



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 19, 2023

Hassen Beshir
Construction Manager
27434 Mangrove Road
Hayward, CA. 94544

Re: Your Request for Advice
Our File No. A-23-168

Dear Mr. Beshir:

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 Alameda 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

As a former employee of the San Francisco Bay Area Rapid Transit District ("BART") who served as a member of BART's selection committees tasked with evaluating and ranking potential contractors, are you prohibited by Section 1090 from subsequently working under those contracts as an employee of a company selected under the process in which you previously participated?

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

Yes. Under Section 1090, you are prohibited from working for your current employer to provided services under the BART contracts in question because you participated in the making of those contracts while an employee of BART.

FACTS AS PRESENTED BY REQUESTER

During your employment with BART, you were a member of various committees, including a selection committee responsible for choosing on-call contractors for engineering design and construction management services. In 2018 and 2020, you participated, as a committee member, in the selection of on-call contractors. However, you note that while you participated in the evaluation and ranking process of these contractors, the final decisions on awarding contracts were made by upper management and ultimately approved by the Board of Directors.

In a follow up telephone call, you provided more detail about the selection committee process. BART would begin by providing a request for proposal (“RFP”) to potentially interested parties. You expanded that interested contractors would then respond to the RFP. BART would provide ten of these responses to the appropriate committee, and the committee would then select the eight contractors it concluded to be the most qualified, rank them in order of qualification, and provide this list to upper management.

In a follow up document, you explain that you were a member of the selection committees for Agreement No. 6M8150 in 2018 and again in 2020 for Agreement No. 6M8177. PreScience Construction Management (“PreScience”) was selected and awarded contracts under both agreements where you served as a member of selection committees.

You retired from BART in March 2021. In March 2023, two years after retiring from BART, you accepted an employment offer from PreScience, which later became Bureau Veritas North America (“BVNA”). BVNA was one of the eight on-call contractors selected by the committee, of which you were a member, for construction management services during your tenure at BART.

You state that, prior to accepting employment with BVNA, you approached BART’s Office of Inspector General (“OIG”) to discuss any potential conflict of interest resulting from your involvement with these agreements while working at BART. On March 17th, 2023, The OIG responded by stating that it would be a violation of Section 1090 were you to provide services under those contracts as an employee of BVNA. The OIG also strongly suggested that you immediately inform BVNA’s management about your prior participation in selecting contractors where they were awarded projects. You also state that, as a result, you have abstained from working on any BART related projects during your time with BVNA.

ANALYSIS

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 any financial interests, other than perhaps a remote or minimal interest, which

would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective agencies. (*Stigall v. 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.)

A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable or are plainly to the public entity’s advantage. (*Id.* at pp. 646-649.) In addition, courts have recognized that Section 1090’s prohibition must be broadly construed and strictly enforced. (*Stigall, supra*, at pp. 569-571; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-580; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) An important, prophylactic statute such as Section 1090 should be construed broadly to close loopholes and should not be constricted and enfeebled. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1334.)

It is important to note that Section 1090 reaches beyond the officials who actually execute contracts. Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall v. Taft, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41 (1997).)

Section 1090 applies to officials who participate in any way in the making of the contract. “Participation in the making of a contract” is defined broadly and includes any act involving the planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. Taft, supra*, at p. 569.) “The opportunity for that participation followed by such participation itself is the litmus test for determining whether the proscription of the section is breached.” (66 Ops. Cal. Atty. Gen. 156 (1983).) Individuals in advisory positions can influence the development of a contract during these early stages of the contracting process even though they have no actual power to execute the final contract.²

In addition, courts and the Attorney General have stated that although an official or employee may resign from his or her position, that resignation may not be sufficient to avoid a Section 1090 violation when that person has been involved in the contracting process. For instance, county employees were advised that they could not propose an agreement for consultant services, then resign, and provide such consulting services. (66 Ops. Cal. Atty. Gen. 156 (1983).)

² See, e.g., *Schaefer v. Berinstein*, 140 Cal.App.2d 278, 291; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [member of Park and Recreation Board who owned a landscape architectural firm participated in the making of a contract in violation of Section 1090 where he was also a member of a committee created to advise the Board on the design, architecture, landscaping and technical planning of a Japanese garden]; see also 81 Ops. Cal. Atty. Gen. 317, 318-19 (1998) [after leaving office and establishing a private business, Section 1090 precluded former council member from participating in City’s loan program where he had been involved in the “planning, discussions, and approval necessary to implement [the] loan program” and “had the opportunity and did participate in the policy decision to create the government program under which the contract would later be executed.”]

Based on these facts, we conclude that you participated in the contracts between BART and BVNA for engineering design and construction management services, because you were a member of BART's selection committee for contracts. Each selection committee was tasked with selecting eight contractors it concluded to be the most qualified, rank them in order of qualification, and provide this list to upper management. As such, by serving on these section committees tasked with evaluating and recommending potential contractors, you had the opportunity and did participate in planning, discussions, and policy decisions pertaining to the BVNA's contracts with BART. Therefore, the prohibitions of Section 1090 apply because you have a financial interest in and stand to personally benefit from the contracts in which you assisted BART in developing.

The contracts in question were entered into in 2018 and 2020. You retired from BART in 2021. You accepted employment with BVNA two years after retiring from BART. Any arrangement or agreement made with BVNA that would financially benefit you at the time the contracts was made--including future employment --would be a violation of Section 1090 and Section 87407.³

However, your facts do not indicate that there were financial incentives or any separate arrangements regarding employment that was provided to you at the time you participated in making BART's contracts with BVNA. Therefore, Section 1090 would not prevent your continued employment with BVNA so long as you did not have an understanding, agreement, or arrangement regarding prospective employment with BVNA at the time you participated in making the above reference contracts while employed with BART and you do not provide services on behalf of BVNA for the BART contracts in question.

If you have other questions on this matter, please contact me by email at znorton@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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³ Section 87407 states that "A public official shall make, participate in making, or a public official's official position to influence, any governmental decision directly relating to any person with whom the public official is negotiating, or has any arrangement concerning, prospective employment."