

Fresno County Civil Grand Jury Report No. 1
April 12, 2022
CONFLICT-OF-INTEREST WITHIN COUNTY CONTRACTING
UNDERMINES PUBLIC TRUST

SUMMARY

An investigation by the 2021-2022 Fresno County Civil Grand Jury found that conflict-of-interest regulations and guidance are not always followed by the County of Fresno (County) in awarding construction consulting contracts.

The Grand Jury concluded that in the interest of public confidence and the integrity of the purchasing process, the County, its citizens and vendors need to be better protected from conflicts of interest. The County should re-evaluate its conflict-of-interest policies and procedures with an eye toward a better understanding of the regulations by all parties, to enhance training of County employees at all levels, and achieve consistent accountability.

GLOSSARY (the following definitions were used by the Grand Jury for this investigation)

California Political Reform Act: California Government Code §81000 et. seq. regulates conflicts of interest by state and local government officials, including the basic prohibition in §87100 (see Appendix 1), requiring annual disclosure of financial interests on Form 700 (§87200), and adoption of agency conflict of interest codes (§87300-303)

Conflict-of-interest: Occurs when a government employee's personal or financial interest conflicts or appears to conflict with the employee's responsibility.

Consulting contract: An agreement between a private professional engineering or architectural company and the County that specifies services, duration, and rate of compensation, to supplement the skills and capacity of the County staff. The terms and scope of work of the agreement range from simple to very complex.

Fair Political Practices Commission (FPPC): The California state agency responsible for implementing the process, interpreting statutes and issuing the Form 700.

Form 700 (Statement of Economic Interests): California Government Code Section 87200 requires elected and appointed officials, candidates and most state and local government officials and employees who make or participate in the decision-making process to publicly disclose their personal assets and income on this form annually. These public officials and employees must also disqualify themselves from participating in decisions that may affect their personal economic interests. The FPPC is the California state agency responsible for the Form 700.

Form A (Quarterly Gifts and Gratuities Form): A County reporting requirement, Form A is required by Board of Supervisors Administration Policy Number 1 (AP01) to be completed quarterly by County-designated elected officials and public employees who make or influence County decisions. This is in addition to the annual requirement to complete the Form 700.

NEOGOV: A cloud-based public-sector software application used by the County Department of Human Resources (HR) that automates and supports HR processes, initiatives, and recordkeeping.

Ombudsman: An appointed official who investigates complaints (lodged by private citizens, or employees) against businesses, financial institutions, universities, government departments, or other public entities, and attempts to resolve conflicts or concerns raised, by mediation, policy changes, or recommendations for other action.

On-call contract: An agreement with a company with a particular construction discipline (e.g.: electrical, mechanical, environmental, structural engineering, etc.) to be available to

perform the required service. On-call contracts allow the County to mobilize professional services quickly and easily under pre-negotiated terms and conditions, when time is of the essence or because the County is unable to provide or perform those services. On-call contracts are not funded when awarded, have no guaranteed work, and are intended to engage professionals on short notice.

Whistleblower: A person, often an employee, who exposes information or activity within a private, public, or government organization that is alleged to be illegal, illicit, unsafe, fraudulent, or a misuse of taxpayer funds.

HISTORY

The 2021-2022 Fresno County Grand Jury received a citizen complaint that a County contract was awarded to a firm in which one of the principals is closely related to the County official who recommended the award. The Grand Jury was told that throughout 2017 and 2018, the County was reviewing possible locations for a new Sheriff's Department substation to service Area 2 and replace a facility on Shields Avenue near Clovis Avenue that has been leased for more than 30 years. A developer proposed a property in the vicinity of Belmont and Armstrong avenues for a County-owned facility to serve Eastern Fresno County and offers easy access to and from Highway 180.

In early 2019, the developer provided a set of preliminary plans for this project with an architect and a list of consulting engineers. The Grand Jury was informed that only one engineering consultant desired to continue on for the final design and construction phase of the project. All other consultants were replaced by contractors selected by the County. On August 24, 2020, the County awarded a construction contract for an estimated \$14 million. Ground was broken on September 28, 2020; and completion is anticipated in 2022.

BACKGROUND AND IMPACT

Conflicts of interest in the public sector are particularly important because, if they are not recognized and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, agencies, and governments.¹

METHODOLOGY

During its investigation, the Grand Jury interviewed current and former County employees with knowledge of the project, and reviewed architectural drawings, contracts and other documents related to the project. In addition, the Grand Jury inquired about and reviewed the County's conflict-of-interest policies, training, processes and enforcement within the County. The Grand Jury researched relevant California laws, California Attorney General Opinions, the Fresno County Charter, policies of other California counties, and guidelines governing ethics and standards of several professional associations.

DISCUSSION

The Grand Jury reviewed the information available to guide County employees regarding conflict-of-interest matters that may arise during the performance of their responsibilities. These sources include the following:

Fresno County Ordinance Code Section 4.10.030(B) (see appendix 1, C) B. **Prohibited Practices.** County employees shall not engage in practices which might result in unlawful activity including, but not limited to, rebates, kickbacks or unlawful consideration.

In addition, county employees shall not participate in the selection process when those

employees have a relationship with a person or business entity seeking a contract under this chapter which would subject those employees to the prohibition of Section 87100 of the Government Code.

Fresno County Board of Supervisors Administrative Number Policy 1 (see Appendix 2) states in pertinent part that the Board of Supervisors, all County employees, including elected officials, and classified and unclassified personnel should “NEVER discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for one’s self or family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of one’s governmental duties.

Fresno County Charter Section 41 (see Appendix 1, B), does not specifically state what actions constitute a conflict-of-interest for county employees, creating a situation where employees might find themselves in a conflict-of-interest situation during the normal course of business.

Fresno County Charter Section 41 (Section 41) seems unnecessary in light of state law (Gov. Code §1090) and other County ordinances (§4.10.030) and policies (AP01). If the County were to amend Section 41 to conform to current state law, it would have to do the same in the future if the state conflict of interest laws were to change. The simplest method is to delete Section 41 completely and state that the County will conform to all state ethics laws. This would clarify what constitutes a conflict-of-interest for all County employees, especially those who may be confronted with the possibility of a conflict in daily operations. The Grand Jury understands repeal of the County Charter Section 41 is not a simple task because it cannot be done administratively, but instead requires agreement of Fresno County voters after being placed on a ballot by the Fresno County Board of Supervisors in a County-wide election.

At the time the Grand Jury began its investigation, ethics training in the County was given only to elected officials and specific members of Boards, Commissions and Committees, in accordance with Assembly Bill 1234 (AB1234), and to the County Administrative Officer (CAO) and Department Heads. No other training, either initial or recurring, was provided regarding conflict-of-interest for other County managers, supervisors, or employees, especially for those employees in positions where conflicts of interest might occur. The Grand Jury was told that HR agrees that there are deficiencies in ethics training, and is working to correct the situation. The Grand Jury found that there is no single specified official, office or counselor for a County official or employee to consult regarding a real or potential conflict-of-interest. Instead, the County Counsel and Director of Human Resources share the responsibility for information relating to conflicts of interest in the County. Currently, County Counsel has assigned a different staff attorney to work with each individual department relating to legal matters and conflicts-of-interest.

The Grand Jury learned that Fresno County has no defined process or Department or official designated as an “ombudsman” to receive or process whistleblower complaints relating to conflicts of interest. A County ombudsman would be an important protection for persons who see or find unethical conduct in the County.

While conflicts of interest do not appear to be a widespread issue for the County, the conflict of interest situation alleged in the citizen complaint received by the Grand Jury was not an isolated case. The Grand Jury is aware that in February 2022, a former Board of Supervisors staff member was sentenced for a state law conflict-of-interest violation.

In discussions with the Fresno County Human Resources Department, the Grand Jury learned that it has been reviewing ethics and conflict-of-interest issues within the County and Human Resources has independently arrived at the conclusion that the County ethics policies, procedures, and training need revision and updating.

It is important that Fresno County Human Resources complete these actions to enhance the integrity and public trust of Fresno County government.

FINDINGS

- F1.** The Fresno County Charter, Section 41 (see Appendix 1, B), does not specifically state what actions constitute a conflict-of-interest for County employees.
- F2.** The Grand Jury recognizes the energy and effort that is necessary to repeal the County Charter, Section 41. However, it is felt that the current situation of both a County Charter Section and conflicting State statutes is cumbersome, unnecessary and inefficient.
- F3.** Required ethics training (AB 1234) in the County is limited to elected officials, specific members of boards, commissions, committees, the CAO and Department heads.
- F4.** There was no other required initial or recurring training regarding conflict-of-interest for managers, supervisors and employees, especially among those employees in positions where conflicts of interest might occur.
- F5.** There was no single specified official, office or counselor for a County official or employee to consult regarding a real or potential conflict-of-interest.
- F6.** Fresno County has no defined process or Department of official designated as an ombudsman to receive or process whistleblower complaints relating to conflicts-of-interest.
- F7.** The Grand Jury believes that a County Ombudsman would provide a protected environment and process to report issues without the fear of reprisal or adverse actions.
- F8.** The Grand Jury commends County HR for moving forward with ethics training for all County employees in an expeditious and professional manner, including the review of reporting requirements for FPPC Form 700 and County Form A.

RECOMMENDATIONS, the Grand Jury recommends:

- R1.** The County Board of Supervisors should propose the repeal of County Charter, Section 41 in favor of reliance on established California ethics laws, during the next County-wide general election. (Not later than November 2024) (See F1 and F2)
- R2.** The County Department of Human Resources should continue to develop and present to all County officials and employees, both initial and recurring (annual) training with regard to conflict-of-interest and ethics, with special emphasis being placed on those employees in designated positions most susceptible to conflict-of-interest situations. This training should be available by December 31, 2022. (See F3 and F4)
- R3.** The County Board of Supervisors should appoint a public official, Department or counselor, specifically designated to review possible conflict-of-interest situations and make recommendations to the County officers and employees or Departments involved and for them to act accordingly. This should be accomplished by December 31, 2022 (See F5)
- R4.** The County Board of Supervisors should appoint a County Ombudsman and develop a process to receive ethics complaints which will protect the private citizen, public official, or employee bringing the complaint to light. This should be accomplished by December 31, 2022 (See F5, F6 and F7)

REQUEST FOR RESPONSES

Pursuant to California Penal Code, Section 933(a), the Fresno County Grand Jury requests responses to each of the specific findings and recommendations. It is required that responses from governing bodies of public agencies are due within 90 days of the receipt of this report and 60 days for elected county officer or agency heads.

The Fresno Grand Jury requests responses as follows:

- Fresno County Board of Supervisors and County Administrative Officer (CAO) (F1, F2, and F5, and R1, R3, and R4).
- Fresno County Department of Human Resources (F3, F4 and R2)

DISCLAIMER

Reports issued by the Grand Jury do not identify individuals interviewed. Penal Code Section 929 requires that reports of the Grand Jury not contain the name of any person or facts leading to the identity of any person who provides information to the Grand Jury.

Endnotes:

¹ Managing Conflict-of-interest in the Public Sector, A Tool Kit; page 7; Organization For Economic Co-Operation And Development, OECD Publishing, ISBN 92-64-01822-0 ; 2005

APPENDIX 1 REFERENCES

A. APPLICABLE CALIFORNIA STATUTES

California Government Code §1090.

(a) Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

(b) An individual shall not aid or abet a Member of the Legislature or a state, county, district, judicial district, or city officer or employee in violating subdivision (a).

(c) As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

(Amended by Stats. 2014, Ch. 483, Sec. 1. (SB 952) Effective January 1, 2015.)

California Government Code §1097.

(a) Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of the provisions of those laws, is punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.

(b) An individual who willfully aids or abets an officer or person in violating a prohibition by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, is punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.

(Amended by Stats. 2014, Ch. 483, Sec. 3. (SB 952) Effective January 1, 2015.)

CA. Gov. Code 87100

A public official at any level of state or local government shall not make, participate in making, or in any way attempt to use the public official's official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.

(Amended by Stats. 2021, Ch. 50, Sec. 190. (AB 378) Effective January 1, 2022.)

B. FRESNO COUNTY CHARTER SECTION 41

No officer or employee shall be interested directly or indirectly in any contract or transaction with the County or become a surety upon any bond given to the County.

No officer or employee shall receive any commission, money, or thing of value, or derive any profit, benefit or advantage, directly or indirectly, from or by reason of any dealings with, or service for the County, by himself or otherwise, except his lawful compensation as such officer or employee.

As to members of appointive boards and commissions only, the Following standards shall apply. No appointive board or commission member shall be financially interested in any contract made by any body or board of which he is a member.

The meaning of the terms "financial interest" and "made" shall be consistent with state law. Nothing contained herein shall be construed to apply to a board member of a board or commission which is purely advisory.

Any violation of the provisions of this Section shall render the contract or transaction involved voidable at the option of the Board of Supervisors. It shall be the duty of every officer and employee who has knowledge of any violation of the provisions of this section immediately to report such violation to the Board of Supervisors. Failing to do so, he may be removed from his office or employment. (Amended June 3, 1980)

C. Fresno County Ordinance Code, Chapter 4.10 SELECTION of ARCHITECTS, ENGINEERS and OTHER PROFESSIONALS, Section 4.10.030 – Procedures implementing selections of consultants (Fresno County 4-91)

B. Prohibited Practices. County employees shall not engage in practices which might result in unlawful activity including, but not limited to, rebates, kickbacks or unlawful consideration.

In addition, county employees shall not participate in the selection process when those employees have a relationship with a person or business entity seeking a contract under this chapter which would subject those employees to the prohibition of Section 87100 of the Government Code.

D. CALIFORNIA ATTORNEY GENERAL OPINIONS (excerpted)

California's conflict-of-interest statutes are based on the belief that a public official cannot serve two masters simultaneously, and that the duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office.¹ The purpose of the conflict-of-interest statutes is to eliminate temptation, avoid the appearance of impropriety, and limit the possibility of improper personal influence on a public official's decisions.

The California Legislature has enacted two important bodies of statutory law which address potential conflicts of interest of school district employees and board members:

1. Government Code sections 1090, et seq., pertaining to contractual conflicts of interest, and
2. The Political Reform Act of 1974 (Government Code sections 81000 et seq.). The provisions of the Political Reform Act are not limited to contracts, but apply to all "governmental decisions."

The Attorney General noted that Government Code section 1090 is a codification of the common wisdom that a person cannot serve two masters simultaneously, and that even well-meaning people may be influenced when their personal economic interests are at stake in an official board transaction. The Attorney General observed that an important purpose of Section 1090 is to avoid even the appearance of impropriety in government transactions.² As a result, Section 1090 is construed broadly.³

Exceptions to the prohibition of Section 1090 are provided by Government Code section 1091 for "remote interests" and by Section 1091.5 for what might be called "noninterests." A board member, who has a "remote interest" in a contract pursuant to Section 1091, must disclose that interest to the board and must abstain from attempting to influence other members and from voting on the contract. However, a board may approve a contract in which a member has only a remote interest, in contrast to the blanket prohibition of Section 1090, if the following conditions are met:

1. Discloses his or her financial interest in the contract to the public agency;
2. Such interest is noted in the body's official records; and
3. The officer completely abstains from any participation in the making of the contract.³²

The purpose of Government Code section 1090 is to prohibit public officers from participating in decisions in which they have a personal financial interest. Section 1090

prohibits a public official who has a conflict-of-interest not only from approving a contract, but from participating in preliminary discussions, planning, influencing, compromising or otherwise participating in the process leading up to the formal making of the contract.⁴

E. AMERICAN INSTITUTE OF ARCHITECTS (AIA) CODE OF ETHICS

E.S. 3.2 Conflict-of-interest:

Members should avoid conflicts of interest in their professional practices and fully disclose all unavoidable conflicts as they arise.

Rule A: Member shall not render professional services if the Member's professional judgment could be affected by responsibilities to another project or person, or by the Member's own interests, unless all those who rely on the Member's judgment consent after full disclosure.

AIA Commentary: *This rule is intended to embrace the full range of situations that may present a Member with a conflict between his interests or responsibilities and the interest of others. Those who are entitled to disclosure may include a client, owner, employer, contractor, or others who rely on or are affected by the Member's professional decisions. A Member who cannot appropriately communicate about a conflict directly with an affected person must take steps to ensure that disclosure is made by other means.*

Appendix 1-End notes

¹ People v. Honig (1996) 48 Cal.App.4th 289; Thomson v. Call (1985) 38 Cal.3rd 633.

² People v. Honig, 48 Cal.App.4th 289, 314 (1996).

³ Id. at 314-15.

⁴ See, 83 Ops.Cal.Atty.Gen. 246, 248 (2000).

Other References

CALIFORNIA LAW GOVERNING CONFLICT-OF-INTEREST, 2016 by ORANGE COUNTY SUPERINTENDENT OF SCHOOLS

APPENDIX 2

Fresno County Board of Supervisors

Administrative Policy

Number 1: Code of Ethics

Effective Date: May 15, 1990
Revision Date: June 6, 2016

POLICY STATEMENT

The Board of Supervisors and All County employees, including elected officials, classified and unclassified personnel should:

PUT loyalty to the highest moral principles and to country above loyalty to persons, party, or government department.

UPHOLD the Constitution, laws, and legal regulations of the United States and all governments therein and never be a party to their evasion.

GIVE a full day's labor for a full day's pay; giving to the performance of one's duties one's earnest effort and best thought.

SEEK to find and employ more efficient and economical ways of getting tasks accomplished.

NEVER discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for one's self or family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of one's governmental duties.

ACCEPT no money, commissions or thing of value of any kind in exchange for or as quid pro quo for County services other than the regular County salary.

WORK related gratuities are only to be accepted if they constitute a gesture of good will toward the agency or if the primary purpose furthers a legitimate County interest as opposed to the personal interest of the recipient.

A. It is the policy of the Board that any doubts about the propriety of accepting a particular gratuity should be resolved by the refusal of the gratuity.

B. The Board of Supervisors, elected officials, and County officers and employees must report all gifts and gratuities as required by State law. Effective beginning the quarter ending June 30, 1990, each officer and employee required to report under State law shall quarterly file a list containing the name and address of the donors of work-related gifts and gratuities received by them which aggregate in value \$50 or more from a single source during that calendar year, and a description of the gift(s). Department heads and board members shall file their quarterly reports with the Clerk to the Board of Supervisors. All other officers and employees shall file their quarterly reports with their department heads.

MAKE no private promise of any kind binding upon the duties of office, since a government employee has no private word which can be binding on public duty.

ENGAGE in no business with the government, either directly or indirectly, which is inconsistent with the conscientious performance of one's governmental duties.

NEVER use any confidential information received in the performance of one's governmental duties as a means for making private profit.

EXPOSE corruption wherever discovered.

TREAT all individuals encountered in the performance of one's duties in a respectful and professional manner.

UPHOLD these principles, ever conscious that public office is a public trust.

BOARD AND ADMINISTRATOR RESPONSIBILITY

Chairman of the Board of Supervisors and County Administrative Officer

The Chairman of the Board of Supervisors, who is responsible for the orderly conduct of all official Board meetings, shall require all persons participating in any Board room discussion; including Board members, staff and citizens, to act in a courteous, respectful and professional manner.

The Chairman of the Board of Supervisors and the County Administrative Officer (CAO) are to consult if either believes a problem exists or corrective action needs to be taken regarding conduct during public/staff meetings.

County Administrative Officer and Department Heads

The CAO and all department heads are responsible for promoting conformance with the principles of this policy.

County Counsel and Director of Human Resources

County Counsel shall be available to answer questions from both Board members and employees regarding conflict-of-interest provisions under State law, the County Charter, and County ordinances and policies.

The Director of Human Resources shall provide copies of all County policies regarding conflict-of-interest to all department heads upon their employment and shall inform all new employees of applicable County conflict-of-interest policies and regulations.

Ethics Training Under AB 1234

The following County officials shall receive ethics training pursuant to Assembly Bill (AB) 1234 (Gov. Code, § 53234 et seq.) every two years:

- The Board of Supervisors.
- The members of all County boards, committees, and commissions who receive per diem under the Salary Resolution.
- The members of all County boards, committees, and commissions who receive reimbursement for expenses under the Salary Resolution.
- All elected County officers.
- The CAO and all appointed department heads.

The Clerk to the Board of Supervisors annually shall inform the Board of Supervisors, the CAO, and all County department heads of the ethics training required under AB 1234, and of the availability of ethics training program and materials referred to below. For any of those new covered County officials who commence their County service after the provision of that annual information, the Clerk to the Board of Supervisors also shall inform those new covered County officials, on or about their respective service commencement dates, that they shall receive their first ethics training required under AB 1234 by no later than one year from their first day of service, and of the availability of ethics training programs referred to below. Each department that provides staff to a County board, committee, or commission shall provide the same information required under this paragraph, as and when applicable, to all existing and new members of those County boards, committees, or commissions who are County officials required to receive ethics training under AB 1234.

Covered County officials shall use the free on-line self-study AB 1234 ethics training program provided by the Fair Political Practices Commission (FPPC) and the Institute for Local Government (ILG) via the Internet, as the primary method to satisfy their mandatory ethics training obligations under AB 1234. After having completed that self-study program, these covered County officials shall print and fill out the on-line certificate as proof of having participated in that self-study program, and submit that certification to the appropriate record keeper, below. Any covered County officials who are unable to timely use the foregoing on-line self-study program, may use the hardcopy self-study AB 1234 ethics training materials, with a test, available from the ILG, at County cost, if the relevant department has sufficient funds budgeted for that purpose. After having completed those self-study materials and passed that test, these covered County officials will receive the certificate from the ILG as proof of having participated in that self-study program, and shall submit that certification to the appropriate record keeper, below.

Records certifying that covered County officials have received the ethics training required under AB 1234 shall be retained for a minimum of five years as follows:

- Records for members of the Board of Supervisors, the CAO, and department heads shall be kept in the office of the Clerk to the Board of Supervisors.
- Records for members of County boards, commissions, and committees shall be kept in the relevant department.

APPENDIX 3

Fresno Department of Human Resources Initiatives

The Fresno County Department of Human Resources has begun the process of revising existing ethics training to include training for all employees not just top management. The following is a listing of HR initiatives:

- Updating the Fresno County Code of Ethics and Conflict-of-interest, procedures, policies and training, including all relevant and related documents;
- Updating or Eliminating Section 41 to the County Charter. If eliminated, Fresno County would use Government Code 1094 to define Conflict-of-interest;
- Strengthening and updating Administrative Policy 1;
- Developing yearly training for all employees on ethics and conflicts of interest basics with tracking of policy review;
- Reviewing “Quarterly Gifts and Gratuities Forms (Form A)”, required quarterly, and the employee classifications which should be required to provide this form;
- Digitizing the Form 700 within the NEOGOV software;
- Updating the list of designated positions within the County departments whose duties include making or participating in governmental decisions which may have a material effect on any County financial interest;
- Designing and testing a conflict-of-interest form within NEOGOV that will create useful applications for participating departments, and discussing with County Counsel and the County Administrator's office the option to expand the staff that completes this affidavit.
- Developing a method to enhance the tracking and reminders of completion of AB1234 compliant ethics and conflict-of-interest training within NEOGOV Learn;
- Working with Fresno County Counsel to begin the process of creating internal training to eventually replace the existing FPPC training.