

July 9, 2014

Delyn Kies
50 Plata Court
Novato, CA 94947

Re: Your Request for Advice
Our File No. A-14-101

Dear Ms. Kies:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)¹ and Government Code Section 1090. Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate. If this is not the case, then our advice could be different.

In regards to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the Marin County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that the following advice is not admissible in a criminal proceeding brought under Section 1090 against any individual other than the requestor. (See Section 1097.1(c)(5).)

QUESTION

Do the conflict-of-interest provisions under the Act or Section 1090 prohibit you from submitting a proposal and entering into a consultant contract with the Marin County Hazardous and Solid Waste Joint Powers Authority (“JPA”) while serving as a member of the affiliated Local Task Force (“LTF”)?

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. Neither the Act nor Section 1090 prohibits you from submitting a proposal and entering into a consultant contract with the JPA while serving as a member of the LTF.

FACTS

You are an environmental consultant and a sole proprietor specializing in waste management. You also volunteer for the LTF that is affiliated with the Marin County Hazardous and Solid Waste JPA. The JPA, comprised of Marin's cities, towns and the county, provides household hazardous waste collection, information on recycling and disposal, and ensures the county's compliance with state recycling mandates.²

The LTF provides the JPA with citizen and industry review. Over the last year, the LTF was involved in updating the JPA's Model Construction & Demolition Debris ("C&D") Recycling Ordinance. You were on a subcommittee that worked with JPA staff on this project. At the last meeting, the JPA Board approved the updated Model Ordinance, and they also approved the hiring of a consultant to assist staff in certifying C&D recycling facilities and helping cities within the county adopt or update their C&D ordinances. You would like to apply for this consultant position.

As a member of the LTF, you have not worked on any aspect of the proposed consultant contract such as provisions concerning terms or scope of work, and the Board has not requested any involvement from the LTF in the Request for Proposal process. In general, LTF simply acts in an advisory capacity to JPA staff, which makes recommendations independent of the LTF to the JPA Board.

Pursuant to a resolution from the JPA, all members of the LTF are required to file annual Statements of Economic Interests.

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 a financial 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

² Specifically, the JPA includes the cities and towns of Belvedere, Corte Madera, Fairfax, Larkspur, Mill Valley, Novato, Ross, San Anselmo, San Rafael, Sausalito and Tiburon, and the County of Marin itself.

Section 87100. However, as explained below, the answer to your question turns on Step 2 of the standard analysis – whether you will be making, participating in making, or using your official position to influence a governmental decision involving the unfilled consultant position.

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

As a member of the LTF who is required to file an annual Statement of Economic Interests, you are a public official for purposes of Section 87100. (Sections 82003, 82041 and 82048(a).)

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, 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. (Regulation 18702.1(a).) Under Regulation 18702.2, 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. (Regulation 18702.1(a) and (b).) Under Regulation 18702.3, 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. (Regulation 18702.3(a) and (b).)

You have provided no facts suggesting that you (or the LTF) will participate in any respect in determining to whom the JPA will award the consultant position. In fact, the JPA Board has not requested the LTF’s assistance for any part of the Request for Proposal process. In other words, the LTF has no role or influence in the process. Based on these facts, it does not appear that you will make, participate in making or influence the governmental decision involving the subject consultant position. Accordingly, you may submit a bid for the subject position without violating the conflict-of-interest provisions under the Act.

We note that Regulation 18702.4 states that even if a conflict of interest is present, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her “personal interests.” Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. (Regulation 18702.4(a)(2) and 18702.4(b)(1).)

An official's "personal interests" include "[a] business entity wholly owned by the official or members of his or her immediate family." (Regulation 18702.4(b)(1)(B).) Therefore, as the sole proprietor of your business that specializes in waste management, you may participate *as any other member of the public* with respect to matters related to the consultant position.³

Because there is no governmental decision in which you are participating, we need not analyze the remaining steps to determine that you do not have a disqualifying conflict of interest.

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* (1996) 48 Cal.App.4th 289, 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 normally employ a six-step analysis to determine whether an official has a conflict of interest under Section 1090, but we need only address the first three steps as explained below.

Step One: Is the official 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 anybody or board of which they are members." Section 1090 also applies to members of advisory bodies. (*City Council v. McKinley* (1978) 80 Cal.App.3d 204; 82 Ops.Cal.Atty.Gen. 126 (1999).) Because the LTF serves as an advisory body to the JPA, you are subject to the provisions of 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); [FN2] 78 Ops.Cal.Atty.Gen.

³ We do, however, caution that you may not contact members of the JPA Board or staff outside of a public JPA board meeting concerning the consultant position in any manner other than that available to the general public. Of course, this prohibition does not prevent you from formally interviewing for the position.

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.) Here, the JPA is releasing a request for proposal and will contract with the winning bidder. Thus, a contract is involved in the decision.

Step Three: Is the official making or participating in making a contract?

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.) No contract is “made” and no duties attach until one party has offered and another has accepted and consideration is exchanged. But before this, there are “negotiations, discussions, reasoning, planning, and give and take,” all of which are instrumental in “making” the agreement. (*Stigall, supra*, at p. 569.)

Here, you are the sole owner of a business that could enter into a contract with the JPA by way of approval of the JPA Board. The LTF has no input into contracts the JPA Board enters nor will any part of the decision come before the LTF for recommendations to the JPA. Simply put, the LTF will not be participating in the decision.

The Attorney General's office addressed a similar situation in which two firefighters had developed a firefighting protective mask and sought to sell the mask to their own city's fire department. (80 Ops Cal. Atty. Gen. 41(1997).) The firefighters formed a private company and approached the fire chief about selling their product to the City. (*Ibid.*) The firefighters would not be involved as city employees if the contract moved forward beyond the fire chief to the city council, the body that would actually be making the decision. Because the firefighters would not be making the contract, “including its embodiments,” and had no input into the procurement process, the Attorney General opinion concluded that there would be no Section 1090 violation.

Similarly here, you have had no input into the contract itself or any aspect of the contract that will eventually lead to the actual agreement. It is the JPA Board, not the LTF, which will enter into the contract with your business. You have stated that, as to this contract, the LTF has no input into the JPA Board's decision-making process at any stage, nor has it requested LTF involvement. You are therefore not “making” a contract for the purposes of Section 1090. Given this conclusion, 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: Jack Woodside
Senior Counsel, Legal Division

JCW:jgl