

April 1, 2015

Veronica Williams
1373 Magnolia Ave
Carlsbad, CA 92008

Re: Your Request for Advice
Our File No. A-15-029

Dear Ms. Williams:

This letter responds to your request for advice regarding the conflict-of-interest provisions under Section 1090.¹ Because 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), this letter is based on the facts presented.

Regarding 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 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. (Section 1097.1(c)(4).) 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 requestor.” (Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit your personal business from entering into a contract relating to adult education services with MiraCosta College if you are a school board trustee for Carlsbad Unified School District (“CUSD”), which provides adult education services pursuant to a memorandum of understanding with MiraCosta College?

CONCLUSION

No. As explained below, Section 1090 does not prohibit your personal business from entering into a contract relating to adult education services with MiraCosta College.

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

FACTS

You are a school board trustee for CUSD and, together with your spouse, own 51% of BW Research Partnership. Your company has several contracts with community college districts in California to support planning work for AB 86, a grant the state provides to assess how to improve adult education services within the region.

MiraCosta College is the governing board of the Coastal North County Adult Education Consortium, which includes three organizations (MiraCosta College, San Dieguito Union High School District, and Oceanside Unified School District) that provide adult education services. In addition, CUSD is part of the Consortium by virtue of a memorandum of understanding with MiraCosta to provide adult education for their students. CUSD has a staff member that provides feedback to the Consortium about the adult services it provides, but CUSD, including the Board of Trustees, has no voting power in this Consortium. In addition, CUSD has no authority to make decisions concerning MiraCosta's AB 86 funds.

Recently, MiraCosta turned in the regional AB 86 plan to the state seeking additional funding for adult education programs. As part of the additional funding, it is your understanding that MiraCosta will have a need for research and analysis services, both of which your company provides. You have never discussed this potential business with MiraCosta either in your official capacity as a trustee or your personal capacity as an owner of BW Research.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 concerns 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) 103Cal.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. In your situation, however, we need only address whether you will be participating in making a contract (Step 3) for purposes of Section 1090.

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.)

We have previously found that a city planning commissioner who enters into a contract in his private capacity on behalf of his business and had no input on the contract from his public role was not “making” a contract with the city under Section 1090. (See *Asuncion* Advice Letter, 14-062.) Similarly here, you are school board trustee for CUSD who may enter into a contract with MiraCosta in your private capacity as a business owner for research and analysis services. The CUSD Board of Trustees has no authority over and provides no input for contracts MiraCosta enters. Indeed, it is MiraCosta, not the CUSD Board, which may enter into a contract with your company. You will therefore not be making a contract in your official capacity for purposes of Section 1090. Given this conclusion, it is unnecessary to address the remaining steps of the analysis.

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

Sincerely,

John W. Wallace
Assistant General Counsel

By: Jack Woodside
Counsel, Legal Division

JW:jgl