



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 9, 2016

Michael C. Ghizzoni
County Counsel
105 E. Anapamu Street, Suite 20 I
Santa Barbara, CA 93101

Re: Your Request for Advice
Our File No. A-16-021

Dear Mr. Ghizzoni:

This letter responds to your request for advice on behalf of Santa Barbara Deputy County Counsel Steven Baugh regarding his duties under Government Code Section 1090 and the conflict of interest provisions of the Political Reform Act (the "Act").¹ 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.

When a request for advice involves potential issues raised under Section 1090, the Commission is required to forward a copy of the request to the Attorney General's Office and the local district attorney prior to proceeding with the advice. (Section 1097.1(c)(3).) Accordingly, we have forwarded your request to the Attorney General's Office and the Santa Barbara District Attorney's Office. We did not receive a written response from either entity. (Section 1097.1(c)(4).) Finally, the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (Section 1097.1(c)(5).)

QUESTIONS

1. Does Mr. Baugh have a conflict of interest under the Act if he advises the team leading the County of Santa Barbara's AB 900 jail project, including for purposes of resolving bid protests and contract disputes?

2. Does Mr. Baugh have a conflict of interest under Section 1090 under the same circumstances?

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.

CONCLUSIONS

1. Pursuant to Regulation 18700.1(b), Mr. Baugh does not have an interest in his former employer as a source of income because the income was received by or accrued to Mr. Baugh prior to the time he became a public official, the income was received in the normal course of the previous employment and there is no expectation of renewed employment with the former employer.
2. Mr. Baugh does not have a financial interest in the decision for purposes of Section 1090.

FACTS

Steven Baugh has been licensed to practice law in the state of California since September 7, 2013. On March 16, 2015, Mr. Baugh joined the County of Santa Barbara as a Deputy County Counsel. Mr. Baugh's clients include the County's Public Works Department and General Services Department.

Prior to his employment with the County, Deputy County Counsel Steven Baugh worked for the Walsh Group ("Walsh"). Specifically:

- From September 9, 2013 to August 29, 2014, Mr. Baugh was assigned to Walsh Austin Joint Venture, the entity that constructed the Tom Bradley International Terminal project at Los Angeles International Airport pursuant to a contract with Los Angeles World Airports.
- From September 2, 2014 to March 6, 2015, Mr. Baugh was assigned to Walsh Shea Corridor Constructors, the entity currently under contract with the Los Angeles Metropolitan Transportation Authority to construct the Crenshaw/LAX Transit project.
- On March 6, 2015, Mr. Baugh separated from Walsh. All of the income that Mr. Baugh received while employed by Walsh was in the normal course of his employment. Mr. Baugh has not received any income from Walsh since he terminated his employment on March 6, 2015, and has no intention or arrangement to return to Walsh.

On December 14, 2012, the County initiated a \$96.1 million project to construct a new jail facility using state funds made available by AB 900 (2007). On March 17, 2015, the County announced that nine contractors had prequalified to bid on the County's AB 900 jail construction project. The County's AB 900 jail project will go out to bid in spring 2016. In spring 2016, the County intends to award a contract to construct the AB 900 jail. The contract to construct the County's AB 900 jail will be awarded to the lowest responsive, responsible bidder. Walsh Construction is one of the nine bidders prequalified to construct the County's AB 900 jail project. Walsh Construction will be awarded the contract to construct the AB 900 jail project if they are the lowest responsive, responsible bidder.

Mr. Baugh will not have a role in awarding the contract to construct the AB 900 jail project. At all times during his tenure with Walsh, Mr. Baugh worked as an Assistant Contracts Manager with the rank of Project Engineer. His duties were both legal and non-legal, and he provided

services only for the projects to which he was assigned. Mr. Baugh was not a member of the team that assembled the materials necessary to prequalify Walsh Construction to bid on the County's AB 900 jail project. The only compensation Mr. Baugh received from Walsh Construction was his annual salary.

Before Mr. Baugh left Walsh's employ, Mr. Baugh's former supervisor at Walsh Austin Joint Venture, Brian Guerin, Esq., informed Mr. Baugh that Walsh Construction had submitted materials to prequalify for the County's AB 900 jail project. This is the only information that Mr. Baugh has of Walsh Construction's intentions toward the County's AB 900 jail project. Mr. Baugh has no remaining financial ties to Walsh - and has received no compensation from Walsh since leaving their employ. Mr. Baugh will not be impacted in any way if Walsh Construction participates in the AB 900 jail project.

You ask whether Mr. Baugh would have a conflict under the Act or a problem under Government Code, Section 1090 if he advises the team leading the County of Santa Barbara's AB 900 jail project, including for purposes of resolving bid protests and contract disputes, given his prior employment with the Walsh Group.

ANALYSIS

Conflicts of Interest under the Act

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. Interests from which a conflict of interest may arise are defined in Section 87103 and include any source of income to the official, including promised income that aggregates to \$500 or more within 12 months prior to the decision.

According to the facts you have provided, Mr. Baugh has received income from Walsh in the form of salary up to March 6, 2015. However, there is a limited exception for income from a former employer found in Regulation 18700.1(b). Under this exception, an official does not have an interest in a former employer as a source of income if the income was received by or accrued to the public official prior to the time he or she became a public official, the income was received in the normal course of the previous employment and there was no expectation by the official at the time the official assumed office of renewed employment with the former employer. You stated that at the time Mr. Baugh joined the County he had no expectation of renewed employment with Walsh.

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 concerns 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.) 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.)

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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) The result of a contract that is void based on a Section 1090 violation is that the party that contracted with the public entity must disgorge any profit that resulted from the contract and the public entity keeps the benefit of the contract. (See *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323.)

Step One-Three: Is there a public officer who is subject to Section 1090 participating in contract decisions?

The first three steps are not in dispute. Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or *employees* 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 members. [Emphasis added.]” You are asking whether Mr. Baugh may participate in contract decisions.

Step Four: Does Mr. Baugh have a financial interest in the contract?

Under Section 1090, officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig, supra*, at p. 333.) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerger* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Your facts do not evidence any financial interest at this time in the contract in question.

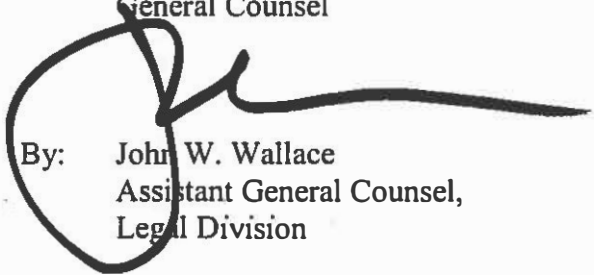
Step Five: Does an exception apply?

We have not applied the exceptions to Section 1090 or the rule of necessity because Mr. Baugh does not have a financial interest in the decision.

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

Sincerely,

Hyla P. Wagner
General Counsel

By:  John W. Wallace
Assistant General Counsel,
Legal Division

JWW:jgl