

August 24, 1989

REPORT TO THE COMMITTEE ON RULES, LEGISLATION,  
AND INTERGOVERNMENTAL RELATIONS  
CONFLICTS OF INTEREST IN AWARDING CONTRACTS AND REVIEWING BIDS

At its June 5, 1989 meeting, the Rules Committee asked the City Attorney to review the conflict of interest laws to set forth guidelines for the Council to follow in awarding contracts and reviewing bids. This is in response to that request.

Two (2) separate areas of the Government Code deal with conflicts of interest in contracts. The Political Reform Act of 1974 (Government Code section 87100 et seq.) deals with economic interests generally, including but not limited to contracts. The second deals exclusively with conflicts in governmental contracts and is located at Government Code section 1090 et seq. In addition, San Diego City Charter section 94 and Council Policy 000-4 also treat conflicts in City contracts. These laws and policy are discussed separately below.

Political Reform Act

The Political Reform Act (the "Act") was adopted by the people in 1974. The Act specifies when economic conflicts of interest prohibit a public official from participating in or making a governmental decision as follows:

Sec. 87100. Public Officials; State and  
Local.

No public official at any level of state or local government shall 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 (Government Code section 87100).

To determine whether a public official will be required to disqualify him or herself from participating in a governmental decision depends on examination of four factors:

- 1) Will the decision have a reasonably foreseeable,
- 2) material financial effect,
- 3) on the official's economic interest,
- 4) that is distinguishable from the effect on the public generally?

I. Is there an Economic Interest?

Generally, it is best to analyze the third factor before

turning to the other three factors, because there is no conflict if no economic interest (as defined by the statute) is affected by the governmental decision.

A. Types of Economic Interests.

The FPPC has recently issued a summary of the economic interests to which a public official should be sensitive. That summary is repeated below:

1. Any business entity in which the official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.
2. Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.
3. Any source of income aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within twelve (12) months prior to the time when the decision is made.
4. Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
5. Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within twelve months (12) prior to the time when the decision is made.

The FPPC stresses that not only the economic interest of the official, but also that of his or her spouse or dependent children is to be considered in determining whether conflict exists

B. Meaning of "knows or has reason to know".

If a public official knows or has reason to know that one of his or her economic interests as defined above may be affected by the governmental decision, then the official should go on to examine the other factors. The law does not impose strict liability on a public official to know under all circumstances whether one of his or her economic interests will be affected by the decision, nor does the law require the officer to inquire about every detail of every item on the Council docket.

However, it is fair to say that a public official would be

presumed to know what economic interests are listed on his or her latest Statement of Economic Interests (S.E.I.) and of any changes in his or her financial portfolio since the S.E.I. was last completed. Also, a public official would be presumed to know about relationships among large companies (whether parent companies or subsidiaries, holding companies, etc.), since that information is readily available from the financial columns of the local newspapers.

Whether a public official knows or has reason to know that a particular decision before the agency may affect one of his or her economic interests also depends on what information is provided to the official about the pending decision. In the case of contracts before the San Diego City Council, it is our understanding that the names of bidders are routinely set forth as part of the Council docket packets. Each Councilmember would be presumed to have knowledge of the materials either personally or through a staff person. If the Councilmember has doubts about whether a particular company who bid on a proposed contract coming before the Council for approval is related to a company listed on his or her S.E.I., then the Councilmember has a duty to inquire further as to the specific relationship and whether there would be a conflict arising because of the Councilmember's participation in the governmental decision.

II. Is there a "reasonably foreseeable material financial effect" in that economic interest?

Only after it is determined that an official knows, or has reason to know that his or her economic interest may be affected by a decision does one determine whether there will be a reasonably foreseeable material financial effect on that economic interest.

A. Meaning of "material financial affect".

The FPPC last year adopted revised rules that clarify the meaning of the term "material financial effect". 2 Cal. Code Regulations 18702 through 18702.6. A copy of those rules is attached for your convenience. Although complex and lengthy, these new rules set forth in a step-by-step process how "materiality" should be determined for each type of economic interest (income, investment or real property interest). Naturally, we stand ready to assist you in determining whether a particular economic interest would be affected materially within the meaning of these rules. These are provided for your reference and convenience.

B. Meaning of "reasonably foreseeable".

Even if a particular governmental decision results in a material financial effect on a public official's economic

interest, that alone is not a violation of the Act unless it was reasonably foreseeable before the governmental decision was taken that a material financial effect on the interest would result.

The term "reasonably foreseeable" is not defined in the statute or in FPPC regulations, but it was discussed at length by the FPPC in one of its early advisory opinions, In the Matter of Tom Thorner, 1 FPPC Opinions at 198 (1975). After reviewing both Federal and California cases that discuss the meaning of "reasonable foreseeability" in the conflict of interest area, the FPPC stated: "the question of whether financial consequences upon a business entity are reasonably foreseeable at the time a governmental decision is made must always depend on the facts of each particular case." 1 FPPC Opinions at 205. Although "the statute requires foreseeability, not certainty, . . . the ultimate test is whether the element of foreseeability, together with the other elements . . ., is present to the point that the official's 'unqualified devotion to his public duty' might be impaired." citation omitted. 1 FPPC Opinions at 206.

Therefore, we can provide no hard and fast rule to guide you in determining whether there are "reasonably foreseeable" material financial effects flowing from certain governmental decisions. Each determination will turn on the facts of a particular case.

III. Is the public generally affected in the same way?

Assuming that a public official's economic interest will be affected by the decision and that it is reasonably foreseeable that there will be a material financial effect on that economic interest, an official may still not be disqualified from participating in the decision if it can be shown that the public generally will be affected in substantially the same way.

A copy of FPPC regulation 18703 defining the phrase "public generally" is attached for your convenient reference. Whether the "public generally" exception applies will generally turn on the particular facts of a given situation. We will be happy to assist you in determining whether the exception applies to a particular fact situation.

Government Code Section 1090 and Charter Section 94.

Government Code section 1090 et seq. prohibits City officials from having financial interests in contracts to which the City is a party. San Diego City Charter section 94 also provides that no officer of the City may be directly or indirectly interested in a contract with the City. Charter section 94 has long been interpreted along the lines of Government Code section 1090 et seq.

As construed by the courts, Government Code section 1090

forbids both direct and indirect interests and prohibits both actual and potential conflicts of interest in City contracts. See, e.g., *People v. Vallerger*, 67 Cal. App. 3d 847, 865 (1977); *City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, 197 (1980).

The statute is designed to ensure that officials exercise absolute loyalty and undivided allegiance to the best interests of the City. *City Council v. McKinley*, 80 Cal. App. 3d 204 (1978).

Council Policy 000-4.

In treating the subject of actual and potential conflicts of interest regarding City contracts, we would be remiss if we did not mention Council Policy 000-4. This policy prohibits an "elected official . . . from engaging in any . . . transaction or . . . from having . . . a personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would have to impair his independence and judgment or action in the performance of such duties."

This is a policy, not a law, and may be waived by vote of the Council. This policy does not require disqualification from consideration of City contracts where there may be a conflicting personal interest. The policy does require, however, that a

Councilmember examine his or her own conscience to determine whether the personal interest would tend to impair his or her judgment in making the decision.

Respectfully submitted,  
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Attachments  
RC-89-34