



## FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

March 10, 2008

Anthony P. Condotti  
333 Church Street  
Santa Cruz, California 95060

Re: Your Request for Advice  
**Our File No. A-08-022**

Dear Mr. Condotti:

This letter responds to your request for advice on behalf of David Dickson regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented; the Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Also, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

### QUESTIONS

1. Does David Dickson, General Manager of the Coastside County Water District (the "District") have a conflict of interest that would prevent him from participating in preparing a request for proposals (RFPs) for a large project the District is undertaking?

May Mr. Dickson:

- a. Participate in assessing and articulating the District's needs for the Supervisory Control And Data Acquisition ("SCADA") System;
- b. Participate in preparing bid documents for the SCADA project, including creating the bid specifications;
- c. Participate in evaluating bids for the project;
- d. Discuss any of the above items with District staff involved in the project; or

---

<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

- e. Discuss any of the above with or make recommendations regarding the above to the Board of Directors?
2. Even if Mr. Dickson does have a conflict of interest, does the "legally required participation" exception apply?

### CONCLUSIONS

1. Yes. Given the facts below, Mr. Dickson potentially has a disqualifying conflict of interests that would preclude him from participating in the District's RFPs and bidding process.
2. No. The legally required exception does not apply in this instance.

### FACTS

You are the District's general counsel, and you represent the District's general manager, Mr. Dickson. Mr. Dickson joined the District in October of 2007. Prior to taking this position, Mr. Dickson worked full-time for Calcon Systems, Inc. ("Calcon"), a company that manages projects for clients by contract. Calcon is not a publicly traded company. You provided information stating that Calcon's "sales" total \$4.2 million. During his time at Calcon, Mr. Dickson managed a project relating to a wastewater plant for Clayton Regency LLC ("Clayton"). In May, 2006, Mr. Dickson went from full-time work with Calcon, to part-time work as a subcontractor so that he could continue the Clayton project.

During this period, Calcon paid Mr. Dickson and billed his work to Clayton. On November 30, 2007, Mr. Dickson ended his employment with Calcon. He now works solely for Clayton, with his payment on the project coming from Clayton.

Calcon performs instrumentation and electrical services for the District. Calcon is currently performing work for the District at the District's Nunes and Denniston treatment plants under several purchase orders that were issued before Mr. Dickson took the position and that total approximately \$35,000. The District treatment plant staff is satisfied with Calcon's work and would like to have Calcon perform additional projects.

Within a few months, the District plans to put a \$250,000 to \$500,000 project up for bid (the SCADA project). The District will put up the project for public bidding and award the project to the lowest responsible bidder. The SCADA project is specialized, however, and the pool of bidders is limited. Calcon is among the limited pool of qualified potential bidders, and the District expects Calcon will bid.

You have inquired about any limitations on Mr. Dickson's involvement in this process.

### ANALYSIS

The Act's conflict-of-interest provisions 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 standard analysis to decide whether an official has a disqualifying conflict of interest. (Regulation 18700(b)(1)-(8).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

**Step One: Is Mr. Dickson a public official due to his position as general manager of the District?**

As the general manager of a local water district, Mr. Dickson is a public official under the Act. (Section 82048(a).)

**Step Two: Will Mr. Dickson be making, participating in making, or using or attempting to use his official position to influence a governmental decision?**

A public official participates in making a governmental decision when he “[a]dvises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by . . . [p]reparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision” such as those listed in Regulation 18701(a)(2)(A). (Regulation 18702.2(b).) These decisions include:

“ . . .

“(iv) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

“(v) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

“(vi) Grant agency approval to a plan, design, report, study, or similar item;

“(vii) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof.”

(Regulation 18701(a)(2)(A).)

By preparing and approving the RFP that will go before the District’s board, Mr. Dickson will be preparing the type of information that Regulations 18701 and 18702.2 contemplate.

**Step Three: Does Mr. Dickson have a financial interest in the decisions at issue?**

A public official has a “financial interest” in a governmental decision within the meaning of the Act if it is reasonably foreseeable that the governmental 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 any one of five enumerated

economic interests. (Section 87103; Regulation 18700(a).) The applicable economic interests include:

- “1. An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).) An interest in any *business entity*<sup>2</sup> in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- “2. An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- “3. Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- “4. Any source of gifts to the public official if the gifts aggregate to \$390 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- “5. A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the “personal financial effects” rule.” (Section 87103, Regulation 18703.5.)

Based on the facts you provided, Mr. Dickson has an economic interest in Calcon as it was a source of at least \$500 of income to him in the previous twelve months.<sup>3</sup> He also has an economic interest, source of income in Clayton for the same reason.<sup>4</sup>

---

<sup>2</sup> Section 82005 provides: “Business entity” means any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation, or association. This definition does not include nonprofits or governmental entities.

<sup>3</sup> The “former employer” exception excludes an employer if all income received from that employer was accrued prior to the time the employee became a public official. (Regulation 18703.3(b).) Because Calcon continued to pay Mr. Dickson after he took his position with the District, the exception does not apply.

<sup>4</sup> Your facts state that Calcon is likely to bid on the proposal, but you mention nothing about Clayton. As you describe Clayton as a “small waste water plant,” we assume that Clayton is not expected to bid. If the situation is otherwise, please write in with further information.

**Step Four: Is the economic interest directly or indirectly involved in the governmental decision?**

**Source of Income**

A source of income is directly involved in the governmental decision if the source of income: "(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or; (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. 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).)

During the process of assessing the District's needs and preparing the RFP, there is not a party or participant to the proceeding. Once the District has received bids on the RFP, there will be parties who are the subjects of the decision. (*See Brue* Advice Letter, I-93-384 (stating that a party is any person who submits a proposal in response to an RFP.) Until the bids come in, Calcon is indirectly involved in the proceeding. (See Reg. 18704.1(b).) Once the District receives the bids, however, if Calcon submits a bid, it would be directly involved.<sup>5</sup> (*See, e.g., McMurty* Advice Letter, A-99-058 (finding that once the source of income economic interest submitted a proposal, it would be directly involved in the proceeding).)

**Step Five: What is the applicable materiality standard?**

Any reasonably foreseeable financial effect, even one penny's worth, on a directly involved source of income to a public official is deemed material. (Regulation 18705.1(b)(1).)

For a source of income that is a business entity and that is indirectly involved, the Commission applies the standards found in Regulation 18705.1(c). (Regulation 18705.3(b).) The standard that would apply depends on the size of the business. Calcon is not a publicly traded company. You provided information stating that Calcon's "sales" total \$4.2 million. The report you provided does not explain whether this figure is an annual amount.

We could assume, however, that this figure puts Calcon within the type of business entity described in Regulation 18705.1(c)(3). That is, a business entity that is not publicly traded, but had net income in its most recent fiscal year of not less than \$500,000, or earning before taxes of not less than \$750,000. (*See* Regulation 18705.1(c)(3).) If that is the case, the financial effect of the governmental decision is material if it is reasonably foreseeable that:

The governmental decision will result in an increase or decrease to the business entity's gross revenues for a fiscal year in the amount of \$300,000 or more; or,

---

<sup>5</sup> The Commission views an RFP as an integral part of a contract, as such, decisions leading up to the contract, such as the decision that sets the foundation for the contractual relations, are decisions concerning a contract. (*Brue* Advice Letter, I-93-384; *see also Thorne* Opinion, 1 FPPC Ops. 198 (1975).)

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 \$100,000 or more; or,

The governmental decision will result in an increase or decrease in the value of assets or liabilities of \$300,000 or more.

(Regulation 18705.1(c)(A)-(C).) Because you stated that the SCADA project could lead to a contract “likely” worth “\$250,000-\$500,000,” the effect of the governmental decision on Calcon would likely be material.

If Calcon does not fit within the type of business entities described in Regulation 18705.1(c)(3), however, Regulation 18705.1(c)(4) would apply. This regulation applies to all business entities that are not otherwise classified. The financial effect of a governmental decision is material on these business entities is material if it is reasonably foreseeable that:

The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

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 \$5,000 or more; or,

The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.

Regulation 18705.1(c)(4). Given the facts as you have described them, the financial effect of the governmental decision in this scenario would be material.

**Step Six: Is the material financial effect reasonably foreseeable?**

A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a mere possibility. (*In re Thorner, supra*, 1 FPPC Ops. 198.) On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

You have stated that, given the nature of the contract, and the limited field of potential bidders, Calcon is likely to bid on the project. In *In re Thorner, supra*, the Commission found that where there was “only a remote likelihood” that a business would be awarded the contract, the financial effect was not reasonably foreseeable. For example, if it were clear that the contract would be awarded to someone else, it would not be reasonably foreseeable that there would be a material financial effect. (*In re Thorner, supra*, 1 FPPC Ops. 198.)

The *Thorner* opinion stated the general rule that “when [a] bid is made with a serious hope that the contract will be awarded” to the bidder, a financial effect is reasonably foreseeable. (*Id.*) The opinion also cautions that when a competitive bid on a

project is being prepared, or has already been made, the public official's attention could focus on the benefit of his decision on the bidder (his [former] employer). (*Id.*) The evil to be avoided is giving Mr. Dickson the opportunity to participate in the RFP process where he could carve out a request that would perfectly match Calcon's qualifications, thereby securing for Calcon the contract. The ultimate test, as discussed in *Thorner*, is whether the public official's "unqualified devotion to his public duty" might be impaired. (*Id.*, quoting *People v. Darby* (1952) 114 Cal. App. 2d 412, 433.)

Given the facts as you describe them, the field of businesses that could conceivably be qualified to submit a proposal is quite limited. For this reason, it is reasonably foreseeable that Calcon, a company that has the specialization the contract will require, could be awarded the SCADA project. Consequently, Mr. Dickson has a disqualifying conflict of interest, under these facts, at least until November 30, 2007.

Once the District awards the contract, if the award does not go to Calcon, Mr. Dickson's conflict would dissolve.

**Step Seven: The Public Generally Exception.**

You have not offered any facts that suggest this exception applies, we therefore do not address it.

**Step Eight: Legally Required Participation**

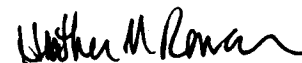
Section 87101 permits officials otherwise disqualified from making governmental decisions to participate in decisions when their participation is legally required. This is the case if a quorum cannot be achieved without the participation of disqualified public officials. In the situation that you describe, if Mr. Dickson has a disqualifying conflict of interest, he would not be able to assist in preparing the RFP.

A public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision. (Regulation 18708.) This situation does not rise to the level of "legally required participation" even though Mr. Dickson's job duties state that the District's general manager has "full charge and control of the maintenance, operation, and construction of the water works or water-works system of the district."

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

Sincerely,

Scott Hallabrin  
General Counsel



By: Heather M. Rowan  
Counsel, Legal Division