

June 25, 2009

SDEC Informal Advice Letter No. IA09-02

Beatrice Kemp
General Counsel
San Diego Convention Center Corporation
111 W. Harbor Drive
San Diego, CA 92101

Re: Request for Advice Regarding the San Diego Convention Center Corporation's
Contract Delegation Policy

Dear Ms. Kemp:

This advice letter responds to your e-mail to the City of San Diego Ethics Commission dated June 11, 2009. You seek general advice from the Ethics Commission regarding the provisions of the City's Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. In particular, you are seeking the Commission's assistance regarding the application of the Ethics Ordinance to San Diego Convention Center Corporation [SDCCC] Policy #506 (Delegation of Authority to Contract and Execute Documents on Behalf of SDCCC). Because you have not identified a specific SDCCC contract, we are treating your letter as a request for informal advice.

QUESTION

Is a contract issued pursuant to and in accordance with SDCCC Policy #506 insulated from the prohibition on a member of the SDCCC Board of Directors having a financial interest in SDCCC's contracts if the Board of Directors does not participate in the contracting process?

SHORT ANSWER

The City's Ethics Ordinance, at San Diego Municipal Code section 27.3560, prohibits members of the SDCCC Board of Directors from being financially interested in any contract made by them in their official capacities. Even if a conflicted member of the Board recuses himself or herself from participating in all aspects of the contract, the Board itself is still legally precluded from making the contract. SDCCC Policy #506, however, provides the SDCCC President and Chief Executive Officer [CEO] with independent contracting authority. A contract made by the CEO pursuant to Policy #506 without the review, oversight, approval, affirmation, or ratification of the SDCCC Board is not a contract "made" by the Board. Accordingly, a contract so made by the CEO will insulate the Board and its members from the prohibitions contained in Municipal Code section 27.3560.

BACKGROUND

You hold the position of General Counsel for SDCCC, which is a non-profit public benefit corporation created by the City of San Diego to manage and market the San Diego Convention Center. A nine-member Board of Directors [Board] comprised of business and community leaders establishes policy for the SDCCC. The Board has the authority to employ, supervise, and terminate the CEO.

You advised us that there is no specific legislation authorizing SDCCC to enter into contracts. Instead, the authority to contract is inherent in the corporation's power to conduct business. On April 27, 2007, the Board adopted Policy #506, entitled Delegation of Authority to Contract and Execute Documents on Behalf of SDCCC. The purpose of the Policy was to memorialize SDCCC's practice of delegating to its CEO the authority to execute contracts on SDCCC's behalf.¹ Under Policy #506:

The President and Chief Executive Officer shall be authorized to make and enter into all contracts, licenses, and other legal agreements, and to execute legal documents on behalf of the corporation. Subject to the spending limitations set forth in Policy 301: Procurement, action by the board of directors shall not be required to create a legally binding obligation for the corporation.

Nothing in the Policy requires the Board to validate a contract negotiated by the CEO by voting to affirm it. To the contrary, the above language expressly states that contracts made by the CEO are valid and binding without any action of the Board.

Policy #506 also contains the following language:

Notwithstanding its delegation of authority as set forth in this policy, the board of directors shall retain the right to direct the President and Chief Executive Officer, through the Chair of the Board, to present a particular contract or legal document to the board of directors for its approval.

You informed us that neither the Board nor its Chairperson evaluate each SDCCC contract for the purpose of deciding whether the Board should, or should not, exercise approval rights over the contract. Instead, the CEO will typically negotiate contracts without any involvement or oversight by the Board or the Board's Chairperson. You stated that the above language was placed within Policy #506 to address contracts that have a high profile or a particularly long term and might warrant special consideration by the Board. When such situations arise, the CEO may advise the Board of the existence of the contract and recommend that it engage in making the contract. Even without such intervention by the CEO, however, the above language unambiguously reserves to the Board the authority to approve any SDCCC contract.

¹ Policy #506 limits the CEO's contracting ability to specific dollar thresholds identified in SDCCC Policy #301, Procurement: "\$100,000 for expenditures pursuant to an Approved Budget, and not to exceed \$25,000 for unbudgeted expenditures when the funds are available from cost savings in an Approved Budget."

Your request for advice seeks to know whether adherence to Policy #506 will insulate the SDCCC Board and its members from the conflict of interest provisions contained in the Ethics Ordinance, particularly the provisions set forth in SDMC section 27.3560.

ANALYSIS

A. *General Prohibition*

The Ethics Ordinance's conflict of interest rules are derived from the state's Political Reform Act and the provisions of Government Code section 1090, et seq. Accordingly, we interpret our rules to be consistent with those set forth at the state level. Your question concerns the inability of the Board to enter into a contract when one of its members is financially interested in that contract. This particular prohibition is set forth in SDMC section 27.3560. "It is unlawful for any City Official to be financially interested in any contract made by them in their official capacity." SDMC § 27.3560(a).² As members of a City agency's board of directors, SDCCC's Board members are considered "City Officials" under the City's Ethics Ordinance. SDMC § 27.3503. Because SDMC section 27.3560 was derived from Government Code section 1090, we therefore look to interpretations of section 1090 set forth in case law and in the Opinions of the California Attorney General's Office.

The purpose of section 1090 is to ensure that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." *Thomson v. Call, supra*, 38 Cal. 3d 633, 650 (1985). A violation of section 1090 does not require that an official intend to defraud the government or otherwise profit from his or her official participation in a contract. Instead, section 1090 is intended to achieve "the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance." *Id.* at 648. The purpose of these prohibitions against "self-dealing" is to "remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official's decision." *Stigall v. City of Taft*, 58 Cal. 2d 565, 569 (1962).

B. *Application of Prohibition to SDCCC Board of Directors*

Under Government Code section 1090, when a member of a city council, board, commission, or similar body is financially interested in a contract, the body on which he or she sits may not enter into that contract, even if the interested member refrains from all aspects of making that contract. "Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council." *Thomson*, 38 Cal. 3d 633 at 649. Thus, under both SDMC section 27.3560 and Government Code section 1090, when a member of the SDCCC Board is financially interested in a contract, the Board may not enter that contract even if the interested Board member recuses himself or herself from all involvement in making that contract. "When section 1090 is applicable to one member of the governing body of a public entity, the prohibition cannot be avoided by having the interested

² For purposes of this advice letter, we will presume that any "financial interest" at issue is not a "remote interest" or "non-interest" under California Government Code sections 1091 and 1091.5, respectively.

board member abstain; the entire governing body is precluded from entering into the contract.” 89 Op. Cal. Att’y Gen. 68 (2006). “Section 1090 constitutes an absolute bar to the formation of a contract by the officer or board, and its terms cannot be avoided by having the financially interested officer or board member abstain from participating in the making of the contract.” 92 Op. Cal. Att’y Gen. 26 (2009).

Your question requires us to evaluate SDCCC Policy #506 in light of the above prohibitions. Does delegation of the Board’s contracting authority to the CEO allow SDCCC to enter into a contract notwithstanding a Board member’s financial interest in the contract? Stated another way, does the delegation of contracting authority effectively remove the Board from the making of a SDCCC contract for purposes of SDMC section 27.3560? For example, may the CEO lawfully bind the SDCCC to a contract with a vendor if one of the Board members has an ownership interest in that vendor? For the reasons set forth below, we conclude that Policy #506 does allow for the making of such contracts.

According to Opinions issued by the California Attorney General, contracts not under the jurisdiction of a board member may avoid the prohibitions of section 1090. For example, in 57 Op. Cal. Att’y Gen. 458 (1974), the California Attorney General evaluated the legality of a county supervisor contracting with the county to provide tow truck services. Although the board of supervisors could not enter into a contract with one of its members, the Opinion concluded that a county purchasing agent could lawfully make that contract on behalf of the county because the agent had independent contracting authority. “The fact that the board hires [the agent] and sets his compensation makes no difference.” *Id.*

In 85 Op. Cal. Att’y Gen. 87 (2002), the California Attorney General evaluated whether the prohibitions of section 1090 would bar a member of the Glendale City Council, in his private capacity, from contracting with a joint powers authority created in part by the City of Glendale. After finding that the Glendale City Council did not “attempt to influence the [joint powers authority] Board in any way concerning developing, negotiating, executing, or performing any contract,” the Opinion concluded that “under these circumstances, the proposed contract cannot be said to be ‘made’ by the Glendale City Council for purposes of section 1090.”

The facts in the two above-cited Opinions are comparable to those in the SDCCC delegation policy to the extent that the SDCCC Board does not participate in any manner in the crafting and executing of a contract. If the SDCCC CEO can enter into a contract without any review, oversight, approval, affirmation, or ratification of the contract by the Board, then the CEO’s independent status will insulate the Board from the making of the contract and from the prohibitions of SDMC section 27.3560.

Other Opinions issued by the office of the California Attorney General reached comparable conclusions. In 81 Op. Cal. Att’y Gen. 274 (1998), it determined that contracts of the County Housing Authority Commission were independent from the County Board of Supervisors and therefore could employ a member of the Board of Supervisors as its executive director without violating section 1090. In 21 Op. Cal. Att’y Gen. 90 (1953), the California Attorney General opined that contracts executed by a city treasurer were not under the supervision or control of the city council and could therefore be lawfully executed notwithstanding a financially interested

member of the city council. The Opinion states that “It is true that the council is responsible for the appointment and removal of the Treasurer, but the relationship between one member of the council and the Treasurer is no less remote than that of a legislator and an agency of the State Government” (referring to 14 Op. Cal. Att’y Gen. 78 (1949), which found that a state legislator could contract with other state offices.)

The Opinions discussed above can be distinguished from those that reached a different conclusion. In 87 Op. Cal. Att’y Gen. 9 (2004), a school board delegated its contracting authority to a superintendent. The California Attorney General determined that the delegation of authority did not relieve the school board from the scope of 1090. The Opinion points out that the California Education Code requires the school board to affirm every contract by a formal vote of the board. “When the board affirms an act that has been delegated to a subordinate, the act becomes the act of the board itself.” *Id.* Similarly, in 88 Op. Cal. Att’y Gen. 122 (2005), the California Attorney General concluded that a city administrator who executed contracts on behalf of a city did not have independent contracting authority (contract terms were ultimately reviewed and controlled by the city council), and members of the city council were therefore not insulated from the provisions of section 1090. The existence of an independent contracting authority, lacking in these two Opinions, is clearly present with SDCCC. There is no requirement that a contract decision made by its CEO be affirmed by a vote of the SDCCC Board. Instead, as Policy #506 states, the SDCCC Board expressly granted to its CEO the power to enter into a legally binding contract without any action by the Board.

The key issue, as emphasized in all of the above-cited California Attorney General Opinions, is the independent status of the party contracting on behalf of the governmental agency. If the SDCCC CEO (assuming of course that such individual has no financial interest in the contract himself or herself) has the authority to make the contract without any involvement by the Board, then no member of the Board will be put in a situation where their loyalty or allegiance to SDCCC can be questioned. As stated above, Government Code section 1090’s goals are to eliminate temptation, avoid the appearance of impropriety, and ensure that public officials have undivided and uncompromised allegiance to their constituency. These goals are met when the financially interested Board member, and the Board itself, have no role in making or influencing a contract. In other words, they cannot be tempted to make a self-serving decision when they are not making a decision to begin with. In sum, the rationale for the section 1090 prohibition, and the corresponding provisions of SDMC section 27.3560, would not be served by applying these laws to a situation where the conflicted member and the Board on which he or she sits play no role in the decisionmaking process.

C. Reservation of Contracting Authority

It must be noted that the above conclusion would change dramatically if the Board became involved in making a contract decision. As stated above, Policy #506 contains language reserving to the Board the power to review and approve any particular contract. The applicable language states that notwithstanding its delegation of contracting authority to the CEO, the board “shall retain the right to direct the [CEO] . . . to present a particular contract or legal document to the board of directors for its approval.” Although you indicated that SDCCC contracts are routinely made by the CEO without the Board or the Board’s Chairperson weighing in on

whether the Board should, or should not, be involved in the making of a particular contract, the fact remains that the Board does have the right to request that the CEO present any contract to the Board for its approval. Inherent in that right is the power to decide not to request approval of a contract, a decision that impliedly authorizes the making of the contract.

Clearly, any exercise of the Board's right to approve a contract, either expressly or by implication, would cause the CEO's independent contracting authority to vanish. Thus, if a member of the Board has a financial interest in a contract that the Board has removed from the exclusive control of the CEO (by making or influencing any decisions regarding the contract, including a decision that the Board will not exercise its approval rights under Policy #506), then that contract would run afoul of SDMC section 27.3560. Only when the contract is made through the CEO's independent contracting authority, without any involvement by the Board, will the contract avoid the prohibitions described above. To avoid an application of section 27.3560, therefore, the Board must be careful to not only refrain from expressly approving or influencing the contract but also from making any decisions regarding whether the contract should come within the Board's purview.

CONCLUSION

Members of the SDCCC Board may not be financially interested in a contract made by them in their official capacities. Moreover, the SDCCC Board may not make such a contract even if its conflicted member recuses himself or herself from participating in all aspects of the contract. On the other hand, under SDCCC Policy #506, the CEO has independent contracting authority and may bind SDCCC to a contract without any review, oversight, approval, affirmation, or ratification by the Board. Because a contract made by the CEO pursuant to Policy #506 without the review, oversight, approval, affirmation, or ratification of the SDCCC Board is not a contract "made" by the Board, such a contract will insulate the Board and its members from the prohibitions contained in Municipal Code section 27.3560. Such insulation will disappear, however, if the Board exercises its contract approval rights or otherwise acts, or chooses not to act, in any manner that diminishes the CEO's independent contracting authority.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

Sincerely,

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General Counsel

By: Stephen Ross
Program Manager-Technical Assistance