



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 22, 2020

Mike Leonardo
Executive Director
Fresno County Transportation Authority
2220 Tulare St. Suite 2101 Floor 21
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-20-046

Dear Mr. Leonardo:

This letter responds to your request for advice on behalf of the Fresno County Transportation Authority (“FCTA”), and Ms. Debbie L Hunsaker regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090, and not under other general conflict of interest prohibitions such as common law conflict of interest.

Also 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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the 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 any potential conflict of interest under the Act or Section 1090 preclude Ms. Hunsaker’s appointment to fill a vacancy on the FCTA’s Board?

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.

CONCLUSION

Neither the Act nor Section 1090 prohibit Ms. Hunsaker from holding this position. However, Section 1090 would prohibit her from participating in certain decisions, as discussed below. No further analysis under the Act is necessary where the contract is prohibited under Section 1090.

FACTS AS PRESENTED BY REQUESTER

The FCTA is a local transportation authority established by statute, in 1986, when Fresno County voters passed Measure C, providing for imposition of a one-half percent sales and use tax. In its first 20 years, Measure C delivered close to \$1 billion worth of improvements to state highways and streets and roads, helping to build additional lanes and thus enhancing the regional transportation system.

In 2006, Fresno County residents approved an extension of Measure C for an additional 20 years. In addition to financing continued improvements to state highways, and local streets and roads (e.g., pothole repairs and paving of streets), Measure C Extension funding (2007-2027) benefits daily commuters, transit riders and other Fresno County residents with unique mobility needs (including the funding of transit and rideshare incentive programs).

The FCTA, which is responsible for administering the Measure C program, has a staff of three full-time employees (Executive Director, Contracts Administrator, and Program Manager). All other services (including the legal services furnished by the Office of Fresno County Counsel) are provided by consultants acting as independent contractors pursuant to contract. Budgeted revenues during Fiscal Year 2019-20 are \$86,030,980, of which 34.6% is passed through to local agencies (the cities and the County) under the Local Transportation Program, and another 24% of which is passed through to local agencies for transit services. FCTA retains the remaining 41.4% for direct allocation of funding for transportation projects or programs to eligible agencies. The largest of these programs that FCTA directly administers is the Regional Transportation Program (30.4%), which consists of major projects on City, County, or State arterials and highways. Only two of these programs, Local Transportation and Regional Transportation, contain projects for which Ms. Hunsaker's firm, Alert-O-Lite, could provide subcontractor services.

Local Transportation Program

The essential role of the FCTA within the confines of the Local Transportation Program is to allocate funds to the local agencies - i.e., the fifteen incorporated cities located throughout the County of Fresno and the County with respect to the unincorporated area - for various transportation projects to be commenced and delivered by those agencies. You note that the FCTA Board has no discretion in the identification, selection, or delivery of those projects. FCTA's role is limited to: (1) allocating the funds on a monthly basis to the local agencies responsible for project delivery; said monthly allocations are based on population and road mile formulas contained in the Expenditure Plan, and (2) ensuring that the local agencies spend these funds appropriately, which is accomplished via audits performed after the close of each fiscal year.

You also note that the FCTA Board has absolutely no discretion when it comes to selection of the contractors and subcontractors that will perform the project construction. Each member agency awards the construction contract for its specific project to the lowest responsible bidder, in accordance with competitive bidding requirements. (The FCTA Board likewise is not involved in the prior selection, by the responsible local agency, of the consultant engineering firm that designs the project.)

Regional Transportation Program

The FCTA allocates Measure C funding to each project by phase (Environmental/Design, Right of Way, Construction), in accordance with the 2006 Measure C Extension Expenditure Plan that was approved by the voters via the ballot language. Funding for all project phases is provided by means of funding agreements and occurs prior to the selection of any contractors utilized during each phase. With one possible exception, FCTA does not play a direct role in the Design, Right of Way, or Construction of any Regional projects. Local agencies or the California Department of Transportation are responsible for these project delivery activities.

Regional Projects funded by the FCTA initially were chosen by the voters' approval of the 2006 Measure C Extension Expenditure Plan ("Expenditure Plan,") which was expressly included, in its entirety, as part of the ballot measure that was approved by the electorate. Fresno Council of Governments ("COG") is the agency responsible for regional transportation planning within the County and is responsible for updating the Expenditure Plan on at least a biennial basis. These biennial updates consist primarily of revising the schedule and estimated cost of each of the Expenditure Plan projects not yet completed. These biennial updates do not add or delete projects from the approved Expenditure Plan. There is a separate process, also administered by Fresno COG, to amend the Expenditure Plan which does allow for the addition or deletion of Expenditure Plan projects.

Fresno COG staff, working in conjunction with its member agencies (the fifteen incorporated cities and the County) and affected stakeholders, develops the draft Expenditure Plan Update. The Fresno COG Policy Board receives, and holds public hearings to review, the draft Expenditure Plan Update. The Fresno COG Policy Board thereafter adopts the updated Expenditure Plan and directs that it be transmitted to the FCTA Board. The FCTA Board then reviews and approves the updated Expenditure Plan as submitted by the Fresno COG Policy Board.

Amendments to the Expenditure Plan are prepared and approved by Fresno COG, after which they must also be approved by FCTA. As a result, the FCTA Board has no role in the selection of the projects to be funded by Measure C, other than to approve the prioritized listing of projects provided in the Expenditure Plan update, including any amendments, prepared and approved by Fresno COG. (Although the enabling legislation does allow the FCTA Board to initiate an amendment to the Expenditure Plan, the process is far more cumbersome and has never been utilized.)

Policy direction is provided by the FCTA's nine-member governing board, which consists of seven local elected officials and two public members at large, with one at large member appointed jointly by the city councils of Fresno and Clovis with the appointee residing within the incorporated area of Fresno or Clovis. Recently those cities were able to reach tentative concurrence on Ms. Hunsaker as a nominee.

Ms. Hunsaker and Alert-O-Lite

Ms. Hunsaker is president and CEO of Alert-O-Lite, Inc., a family-owned contractor's equipment and supply company based in Fresno. The primary focus of the business is to provide traffic control and signage services on transportation projects of various sizes primarily in California's Central Valley. The firm seldom is a prime contractor but typically is selected as a subcontractor or supplier. The firm has provided and presumably will continue in the future to perform work during the construction phase of some projects funded or approved for funding by Measure C dollars. You also note that it is not until the contract for construction of a project has been awarded that it can be determined whether the lowest responsible bidder selected by the agency may have retained Alert-O-Lite, Inc. as one of its subcontractors. Traffic control and/or signage work is a necessity on virtually every transportation related construction project, so performance of such work by someone will be required.

ANALYSIS

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 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. City of Taft* (1962) 58 Cal.2d 565, 569.) 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, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is presumed to be involved in the making of his or her agency's contracts irrespective of whether he or she actually participates in the making of the contract. (*Id.* 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).)

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Participation is defined

broadly and includes 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; see also *Stigall, supra* at p. 569.) For example, an official (or a public employee) may be convicted of a violation of Section 1090 if it is established that he or she had the opportunity to, and did, influence execution of the contract directly or indirectly to promote his or her personal interests. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

You note that the essential role of the FCTA within the confines of the above referenced programs is to approve and allocate funds for various transportation projects. You also note that the FCTA Board has no discretion in the identification, selection, or delivery of those projects, and that its role is limited to allocating the funds to the local agencies and ensuring that the local agencies spend these funds appropriately, and that the FCTA Board has no discretion when it comes to selection of the contractors and subcontractors. However, given that participation in making a contract is defined broadly, and that board members are conclusively presumed to be involved in the making of their agency's contracts, irrespective of any actual participation, Ms. Hunsaker will have participated in any such contracts where the FCTA allocates funding, should she become a member of its Board.

In making this determination, we are also guided by *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91, which applies the “*in pari materia*” canon of statutory construction in determining that Section 1090 should be harmonized with the Act when possible. As explained by the court, “it is well established that Section 1090 and the Act are “*in pari materia*.” (*Ibid.*) “Statutes ‘*in pari materi*’ should be construed together so that all parts of the statutory scheme are given effect.” (*Ibid.*, citing *People v. Lamas* (2007) 42 Cal.4th 516, 525.)² We have previously advised that, if there is a realistic possibility that the primary contractor with a governmental entity will retain as a subcontractor the company for which a board member is either employed or that is a source of income to the board member's own business, and the financial impact on that company meets the applicable materiality threshold, the board member would be prohibited under the Act from participating in the contracting decision. (*Mallet Advice Letter*, No. I-14-144.)

As a further basis, the courts have also generally held that an official is financially interested in a contract under Section 1090 if he or she participates in the making of the contract and later benefits directly or indirectly under the contract. (*City Council v. McKinley* (1978) 80 Cal.App.204, 212.) We have previously advised that in instances where a councilmember has properly participated in approving a contract because it does not include her employer as a subconsultant, Section 1090 will still apply to the City and general contractor as a prohibition against subsequently retaining the councilmember's employer as a subconsultant. (*Black Advice Letter*, No. A-18-213.) Thus, should Ms. Hunsaker become a member of the FCTA Board, barring any applicable exceptions, Section 1090 would be violated if Ms. Hunsaker's firm, Alert-O-Lite, provided services under any contracts in which the Board played a role in making by allocating the necessary funds.³

² Statutes are “*in pari materia*” if “they relate to the same person or thing, to the same class of person[s] or things, or have the same purpose or object.” (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn.4.)

³ See Gov. Code Sections 1091 (“remote interests”) and 1091.5 (“noninterests”) for potential exceptions.

In regard to the Act, no further analysis is necessary because Section 1090 generally prohibits a subsequent subcontract with Ms. Hunsaker's firm if the FCTA has allocated the funds for the initial contract. To the extent that any exception to Section 1090 may apply, Ms. Hunsaker may wish to seek further advice under the Act.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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