



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 15, 2021

Jamie Raymond
Chief Deputy City Attorney
City of Corona
400 S. Vicentia Avenue Suite 310
Corona CA 92882

Re: Your Request for Advice
Our File No. A-21-003

Dear Mr. Raymond:

This letter responds to your request for advice 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, 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 Riverside 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

Do the conflict of interest provisions of the Act or Section 1090 prohibit the City of Corona from entering a contract with Falcon Engineering for construction management services for a City project where the employer of Councilmember Wes Speake will be a subcontractor for Falcon Engineering on the project?

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 18110 through 18997 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

No. The remote interest exception under Section 1091(b)(2) applies to allow the City to enter a contract with Falcon Engineering where Councilmember Speake's employer will be a subcontractor so long as he follows the requirements for abstention pursuant to Section 1091(a). In addition, he must leave the room during any decision concerning the contract in accordance with the Act's recusal requirements.

FACTS AS PRESENTED BY REQUESTER

You are the Chief Deputy City Attorney seeking advice on behalf of City Councilmember Wes Speake. Councilmember Speake, who was elected in November 2018, is an employee of Wood Environment and Infrastructure Services ("Wood EIS"), a large multi-national consulting firm with thousands of employees in over 20 countries. Wood EIS is owned by John Wood Group, PLC ("Wood PLC"), which has over 60,000 employees in 40 countries.

Councilmember Speake was hired by Ogden Environment and Energy Services in March 2000. Ogden was acquired by AMEC Earth and Environmental in November of 2000. AMEC merged with Foster Wheeler in January 2014 to create AMEC Foster Wheeler, which was then purchased by Wood PLC in March 2017. As indicated above, Wood EIS is a subsidiary of Wood PLC.

Councilmember Speake does not own any stock or stock options or have any other ownership interest in Wood EIS or Wood PLC. The City of Corona has recently issued a Request for Proposals for construction management services in connection with a multi-million dollar railroad grade separation construction project ("Grade Separation Project"). We understand that Falcon Engineering intends to submit a proposal to provide construction management services on the Grade Separation Project and has invited Wood EIS to be a subcontractor. If Wood EIS agrees to subcontract with Falcon Engineering, Councilmember Speake would not work on any portion of the Grade Separation Project and would not be named in the proposal submitted to the City by Falcon Engineering.

Wood EIS and its predecessors have provided similar subcontracting services to Falcon Engineering since 2008. The contracts for these previous projects have been between Falcon Engineering and AMEC Earth and Environmental, AMEC Foster Wheeler and Wood EIS based upon the date the contract was entered into. Specifically, Wood or its predecessors have worked on 9 projects with Falcon Engineering since 2008, with 7 of the 9 projects involving biological compliance monitoring that is similar to the proposed scope for Wood EIS's work on the Grade Separation Project. Additionally, Wood EIS and/or its predecessors have proposed to be a subcontractor on over a dozen additional projects with Falcon Engineering since 2008.

The contract for construction management services for the Grade Separation Project would need to be considered and approved by the City Council.

ANALYSIS

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 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. City of 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.)

As your request correctly presumes, employees have been found to have a financial interest in a contract that involves their employer, even when the agreement would not result in a change in income. This is because an employee has an overall interest in the employer's financial success and continued employment. (See e.g., 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001); *Gallien* Advice Letter, No. A-16-263.) We therefore focus on the applicability of any exceptions under Section 1090.

As a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) However, 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(b)(2), an official has a remote interest in a contract entered into by the body or board of which the official is a member if the official is an employee or agent of the contracting party and all of the following factors are present:

- The contracting party has 10 or more employees.
- The employee has been an employee or agent of that party for at least 3 years prior to the official's term in office.
- The employee owns less than 3 percent of the shares of stock of the contracting party.
- The employee is not an officer or director of the contracting party.
- The employee did not directly participate in formulating the bid of the contracting party.

The facts you have provided do not fall squarely within the express language of the exception. To apply, Section 1091(b)(2) requires that the official be an employee of the contracting party. Here, the governmental decision at issue—approval of a City contract concerning construction management services for the project—involves the City entering into a contract with Falcon Engineering who would use Councilmember Speake’s employer as a subcontractor. However, we do not view this technical distinction as one that impacts the applicability of the remote interest exception in this situation as it is logical to extend application where Councilmember Speake’s interest is even more remote. (See, e.g., *Schons* Advice Letter, No. A-17-129; *Craft* Advice Letter, No. A-14-168.)²

When a “remote interest” is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).)

Based on the facts provided, all the requirements for the remote interest exception of Section 1091(b)(2) have been met and Councilmember Speake will not work on any portion of the project including the bid for the project. Therefore, the City may enter a contract with Falcon Engineering, with Councilmember Speake’s employer as a subcontractor, so long as he discloses his financial interest in the contract, it is noted in the official records, and he abstains from any participation in making the contract.

The Act

In addition to Section 1090, the conflict of interest provisions in Section 87100 of the Political Reform Act prohibit a public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has an interest. As applied to the facts you have provided, the decision at issue implicates Councilmember Speake’s potentially disqualifying financial interests in his employer as a business entity and a source of income. However, by following the abstention requirements of Section 1090 and additionally leaving the room during the decision, Councilmember Speake will satisfy the Act’s recusal provisions set forth in Section 87105 and Regulation 18707. As such, we do not analyze the Act’s conflict of interest provisions further.

² In addition, we recognize that Councilmember Speake began his employment in 2000 with Ogden Environment and Energy Services and now works for Wood EIS through a series of acquisitions. However, we view this as satisfying the requirement that the official have been employed by the contracting party for at least 3 years prior to the official’s term in office.

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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