



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 17, 2015

Zakhary Mallett, MCP
Director, District 7
San Francisco Bay Area Rapid Transit District (BART)
300 Lakeside Drive, 23rd Floor
Oakland, California 94612

Re: Your Request for Advice
Our File No. A-15-119

Dear Mr. Mallett:

This letter responds to your request for advice regarding Section 1090 and the provisions of the Political Reform Act (the “Act”).¹ Please note that we do not advise on any other area of law, 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 Alameda 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).)

QUESTION

Does either the Act or Section 1090 prohibit your participation in decisions as a board member of the San Francisco Bay Area Rapid Transit District (the “District” or “BART”) regarding contracts between the District and contractors for whom you serve as a subcontractor where you do not act as a subcontractor on any contracts involving the District?

CONCLUSION

Under the Act, you may not participate in these decisions if it is reasonably foreseeable that the decision’s financial effect would contribute to a change in the value of the contractor’s business.

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.

Section 1090 does not prohibit your participation in these decisions because you do not have a “financial interest” in the contracts.

FACTS

You are an elected member of the board of directors of the District and own a consulting business that is organized as a sole proprietorship. Your firm seeks to work as a subcontractor for larger consulting firms that contract with the District on transportation projects. All such contracts must be approved by the District’s board. You do not intend to enter into any contracts with the District or serve as a subcontractor on any BART projects.

ANALYSIS

CONFLICT OF INTEREST UNDER THE ACT

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on the public official or any interest described in Section 87103.

The interests that can give rise to conflicts of interest under the Act that are pertinent to your request are the following:

Business Entity – A public official has an 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).) As the owner of your firm, you have an interest in the firm as a business entity.

Source of Income – A public official has an interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c).) Your business and any client from which you derive income aggregating to \$500 or more in the 12 months prior to a board decision, are sources of income to you.

Foreseeability

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official’s interests is material. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision.

Under the facts you have provided, your business is not explicitly involved in any BART contracts. Thus, as applied to your business, Regulation 18701(b) provides: “In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

A financial effect is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest. (Regulation 18701(a).) Clearly, any prime contractor that is a source of income to you that bids on or enters into a contract with the District is a named party in and the subject of proceedings involving the contract. Therefore, any financial effect on the contractor is presumed to be reasonably foreseeable.

Materiality

The next inquiry is whether the foreseeable financial effect on an official's interests will be material. A financial effect on a business entity is material if "a prudent person with sufficient information would find it reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity." (Regulation 18702.1(b).)

You have not identified any particular governmental decision in which you wish to participate. Each decision regarding a project must be analyzed individually to determine whether the decision would contribute to a change in the value of the contractor's business. For example, if a contractor receives a majority of its revenues or profits from BART contracts, it is likely that any such contracts will contribute to the value of the contractor's business. Therefore, any board decisions regarding such contracts would have a material financial effect on the contractor's business. If the contractor is a source of income to you, you would have a disqualifying conflict of interest that would prevent you from participating in decisions regarding the contract.²

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. 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.)

Although Section 1090 does not specifically define 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, supra*, 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).)

² Note that when a public official who holds an office specified in Section 87200 and has a conflict of interest in a decision, under certain circumstances he or she must orally identify each type of financial interest involved in the decision as well as details of the interest, recuse himself or herself, and leave the room. The District's board members are not subject to the rule of the statute (although the board's own rules may impose similar requirements).

More recently, in *Eden Township Healthcare Dist. v. Sutter Heath* (2011) 202 Cal.App.4th 208, the court of appeal held that “to be prohibited under section 1090, the public official’s financial interest must be related to the contract The purpose of the prohibition is to prevent a situation where a public official would stand to gain or lose something *with respect to the making of a contract* over which in his official capacity he could exercise some influence.” (*Id.* at p. 225.)

You state that you will not enter into any contracts with the District nor will you serve as a subcontractor on any District contracts. Thus, there appears to be no connection between District contracts and any possible financial effect on you or your business. Accordingly, we find that you are not “financially interested” in the District’s contracts. You and the board would not violate Section 1090 by making such contracts.

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