



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 13, 2022

Marian L. Slocum
RWG Law
City of Brea
350 South Grand Avenue, 37th Floor
Los Angeles, CA 90071

Re: Your Request for Advice
Our File No. A-22-084

Dear Ms. Slocum:

This letter responds to your request for advice on behalf of the City of Brea (“City”) Council Member Marty Simonoff 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 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. Lastly, the Commission does not provide advice with respect to past conduct. (Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions and the decisions described below.

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 Orange 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 Council Member Simonoff participate in decisions to overhaul the City’s Waste Agreement with its exclusive franchisee Republic Waste Services of Southern California, LLC (“Republic”) where he is employed by EDCO Waste Services, Inc.

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.

(“EDCO”), a competitor waste service company that operates in the Los Angeles and Orange County areas?

CONCLUSION

No. Section 1090 prohibits participation where there is any financial interest on the part of the official that might impinge upon their exercising an undivided loyalty in serving their agency. Council Member Simonoff has a financial interest in EDCO, and the negotiations and decisions between the City and Republic could indirectly affect EDCO as a competitor business operating in the area.

To the extent that the City Council is the body solely able to negotiate and enter into an updated contract with Republic, the rule of necessity would apply to permit the City to make these decisions in order to carry out its essential functions. Council Member Simonoff, as an interested board member, however, must abstain from any participation in the contract decisions.

FACTS AS PRESENTED BY REQUESTER

This request seeks guidance on whether Brea City Council Member Simonoff’s employment with EDCO, a competitor solid waste company that services other municipalities in the Orange County area and utilizes the County landfill located adjacent to the City, prohibits his participation in the decision-making process for upcoming amendments to the City’s solid waste contracts involving franchisee Republic.

The City and Republic are parties to a September 3, 2002, Amended and Restated Agreement for the Collection, Transportation, Recycling, Composting and Disposal of Solid Waste, Recyclable and Compostable Materials (“Waste Hauling Agreement”). Under this agreement, Republic has had an exclusive franchise for collection, transportation, recycling, composting, and disposal of solid waste, recyclable, and compostable materials generated by premises in the City. The contract set Republic’s 2002 billing rates for residential and commercial customers, and it provides for an annual Consumer Price Index (“CPI”) rate adjustment subject to the City’s approval. The Waste Hauling Agreement currently is set to expire on December 31, 2039.

You provided additional information by email that since the original contract, the rates have been adjusted annually and occasional amendments have been made to include items such as the disposal of compostable and organic materials related to changes in state requirements.

The City and Republic also are parties to a November 19, 2019, Commercial Organics Recycling Program Agreement (“CORP Agreement”). This contract provides for Republic’s implementation of a commercial organics recycling program in compliance with AB 1826 (2014). The contract set Republic’s 2019 billing rates for commercial customers participating in the program, and it provides for annual CPI rate adjustment subject to the City’s approval in accordance with the Waste Hauling Agreement. The CORP Agreement currently is set to expire December 31, 2024.

In response to our questions regarding these contracts, you explained in subsequent emails that the goal of the City currently is to do an overhaul of both agreements and combine all the City’s new waste service needs into one waste agreement with Republic. This will all likely occur

through an amended and restated Waste Hauling Agreement. In the new agreement, regarding waste collection services, the City is looking to update its terms on bulky item, e-waste collection (cost/frequency), and holiday tree collection as well as the Public Education and outreach program to educate the public on the new waste sorting requirements. Additionally, the City will be looking to add a residential food waste program, additional commercial recycling and organics waste container sizes, terms for emergency waste hauling services and special cleanup rates, a neighborhood cleanup event, a minimum diversion requirement, and terms compliant with SB 1383 concerning contamination monitoring, trash cart and bin colorization, waste processing requirements, and edible food recovery outreach. The City would also like to add terms for additional waste and bulky item collection from City facilities and for large venue and event waste removal.

As to other contract terms, the City would like to add a new term of agreement, street sweeping services, a contract compliance audit, a corporate bond or letter of credit to the contract, include a section on assignment and transferability, additional liquidated damages, allow Republic to directly bill residential customers, and a new annual rate adjustment methodology.

You state that the adjustments and added services are to ensure the City complies with new state requirements imposed subsequent to the execution of the Republic contract and to ensure the City avoids being fined by the state for not having such services. Finally, these adjustments and new terms to the contract are not considered novel for the industry at this point in time as many other cities are also working to ensure their waste management service contracts with their waste services providers comply with the new state requirements for waste removal and processing.

Additionally, since 1995, the City has had a Memorandum of Understanding (“MOU”) with Orange County regarding the Olinda Alpha Landfill, owned and operated by the County and located near the City. Under this agreement, the County pays the City a host fee and agrees to take measures to mitigate impacts related to the County’s acceptance of solid waste from outside the County’s jurisdiction. The landfill has a permitted capacity, a maximum permitted elevation and its estimated closure year is 2036. The City and Orange County also are parties to a July 14, 2009, Cooperative Agreement regarding the landfill, which addresses public health and safety measures, operating procedures, payment of a host fee, and other matters related to the County’s expansion and continued operation of the landfill. The City and Orange County will be negotiating a new Cooperative Agreement to replace this contract. While initially this request extended to decisions about changes to the landfill agreements with the County, City staff has only limited information on the potential amendments to the landfill contract at this time and may make a separate advice request concerning these changes at a later date.

Council Member Simonoff’s Financial Interests

Council Member Simonoff is employed by EDCO as the Director of Public Affairs (Public Relations) and receives more than \$500 income from the company in any 12 month period. Neither he nor his immediate family has an ownership interest in the company. Council Member Simonoff’s duties for EDCO are focused on nearby municipalities, Lakewood, and, to a lesser degree, Signal Hill. In his work for Lakewood, Council Member Simonoff does pricing reviews of EDCO’s waste services. He does not select EDCO’s disposal sites, nor is he involved in EDCO’s decisions to hire or fire employees. Council Member Simonoff is not involved in EDCO’s business interests in Orange County.

Council Member Simonoff has been employed by EDCO for approximately 17 years. Prior to working for EDCO he was employed by his family's waste services business, BZ Disposal, which was later sold to EDCO. BZ Disposal did not provide any services or conduct any business with any entity in Orange County. While he worked at BZ Disposal and was on the City Council he did participate in City actions regarding the Republic contract with the City.

Once he began working for EDCO [approximately 2005], he no longer participated in City actions or discussions regarding the contract between Republic and the City. However, due to changes in the state's solid waste laws over the past few years, Council Member Simonoff considers the up-coming overhaul of the Republic contract to be significantly more important for the City. And, if there is no disqualifying conflict of interest, then he would like to share his expertise with his Council colleagues.

Potential Financial Impacts of the Decisions

EDCO is a competitor of Republic. In Los Angeles County, EDCO provides waste management services for the Cities of El Segundo, La Mirada, Lakewood, Long Beach, Rancho Palos Verdes, and Signal Hill, as well as for unincorporated open space areas. In Orange County, EDCO provides waste management services for the Cities of Buena Park and La Palma. EDCO utilizes Orange County's landfill system, including the Olinda Alpha landfill, for its solid waste disposal for Buena Park and La Palma.

In response to our request for information regarding the possible financial impacts renegotiations of the Waste Agreement could have on EDCO, Council Member Simonoff's and the City Manager's assessment is that any decisions the City makes regarding its contract with Republic will not have an impact on EDCO for two reasons: First, EDCO's agreements with its municipal clients are unrelated to the City's contract with Republic. EDCO's contracts with its municipal clients are based on its own rate calculations and the needs of the individual municipality. Second, the City's contract with Republic currently has a December 31, 2039, expiration date and it is not anticipated that the contract will be terminated early by either party. In a follow-up email you emphasized that while such a scenario is hypothetically possible and would possibly result in EDCO entering a public bidding process to find a new waste services provider, the City considers this unlikely.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers or employees, 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 a public officer or employee 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.) 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.)

When applicable, Section 1090's command is absolute; neither the person with the prohibited financial interest nor any body of which the person is a member may enter into the

contract. The prohibition cannot be avoided merely by having the financially interested officer or employee abstain from participating in the contracting process. (85 Ops. Cal. Atty. Gen. 176, 177 (2002) citing *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212; 78 Ops.Cal.Atty.Gen. 362, 368 (1995).) The prohibition applies 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.)

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.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) 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. (See e.g., *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002).) “The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official’s loyalties and compromise the undivided representation of the public interests the official is charged with protecting.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1075.)

As a member of the Brea City Council, Council Member Simonoff is presumed to be involved in the making of all contracts by the City irrespective of whether he actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.)² Thus, the primary issue is whether Council Member Simonoff has a financial interest in the negotiations and decisions to amend the Waste Hauling Agreement between the City and Republic due to his employment with competitor waste service, EDCO.

We find that his employment with EDCO is a financial interest that may prevent him as a public officer from exercising absolute loyalty and undivided allegiance in furthering the best interests of the City. As noted above, the courts apply the Section 1090 prohibition where there is an appearance of impropriety (*City of Imperial Beach v. Bailey, supra*) and 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) Although the possibility may be unlikely that contract negotiations with the City’s long-term exclusive franchise for providing waste services could result in one of the parties ending the exclusive arrangement, we must consider that possibility for purposes of Section 1090 and thus the possibility that his employer, EDCO, could somehow benefit from the negotiations. It is also a possibility that the rates negotiated in this setting could have an indirect impact on contract negotiations between EDCO and other municipalities due to the state law changes or involving similar services. This situation presents a potential for divided loyalties on the part of the official. Therefore, Council Member Simonoff should not participate in the contract amendment process. Additionally, Section 1090 also acts to prohibit the City from making decisions regarding the contract unless an exception applies. We note that none of the statutory exceptions to Section 1090 appear to apply to the facts presented and proceed with an analysis of the limited exception under the “rule of necessity.”

² We provide no analysis regarding past decisions related to City contracts with Republic in terms of compliance with Section 1090.

The Rule of Necessity

In limited circumstances, the “rule of necessity” allows a government body to carry out its essential functions if no other entity is competent to do so, with the requirement that a conflicted member must not participate in any manner in the contract decisions. (See *Lexin, supra*, at p. 1097.) To the extent that the City Council is the body solely able to negotiate and enter into an updated contract with Republic, we find that the rule of necessity applies and permits the City to make these decisions in order to carry out its essential functions. Council Member Simonoff, as an interested board member, however, must abstain from any participation in the contract decisions, so long as he is an EDCO employee.

Government Code Section 87100 of the Act

Additionally, because Council Member Simonoff must abstain from any participation in the relevant contract decisions under Section 1090, we do not need to further analyze the potential conflict of interest issue raised under the Act. His abstention under Section 1090 would also satisfy the requirements of the Act.

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

Sincerely,

Dave Bainbridge
General Counsel

By: **L. Karen Harrison**
L. Karen Harrison
Senior Counsel, Legal Division

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