MEMORANDUM OF LAW

DATE: June 19, 1989

TO: Councilmember Bruce Henderson

FROM: City Attorney

SUBJECT: Meaning of "Material Financial Effect/Conflicts of Interest

This is in response to your memorandum of June 6, 1989, containing follow-up questions regarding our Memorandum of Law dated June 5, regarding potential conflicts of interest in San Diego Data Processing Corporation's (SDDPC) telecommunication contract. First, you ask for a clearer copy of the recently revised Fair Political Practices Commission regulations defining the term "material financial effect." A copy is attached.

Second, you question whether the Council's action of May 30 was sufficient to create a conflict of interest for you by virtue of your ownership of GTE's stock. You characterize the Council's action as: "SDDPC was requested to seek additional expert advice in reviewing their bid evaluation procedures prior to actually awarding the telephone contract bid". You point out in your memo that "no award was made by the Council, nor was any bidder rejected by Council." Specifically, you query: "Is it sufficient to create a conflict that the Council's action simply made it possible for GTE to continue, along with every other bidder, to participate in the bidding process?"

The essential issue underlying your question is whether the City Council attempted to "influence" a governmental decision made by another governmental agency, SDDPC. We agree that the Council did not by its May 30 action directly affect a City contract, and hence did not "participate in a governmental decision" within the meaning of the law. However, as shown in FPPC Regulations 18700 and 18700.1 attached to the June 5 memo, the regulation defining "influencing a governmental decisions" is very broad. The definition clearly includes attempts by City Councilmembers to influence the award of a contract by one of its wholly owned corporations, such as SDDPC. Even though the Council did not and could not legally direct SDDPC to award the contract to one bidder over another, there was clear dissatisfaction on the part of the Council with the manner in which SDDPC had selected the final bidder, Siemens/Tel Plus. The upshot of the Council action and discussion was to encourage SDDPC to reconsider its procedure and allow all seven (7) bidders to submit further bids ("final best offers"). In other words, the Council action was a measure to encourage SDDPC to allow six (6) disappointed bidders, GTE included, another bite of the apple.

The second issue underlying your question relates to the relative level of certainty required to find that there will be a financial impact on an official's economic interest resulting from a particular governmental decision. The test to determine whether there is a conflict under Government Code section 87100 and 87103 is whether it is reasonably foreseeable that a governmental decision will have a material financial effect on one of the official's economic interest. 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.

In your memorandum, you emphasize that the statute uses the term "will have", not "might have", or "could have". The statute reads in relevant part: "An official has a financial interest in a decision . . . if it is reasonably foreseeable that the decision will have a material financial effect . . ." on certain economic interests. Government Code section 87103. The cases and regulations focus their attention on the phrase "reasonable foreseeability", not the term "will have". As the Thorner opinion points out, the statute requires not certainty, but foreseeability. Whether there is in fact a conflict depends on the facts of a given case.

Since in the present case it was foreseeable at the time of the May 30 vote that the Council's actions would result in the SDDPC bidding process being reopened to allow all seven (7) bidders (including GTE as one of the original six (6) disappointed bidders) to rebid on an admittedly lucrative contract ($12-18 million), we concluded on those facts that the action created a reasonably foreseeably material financial effect on one of your economic interests, GTE.

Last, you query whether the conflict provisions would apply if you had voted to deny the contract to GTE to its detriment. As the attached regulation 18702.2 on "materiality" points out, the effect of a decision is considered material on a business entity in which a public official has an economic interest if the decision results in an increase or decrease in revenues. Therefore, the answer to your question is "yes".

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:jrl:048(x043.2)

Attachments

ML-89-65