



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 13, 2023

Pete Benavidez
President and CEO
Blindness Support Services
City of Riverside
3980 Polk Street, Unit A
Riverside, CA 92505

Re: Your Request for Advice
Our File No. A-23-122

Dear Mr. Benavidez:

This letter responds to your request for advice 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 Riverside 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 Section 1090 and the Act prohibit you, as a member of the Riverside Budget Engagement Commission (“Commission”), from taking part in recommendations to provide grant

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 18104 through 18998 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.

funding to Blindness Support Services, Inc. (“BSS”), a private not-for-profit corporation, and source of income, of which you serve as President and Chief Executive Officer (“CEO”)?

CONCLUSION

In general, Section 1090 prohibits you from participating in the making of contracts for the grants to BSS, because such contracts will implicate your financial interest in your source of income. Prohibited conduct includes taking part in any discussion as a member of the Commission, as well as voting on recommendations to be made to the City Council. However, Section 1090 does not prohibit the Commission from making a recommendation on funding to the BSS so long as you abstain from the decision as the Commission is advisory and your interest is remote under Section 1091(b)(1). Because Section 1090 prohibits your participation in the making of a contract concerning BSS, we do not further analyze disqualification under the Act.

FACTS AS PRESENTED BY REQUESTER

You are the Vice Chair of the City of Riverside (“City”) Budget Engagement Commission. This body provides input and oversight to the City’s Measure Z initiative and advises the Mayor and City Council on spending and policy priorities. Measure Z, which was approved by voters in 2016, imposes a one-cent transaction and use tax to help pay for critical unfunded City programs and services. In a follow-up telephone call, you stated that Measure Z included language indicating that funds would be used to provide programs and services to seniors and persons with disabilities. However, no funds specifically for such programs or services have been allocated to date.

You are also the President and CEO of BSS, a private not-for-profit corporation based in Riverside. BSS provides services for blind and visually impaired residents of Riverside County and surrounding areas in Southern California. These include assistive technology training (screen reading, magnification software, and adaptive technology), brail instruction courses, and assistance with independent living skills. You state that BSS will be seeking financial resources from Measure Z in the months and years to come, and as its CEO, you will be heading this effort.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Therefore, “the test is whether the officer or employee participated in the making of the contract in (their) official capacity.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1292 quoting *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 236-237.) The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the public entity’s advantage. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) A contract that violates Section 1090 is void. (*Thomson, supra*, at p. 646.)

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 v. Call, supra*, at pp. 647-649; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

The Section 1090 prohibition also applies to persons in advisory positions to contracting agencies. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley* (1978) 80 Cal.App.3d 204.) This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, etc., even though they have no actual power to execute the final contract. However, because advisory boards do not actually enter into contracts, members with a financial interest in a contract may avoid a conflict by disqualifying themselves from any participation in connection with the contract. (82 Ops.Cal.Atty.Gen. 126(1999).)

Section 1090 casts a wide net 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.) Participation is defined broadly and includes 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, supra*, at pp. 237; see also *Stigall, supra* at p. 569.) For example, an official (or a public employee) may be convicted of a violation of Section 1090 if it is established that he or she had the opportunity to, and did, influence execution of the contract directly or indirectly to promote his or her personal interests. (*People v. Sobel, supra* at p. 1052.) Accordingly, Section 1090 prohibits you from any participation in a contract concerning BSS including, but not limited to, participating in any discussion of the Budget Engagement Commission relating to grant funding for BSS and voting on the recommendations to be made to the City Council.

Although you are generally prohibited from participating in the making of a contract involving any grant to BSS, under Section 1090, the Budget Engagement Commission is not prohibited from doing so, including making recommendations to the City Council, so long as you recuse yourself. “[A]n advisory committee may perform its responsibilities as long as the interested member abstains and does not participate in the giving of advice.” (82 Ops.Cal.Atty.Gen. 126, 130 (1999), citing Cal. Atty. Gen., Indexed Letter No. IL 72-143 (Aug. 16, 1992); see also *Ueda* Advice letter, No. A-16-104.) “They are treated differently from boards responsible for executing the actual contracts under the governing statutes and policy reasons for the prohibition. Abstention by the interested member is allowed for the one, but not for the other.” (82 Ops.Cal.Atty.Gen., *supra*, at p. 130.)

Additionally, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the interest involved is deemed a “remote interest,” as defined in Section 1091 or a “noninterest,” as defined in Section 1091.5. If a remote interest is present, the contract may be made by the agency provided: (1) the officer discloses his or her financial interest in the contract to the public body; (2) the interest is noted in the body’s official records, and; (3) the officer abstains from participating in the making of the contract. (84 Ops.Cal.Atty.Gen 158, 159 (2001).) Further, under Section 1091(b)(1), a “remote interest” includes “[t]hat of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code ...”

Accordingly, because the Commission is advisory and your interest in your nonprofit employer is considered a remote interest, Section 1090 does not prohibit the Commission from making a recommendation on funding to the BBS so long as you recuse yourself from the decision, your interest is disclosed, and the interest is noted in the Commission's official record. Because Section 1090 prohibits your participation in the making of a contract concerning funding for BSS, we do not further analyze disqualification under the Act.

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

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