

June 5, 2014

Alan R. Burns, District Counsel
Costa Mesa Sanitary District
453 South Glassell Street
Orange, CA 92866

Re: Your Request for Advice
Our File No. A-14-060

Dear Mr. Burns:

This letter responds to your request for advice on behalf of the Costa Mesa Sanitary District (“CMSD”) regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Government Code Section 1090. We do not provide advice on other conflict of interest restrictions, if any, that could arise such as those governed by the prohibition against holding incompatible offices (Government Code Section 1099), inconsistent employment (Government Code Section 1126) and common law conflicts of interests. Please note that the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), and this letter is based on the facts presented. In addition, the Commission does not provide advice on past conduct.

Pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General’s Office and the Orange County District Attorney’s Office concerning potential issues raised under Section 1090 and we did not receive a written response from either entity.

QUESTION

Based on the facts below, does either the Act or Section 1090 prevent CMSD from contracting with Wendy Davis, its Interim Finance Manager, to offer her a permanent employee position as Finance Manager?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

No. Based upon the facts presented, neither the Act nor Section 1090 precludes CMSD from making this contract. Neither the Interim Finance Manager nor the Treasurer will be making, participating in making, or influencing this contract under the Act or for purposes of Section 1090.

FACTS

CMSD is a California sanitary district established pursuant to Health and Safety Code sections 6400 *et seq.* It has a Treasurer position that manages its money and investments. The Treasurer provides the Board of Directors with an investment policy and advice on that policy. The Treasurer is an independent contractor that serves in a staff capacity.

CMSD also has employees. It plans to convert its Finance Manager position (currently occupied by an independent contractor) into an employee position, as it has in past years. The Finance Manager assists in the preparation of the budget and oversees accounts payable.

Marc Davis is currently the Treasurer. He is part of CBIZ, a business services firm that provides contractor services to CMSD. His wife, Wendy Davis, is also currently providing services through that firm as an independent contractor to CMSD as its Interim Finance Manager. In the past, she has also been CMSD's Treasurer. Both positions, Finance Manager and Treasurer, make or participate in the making of governmental decisions as defined under Regulation 18702.2.

The Board would like to consider hiring Mrs. Davis as its employee in the Finance Manager position but wants to be sure that there are no conflict of interest or Government Code Section 1090 problems.

Mr. Davis, as Treasurer, is responsible for the safekeeping of district money and investments. His revised duties will include placing and tracking district investments, preparing the monthly Treasurer's Report, preparing and making recommendations on the district's Statement of Investment Policy, and attending Board meetings to report on those subjects.

The Finance Manager plans, organizes, and directs all operations of the finance department, including financial planning, budgeting, accounting, data processing, revenue administration, purchasing, special assessments, and service charges. The position assists the General Manager in preparing the annual budget, including "preparation of budget assumptions," coordinating budget documents and scheduling and preparing "salary calculations for forecasting future cost." The Finance Manger also reviews staffing levels, salaries, benefits and expenses, is responsible for payroll, reviews financial transactions, and controls the expenditure of appropriated funds.

In a May 19, 2014 electronic message, you stated that “The decision to hire the [F]inance [M]anager will be made by the General Manager” in consultation with the CMSD Board. You added that the General Manager is responsible for long range financial planning and for the preparation of the annual budget and is the purchasing manager and has the authority to enter into certain contracts and to transfer money from account to account. This position also has the authority to approve certain warrants and payroll.

You stated that the Treasurer “is not involved in any way” in the decision to hire the Finance Manager and will not be supervising or controlling the Finance Manager. You also stated that “He has been advised not to provide any recommendations or to promote his wife’s appointment.” The Finance Manager will be appointed pursuant to CMSD rules and will not serve pursuant to a contract.

Additionally, you state that “The Interim Finance Manager would not provide advice or attempt to influence the budgeting for the Finance Manager position and has specifically been advised not to do so.”

ANALYSIS

Conflicts of Interest under the Act

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has an interest specified in Section 87103. A public official has a “financial interest” in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a conflict of interest under Section 87100.

Step One – Is the individual a public official? (Section 87100; Regulation 18700(b)(1).)

Your facts indicate that the Interim Finance Manager and the Treasurer are contract employees who serve in a staff capacity with CMSD. Both positions participate in making governmental decisions, and perform the same or substantially the same duties for the agency that would otherwise be performed by an individual holding a position specified in the district’s Conflict of Interest Code under Government Code Section 87302.

As consultants with staff duties and advisory capacity to CMSD, Wendy Davis, as Interim Finance Manager, and Marc Davis, as Treasurer, meet the definition of “consultant” under Regulation 18701 and are “public officials” under the Act.

Step Two – Will the public official be making, participating in making, or using his or her official position to attempt to influence a government decision? (Section 87100; Regulation 18700(b)(2).)

As stated above, a public official is subject to Section 87100 if he or she makes, participates in making, or uses his or her official position to attempt to influence a government decision.

Under Regulation 18702.1(a), an official “makes” a government decision when he or she, among other things, votes on a matter, enters into a contract on behalf of his or her agency, or obligates or commits his or her agency to any course of action.

Under Regulation 18702.2(a) and (b), an official “participates” in a government decision when, generally, he or she negotiates, without significant substantive review, regarding a government decision, or advises or makes recommendations to the decisionmaker directly or without significant substantive review.

Finally, under Regulation 18702.3(a) and (b), an official “uses his or her official position to influence” a government decision when he or she contacts, appears before or otherwise attempts to influence a member, officer, employee or consultant of the official’s own agency or, when appearing before another government agency, the official acts or purports to act on behalf of his or her own agency.

However, the Commission has determined that it is necessary that public officials be permitted to make and participate in making decisions affecting their own compensation and the terms and conditions of their own employment or contract. Regulations 18702.4(a)(3) and (b)(3) contain specific exceptions to the definition of “decisionmaking” that take this into account. (See *Schectman* Advice Letter, No. A-87-226 and the *Romney* Advice Letter, No. A-99-292.)

Your facts indicate that under the Act, neither Wendy Davis nor Marc Davis will make, participate in making, or use their official position to attempt to influence the hiring of the Finance Manager. Because you indicate that Wendy and Marc Davis are not involved the governmental decision, there is no conflict of interest under the Act.

Application of Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig, supra*, at 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We typically employ a six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090.

Step One: Are the Interim Finance Manager and Treasurer subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers 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.” (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed, at both the state and local level. It also applies to certain consultants and independent contractors.

Courts have concluded that independent contractors, who serve in advisory positions that are often held by officers and employees, are subject to section 1090. Specifically, “independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency’s contracts.” (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; see also *California Housing Financing Agency v. Hanover* (2007) 148 Cal.App.4th 682 [concluding that an independent contractor who performed a public function by participating in the making of contracts was an “employee” for purposes of inclusion under Section 1090].)

Your facts indicate that the Interim Finance Manager and the Treasurer are contract employees who serve in a staff capacity with CMSD. Both positions participate in making governmental decisions, and perform the same or substantially the same duties for the agency that would otherwise be performed by an individual holding a position specified in the district’s Conflict of Interest Code under Government Code Section 87302. Both Wendy and Marc Davis meet the definition of “consultant” under Regulation 18701 and are “public officials” under the Act. For these same reasons, they both are also subject to the prohibition in Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require

that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

A civil service appointment is an employment contract. (See 59 Ops.Cal.Atty.Gen. 223 (1960).) Additionally, payment of spousal expenses involves the making of a contract. For example, Section 1090 prohibits a hospital district from paying the expenses for a board member’s spouse to accompany the board member to a conference. The board member has a financial interest in the payment of his or her spouse’s expenses and the payment itself constitutes a contract. (75 Ops.Cal.Atty.Gen. 20 (1992).)

Your facts indicate that the appointment of the Interim Finance Manager to a permanent civil service employee position with CMSD involves the approval of an employment contract. In addition, any payments for spousal expenses would also involve a contract.

Step Three: Are the officials making or participating in making a contract?

Section 1090 applies to officials who participate in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, planning, drawing of plans and specifications. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft, supra* at p. 569.)

Participation in the making of a contract is defined very broadly. In *Stigall*, the court concluded that where a city councilmember had been involved in the preliminary stages of the planning and negotiating process on a city contract, but had resigned from the council prior to its vote on the contract, the councilmember had been involved in the making of the contract. (*Id.* at pp. 570-571.) The *Stigall* court noted that “negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense.” (*Id.* at p. 569.) Therefore, any participation by a financially interested officer or employee in the process by which such a contract is developed, negotiated, and executed is a violation of section 1090.

The Section 1090 prohibition also applies to persons in advisory positions to contracting agencies. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley* (1978) 80 Cal.App.3d 204.) This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, and other actions even though they have no actual power to execute the final contract.

When an employee is financially interested in a contract, the employee’s agency is prohibited from making the contract only if the employee was involved in the contract-making process. However, as long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee’s duties or because the employee disqualifies himself or herself from all such participation), the employee’s agency is not prohibited from contracting with the employee or the business entity in which the employee is interested. (See 80 Ops.Cal.Atty.Gen. 41 (1997) [firefighters permitted to sell a product,

which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity]; 63 Ops.Cal.Atty.Gen. 868 (1980) [real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal].)

As Treasurer of CMSD, Marc Davis is a high-ranking employee charged with advisory functions and responsibilities over district investments. His wife, Wendy Davis, as Interim Finance Manager, is also a high ranking employee of CMSD with advisory capacity and responsibility over the district's finances and expenses. In addition, your facts indicate that the Finance Manager's job description includes preparation of "budget assumptions" and "salary calculations for forecasting future cost." You state, however, that both Wendy and Marc Davis have been admonished not to participate in any way, including "negotiations, discussions, reasoning, planning" of the position, nor to provide advice or influence the hiring process for the Finance Manager.

You have stated that, as to the contract to convert the Interim Finance Manager position into a permanent employee position, neither Wendy Davis nor Marc Davis has any input in the General Manager's or the CMSD Board of Directors' decision-making process at any stage. Therefore, assuming these facts are true, neither official is "making" a contract for the purposes of Section 1090. Given this, we do not reach the following steps of the analysis.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl