



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 5, 2019

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Re: Your Request for Advice
Our File No. A-19-038

Dear Ms. Bhatt:

This letter responds to your request for advice on behalf of Council Member Chad Billingsley regarding the conflict of interest provisions of Government Code section 1090. ("Section 1090").¹ Please note that we are only providing advice under the conflict of interest provisions of Section 1090, not under the Political Reform Act or 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.

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 Fresno 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

Based on the facts provided, will the remote interest exception under Section 1091(b)(2) apply to allow the City of Lemoore to renegotiate its existing agreement with Leprino Foods?²

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

² Your request presumes Council Member Chad Billingsley has prohibitory conflict of interest under Section 1090.

CONCLUSION

Yes. As explained below, Section 1091(b)(2) will apply to allow the City of Lemoore to renegotiate its existing agreement with Leprino Foods?

FACTS AS PROVIDED BY REQUESTOR

Your office represents the City of Lemoore ("City") and you are seeking advice on the City's behalf regarding the applicability of the remote interest exception in Section 1091(b)(2) based on the facts provided.

Leprino Foods ("Leprino") is a private company currently listed as number 136 on Forbes "America's Largest Private Companies List," with plants in various states, in the United Kingdom, and in Singapore. Leprino operates the world's largest mozzarella cheese facility, is the City's largest employer, and employs thousands of people.

Leprino operates two cheese manufacturing plants in the City, which together generate over two million gallons of wastewater per day. Previously, the City and Leprino agreed to a cost-sharing and lease agreement plan to pay the discharge and treatment of the City's and Leprino's wastewater. Under the agreement, Leprino conveys wastewater from its two plants to the City's wastewater treatment facility where it is combined with the City's wastewater and treated. Pursuant to this agreement, the City and Leprino both pay portions of the cost for the wastewater treatment.

After the approval of the agreement and in December 2018, Council Member Chad Billingsley ("Mr. Billingsley") was elected to the City Council. He had no involvement in any preliminary discussions, negotiations, or approval of the agreement between the City and Leprino.

Council Member Billingsley has been employed by Leprino for over ten years. He is currently employed as a "Safety Supervisor." This is a mid-management position for which Council Member Billingsley receives an annual salary. His job duties include directing and managing the safety training process, ensuring compliance with state and federal health safety regulations, supervising employees, and establishing safety related policies, among other duties.

Councilmember Billingsley is not an officer or director for Leprino and he does not hold any ownership interest of any kind or shares of stock in Leprino. He has no financial relationships with Leprino other than that of employee, meaning that there are no debtor-creditor or other financial arrangements or business ventures between Council Member Billingsley and the City.

To reduce costs related to wastewater treatment, the City now wishes to renegotiate and modify the existing agreement with Leprino. Given that the City and Leprino are parties to an existing agreement, the City does not anticipate engaging in a bidding process that involves the submission of bids and/or the awarding of a contract to a lowest responsible bidder. Rather, the City anticipates entering into direct negotiations with Leprino and inviting Leprino to propose more favorable terms, potentially resulting in the modification of the current agreement.

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. City of Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. 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.)

As your request correctly states, employees have been found to have a financial interest in a contract that involves their employer, even when the agreement would not result in a change in income. This is because an employee has an overall interest in the employer's financial success and continued employment. (See e.g., 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001); *Gallien* Advice Letter, No. A-16-263.) Your request therefore presumes the existence of a conflict of interest and focusses on the applicability of the remote interest under Section 1091(b)(2) to the present situation.

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 Section 1091(b)(2), 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.

(See Section 1091(b)(2).)

The facts you have provided do not fall squarely within the express language of the exception. To apply, the final factor under Section 1091(b)(2) prohibits any direct participation by

the official in the formulation of the contracting party's *bid*. Here, however, there is no bid because Council Member Billingsley's employer, Leprino, already has a contract with the City that the City now wishes to renegotiate.³ We do not view this distinction as one that impacts the applicability of the exception to the present situation. The policy underlying the exception is still served by applying it to the present situation so long as Council Member Billingsley does not participate in any manner in the renegotiation of the contract (see below) and the remaining four factors are satisfied, which they are. Accordingly, Council Member Billingsley has a remote interest in the renegotiation of the existing contract.

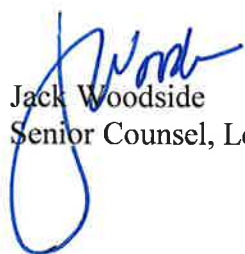
When a "remote interest" is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).)

Therefore, the City may renegotiate its existing contract with Leprino so long as Council Member Billingsley discloses his financial interest in the contract, it is noted in the official records, and he abstains from any participation in renegotiating the contract.

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

Sincerely,

Dave Bainbridge
General Counsel

By:  Jack Woodside
Senior Counsel, Legal Division

³ A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191.)