



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 26, 2017

Kent S. Boes
Colusa County Board of Supervisors, District 3
547 Market Street, Suite 102
Colusa, CA 95932

Re: Your Request for Advice
Our File No. A-17-116

Dear Mr. Boes:

This letter responds to your request for advice regarding the Political Reform Act¹ (the "Act") 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.

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 Colusa 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 you (a Member of the Board of Supervisors) participate in a public auction of tax-defaulted property within Colusa County conducted by the County Tax Collector?

CONCLUSION

We understand the Board approved the list of properties for sale. Assuming the Board had no substantive involvement in the process and ultimate contracts for sale, other than simply approving the list of houses to be sold, Section 1090 would not apply to a Member of the County Board of Supervisors buying property from the County.

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.

FACTS

You were recently elected to the Board of Supervisors in Colusa County, representing District 3. The County Tax Collector holds public auctions of tax-defaulted property within the County. For those auctions, the County Tax Collector compiles a list of properties that meet specific criteria and are eligible to be auctioned off in a public format. This list is brought to the Board of Supervisors for approval, after which the Tax Collector begins his noticing and auction process.

Chapter 8000 of the County Tax Collectors' Reference Manual, specifically section 8104, states:

“Any person or entity, including cities, taxing agencies, revenue districts, and the State, may purchase property at a public auction. The only exception to eligible purchasers is the tax collector who conducts the sale or his/her employees.”

This passage references Revenue and Taxation Code Sections 3691 and 3705. Section 3691(a)(I)(A) states “Any person, regardless of any prior or existing lien on, claim to, or interest in, the property, may purchase at the sale”

This passage also references Section 1090 in relation to the Tax Collector himself not being allowed to bid.

ANALYSIS

Political Reform Act

As noted in informal advice provided to you on May 8, 2017, the Commission's policy is to decline to advise on past conduct. (See, Regulation 18329(b)(8)(A).) Section 87100 and 87103 prohibit any public official from making, participating in making, or using his or her official position to influence a *governmental decision* if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests. That governmental decision (approval of the sale property) has already occurred, and therefore we cannot advise whether a conflict of interest existed at that time.

Section 1090

Section 1090, in contrast to Section 87100, prohibits the making of a contract in violation of its provisions. 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.) 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.)

We employ the following six-step analysis to determine whether Section 1090 prohibits a public entity from entering into a contract.

Step One: Are you subject to the provisions of Section 1090?

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.” As a County Supervisor, you are subject to Section 1090.

Step Two: Does the decision involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal. Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) “A sale is a contract within the conflict of interests statutes. [Citation.]” Because the County’s auction process will result in a sale, a contract is involved.

Step Three: Is the official making or participating in making a contract?

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been 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 v. City of Taft* (1962) 58 Cal.2d 565, 569.) Moreover, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

However, Section 1090 does not apply where the contracting decision is not made by the Member’s Board but rather is made by a person with independent status to contract on behalf of the agency. In 21 Ops.Cal.Atty.Gen. 90 (1953), the Office of the Attorney General concluded that Section 1090 did not prohibit a city from depositing funds in a bank in which a city councilmember was a member of the bank’s board of directors and an owner of less than 5% of the outstanding capitol stock of the bank. (See also, *Walter Advice Letter*, No. A-15-050.)

The Attorney General stated:

“[A] County Supervisor is not precluded from contracting for construction work with a school district since the contracts for school buildings or school construction are let by Boards of School Trustees without control or supervision of the County Board of Supervisors (17 Ops.Cal.Atty.Gen. 44).”

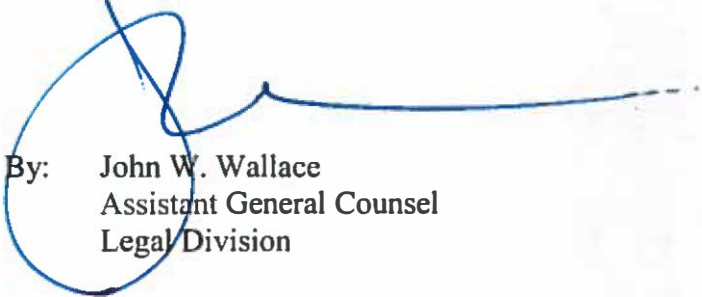
However, a body such as a city council cannot avoid application of Section 1090 by delegating its contracting authority to another individual or body. (See 87 Ops.Cal.Atty.Gen. 9 (2004); 88 Ops.Cal.Atty.Gen. 122 (2005).) A governmental board may only avoid violating Section 1090 when the contract is made by an “independent” government official and that official does not have a conflict of interest.² (See e.g., 81 Ops.Cal.Atty.Gen. 274 (1998); 57 Ops.Cal.Atty.Gen. 458 (1974).)

Consistent with the analysis and conclusion of the Attorney General, no Section 1090 conflict of interest exists when you (a Member of the County Board of Supervisors) buy the property from the county, since the contract for sale of the property to the buyer is not entered into by the Board of Supervisors.

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

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² The Attorney General has considered Section 1090 explicitly in the context of these sales. While the Attorney General concluded that Section 1090 prohibits a Tax Collector from purchasing property from the County, the Attorney General has opined that it does not prohibit other officials of the agency in the same manner (such as staff of the Tax Collector's office that did not participate in or influence the sale of surplus property.) A county assessor, as the appointing power, may prohibit all the employees in his office from purchasing property within the county at a tax-deeded land sale subject to the approval of and in accordance with any rules adopted by the board of supervisors of the county. (63 Ops. Cal. Atty. Gen. 868.)