

March 16, 1988

REPORT TO THE COMMITTEE ON RULES, LEGISLATION,
AND INTERGOVERNMENTAL RELATIONS
SAN DIEGO CONVENTION CENTER
CORPORATION FOOD AND BEVERAGE CONTRACT

At your meeting of February 17, 1988, you requested that we report back to you concerning several legal issues raised in connection with the San Diego Convention Center Corporation ("SDCCC") selection of Premier Food Services, Inc. ("Premier"), as SDCCC's catering and concessions services contractor. Each of these issues will be discussed separately.

QUESTION 1

Is there a conflict of interest on the part of SDCCC Board member Mateo Camarillo which would preclude his participation in the selection of Premier?

ANSWER 1

No. We do not believe that Mr. Camarillo is precluded from participating in the selection of Premier because of any conflict of interest.

FACTS

SDCCC issued a Request for Proposals ("RFP") late last year in order to find a suitable provider of food and beverage services for the Convention Center. A subcommittee of the Board was set up to evaluate the proposals which came in. Mr. Camarillo was a member of the subcommittee.

The field was narrowed down to three potential providers. One of the three was Premier, which is owned in part by Ballard Smith. Mr. Smith is also a member of the Board of Directors of the McDonald's Corporation. Premier was ultimately selected by the SDCCC Board by a 3 to 2 vote with Mr. Camarillo chairing the meeting and voting in favor of Premier.

Mr. Camarillo owns a franchise with the McDonald's Corporation. Mr. Camarillo's relationship with McDonald's Corporation is governed by a Franchise Letter Agreement and a Uniform Franchise Offering Circular (copies attached respectively as Exhibits A and B). We have been advised by McDonald's Corporation that the Board of Directors does not deal with the individual franchises. This was reiterated in a letter from Donald P. Horwitz, Executive Vice President-Law, for McDonald's Corporation, to Mr. Camarillo. A copy of that letter is attached to this report as Exhibit C. Mr. Camarillo does not now receive

nor has ever received any income from Premier.

ANALYSIS

We believe that members of the Board of Directors of SDCCC are governed by two separate bodies of law and policy with respect to potential conflicts of law. One body of law emanates from the State and is codified as the California Political Reform Act ("Act") Government Code sections 81000 et seq. (and regulations by the Fair Political Practices Commission ("FPPC") promulgated thereunder and Government Code section 1090.

The other body of law and policy is set forth in the San Diego Charter (section 94) and City Council Policy (#000-4). We shall examine them all in this context.

A. City of San Diego Conflict of Interest Provisions

City Charter section 94 reads in pertinent part: "No officer, whether elected or appointed, of the City of San Diego shall be or become directly or indirectly interested in, or in the performance of, any contract with or for the City of San Diego."

City Council Policy 000-4 states:

No elected official, officer, appointee or employee of the City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

Emphasis added.

Whether Mr. Camarillo is governed directly by City Charter section 94 is not free from doubt. However, we note that in the case of *City Council v. McKinley*, 88 Cal.App.3d 204 (1978), the Court of Appeals for the 4th District had little difficulty in finding the Charter section applicable to a member of the Park and Recreation Commission. Thus, we believe the Charter Section should be construed to cover members of SDCCC's Board. For purposes of this construction, we note that the City is the sole member of the Corporation and that appointments to the Board are made directly by the City Council.

We also note that (i) the proposed agreement for concession and catering services is not with or for the City, and (ii) there is no evidence that Mr. Camarillo has any direct or indirect interest in, or performance by, Premier. Thus, although Section 94 would seem to cover Mr. Camarillo, it would not preclude his participation or Premier's contract.

As to Council Policy 000-4, (specifically drafted at the request of the City Council by Assistant City Attorney C. M. Fitzpatrick in 1967) it is clear to us that it includes appointees such as Mr. Camarillo. That being the case, the test of its applicability to our factual situation seems to be whether the relationship between Mr. Smith as a Board of Directors' member of McDonald's Corporation and Mr. Camarillo as a McDonald's Corporation franchise holder establishes some "financial or other personal interest" connection which would bring 000-4 into play. In view of our analysis with respect to the applicability of various sections of the Political Reform Act, we think not.

B. State Law Conflict of Interest Provisions

The California Political Reform Act (the "Act") is codified in Government Code section 81000 et seq. The regulations adopted by the Fair Political Practices Commission ("FPPC") pursuant to the Act are codified at 2 California Code of Regulations, Division 6.

The Act prohibits a public official from making or participating in making a governmental decision in which he or she knows, or has reason to know to believe, that he or she has a financial interest. Government Code section 87100.

Government Code section 87103 explains the meaning of having a "financial interest" under section 87100.

An 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:

- (a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000);
- (b) Any real property interest in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more;
- (c) Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made;

A careful reading of the foregoing Government Code sections indicates to us that a public official does not have to legally disqualify himself from participating in a governmental decision unless several elements are present: (1) It must be reasonably foreseeable that there will be some financial effect resulting from the decision; (2) the financial effect must be on one of the interests described in Government Code section 87103; (3) the financial effect must be material; and, (4) the effect must be one that differs from the effect on the public generally. In re Thorner, 1 FPPC Ops. 198, 202 (1975).

Finally, Government Code section 1090 must be examined in the analysis of any conflict of interest on Mr. Camarillo's part. It states in pertinent part: ". . . City officers or employees shall not be financially interested in any contact made by them in their official capacity, or by any body or board of which they are members."

After examining the facts as known in light of the above-cited law, it does not appear that Mr. Camarillo had a financial interest in the selection of Premier so as to constitute a legal conflict of interest.

Under the Act, we do not see how it can be found to be reasonably foreseeable that Mr. Camarillo's vote for or against Premier would have a material financial effect on Mr. Camarillo's interest in his McDonald's franchise. While it is true that Mr. Smith sits on the Board of Directors of McDonald's Corporation, the Board does not manage or govern the individual franchises (see Exhibit C). There is only one situation in which the Board would become involved in an individual franchise and that is voting on management's recommendation that the Board approve or not approve the purchase of a franchise. Mr. Camarillo already owns his franchise.

Finally, Mr. Camarillo has no relationship with Premier. Whatever benefits which accrue to him as a result of Premier providing catering and concessions services to the Convention Center are no different than those that would accrue to the public at large.

QUESTION 2

What is the legality of negotiating the financial terms after selection of a proposal?

ANSWER 2

There is no legal preclusion to negotiating additional financial terms after the selection so long as the fundamental terms of the RFP are followed.

FACTS

Premier was selected by the Board by a 3 to 2 vote. The

majority vote was made with the understanding that additional negotiations with respect to the precise monetary terms and conditions should take place.

ANALYSIS

This analysis commences with the premise to which we have long adhered that there is no legal requirement to call for bids on service agreements such as we are considering here. The RFP process is a policy decision which seems to make good sense from a policy point of view.

However, it is our view that once the RFP process is commenced, it should be followed. If the RFP precludes any additional negotiations, that prohibition should be honored. If the RFP restricts additional negotiations, that limitation should be honored. If the RFP is silent on the subject, as appears to be the case here, there is no preclusion from adding terms and conditions consistent with the RFP. See *SAFE v. Superior Court*, 88 DAR 258.

QUESTION 3

Were proper voting procedures followed by the Board?

ANSWER 3

The voting procedure followed by the Board appears to comply with the Corporation's Bylaws.

FACTS

There are seven (7) members of the SDCCC Board. Two (2) disqualified themselves from voting on this issue, claiming a conflict of interest. The vote in favor of selecting Premier was 3 to 2.

ANALYSIS

Article III, section XI of SDCCC's Bylaws states:

A majority of the number of directors holding office shall be necessary to constitute a quorum for the transaction of all business except to adjourn, as hereinafter provided.

Every act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present shall be regarded as the act of the Board of Directors.

Five (5) of the seven (7) members were present at the time the vote was taken to chose a catering and concessions provider, thus giving the group a quorum. A majority of the five (5) voted for Premier. Under SDCCC's Bylaws, the voting procedure was proper.

QUESTION 4

Is the Board constrained from entering into a contract valued in excess of \$10,000 without City Council ratification?

ANSWER 4

The Board is not constrained under the provisions of the Operating Agreement. The contract monetary limitation in the Agreement is inapplicable to this situation.

LEGAL ANALYSIS

Section 2.06 of the Operating Agreement between The City of San Diego and the SDCCC reads in pertinent part:

Corporation shall not enter into any agreement for the provision of services by third parties in excess of ten thousand dollars (\$10,000) without the prior approval of the City Council. Corporation shall, without the prior approval of the City, have the right to enter into agreements and contracts which are consistent with the Approved Budget.

This section does not prevent SDCCC from entering into any contract over the amount of \$10,000 without prior City Council approval. It only prevents SDCCC from entering into contracts in which SDCCC is providing services in excess of \$10,000. Furthermore, assuming the contract for catering and concessions services was provided for in the Approved Budget, SDCCC had the right by agreement with The City of San Diego, to enter into the contract with a catering and concessions provider without prior City Council approval. The purpose of this clause is clearly to preclude the Corporation from expending funds or services without City Council approval and is irrelevant to the matter before us.

Respectfully submitted,

JOHN W. WITT

City Attorney

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Attachments-Exhibits(A),(B),(C)

RC-88-14