

December 8, 2014

Daniel Hentschke
General Counsel
San Diego County Water Authority
4677 Overland Avenue
San Diego, California 92123-1 233

Re: Your Request for Advice
Our File No. A-14-187

Dear Mr. Hentschke:

This letter responds to your request for advice on behalf of the members of the San Diego Water Authority board regarding the conflict of interest provisions of Government Code Section 1090 (“Section 1090”).¹ Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Political Reform Act (the “Act”)² and 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 complete and accurate.

We are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the San Diego County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requester.” (Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit San Diego Water Authority board members from participating in a region-wide water conservation program?

¹ All statutory references are to the Government Code, unless otherwise indicated.

² 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. While Section 1090 does apply in the situation described below, a non-interest exception applies to allow any board member to participate in the program.

FACTS

You are the General Counsel for the San Diego Water Authority (the “Water Authority”), which provides wholesale water and other services in the San Diego region. It is governed by a 35-member board of directors, each of whom is appointed by 24 member public agencies.

The Water Authority has established a WaterSmart Turf Replacement Program that provides a reimbursement incentive of \$1.50 per square foot for replacement of turf with water-conserving landscape plants. The program is generally available to all retail water customers of any of the Water Authority’s member public agencies. The program is funded by an Integrated Regional Water Management Grant from the California Department of Water Resources and a grant from the federal Bureau of Reclamation. Currently, the program prohibits participation by Water Authority staff, board members, contractors, program administrators, and other similar “insiders.” The Water Authority would like to eliminate or modify the restriction so that Water Authority officers, employees, and directors may participate in the program.

About 50 percent of all water used by San Diego County homes and businesses is used in outdoor landscaping. Improving outdoor water efficiency is an important conservation objective to help the region meet its long-term water management goals. Therefore, Water Authority staff developed plans to implement a regional rebate program to provide incentives to retail water customers who replace existing turf with water efficient landscaping, including developing a basic plan outline and soliciting requests for proposals from program administration.

The qualifications for the program benefits are simple and apply to all applicants. An applicant must be a current retail water customer, must participate in a training course, must replace existing turf with qualifying plants, and must fill out the standard application form and agreement to program terms. Benefits are available on a first-come, first-served basis, and while the amount of benefit may vary, the variance is based on objective and quantifiable data (e.g., the square footage of the turf replaced). While the program administrator does have some decision-making authority to determine whether the replacement meets all the program requirements (such as the amount of turf replaced and whether qualifying plants are used), the determination is essentially ministerial and does not involve discretion to pick and choose among applicants or to vary benefits from one applicant to the next.

At this point, the board would like to change the program’s restriction and allow Water Authority staff, officers and board members the opportunity to participate. Because you write on behalf of the Board of Directors, our analysis is limited to that body.

ANALYSIS

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 employ the following six-step analysis to determine whether the Water Authority board members will have a conflict of interest under Section 1090 should the restrictions be lifted and they were to apply under the program.

Step One: Will the provisions of Section 1090 apply?

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.” The term “district” is defined in Section 1090 as “any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.” Therefore, the members and officers of the board 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); 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.)

As mentioned, the Water Authority proposes to change the terms of the replacement program to allow Water Authority board members, among others, to participate in the program. Such a change, in itself, does not involve any contractually related issues. Once the program is in place, however, there will be contracts between the Water Authority and any board member who applies (on a first-come, first-served basis). The Water Authority has offered qualified

persons \$1.50 per square foot of turf replaced in exchange for the property owner's replacing the turf with water saving plants. The program contains within it an offer, acceptance, and consideration, which are the tenants of a contract. Any person who is chosen to participate in the WaterSmart Turf Replacement program will therefore enter into a contract with the Water Authority. These contracts are subject to the provisions of Section 1090.

Step Three: Will the public employee or official be 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.) Notably, in relation to a public body, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops. Cal. Atty. Gen. 49 (2006).)

The Water Authority enters into a contract with any person who qualifies for the program. The property owner agrees to replace turf with water conserving plants, and the Water Authority agrees to pay \$1.50 per square foot of turf replaced. As stated above, the board members are presumed to be participating in the contract decisions due to their position on the board.

Step Four: Does the official have a financial interest in the contract?

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 p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 nowhere specifically defines the term "financial interest," case law and Attorney General Opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (See e.g., *Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5.)

Individuals who participate in the program will be paid \$1.50 for every square foot of replaced turf. Therefore, unless an exception applies, the board members who decide to participate will necessarily have a prohibitory financial interest in their own contracts with the Water Authority.

Step Five: Does either a remote interest or non-interest exception apply?

As a general rule, when Section 1090 applies to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) The Legislature has created various statutory exceptions to Section 1090's prohibition, however, including a broad category of "non-interests" under Section 1091.5. If a non-interest is present, the official may enter the contract in his or her official and personal capacities.

Under Section 1091.5(a)(3), an officer or employee is deemed not interested in a contract if his or her interest is "[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board."

The phrase "on the same terms and conditions" requires there be no special treatment of an official, either express or implied, because of that person's status as an official. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1101.) Accordingly, the public services exception generally will *not* apply when the provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official's particular circumstances.³

You have explained that the program is applied to each applicant in an identical manner. The method of choosing applicants is on a first-come, first-served basis, for as long as the program has funds available. Each applicant must be a current retail water customer, must participate in a training course, must replace existing turf with qualifying plants, and must fill out the standard application form and agreement to program terms. While the program administrator does have some decision-making authority to determine that the replacement meets all the program requirements (such as the amount of turf replaced and whether qualifying plants are used), the determination is essentially ministerial and does not involve discretion to pick and choose among applicants or to vary benefits from one applicant to the next.

Based on the above, the 'public services generally provided' exception under Section 1091.5(a)(3) applies here to allow any board member to participate in the program should the restriction be lifted.⁴

³ *Lexin, supra* at 1088, 1100 at note 28; 88 Ops.Cal.Atty.Gen. at 128 ("discretionary or highly customized services" benefitting official would not come within "public services" exception), 92 Ops.Cal.Atty.Gen. at 71.

⁴ Because we find a non-interest exception applies, we do not apply step six (the rule of necessity) 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: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl