



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 27, 2015

Benjamin T. Reyes II
City Attorney
City of Pinole
555 12th Street, Suite 1500
Oakland, CA 94607

Re: Your Request for Advice
Our File No. A-15-099

Dear Mr. Reyes:

This letter responds to your request for advice on behalf of Mayor J. Murray, the mayor of the City of Pinole, regarding the conflict of interest provisions under Government Code Section 1090 and the Political Reform Act (the “Act”).¹ Please note that we do not advise on other areas of law outside the Act, including the Public Contract Code or common law conflicts of interest. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

In regard 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 Contra Costa 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 advice “is not admissible in a criminal proceeding brought against any individual other than the requestor.” (Section 1097.1(c)(5).)

QUESTIONS

1. Do the provisions of Section 1090 or the Act prohibit Mayor Murray from taking part in council decisions regarding a project to upgrade the City’s water pollution control plant (the “Project”) where his employer is a subcontractor on the Project?

2. Is he prohibited from taking part in decisions regarding a project labor agreement in connection with the Project where he is a member of a Union that will be a party to the contract?

CONCLUSIONS

1. Yes. Under Section 1090, Mayor Murray has a financial interest in the contract. However, because it is a “remote interest,” the City may enter into such contracts even if his employer is

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.

named as a subcontractor in the contractor's bid. However, Mayor Murray may not participate in any decisions involving the contracts. Under the Act, even if Mayor Murray has a conflict of interest, the City may enter into contracts with the prime contractor so long as the mayor follows the Act's recusal requirements.

2. No. Mayor Murray does not have a financial interest either under Section 1090 or the Act in the project labor agreement.

FACTS

The City of Pinole owns and operates a regional Water Pollution Control Plant and is planning to upgrade the plant to conform to state Water Resources Control Board requirements. The estimated cost of the project is \$45,000,000.

The engineering design, plans and specifications for the project are scheduled to be completed in the summer of this year. The City will then solicit bids and anticipates awarding the contract in the fall. The program is designed to ensure that only highly qualified contractors are eligible to submit bids for the project. Bids must include the names of subcontractors whose share of the contract is 0.5% of the bid. It is likely that if Mayor Murray's employer is a subcontractor on a contract involving the project, it will be named in the bid.

The project will be subject to a project labor agreement that the city council has approved in concept. The terms are being negotiated with the appropriate trade unions. Under the agreement the trade unions will agree not to strike or stop work and the City will agree to certain bargained benefits and preferential hiring of skilled local trade workers. If ultimately approved, the City will enter into the agreement with the usual trade union signatories that work on large waste water treatment plant projects. Given the extent of the electrical work, the City anticipates that the International Brotherhood of Electrical Workers will likely be a signatory to the agreement.

Mayor Murray has served on the city council since 1992. He is an electrician by trade and, for the last 35 years, has been employed by Contra Costa Electric, Inc. ("CCE"), a wholly owned subsidiary of EMCOR Group Inc. CCE may be selected as a subcontractor by a prime contractor bidding on the project. EMCOR is a New York Stock Exchange company with revenues of approximately \$6 billion. Mayor Murray is CCE's Marketing Director. He does not serve as a board member or officer of CCE or EMCOR. His compensation is more than \$100,000 and he receives health care and other standard benefits. He is also eligible for a discretionary bonus based on CCE's performance as a whole. His compensation is not based on commission or the number of projects he has solicited for the company. He does not own stock in CCE or EMCOR. CCE has more than ten employees.

Mayor Murray is also a member of IBEW Local 302, (the "Union"), a labor Union that is likely to be a party to the project labor agreement. Mayor Murray is not an officer nor does he sit on any committee, board or governing body of the Union. He will not be representing the Union in any negotiations relating to the project labor agreement.

ANALYSIS

Question 1

Conflict of Interest under 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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

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

Steps One and Two: Is the official subject to the provisions of Section 1090 and does the decision at issue involve a contract

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.” Plainly, Mayor Murray is covered by this prohibition and the agreement between the City and prime contractor is a contract.

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

Where an official is a member of a board or commission that has the power to execute the contract, he or she is deemed to be involved in the making of the contract whether or not he or she actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 9(2004); 88 Ops.Cal.Atty.Gen. 122 (2005).) The city council must approve the agreement with the contractor; therefore, the mayor would be participating in the making of the contract.

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*, 48 Cal.App.4th 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. (*Thomson v. Call, supra*, 38 Cal.3d at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

In addition, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141, 146 [“(h)owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void”].) Further, “the certainty of financial gain is not necessary to create a conflict of interest . . . (t)he government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

With these principles as a backdrop, we turn to the issue concerning the potential conflict of interest presented by this matter. In a 2003 Attorney General Opinion, the board of a redevelopment agency anticipated entering into contracts with business firms intending to locate or expand their offices in a certain redevelopment project area. (86 Ops.Cal.Atty.Gen. 187 (2003).) Several of those businesses were clients of one of the board member’s promotional products company. The Attorney General determined that the board member would have a financial interest in any contracts between the redevelopment agency and those businesses due to the official’s business relationship with the contracting parties as a supplier of goods or services:

“The board member could be influenced by the prospect of future business opportunities directly related to the contracts or by a desire to maintain favorable ongoing relationships with the contracting parties . . . The Legislature has made clear that ongoing business relationships may represent financial interests for purposes of section 1090.” (86 Ops.Cal.Atty.Gen. 187, 188.)

In the *Khuu* Advice Letter, No. I-14-107, finding that a council member had a financial interest in a contract that identified his employer as a subcontractor, we said:

“[I]t is difficult to imagine how the councilmember would ever be able to provide his or her absolute, undivided allegiance to the City when participating in the contracting process involving clients of the firm. This is especially true given the councilmember’s compensation package includes not only a monthly fee and commission based on newly acquired clients, but also a year-end bonus. To be sure, a real potential exists for the councilmember to curry favor with his or her firm and the firm’s clients understanding that it may ultimately affect

his or her year-end bonus and future business opportunities. This is exactly the type of indirect interest Section 1090 attempts to thwart.”

Here, similar to the situations just described, the mayor may be influenced by a desire to “maintain favorable ongoing relationships” between the City and his employer of 35 years who pays him a discretionary bonus based on company performance. Therefore, he has a financial interest in the contract under Section 1090.

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

As a general rule, when Section 1090 is applicable 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).) However, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5.

Under the present circumstances, only the “remote interest” specified in Section 1091(b)(2) appears relevant. An official has a remote interest in a contract entered into by the body or board of which the official is a member if the official is an employee or agent of the contracting party and all of the following factors are present:

- The contracting party has 10 or more employees.
- The employee has been an employee or agent of that party for at least 3 years prior to the official’s term in office.
- The employee owns less than 3 percent of the shares of stock of the contracting party.
- The employee is not an officer or director of the contracting party.
- The employee did not directly participate in formulating the bid of the contracting party.

The facts you have provided do not fall squarely within the language of the exception. Section 1091(b)(2) contemplates a relationship between the official and the contracting party. Here, the mayor is not an employee of the contracting party, but rather an employee of the company that subcontracts with the contracting party. Nonetheless, we believe the policy underlying the exception is still served by applying it to the present situation provided the five factors are satisfied. The facts you have provided indicate that all five factors are present. Accordingly, the mayor has a remote interest in the subject contracts.

If a “remote interest” is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity’s official records, and (3) the officer abstains from any participation in the making of

the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).)²

Question 2

Conflict of Interest under Section 1090

As stated above, there is a statutory exception to Section 1090's prohibitions commonly referred to as a "noninterest." Under Section 1091.5(a)(7), an officer or employee is deemed to be not interested in a contract if his or her interest is that of a nonsalaried member of a nonprofit corporation, provided that the interest is disclosed to the body or board at the time of the first consideration of the contract and noted in its official records. The Union is a nonprofit corporation; therefore, Mayor Murray has no financial interest in the project labor agreement and may take part in decisions concerning the agreement.

Conflict of Interest under the Act

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. Under Section 87103, a public official has financial interest in:

- A business entity in which he or she has a direct or indirect investment of \$ 2,000 or more (Section 87103(a); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)
- Any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- Any source of gifts to him or her if the gifts total \$460 or more within 12 months prior to the decision. (Section 87103(e).)
- His or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the "personal financial effects" rule. (Section 87103.)

As a nonprofit entity, the Union is not a "business entity" as defined in Section 82005. Also, nothing in the facts suggests that Mayor Murray receives any income from the Union. Therefore,

² Inasmuch as we have determined that Mayor Murray has a remote interest we end our analysis here without addressing the final step, the "rule of necessity" exception. Additionally, in light of our conclusion that Mayor Murray must recuse himself from participating in the decision under Section 1090, further advice under the Act is not necessary. However, the Act does set forth specific procedures for city council members to properly recuse themselves from a governmental decision, which must also be followed. (See Section 87105; Regulation 18704.5.)

Mayor Murray's membership in the Union does not create the basis for a conflict of interest under the Act.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl