



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 18, 2021

Nicholas Sanders
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150 Post Street, Suite 405
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Re: Your Request for Advice
Our File No. A-21-110

Dear Mr. Sanders:

This letter responds to your request for advice on behalf of the Port of San Diego and Port Commissioner Sandy Naranjo regarding the conflict of interest provisions of the Political Reform Act (“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.

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 Diego 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).)

QUESTIONS

1. Under the Act and Section 1090, may Commissioner Naranjo take part in governmental decisions and the contracting processes for “Contracts #1 and 2,” on which her husband’s employer, Baker Electric (“Baker”) has placed bids?

¹ The 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.

2. If Commissioner Naranjo is disqualified under Section 1090 from taking part in the contracting processes for Contracts #1 and 2, may the Port of San Diego still contract with Baker?

CONCLUSIONS

1. No, under the Act and Section 1090, Commissioner Naranjo is disqualified from taking part in the governmental decisions and contracting processes because both Contracts #1 and #2 would financially impact Baker as a subject of the decisions.
2. The Port of San Diego may contract with Baker following Commissioner Naranjo's proper recusal only to the extent that a Section 1090 exception for remote or noninterest applies. As pertinent to this request, Commissioner Naranjo's interest would be considered a "remote interest" under Section 1091(b)(3) only to the extent that Baker has the requisite number of employees, has placed the lowest bid, and all other criteria are satisfied.

FACTS AS PRESENTED BY REQUESTER

Commissioner Naranjo became a Port of San Diego ("Port") Board of Commissioners ("Board") in early January 2021. Her husband ("Mr. Naranjo") is an electrician at Baker, a prominent electrical construction and renewable energy services company located in San Diego County, which has provided electric services for Port projects in the past. He is a salaried employee and eligible for discretionary bonuses, but does not have any ownership in the company, does not work on any bids which the company submits to do work for Port contracts, and is not part of the company's executive team, nor does he work in a management capacity. He began working for Baker on November 1, 2019.

As her husband's employer, Baker is one of Commissioner Naranjo's financial interests and is listed as a source of her income on her Statement of Economic Interests (Form 700).

Baker is currently involved in bids/proposals for two contracts pending before the Port. The details of the bids and staff's recommendation for these two projects are not yet public.

In the first contract—"Contract #1"—Baker is one of several companies which has submitted a proposal in response to a Port RFP for a solar power project. Port staff is currently reviewing the proposals using the "best value" criteria applicable to public contracting solar projects, and has narrowed down the field to three companies ("Company A," "Company B" and Baker); staff will submit its recommendation to the Board in the near future, though the contract is not expected to go before the Board until its November 2021 meeting at the earliest. Baker may or may not ask Commissioner Naranjo's husband to work on the project if its proposal is selected for the project.

When the matter comes before the Board, staff will present the contract it has negotiated with recommended company, though the Commissioners will also receive information about the proposals submitted by the other two companies. The question before the Board will be whether to accept or reject staff's recommended contract. The Board will not be able to award the contract to one of the non-recommended companies because there will not be negotiated contracts with the other companies before the Board. For example, if staff recommends Company A, and the Board

rejects that recommendation, it could direct staff to return to the Board in the future with a contract with another company.

In “Contract #2,” Baker is a subcontractor listed on a bid submitted by a company for a relatively small public works construction project. The public works bidding law requires the Port to select the company for this construction project which submitted the lowest bid, as long as the company meets other specific contracting criteria. Port rules require the Board to approve all contracts over a certain amount, while contracts below this amount are approved solely by Port staff. Depending on the bids submitted by the company for whom Baker is a subcontractor and the other bidders for this construction contract, the contract may be approved by staff with no participation by the Board, or it may have to be approved by the Board.

If the contract is above the threshold for Board approval, the Board will not have discretion to reject the bid in favor of another because it would be the lowest bid. However, it could conceivably find the low bidder non-responsive or non-responsible (if there are facts to support such a conclusion) and then award the bid to the next lowest bidder, or it could reject the bid and ask staff to re-issue the bids, or it could opt to not have the Port do this construction project at all. The Board may vote on the contract as soon as its October or November 2021 meeting. Baker may or may not ask Commissioner Naranjo’s husband to work on this contract if the bid on which they are a subcontractor is selected.

ANALYSIS

The Act

Under Section 87100 of the Act, no public official at any level of state or local government shall make, participate in making or in any way attempt to use their 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 is “[a]ny source of income . . . 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.” (Section 87103(c).) As noted in your request for advice, Commissioner Naranjo has an economic interest in Baker as a source of income.

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 reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a source of income is material if the source is a named party in, or the subject

of, the decision including a claimant, applicant, respondent, or contracting party. (Regulation 18702.3(a)(1).)

The Board will consider staff recommendations regarding which companies to contract with for Contract #1. With respect to Contract #2, the Board may be required to select the lowest bidder for the contract, but could alternatively reject the bid and ask staff to re-issue the bids. As an applicant and named party in the decisions before the Board, Baker would be considered the subject of the decisions. In either case, even if Baker was not part of the contract recommended or presented to the Board, the Board could reject the contract and thereby give Baker a second opportunity to potentially contract with the Board. As a named party and subject of the governmental decisions at issue, the decisions would have a reasonably foreseeable, material financial effect on Baker. Accordingly, the Act prohibits Commissioner Naranjo from taking part in the decisions, regardless of which company Port staff recommends.

Section 1090

Under Section 1090, public officials “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.) The courts have interpreted “financial interest” broadly in the context of Section 1090 to include “indirect interests and future expectations of profit or loss.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 239, citing *Thomson v. Call* (1985) 38 Cal.3d 633, 645-646.) Whether a proscribed financial interest exists in a public contract is primarily a question of fact. (See, e.g., *People v. Vallerga* (1977) 67 Cal.App.3d 847, 864-866.)

A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, 38 Cal.3d at pp. 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.)

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. Based on the information provided, the only exception that appears to be potentially applicable is a remote interest exception under Section 1091(b)(3).²

Under Section 1091, “[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

² Given that Mr. Naranjo’s work predates Commissioner Naranjo taking office by less than three years, Section 1091(b)(2) is not applicable.

sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.” (Section 1091(a).) Section 1091(b) defines “remote interest” to include that of an employee or agent of the contracting party, if all of the following conditions are met:

- (A) The agency of which the person is an officer is a local public agency located in a county with a population of less than 4,000,000.
- (B) The contract is competitively bid and is not for personal services.
- (C) The employee or agent is not in a primary management capacity with the contracting party, is not an officer or director of the contracting party, and holds no ownership interest in the contracting party.
- (D) The contracting party has 10 or more other employees.
- (E) The employee or agent did not directly participate in formulating the bid of the contracting party.
- (F) The contracting party is the lowest responsible bidder.

(Section 1091(b)(3).)

The decisions coming before the Board involve either approving or rejecting contracts that may involve Baker either directly as a contractor or indirectly as a subcontractor. In the instance, that Baker is not a part of the recommended contract, the Board may reject the contract. With respect to Contract #1, the Board could direct that Port staff negotiate a contract with Baker. With respect to Contract #2, the Board could reject the contract involving the lowest bidder and ask staff to re-issue the bids, giving Baker a subsequent opportunity to potentially contract with the Port. Accordingly, unless an exception applies, Section 1090 would prohibit Commissioner Naranjo from taking part in the contracting process, including the decisions coming before the Board regarding recommended contracts. Further, because the entire governing body is precluded from entering the contract (*Thomson, supra*, 38 Cal.3d at pp. 647-49), the Board is also prohibited from contracting with Baker (or the company Baker would be subcontracting with) unless an exception applies.

As noted above, Section 1091(b)(3) provides a potentially relevant “remote interest” exception which, if applicable, would permit the Board to contract with Baker following Commissioner Naranjo’s proper recusal. With respect to the Section 1091(b)(3) criteria noted above, Commissioner Naranjo’s interest is that of an employee of the contracting party (i.e., her husband’s employment in Baker) and the following conditions are met:

- (A) The Port of San Diego is a local public agency located in San Diego County, which has a population of less than 4,000,000.³
- (B) The contracts at issue are competitively bid and are not for personal services.

³ See U.S. Census QuickFacts, San Diego County, <https://www.census.gov/quickfacts/fact/table/sandiegocountycalifornia,CA/PST045219> (listing estimated 2019 population of 3,338,330).

(C) Mr. Naranjo is an electrician and not in a primary management capacity with Baker, is not an officer or director at Baker, and holds no ownership interest in Baker.

(D) As a “prominent” electrical construction and renewable energy services company located in San Diego County, Baker presumably has 10 or more other employees.

(E) Mr. Naranjo does not work on any bids that Baker submits for Port contracts.

Thus, to the extent statements (A)-(E) above are accurate, each of the criteria for Section 1091(b)(3) is satisfied except for subdivision (F), “[t]he contracting party is the lowest responsible bidder,” which we do not yet know. If Baker is the lowest responsible bidder, then Section 1091(b)(3) would apply and Commissioner Naranjo would have only a remote interest in the contract. She would still be required to recuse herself from the contracting process, but the Board could contract with Baker thereafter. In the event that Baker is *not* the lowest responsible bidder, Commissioner Naranjo’s interest would not be considered “remote” and the Board would not be permitted to contract with Baker.

To summarize, under the Act and Section 1090, Commissioner Naranjo is prohibited from taking part in the contracting process and governmental decisions related to Contracts #1 and #2. Following Commissioner Naranjo’s recusal pursuant to the Act and Section 1091(a), however, the Board may either: (A) contract with Baker, if the Section 1091(b)(3) criteria are satisfied, or (B) contract with another company.

You have additionally inquired whether Commissioner Naranjo may take part in the governmental decisions/contracting processes if Baker puts protocols in place to make certain her husband will not do any work on the project and that his compensation will not be tied in any way to Baker’s work on the project. Because the relevant analysis discussed above concerns the potential financial effect on Baker as a source of Commissioner Naranjo’s income generally, rather than on Mr. Naranjo’s work for the company, any such protocols would not impact her disqualification from taking part in the decisions.

You also inquired whether Commissioner Naranjo may take part in the governmental decisions/contracting processes if all of Baker’s work on a project would be performed by a separate, wholly-owned subsidiary of Baker, which Mr. Naranjo does not work for and does not have his compensation or finances tied to in any way. In Attorney General Opinion, 84 Ops.Cal.Atty.Gen. 158 (2001), an official was a 48 percent stockholder, chief executive officer, president, and lessor to an architecture corporation. To avoid a conflict-of-interest prohibition, one of the three other licensed stockholders of the corporation sought to set up a separate firm to contract with the city. The Attorney General opined that, even where the official would not be an owner of the separate firm and the corporation would not share in the profits of the firm, “the financial identity between the corporation and the separate firm would be too pervasive to allow such contracts.” (*Id.* at 162.) The Attorney General’s reasoning focused on the city contract’s indirect and direct impacts on the financial health of the corporation, in which the official had a financial interest.

Additionally, under the Act, an official with an economic interest in a business entity also has an interest in a parent or subsidiary of the business entity or an otherwise related business entity except when the business entity meets certain criteria not applicable here. (Regulation 18700.2(c).) Though Section 1090 and related statutes do not expressly address subsidiaries, the California

Supreme Court has explained that Section 1090 and the Act are *in pari materia*, or “of the same matter,” and therefore, “to the extent their language permits, we will read section 1090 et seq. and the Political Reform Act as consistent.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91.) Accordingly, Section 1090 should be read to similarly prohibit participation in a contracting process that would affect a wholly-owned subsidiary of a business entity in which an official has a financial interest. For these reasons, and the fact that the contracts themselves would still involve Baker, our above conclusions would be applicable even if the actual work would be performed by a subsidiary of Baker, rather than Baker itself.

Finally, the governing board of an agency may not avoid the conflict-of-interest provisions of Section 1090 by adopting a policy delegating its authority to contract on behalf of the agency. (See 87 Ops.Cal.Atty.Gen. 9 (2004).) Therefore, in the event Contract #2 did not meet a monetary threshold such that Board approval was required, Port staff would similarly be prohibited from entering a contract with Baker unless the Section 1091(b)(3) criteria discussed above was satisfied.

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

KMC:dkv