



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 4, 2024

Randy Crabtree
California Fairs Financing CCA
DBA California Construction CCA
1776 Tribute Road, Suite 220
Sacramento, CA 95815

Re: Your Request for Advice
Our File No. A-24-009

Dear Mr. Crabtree:

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 El Dorado, Solano, and Placer County District Attorney's Offices, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from these entities. (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).) Lastly, the Commission does not provide advice with respect to past conduct. Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

Does Section 1090 prohibit the California Fairs Financing Authority, a public agency doing business as the "California Construction Authority" ("CCA") from entering into service contracts

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.

with the 20th District Agricultural Association (“20th District”), where you are employed as the CCA’s CEO and you were recently appointed to the 20th District’s Board of Directors?

CONCLUSION

No. Because you are a CCA employee in the “department” that is directly involved in making the contracts at issue, you have a remote interest in service contracts between your government employer and the 20th District under Section 1091(b)(13). The CCA may make a service contract that is subject to authorization or approval by the 20th District’s Board of Directors so long as your interest is disclosed to the 20th District Board, noted in its official records, and the contract is approved without counting your vote. (Section 1091(a).) Additionally, you must not act to influence or attempt to influence any member of the 20th District Board to enter into the contract. (Section 1091(c).) As detailed below, you may not take part in the making of the service contract in any way, including any and all participation as a member of the 20th District Board, any attempts to influence the Board or the 20th District staff, and any participation as the CEO of the CCA with either the CCA Board or CCA staff.² Subject to the above restrictions, you are not prohibited from participating in making any separate construction contracts to perform the work authorized under the service contract in your role as CEO.

FACTS AS PRESENTED BY REQUESTER

The CCA is a Joint Powers CCA organization³ comprised of public agencies El Dorado County, Solano County, and the 22nd, 32nd, and 46th District Agricultural Associations (the “Member Entities”). The CCA’s Associate Members, who may contract with the CCA, but have no voting rights in regard to the CCA’s Board of Directors, include any District Agricultural Associations (“District”), County, Citrus Fruit Fair, nonprofit corporation, the California Exposition and State Fair, and the California Department of Food and Agriculture (“CDFA”), that is admitted into the CCA.

The CCA provides central administration for the common interests of the Member Entities and its Associate Members. It also conducts construction management services, plan review, and inspection services related to the fair industry under “service contracts” for California districts, counties, and non-profit organizations. The service contracts are for items such as the repair of a fairground building. You state that the CCA provides standard services, which cannot be customized regardless of the customer. The CCA is governed by a six-member Board of Directors, which includes a representative from each Member Entity and the CDFFA.

You are employed as the CCA’s Chief Executive Officer (“CEO”). You manage the CCA’s daily operations along with the CCA’s permanent staff. In response to our request for additional

² In some instances the rule of necessity may apply to allow the participation of an executive employee solely in the role of the executive employee where the contract involves the department that employs the officer and a government agency board of which the officer is a member. However, in this case, there is no indication that the rule of necessity applies to the facts presented. The facts indicate that CCA will execute and manage these contracts through its Board.

³ A Joint Powers Authority (JPA) is a partnership between two or more public agencies. (See Section 6502.)

information on the structure of the CCA,⁴ you state that it is a small agency with less than ten staff members and currently is not broken into management units. Your role as CCA CEO is to review and execute service contracts that are formed by a CCA Project Manager, as well as resolve and manage any contract disputes and approve any amendments. You are more actively involved in coordinating the construction contractors, who, under separate contracts with the CCA, perform the work authorized under a service contract.

Recently, you were appointed by the Governor to serve on the 20th District's Board of Directors. The 20th District⁵ is an Associate Member and does business with the CCA. As part of your appointment to the 20th District's Board, you agreed that you would recuse yourself from all matters between the 20th District and the CCA. And, as CEO of the CCA, you will not directly manage any 20th District agreement or contract, and any disputes will be handled by the CCA's Board of Directors.

In response to our request for additional information, you state that service contracts between the 20th District and the CCA are governed by a Master Project Agreement executed by the 20th District Board and CEO, and by the CCA's Board and CEO in 2016. The Master Plan Agreement specifies how the CCA will perform the contracts. The Master Project Agreement states the process as follows: the 20th District will request and the CCA may provide a written Individual Project Agreement ("IPA") designating the scope, time, any interim approvals needed by the 20th District, and amount to be paid by the 20th District to the CCA for the project. The Master Plan Agreement is incorporated into the IPA. The 20th District's CEO and the CCA's CEO are designated as the representatives for each agency, and once each agency executes the IPA, the CCA performs the services in the IPA.

The Master Plan Agreement states that the CCA retains all the consultants, professional services, and general contractors for the project, which must be selected in accordance with applicable state laws. The CCA provides project management, contract management, project administration, bidding services, and construction inspection services for the project. The 20th District's payment for services and project costs are set forth in the particular IPA for the project. Total project costs include project management and administration, design and bidding services, construction and contingencies, fees, CCA staff time, travel and overhead, and third-party charges such as legal fees. You state that the CCA project management fees are on a set, flat percentage of total construction costs (12 to 15% depending on the threshold of total costs), and all other costs are pass-through expenses for the project.

As to the 20th District Board's involvement in the IPA process, you state that the 20th District Board's role is typically to authorize its CEO to pursue a particular project at the beginning of the process. An example of the process is as follows: the 20th District CEO would initially notify the 20th District Board that a specific fairground building needs repair and present a capital improvements budget. The 20th District Board then votes to authorize the project for the budget amount indicated. At this time, the 20th District CEO may request an IPA with the CCA. The CCA's Project Manager, the CCA employee tasked with forming the IPA, brings in a design firm to establish the scope and specifications for the project. Next, a construction estimation firm provides

⁴ You provided additional information for this request by emails and in two phone conversations.

⁵ Also known as the Gold Country Fairgrounds, which is located in Placer County.

a general construction estimate. The CCA Project Manager then discusses the project's time, scope, and costs/budget with the 20th District. If the parties agree, an IPA is prepared. Generally speaking, prior to your appointment to the 20th District, the IPA would have been executed by you as the CEO of the CCA and by the 20th District's CEO. The IPA would not be executed by the 20th District's Board of Directors due to the Board's prior authorization for the project. Unless the project costs exceed the 20th District Board's earlier general authorization, the Board will not revisit its authorization. If the project costs exceed the original authorization, the IPA will be submitted to the Board for approval. IPA amendments are also submitted to the Board for approval.

ANALYSIS

Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under this section, 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, and the prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, at pp. 646-649.)

Section 1090 reaches beyond officials who actually execute the contract and applies to those officials who participate in any way in the making of the contract.

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

(*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, 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* (1962) 58 Cal.2d 565, at p. 569.) Importantly, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647- 649; *Stigall v. Taft, supra* at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

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).) The California Supreme Court in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050 stated that the situation "where public officials on behalf of a public entity participate in making a contract with a second entity for which they work, the scenario poses at least the risk that

the officials will be compromised by serving ‘two masters.’” (*Lexin, supra*, at p.1075, citing *Thomson, supra*, at p. 645 and fn. 14 [additional citations omitted].)

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. A remote interest is only applicable to members of a multi-member body. If a remote interest is present, the contract may be made if: (1) the officer discloses the interest in the contract to their board; (2) that interest is noted in the board’s official records; and (3) the board ratifies the contract without counting the vote of the officer. (Section 1091(a).) Additionally, the officer may not influence or attempt to influence any member of the board to enter into the contract. (Section 1091(c).) 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.)

CCA Service Contracts with the 20th District

As the CCA’s CEO and in your role as a member of the 20th District’s Board of Directors, you are a public officer subject to Section 1090’s conflict of interest provisions. The decision at issue is a future service contract between the CCA and the 20th District. You have a financial interest in the CCA as your employer and source of income. The determinative question is whether your employment interest in the CCA is a “remote” or “noninterest” as defined in Sections 1091 and 1091.5, such that the two agencies may enter into the contract.

Contracts Involving an Employee of One Agency and a Board Member of a Second Agency

The Legislature has addressed the issue of a public officer’s involvement in a contract between two government agencies, where the public officer serves as a member of a body or board contemplating a contractual relationship and is employed by a separate government entity. Generally, for a contract between the two agencies, the officer or employee’s financial interest related to their salary is a “noninterest” under Section 1091.5(a)(9) so long as the contract does not directly involve the department that employs the officer, the interest is disclosed to the board, and noted in the record. This section provides:

An officer or employee shall not be deemed to be interested in a contract if his or her interest is . . . [t]hat 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.

When the contract involves the department that employs the board member, the board member’s interest in their salary, per diem, or reimbursement is a “remote” interest in contracts between the two agencies under Section 1091(b)(13). The recusal requirements in Section 1091(a) and (c), noted above, apply.

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.)

First, we must determine if the service contracts with the 20th District "directly involve" your employing department or if the contracts are "only with the general government entity" for which you work. The facts indicate the service contracts are approved and directly managed by you in your role as CEO, and there are no facts indicating that service contracts otherwise involve a particular department or unit within the CCA. Therefore, these are contracts that directly involve your employing department, and your government salary interest in this type of contract is a remote interest under Section 1091(b)(13).

Under the Section 1091(b)(13) remote interest exception, the CCA and the 20th District's Board of Directors may make the contract so long as you disclose your government salary interest in the contract to the 20th District Board, your interest is noted in the 20th District's Board's official records, and the Board authorizes, approves or ratifies the contract without counting your vote. (Section 1091(a).) Additionally, you may not influence or attempt to influence any member of the 20th District Board to enter into the contract. (Section 1091(c).)

In light of the prohibition against influencing any member of the 20th District Board and the fact that 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 solicitation for bids, we must also examine how Section 1090 applies to your role of CEO at the CCA. 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 abstains 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.)

Therefore, you may not discuss the service contract, including preliminary discussions, with the 20th District Board members, or 20th District staff, and you may not vote on the contract. The remote interest requirements would apply to any subsequent amendments to the service contract. You have taken the additional measure of agreeing as part of your appointment that, in addition to recusing yourself from all matters between the 20th District and the CCA, in your CEO role you will not directly manage any 20th District contract, and any disputes will be handled by the CCA's Board of Directors. Additionally, you should not execute any 20th District contract or amendment or

participate in the making of the contract or amendment with CCA's Board or staff. These practices are necessary to eliminate the possibility of any personal influence with the 20th District Board related to your role as CEO of the CCA in compliance with Section 1091(c). Note that subject to the above restrictions, you are not prohibited from participating in making any separate construction contracts to perform the work authorized under the service contract in your role as CEO, as these are separate and distinct contracts between the CCA and the contractors.

The Act

Under the Act's conflict of interest prohibitions, a public official is prohibited from making, participating in making, or otherwise using their official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) An official has a financial interest in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's interests identified in Section 87103. Most pertinent to these facts are:

- An interest in any source of income to the official aggregating \$ 500 or more in value provided to, received by, or promised to, the public official within 12 months prior to the decision.
- An interest in a business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- An interest in their personal finances, including an immediate family member.

Section 82030(b)(2) excludes salary, reimbursement for expenses, and per diem from a governmental agency from the definition of "income" for purposes of the Act. Additionally, government agencies, such as CCA, are not organizations or enterprises operated for profit. You do not have an interest under the Act in your agency employer as a source of income or as a business entity related to the service contract decisions. There are no facts presented regarding a particular contract and a potential effect on your personal finances under Regulation 18702.5. Therefore, we do not further examine this issue. Please note that the recusal requirements under Section 1091(b)(13) will satisfy the recusal requirements for a conflict of interest under the Act. (See Regulation 18707.)

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division