



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 27, 2020

Elizabeth M. Calciano
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Re: Your Request for Advice
Our File No. A-20-084

Dear Ms. Calciano:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the San Bernadino 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.” (See Section 1097.1(c)(5).)

QUESTION

Under the Act and Section 1090, may Chino Hills City Councilmember Brian Johsz and the City Council potentially contract with a company that employs Councilmember Johsz?

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

Under the Act, Councilmember Johsz is prohibited from taking part in the potential contracting process, given that it would explicitly involve his employer and therefore have a reasonably foreseeable, material financial effect on his source of income and business entity interests. Similarly, Councilmember Johsz's financial interest in his employer also prohibits him from taking part in the contracting process under Section 1090. However, given the circumstances of his employment, including it predating his service as a councilmember and his status as an employee rather than an officer or director, his financial interest would be considered "remote" under Section 1091(b)(2) if he properly recuses himself. Accordingly, the City Council would be permitted to contract with Councilmember Johsz's employer despite his remote interest.

FACTS AS PRESENTED BY REQUESTER

The City of Chino Hills' ("City") multi-million dollar solid waste management franchise is due to expire at the end of this year. City staff has begun work on a Request for Proposals for the next multi-year franchise.

Brian Johsz is a member of the Chino City Council. He is also employed by Arakelian Enterprises, Inc. (dba Athens Services) ("Athens"). Athens provides solid waste management services and might submit a proposal in response to the City's RFP. Athens has well over 100 employees. Councilmember Johsz's position at Athens is Director of Government Affairs. That role is not considered an "officer" position and Councilmember Johsz is not a member of the Athens Board of Directors. Councilmember Johsz does not own stock in Athens. He has not played any role in formulating the proposed contract. Councilmember Johsz has worked for Athens since September 8, 2014 and was first sworn into office as a City Councilmember on September 11, 2017 (after first being appointed to the position in August 2017).

Councilmember Johsz plans to refrain from any participation in the City's decision and recuse himself from the City Council's decision on the award of the solid waste management franchise. Earlier this year, Councilmember Johsz recused himself from the City Council item that approved issuing an RFP for a Solid Waste Management Consultant that will assist the City in evaluating the City's current solid waste programs and services, work closely with City staff in the development of a Request for Proposals to solicit new solid waste management service proposals, and negotiate a new franchise agreement.

ANALYSIS

The Act

Under Section 87100 of the Act, "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." "A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her

immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests are:

- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(Section 87103(c)-(d).)

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest 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 financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

The applicable standards for determining whether a reasonably foreseeable financial effect on a business entity interest is material, found in Regulation 18702.1, are the same standards applicable where a source of income interest is a business entity. (See (Regulation 18702.2(a)(4).) Under Regulation 18702.1(a)(1)(C), the reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a business entity, including a business entity which is a source of income to the official, is material if the entity is a named party in, or the subject of the decision, including any decision in which the entity enters into a contract with the agency.

Here, Athens would be bidding on a contract with the City. Councilmember Johsz’s source of income and business entity interest would be explicitly involved in the governmental decision, which would have a reasonably foreseeable, material financial effect on those interests. Accordingly, under the Act, Councilmember Johsz would be prohibited from taking part in the decision and would be required to recuse himself from the decision.

Section 1090

Under Section 1090, city officers “shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member.” 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. City of Taft* (1962) 58 Cal.2d 565, 569.) 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, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

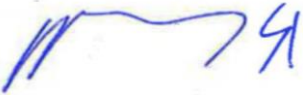
Under Section 1091(a), however, "[a]n officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest." Section 1091(b)(2) defines "remote interest" to include "[t]hat of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party."

Here, Councilmember Johsz is an employee of Athens, a company with 10 or more other employees. He has been an Athens employee for more than three years prior to initially accepting his office as City Councilmember. He does not own stock in Athens. He is not an officer, nor is he a director within the meaning of Section 1091(b)(2). Finally, he has not directly participated in formulating a bid by Athens. Accordingly, while Councilmember Johsz has a disqualifying financial interest under Section 1090, that interest will be considered "remote" under Section 1091(a) if Councilmember Johsz discloses his interest to the City Council and has it noted in the City Council's records. Thereafter, with Councilmember Johsz recusing himself and not taking part in a vote on the contract, the City Council would be permitted to contract with Athens.

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

Sincerely,

Dave Bainbridge
General Counsel


By: Kevin Cornwall
Counsel, Legal Division

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