



FAIR POLITICAL PRACTICES COMMISSION

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January 27, 2005

Richard Reyes
Department of Fish & Game
License and Revenue Branch
3211 S Street
Sacramento, CA 95816

**Re: Your Request for Advice
Our File No. A-04-210**

Dear Mr. Reyes:

This letter is in response to your request on behalf of Damian Sivak for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

May Mr. Sivak evaluate bid proposals as part of a team for the Department of Fish and Game even though he owns stock in one of the bidders?

CONCLUSION

Mr. Sivak may participate in this bid proposal process only if it is not reasonably foreseeable that any governmental decision will result in an increase or decrease of \$10,000,000 or more in IBM's gross revenues during a fiscal year; in IBM incurring or avoiding expenses of \$2,500,000 or more during a fiscal year; or an increase or decrease in the value of IBM's assets or liabilities or \$10,000,000 or more.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

These facts are based on your incoming correspondence and phone conversations with Commission counsel.

The Department of Fish and Game ("DFG") plans to procure Information Technology ("IT") services from a vendor through the competitive procurement process to develop, implement and operate the Automated License Data System ("ALDS").

The ALDS will replace the DFG's current manual paper-based licensing system with an automated system. The ALDS procurement will result in a contract with a value of approximately \$20 million over a five to six year period.

Damian Sivak, a DFG employee, owns common stock in IBM (56 shares with a total value of approximately \$4,900), a company which has expressed interest in this contract. Mr. Sivak's dividends from this stock amount to approximately \$40 annually. Mr. Sivak provides subject matter and technical expertise and has been integral in the development of the system requirements and the completion of the ALDS Request for Proposals ("RFP").

Process

The ALDS will be procured using the formal request for proposal process. The Department of General Services will act as the state procurement official. DFG will obtain procurement assistance from Gartner Consulting and project oversight will be conducted by the Department of Finance and Public Sector Consulting, an independent project oversight consultant.

The formal bid evaluation procedures have been established. These procedures are very structured and require a consensus score for each evaluated element of each bidder proposal.

Subject Prospective Bidder

IBM's 2003 revenues were \$89 billion (\$89,131,000,000). IBM is listed as number nine on the Fortune 500 list. The estimated ALDS contract amount is \$20 million or \$4 - 5 million annually. This \$4 - 5 million would likely be divided between the prime contractor and several subcontractors. Even if all contract revenue went to IBM and all revenues remained constant, IBM's resulting increase in revenue would be five thousandths of one percent (.005%).

IBM has submitted a response to DFG's Request for Interest for the ALDS project, along with approximately 60 other companies who responded. IBM has not bid on such a state project for about 5 years.

ANALYSIS

Your question implicates the Act's conflict-of-interest provisions, which ensure that public officials "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).) Specifically, section 87100 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.

The Commission has adopted an eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).) We apply this analysis to your circumstances.

Step 1 – Public Official.

The Act's conflict-of-interest provisions only apply to public officials. (Sections 87100, 87103; regulation 18700(b)(1).) "Public official" is defined as "every member, officer, employee or consultant of a state or local government agency ..." (Section 82048.) As an employee of the Department of Fish and Game, Mr. Sivak is a public official under the Act, and the conflict-of-interest provisions apply to him.

Step 2 – Making, participating in making, or using official position to influence governmental decisions.

The Act's conflict-of-interest provisions only apply to public officials who "make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Section 87100; regulation 18700(b)(2).)

A public official makes a governmental decision when the official, while acting within the authority of his or her office or position, votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, enters into any contractual agreement on behalf of his or her agency, or determines not to act. (Regulation 18702.1(a).) A public official participates in making a governmental decision when he or she, without significant substantive review, negotiates, advises, or makes recommendations regarding a decision. (Regulation 18702.2.) Mr. Sivak will make, participate in making, or influence a governmental decision if he evaluates ALDS bid proposals as part of the DFG team.

Step 3 – Identifying the economic interests.

The Act's conflict-of-interest provisions only apply to conflicts of interest arising out of economic interests as defined in regulations 18703 - 18703.5. A public official has an economic interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on the official, a member of his or her immediate family, or on any of the following:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (section 87103(a); regulation 18703.1(a)); in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (section 87103(d); regulation 18703.1(b));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (section 87103(b); regulation 18703.2);
- A public official has an economic interest in any source of income, including promised income, which aggregate \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate \$340 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
- A public official has an economic interest in his or her personal finances including those of his or her immediate family – this is the “personal financial effects” rule (section 87103; regulation 18703.5).

Mr. Sivak has an economic interest in IBM, since he owns 56 shares of this entity worth approximately \$4,900. In contrast, based on your facts, Mr. Sivak does not currently have an economic interest in IBM as a *source of income* to him because he has not received from IBM income aggregating \$500 or more in a 12-month period. (You have stated that he only receives \$40 annually.) However, please note, if Mr. Sivak were to receive income from IBM that aggregates to \$500 as described above, he would have an economic interest in IBM as a source of income, a fact that could alter the conclusion of this letter.² (See footnote 3.)

For purposes of this letter, we assume Mr. Sivak has no other economic interests relevant to the identified decisions.

Step 4 – Directly or indirectly involved in the governmental decision.

A person, including a business entity, is directly involved in a decision before an official’s agency when the person, either directly or by an agent: initiates the proceedings by filing an application, claim, appeal or other similar request; or, is a named party in, or is the subject of, the proceeding concerning the decision before the official or the officials agency. (Regulation 18704.1(a).) “A person 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 subject person.” (Regulation 18704.1(a)(2).)

² If Mr. Sivak sells his stock without receiving income from IBM, he will no longer have an economic interest in this business entity.

IBM is directly involved in the governmental decision if it is a named party as an ALDS proposal bidder. Under regulation 18705.1(b), unless the exception of 18705.2(b)(2) applies, the financial effects of a governmental decision on a business entity which is directly involved in the decision is presumed to be material. Under the general rule, if Mr. Sivak were asked to evaluate each bidder's proposal and determine whether DFG should enter into a contract with IBM, he could not participate in the decision.

Step 5 – The applicable materiality standard.

However, based on your facts, it appears the exception of 18705.2(b)(2) does apply even if IBM is a bidder. Where a public official's only economic interest in the business entity is an investment interest and the public official's investment in the business entity is worth \$25,000 or less, the materiality standards of regulation 18705.1(c)(1) apply. (Regulation 18705.1(b)(2).)

Under regulation 18705.1(c)(1), the financial effect of a governmental decision on a Fortune 500 business is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year of \$10,000,000 or more; or

“(B) The governmental 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 \$2,500,000 or more; or

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$10,000,000 or more.”³

Mr. Sivak must analyze whether the decision before him would meet any of the monetary thresholds provided by regulation 18705.1(c)(1)(A) - (C).

Step 6 – Is it reasonably foreseeable that the financial effect of the governmental decision on the public official's economic interests will meet the applicable materiality standard?

A material financial effect on an economic interest is reasonably foreseeable if it is substantially likely that one or more of the materiality standards applicable to that economic interest will be met as a result of the governmental decision. (Regulation

³ Note that if Mr. Sivak determines he has an economic interest in IBM as a source of income, “[a]ny reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official's agency, is deemed material.” (Regulation 18705.3(a).) Under such circumstances, Mr. Sivak would most likely have a conflict of interest. If Mr. Sivak determines he has an economic interest in IBM as a source of income, he should seek further guidance on this matter.

18706(a).) Please note that the Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Therefore, the determination of whether or not it is reasonably foreseeable that the applicable materiality standard will be met for Mr. Sivak's investment is necessarily a factual question that is ultimately for him to decide.

In determining whether a governmental decision will have a reasonably foreseeable material financial effect on an economic interest, the following factors listed below should be considered:

- (1) The extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction;
- (2) The market share held by the official or the official's source of income in the jurisdiction;
- (3) The extent to which the official or the official's source of income has competition for business in the jurisdiction;
- (4) The scope of the governmental decision in question; and
- (5) The extent to which the occurrence of the material 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." (Regulation 18706(b).)

We have advised that regulation 18706(b) provides a non-exhaustive list of factors that should be considered in determining the foreseeability of a material financial effect on an economic interest. (*Churchwell* Advice Letter, No. A-04-063.) These factors, applicable to a "source of income," can also be used to evaluate Mr. Sivak's situation involving his investment interest in IBM.

If IBM does not submit a bid for this project, it seems clear that decisions involving the bids will not have a reasonably foreseeable material financial effect on Mr. Sivak's economic interest in IBM. Under these circumstances, Mr. Sivak would not have a conflict of interest in evaluating the bid proposals. However, you have stated that IBM has submitted a response to DFG's Request for Interest for the ALDS project. Therefore, it does appear that IBM may submit a bid. The pertinent question then is whether it is reasonably foreseeable, given facts available to Mr. Sivak, that a decision made by Mr. Sivak on any of the bids will result in an increase or decrease of \$10,000,000 or more in IBM's gross revenues during a fiscal year; in IBM incurring or avoiding expenses of \$2,500,000 or more during a fiscal year; or an increase or decrease in the value of IBM's assets or liabilities or \$10,000,000 or more

If it is reasonably foreseeable that the financial effect of a particular governmental decision related to the bid process meets the applicable materiality standard, Mr. Sivak will be prohibited from making, participating in making, or influencing that governmental decision.

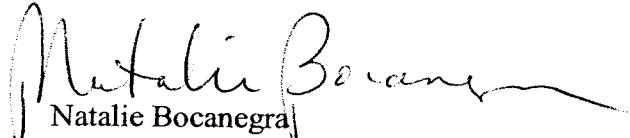
Steps 7 & 8 - "Public Generally" and "Legally Required Participation" Exceptions.

The "public generally" exception applies when the reasonably foreseeable and material financial effect on an official's economic interest is not distinguishable from the effect on the public generally. (Section 87103.) The "legally required participation" rule applies when the official's participation in a governmental decision is legally required. (Section 87101; regulation 18708.) Your facts do not indicate that either of these exceptions are applicable to Mr. Sivak's situation.

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

Sincerely,

Luisa Menchaca
General Counsel

By: 
Natalie Bocanegra
Counsel, Legal Division

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