \$10,000 or more.

C. Making, Participating in Making and Influencing

What constitutes making, participating in making, and influencing has been broadly defined. (Regulations 18700 and 18700.1) For example, Regulation 18700.1(a) provides that with regard to a governmental decision which is within or before the official's own agency, or any agency appointed by or subject to the budgetary control of his agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. (Regulations 18700 and 18700.1.)

You stated that the IWMA is an independent agency. However, the fact that the decisionmaking governing board is comprised of all of the county supervisors would suggest that these two agencies are linked. At a minimum it means that the agency fills seats on the IWMA, making the IWMA a "subordinate" agency for purposes of Regulation 18700. Thus, Regulation 18700 would prohibit you from contacting or appearing before the IWMA, or

³ A business is directly before the county when it initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or the subject of, the proceeding. A business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the business entity. (Regulation 18702.1(b).)

otherwise attempting to influence, any member, officer, employee or consultant of the agency regarding your contract with it. (Regulations 18700 and 18700.1.)

D. Exceptions

However, both Regulations 18700 and 18700.1 provide exceptions from these disqualification rules.

Making or participating in making a governmental decision shall not include:

* * *

(2) Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interests; or

(3) Actions by public officials relating to their compensation or the terms or conditions of their employment or contract. In the case of public officials who are "consultants," as defined above, this includes actions by consultants relating to the terms or conditions of the contract pursuant to which they provide services to the agency, so long as they are acting in their private capacity.

Regulation 18700(d).

Notwithstanding subsection (a) an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by subsection (a) if the official:

(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:

* * *

(B) A business entity wholly owned by the official or members of his or her immediate family.

(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.

* * *

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

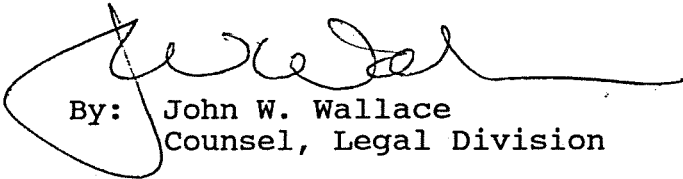
Regulation 18700.1(b).

These exceptions would apply to you if you wanted to bid for a contract with the IWMA in your private capacity and in the same manner as any other member of the general public.⁴

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5660.⁵

Sincerely,

Steven G. Churchwell
General Counsel


By: John W. Wallace
Counsel, Legal Division

ENCLOSURE

⁴ Please note that if you are granted the contract other conflict of interest issues will be created. You should contact us for further advice at that time.

⁵ Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.