



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 28, 2025

Joshua Nelson
Best Best & Krieger
500 Capitol Mall, Suite 1700
Sacramento, California 95814

Re: Your Request for Advice
Our File No. A-25-001

Dear Mr. Nelson:

This letter responds to your request for advice on behalf of Soquel Creek Water District's General Manager, Melanie Mow Schumacher, regarding the Political Reform Act (the "Act") and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and 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 Santa Cruz 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

Does either the Act or Section 1090 prohibit General Manager Schumacher from taking part in, or the District from entering into, a contract with Anderson Pacific Engineering Construction given her spouse is employed by Anderson?

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 the Act, Anderson will be a named party in or the subject of the District decision, and it is therefore reasonably foreseeable that the financial effect of such a decision would be material on General Manager Schumacher's source of income interest in Anderson. She also has a prohibitory financial interest under Section 1090 in any contract between the District and Anderson. However, so long as General Manager Schumacher completely abstains from making or participating in the making of the potential contract between the District and Anderson, Section 1090 would not prohibit the District from entering into that contract.²

FACTS AS PRESENTED BY REQUESTER

Your firm acts as General Counsel to the Soquel Creek Water District ("District"), and you seek this advice on behalf of the District's General Manager, Melanie Mow Schumacher, with respect to the application of the law and the FPPC's regulations to the facts set forth below.

The District is a county water district organized under Division 12 of the California Water Code. The District operates and maintains a complex water collection and distribution system providing water to numerous communities within Santa Cruz County.

The District's Board of Directors ("Board") recently approved plans and specifications for the Cunnison-Tannery Well Site Centralized Water Treatment Plant Pipeline Project ("Project"). The Project includes, among other things, constructing a pipeline between a groundwater well and a treatment facility. As part of the Project, the Board approved a notice inviting sealed proposals and intends on opening public bidding on February 6, 2025.

General Manager Schumacher is currently married to a project manager who is employed by Anderson Pacific Engineering Construction, Inc. ("Anderson"). It is your understanding that her spouse is not an equity partner or shareholder, nor does Anderson consider the spouse's Vice President position a director position within the company. The spouse, however, does hold a managerial position as Vice President overseeing the underground, grading and paving division within the company.

Anderson has expressed interest in submitting a bid for the construction of the pipeline portion of the Project. To date, General Manager Schumacher has not been involved or participated in any aspect of the development or bidding for the Project, nor does she anticipate becoming involved in the Project given the potential conflict of interest. The Engineering Manager/Chief Engineer will oversee the administration and execution of the contract, and any change order or dispute resolution will not engage or involve General Manager Schumacher.

² Please note that we are statutorily prohibited under Section 1090 from providing any advice related to past conduct, and we do not analyze conduct, if any, by General Manager Schumacher involving the contract that may have already occurred. (Section 1097.1(c)(2).)

ANALYSIS

The Act

The Act's conflict of interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests. (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Section 87103 defines financial interests to include:

- An interest in a source of income to the official, or promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c)) including any community property interest in the income of a spouse. (Section 82030(a)).

Because General Manager Schumacher's spouse is an employee of Anderson, she has an interest in the company as a source of income. Therefore, she will have a conflict of interest in any decisions that would have a reasonably foreseeable and material financial effect on Anderson.

Foreseeability

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)."

Where an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, "[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

Materiality

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Regulation 18702.3 provides the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's source of income interest, and provides, in part, that the decision's effect is material if

“[t]he source is a business entity that will be financially affected under the materiality standards in Regulation 18702.1.” (Regulation 18702.3(a)(4).) In turn, Regulation 18702.1(a)(1) provides that the decision’s effect is material if “[t]he business is a named party in, or the subject of, the decision.”

Here, the District intends to hire a company to construct a pipeline between a groundwater well and a treatment facility in connection with the Project. If Anderson submits a bid to do the work, it will be a named party in or the subject of the decision, and it is therefore reasonably foreseeable that the financial effect of such a decision would be material on General Manager Schumacher’s source of income interest in Anderson. Accordingly, she is disqualified from taking part in the District’s decision to hire a contractor if Anderson submits a bid.

Making, Participating in Making, or Influencing a Decision

Where a public official is disqualified from a governmental decision based on a conflict of interest under the Act, the official is prohibited from making, participating in making or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. (Section 87100.) Regulation 18704 includes definitions for “making a decision,” “participating in a decision,” and “using official position to influence a decision.” “A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits the official’s agency to any course of action, or enters into any contractual agreement on behalf of the official’s agency.” (Regulation 18704(a).) “A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.” (Regulation 18704(b).) A public official uses an official position to influence a governmental decision if the official: (1) Contacts or appears before any official in the official’s agency or in an agency subject to the authority or budgetary control of the official’s agency for the purpose of affecting a decision; or (2) Contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within the official’s authority or on behalf of the official’s agency in making the contact. (Regulation 18704(c).)

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local levels. 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.) 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.)

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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies

regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

At issue is whether General Manager Schumacher has a financial interest in the District contract decision related to the construction of a pipeline between a groundwater well and a treatment facility in connection with the Project due to her spouse's employment with Anderson. 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. 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn.5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

In addition, under settled case law, Attorney General opinions, and Commission advice letters, an officer is always financially interested in a source of income to their spouse for purposes of Section 1090. (78 Ops.Cal.Atty.Gen. 230 (1995); 81 Ops.Cal.Atty.Gen. 169 (1998).) Therefore, General Manager Schumacher has a financial interest in any contract between the District and Anderson.

The next issue is whether the District may enter into a contract with Anderson even though General Manager Schumacher has a prohibitory financial interest in the contract. The facts state that to date General Manager Schumacher has not been involved in any aspect of the development or bidding for the Project and the District intends to have the Engineering Manager/Chief Engineer oversee the administration and execution of any contract. Further, she is disqualified under the Act from taking part in the decision to hire a contractor for the pipeline part of the Project if Anderson submits a bid. "When an employee, rather than a board member, is financially interested in a contract, the employee's agency is prohibited from making the contract only if the employee was involved in the contract-making process. Therefore, as long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested." (Conflicts of Interest, California Attorney General's Office, (2010), p. 62; see also 80 Ops.Cal.Atty.Gen. 41 (1997) [Section 1090 does not apply to an employee (in contrast to members of multimember boards where participation is presumed) absent actual participation].)

Accordingly, so long as General Manager Schumacher completely abstains from making or participating in the making of the potential contract between the District and Anderson, Section 1090 would not prohibit the District from entering into that contract.³

³ We caution that Section 1090 broadly defines the "making" of a contract to include 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, supra*, at p. 569.)

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

JW:aja