



January 16, 2025

Chairperson Silver
Commissioner Baker
Commissioner Ortiz
Commissioner Wilson
Commissioner Wood
State of California
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

Re: ITEM NO. 8 - Comments on Proposed Amendments to Regulations 18438.2, 18438.3, 18438.4, 18438.5, 18438.6, 18438.7, 18438.8, 18360.1 and 18705

Greetings:

On behalf of the FPPC Committee ("Committee") of the City Attorneys Department of the League of California Cities ("Cal Cities") I am presenting the following comments related to the proposed changes to the above-referenced regulations, which are scheduled for discussion at the Commission's January 16, 2025, meeting.

Preliminarily, the Committee appreciates the efforts of FPPC staff, and the Commission in drafting changes to the regulations in response to last year's legislation (i.e., SB 1243 (Dodd) and SB 1181 (Glazer)) to amend Government Code section 84308 of the Political Reform Act ("Act"). Moving quickly to draft the proposed regulations reflects the importance the Commission has given to dealing with the legislation in a timely manner. Elected public officials throughout California will benefit from understanding the final regulations as soon as possible.

Having reviewed the proposed amendments the Committee presents its comments and suggested changes to two of the draft regulations, sections 18438.2 and 18438.7.

Section 18438.2. Proceedings Under Government Code Section 84308

The amendments to section 18438.2 eliminate the existing definition of "competitively bid contract," and rely on the description found in section 84308 (a) (5) (B) of the Act. Section 84308(a)(5)(B) (as amended by SB 1243 and SB 1181) exempts competitively bid

contracts from the definition of “license, permit, or other entitlement for use,” in determining if an elected public official is disqualified from participation as a result of campaign contributions from a party or a party’s agent. However, the meaning of a “competitive process” in section 84308 (a) (5) (B) (i) is far from clear and it would be extremely helpful if regulation 18438.2 would include a definition that further refines the interpretation of that term found in section 84308.

Public agencies use various definitions of “competitive” purchasing. Some purchasing ordinances may define discretionary processes such as informal bids, requests for proposals, and competitive negotiation as a “competitive” process. Some agencies also use “bid” loosely; the word “bid” does not necessarily refer to a process where the contract must be awarded to the lowest responsive and responsible bidder.

The problem remains that without more precise guidance, an elected public official might unwittingly participate in the approval of a contract of modest value, where their agency’s ordinance, or policy, mandates the legislative body’s approval through a “competitive” process. Cities and counties choose whether to require approval of their legislative body on a number of factors or preferences. Some simply believe that it is a core value that the legislative body’s should approve all contracts and are more restrictive than those requirements found in the Public Contract Code for local agencies (i.e., \$3,000). Others, such as charter cities or counties, are not bound by the Public Contract Code and are free to treat competitively bid contracts as those awarded in values only limited by their charter or purchasing ordinance. Importantly, some legislative bodies approve a “warrant list,” frequently in each and every regular meeting, where the legislative body has delegated the payment of warrants to certain agency personnel where supported by appropriations previously approved by the legislative body. (See, e.g., Government Code § 53910, *et seq.*) The regular approval of the list of such warrants can be a tedious and overwhelming process if an elected official is required to abstain from the approval of a vendor or contractor that was previously awarded a bid and is on such a list.

Finally, some laws prohibit awarding proposals that are based on cost rather than value and experience, and require that the party is selected on demonstrated competence and professional qualifications. (See, e.g., Government Code section 4526, when selecting certain professional services firms.) Is submitting a proposal by an engineering firm a “competitive” process under these circumstances? Historically, analyzing proposals based on “demonstrated competence and professional qualifications” uses an objective rating process, not simply the lowest responsible and responsive bidder. However, those companies submitting bids do, in effect, compete with others for the work.

For the foregoing reasons it is the Committee’s recommendation that more thought be given to provide clear guidance to elected officials when awarding contracts where it involves a party having made campaign contributions to an official’s campaign.


Section 18438.7. Prohibitions and Disqualification Under Section 84308

The amendments to this section re-opens the question of how an elected public official is to determine if the campaign contributions received in 2024 should be calculated for decisions in 2025. The issue is similar to the question requested in the *Kendrick* opinion (O2-002), which opinion was thereafter codified in section 18438 to provide guidance that only contributions on or after January 1, 2023, would apply in determining disqualification of an elected official in the light of the 2022 legislation to amend the Levine Act (SB 1439 (2022)).

It is the Committee's recommendation that a similar regulation consistent with section 18438 and the *Kendrick* opinion should be added addressing contributions accepted in 2025 as expressly applying to decisions made in 2025, and thereafter, rather than applying a running 12 months that overlap years 2024 and 2025, and those made through December 31, 2024, addressing contributions through 2024. By way of example, if (in October of 2024) an elected official received a campaign contribution in excess of \$250 for their campaign for re-election in November. Prior to the amendments to section 84308, the elected official would have been disqualified until 12 months had passed. Will the "old" law control decisions until October of 2025? Or would the elected official be permitted to participate in 2025? Another situation might occur if the elected official was successfully elected to city council in 2024, and had received \$250 from a donor for that campaign in 2024. After taking office a member of the county Board of Supervisors resigned effective January 16, 2025, and the remaining supervisors call for a special election to fill that seat. Assuming that the newly elected councilmember decides to seek election to that vacant seat, begins their campaign, and the same donor now contributes \$300 toward that campaign does the Levine Act now prohibit that councilmember from participating in a decision related to that donor's city project?

The Committee is grateful for the thoughtful and prompt work put into the proposed amendments to the draft regulations and are ready to assist in any further review that might be of assistance to the Commission and your staff.

Sincerely,



Morgan L. Foley
Chairperson