



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 7, 2016

Mark J. Hattam
General Counsel
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123-1233

Re: Your Request for Advice
Our File No. A-16-204

Dear Mr. Hattam:

This letter responds to your request for advice regarding Government Code Section 1090, *et seq.*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.

In regard to our 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. (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

May the San Diego County Water Authority amend its existing contract or execute a new contract with a law firm, in light of the fact that the spouse of Director Jim Madaffer recently joined the firm as a partner, if the Director Madaffer recuses himself from the decision?

CONCLUSION

Under the remote interest exception in Section 1091(b)(17), the Authority is not prohibited from amending its existing contract or executing a new contract with the law firm so long as Director Madaffer discloses his interest in the law firm to the public agency, the interest is noted in the agency's official records, and Director Madaffer abstains from any participation in the making or approval of the contract.²

¹ Government Code Sections 1090 through 1097.5. All statutory references are to the Government Code unless otherwise indicated.

² We note that so long as Director Madaffer abstains from participating in the making or approval of the contract pursuant to Section 1090, the conflict of interest provisions of the Political Reform Act are not implicated. (Sections 81000 through 91014.)

FACTS

You are the General Counsel of the San Diego County Water Authority and are seeking advice regarding Section 1090 on behalf of the Authority, which is directed by an appointed board of directors, and Director Jim Madaffer, a member of the board.

Director Madaffer has served on the Authority's Board since 2012. Additionally, the Authority has retained the law firm of Procopio, Cory, Hargreaves & Savitch LLP ("Procopio") as special counsel regarding certain litigation matters. In the past year and well after the Authority's existing contract with Procopio was in place, Director Madaffer's spouse joined Procopio as a non-equity partner. It is anticipated that in the next year, the Authority may need to amend its existing contract with Procopio or enter into new contracts with the firm for additional legal services. Additionally, Director Madaffer's spouse may become an equity partner prior to these decisions.

ANALYSIS

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.)

When Section 1090 applies to a member of a governing body of a public entity, in most cases, the prohibition cannot be avoided by having the interested board member abstain from the decision. The entire governing body is precluded from entering into the contract. (*Thomson, 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 Legislature, however, has created various statutory exceptions to Section 1090's prohibition for "remote interests" and "non-interests." If an official's interest is a "remote interest," an agency may execute a contract if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) the 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).) If the official's interest is a "noninterest, an agency may execute the contract and the official is not required to abstain from the decision. Except in limited circumstances, a noninterest does not require any disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

In this instance, the only issue implicated by your request for advice is whether Director Madaffer's financial interest in Procopio qualifies for an exception under Section 1090 as a "remote interest" in decisions regarding a contract between the Authority and Procopio.

The remote interest under Section 1091(b)(17) is defined to include:

"That of an owner or partner of a firm serving as an appointed member of an unelected board or commission of the contracting agency if the owner or

partner recuses himself or herself from providing any advice to the contracting agency regarding the contract between the firm and the contracting agency and from all participation in reviewing a project that results from that contract.”

In this case, Director Madaffer is an appointed member of an unelected board and his spouse is the owner or partner of the law firm.³ It is well established that the remote interest exceptions apply in those circumstances when it is the official’s spouse who has the actual interest as opposed to the official. In other words, if an official who is the owner or partner of a firm has a remote interest under Section 1091(b)(17), the official’s interest is even further removed if it is the official’s spouse who is the owner or partner of the firm. (See *Glover* Advice Letter, No. A-14-138; *Craft* Advice Letter, No. A-14-168; 78 Ops.Cal.Atty.Gen 230 (1995); and 81 Ops.Cal.Atty.Gen. 169 (1998).) Accordingly, the remote exception applies and the Authority may amend its existing contract or enter into new contracts with Procopio so long as Director Madaffer discloses his interest in the law firm to the public agency, the interest is noted in the agency’s official records, and Director Madaffer abstains from any participation in the making or approval of the contract.

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

³ We note that Section 1091(b)(17) applies to an “owner or partner” of a firm. By its express terms, we find that Section 1091(b)(17) applies to either a non-equity partner or an equity partner.