CITY OF OAKLAND

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CITY COUNCIL
Oakland, California

MAYOR JERRY BROWN
Oakland, California

RE: ADOPTION OF BUDGET AND CONTRACTS FOR WORKFORCE INVESTMENT

Dear Mayor Brown, President De La Fuente, and Members of the Council:

I. INTRODUCTION

At its July 19, 2005, meeting, the City Council considered a resolution authorizing the City Administrator to implement the actions of the Oakland Workforce Investment Board ("WIB") as follows: (1) to negotiate and enter into a Memorandum of Understanding ("MOU") with the Oakland Private Industry Council, Inc., ("PIC") to serve as the workforce development system administrator with an operating budget not to exceed $1.3 million for FY 2005-2006; (2) to enter into a MOU with the PIC to serve as the one-stop career center operator for an amount not to exceed $1.9 million; and (3) to authorize disbursement of additional funds to the PIC for subcontracts, services and implementation of certain grant agreements and programs. (Item 16, July 19, 2005, City Council agenda.)

President De La Fuente distributed a motion on the floor that provided for the PIC to receive $1.325 million as one-stop operator instead of the $1.9 million allocated by the WIB, and for the $575,000 difference to be allocated as follows: an additional $275,000 to Allen Temple Housing and Economic Development Corporation ("Allen Temple"), and $300,000 to Acts Full Gospel Church/Men of Valor Academy ("Acts Full Gospel"). (The WIB had allocated $25,000 to Allen Temple, which had been included as a one-stop partner as part of the PIC's one-stop operator proposal. The WIB had not allocated any funds to Acts Full Gospel, which was not part of the PIC proposal.)

The City Attorney advised the Council that (1) Council could not reallocate the funding that evening in accordance with President De La Fuente's motion because his motion constituted a significant substantive change in the item (and therefore such a reallocation required a new notice under Oakland's Sunshine Law); (2) Council could give direction to staff to bring back a resolution that provides the allocation that President De La Fuente proposed; and (3) this Office would not precipitously render advice on the floor, but would provide a considered legal opinion regarding the powers and role of the Council, the Mayor and the WIB in the workforce investment system, if the Council were to request such an opinion.

The Council passed a motion directing staff to bring back a resolution for the Council's consideration that would reallocate the dollars in accordance with President De La Fuente's motion. Further, Council requested that the City Attorney provide a legal opinion on the powers and role of the Council, the Mayor and the WIB in workforce development. During and after the meeting, individual Councilmembers also sought legal opinions on other related issues, including conflicts of interest. This opinion letter answers those questions.

II. ISSUES

A. What are the respective roles of the City Council, the WIB, and the Mayor in adopting budgets and approving contracts for the City's workforce investment system?

B. Would the reallocation of funds from the PIC to Allen Temple and Acts Full Gospel comply with Department of Labor procurement and contracting rules?

C. Does the PIC have a conflict of interest if it serves as both the system administrator and the one-stop operator for the City's workforce investment system?

D. Under conflict of interest laws (1) could the executive director of the PIC speak at the City Council meeting on adoption of the budget and the MOUs, given her membership on the WIB; and (2) would the recusal of the PIC's executive director from participation in the WIB's decision-making process address any conflicts of interest?

III. SUMMARY CONCLUSIONS

A. Under federal law (the Workforce Investment Act) and local law (the City Charter), the City Council, the WIB, and the Mayor share the decision-making authority to approve workforce investment budgets and contracts such as the MOUs. No one entity has ultimate authority that overrides the other two entities' authority. **Therefore, to approve the workforce development budgets and MOUs, the Council, the WIB, and the Mayor each must concur on these actions.** If the three entities do not agree, the City ultimately will lose its right to federal job training funds.

B. Under federal procurement rules, the City must undertake a public and competitive request for proposals process to reallocate the funds to another agency or agencies, unless the City can make a written determination showing why a noncompetitive process is justified in these circumstances. Since the proposed reallocation to Allen Temple and Acts Full Gospel has not gone through a competitive process, and since the City has not made any showing that such a process would be infeasible, the proposed reallocation to these two agencies does not currently comply with federal law.

C. Under the governmental conflict of interest laws, there likely is no conflict of interest in having the PIC serve as the system administrator and the one-stop operator because PIC employees are not "public officials." Also, nothing in the scope of services itself for the system administrator role would create a legal conflict of interest with the PIC's role as one-stop operator. (Whether it makes sense from a business perspective to have the same entity serve as both the system administrator and one-stop operator—as some have questioned-- is a policy question, not a legal question.)

D. The PIC executive director does not have a conflict of interest in speaking before the City Council. Any WIB member may contact City Council members and the Mayor and speak before the City Council in their private capacities; such actions would not constitute a conflict of interest or improper influence over the WIB, because the Council is a separate "agency" from the WIB. So long as the PIC executive director did not vote, engage in WIB board discussions or contact fellow WIB members regarding the contract awards, there is no conflict of interest in the WIB's decision on the awards.

IV. BACKGROUND

Since the federal government is the source of most of the City's job training funds, the workforce investment system in Oakland is governed primarily by a federal statute, the Workforce Investment Act of 1998 ("WIA"), codified at 29 USC §2801, et seq., and its implementing regulations, codified at 20 CFR Part 660, et seq. As required by WIA, the Mayor created the WIB in 2000. The WIB is a City board that consists of designated representatives of local businesses, educational institutions, labor unions, job training agencies, and other community based organizations; the WIB is responsible for policymaking and oversight of Oakland's workforce development system. The Mayor has the authority to make appointments to the WIB under WIA; City Council approval is not required.

On April 7, 2005, the WIB voted to designate the PIC, a nonprofit agency, to be both the one-stop career center operator and the system administrator for the Oakland workforce investment system. The PIC has served in these roles in the past. On June 23, 2005, the WIB voted to approve its FY 2005-06 budget, including an allocation of $1.3 million to the PIC for its operating costs as systems administrator and an allocation of $1.9 million to the PIC for its operating costs as the one-stop operator.

On July 19, 2005, the City Administrator, per the WIB's action, presented the City Council with a resolution authorizing the City to enter into two Memoranda of Understanding (the "MOUs") with the PIC that govern the PIC's work as one-stop operator and system administrator. The MOUs incorporated the operating budgets approved by the WIB. The Council passed a motion directing staff to bring back a resolution reallocating $575,000 from the PIC's one-stop operator budget to two other agencies. The proposed reallocation would increase the allocation to the Allen Temple from the $25,000 included in the WIB budget to $300,000, and give a new allocation of $300,000 to the Acts Full Gospel, which had not been included in the WIB budget. The funds would be used to provide services to formerly incarcerated clients.

Gay Cobb, the executive director of the PIC, also is a member of the WIB. At the July 19 Council meeting, Dan Siegel, the PIC's legal counsel, asked this Office to consider whether Ms. Cobb had a conflict of interest in speaking before the City Council. Although the City Attorney's Office has no duty to advise third parties such as Ms. Cobb, this Office announced that it could not determine with certainty whether or not Ms. Cobb would violate Government Code section 1090 if she spoke at the Council meeting because the process involves three parties and the matter might have to return to the WIB for consideration. Further, we stated that Ms. Cobb had the right to speak if she chose to, that the Attorney General and District Attorney would be the final arbiters on the conflict of interest issue, that she should consult her legal counsel, and that a member of her staff could speak to the issues without any prospect of violating conflict of interest laws. Ms.

Cobb spoke about her concerns about the process and the need for a meeting between the Council and the WIB to address communication and other problems.

V. DISCUSSION

A. AUTHORITY OF COUNCIL, WIB, AND MAYOR OVER WIA BUDGETS AND CONTRACTS

1. Federal law grants decision-making authority jointly to the WIB and the Mayor

WIA grants most decision-making authority over workforce development jointly to the local workforce investment board and the chief elected official of the local area, i.e., the Mayor.[1] (It should be noted in this respect that, unlike many policy boards and commissions in Oakland, the WIB is not merely advisory, but holds significant decision-making authority.) Among other things, the WIB is responsible for designating the one-stop operator, and terminating the operator for cause, with the "agreement" of the Mayor. (WIA §121(d); 20 CFR §§661.305(a)(2) and 662.410.) The WIB is responsible for identifying providers of services, and entering into MOUs with one-stop partners with the "agreement" of the Mayor. (WIA §121(c); 20 CFR §§661.305(a)(3), 662.230(c), and 662.300.) The WIB has the authority to develop a budget for workforce development activities, "subject to the approval" of the Mayor. (WIA §117(d)(3)(A); 20 CFR §661.305(a)(4).)[2]

The statute is clear that the WIB and the Mayor each must agree on who the one-stop operator shall be, who the one-stop partners shall be, and what budget allocation shall be made to each of these entities. WIA is silent on what happens if the WIB and the

[1] WIA provides that the workforce investment board and the chief elected official may enter into an agreement defining their respective roles and responsibilities, although this is not required. (20 CFR. §661.300(c).) The Oakland WIB and the Mayor have not entered into such an agreement.

[2] Among the WIB's other statutory functions and responsibilities are: (1) setting workforce development policy, in "partnership" with the Mayor; (2) developing and submitting a five-year comprehensive local plan to the Governor, in "partnership" with the Mayor; (3) providing oversight over local employment and training, the one-stop system, and youth service activities, in "partnership" with the Mayor; (4) adopting performance measures, as "negotiated" with the Mayor and Governor; and (5) providing linkages with employers, etc. (WIA §117(d); 20 CFR §§661.300 and 661.305.) The Mayor is exclusively responsible for appointing WIB members, serves as the local grant recipient, and is liable for the misuse of any grant funds. (WIA §117(c)(1)(A) and (d)(3).)

Mayor cannot reach agreement on any of these matters.[3] We see nothing in the statute or the regulations that gives either the WIB or the Mayor overriding authority over the other in the event of disagreement.

2. Nothing in federal law precludes the Council from exercising its authority under the City Charter to consider and approve WIA budgets and contracts

Federal law grants no decision-making authority to the City Council over workforce investment. The WIA makes no mention of governing boards of local government entities. However, there is nothing in the statute that precludes local governing boards like the Council from exercising the governing authority given to them under local law.

The Oakland City Charter provides that the City Council is the governing body for the City of Oakland. (Charter §207.) The Charter gives the City Council the authority to consider and approve budgets[4] and City contracts.[5] While the Charter

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[3] The City asked legal counsel for the Department of Labor for their interpretation of the statute. The Department declined to give their interpretation, pointed out that the statute was ambiguous, but stated that "we expect you to act responsibly."

[4] On budget authority, see Charter §305(a) ("The Mayor shall be responsible for the submission of an annual budget to the Council which shall be prepared by the City Administrator under the direction of the Mayor and Council."); §504 ("The City Administrator shall have the power and it shall be his duty....(f) To prepare an annual budget under the direction of the Mayor and Council for the Mayor's submission to the Council."); §801 ("Under the direction of the Mayor and the City Council, the City Administrator shall prepare budget recommendations for the next succeeding fiscal year which the Mayor shall present to the Council, in a form and manner and at a time as the Council may prescribe by resolution. Following public budget hearings, the Council shall adopt by resolution a budget of proposed expenditures and appropriations necessary therefore for the ensuing year..."); §804 ("The Council shall create, reduce or eliminate such Funds as are required for proper accounting and fiscal management, or required as a condition of receiving funds from any other government..."); and §806 ("No expenditure of City funds shall be made except for the purposes and in the manner specified by an appropriation of the Council..."). The budgeting authority of Council is not limited to City general funds, but extends to all funds received by the City including federal grant funds in which the City acts as recipient. WIA provides that the chief elected official is the local grant recipient of WIA funds, and authorizes this official to designate an entity to serve as local grant sub recipient and fiscal agent. (WIA §117(d)(3)(B)(i).) In Oakland, the Mayor has designated the City to act as grant sub recipient and fiscal agent for WIA funds.

[5] On contracting authority, see Charter §§504 (g) and (h) ("The City Administrator shall have the power and it shall be his duty.... (g) To prepare or cause to be prepared... contracts for work which the Council may order. (h)... to make recommendations to the

assigns to the Mayor the special role of encouraging and promoting economic development (Charter §305(c) and (d)), the Charter also provides that the Mayor represents the City in intergovernmental relations "as directed by the Council." (Charter §305(g).) Under its Charter authority, Council has considered and approved WIA budgets and contracts since WIA's inception, as well as budgets and contracts in the past under the Job Training Partnership Act ("JTPA"), the predecessor statute to WIA.

3. Federal law does not preempt the Charter's provisions giving Council authority to approve budgets and City contracts

We conclude that WIA does not preempt local laws such as the Charter with respect to contracting and budgeting authority. This Office has opined in the past, in the context of the JTPA, that federal job training laws do not preempt local procedural laws. (See October 27, 1992, legal opinion, attached, at 6-8.)

The doctrine of federal preemption, rooted in the Supremacy Clause of the U.S. Constitution, provides that neither states nor local governments may pass laws inconsistent with federal law. There are three types of federal preemption: (1) "express preemption," where a federal statute expressly prohibits state or local regulation over a matter; (2) "conflict preemption," where compliance with both federal law and the local law is physically impossible or where the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"; and (3) "field preemption" or "implied preemption," where the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." (Gade v. National Solid Wastes Management Assoc. 505 US 88, 98 (1992).)

The U.S. Supreme Court has long held the position that preemption is disfavored, and it applies a presumption against the invalidation of local law based on a preemption defense. (Cipollone v. Liggett Group, Inc. 505 US 504, 518 (1992).) Indeed, the general standard is to "start with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act[s] unless that [is] the clear and manifest purpose of Congress." (Id. at 516.) The purpose of Congress is the "'ultimate touchstone'" of preemption analysis. (Id. at 516.)

We see no compelling indication that Congress intended federal law to preempt the ability of local governments to apply additional decision-making procedures mandated by local law to WIA matters.

Council in connection with the awarding of public contracts."); and §808 ("The Council shall establish by ordinance the conditions and procedures for any purchase or contract...").

Express preemption. There is nothing in the WIA language that purports to preempt local law. While the statute does grant decision-making power over workforce investment policy to the local board and the chief elected official, the statute does not say that only the local board and the chief elected official may have decision-making power to the exclusion of other decision-making bodies.[6]

Conflict preemption. There is no contradiction between the grant of authority to the WIB and the Mayor set forth in WIA and the grant of authority to Council set forth in the Charter. Compliance with the decision-making authority established in the two laws with respect to contract and budget approval is not physically impossible; the City can comply with both WIA and the Charter simply by requiring concurrence over these matters by the WIB, the Mayor, and the Council. Nor does the requirement that the Council approve budgets and contracts stand as an obstacle to federal law. While WIA clearly intends that the WIB and the chief elected official have decision-making authority over WIA policymaking, there is nothing that indicates that the WIB and chief elected official must have exclusive decision-making authority or that sharing this authority with other bodies would compromise any legislative purpose behind WIA.

Field preemption. We see no evidence of any legislative intent of Congress to occupy the field of workforce investment policymaking to exclude localities from imposing supplemental decision-making requirements over WIA contracting and budgets, or to otherwise restrict local control over WIA funds, as long as local control is exercised within the parameters of the statute. Indeed, WIA's requirement for local workforce investment boards and local plans indicates Congress' intent that there be significant local control over the workforce investment system.[7] We believe that in

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[6] WIA states that the local grant recipient "shall" disburse workforce development funds at the direction of the WIB, "immediately on receiving such direction from the [WIB]." (WIA §117(d)(3)(B)(i)(III).) We read this provision simply as an affirmative grant of authority to the WIB to authorize disbursements, not as a limitation on the authority over disbursements otherwise held by other agencies.

[7] See 64 Fed. Reg. 18663 (April 15, 1999) (a key principle of WIA is to increase state and local flexibility and to reserve authority to localities to meet local needs) and 20 CFR §§661.110 ("These regulations provide the framework in which State and local officials can exercise such flexibility within the confines of the statutory requirements. Wherever possible, system features such as design options and categories of services are not narrowly defined, and are subject to State and local interpretation."). See also House Report 105-093, Report of the Committee on Education and the Workforce on H.R. 1385: "Localities are provided with the flexibility and authority to design and to operate local programs that meet the employment, training, and literacy needs of their individual communities, consistent with the statewide policies set by the Governor through the collaborative process." The Department of Labor procurement rules (which apply to WIA funds) require local government sub grantees to "use their own procedural

adopting WIA, Congress left ample room for a local government to apply its own decision-making requirements to supplement the decision-making structure set forth in the statute.

4. Charter provisions giving Council authority to approve budgets and City contracts do not supplant WIA's grant of decision-making authority to the WIB and the Mayor

Although WIA does not preempt the Charter, by the same token the Charter does not preempt WIA. The provisions in the Charter that establish the Council as governing body for the City do not supercede provisions in WIA that grant decision-making authority over various functions to the chief elected official and the WIB, even though ultimate decision-making authority over contracts and budgets for most other City functions usually resides exclusively in the Council. The home rule powers given to charter cities by the California Constitution, which give such cities broad authority to govern municipal affairs, do not override federal law. The Supremacy Clause of the U.S. Constitution establishes federal law as preeminent in our federal system of government, and there is no circumstance in which local law could take precedence over (i.e., override or preempt) federal law. While we see no conflict between federal law and local law here that would require federal law to preempt local law, neither do we see any legal basis for local law preempting federal law.

5. The Council, the WIB, and the Mayor share final decision-making authority and must agree on WIA matters to receive the funds

Therefore, the lines of decision-making authority established by WIA and by the Charter must be reconciled, so that the lines of authority established by both laws are observed. Because the authority to approve WIA budgets and contracts is assigned by law to the WIB, the Mayor, and the Council, the three entities share final decision-making authority and must agree on these matters. If the Mayor, WIB and City Council fail to reach agreement, the City will not have an approved budget and MOU -- at least as to the $575,000 at issue -- and therefore could not disburse these funds, either to the PIC, Allen Temple, or Acts Full Gospel. Therefore, the City would risk losing any funds as to which the three parties do not reach agreement, since the awarding agency ultimately would reprogram unused WIA funds to other uses. Based on the Council's proposed reallocation motion, it appears that the three decision-making parties have not yet reached agreement on the allocation of $575,000 of the funds.

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procedures which reflect applicable State and local laws and regulations," as long as those procedures conform to federal law. (29 CFR §97.36(b)(1).)

B. COMPLIANCE OF PROPOSED REALLOCATION WITH PROCUREMENT RULES

WIA regulations require local government subgrantees to follow the Department of Labor's general administrative regulations on grants for WIA funds. (20 CFR §667.200(a)(1).)[8] These regulations require, among other things, that local governments conduct procurement transactions "in a manner providing full and open competition." (29 CFR §97.36(c)(1).) Normally, a competitive request for proposals ("RFP") process should be followed.[9] (29 CFR §97.36(d)(3).) The regulations require that RFPs be publicized, identify evaluation factors, and solicit proposals from an adequate number of qualified sources. Local governments must have a method for conducting technical evaluations of proposals and selecting awardees. The regulations provide that awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered. (Id.)

The regulations allow procurement by noncompetitive means only when a competitive process is infeasible, and when one of the following is true: (1) the service is available only from a single source; (2) the public exigency or emergency for the requirement will not permit a delay resulting from a competitive process; (3) the awarding agency (i.e., the California Employment Development Department ("EDD")) authorizes noncompetitive proposals; or (4) after solicitation of a number of sources, competition is deemed inadequate. (29 CFR §97.36(d)(4).)

In accordance with these regulations, the City recently entered into a Corrective Action Plan with EDD on procurement after state monitors found deficiencies in the City's procurement practices. The Plan reiterates the regulatory standards, and provides that "[p]rocurement using noncompetitive and/or sole source methods is to be considered the last resort for procurement activities conducted by or for the Oakland [local area]." Any services procured noncompetitively must including a written determination indicating how the procurement met legal standards.

The Department of Labor's procurement rules apply to the proposed reallocation of funds to Allen Temple and Acts Full Gospel because the City would be procuring job training services from those agencies using WIA funds. The reallocations to these agencies have not gone through a public and competitive RFP process. (While Allen Temple was a part of the PIC's proposal, which was responsive to an RFP, the proposed reallocation would increase that agency's allocation more than ten-fold. Since an

[8] For local government sub grantees, those rules are codified in 29 CFR part 97. Part 95 of the regulations, which has been erroneously cited as applicable to the City, applies only to nonprofits and other nongovernmental entities. (20 CFR §667.200(a)(2).)

[9] We assume that procurement by small purchase procedures and by sealed bids, as allowed by the regulations, would be inappropriate in this context.

increase of this magnitude would so dramatically and fundamentally change the scope of services Allen Temple would provide, it should be treated as a new proposal for purposes of procurement.) No reason has been given for why a competitive process for reallocating these funds would be infeasible; therefore, the City does not meet the first prong of the test for justifying a noncompetitive process. None of the other four factors justifying noncompetitive procurement under the second prong of the test would apply: (1) there is no documented evidence that job training services to formerly incarcerated clients are only available from Allen Temple and Acts Full Gospel; (2) there is no indication of any public exigency or emergency that would preclude a competitive process; (3) there is no EDD authorization for noncompetitive proposals; and (4) there is no documented evidence that the City has solicited proposals from other sources, or that competition for these funds could be deemed inadequate.

Therefore, assuming that the WIB, Council and Mayor agree on reallocating PIC funds to other agencies, the City would then be required under Federal law to undertake a public and competitive RFP process to award these funds to another agency or agencies, or the City would have to make a written determination showing why a noncompetitive process is justified in these circumstances. As we previously concluded, the WIB, the Council, and the Mayor would then have to agree on the reallocation to the agencies selected through this process.

C. CONFLICT OF INTEREST OF PIC AS SYSTEM ADMINISTRATOR AND ONE-STOP OPERATOR

The PIC serves both as system administrator of Oakland's workforce development system and as operator of the one-stop career center in Oakland. The question asked of the City Attorney is whether the two roles present a legal conflict of interest; that is, does the PIC in its system administrator's role make decisions in a governmental capacity that could affect its financial interests as one-stop operator.

The PIC's role as system administrator is spelled out in the MOU with the City. The MOU provides that the PIC "shall diligently and in good faith provide fiscal and program administration for WIA, and other WIA-related funds . . . subject to City review and oversight." The MOU goes on to enumerate a number of administrative tasks for which the PIC is responsible. The MOU provides that the City, as subgrant recipient and fiscal agent, maintains ultimate fiscal authority and responsibility over WIA funds, and that City staff – i.e., the Workforce Development Division of the Community and Economic Development Agency – is responsible for overseeing and monitoring the workforce system. The WIB also exercises oversight over the system, including the system administrator, under WIA. (WIA §117(d)(4).) The enumerated tasks do not indicate that the PIC as system administrator exercises any oversight or decision-making over its work as one-stop operator.

The governmental conflict of interest laws such as the Political Reform Act only apply to "public officials" and address only financial conflicts of interest. Consultants may be considered public officials in certain instances. The conflict of interest analysis of the Political Reform Act looks only at the conflicts of interest of individuals, not companies. (Wasko Advice Letter, FPPC No. A-04-270 (2005).) Therefore our threshold analysis looks to whether the PIC employees in their work as system administrator would be "public officials" within the meaning of the statute. We conclude that they are not.

One test asks whether the individual will be serving in a staff capacity with the agency and performs duties that otherwise would be performed by a City designated employee. (Title 2, Division 6, California Code of Regulations section 18701(a)(2)(B).)[10] According to the Manager of the Workforce Development Unit, City staff has advised that the system administrator is considered to be "staff to the City staff." PIC employees are not serving in the capacity of staff to the WIB staff on workforce development matters. Indeed, City staff in CEDA already is performing those staff duties. The system administrator's role is more to assist CEDA staff on an as-needed basis with certain administrative tasks, and such work is done under the ultimate oversight of staff, as well as the WIB. Accordingly it does not appear that PIC employees act in a "staff capacity with the agency," and therefore they are not public officials under this test.

There is a counter argument that the system administrator's employees do serve in a "staff capacity" with the WIB. The City Administrator's Report to Council, dated July 19, 2005, states, "Typically, the entities designated as Workforce Investment Areas, such as cities, counties, or consortia of counties, serve as their own System Administrators. Oakland's bifurcated administrative and program support structure is unique." The MOU says that the PIC will provide "reasonable staff support for the WIB . . . " on a per request basis. However, so long as City staff remains in place and has primary authority over the PIC's work, then there is probably a stronger argument that PIC employees do not "serve in a staff capacity" to the WIB.

The other test for determining whether an individual is a "public official" is whether the individual is making governmental decisions. (Title 2, Division 6, California

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[10] ""*Consultant*" *means an individual who, pursuant to a contract with a state or local* government agency:
(B) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Government Code Section 87302."

Code Of Regulations section 18701(a)(2)(A).)[11] Governmental decisions include approving a regulation, enforcing a law, authorizing a contract or contract amendment, granting agency approval to a report, study, or similar item, or granting agency approval of policies.

The scope of services of the system administrator does not empower PIC employees with governmental decision-making power over the types of decisions listed in the PRA regulations. PIC employees are responsible only for performing administrative tasks related to the day-to-day functioning of the workforce development system. Policymaking decisions are left to the City Administrator, Mayor, WIB, and City Council. Accordingly, PIC employees are not public officials under this test.

If PIC employees were held to be covered public officials, then the conflict of interest analysis would have to be done on a decision by decision basis. The system administrator's contract duties in the scope of services, at least on their face, do not appear to indicate decisions that would result in a legal conflict of interest. The responsibilities specified in the scope of services do not give PIC employees the power to make decisions in their role as system administrator that would have a financial effect on the PIC as one-stop operator. In order to protect against such a possibility, we recommend adding the following language to the system administrator MOU:

> "The Oakland PIC shall have no oversight responsibilities under this MOU with respect to the one-stop career center operations. Such oversight responsibilities shall rest solely with the City, City staff and the WIB. In conducting its work under this MOU, no employee of the Oakland PIC may participate in any decisions or make any recommendation or evaluation that could have a material

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[11] ""Consultant" means an individual who, pursuant to a contract with a state or local government agency:
(A) Makes a governmental decision whether to:
1. Approve a rate, rule, or regulation;
2. Adopt or enforce a law;
3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
5. Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
6. Grant agency approval to a plan, design, report, study, or similar item;
7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof . . . ."

financial effect on the Oakland PIC's interest as operator of the one-stop career center."

The City Administrator's report noted that several of the outside proposal readers who participated in the WIB RFP process questioned whether it was appropriate for one entity to perform both as system administrator and one-stop operator. Whether it makes sense from a business perspective to have the same entity serve in both roles is a policy decision, not a legal question. If the policy makers do not want the system administrator and the one-stop operator to be the same entity for business reasons, they are always free as a matter of policy to assign those functions to different entities.

D. CONFLICT OF INTEREST OF PIC EXECUTIVE DIRECTOR PARTICIPATION IN DECISIONS TO AWARD CONTRACTS TO THE PIC.

Government Code Section 1090 provides that a public officer or employee may not make a contract in which he or she is financially interested. It is a violation of Section 1090 for an officer or employee to participate in any way in the development, negotiation and/or execution of such a contract. (Millbrae Assn. For Residential Survival v. Millbrae 262 Cal.App.2d 222 (1968).) A violation of Section 1090 is punishable as a felony. In addition, a contract executed in violation of Section 1090 is void, and the contractor must return to the governmental entity any payments the contractor received.

Local workforce investment boards are specifically addressed in the 1090 law (Government Code Section 1091.2), and WIB Boardmembers, acting in their official capacity, are public officers. A conflict of interest over a contract would occur only if: (1) the particular contract directly relates to services the entity the board member represents or financially benefits the member or the entity he or she represents; and, (2) the member makes, participates in making, or uses his or her official position to influence the decision on the contract. Recusal from these activities (including not voting and not participating, formally or informally, in any board discussion on the item and refraining from contacting other WIB members about the decision making process or decision) would prevent a conflict of interest.

"Using" one's "official position" is not defined by Section 1090. However, a parallel conflict of interest statute, the Political Reform Act, uses the same term and there is an interpretive regulation for that act. Using one's official position to influence includes appearing before, or otherwise attempting to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer." (Title 2, Division 6, California Code of Regulations section 18702.3, emphasis added.) **Improper influence can include merely contacting fellow board members regarding a decision.**

The MOUs for the one-stop operator and the system administrator for Oakland's workforce system meet the first trigger of Section 1091.2. These services would be provided through contracts with the City. The contracts "directly relate" to services to be provided by the PIC, the entity represented by WIB member, Gay Cobb. (Ms. Cobb would have a financial interest in the PIC as its paid executive director.)

Whether the second condition is triggered is a question of fact. It is our understanding that Ms. Cobb has recused herself from any WIB vote relating to the RFP process and discussions at WIB meetings on the matter. On October 21, 2004, the City Attorney's Office closed an inquiry regarding Government Code 1091.2 finding "insufficient competent evidence supporting a violation of Government Code section 1091.2 requiring an invalidation of a subsequent contract with the Private Industry Council." So long as Ms. Cobb did not participate in the WIB's decision-making process and refrained from contacting other WIB members regarding the WIB decision, there would be no conflict of interest.[12]

As mentioned in the introduction, we advised Ms. Cobb at the July 19, 2005, meeting that the City Attorney's Office could not give a "green light" to her speaking before the Council from a conflict of interest standpoint. However, based on our determination of the roles of the City Council and the WIB, we now conclude that speaking before or otherwise contacting the City Council would not constitute a conflict of interest for Ms. Cobb so long as she is addressing the City Council in her private capacity as PIC director, not as a WIB representative This is because Ms. Cobb is not a member of the City Council and she therefore would not be attempting to influence her fellow board members, but rather members of the City Council. (Faulconer Advice Letter, FPPC No. I-05-042 (2005).) This is because the Council is considered a separate "agency" from the WIB.

[12] The City Attorney's Office periodically provides training to the City's boards and commissions on conflict of interest, Brown Act, Sunshine Ordinance and other matters. The most recent training of the WIB on general conflict of interest issues, including Government Code 1090 was in 2000. The City Attorney's Office also has advised the PIC executive director, as well as the WIB as a whole, on a number of occasions orally and in writing of the 1090 issues related to her membership on the WIB.

VI. CONCLUSION

In summary, for the reasons explained in this opinion (1) the reduction in the PIC one-stop operator funding proposed by the Council motion would require the concurrence of the Mayor and the WIB, and (2) any reallocation of such funds to another agency or agencies would require either (a) a public competitive RFP process, or (b) a written determination both that a competitive process is infeasible and that a noncompetitive award is otherwise justified under the factors set forth in the procurement rules.

In light of the outstanding legal issues, the following are possible alternative actions that the three decision-making parties could take and their ramifications:

Alternative #1: The Council and Mayor concur with the WIB's June 23 budget allocation, without a reduction in PIC funding. This would resolve all legal issues.

Alternative #2: (a) The WIB and Mayor concur with the July 19 Council proposal to reduce PIC funding; (b) the City conducts a public competitive RFP process for the reallocation of the funds as to which the parties have not reached agreement (Based on the July 19th proposed allocation, the amount at issue is $575,000); and (c) the WIB, Mayor, and Council approve the reallocation of such funds to the agency or agencies selected in the process. This would resolve all legal issues and comply with federal procurement requirements.

Alternative #3: (a) The WIB and Mayor concur with the Council proposal to reduce PIC funding; (b) the City documents why a competitive process for reallocating such funds is infeasible; and (c) the WIB, Mayor, and Council approve the reallocation of such funds to Allen Temple and Acts Full Gospel. This would raise an issue of compliance with federal procurement requirements. Noncompetitive procurement may be used only as a last resort. The documentation as to why a noncompetitive award is appropriate must be compelling.

Alternative #4: The WIB, Mayor, and Council do not concur either on the reduction of PIC funding or on the reallocation of such funds to other agencies. Under this scenario the City ultimately would lose federal workforce development funds, at a minimum as to those funds regarding which the three governing entities have not reached agreement. As discussed earlier, based on the proposed reallocation in Council's motion, the amount at issue is $575,000.

Respectfully submitted,

JOHN A. RUSSO
City Attorney

Attorneys Assigned:
Mark Morodomi
Daniel Rossi

cc: Oakland Workforce Investment Board
Al Auletta, CEDA Workforce Development

Attachment:
October 27, 1992, legal opinion from Jayne Williams to Council Legislation & Long Term Planning Committee

CITY OF OAKLAND

505-14TH STREET • 12TH FLOOR • OAKLAND, CALIFORNIA 94612
(415) 273-3601
TDD 839-6451

Office of the City Attorney
Jayne W. Williams
City Attorney

October 27, 1992

Legislation & Long Term Planning Committee
Oakland, California

Chairperson Spees and Members of the Committee:

Re: Selected Issues Regarding the Relationship Between the City and the Private Industry Council

At the October 6, 1992 meeting of the Legislation & Long Term Planning Committee, the City Attorney was asked to report back on the following issues between the City and the Private Industry Council (PIC):

1. The role of the City Council in reviewing and approving JTPA budgets.

2. Disbursement procedures that should be incorporated into the City/PIC Agreement.

3. The relationship between the PIC and its subcontractors.

4. Whether the Brown Act applies to meetings of the PIC.

5. Whether state conflict of interest laws apply to members of the PIC.

6. Who has the power to remove members of the PIC.

7. Whether the Office of Economic Development and Employment continues to perform any employment responsibilities for the City.

The first three issues are issues that the City Attorney's Office identified as categories of issues that need to be resolved between the City and the PIC in order to finalize the City/PIC Agreement. The Committee asked that certain City staff prepare a memorandum detailing the issues in these categories and making recommendations to the Committee with respect to the City's position on those issues. The Committee also asked that the last four issues listed above also be discussed in that memorandum.

This report will review the structural flow of Job Training Partnership Act (JTPA) funds into the City of Oakland, their relationship to the first three issues, and the status of staff efforts to resolve those issues. The report will also discuss issues 4, 5, and 6 as listed above. This office refers the response to issue number 7 to the City Manager's Office.

Structural Flow of Funds

On July 14, 1992, this office submitted a report to your Committee regarding the relationship between the City and the Private Industry Council. A copy of that report is attached as Exhibit A. The July 14 report described the flow of JTPA funds from the federal government to the state government to the local government, and the flow is graphically depicted in Table 1, attached.

Table 1 shows the step-by-step process for the flow of JTPA funds in the Oakland Service Delivery Area (SDA) after the federal government has approved funds for the State of California. As described in the July 14 Report, the Mayor (as the chief elected official for the Oakland SDA) enters into an agreement with the PIC which determines procedures for the development of a **"job training plan"**, names the **"grant recipient"**, and names the **"administering entity."** After the job training plan is developed, the first step is for the Mayor and the PIC to jointly submit the job training plan to the State for approval. After the State approves the job training plan, the State enters into a **"Grant Agreement"** with the grant recipient (i.e., the City in this case). Because the Mayor/PIC Agreement designates the PIC to be the administrative entity, the City needs to enter into an agreement with the PIC in order to (a) allow JTPA funds to be disbursed from the City to the PIC, (b) enable the City to enforce its responsibilities as the grant recipient under the Grant Agreement with the State, and (c) better define what the City's role is in relation to the PIC.

After the PIC receives JTPA funds from the City, the PIC will enter into contracts with various subcontractors and service providers. Because the City is the grant recipient of JTPA funds, the City is the entity that will be responsible for ensuring that all JTPA funds are used in compliance with state and federal regulations governing the use of JTPA funds. The City must therefore ensure that all entities who receive JTPA funds (including the PIC, the OPSC, the PIC's subcontractors and service providers)

through the City comply with all JTPA regulations that are imposed upon the City through the Grant Agreement. Because the City has no contractual relationship with the PIC's subcontractors and service providers, the only way to enable the City to enforce its responsibilities under the Grant Agreement and the JTPA regulations is to give the City certain rights and powers in the City/PIC Agreement.

Issues Concerning the City/PIC Agreement

As was reported on October 6, the three main categories of issues to be resolved before finalizing the City/PIC Agreement are: (i) the role of the City Council in reviewing and approving JTPA budgets, (ii) the City's disbursement procedures for JTPA funds, and (iii) the relationship of the PIC to its subcontractors and service providers. Staff from the City's Finance Department is working with PIC representatives to develop a disbursement procedure that is acceptable to both the City and the PIC. Representatives from the Mayor's Office are similarly working to resolve the other two issues in ways that will be satisfactory to all concerned. This office is informed that these issues may be resolved in the next few weeks. Once those issues have been resolved, this office will proceed to finalize the City/PIC Agreement.

Applicability of the Brown Act to PIC Meetings

For purposes of discussing the next three issues (i.e., Brown Act, state conflict of interest, and power of removal), it is important to distinguish between the body known as the Private Industry Council (referred to herein as the "PIC") and the Oakland Private Sector Corporation (the "OPSC"). Although the PIC and the OPSC are often commonly referred to collectively as the PIC, they are really two different bodies. The common reference to both bodies as the PIC has caused a great deal of confusion and disagreement over the scope of jurisdiction that the City Council has over the PIC. For the remainder of this report, all references to the PIC refer only to the body known as the Private Industry Council established by the City Council and <u>not</u> to the OPSC or the board of directors of the OPSC.

The City Council established the PIC by Ordinance No. 9669

C.M.S. on October 24, 1978 (the "Ordinance")[1]. Section 1 of the Ordinance states:

> "Pursuant to §501 of the Charter of the City of Oakland, there is hereby created a Private Industry Council (PIC).[2] It shall be the function and duty of the PIC to **assist and advise** the City Manager and Council in the development, planning and oversight of federal training and employment programs geared to the interests of the private sector as the City Manager and/or Council may direct, or as the PIC may deem advisable; to make reports and recommendations thereon and to formulate policy recommendations and plans for the future development of training and employment matters so that programs can be developed to provide maximum benefits to the citizens of the City of Oakland; and to perform such other duties and functions as the City Manager and/or the Council may from time to time direct." (emphasis added)

The PIC is therefore a City advisory commission. Its powers are limited only to assisting and advising and performing those functions set forth in the Ordinance or that the City Manager or the City Council may direct. Although the Ordinance was adopted during the JTPA's predecessor legislation, the Comprehensive Employment and Training Act, the Ordinance has never been repealed and remains in effect and in satisfaction of the requirements of the JTPA.

Under current law, the Brown Act (Government Code sections 54950 - 54962) applies to City advisory boards, commissions and committees if they are created by some <u>formal</u> action of the City Council or one of its members. (Gov. Code §54952.3.) Virtually

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[1] It should be noted that section 2 of the Ordinance establishes the number of members of the PIC at 15, and the current number of members on the PIC is 23. The federal Job Training Partnership Act does <u>not</u> prescribe a specific number of members that must sit on the PIC. (see 29 USCA §1512(e))

[2] In 1978, section 501 of the Oakland City Charter provided for the creation of boards and commissions. In 1988, section 501 was renumbered to section 601.

any action taken by the City Council or one of its members, in an official capacity, to create the advisory body is sufficient to constitute formal action. (Joiner v. City of Sebastopol (1981) 125 Cal.App.3d 799.) The PIC was clearly created by formal action of the City Council and is therefore subject to the requirements of the Brown Act.

Applicability of State Conflict of Interest Laws to PIC Members

As previously stated, the term "PIC" refers to the body created by the City Council pursuant to Ordinance No. 9669 C.M.S. "PIC" does not refer to the OPSC or its board of directors.

We will address two state conflict of interest statutes for purposes of this discussion. They are the Political Reform Act of 1974, as amended, Government Code sections 87100 et seq., and Government Code section 1090.

Government Code section 1090 prohibits certain specified public officials from being financially interested in any contract made by them in their official capacity or by any body or board of which they are members. Section 1091.2 makes the provisions of section 1090 applicable to private industry councils **only when** both of the following conditions are met:

(a) The contract or grant directly bears on services to be provided by any member of a private industry council or any business or organization which the member directly represents, or the contract or grant would financially benefit the member or business or organization which the member represents.

(b) The affected private industry council member fails to comply with Government Code section 87100.

Government Code section 1090, by expressly conditioning its application in part upon compliance with Government Code section 87100, clearly indicates that the legislature intended that the provisions of the Political Reform Act apply to members of private industry councils in general and therefore to members of the PIC.

Since Government Code section 1090 clearly requires members of the PIC to comply with the Political Reform Act, we need not

proceed any further in our analysis as to whether the Political Reform Act applies to the PIC. However, we note that in 1982, the Attorney General issued a similar opinion that concluded that the Political Reform Act applied to members of private industry councils such as the PIC. (65 Ops.Cal.Atty.Gen. 41 (1982)) Although this opinion was issued just before CETA was replaced by the JTPA, we believe that the analysis and conclusion of that opinion would remain unchanged under the JTPA.

In short, it is our opinion that the provisions of the state Political Reform Act do apply to members of the PIC, and the provisions of Government Code section 1090 also apply to members of the PIC when the conditions specified in section 1091.2 are met.

Whether the City Council or the PIC has the Power to Remove PIC Members from the PIC

We reiterate that the PIC is a City advisory commission created pursuant to Ordinance No. 9669 C.M.S. and pursuant to City Charter section 501, now renumbered to section 601. Section 601 allows the City Council to create advisory boards and commissions and prescribes the duties of those commissions. It also allows for the removal of members of those boards and commissions "for cause, after hearing, by the affirmative vote of at least six members of the Council." Clearly then, the City Council has the power to remove members of the PIC.

However, we note that the Job Training Partnership Act, 29 USC sections 1501 et seq., also contains a provision for the removal of PIC members. 29 USC section 1512(f) reads:

> "Members shall be appointed for fixed and staggered terms and may serve until their successors are appointed. Any vacancy in the membership of the council shall be filled in the same manner as the original appointment. **Any member of the council may be removed for cause in accordance with procedures established by the council."** (emphasis added)

There is an issue of whether the City Council's Charter created power to remove commission members is preempted by the federally created right of private industry councils to remove their own members under United States Code section 1512(f).

As a chartered city, the City of Oakland has the right and power to prescribe the method of appointment and removal of its municipal officers. Its right to adopt a charter derives from the California Constitution. Under article XI, section 3 of the California Constitution, "the provisions of a charter are the law of the State and have the force and effect of legislative enactments." Article XI, section 5 of the California Constitution grants chartered cities complete powers over municipal affairs, and, unless limited by the charter, the city council may exercise all powers not in conflict with the state and United States Constitution and federal laws. (Committee of Seven Thousand v. Superior Court (1988) 45 Cal.3d 491.) A chartered city's powers over its municipal affairs includes plenary authority to provide for the method of appointment and removal of its several municipal officers. (Cal. Const., art XI, §5(b).) The officers of the City of Oakland include the members of boards or commissions as may be so designated by ordinance. (Art. IV, §400 of the Charter of the City of Oakland.) Members of the PIC are therefore officers of the City who may be removed in accordance with the City Charter.

Preemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. (Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co. (1981) 450 US 311, 67 L.Ed.2d 258).

There is nothing in the Job Training Partnership Act which unmistakably evidences Congress' intent to preempt state law. In fact, because the JTPA clearly calls for a great deal of state and local involvement in the development and implementation of job training programs, it appears to indicate that Congress did not intend to preempt local regulation over all areas covered by the JTPA. It is therefore our opinion that the JTPA does not preempt the City Charter's provision for the appointment and removal of members of the PIC.

The provision of 29 USC section 1512(f) does not conflict with the City Council's power to remove members of the PIC pursuant to the City Charter. We are not aware of any action taken by the PIC to establish such procedures for the removal of any of its members. However, any such procedures must conform with the City Charter's provisions for the removal of members of City commissions.

We are cognizant of the fact that the Oakland Private Sector

Corporation is a nonprofit corporation under the laws of the State of California. We are also aware that Article II, Section 1 of the Bylaws of the OPSC require that the directors of the OPSC be appointed by the "chief elected official of the City of Oakland pursuant to the provisions of the Job Training Partnership Act." Section 19 of those Bylaws also provide for the removal of any director of the OPSC for cause, after a hearing, by a majority of OPSC directors at a duly constituted meeting of the OPSC board of directors. We find all of these facts, which relate only to the OPSC, to be irrelevant to our analysis of the removal authority over the members of the PIC.

The OPSC is a separate and distinct legal entity from the City, organized and existing under the laws of the State of California. The PIC is a City advisory body, organized and existing pursuant to the City Charter. The fact that the OPSC has elected to have the members of its board of directors appointed in a manner that effectively makes the members of the PIC the OPSC's board of directors does not change the fact that the PIC is a City advisory body subject to the provisions of the City Charter. If the OPSC chooses to remove one of its board members pursuant to its Bylaws, such an action will have no effect upon the makeup of the PIC. Any member of the PIC who is removed from the board of directors of the OPSC will remain a member of the PIC unless that member has also been removed from the PIC in accordance with the City Charter.

In conclusion, it is our opinion that only an affirmative vote of six members of the City Council can remove any member of the PIC.

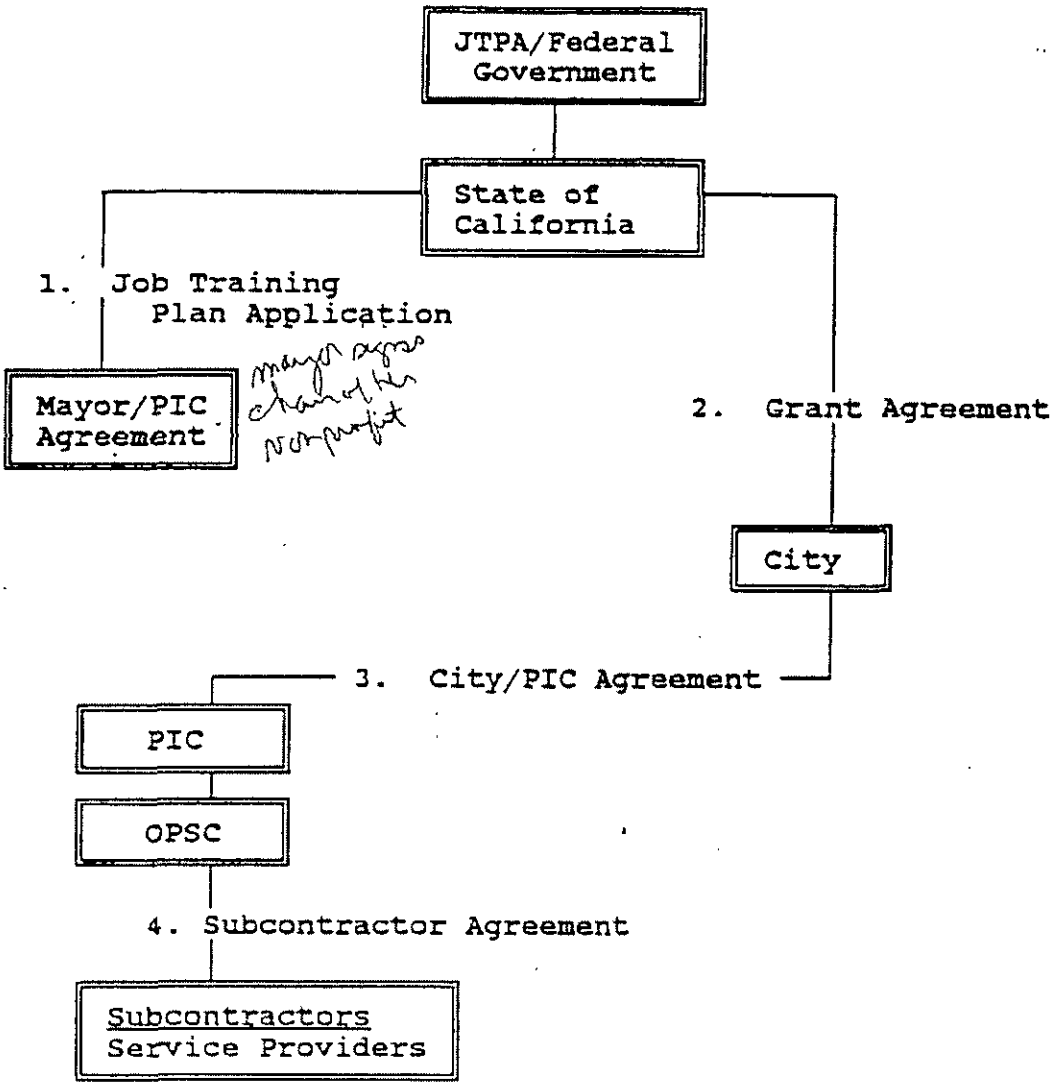
Respectfully submitted,

JAYNE W. WILLIAMS,
City Attorney

Attorney assigned:

Donnell W. Choy

Table 1


JTPA/Federal Government
State of California
1. Job Training Plan Application
Mayor/PIC Agreement
2. Grant Agreement
City
3. City/PIC Agreement
PIC
OPSC
4. Subcontractor Agreement
Subcontractors
Service Providers

CITY OF OAKLAND

MEMORANDUM

TO: Al Auletta, CEDA Workforce Development

FROM: Daniel Rossi, City Attorney's Office

DATE: October 13, 2005

RE: Clarification re PIC conflict opinion

You have asked us to clarify certain points this Office raised in our August 12, 2005, opinion to the City Council and Mayor regarding whether there is a legal conflict of interest if the Oakland Private Industry Council, Inc. ("PIC") serves as both the system administrator and the one-stop operator for the City's workforce investment system.

I. QUESTION PRESENTED

May the PIC in its role as system administrator participate in (1) monitoring or oversight the PIC's work as one-stop operator, (2) analyzing the performance data of the PIC as one-stop operator, (3) recommending budget allocations for the PIC as one-stop operator, or (4) approving payments to the PIC as one-stop operator?

II. SUMMARY CONCLUSIONS

Giving PIC employees a role as system administrator staff in these tasks could violate state conflict of interest rules. Such work could involve a PIC employee, acting in a staff capacity with the City, participating in making a government decision, or using or attempting to use his/her official position to influence a government decision, that will foreseeably have a material financial effect on his or her source of income. Therefore, we advise that such functions should not be included in the system administrator contract. However, PIC employees may perform these tasks and other system administrator tasks if such tasks do not involve monitoring or oversight of the PIC's work as one-stop operator, or contract or budget decisions affecting the PIC's role as one-stop operator.

III. BACKGROUND

Our August 12 opinion concluded that, on its face, there was not an inherent legal conflict of interest between having the PIC act as system administrator for the City's workforce investment system, and having the PIC act as operator of the one stop career center. This conclusion was based on the scope of services set forth in the previous Memoranda of Understanding ("MOUs") between the City and the PIC for the two functions. We found nothing in the scope of services that gives PIC employees the power to make decisions in their role as system administrator that would have a financial effect on the PIC as one-stop operator.

We cautioned, however, that a complete conflict of interest analysis would have to be done on a decision-by-decision basis; and we advised that you should include language in the system administrator MOU that (1) prohibits the PIC from having oversight responsibility over one-stop operations, and (2) provides that no employee of the PIC may participate in any decisions or make any recommendation or evaluation that could have a material financial effect on the PIC's interest as operator of the one-stop career center. The contract language we proposed simply paraphrases the conflict of interest rule under the California Political Reform Act ("PRA") that would apply to any public agency staff or contractors acting as public agency staff.

After this Office issued the August 12 opinion, you forwarded us information on some of the specific duties you expect the PIC to perform as the system administrator, and expressed concern that in performing some of these tasks, the PIC might oversee its work as one-stop operator. You were concerned that these tasks would be inconsistent with the legal standard we set forth in our opinion and our suggested contract language. You asked us to clarify our opinion in light of this information.

IV. ANALYSIS

A. Conflict of interest rule

The PRA conflict of interest rule in a nutshell prohibits a **public official** from **participating in making** a government decision, or **using or attempting to use his/her official position to influence** a government decision, if the decision will foreseeably have a **material financial effect** on the official's **economic interests**. (2 CCR section 18700(a).)

1. Public official status

A "public official" for purposes of the PRA includes a "consultant" of a local government agency, as well as board members, officers, and employees. (2

CCR section 18701(a).) A covered "consultant" means an individual who, under contract with a local government agency, either (1) makes a governmental decision (see below for a discussion of what decisions are included), or (2) serves in a staff capacity with the agency.

2. Governmental decisionmaking

An official "participates in making a governmental decision" when he/she (1) negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision; or (2) advises or makes recommendations to the decisionmaker to influence a governmental decision, either directly or without significant intervening substantive review, either by conducting research, making any investigation, or preparing or presenting any report, analysis, or opinion, which requires the exercise of judgment on the part of the official. (2 CCR section 18702.2.) An official is "attempting to use his or her official position to influence the decision" if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency, or the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. (2 CCR section 18702.3(a).) Actions of public officials which are solely ministerial, secretarial, manual, or clerical are not considered decisionmaking, however. (2 CCR section 18702.4(a)(1).)

Relevant government decisions include, among other things: (1) issuing, denying, suspending, or revoking any application, certificate, approval, order, or similar authorization or entitlement; (2) authorizing the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval; (3) granting agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract; (4) granting agency approval to a plan, design, report, study, or similar item; or (5) adopting, or granting agency approval of, policies, standards, or guidelines for the agency. (2 CCR section 18701(a)(2)(A).)

3. Financial effect and economic interests

An official has an "economic interest" in, among other things, any source of income greater than $500 a year. (2 CCR section 18703.3(a).) Any financial effect on such an entity is considered "material" if the entity is directly affected by the decision, i.e., the entity is the subject of the decision. (2 CCR section 18704.1.)

B. Application of conflict rule to PIC

All PIC employees have an economic interest in the PIC as an organization, since the PIC is a source of income to such persons. Therefore, if

those employees are acting in a staff capacity to the City in their work as system administrator for the City's workforce development system, then they should not be involved in any decisionmaking, as defined in the PRA, concerning the PIC as one-stop operator that could financially affect the PIC.

The following are tasks you have identified (in italics) that could involve PIC employees, working as system administrators, taking actions that could affect the PIC's interest as one-stop operator. Our analysis as to whether this task would be permissible under the PRA follows. In our analysis we consider first whether PIC employees are acting as a public officials, second whether the tasks involve governmental decisionmaking within the meaning of the PRA, and third whether the decisionmaking, if applied to the PIC's work as one-stop operater, could foreseeably have a material financial effect on the PIC.

1. *Program monitoring: PIC reviews all operator client files and procedures, issues findings and requires corrections when needed, including review of the PIC as one-stop operator as well as other operators.*

   Public official status: PIC employees who perform the program monitoring tasks you describe are acting in a staff capacity to the City, and so are "public officials." Program monitoring of outside agencies that receive grant funds from the City is an administrative function typically performed by City staff under most other City grant programs.

   Governmental decisionmaking: PIC staff who perform the program monitoring tasks you describe are "participating in the making" of a governmental decision, because such monitoring involves conducting research, investigating, and/or preparing or presenting reports, analyses, and/or opinions concerning the performance of operators, as well as advising or making recommendations to CEDA staff and the WIB as to such performance. Such actions could also be characterized as "attempting to use his or her official position to influence" a governmental decision, since the recommendations produced as a result of such monitoring are intended to influence the actions of CEDA staff, the WIB, and other City officials. These tasks require the exercise of judgment, and are not ministerial.

   Financial effect on PIC: Program monitoring of the PIC's one-stop operations could foreseeably have a financial effect on the PIC, since the findings and recommendations resulting from the monitoring could affect (1) whether and when the PIC gets paid for its work as one-stop operator, (2) what level of work the PIC is required to perform in order to meet program standards, and/or (3) whether the PIC will be awarded future contracts to act as one-stop operator.

Conclusion: We advise against PIC staff having a role as system administrator that involves program monitoring of the PIC as one-stop operator. PIC staff may engage in program monitoring of other operators and service providers, however.

2. *Performance 1: When annual state ratings are poor the system administrator holds primary responsibility for fixing problems. Operator performance is the largest source of performance outcomes, good and bad, and PIC as one-stop operator represents about 70% of all adult operator services. Therefore correcting performance requires the system administrator to help the operators improve. If that doesn't work, the next step is for the system administrator to recommend contract hold backs or terminations for the non-performing operators.*

   Public official status: PIC employees who perform the program tasks you describe for correcting the performance of underperforming operators are acting in a staff capacity to the City, and so are "public officials." Taking corrective action, or recommending such action, against outside grantee agencies that do not comply with performance standards set forth in a City grant contract is an administrative function typically performed by City staff under most other City grant programs.

   Governmental decisionmaking: PIC staff who perform the tasks you describe for correcting the performance of underperforming operators are "participating in the making" of a governmental decision, because such actions involve conducting research, investigating, and/or preparing or presenting reports, analyses, and/or opinions concerning the performance of operators, as well as advising or making recommendations to CEDA staff and the WIB as to whether the operator is performing according to program standards and whether the operator's contract should be renewed, modified, or terminated. Such actions could also be characterized as "attempting to use his or her official position to influence" a governmental decision, since the recommendations produced as a result of such monitoring are intended to influence the actions of CEDA staff, the WIB, and other City officials. These tasks require the exercise of judgment, and are not ministerial.

   Financial effect on PIC: Imposing corrective actions on or recommending that corrective actions be taken on the PIC as one-stop operator could foreseeably have a financial effect on the PIC, since the findings and recommendations related to corrective action could impact (1) whether and when the PIC gets paid for its work as one-stop operator, (2) what level of work the PIC is required to perform in order to meet program standards and take corrective action, and/or (3) whether the PIC will be awarded future contracts to act as one-stop operator.

Conclusion: We advise against the PIC having a role as system administrator that involves imposing corrective action or recommending corrective action with respect to the PIC as one-stop operator. The PIC may be engaged in corrective actions of other operators and service providers, however.

3. *Performance 2: PIC as system administrator is responsible for managing the input of data from all operators which determines performance. PIC as system administrator then provides results for evaluation to the City and the WIB. All local performance oversight is based on information furnished by PIC as system administrator, including oversight of PIC as one-stop operator as well as other operators.*

Public official status: PIC employees who perform the program tasks you describe for collecting and analyzing performance data from operators are acting in a staff capacity to the City, and so are "public officials." Collecting and analyzing performance data on outside grantee agencies is an administrative function typically performed by City staff under most other City grant programs.

Governmental decisionmaking: PIC staff who perform the tasks you describe for collecting and analyzing performance data from operators are "participating in the making" of a governmental decision, because such actions involve conducting research, investigating, and/or preparing or presenting reports, analyses, and/or opinions concerning the performance of operators. Such actions could also be characterized as "attempting to use his or her official position to influence" a governmental decision, since the recommendations produced as a result of such data analysis are intended to influence the actions of CEDA staff, the WIB, and other City officials. These tasks require the exercise of judgment, and are not ministerial.

Financial effect on PIC: The analysis of performance data concerning the PIC as one-stop operator could foreseeably have a financial effect on the PIC, since the findings and recommendations that arise from such data analysis could impact (1) whether and when the PIC gets paid for its work as one-stop operator, (2) what level of work the PIC is required to perform in order to meet program standards, or (3) whether the PIC will be awarded future contracts to act as one-stop operator.

Conclusion: For the reasons set forth above, we advise against the PIC having a role as system administrator that collecting and analyzing performance data with respect to the PIC as one-stop operator. Data concerning the performance of the PIC as one-stop operator should be submitted directly to and analyzed by City staff.

4. *Budget: PIC as system administrator recommends budget allocation amounts and service levels for operators, including PIC as one-stop operator. Those recommendations always go straight through to at least the first draft of the budget seen by the WIB, and are most often adopted in whole by the WIB.*
   Public official status: PIC employees who make budget recommendations as to operators and service providers to the WIB or CEDA staff are acting in a staff capacity to the City, and so are "public officials." Making such recommendations is an administrative function typically performed by City staff under most other City grant programs.
   Governmental decisionmaking: PIC staff who make budget recommendations as to operators and service providers are "participating in the making" of a governmental decision, because such work involves conducting research, investigating, and/or preparing or presenting reports, analyses, and/or opinions concerning the appropriate budget allocation for each operator, as well as advising or making recommendations to CEDA staff and the WIB as to the appropriate allocations. Such actions could also be characterized as "attempting to use his or her official position to influence" a governmental decision, since the recommendations on budget allocations are intended to influence CEDA staff, the WIB, and other City officials. Making a recommendation on a budget allocation to an agency requires the exercise of judgment, and is not a ministerial act.
   Financial effect on PIC: Making a recommendation on the appropriate budget allocation to the PIC as one-stop operator could foreseeably have a financial effect on the PIC, since the recommendations directly affect the level of funding received by the PIC.
   Conclusion: We advise against the PIC having a role as system administrator that involves making budget allocation recommendations concerning the PIC as one-stop operator.

5. *Contracting: The system administrator administers payments to operators. Despite the fact that the PIC as one-stop operator has a direct MOU with the City, payments for PIC's one-stop operator work are approved by PIC as system administrator and then submitted by PIC as system administrator to the City, which issues checks and then draws down funds from the State to cover those costs. Compliance with contract terms is monitored by PIC as system administrator.*
   Public official status: PIC employees who approve payments to operators and service providers, or who recommend such approval are acting in a staff capacity to the City, and so are

"public officials." Processing payment requests is an administrative function typically performed by City staff under most other City grant programs.

Governmental decisionmaking: PIC staff who approve payments to operators and service providers, or who recommend such approval, are "participating in the making" of a governmental decision, because such work involves conducting research, investigating, and/or preparing or presenting reports, analyses, and/or opinions concerning whether the operator has performed as required, as well as advising or making recommendations to CEDA staff as to whether the operator should get paid. Such actions could also be characterized as "attempting to use his or her official position to influence" a governmental decision, since the recommendations on payment are intended to influence the actions of CEDA staff. Making a recommendation to approve a payment to a contractor requires the exercise of judgment, and is not a ministerial act.

Financial effect on PIC: Approving a payment or making a recommendation to approve a payment to the PIC as one-stop operator could foreseeably have a financial effect on the PIC, since such actions directly impact the level of funding received by the PIC.

Conclusion: We advise against the PIC having a role as system administrator that involves approving payments or making recommendations concerning payments to the PIC as one-stop operator.

6. *Contracting in future: The WIB wants adult operators to be on performance-based contracts, as is already done with youth providers. Those payments take place when PIC as system administrator says the performance benchmarks have been met by the operators; in the future this would mean PIC as system administrator says PIC as one-stop operator has met performance increments and can therefore get paid the full contract amounts (or, alternatively, the PIC as system administrator could say PIC as one-stop operator has not met increments and therefore does not get the full contract amount).*
For the reasons set forth above, we advise against the PIC having a role as system administrator that involves monitoring, oversight, contracting, or payment with respect to the PIC as one-stop operator. This would be true whether or not the PIC is working under a performance-based contract.

V. CONCLUSION

In summary, we conclude that giving PIC employees a role as system administrator staff in (1) monitoring or oversight of the PIC as one-stop operator, (2) analyzing performance data of the PIC as one-stop operator, (3) recommending budget allocations for the PIC as one-stop operator, or (4) approving payments, or recommending payments, to the PIC as one-stop operator, could violate PRA conflict of interest rules. Such work could involve a PIC employee, acting in a staff capacity with the City, participating in making a government decision, or using or attempting to use his/her official position to influence a government decision, that will foreseeably have a material financial effect on his or her source of income. Therefore, we advise that such functions should not be included in the system administrator MOU.

The fact that the PIC has proposed to establish an "independent division" to operate the one-stop center does not change the conflict of interest analysis under the PRA. The conflict of interest laws focus on whether a public official's decisionmaking may have a financial effect on any organization that is a source of income to that official. All PIC employees have an economic interest in the PIC as an organization, regardless of what division of the PIC they work for, since the PIC is a source of income to all of its employees.

We see no alternative under the present structure but for City staff and the WIB to provide the overall monitoring and oversight over the PIC's one-stop operator work. For conflict of interest reasons, that oversight responsibility should not be delegated down to the PIC itself. We strongly advise that the language in the previous MOUs providing that the City, as grant recipient and fiscal agent, maintains ultimate fiscal authority and responsibility over WIA funds, and that City staff is responsible for overseeing and monitoring the workforce system, be maintained in future MOUs. Please note, however, that PIC employees may perform the tasks you identify and other system administrator tasks, including monitoring and oversight of other service providers, if such tasks do not involve monitoring or oversight of the PIC's work as one-stop operator, or contract or budget decisions affecting the PIC's role as one-stop operator.

We note that the PIC in its proposal has offered to spin-off its one-stop operator functions to a separately incorporated nonprofit organization, if the WIB so desires. Creating a separate nonprofit organization to operate the one-stop center could be another way to allow the PIC as system administrator to exercise an oversight function over the one-stop operations, depending on how the new organization is structured and staffed. However, care would have to be taken to ensure that no employees of the PIC who are involved in the system administrator function -- including both line staff and managerial staff -- receive any income from the new entity.