STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 22, 2024

Gary S. Winuk
621 Capitol Mall, Suite 1900
Sacramento, CA 95814
Kaufman Legal Group

Re: Your Request for Advice
Our File No. A-24-103

Dear Mr. Winuk:

This letter responds to your request for advice regarding the Political Reform Act (the "Act") and Government Code Section 1090, et seq.[1] Please note that we are only providing advice under the Act and Section 1090, 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 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

Does either the Act or Section 1090 prohibit San Diego Unified Port District Board Commissioner Sid Voorakkara ("Commissioner Voorakkara") from taking part in, or the District from entering into, a contract with the Governor's Office of Business and Economic Development ("GO-Biz") if GO-Biz were to employ the Commissioner's company to provide consulting services unrelated to the GO-Biz contract with the District?

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[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 18104 through 18998 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

As explained below, where Commissioner Voorakkara's company intends to provide consulting services to a unit within GO-Biz that is different from the unit involved with the District contract, Section 1090 would not prohibit him from making, or the District from entering into, the contract with GO-Biz under the noninterest exception of Section 1091.5(a)(9). For this exception to apply, he must disclose his interest in GO-Biz to the District at the time the District contract is considered, and the interest is noted in the District's official records.[2] Under the Act, there are no facts to suggest that it is reasonably foreseeable the District decisions to enter into or reconsider a contract with GO-Biz will have a material effect on Commissioner Voorakkara's interest in his business or in Go-Biz as a source of income. However, the Act prohibits him from contacting or appearing before GO-Biz in his official capacity in an attempt to influence any decision on his company's consulting contract.

FACTS AS PRESENTED BY REQUESTER

You seek this advice under the Act and Section 1090 on behalf of the San Diego Unified Port District ("District") and Commissioner Voorakkara who was sworn into the District Board on February 20, 2024, as an appointee of the City of San Diego.

The District is a specially created public district that manages the San Diego Bay and 34 miles of waterfront. The Port was established in 1962 and has five member cities; Chula Vista, Coronado, Imperial Beach, National City and San Diego. Management of the District is entrusted to seven appointed commissioners. One commissioner is appointed by each of the city councils of Chula Vista, Coronado, Imperial Beach and National City, and three commissioners are appointed by the San Diego City Council.

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[2] While your request states that Commissioner Voorakkara's company provides consulting services to various state and local government clients, you have only provided information concerning one potential contract with GO-Biz. Without specific contracts to consider, however, we are unable to advise on Section 1090 beyond the District's potential contract with GO-Biz. We therefore recommend that you seek additional advice as needed for a decision involving a particular contract when more information is available. In addition, we express no opinion regarding any previous consulting contracts his company may have entered with GO-Biz (or other government entities), including the discussions and negotiations for any of these existing contracts while serving as a Commissioner. The Commission cannot provide advice related to past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).) Furthermore, we caution that to the extent the Commissioner takes part in any discussion of a subsequent contract with a governmental entity, including GO-Biz, not currently employing the Commissioner's company, ArroyoWest, Section 1090 may restrict the Commissioner and ArroyoWest from accepting future employment with that government entity. Under Section 1090 he may have participated in the "making of the contract" as an official and may not benefit from the contract in his private capacity. Accordingly, Commissioner Voorakkara should seek additional advice should his company seek employment with a government entity after taking part in any District decisions involving a contract with the same government entity.

The District Board establishes policies under which the Port's staff conducts its daily operations. It also regularly considers, and votes on the approval of, many types of contracts and agreements between the District and various public and private entities.

In his private capacity, Commissioner Voorakkara is a senior partner at ArroyoWest, LLC, a small business providing communications, public affairs, and strategic planning for public, private, and nonprofit clients. He owns more than 10% of the business. On occasion, ArroyoWest publicly bids on various municipal and state agency Requests for Proposals ("RFPs") and enters into contracts with State and local government entities to provide communications, public affairs and strategic planning services. Some of these public entities may also have contracts or other interactions with the District that require approval by the District Board.

As an example, the District currently has a contract with the Governor's Office of Business and Economic Development ("GO-Biz"), a state agency.[3] GO-Biz established a grant program to fund a collaborative project with five ports in California to build data-sharing capacity. The initiative was born out of the Covid pandemic, which highlighted the fact that ports had little information on commerce in and out of each other's ports. The grant award will support a multiport data infrastructure during a crisis that implicates commerce flow to other ports. The District receives funding from GO-Biz to participate in this project and the District Board voted to approve a contract (grant agreement) with GO-Biz to receive these grant funds and participate in this collaborative project. Commissioner Voorakkara was not a member of the Board when the receipt of the grant and project participation was first approved, but this project will likely require further Board consideration in the future. Neither Commissioner Voorakkara in his private capacity nor ArroyoWest will have any involvement with or direct financial gain from this District contract with GO-Biz.

ArroyoWest is currently seeking consulting work with GO-Biz, on a project that is completely independent of the GoBiz port data-sharing project and does not relate to the District.[4] GO-Biz issued a Request for Proposals to provide communications services to build statewide community awareness around hydrogen clean energy and to support long-term hydrogen infrastructure. ArroyoWest submitted a response to this Request for Proposals with a primary focus of holding public forums to promote hydrogen clean energy. Were ArroyoWest to be awarded the hydrogen clean energy project, the business would be compensated by GO-Biz for its work.

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

[3] By email dated October 22, 2024, you confirmed that GO-Biz is a state agency and is not part of the Governor's office. Similar to the Office of Emergency Services, it has a separate budget item.

[4] You confirmed that the contract involving the District and GoBiz is with a different specific unit within GO-Biz than the contract ArroyoWest is considering.

agencies. (*Stigall v. 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 typically 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.)

As a District Board Commissioner, Commissioner Voorakkara is a public officer subject to the provisions of Section 1090. Additionally, due to his status as a Commissioner, he is presumed to be involved in the making of all contracts by the District irrespective of whether he actually participated in the making of the contract. (*Thomson*, *supra*, at pp. 645, 649.) Thus, assuming his company provides consulting services to GO-Biz, the determinative question is whether he would have a financial interest in contract decisions involving the District and GO-Biz and, if so, whether his interest would be a "remote interest" or a "noninterest" as defined in Sections 1091 and 1091.5.

Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state that 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. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) 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.) A financial interest may include a public officer's prospect of future business opportunities related to the contract or desire to maintain a favorable ongoing relationship with the contracting party. (86 Ops. Cal. Atty. Gen. 187, 189 (2003).) 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*, *supra* at p. 569.)

You state the District receives funding from GO-Biz to participate in a project with five ports in California to build data-sharing capacity, and the contract will likely require further Board consideration in the future.[5] A contract between the District and GO-Biz may involve an increase or decrease in GO-Biz's funds which could indirectly or directly impact its ability to enter into a separate and unrelated contract with the Commissioner's company for its consulting services on other projects. To the extent that his company has an existing contract for consulting services with GO-Biz, Commissioner Voorakkara will have a financial interest in contracts, including the data-sharing contract, between the District and GO-Biz.

However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091 or a "noninterest," as defined in Section 1091.5. If a remote interest is present, the contract may be made if: (1) the officer discloses the interest in the contract to his or her public agency; (2) that interest is noted in the agency's official records; and (3) the officer abstains from

[5] A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a new contract under Section 1090. (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191.)

any participation in the making of the contract. (Section 1091(a).) If a noninterest is present, the contract may be made without the officer's abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist*. (1999) 69 Cal.App.4th 508, 514-515.)

The Legislature has addressed the issue of a public officer's involvement in a contract between two government agencies, where the public officer is employed by one agency and serves as a member of a body or board contemplating a contractual relationship, and defined circumstances where the interest may be deemed a "noninterest" or a "remote" interest.

Under Section 1091(b)(13), an agency board member who receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. However, an officer or employee of a government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies "unless the contract directly involves the department of the governmental entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record." (Section 1091.5(a)(9).)

The California Supreme Court examined the application of the two "government employment" sections and found as follows:

> The result is a logical statutory scheme. If a contract an official considers in his or her official capacity is with the official's government employer and involves direct financial gain, the official is prohibited from participating under section 1090. If the contract involves no direct financial gain, but is with or affects the official's own department, the official's interest is a remote interest under section 1091, subdivision (b)(13) and subject to the disclosure and recusal requirements of section 1091. Finally, if the contract involves no direct financial gain, does not directly affect the official's employing department, and is only with the general government entity for which the official works, the interest is a minimal or noninterest under section 1091.5(a)(9) and no conflict of interest prohibition applies.

(*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081.)

Sections 1091(b)(13) and 1091.5(a)(9) expressly refer to a "person receiving salary, per diem, or reimbursement for expenses from a government entity," which has generally been interpreted to cover such payments to an officer or employee of a government entity. Because the exceptions make no mention of paid consultants of government entities, we must determine if they are subject to the same remote interest and noninterest exceptions as any other officer or employee of a government entity. In a similar situation, the Commission examined whether the remote interest exception under Section 1091(b)(1), which expressly applies to "an officer or employee of a nonprofit entity" would also apply to an independent contractor of a nonprofit entity. (*Nerland* Advice Letter, No. A-19-014.) In concluding that it would, the Commission stated:

> While an independent contractor is distinguishable from a business's regular employees, an independent contractor is still employed by the contractual employer under a broad definition of "employment." Moreover, there is no reason to categorically exclude independent contractors from the remote interest exception in Section 1091(b)(1). In many cases, an independent contractor is performing essentially the same work that an employee might perform for a 501(c)(3) organization, and generally an independent contractor's interest in his or her contractual employer is more attenuated than a regular employee's interest. Accordingly, there is no public interest served in excluding an independent contractor from Section 1091(b)(1) and there is no reason to believe that the Legislature intended to do so in promulgating Section 1091.

(*Nerland* Advice Letter, *supra*.)

For the same reasons, we believe the Legislature did not intend to categorically exclude paid consultants of a government entity from coming within the scope of the two government salary exceptions."[6] Here, Commissioner Voorakkara's company intends to provide consulting services to a unit within GO-Biz that is different from the unit involved in the District contract. Therefore, Section 1090 would not prohibit him from making or participating in making, or the District from entering into, a contract with GO-Biz concerning the data sharing project because the noninterest exception of Section 1091.5(a)(9) applies, so long as Commissioner Voorakkara discloses his interest in GO-Biz to the District at the time the contract is considered, and the interest is noted in the District's official records.

The Act

The Act's conflict of interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests. (Section 81001(b).) 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. (Section 87103.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official's interests. Section 87103 defines financial interests to include:

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[6] This conclusion appears consistent with the legislative history regarding these statutory exceptions (Stats. 1991, ch. 382, § 1), which expressed a general concern that "government employees who also serve as local elected officials are often prohibited from voting on a broad range of issues, rather than just those bills that affect their employers. For example, a peace officer who is also an elected official may be prohibited from voting on contracts dealing with any city agency, rather than only those contracts affecting the police department. (See report of Assembly Committee on Elections, Reapportionment and Constitutional Amendments, May 9, 1991.) It is also generally consistent with previous advice letters where we have extended application of Section 1091's remote interest exceptions when, as here, the official's interest is no less remote than the interest specified in the exception. (See, e.g., *Schons* Advice Letter, No. A-17-129; *Raymond* Advice Letter, No. A-21-003; *Whitham* Advice Letter, No. A-19-129.)

- An interest in a business entity in which the official has a direct or indirect investment of $2,000 or more (Section 87103(a)) or in which the public official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).

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

Commissioner Voorakkara has both a business entity and source of income interest in ArroyoWest and would have a potential source of income interest in GO-Biz if his company enters into a contract with Go-Biz to provide consulting services.[7]

Foreseeability and Materiality

Relevant to the official's business and source of income interests, Regulation 18701(a) provides that a governmental decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an 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 interest.

Regulation 18701(b) sets forth the foreseeability standard applicable to a decision's effect on an official's interest that is not explicitly involved in the decision, as here, and provides that the effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

Regulation 18702.1 provides, in relevant part, that the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity, including a business entity that is a source of income to the official, is material where the decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or greater than $1,000,000, or five percent of the entity's annual gross revenues and at least $10,000. (Regulations 18702.1(a)(2)(A)-(B), 18702.3(a)(4).) The reasonably foreseeable financial effect of a governmental decision on an official's business entity interest is also material where the decision may cause the entity to incur, avoid, reduce, or eliminate expenses equal to or greater than $250,000, or one percent of the entity's annual gross revenues and at least $2,500. (Regulation 18702.1(a)(3)(B).)

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[7] Section 82030(a) provides that "[i]ncome of an individual" includes "a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly, or beneficially a 10-percent interest or greater." Therefore, Commissioner Voorakkara has a potential source of income interest in his company's clients. Aside from GO-Biz, no specific facts are provided regarding his business clients as sources of income and we do not further consider the issue at this time. Also note that unlike Section 1090, the Act's "government salary exception" does not apply to income received as an independent contracting consultant. (See *Strachan* Advice Letter, No. A-10-098.)

As mentioned, the District will need to amend or extend a current contract with GO-Biz under which it receives funding to participate in a project with other California ports to build data-sharing capacity, and the contract is with a GO-Biz unit that is different from the one Commissioner Voorakkara's company would contract with to provide consulting services. Moreover, you stated Commissioner Voorakkara's company would not receive any financial gain from the District contract with GO-Biz that is unrelated to his company's consulting services contract. Accordingly, there is no suggestion from these facts that it is reasonably foreseeable the decisions by the District regarding the current contract with Go-Biz will have a material effect on Commissioner Voorakkara's interests.[8]

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

Sincerely,

Dave Bainbridge
General Counsel

By: Jack Woodside
Jack Woodside
Senior Counsel, Legal Division

JW:aja

[8] Note that under Regulation 18704(c)(2), a public official is not permitted to use their official position to influence a decision before another governmental agency in which the official has a financial interest. Under this restriction, Commissioner Voorakkara may not contact or appear before GO-Biz in his official capacity in an attempt to influence any decision on his company's potential consulting contract as it is reasonably foreseeable a decision regarding a contract with the Commissioner's consulting company would have a material financial effect on the business entity. Accordingly, in soliciting a contract with GO-Biz, Commissioner Voorakkara may not act or purport to act within his official authority or on behalf of the District.