



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 19, 2024

Derek McDonald
General Counsel
East Bay Municipal Utility District
375 11th Street, MS 904
Oakland, CA 94607

Re: Your Request for Advice
Our File No. A-24-061

Dear Mr. McDonald:

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 Alameda and Contra Costa County District Attorney's Offices, respectively, 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. Under Section 1090, may the Central Contra Costa County Sanitation District (Central Sans) contract to provide wastewater to a recycled water joint powers authority (DERWA), given that a member of the Central Sans board of directors, Florence Wedington, is also an employee of one of the member agencies that formed DERWA?

2. If Section 1091(b)(13)'s "remote interest" exception for officials with a financial interest in a government agency is applicable, is Director Wedington required to completely abstain from

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.

the contracting process in both her capacity as a Central Sans board member *and* as an employee of one of the member agencies?

CONCLUSIONS

1. Yes. Section 1091 establishes a “remote interest” exception for an officer who is an employee of a contracting government agency, provided the officer discloses their interest to the body or board of which they are a member, the body or board notes the interest in its official records, and the officer recuses themselves from the contracting process.
2. Yes. Section 1091’s remote interest exceptions are not applicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which the officer is a member to enter into the contract. Accordingly, Section 1090 prohibits the contract unless Director Wedington completely abstains from any participation in the matter including any work on studies in support of the formation of the contract.

FACTS AS PRESENTED BY REQUESTER

The East Bay Municipal Utility District (EBMUD) serves water to 1.4 million customers in the East Bay. The Dublin San Ramon Services District (DSRD) is a special district providing water and wastewater services to approximately 193,000 people. Together, EBMUD and DSRD have formed a Joint Powers Authority, the DSRD-EBMUD Recycled Water Authority (DERWA), which manages the San Ramon Valley Recycled Water Program.

Florence Wedington is a Senior Engineer in EBMUD’s Water Supply Improvements Division and works on recycled water matters. She is also an appointed member of Central Sans governing board of directors.

Central Sans and DERWA may, in the future, negotiate a contract under which Central Sans will provide DERWA with wastewater for use in a DSRD recycled water facility. The recycled water will be circulated throughout DERWA’s service area and will benefit EBMUD customers. As part of her duties as an EBMUD employee, Director Wedington may be asked to work on certain studies on behalf of EBMUD (as a DERWA partner) in support of the formation of the contract.

In a follow-up email, you clarified that DERWA does not have its own staff and, consequently, EBMUD would essentially provide the staff (including Director Wedington) to do the work supporting the contract between DERWA and Central Sans on behalf of the DERWA agencies. For example, EBMUD’s staff may prepare studies that inform the terms of the contract between DERWA and Central Sans.

ANALYSIS

Under Section 1090, public officials “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. 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 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.)

Although section 1090 refers to a contract “made” by the officer or employee, the word “made” is not used in the statute in its narrower and technical contract sense but is used in the broad sense to encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. (*Millbrae Asso. for Residential Survival v. Millbrae* (1968) 262 Cal. App. 2d 222, 237.)

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.

Under Section 1091.5(a), an officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs 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.

(Section 1091.5(a)(9).)

The California Supreme Court in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050 examined the application of the two “government employment” sections and wrote:

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*, 47 Cal.4th at p. 1081.)

Here, although the potential contract would technically be between Central Sans and DERWA, agencies that are distinct from Director Wedington's employer EBMUD², based on the circumstances you have described, the contract would "directly involve[] the department of the government entity that employs" Director Wedington. Not only would the contract result in recycled water circulating throughout DERWA's service area and thus benefit EBMUD customers, but given that DERWA does not have any staff, any contract between Central Sans and DERWA would necessarily impact EBMUD's agency resources. As such, the noninterest exception under Section 1091.5(a)(9) is inapplicable.

Section 1091 states:

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(a).) Section 1091(b) defines "remote interest" to include "[t]hat of a person receiving salary, per diem, or reimbursement for expenses from a government entity." (Section 1091(b)(13).) However, Section 1091's remote interest exceptions are "inapplicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which [the officer] is a member to enter into the contract." (Section 1091(c).)

Given Section 1091.5(a)(9)'s inapplicability, Director Wedington has a remote interest under Section 1091(b)(13). Therefore, Director Wedington must disclose the fact of that interest to Central Sans and the interest must be noted in the agency's official records. Thereafter, Central Sans may authorize, approve, or ratify the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of Director Wedington.

We must also examine how Section 1090 applies to Director Wedington in her capacity as Senior Engineer for EBMUD. As noted above, Section 1091's remote interest exceptions are "inapplicable to any officer interested in a contract who influences or attempts to influence another member of the body or board of which [the officer] is a member to enter into the contract." (Section 1091(c).) Also, participation in the making of a contract is defined broadly to include any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (*Millbrae, supra*, 262 Cal. App. 2d at p. 237.) Generally, the Attorney General's Office has advised that where the remote interest exception of Section 1091(b)(13) applied, the official recusing from the decision must "completely abstain[] from any participation in the matter." (83 Ops.Cal.Atty.Gen. 246, at p.248 (2000).) Additionally, we have advised executive officers that under the application of Section 1091(b)(13), they "may not participate in the decisions" and "must abstain from any participation in the making or approval of the [contract]." (See *Plotz* Advice Letter, No. A-22-015 and *Jackson* Advice Letter, No. A-15-223.)

² See Cal. Gov. Code Section 6507—of the Joint Exercise of Powers Act—stating, "[f]or purposes of this article, the [JPA] is a public entity separate from the parties to the agreement."

Based on the above, for Section 1091(b)(13) to apply and permit Central Sans and DERWA to contract with one another, Director Wedington must also refrain from participating in the contract in her capacity as a Senior Engineer for EBMUD. You explained that because DERWA does not have its own staff, EBMUD staff—including Director Wedington—would be used for contract support, such as preparing studies that inform the terms of the contract. If Director Wedington were to do so, however, she would be taking part in the making of the contract and influencing her Central Sans colleagues by essentially taking part in the reasoning, planning, and drawing of plans and specifications to support the contract. As such, in order for 1091(b)(13) to permit the contract as a “remote interest,” Director Wedington must satisfy Section 1091(c) and completely abstain from any participation in the matter.

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

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

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