



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 27, 2016

Yvette M. Abich Garcia
City Attorney
P O Box 7016
Downey, CA 90241-7016

Re: Your Request for Advice
Our File No. A-15-239

Dear Ms. Abich Garcia:

This letter responds to your request on behalf of Councilmember Fernando Vasquez for advice regarding provisions of the Political Reform Act (the "Act")¹ and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

For advice on Section 1090, we are required to forward your request 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. We are also required to advise you that, for purposes of Section 1090, the advice "is not admissible in a criminal proceeding brought against any individual other than the requestor." (Section 1097.1(c)(5).)

QUESTION

May the City of Downey enter, and may Councilmember Vasquez take part in decisions regarding, contracts between the city and the Downey Unified School District in light of the councilmember's private contract with the school district to provide disposal of medical waste?

CONCLUSION

Pursuant to the Act, the decisions identified would not have a foreseeable material financial effect on the councilmember's interest in his business or his business's lease. Notwithstanding any financial effect of the decisions on the school district, Councilmember Vasquez may take part in the decisions identified under the public generally exception in Regulation 18703(e)(7) for decisions affecting an interest in a governmental entity agency. Moreover, for purposes of Section 1090, Councilmember Vasquez does not have an interest in the contracts identified. Thus, Section 1090

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.

does not restrict the City of Downey from entering the contracts or the councilmember from participating in decisions regarding the contracts.

FACTS

You are the City Attorney of the City of Downey (the "City"), and are requesting advice on behalf of City Councilmember Fernando Vasquez regarding his obligations under the Act and Section 1090. Councilmember Vasquez is the President and sole shareholder of Prima Waste Management, Inc. ("Prima"). Prima provides services to a wide variety of customers in Southern California for the disposal of medical and other regulated waste and for related services such as training. Its business office is located in Downey, and Prima recently renewed its office lease for an additional one-year term.

Prima has an Agreement with the Downey Unified School District (the "School District") to provide medical waste disposal services to the Downey Adult School for its medical programs. The term of the Agreement is July 1, 2015 through June 30, 2016. Prima will provide services for \$650 per month, for a total contract amount of \$7800 for the one-year term of the contract. The Agreement further provides that the term will automatically renew each year on the same terms unless either party provides notice of termination at least 60 days prior to the end of the current term. Funding for the District's Adult Education programs including the medical programs is provided through a Federal Perkins grant, which is administered by the California Department of Education. Downey Adult School is located in close proximity to Prima's office.

The City is a charter city. The City and the District are separate governmental entities governed by separate governing bodies. Neither entity has authority over the other entity's decisions. More specifically, the City does not have any supervisory or other jurisdiction over the School District's contracts. However, the City and the School District have had a close and cooperative relationship for many years with the common goal of serving the City's residents. For example, there are long-standing agreements between the City and the School District that provide for the joint use of community pool (expires in July, 2036), the joint use of the sports field at the high school (a 15-year agreement that expires July 2016), and the joint operation of the ASPIRE after school programs (no expiration date). Three City-School District contracts and one Grant Agreement will expire in June or July of 2016. It is likely that both the City and the School District will renew these agreements for an additional year or years. These agreements include:

- Joint Use of Sports Field at Columbus High School - This Agreement was entered into in 2001 for an initial term of 15 years, and will be up for renewal in July 2016, likely for another lengthy term. Under this Agreement, the City and the School District have agreed to jointly use the District's sports field and appurtenant facilities on the Columbus High School site based on a sharing of the costs relating to the sports field. Columbus High School is also located within proximity of Prima's office.
- School Resource Officer Agreement - This Agreement, which expires in June 2016, requires the City to provide three police officers to serve as School Resource Officers ("SROs") on an overtime basis at the District's three high schools for the academic year 2015-2016. The

District pays the cost of the three SROs. It is anticipated that the Agreement will be renewed for the 2016-2017 academic year under the same or similar terms.

- Memorandum of Understanding for Summer Enrichment Program (“STEAMWORKS”) - This proposed MOU formalizes the partnership between the City and the School District renewing STEAMWORKS for a second year. The Downey City Council has not yet approved this proposed MOU. The program is modeled after the on-going after-school ASPIRE program. The proposed MOU provides that the City will provide city staffing to develop and implement the summer afterschool program and the District will pay all program costs.
- Community Development Block Grant Sub-Recipient Agreement - This Agreement provides for the City’s allocation of federal funds granted from the Department of Housing and Urban Development to the School District for outreach programs and related services to at-risk youth in the community. The current Agreement is for the 2015-2016 school year, and the total grant is \$20,782. It is anticipated that a similar grant would be made for the 2016-2017 school year if the City receives a renewal of the funds.

You have confirmed with both City staff and Councilmember Vasquez that neither he nor his business have any other connection to these City-District contracts. In addition, none of the current or pending contracts involves the District’s Adult School or its medical programs, and you have not identified any other possible financial effects of these contracts on the Councilmember or his business arising from the proximity between the Councilmember’s business and the District’s Adult School and Columbus High School.

ANALYSIS

Political Reform Act

Councilmember Vasquez is subject to the Act’s conflict of interest provisions. Under Section 87100, a public official may not make, participate in making, or use 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 on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Section 87103 identifies interests from which a conflict of interest may arise. Based upon the facts provided, Councilmember Vasquez has the following interests, which the decisions may implicate:

Prima: Under Section 87103(a) and (d), an official has an interest in any business entity in which the official has an investment of \$2,000 or more. An official also has an interest in any source of income aggregating \$500 or more within 12 months prior to the time when the decision is made. (Section 87103(c).) As the President and sole shareholder of Prima, Councilmember Vasquez has interests in Prima as both a business entity and as a source of income.

Prima’s Office: Under Section 82033 and 87103(b) and official has an interest in any real property, including any leasehold, in which the official has a direct or indirect interest of \$2,000 or

more. Because Prima's office is leased for a one-year term, Councilmember Vasquez has a real property interest in the leasehold.

The District: Under Section 82030 and 87103(c), an official also has an interest in any source of income to a business entity in which the official or official's spouse owns a 10-percent interest or greater if the pro rata share of income from the business entity aggregates to \$500 or more within 12 months prior to the decision. While you have not identified all Prima customers, Councilmember Vasquez does have an interest in the District as a source of income to Prima.²

To analyze the potential effect of any decisions regarding a contract with the District on Councilmember Vasquez's interests, we must determine whether the financial effect on any interest is both foreseeable and material. Generally, a financial effect is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) If the interest is "not explicitly involved" in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).) Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. (Regulation 18702.) The materiality standards for any particular interest are provided in Regulations 18702.1 through 18702.5.

Prima: Councilmember Vasquez's interests in Prima are not explicitly involved in the decisions identified. Accordingly, a financial effect must be more than hypothetical or theoretical. Moreover, a financial effect is material only "if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of a business entity's publically traded stock, or the value of a privately-held business entity." (Regulations 18702.1(b) and 18702.3(a)(4).) In this case, the contracts identified are wholly unrelated to the services Councilmember Vasquez provides the District. Thus, there is no reason to believe that the contracts would have any effect on Prima whatsoever, and we do not find a foreseeable material effect on the councilmember's interests in Prima from the decisions.

Prima's Office: Councilmember Vasquez's interest in the lease of Prima's Office is also not explicitly involved in the decisions identified. Thus, the financial effect must be more than hypothetical or theoretical. For the property interest in a leasehold interest, the materiality standards are provided in Regulation 18702.2(b). Under this regulation, a financial effect on a leasehold interest is foreseeable if the decision will:

"(1) Change the termination date of the lease;

"(2) Increase or decrease the potential rental value of the property;

"(3) Increase or decrease the rental value of the property, and the official has a right to sublease the property;

² While salary from a governmental entity is not considered income pursuant to Section 82030(b)(2), income as a contractor for a governmental entity is not considered salary for purposes of this exception.

“(4) Change the official’s actual or legally allowable use of the real property.”

Theoretically, contracts between the City and the District may potentially affect property. For example, the increased use of the District’s facilities such as the Adult Education programs and Columbus High School, which are proximate to Prima’s office could increase traffic in the general vicinity. In this case, however, the nature of Councilmember Vasquez business is not dependent on traffic and the shared use of the sports facilities, summer enrichment program, and after-school programs are not of a magnitude that one would expect significant impacts on the neighborhood. Accordingly, we do not find a foreseeable material financial effect on Councilmember Vasquez’ interest in the lease of Prima’s office from the decisions identified.

The District: Unlike interests in Prima and the lease of Prima’s Office, Councilmember Vasquez interest in the District as a source of income is explicitly involved in decisions regarding contracts between the City and the District. Any financial effect is presumed foreseeable under Regulation 18701(a) and considered material under Regulation 18702.3(a.) Nonetheless, a conflict of interest may arise only when it is reasonably foreseeable that the decision will have a material financial effect on the official or his or her immediate family “distinguishable from its effect on the public generally.” (Section 87103.) Regulation 18703 provides the Commission’s rules for determining when the effect of a decision on the official’s interest is indistinguishable from the effect on the public.

Generally, an effect on the official is indistinguishable from the effect on the public if the official establishes that a significant segment of the public is affected and that there is no unique effect on the official. (Regulation 18703.) Regulation 18703(b) provides the general rule for determining a significant segment, while subdivision (e) provides rules for special circumstances. For decisions affecting an official’s interest in a federal, state, or local governmental entity, Regulation 18703(e)(7) provides the pertinent rule and permits an official to take part in decisions affecting the governmental entity so long as there is no unique effect on the official’s interest. In this case, none of the contracts identified are even remotely related to the services Councilmember Vasquez provides to the District. Accordingly, there is no unique effect on the councilmember’s interest in the District from the decisions identified. Notwithstanding his interest in the District as a source of income, Councilmember Vasquez is not disqualified from the decisions identified under the Act’s public generally exception.

Section 1090

In addition to the Act, we must also determine whether Councilmember Vasquez has a potentially disqualifying interest in decisions regarding contracts between the City and the District under Section 1090. Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under this section, “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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

It is not contested that Councilmember Vasquez is a public officer subject to the provisions of Section 1090 and that the City's contracts with the District constitute contracts for purposes of Section 1090. Moreover, as a member of the City's governing board, Councilmember Vasquez is presumed to be involved in the making of all contracts by the City irrespective of whether he actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the determinative question is whether Councilmember Vasquez has a financial interest in the contracts under Section 1090.

In this case, Councilmember Vasquez has a private contract with the District. While courts have concluded that independent contractors, who serve in advisory positions that are frequently held by officers and employees, are subject to Section 1090 (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125 and *California Housing Financing Agency v. Hanover* (2007) 148 Cal.App.4th 682), Section 1090 requires disqualification only when an official is financially interested in the contract. As held by the court in *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, 225, "to be prohibited under section 1090, the public official's financial interest must be related to the contract...." Moreover, "if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract...." (*Id.* at 228.) Councilmember Vasquez's private contract with the District is wholly unrelated to the contracts between the City and the District and there is nothing to suggest that the contracts between the City and the District will benefit the councilmember in anyway. Based upon the facts provided, Councilmember Vasquez does not have a prohibited interest in the contracts identified and Section 1090 does not apply.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl