



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
1102 Q Street • Suite 3000 • Sacramento, CA 95811  
(916) 322-5660 • Fax (916) 322-0886

March 23, 2021

Lynn Tracy Nerland  
City Attorney  
City of San Pablo  
1000 Gateway Ave  
San Pablo, CA 94806

Re: Your Request for Advice  
**Our File No. A-21-012**

Dear Ms. Nerland:

This letter responds to your request for advice regarding conflict of interest provisions of the Political Reform Act (the “Act”), as well as Government Code Section 1090, et seq.<sup>1</sup> 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 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. Is City Councilmember Patricia Ponce precluded under the Act from taking part in any decisions pertaining to her employer, Swinerton Inc.?
2. Does Section 1090 prohibit the City from potentially contracting with Swinerton, Inc. due to Councilmember Ponce’s financial interests?

---

<sup>1</sup> 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.

## CONCLUSIONS

1. Yes. It is reasonably foreseeable that potential decisions by the City to enter into contracts with Swinerton would have a material financial effect on her source of income and business entity interests. She must recuse herself from these decisions.
2. No. Under Section 1091(b)(2) Councilmember Ponce's interest in the contractual decisions is deemed a "remote interest" and the City is not prohibited from contracting with the construction company under Section 1090.

## FACTS AS PRESENTED BY REQUESTER

You serve as the City Attorney for the City of San Pablo and seek advice regarding conflicts of interest under both the Act and Government Code 1090 on behalf of City Councilmember Patricia Ponce.

Councilmember Ponce was elected to the San Pablo City Council in November 2020. She has worked at Swinerton, Inc., a large construction company with approximately 1,800 salaried employees, since 2001. Her current job title is Corporate Accounts Payable Supervisor and her responsibilities include overseeing a team of six in handling accounts payable for the corporation. This position includes management functions, but it is not a director or officer position. Swinerton is 100% employee owned with employees receiving company stock in an annual bonus program. Councilmember Ponce's current shares are less than 3% the value of corporation's shares.

Although Swinerton currently has no contracts with the City of San Pablo, they have provided construction management services in the past and could be interested in some larger construction projects that the City may be undertaking in the future.

## ANALYSIS

### *The Act*

Section 87100 prohibits any public official from making, participating in making, or otherwise 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, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) The financial interests relevant to Councilmember Ponce are:

- *Source of Income*: An interest in any source of income aggregating \$500 or more in the 12 months prior to a decision. (Section 87103(c).)
- *Business Entity*: An interest in any business in which the official has an investment worth \$2,000 or more (Section 87103(a)), or in which the official is a director,

officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).

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's agency. (Regulation 18701(a).) Additionally, the reasonably foreseeable financial effect of a governmental decision on an official's interest in a business entity is material if the entity is explicitly involved and bids on, or enters into a contract with, the official's agency. (18702.1(a)(1).)<sup>2</sup> As Councilmember Ponce has a financial interest in Swinerton as both an employer and a source of income of \$500 or more, should Swinerton bid on or enter into any contracts with the City, there will be a reasonably foreseeable material financial effect on her interests.

Accordingly, pursuant to the current facts, Councilmember Ponce may not make, participate in making, or use or attempt to use, her official position to influence a governmental decision pertaining to Swinerton. Regulation 18704 defines these terms as follows:

- (a) Making a Decision. A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency.
- (b) Participating in a Decision. A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.
- (c) Using Official Position to Attempt to Influence a Decision. A public official uses his or her official position to influence a governmental decision if he or she:
  - (1) Contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or
  - (2) Contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.

In addition to abstaining from participating in the decision, Councilmember Ponce must also recuse herself in accordance with Regulation 18707, which requires her to identify her interest in the decision and to leave the room for the duration of the discussions and decision.

---

<sup>2</sup> The materiality standard for a financial interest in a source of income which is a business entity is found in Regulation 18702.1. (Regulation 18702.3(a)(4).)

### *Section 1090*

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.) A contract that violates Section 1090 is void, and the prohibition applies 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.)

Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal. App.3d 1046, 1052.) Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

As a general rule, 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. (*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.

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 focuses on the applicability of the remote interest under Section 1091(b)(2) to the present situation.

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 official has been an employee or agent of that party for at least 3 years prior to the official's taking office;
- The official owns less than 3 % of the shares of stock of the contracting party;
- The official is not an officer or director of the contracting party; and
- The official did not directly participate in formulating the bid of the contracting party.

Based on the facts provided, Swinerton has more than 10 employees, Councilmember Ponce has worked for the company for more than 3 years prior to taking office, she owns less than 3% of the company and is not an officer or director of Swinerton, and the Councilmember would not take

part in the formulation of any bids should they be put forward, such that the remote interest exception would apply.

You have also asked whether the exception would extend beyond bids to proposals for professional or design-build services, and directly negotiated agreements. As outlined above, the making of a contract has been defined quite broadly throughout case law to include acts involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. In this way, the submission of bids and any other negotiated agreements can be viewed holistically as part of the contract process. Our prior advice on Section 1091(b)(2) supports this broad interpretation through application of the exception to actions beyond the bidding process: *Calciano* Advice Letter, A-18-152 [application of Section 1091(b)(2) remote interest exception in negotiation of street-sweeping contract]; *Bhatt* Advice Letter, A-19-038 [applying the remote interest exception of Section 1091(b)(2) to permit a City to renegotiate a waste water treatment agreement with a local private company]; and *Googins* Advice Letter A-20-065 [application of Section 1091(b)(2) remote interest exception permitting a City to enter into a contract regarding the purchase of firefighting vehicles]. Thus, so long as Councilmember Ponce does not participate in the formulation of bids and abstains from any attendant agreements or contracts entered into with Swinerton, the remote interest exception will apply.

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 enter into potential contracts with Swinerton so long as Councilmember Ponce discloses her financial interests in the contract, it is noted in the official records, and she abstains from any participation in the making of these contracts.

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

Sincerely,

Dave Bainbridge  
General Counsel



By: Erika M. Boyd  
Senior Counsel, Legal Division

EMB:aja