



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 7, 2023

Abel Salinas
Ethics Officer
Metropolitan Water District of Southern CA
P.O. Box 54153
Los Angeles, CA 90054-0153

Re: Your Request for Advice
Our File No. A-23-056

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.

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 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

1. Does Section 1090 prohibit Metropolitan Water District of Southern California District Board ("District Board") members Larry Dick, Karl Seckel, Linda Ackerman and Dennis Erdman, who were appointed by member agency Metropolitan Water District of Orange County (the "MWDOC") from taking part in the Local Resources Programs Ranch Water Filtration Plant Project ("LRP contract") contract decisions involving the MWDOC where the District Board members are paid a per diem by MWDOC for each District Board meeting and they participate in the MWDOC's Defined Contribution Plan?

2. Does Section 1090 prohibit District Board members Nancy Sutley, Carl Douglas, Tracy Quinn, Matt Petersen and Miguel Luna, who were appointed by the City of Los Angeles to

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.

represent member agency Los Angeles Department of Water and Power (the “LADWP”) from taking part in future LRP contract decisions involving the LADWP where the City is statutorily required to pay them a set fee to attend District Board meetings, but the District Board members have all voluntarily waived the fee?

CONCLUSIONS

1. Under Section 1090, the District Board members appointed by the MWDOC have a financial interest in the upcoming contract between the District and the MWDOC related to their receiving a per diem and their participation in the MWDOC’s contribution plan. However, as explained below, the noninterest exception under Section 1091.5(a)(9) applies to permit the four District Board members to participate in the decisions provided they disclose their interest in the contract to the District Board and the interest is noted in the District Board’s records.

2. Under Section 1090, while the District Board members appointed by the City have waived their statutory right to the attendance fee from the City, they nonetheless have a financial interest in the future LRP contract between the District and the LADWP under Section 1090. However, the noninterest exception under Section 1091.5(a)(9) applies to permit the five District Board members to participate in the decisions provided they disclose their interest in the contract to the District Board and the interest is noted in the District Board’s records.²

FACTS AS PRESENTED BY REQUESTER

You are the Ethics Officer for the District seeking advice on the application of Section 1090 to District officials.³ You seek clarity on when section 1090 requires District Board members to recuse themselves from participation and voting on District contracts involving member agencies (or other governmental entities) from which they receive “salary, per diem, or reimbursement for expenses” under the remote interest exception in section 1091 versus when section 1090 may allow their participation in such contracts with proper disclosure under the noninterest exception in section 1091.5.

The District

The District is a regional wholesaler that delivers water to its 26 public member agencies – 14 cities, 11 municipal water districts, and one county water authority – which in turn provide water to 19 million people in Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura

² We caution that these conclusions are limited to the identified future contracts between the District and the MWDOC and LADWP, and we express no opinion regarding previous contracts between those entities as the Commission cannot provide advice related to past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).)

³ You previously requested advice in November of 2022, but the Commission declined to respond because the request did not identify specific contracts before the Metropolitan Board. The District is re-submitting the request with additional information on two specific contracts that are expected to come before the District Board.

counties. The District is governed by a 38-member board of directors (District Board), representing each of the District's member agencies.

Member agencies appoint individuals to serve on the District Board. Several District Board members also serve on their member agency's board of directors – others do not.⁴ Neither type of appointee is an “employee” of the District or of their member agency. District Board members represent their member agency as a whole, not any one department of the member agency.

District Board Members: Payment for Service from Member Agency

District Board members are entitled to receive a per diem from their member agencies for attending District Board meetings and other meetings related to their District Board service. District Board members may also receive other types of “income” from their member agencies for serving on the member agency's board of directors⁵ including compensation in the form of stipends or per diem for attending board or committee meetings, retirement plan eligibility, health care insurance, contributions to retirement plans, and various other benefits.

The District generally does not provide stipends, income, or other financial benefits to District Board members for serving on the District Board. The District does provide reimbursement and/or payments to District Board members for actual expenses incurred in the course of District duties such as trainings, symposiums, and conventions.

Contracting at the District

The District Board and its various committees⁶ regularly consider, and vote on the approval of, many types of contracts and agreements between the District and various public and private entities. Although some of these contracts have terms in excess of ten years, they may involve periodic amendments. Agreements include contracts with the District's 26 member agencies and other government entities. Examples of common contracts with government entities include:

- Local Resources Programs (LRP) – LRP agreements are regularly made with the District's member agencies and their sub-agencies (also government entities) to help improve regional water supply reliability and support water use efficiency goals. Specifically, LRPs provide financial incentives to Metropolitan member agencies to develop new local projects. LRP agreements are up to 25 years in duration. Typical LRP projects include groundwater recovery and recycled water

⁴ District Board members who also serve on the governing body of their appointing authority are already prohibited from voting on contracts between the District Board and their member agencies under state law (Metropolitan Water District Act, Section 56). There is no disclosure requirement when a District Board member is prohibited from voting upon a contract pursuant to the Section 56 restriction.

⁵ District Board members who do not also serve on their member agency's board may be entitled to the same or similar benefits as those serving on their member agency's board.

⁶ Actions by District committees of the Board are only advisory to the Board. A committee cannot bind the District even if the members of the committee constitute a quorum. Though not required to, the District Board regularly accepts the recommendations of its committees when voting to approve contracts.

projects. Local entities, including the District's member agencies, submit LRP applications to the District and the District Board ultimately votes on whether to approve the proposed agreement. Selections are based on Board-adopted guidelines and criteria for LRP projects.

- Easements – The District grants easements on its property to government entities. Examples include easements to allow access for utility services such as electricity and for pipelines.
- Water supply agreements – The District periodically contracts with government entities for delivery or purchases of water.

As noted in footnote 4, above, a District Board member who also serves on the governing body of their appointing authority are prohibited from voting on contracts between the District Board and their member agencies under state law. There is no disclosure requirement related to this prohibition.

Future Contract between the District and the MWDOC

As mentioned above, the District Board commonly considers and enters into agreements with member agencies and other government agencies. The District will consider the following agreement with the MWDOC in the coming months:

LRP: Ranch Water Filtration Plant Project – Objective: Santa Margarita Water District will construct the Ranch Water Filtration Plant Project to serve approximately 15,000 residents in Rancho Mission Viejo. The new project will produce up to 1,500 acre-feet per year of groundwater that will be treated by the new plant to potable standards. The treatment processes will include iron and manganese removal, prefiltration, micro-filtration, reverse osmosis, and disinfection. In addition, approximately 5,000 feet of pipelines will be constructed for distribution and brine discharge.

In a follow up email dated June 30, 2023, you stated the MWDOC appoints four individuals to serve on the District Board. Two of the District Board members, Larry Dick and Karl Seckel, also serve on the MWDOC Board and the remaining two appointees, Linda Ackerman and Dennis Erdman, serve only on the District Board.

The MWDOC pays compensation to its appointed District Board members at the rate of \$327.43 per meeting (one per day) with a maximum of ten paid meetings (or days) per month, and they participate in a Defined Contribution Plan (401(a)). Any expenses incurred by the District Board members, except mileage to the MWDOC Board meetings, are submitted to the District for payment with accompanying receipts. Mileage to the MWDOC Board meetings is paid by the MWDOC at the standard mileage reimbursement rates.⁷

⁷ The District Board members who also serve as MWDOC Board members, Larry Dick and Karl Seckel, receive from the MWDOC, among other benefits, health care insurance and coverage for short-term disability and worker's compensation insurance.

Future Contract between the District and the LADWP

LRP: LADWP Hyperion – Objective: To implement an advanced water purification facility and maximize the distribution of up to 1.5 MGD or 1,680 AFY, of advanced treated recycled water to customers in the City’s Westside area for potable water offset. This new source of water to the City will reduce the demand on MWD’s imported water supply and help maintain regional supply reliability.

The LADWP is a department of the City of Los Angeles. The City, which is the authority responsible for appointments to the District Board, has appointed Nancy Sutley, Carl Douglas, Tracy Quinn, Matt Petersen and Miguel Luna to the District Board. The Los Angeles Administrative Code (Chapter 10 Sec. 8.132) provides that the City shall pay each appointee to the District Board an attendance fee of \$50 per Board meeting attended, not to exceed \$250 per District Board member in any calendar month. However, each appointee to the District Board has signed a memorandum to the Mayor stating, “I hereby release any interest in payment for my services as a member of this board.” Although the City Administrative Code provides for payments, these District Board members have waived the payments, as is traditional for City appointees to the District Board. As a result, they receive no compensation or other financial benefits from the City for their service on the District Board.

In a follow-up email, you provided information from District Board member Sutley, who is currently the City of Los Angeles’ Deputy Mayor of Energy and Sustainability, that indicated the City may not appoint individuals who choose not to sign the memo, and that as a practical matter, appointees would not ask the Mayor, who is the appointing authority, to rescind a memorandum the appointee voluntarily signed.

ANALYSIS

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. 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.)

The District Board members appointed by the MWDOC and the LADWP are public officers subject to the provisions of Section 1090. Additionally, they are presumed to be involved in the making of all contracts by the District Board irrespective of whether they actually participated in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the determinative question is whether they have a financial interest in contract decisions involving the District and their member

agencies and, if so, whether their interests are considered 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.) 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.)

In order to determine whether the District Board members appointed by the MWDOC and the LADWP have a financial interest in the future LRP contracts between the District and their member agencies it is appropriate to look to the definitions of the remote and noninterest exceptions contained in Sections 1091 and 1091.5 for guidance in determining what falls within the scope of the term “financial interest” as used in Section 1090. (See 85 Ops.Cal.Atty.Gen. 34, 36 (2002).) In this regard, 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 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.)

Pertinent to this situation is the remote interest exception under Section 1091(b)(13) and the noninterest exception under Section 1091.5(a)(9). Under Section 1091(b)(13), an agency board member who receives salary,⁸ per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. However, under Section 1091.5(a)(9), an agency board member 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

⁸ Note that the term “salary” is not defined under the provisions of Section 1090 but has been interpreted to include compensation including pension benefits, such as retirement health benefits. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, p. 1082.) Under the Act, “salary” from a government entity is broadly defined to mean “any and all payments made by a government agency to a public official ... as consideration for the public official’s services to the government agency.” (Regulation 18232(a).) We note that “it is well established that Section 1090 and the Act are “in pari materia.” (*Lexin, supra, at pp.*, 1090-91.) “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.) Therefore, even assuming the District Board members did not receive a per diem from the MWDOC or from the LADWP, any other type of payment received as consideration for their service would qualify as “salary” under the exception.

entity that employs⁹ 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.”

The California Supreme Court in *Lexin, supra*, 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, supra*, at p. 1081.)

MWDOC Appointees

The MWDOC pays its four appointed District Board members a per diem in the amount of \$327.43 per District meeting, and while the future LRP contract decision involving the MWDOC will affect the agency, it will not affect the “department” that employs the appointees to the District Board for purposes of Section 1090. (See, e.g., *Conflicts of Interest*, Office of the Attorney General (2010) at p. 75 [“(w)hen the official in question is a member of the governing board, and not a member of a ‘department’ of the agency, the official would have a noninterest in the contract between the two agencies. For example, a member of a county board of supervisors who also serves as a member of a children and families commission has a noninterest in contracts between the two agencies because the ‘department’ limitation does not apply”].)¹⁰

Accordingly, because the MWDOC’s four appointees to the District Board will have a noninterest in the LRP contract decisions involving the District and the MWDOC, they may

⁹ Your facts state that the MWDOC appointees are not “employees” of the MWDOC. Sections 1091(b)(13) and 1091.5(a)(9) expressly refers 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. Even assuming the MWDOC appointees were not considered employees or officers of the MWDOC, the exceptions, by their plain language, would still apply to each of them as a “*person* receiving salary, per diem, or reimbursement for expenses from a government entity.”

¹⁰ As indicated, the noninterest exception under Section 1091.5(a)(9) would apply to the two MWDOC appointees to the District Board who are not also members of the MWDOC Board as “*person(s)* receiving salary, per diem, or reimbursement for expenses from a government entity,” and just as the “department” limitation would not apply to the two appointees who are also members of MWDOC’s governing board, it would likewise not apply to the two appointees MWDOC pays to serve only on the District Board.

participate in the decisions provided they disclose their interest in the contract to the District Board and the interest is noted in the District Board's records. (Section 1091.5(a)(9).)¹¹

LADWP Appointees

The City of Los Angeles is responsible for appointing members to the District Board to represent the LADWP, which is a department within the City. While the appointees are legally entitled to a per diem from the City for each District Board meeting attended, all members have voluntarily signed a memorandum to the Mayor, that states they are releasing any interest in the per diem for their attendance at District Board meetings. Though the waiver is not irrevocable, the facts indicate that an appointee who has signed the waiver would not likely attempt to rescind the memo after voluntarily signing it.

As evidenced by the remote and noninterest exceptions noted above, an official has a financial interest where the official receives "salary, per diem, or reimbursement for expenses" from a government entity. The City of Los Angeles is statutorily required under the Administrative Code to pay District Board members representing the LADWP an attendance fee of \$50 per Board meeting attended. While each appointee to the District Board has voluntarily signed a memo to the Mayor waiving the fee, we find no legal authority to suggest the application of Section 1090's provisions may be avoided in such a manner, especially where the waiver is not irrevocable. Indeed, the California Supreme Court explained that the situation, where a public official on behalf of a public entity participates in making a contract with a second public entity for which they work, poses some risk that the official will be compromised based on the relationship with both entities. (*Lexin, supra*, at p. 1075; see also *Stigall, supra* [Section 1090 is designed to apply to any situation that "would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the (public entity concerned)"].)

Therefore, the District Board members appointed by the City to represent the LADWP would have a financial interest in the future LRP contract between the District and the LADWP even where they have waived their right to the statutory fee for their service on the District Board. However, for the same reasons provided concerning the decisions between the District and the MWDOC above, the future LRP contract decisions between the District and the LADWP will not affect the department that employs the appointees to the District Board for purposes of Section 1090.

Accordingly, because the LADWP's appointees to the District Board will have a noninterest in the LRP contract decisions regarding the water purification facility and distribution of treated water involving the District and the LADWP, they may participate in the decisions provided they

¹¹ We note that even though the two District Board members who are also members of the MWDOC Board are already prohibited from voting on the LRP contract pursuant to the Metropolitan Water District Act, they are presumed under Section 1090 to be involved in the making of all contracts by the District Board even if they do not actually participate. (*Thomson, supra*, at p. 645.) Therefore, the provisions of Section 1090 still apply to them, and they must follow the disclosure requirements under Section 1091.5(a)(9).

disclose their interest in the contract to the District Board and the interest is noted in the District Board's records.¹²

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

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¹² This conclusion does not change with respect to District Board member Sutley based on her employment as the City of Los Angeles' Deputy Mayor of Energy and Sustainability, to the extent it does not involve her department.