



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 31, 2017

Donna Mooney
Chief Assistant City Attorney
City of Vallejo
555 Santa Clara Street
Vallejo CA 94590

Re: Your Request for Advice
Our File No. A-17-226

Dear Ms. Mooney:

This letter responds to your request for advice on behalf of City of Vallejo Planning Commissioner and Fiber Optic Advisory Board Member Chris Platzer regarding Government Code Section 1090 *et seq.*¹ We are only providing advice regarding Section 1090, and we offer no opinion on the applicability of other conflict of interest laws. Please 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.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to it to the Attorney General's Office and the Solano 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

Does Section 1090 prohibit Fiber Optic Advisory Board Member Platzer from accepting an offer for private employment from Inyo Networks ("Inyo") to market and sell telecommunications services pursuant to Inyo's contract with the City (the "Vallejo Network Contract") to manage the City's fiber optic network?

CONCLUSION

Yes. Section 1090 prohibits Board Member Platzer from accepting Inyo's private employment offer because he participated in the making of the Vallejo Network Contract.

¹ All statutory references are to the Government Code, unless otherwise indicated.

FACTS

You are the Chief Assistant City Attorney of the City of Vallejo and the authorized representative of Planning Commissioner and Fiber Optic Advisory Board Member Chris Platzer. You provided additional information relevant to this advice in late September and early October.

The City owns its own fiber optic network and associated telecommunications infrastructure (the "Vallejo Network"). To date, the City has used the Vallejo Network to provide City Departments with telecommunications services.

In 2014, Mr. Platzer became a Member of the City's Fiber Optic Advisory Board. The purpose of the Board was to discuss how the City might improve its deployment and use of the Vallejo Network to attract more businesses to the City. A few Board Members, including Board Member Platzer, drafted a proposal for the Downtown Vallejo City-Fiber Project, a public-private partnership designed to rapidly deploy "Gigabit Internet service" in Vallejo's downtown district using the Vallejo Network. However, City staff did not proceed with that proposal.

Instead, the City staff issued a request for proposals ("RFP") for a consultant to create a City-wide Fiber Optic Master Plan to identify policy options regarding the Vallejo Network and to determine the advantages and disadvantages to each. City staff reviewed proposals submitted in response to the RFP and selected a consultant to create the Master Plan. The City Council adopted the Master Plan in February 2016.

In July 2016, the Fiber Optic Advisory Board discussed a proposed RFP for a contractor to assist the City in providing telecommunications services through the Vallejo Network in accordance with the City's Fiber Optic Master Plan. City staff then issued that RFP, received several responses to the RFP, including a response from Inyo, reviewed and evaluated the responses, and selected Inyo to be the contractor. In February 2017, the City Council approved the Vallejo Network Contract with Inyo, leasing the Vallejo Network to Inyo in exchange for Inyo's promise to improve and maintain it and to market and sell the telecommunications services provided through it.

Board Member Platzer and the Chief Operating Officer of Inyo were both in attendance at the City Council meeting in February 2017 at which the City Council approved the Vallejo Network Contract. Prior to the City Council voting to approve the Vallejo Network Contract, Inyo's Chief Operating Officer informally offered the Board Member private employment with Inyo as an independent contractor marketing and selling telecommunications services provided by Inyo pursuant to the Vallejo Network Contract. Prior to the Chief Operating Officer making the offer to the Board Member, there was no discussion about private employment with Inyo.

Board Member Platzer joined the City's Planning Commission in October 2016. While the Fiber Optic Advisory Board currently does not meet regularly, City staff anticipates the need for future meetings to discuss telecommunications issues.

ANALYSIS

Section 1090 provides, in pertinent 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.” Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed, at both state and local level, including certain independent contractors.

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.”² A contract that violates Section 1090 is void, and the prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties.³ For purposes of this letter, the determinative issues are whether Board Member Platzer (1) participated in the making of the Vallejo Network Contract, and (2) has an interest in that contract.

(1) Participation in the Making of the Vallejo Network Contract?

It is important to note that Section 1090 reaches beyond the officials who actually execute the contract, extending to any officials who participate in the making of the contract. Participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids.⁴ Moreover, Section 1090 also applies to individuals in advisory positions to contracting agencies because those individuals can influence the development of a contract during these early stages of the contracting process even though they have no actual power to execute the final contract.⁵

At a Fiber Optic Advisory Board meeting in July 2016, the Board discussed a proposed RFP for a company to assist the City in providing telecommunications services through the Vallejo Network in accordance with the City’s Fiber Optic Master Plan. Thereafter, the City staff issued that RFP, evaluated the submitted proposals, including a proposal from Inyo, and selected Inyo as the contractor. The City Council then approved the Vallejo Network Contract at a City Council meeting in February 2017.

Board Member Platzer and the Chief Operating Officer of Inyo were both in attendance at the February 2017 City Council meeting at which the City Council approved the Vallejo Network Contract. Prior to the City Council vote on whether to approve that Contract, the Chief Operating Officer informally offered the Board Member private employment with Inyo marketing and selling

² *People v. Honig* (1996) 48 Cal.App.4th 289, 333.

³ *Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.

⁴ *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.

⁵ See, e.g., *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; *City Council v. McKinley* (1978) 80 Cal.App.3d 204; see also 81 Ops.Cal.Atty.Gen. 317, 318-319 (1998).

the telecommunications services that would be provided through the Vallejo Network pursuant to the Vallejo Network Contract.

Based on these facts, Board Member Platzer participated in the making of the Vallejo Network Contract because he took part in preliminary discussions, reasoning, and planning regarding the contract at the July 2016 Fiber Optic Advisory Board meeting.

(2) Financial Interest in the Vallejo Network Contract?

We now turn to the issue of whether Board Member Platzer has a financial interest in the Vallejo Network Contract for purposes of Section 1090. Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions indicate that the term is to be liberally interpreted.⁶ The 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.⁷ “Put in ordinary, but nonetheless precise, terms, an official has a financial interest in a contract *if he might profit from it.*”⁸

In addition, courts and the Attorney General have stated that although an official or employee may resign from his or her position, that resignation may not be sufficient to avoid a Section 1090 violation when that person has been involved in the contracting process.⁹ For instance, county employees were advised that they could not propose an agreement for consultant services, then resign, and provide such consulting services.¹⁰

The Commission has also issued advice under Section 1090 regarding financial interests involving prospective employment: In the *Ostrenger* Advice Letter, No. A-16-088, we determined that Section 1090 prohibited the superintendent of a city golf course from becoming financially interested in a city contract that the superintendent participated in making in his official capacity.

While Board Member Platzer was not financially interested in the Vallejo Network Contract when he participated in making that contract, he would become financially interested in the contract if he accepts Inyo’s private employment offer to market and sell telecommunications services under the Vallejo Network Contract. Because Section 1090 prohibits a public officer from being financially interested in a public contract that the officer made or participated in making in his or

⁶ *People v. Deysher* (1934) 2 Cal.2d 141, 146 [“However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.”].

⁷ *Thomson, supra*, at p. 651; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).

⁸ *Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal.App.4th 208, 221, quoting *Honig, supra*, at p. 333, italics in original.

⁹ See *Stigall, supra*, at pp. 568-569; *McKinley, supra*, at p. 212; 81 Ops.Cal.Atty.Gen. 317 (1998).

¹⁰ 66 Ops.Cal.Atty.Gen. 156 (1983).

her official capacity, Section 1090 prohibits the Board Member from accepting Inyo's private employment offer.¹¹

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

Sincerely,



Brian G. Lau
Assistant General Counsel,
Legal Division

BGL:jgl

¹¹ However, Section 1090 does not reach beyond a public officer's financial interests in the public contract at issue. Therefore, Board Member Platzer may accept private employment from Inyo that would not result in the Board Member becoming financially interested in the Vallejo Network Contract. However, if the Board Member becomes financially interested in Inyo, Section 1090 may prohibit him from making or participating in making any contract between the City and Inyo in his official capacity, including a modification to the Vallejo Network Contract.