



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 30, 2023

Diana Varat
City of Pasadena
350 South Grand Avenue
37th Floor
Los Angeles, CA 90071

Re: Your Request for Advice
Our File No. A-23-011

Dear Ms. Varat:

This letter is in response to your request for advice regarding Government Code section 1090, et seq. Please note that we are providing advice under Section 1090 only, not under other general conflict of interest laws. 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 is based on the presumption that the facts you provide are complete and accurate. If this is not the case or if the facts underlying your request change, then 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 Los Angeles 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).)

QUESTIONS

Does Pasadena City Councilmember Felicia Williams, who performs contract work for Kosmont Companies (Kosmont), have a conflict of interest under Section 1090 in a prospective contract between the City and Kosmont? If so, does an exception apply that would allow the making of the contract?¹

CONCLUSIONS

Councilmember Williams has a conflict of interest under Section 1090, however the "remote interest" exception under Section 1091(b)(2) applies. Section 1090, therefore, does not prohibit the

¹ In light of the conclusion that Councilmember Williams must recuse under Section 1090, it is unnecessary to further consider whether she may take part in the decision under the Political Reform Act. However, we note that it does appear that Councilmember Williams is also disqualified under the Act as you have also concluded, and that the Act also requires a city councilmember to leave the room prior the consideration of a matter at a public meeting in which the councilmember must recuse. (See Regulation 18707.)

City Council from entering into a future contract with Kosmont involving the prospective public infrastructure project.

FACTS AS PRESENTED BY REQUESTER

Councilmember Felicia Williams was elected to the Pasadena City Council on March 3, 2020, and took office on December 7, 2020.

From 1995 to 1998, Councilmember Williams was employed directly by Kosmont. She then worked elsewhere for almost 20 years. Councilmember Williams initiated her current working relationship with Kosmont in October 2017. At the time, she was an independent sole proprietor with a contract to perform services for Kosmont.

In February 2018, Ms. Williams established FWD Consulting, LLC (FWD) and through this business entity she signed a new contract in October 2018 to continue to do the same type of work for Kosmont that she had performed since October 2017. Ms. Williams is the President and 100% owner of FWD which currently has three clients including Kosmont. Under the existing contract between Kosmont and FWD, Ms. Williams is paid hourly for specific projects, based on the negotiated rate in the FWD contract with Kosmont. Under the terms of that contract, she also receives a stipend for overhead and marketing. She does not receive any bonus, payments, or merit increases from Kosmont, nor does she have any ownership stake in Kosmont.

For external clients, Ms. Williams' title is Senior Vice President to correspond to Kosmont's billing schedule. Her internal job title is Independent Consultant based on a 2-year consulting contract. Ms. Williams does not receive a salary, benefits bonus, performance pay, annual pay increases, or any compensation related to the performance of the firm, only payments at the hourly compensation rates outlined in her contract for the projects that she submits billing for where her expertise is needed. Her duties are to consult on special client projects as assigned by Kosmont, including sustainability, funding, and grant-writing related to the formation of special districts

Although the existing contract states that Ms. Williams will have the title of "Senior Vice President," she does not have any official duties, powers, or obligations as a corporate officer for Kosmont, nor is she a member of the Kosmont Board of Directors. FWD has received more than \$500 from Kosmont in the last 12 months.

City staff has prepared two Requests for Proposals (RFPs). The first RFP relates to a broad City project, the Economic Development Strategic Plan (EDSP). The second RFP relates specifically to the development strategy for the "SR-710 Northern Stub" project, which will require the respondent to provide technical financial and engineering feasibility analysis. As background, in 2022 the City acquired over 40 acres of land known as the "SR-710 Northern Stub," a former Caltrans site cleared for freeway development in the early 1970s. The development of the SR-710 Northern Stub will be a part of the Economic Development Division's overall strategic plan for the City's economic development, but the EDSP will be broader than just that project.

The RFP for the EDSP seeks consultants to assist the City's Economic Development Division in "developing a strategic plan to guide the division's priorities, programs, and services for the next five years." The City has received a number of responses to the RFP for the EDSP,

including a response from Kosmont. Vice Mayor Williams did not work on Kosmont's response to this RFP.

The second RFP, which has not yet been issued, more specifically relates to the "SR-710 Northern Stub" property. The RFP will seek a consultant to assist the City with a broad array of tasks related to the redevelopment of that site from architectural renderings to infrastructure planning and financing. The RFP will request that the respondent have capacity, or include a subcontractor in their response that has capacity, to assist the City with technical financial and engineering feasibility work related to infrastructure enhancements needed as part of the redevelopment of the site. Given the nature of the work, you anticipate that Kosmont may be interested in responding to this RFP.

You state that Ms. Williams would not provide services relating to either of the proposed projects and would not receive any direct financial remuneration from a potential contract with the City under either RFP.

ANALYSIS

Under Section 1090, city officers "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 a member." 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.)

Section 1090 prohibits the use of a public position for self-dealing. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124 [independent contractor leveraged his public position for access to city officials and influenced them for his pecuniary benefit]; *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682, 690 ["Section 1090 places responsibility for acts of self-dealing on the public servant where he or she exercises sufficient control over the public entity, i.e., where the agent is in a position to contract in his or her official capacity"]; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090 [The purpose of Section 1090 is to prohibit self-dealing, not representation of the interests of others].)

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.)

Councilmember Williams is subject to Section 1090's conflict of interest provisions and would be making a contract if the City Council entered into a contract with Kosmont to perform work on a City project. The primary question, therefore, is whether Councilmember Williams would have a financial interest in the contract between the City and Kosmont and, if so, whether any exception to Section 1090 would allow the City to enter the contract with Kosmont.

A. Financial Interest.

“Financial interest” under Section 1090 is given a broad analysis and includes grants or contracts that may directly or indirectly benefit the officer. The California Supreme Court has explained what constitutes a financial interest under Section 1090:

[T]he term “financially interested” in section 1090 cannot be interpreted in a restricted and technical manner. (*People v. Honig, supra*, 48 Cal.App.4th at p. 315.) 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. (See *Stigall v. City of Taft, supra*, 58 Cal.2d at p. 569.) Thus, that the interest “might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good.” (*Terry v. Bender* (1956) 143 Cal. App. 2d 198, 208 [300 P.2d 119]; see also *Thomson v. Call, supra*, 38 Cal.3d at p. 645 [direct and indirect interests are equally prohibited].)

(*Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, at p. 1075.)

Here, Councilmember Williams works as an independent contractor for Kosmont and is identified as Kosmont’s Senior Vice President in her work performed on behalf of Kosmont’s clients. Under Section 1090, whether or not she performs work on the proposed City projects or receives a benefit from a contract between the City and Kosmont is not determinative for the purpose of determining whether Councilmember Williams has an interest in Kosmont’s contracts. (See *ibid.*) In this case, Councilmember Williams has a close business relationship with Kosmont and is publicly identified as a Senior Vice President. Considering this relationship, Councilmember Williams’ interest as an independent contractor and Kosmont consultant is directly tied to an interest in Kosmont and Kosmont’s continuing financial success. Based on this relationship, Councilmember Williams has a financial interest in Kosmont’s contracts including any contract with the City.

Considering this financial interest, Councilmember Williams may not participate in any decisions related to the execution of a contract between the City and Kosmont. Moreover, under Section 1090, a member of a public agency’s governing body is conclusively presumed to participate in the making of a contract under the governing body’s authority, regardless of whether the member in fact participates in the making of that contract. (*Thomson, supra*, 38 Cal.3d at pp. 649-650.) Accordingly, Section 1090 prohibits both Councilmember Williams from participating in, and the City from entering into, an agreement between the City and Kosmont for the Project unless an exception applies.

B. Remote Interest.

Statutory exceptions to Section 1090 exist where the financial interest involved is a “remote interest” or a “noninterest.” The exception that may apply under the facts provided here is the remote interest set forth in Section 1091(b)(2).

Section 1091(a) provides:

An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

Section 1091(b)(2) defines a “remote interest” to include in relevant part:

That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.

Here, based on the facts provided, Councilmember Williams is Senior Vice President for Kosmont with authority to represent Kosmont in her consultation services provided to Kosmont’s clients, who are third parties. Councilmember Williams is authorized to represent Kosmont in “dealings with third persons,” and is thus an “agent” under Section 1091(b)(2). (See *Frazer-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 216-217.)

The facts provided further indicate that Kosmont has 10 or more other employees, that Councilmember Williams was an employee or agent of Kosmont for at least three years prior to taking office in December 2020, that she does not own more than 3 percent shares of stock in Kosmont, and that she would not provide services relating to either of the proposed projects and would not participate in formulating either RFP.

Accordingly, based on the facts provided, the remote interest exception under Section 1091(b)(2) for “an employee or agent of the contracting party” applies and Section 1090 does not prohibit the City Council from entering into a future contract with Kosmont involving the prospective public infrastructure project. However, Councilmember Williams may not take part in these decisions, and her interest must be noted to the City Council and included in its official records.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

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