STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
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October 12, 2018

Jay Wilverding
Auditor-Controller
County of San Joaquin
3909 Bay View Court
Stockton, CA 95219

Re: Your Request for Advice
Our File No. A-18-162

Dear Mr. Wilverding:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act"),[1] and Section 1090. 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

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 Joaquin 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

Under the Act and Section 1090, may you present the San Joaquin County Board of Supervisors with the decision to expand your office's current pay supplement policy to include a Certified Internal Auditor certificate, given that you would qualify for the pay supplement, if approved?

CONCLUSION

Under the Act, the Board's consideration of the pay supplement would not result in a reasonably foreseeable material financial effect on your interests, pursuant to the materiality exception established by Regulation 18702.5(b)(1). Under Section 1090, you are prohibited from presenting the policy change to the Board in your official capacity. However, so long as you

[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.

explicitly act in your individual and private capacity, you may appear or contact the Board regarding the pay supplement.

FACTS AS PROVIDED BY THE REQUESTOR

You are the San Joaquin County Auditor-Controller. Currently, the County offers a two-to-five-percent pay supplement for anyone in the Auditor-Controller's Office with a Certified Public Accountant ("CPA") certificate. This policy has been in place for over 20 years. Several employees in your office receive the supplement, including your predecessor.

You would like to request that the County Board of Supervisors expand the pay supplement to include anyone in your department with a Certified Internal Auditor ("CIA") certification. You note that state law treats both CPA and CIA certifications as sufficient qualifications for the office of County Auditor, and you are aware that other counties offer pay supplements for both certifications. You indicated that it is extremely difficult, if not impossible, to get a CPA certificate by experience in your office due to specialized experience requirements. In contrast, a CIA certificate by experience is quite possible to achieve.

If approved, you anticipate that the pay supplement will serve as a hiring, professional development and retention incentive. You note that you are a CIA and you would be eligible to receive the CIA pay supplement.

ANALYSIS

Political Reform 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.[2] Pertinent to the provided facts, the Act's conflict of interest provisions apply to financial interests based on the following:

- An interest in a source of income to the official, including promised income, which aggregates to $500 or more within 12 months prior to the decision. (Section 87103(c).)

- The official's interest in his or her personal finances and those of immediate family members. (Section 87103.)

The Act excludes from the definition of "income" any "salary and reimbursement for expenses or per diem, and social security, or other similar benefit payments received from a state, local, or federal government agency . . .." (Section 82030(b)(2).) Therefore, salary paid by a local government agency, such as the County, is generally not considered "income" for purposes of the Act, and you do not have a source of income interest in the Board of Supervisors' decision regarding the pay supplement.

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[2] Section 82048 defines "public official" as every member, officer, employee or consultant of a state or local government agency.

Nonetheless, material financial effects on an official's government salary may still be disqualifying where a decision will result in a reasonably foreseeable material financial effect on an official's personal finances that is distinct from other officials. (See *Boydston* Advice Letter, No. A-12-133.)

Foreseeability and Materiality

The standard for foreseeability varies depending on whether an interest is explicitly involved in the decision. An official's financial interest is explicitly involved in a governmental decision if the interest is a named party in, or subject of, the decision. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, or if the decision affects a real property interest described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).) As the Board of Supervisors' decision directly relates to the salary policies of your office's employees, including you, your personal finances are the subject of, and therefore explicitly involved in, the decision.

Regulation 18702.5 provides the materiality standards for personal financial effects. Under Regulation 18702.5(a), a financial effect is material where the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision. However, Regulation 18702.5(b) specifically excludes:

> "(1) Any establishment of or change to benefits provided under an employment or retirement policy for employees or retirees if the financial effect of the decision applies equally to all employees in the same bargaining unit or other representative group."

Under the facts provided, all employees in your office who obtain a CIA certificate will be eligible to receive a benefit if the pay supplement is approved. Accordingly, the benefit would apply equally to all employees in a representative group, the Auditor-Controller's Office. Under Regulation 18702.5(b)(1), the financial effect on your personal finances is not material.

Section 1090

Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed, at both the state and local level. The purpose of Section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." (*Thomson v. Call* (1985) 38 Cal.3d 633, 650.) A contract that violates Section 1090 is void. (*Id.* at p. 646.)

Section 1090 reaches beyond the actual execution of the contract. Officials who participate in any way in the making of the contract are also covered by Section 1090. 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.

(*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.) A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of section 1090].) Further, where an existing contract requires periodic renegotiation of payment terms, the modification of such terms constitutes the making of a contract. (81 Ops.Cal.Atty.Gen. 134 (1998).)

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* (1996) 48 Cal.App.4th 289, 333.) The Attorney General has recognized that an employee of a government agency has a financial interest in receiving a salary as an employee. (81 Ops.Cal.Atty.Gen. 274.) Additionally, the Attorney General concluded that public employment constitutes a "contract" within the meaning of Section 1090. (65 Ops.Cal.Atty.Gen. 305, 308, fn. 4 (1962); 36 Ops.Cal.Atty.Gen. 121 (1960).) Therefore, as a County employee who receives a salary from a government agency, you have a financial interest in a contract, and Section 1090 prohibits you from participating in the contract in your public capacity.

In the case of an employee, a contract may be renegotiated, so long as the employee totally disqualifies himself or herself from any participation in his or her public capacity, in the making of the contract. As long as the employee plays no role whatsoever in the contracting process, the employee's agency is not prohibited from contracting with the employee. (See 80 Ops.Cal.Atty.Gen. 41 (1997) [firefighters permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity]; 63 Ops.Cal.Atty.Gen. 868 (1980) [real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal].)

Employees can participate in contract negotiations with a government entity for compensation for services even if a contract already exists, so long as the official acts solely in his or her private capacity. (See *Calabrese* Advice Letter, No. A-17-087.) Should you seek to present the pay supplement to the Board of Supervisors on your own behalf, or as a group of employees of the County, you must make it clear that you are appearing before the Board solely in your individual and private capacity.[3] As the court in *Calabrese, supra*, noted, acting in a private capacity means that an employee, for example, cannot provide a Board with information such as an official analysis. (*Ibid.*)

Rule of Necessity

We acknowledge that the situation may arise where you, as the County Auditor-Controller may be the only one who may present this proposal to the Board and respond to the Board's need for information. In such instances, the rule of necessity may apply, where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) If you would like additional information to determine if the rule of necessity applies, you should seek further assistance identifying the reasons you believe that you are the only official who can legally act. However, if it is possible for an outside party or unaffected employee to provide the necessary documentation or

[3] For example, do not use your title as Auditor-Controller when addressing the Board.

analysis, these tasks must be performed by someone other than an affected employee. (See *Calabrese* Advice Letter, No. A-17-087.)

Accordingly, Section 1090 prohibits you from addressing the Board of Supervisors regarding the pay supplement in your official capacity. However, you may appear at a Board meeting or have contact with the Board concerning the pay supplement so long as you make it clear that you are speaking only in your individual, private capacity as an employee or as a part of a group of employees.

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

Sincerely,

Dave Bainbridge
General Counsel

By: Sara K. Puricelli
Counsel, Legal Division

SKP:gal