



FAIR POLITICAL PRACTICES COMMISSION

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September 18, 2008

Michael V. Sexton
Minasian, Spruance, Meith,
Soares & Sexton, LLP
1681 Bird Street
Oroville, CA 95965-1679

Re: Your Request for Advice
Our File No. -A-08-148

Dear Mr. Sexton:

This letter responds to your request for advice on behalf of the Tahoe City Public Utilities District general manager, Cindy Gustafson, regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ We base our advice solely on the provisions of the Act and do not address the applicability, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090. We urge you to contact your agency counsel regarding the application of these other conflict-of-interest laws, particularly Section 1090.

QUESTION

If the Tahoe City Public Utilities District (TCPUD) contracts with Auerbach Engineering Corporation (AEC), a company owned by the spouse of TCPUD General Manager Cindy Gustafson, will Ms. Gustafson have a conflict of interest in decisions affecting AEC, even if she refrains from participating in the engineering consultant selection process or the management of any contracts with AEC?

CONCLUSION

So long as Ms. Gustafson does not make, participate in making, or influence any decision financially impacting AEC, she will not have a conflict of interest under the Act based on her interest in her spouse's firm.

¹ 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.

FACTS

Ms. Gustafson is the general manager of TCPUD. In 2005, Ms. Gustafson married Mr. Wally Auerbach. Mr. Auerbach frequently makes bids to and provides services to TCPUD, under contract, through his engineering firm, AEC. Prior to 2005, while Ms. Gustafson and Mr. Auerbach were in a dating relationship, the TCPUD board of directors created a procedure whereby Ms. Gustafson would not engage in the selection process of AEC when it was considered by the board for a potential contract award. The procedure also called for an engineering consultant selection procedure that would have a standing committee, consisting of directors and staff, evaluate engineering consultants with the final selection to be made by the board of directors. Additionally, Ms. Gustafson signed a "declaration of non-participation," drafted by the board's counsel. You have asked whether this procedure is sufficient to avoid a conflict of interest.

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.

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 on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted a standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision, which is applied here. (Regulation 18700(b)(1)-(8).)

Step 1. Is Ms. Gustafson a public official?

A "public official" is every member, officer, employee, or consultant of a state or local government agency. (Section 82048.) A "local government agency" means a county, city or district of any kind, including a school district, or any other local political subdivision, or any county board commission. (Section 82041.) As the general manager of TCPUD, (a public utility district formed under the laws of California as a local government entity), Ms. Gustafson is a "public official" for purposes of the Act (see Sections 82048, 82041), and the conflict of interest rules apply to her.

Step 2. Will Ms. Gustafson be making, participating in or influencing a governmental decision?

The Act's conflict of interest provisions come into play only when a public official makes, participates in making, or in some way attempts to use his or her official position to influence a governmental decision in which the official knows - or has reason to know - that he or she has a financial interest (Section 87100.) Commission regulations describe in detail what constitutes making, participating in making, or influencing a governmental decision. (Regulations 18702.1, 18702.2, and 18702.3, respectively.) Ms. Gustafson clearly will be making, participating in making, or influencing a governmental decision if she votes and deliberates on decisions regarding TCPUD's engineering consultant selection process when AEC is being considered for a contract award or manages a contract with AEC.

You ask whether a procedure may be utilized to avoid Ms. Gustafson making, participating in making, or influencing a decision affecting AEC. We discuss this further below.

Proposed Procedure to Wall Ms. Gustafson off From AEC Decisions.

Having concluded that Ms. Gustafson will have a conflict of interest in decisions affecting AEC, you propose a methodology to ensure that Ms. Gustafson will not be making, participating in making, or influencing a governmental decision affecting her interests. This would be Ms. Gustafson's duty under the Act. According to your letter, whenever AEC has been or will be considered in a contracting decision Ms. Gustafson will remove herself from the engineering consultant selection process. Rather, engineering consultants will be evaluated by a standing committee consisting of directors and staff with the final selection to be made by the board of directors. In addition, you state that she will not participate in managing contracts with AEC. Assuming, under the procedure, Ms. Gustafson will not make, participate in making, or influence the decisions affecting AEC; she will not have a conflict of interest.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Amber Maltbie
Legal Intern, Legal Division

AM:jgl