



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 7, 2023

Shiri Hoffman
Chief Deputy County Counsel
1600 Pacific Hwy #355
San Diego, California 92101

Re: Your Request for Advice
Our File No. A-22-130

Dear Ms. Hoffman:

This letter responds to your request for advice regarding 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, including Public Contract Code.

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

Under Section 1090, is San Diego County permitted to enter into or amend a contract with the San Diego Workforce Partnership ("SDWP") to implement behavioral health workforce initiatives identified in a report that the SDWP prepared on behalf of the County?

CONCLUSION

Yes, the County may enter a contract with SDWP for services to implement the behavioral health workforce initiatives that SDWP identified in their report because SDWP is a Workforce

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.

Development Board within the definition of Section 1091.2 and therefore contracts with SDWP are exempt from Section 1090 prohibitions.

FACTS AS PRESENTED BY REQUESTER

The San Diego Workforce Partnership, Inc. (“SDWP”) is a California nonprofit public benefit corporation and serves as the only local Workforce Development Board for San Diego, pursuant to the federal Workforce Innovation and Opportunity Act of 2014 (“WIOA”). The federal Workforce Investment Act of 1998 has now been superseded by WIOA. SDWP’s Board of Directors is appointed by the Policy Board of the San Diego Consortium (“Consortium”), a joint powers agency formed by the City of San Diego and County of San Diego in 1974. The Executive Director of the Consortium serves as CEO of SDWP. As authorized by WIOA, a Partnership Agreement between the Consortium and SDWP designates SDWP as the Local Workforce Investment Area grant recipient and administrative entity. Pursuant to that agreement, SDWP and the Consortium work collaboratively to develop and implement the region’s workforce development plan.

In November 2021, San Diego County entered into a consultant agreement with SDWP to evaluate, identify, and address public behavioral health workforce shortages in San Diego County. SDWP would also “design strategies that will assist to recruit and retain public behavioral health services staff to service the County of San Diego.”

SDWP did extensive research and implemented pilot programs to conduct their evaluation. SDWP provided the results of its evaluation in a 92 page report with five recommendations, which the County Board of Supervisors received in October 2022 and directed the Chief Administrative Officer to return to the Board with plans to implement the report’s recommendations.

Given SDWP’s expertise and extensive research, as well as the fact its board serves as the only Workforce Development Board in the County, SDWP would be well-situated to assist the County in implementing the recommendations set forth in the report.

ANALYSIS

Section 1090

Section 1090 covers contracts made by public officials, providing in part:

“Members 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. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.”

Section 1090 generally prohibits public officers from being financially interested in contracts made by them in their official capacity or made by boards or commissions of which they are members. (87 Ops.Cal.Atty.Gen. 23, 24 (2004).) The purpose “is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct.” (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) The statutory goal is “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.) A contract that violates Section 1090 is void and unenforceable. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) Importantly, Section 1090's prohibition applies regardless of whether the contract would otherwise be fair and equitable (*id.* at pp. 646-649), and a board member with a proscribed interest may not avoid the prohibition by abstaining from the decision-making process; the entire board is prohibited from executing the agreement if the prohibition is applicable. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest,” and 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.) 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. (*Thomson, supra*, at pp. 645, 651-652; 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).)

Section 1091.2 provides the following with respect to local workforce investment boards:

“Section 1090 shall not apply to any contract or grant made by local workforce investment boards created pursuant to the federal Workforce Investment Act of 1998 except where both of the following conditions are met:

“(a) The contract or grant directly relates to services to be provided by any member of a local workforce investment board or the entity the member represents or financially benefits the member or the entity he or she represents.

“(b) The member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.”

Section 1091.2 clearly states that Section 1090 does not apply to any contract made by a workforce investment board created pursuant to the federal Workforce Investment Act of 1998, except when a member of that board is seeking services from the board and fails to recuse himself from its decisions. (See e.g., *Highsmith* Advice Letter, No. A-16-150.) The federal Workforce Investment Act of 1998 was superseded by WIOA, which SDWP was formed under. Here, there is no issue surrounding a member of the board seeking services. As such, the County would be permitted to enter into the contract with SDWP as Section 1091.2 applies, exempting the contract from Section 1090.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Valerie Nuding
Counsel, Legal Division

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