



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 15, 2022

Tricia Shafie
Deputy City Attorney
1 Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612

Re: Your Request for Advice
Our File No. A-21-147

Dear Ms. Shafie:

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.

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 Alameda 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

If the Director's Assistant works on or oversees any part of the New Construction Notice of Funding Availability ("NOFA"), does Section 1090 prohibit the City of Oakland from subsequently awarding a contract to the contractor that subcontracts with the firm that employs the Director's Assistant's spouse?

CONCLUSION

If the Director's Assistant works on or oversees any part of the NOFA, Section 1090 would prohibit the City from subsequently awarding a contract to the contractor that subcontracts with the firm that employs the Director's Assistant's spouse. So long as the Director's Assistant has no input

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

or participation in the decisions regarding the NOFA, Section 1090 would not prohibit the City from entering into a contract with the developer who subcontracts with the architectural firm that employs the Director's Assistant's spouse.

FACTS AS PRESENTED BY REQUESTER

The City of Oakland seeks advice regarding a potential 1090 conflict involving Christina Mun, the City's Assistant to the Director of the Housing and Community Development Department (Director's Assistant)(H&C Dept). The City is drafting a NOFA. This particular NOFA will be for affordable housing within the City.

The Director's Assistant directly supervises a manager of the City's Housing Development Services team, which is comprised of 8 city employees. This team is responsible for drafting and scoring the NOFA. The NOFA will be drafted to ensure that the scoring reflects the City's equity and policy priorities. The NOFA team will award each developer points based on their responses and the particular needs of the intended project, e.g., affordability, readiness of the developer, cost efficiency, etc. The developer who scores the highest and is deemed a responsible bidder will be awarded the new construction funds.

The City anticipates that a number of new construction developers will respond to the City's NOFA. Some of these developers may identify the architectural firms that are part of the developer's team as a sub-contractor. However, identifying architects or architectural firms is not a requirement of responding to the NOFA.

The Director's Assistant will not participate in the drafting or scoring of the NOFA other than to help direct staff as they update the NOFA and ensure that the scoring reflects the City's equity and policy priorities. The Director's Assistant would also guide streamlining the application materials/process, and drive the progress of the work. The Director's Assistant would not directly review applications, but would likely review the award recommendation memo and all materials prepared by staff for the City Council once application review is complete. The Director's Assistant could recuse from this role as needed.

The Director's Assistant's spouse works for David Baker Architects ("DBA"). DBA has three offices in San Francisco, Oakland and Birmingham, AL. DBA provides architectural services for a number of housing developments in and around the Bay Area. DBA has no known contracts or projects with the City of Oakland currently. While DBA may be listed as the architectural firm of one of the developers responding to the City's NOFA, the Director's Assistant's spouse will not be a part of the DBA architectural team providing services to the City. Moreover, the Director's Assistant's spouse is not a part of DBA's management or Executive Teams, does not hold any stock or voting shares in DBA and is strictly a salaried employee.

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. 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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) Public agency employees, including city employees such as Ms. Mun, are subject to Section 1090. (See, *People v. Vallerger* (1977) 67 Cal.App.3d 847.)

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (See *People v. Sobel* (2d DCA 1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall*, 58 Cal.2d at 569.)

Under Section 1090, 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 an employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) We note that as a general rule, a member of a board or commission, as well as an employee thereof, has a financial interest in his or her spouse’s source of income for purposes of Section 1090. (See e.g. 78 Ops.Cal.Atty.Gen. 230, 235 (1995).) The facts presented indicate that the Director’s Assistant has a financial interest in DBA in light of her spouse’s employment with the firm.

The courts have generally held that an official is financially interested in a contract under Section 1090 if he or she participates in the making of the contract and later benefits directly or indirectly under the contract. (*City Council v. McKinley* (1978) 80 Cal.App.204, 212.) We have previously advised that in instances where a councilmember has properly participated in approving a contract because it does not include her employer as a subconsultant, Section 1090 will still apply to the City and general contractor as a prohibition against subsequently retaining the councilmember’s employer as a subconsultant. (*Black Advice Letter*, No. A-18-213.) Therefore, if the Director’s Assistant works on or oversees any part of the NOFA, Section 1090 would prohibit the City from subsequently awarding a contract to the contractor that subcontracts with the firm that employs the Director’s Assistant’s spouse.

When an employee of an agency, as opposed to a board member, has a financial conflict under Section 1090, the employee’s agency may enter into the contract as long as the employee plays no role in the contracting process. To the extent that the Director’s Assistant works on or oversees any part of the NOFA, Section 1090 would prohibit the City from subsequently awarding a contract to the contractor that subcontracts with the firm that employs the Director’s Assistant’s spouse. However, if the employee plays no role in the contracting process (either because such participation is outside the scope of the employee’s duties or because the employee disqualifies themselves from all such participation), the employee’s agency is not prohibited from contracting with the employee or the business entity in which the employee is interested. (See 80 Ops.Cal.Atty.Gen. 41 (1997); *Burns Advice Letter*, A-14-060.) Thus, the City is not prohibited

from entering a contract with the contractor if the Director's Assistant recuses herself from all NOFA related decisions.²

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

ZWN:dkv

² While you indicate that the Director's Assistant could recuse from her role as needed, we caution that she must not provide any input or participation in the decisions regarding the NOFA to avoid a Section 1090 conflict.