



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 13, 2020

Abel Salinas
Ethics Officer
PO Box 54153
Los Angeles, CA 90054-0153

Re: Your Request for Advice
Our File No. A-20-110

Dear Mr. Salinas:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under 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 Los Angeles 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

Do the conflict of interest provisions under Section 1090 prohibit the Metropolitan Water District of Southern California ("Water District") from contracting with a firm where a Director on its Board has a consulting arrangement with the firm?

CONCLUSION

No. Section 1090 does not prohibit the Water District from entering contracts with the firm where the Water District's General Manager has the independent authority, not subject to review by

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.

the Board, to enter such contracts. In addition, because the Director has only a remote interest in those contracts, the Water District may enter other contracts with the firm so long as the Director abstains from any participation and follows the requirements specified in Section 1091.

FACTS AS PRESENTED BY REQUESTER

You seek advice on behalf of the Metropolitan Water District of Southern California Board of Directors (“Board”) and John Morris, who represents the City of San Marino as a Director on the Metropolitan Board.

The Water District² is a regional water wholesaler that delivers water to its 26 public member agencies – 14 cities, 11 municipal water districts, and one county water authority. These member agencies, or their own member agencies, provide water to 19 million people in Los Angeles, Orange, Riverside, San Bernardino, San Diego and Ventura counties. The Water District is governed by a 38-member Board, representing each of the Water District’s member agencies. Directors are appointed to serve on the Board.

Director Morris joined the Board by appointment in 1990. He currently chairs the Facilities Naming Ad Hoc Committee and is a member of the following Board Committees: Bay-Delta; Communications and Legislation; Conservation and Local Resources; Engineering and Operations; Organization, Personnel and Technology; and Water Planning and Stewardship. As a member of the Board, Director Morris must file an annual Statement of Economic Interests pursuant to Section 87200.

Director Morris has been a California-licensed civil engineer since 1973 and professionally involved in the water industry for over 50 years. In the past, Director Morris consulted on water issues as owner and principal of Morris Water Resources Consultants. His consulting company specialized in desalination, water reuse, master planning, alternative resource evaluations, rate evaluations, and independent design review. Director Morris’ consulting company is no longer active, and he is currently retired.

The Board and its Committees participate in, and vote on, various types of government contracts. Some Water District contractors are selected through a competitive process and are thereafter approved by the Board. The General Manager possesses the authority to enter into contracts valued at \$250,000 or less, including professional services contracts, in Section 8121 of the Water District’s Administrative Code:

- (a) Contracts Over \$250,000. Except as provided in Section 8122, if the amount payable or expected to be paid by the District under the terms of the contract is in excess of \$250,000, the contract shall be executed only upon prior approval of the Board, provided that the Board may designate an officer of the District to negotiate and execute classes of contracts without prior approval of the Board.

² The Water District was established by the California Legislature in 1928 through the Metropolitan Water District Act. (<http://www.mwdh2o.com/WhoWeAre/MWDAct.>)

(b) Contracts of \$250,000 or less. If the amount payable or expected to be paid by the District under the terms of a contract is \$250,000 or less the contract may be executed by the General Manager except as provided in Section 8122 or otherwise directed by the Board.

(c) Professional and Technical consultants. The General Manager may exercise without restriction the contractual powers conferred by Section 8121(b) regardless of subject matter, provided that the amount payable under any one contract for professional and technical services during any one year shall not exceed \$250,000.

An engineering firm³ recently offered Director Morris a consulting opportunity to be included as a named team member in the firm's response to a Request for Proposals for a multi-year consulting contract with a government agency. The firm's offer prompted this request for advice. The firm currently has an open contract with the Water District, and often responds to requests for proposals as either a primary consultant or subcontractor on contracts with the Water District. Therefore, you have reason to believe the firm may continue to participate in the Water District's contracting process in the future. The firm plans to name Director Morris as a team member in the RFP this month, however it is uncertain whether the firm will be awarded the contract.

Because this contractor is likely to reappear as a named contractor or subcontractor in a future Water District contract bid, or be involved in another potential contracting scenario such as an amendment to an existing contract with the Water District, you seek advice as to whether Section 1090 would prohibit potential Water District contracts with the firm while Director Morris is on the Board.

ANALYSIS

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.) Section 1090 is concerned with financial interests, other than remote or noninterests, 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.) An officer is conclusively presumed to be involved in the making of his or her agency's contracts when the officer is a member of a board or commission that has the power to execute the contract at issue. (*Thomson, supra*, p. 649.) As a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, the entire governing body is precluded from entering into the contract. (*Stigall, supra*, at p. 569.)

Financial Interest in a Contract

This matter concerns a potential contract between the Water District and the firm providing Director Morris with an opportunity to work as a consultant to the firm. An initial issue is whether Director Morris would have a financial interest in any such contract.

³ Because competitive bidding is a confidential process and is ongoing, you have not identified the government agency issuing the RFP, or the responsive firm, in this request. However, the RFP was not issued by the Water District.

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) and officials are deemed to have a financial interest in a contract if they might profit from it in any way. Employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because the employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001); 88 Ops.Cal.Atty.Gen. 106, 108-110 (2005) [board member has financial interest in contract between his employer and district board because it would contribute to the financial health of the his employer from whom he receives most of his income].)

Although Director Morris will not be an employee of the firm, we believe the concerns just mentioned would still apply to him in his capacity as a consultant to the firm, especially where he would be named team member for a potential multi-year consulting contract with a different government agency. An important purpose of Section 1090 is “to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official’s decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct.” (*Stigall, supra*, at p. 569.) In addition, conflict of interest statutes are to be “strictly enforced” and are “strictly construed” by the courts. (69 Ops.Cal.Atty.Gen. 255, 258 (1986).) Therefore, Director Morris would have a financial interest in any contracts between the Water District and the firm.⁴

Independent Contracting Authority

According to the facts, the General Manager has the authority to enter into contracts valued at \$250,000 or less, including professional services contracts. The next issue is whether the General Manager would be able to enter into contracts with the firm on behalf of the Water District, thus avoiding a Section 1090 violation because the Board would not be participating in the making of the contract.

Instructive is an Attorney General opinion that found a county supervisor’s ownership in a business did not cause a Section 1090 violation where a county employee had independent legal authority to approve of transactions with the business. In that matter, the county wished to obtain towing services and service station supplies from a county supervisor who owned the only service station in a certain area of the county to avoid having to obtain them elsewhere. (57 Ops.Cal.Atty.Gen. 458, 459 (1974).) The county board of supervisors had the authority to hire a county purchasing agent under Section 25500, while Section 25501 set forth the purchasing agent’s authority to make such purchases. (*Id.* at p. 460.) The opinion concluded that the county purchasing agent had independent authority to contract, and thus could execute a contract with the county supervisor for goods or services without violating Section 1090 because the board of supervisors would not be participating in the making of the contract. (*Id.* at p. 460-61; see also 21 Ops.Cal.Atty.Gen. 90 (1953) [city treasurer can deposit funds in a bank in which a city council member was a stockholder and director. “The significant fact in each of these opinions is the

⁴ This conclusion would be the same regardless of whether the firm is the primary consultant or a subcontractor. Also note that the prohibition would apply to any decision to modify, extend or renegotiate the Water District’s current contract with the firm.

independent status of the party contracting on behalf of the governmental agency.” (*Id.* at p. 92; 14 Ops.Cal.Atty.Gen. 78 (1949); 3 Ops.Cal.Atty.Gen. 188 (1944)].)

It appears certain contracts entered by the General Manager may be similar. The Water District was established by the Legislature through the Metropolitan Water District Act. The Metropolitan Water District Act provides that the Board may create any and all necessary offices, including the office of general manager. (Water Code, § 109-80 (West).) Further, the Board may pass ordinances and resolutions necessary to carry out the provisions of the Metropolitan Water District Act (*id.* at § 109-61) and establish the powers and duties and compensation of all officers and employees. (*Id.* at § 109-61.) Pursuant to Section 8121, subdivision (c), of the Water District’s Administrative Code, the General Manager has the authority, *without restriction*, to enter a single contract for professional and technical services on behalf of the Water District valued at \$250,000 or less. On the other hand, the Code reserves the discretionary power to the Board for contracts over \$250,000 or contracts of less than \$250,000 for services other than professional and technical services. (Water District Administrative Code, § 8121, subds. (a) and (b).)

To the extent that a contract falls within subdivision (c) of the Water District’s Administrative Code, we conclude the General Manager has independent authority to contract on behalf of the Water District for the specified contracts. Moreover, the Water District does not violate Section 1090 when the General Manager enters into any such contract. (See *Walter Advice Letter*, No. A-15-050 [Section 1090 violation avoided where City Manager’s authority to enter contracts for professional services is within the power and duties of the City Manager and not subject to the supervision or control of the City Council]; but see 87 Ops.Cal.Atty.Gen. 9, 12-13 (2004) [a district superintendent’s authority to contract remains subject to the review and ratification of the governing board under state law].)

Remote and Noninterest Exceptions

While Section 1090 would not prohibit a contract entered by the General Manager under the independent authority of subdivision (c) of the Water District’s Administrative Code, we must continue our analysis for contracts outside of subdivision (c). Accordingly, we turn to an examination of the remote and noninterest exceptions.

The Legislature has expressly defined certain financial interests as “remote” or “noninterest” exceptions to Section 1090’s general prohibition. Where a remote interest is present, the contract may be lawfully executed provided (1) the officer discloses his or her financial interest in the contract to the public agency; (2) the interest is noted in the public body’s official records; and (3) the officer completely abstains from any participation in the making of the contract. (Section 1091.) Where a noninterest is present, the contract may be executed without the abstention. (Section 1091.5.) For those contracts with the firm that may exceed \$250,000, the next issue is whether any remote or noninterest exceptions apply to avoid Section 1090’s prohibition.

As pertinent to your question, the remote interest exception in Section 1091(b)(11) provides that the interest of an engineer, geologist, architect or planner employed by a consulting engineering, architectural, or planning firm is a remote if the interested official does not serve in a primary management capacity or as an officer or director of the firm.

Here, the consulting firm in question seeks to hire Director Morris, a licensed civil engineer, as a consultant to be a named team member for a potential multi-year consulting contract. In our view, it would be logical to extend application of this remote interest exception where Director Morris, as a consultant hired by the firm, would have an interest even more remote than an employee of the firm.⁵ (See, e.g., *Schons* Advice Letter, No. A-17-129; *Craft* Advice Letter, No. A-14-168.) Accordingly, the Water District may enter other contracts with the firm hiring Director Morris as a consultant so long as he abstains from any participation and follows the requirements specified in Section 1091.

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

Sincerely,

Dave Bainbridge
General Counsel

Jack Woodside
By: Jack Woodside
Senior Counsel, Legal Division

JW:aja

⁵ By email dated November 10, 2020, your office confirmed that as a consultant to the firm, Director Morris would not serve in a primary management capacity or as an officer or director of the firm.