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Mike Madigan, Chairman, and
Members of the
Bay-Delta Advisory Council

RE: Conflict of Interest in Contracting

Dear Chairman Madigan and BDAC members:

This letter provides a brief summary of key provisions of California law governing conflicts of interest, focusing specifically on potential conflicts arising out of government contracts. Because the topic is complex, the summary which follows should be considered an introduction rather than an exhaustive study.

Conflicts of Interest Provisions Under the Political Reform Act of 1974 (Gov. Code §87100, et seq.)

Public officials are disqualified from participating in government decisions in which they have a financial interest. The disqualification provision of the act hinges on the effect a decision will have on a public official's financial interests. When a decision is found to have the requisite effect, the official is disqualified from making, participating in the making, or using his or her official position to influence the making of that decision at any level of the decision making process.

Public official means elected and appointed officials, and any "member, officer, employee or consultant of a state or local government agency." (§82048.) The Fair Political Practices Commission has interpreted this act to apply to the members of all boards or commissions, whether salaried or not, with decision-making authority. A board or commission possesses decision-making authority whenever:

1. it may make a final governmental decision;
2. it may compel or prevent the making of a governmental decision by its action or inaction; or

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3. its recommendations are routinely and regularly followed. The difficulty in applying this standard involves the determination of whether the board or commission in question has established a track record of having its recommendations regularly or routinely adopted.

BDAC is advisory in nature. It does not possess the ability to make final governmental decisions or to compel or prevent the making of a governmental decision. BDAC, therefore, does not meet the first two tests for possessing decision-making authority. BDAC was established relatively recently, and has not, as yet, developed a "track record" of having its recommendations routinely adopted by governmental decision-makers. For these reasons, the Political Reform Act probably does not apply to BDAC members at this time. However, the basic prohibition against self-dealing in contracting is applicable to BDAC members as described below.

Conflicts of Interests in Contracts: Government Code Section 1090, et seq.

Government Code §1090 basically prohibits a public official from being financially interested in a contract or sale in both his or her public and private capacities. The section provides that an officer or employee may not make a contract in which he or she is financially interested.

Any participation by an officer or an employee in the process by which such a contract is developed, negotiated and executed is a violation of this provision. The courts have defined the making of a contract to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. (Millbrae Assn. for Residential Survival v. City of Millbrae (1968) 262 Cal.App.2d 222.)

The prohibition applies to virtually all state officers, employees, consultants, and multi-member bodies whether elected or appointed. The courts have applied the prohibition contained in section 1090 to advisory positions to contracting agencies. (Schaefer v. Berinstein (1956) 140 Cal.App.2d 278; City Council v. McKinley (1978) 80 Cal.App.3d 204.)

A board member is conclusively presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified himself or herself from any and all participation in the making of the contract. (Thomson v. Call (1985) 38 Cal.3d 633, 645, 649.) There is no recusal option from §1090 requirements in this situation.

The following economic relationships generally constitute a financial interest: employee of a contracting party; attorney,

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agent or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; officer or employee of a nonprofit corporation which is a contracting party.

There are exemptions for remote interests (§§1091, 1091.5) or noninterests (1091.5). Examples of remote interests include:

- a member of a nonprofit corporation formed under the Agricultural Code or the Corporations Code for the sole purpose of selling agricultural products or supplying water. (§1091(b)(7).)
- an engineer, geologist, or architect in a consulting, engineering, or architectural firm if he or she does not serve as an officer, director, or in a primary management capacity. (§1091(b)(11).)

Examples of noninterests include a public official who is a nonsalaried member of a nonprofit corporation provided the official's interest is disclosed to the body or board at the time the contract is first considered and is noted in its official records. (§1091.5(a)(7).)

A contract made in violation of §1090 is void and cannot be enforced. In addition, an official who commits a violation may be subject to criminal, civil and administrative sanctions. Such an official is forever disqualified from holding any office in this state.

Recent court decisions underscore the adverse consequences of violating section 1090, to government bodies and individual decision-makers alike. In Thomson v. Call, supra, 38 Cal.3d 633, for example, a city councilmember had sold a parcel of land to a third party, which in turn re-sold the property to the city. Despite the fact that the councilmember had abstained from the council vote which authorized the latter sale and had acted throughout in good faith, the California Supreme Court concluded that he had violated section 1090. As a sanction, the Court required the forfeiture of the councilmember's entire sales price for the parcel--\$258,000. (38 Cal.3d at 646-652.) The Supreme Court reached this harsh result based on the perceived importance of strictly enforcing state conflict of interest laws such as section 1090.

In People v. Honig (1996) 48 Cal.App.4th 289, the State Superintendent of Public Instruction was found guilty of violating section 1090 by entering into official contracts in which he had a financial interest. Superintendent Honig was criminally convicted of this offense, and eventually was required to relinquish his public office as a result.

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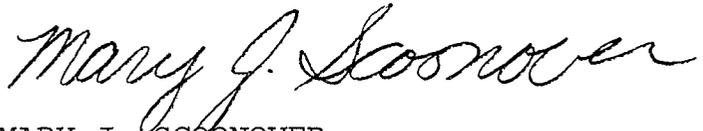
Conclusion

This letter summarizes key provisions of California law governing conflicts of interest in contracts. Hopefully it will provide general guidance to BDAC members. Invariably, however, decisions about whether a particular conflict exists and what is legally required in light of such a conflict requires the application of the above-described principles to particular facts.

It is appropriate when those concerns arise to discuss them with me at the earliest practicable time.

Sincerely,

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