



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

November 06, 2023

Inna Zazulevskaya
Senior Deputy County Counsel
County of San Diego
1600 Pacific Highway, Room 355
San Diego, CA 92101

Re: Your Request for Informal Assistance
Our File No. I-23-157

Dear Ms. Zazulevskaya:

This letter responds to your request for advice regarding Section 84308 of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. Your request for advice is general in nature as it does not specifically identify the governmental decision pending before the San Diego County Board of Supervisors. Accordingly, we are treating your request as one for informal assistance.²

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.

QUESTIONS

Where the County of San Diego (“County”) Board of Supervisors is conducting a sale of County-owned property under the requirements of Section 25520 et seq., which mandate that the sale be publicly noticed, with set terms of sale, a stated minimum price and that the proposal with the highest bid made by a responsible bidder must be accepted or all bids rejected, does the decision

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

to award the contract meet the definition of a “purely ministerial decision” or of a “competitively bid contract” such that it is not an entitlement for use proceeding subject to Section 84308?

CONCLUSIONS

Because the provisions in Section 25520 et seq. provide that in making its decision, the County Board of Supervisor may exercise its discretion to reject all bids and withdraw the property from sale, particularly if it deems this to be in the best public interest, this decision is not “purely ministerial.”

This decision is exempt from Section 84308’s provisions because it is a competitively bid contract decision. Due to the fact that the County’s award of the sale contract must comply with the bid process set forth in Section 25520 et seq. and be awarded to the highest responsible bidder as is appropriate for a sale of County-owned property, the decision meets the spirit of the definition of a “competitively bid contract” in Regulation 18438.2(a)(3)(A), which has language requiring that a competitively bid contract must be one awarded by law to the “lowest” responsible bidder, reflecting the common public procurement requirement for goods and services contracts.

FACTS AS PRESENTED BY REQUESTER

The County Board of Supervisors will be selling County-owned property in January 2024 pursuant to Section 25520 et seq., which requires this property to be sold to the highest responsible bidder through a competitive bidding procedure. You further state that Section 25530 requires that the property in question be sold to the bidder submitting the highest conforming bid, and states: “[o]f the proposals submitted which conform to all terms and conditions specified in the resolution of intention to sell or to lease and which are made by responsible bidders, the proposal which is the highest shall be finally accepted.”

You believe that the act of awarding a contract to a conforming low-bidder in the context of “competitively bid contracts” or awarding a conforming high-bidder in the context of a county property auction appear analogous, and you request advice as to whether the upcoming sale proceedings are subject to Section 84308 or excluded because the decision is ministerial, or because it falls under the category of a “competitively bid contract.”

ANALYSIS

Section 84308

Known as the “pay-to-play restriction,” Section 84308 establishes certain requirements and prohibitions pertaining to an officer’s ability to take part in proceedings involving a license, permit, or other entitlement for use where a party or participant in the proceeding has contributed more than \$250 to the officer within the preceding 12 months. The statute similarly prohibits officers from receiving contributions exceeding \$250 from parties or participants for the 12 months following the date a final decision is rendered in such a proceeding. Section 84308 aims to protect California citizens not only against quid pro quo practices but also the appearance thereof, as such corruption and its appearance threaten the confidence in our system of representative government.

Section 84308(a)(5) defines the term “entitlement for use” proceeding to include “all contracts (other than competitively bid, labor, or personal employment contracts).” Regulation 18438.2(a) further provides that such a proceeding “does not solely involve purely ministerial decisions” and, applicable to a contract, involves “a contract between the agency and the party, other than a contract that is competitively bid, a labor contract or a personal employment contract.” A “competitively bid contract” is defined as “a contract required by law to be awarded to the lowest responsible bidder with a responsive bid,³ or, if the successful bidder refuses or fails to execute the contract, to the next lowest bidder with a responsive bid.” (Regulation 18438.2(a)(3)(A).)

In the memorandum to the Commission regarding recently amended Regulation 18438.2(a)(3)(A), staff noted that the above definition was consistent with the public procurement requirements in the Public Contract Code, the Department of General Services’ State Contracting Manual, as well as the language used in many municipal codes. (See Commission Staff Memorandum, “Proposed Adoption of Section 84308 Regulations Implementing SB 1439,” June 5, 2023, page 5.) The memorandum cites the case, *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal. App. 4th 209, and notes the court’s discussion of the technical meaning of the phrase, “competitive bidding” in the context of public procurement. In this matter, the court states, “[s]tatutes and ordinances that authorize or require competitive bidding in the letting of public contracts ordinarily serve the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest price practicable” and have “the object of insuring economy and excluding favoritism and corruption.” (*Id.*, at p. 211, citing *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173.)

Sale of County Real Property (Section 25520 et seq.)

Section 25520 et seq. authorizes a county board of supervisors to sell or lease real property owned by the county. For applicable properties,⁴ Section 25526 requires the board of supervisors to adopt a resolution before ordering the sale declaring its intent to sell the particular property and stating the specified minimum price, the terms of sale, and the regular public board meeting at which time it will receive and consider sealed proposals to purchase the property. (Section 25526.) The board has the discretion to offer to pay a real estate broker commission as a part of the resolution’s stated terms of sale. (Section 25527.) The sale must be publicly noticed. (Section 25528.) The sealed proposals are received at the board’s stated meeting time (Section 25530) and oral bidding is permitted prior to accepting any written proposals. (Section 25531.) The property must be sold to the highest responsible bidder (this may be an oral bidder if the oral bid exceeds the

³ “Responsible bidder” means a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the contract. “Responsive bid” means a bid that indicates compliance without material deviation from the requirements of the solicitation and the terms and conditions of the proposed contract. (Regulation 18438.2(a)(3)(A).)

⁴ Sections 25526, 25526.5 and 25526.7 provide modified procedures for real property sales with a minimum estimated sale price of less than \$2,000, and exemptions from the bidding process requirements for property with an estimated sale price that does not exceed \$25,000 and, applicable to a county with a population of 6 million or more, for property with an estimated sales price that does not exceed \$100,000, respectively. For purposes of this advice, we assume that the County’s sale involves property that is not subject to any of the exceptions to the full bidding process otherwise set forth in Section 25520 et seq.

highest written proposal by 5 percent), or the board may reject all bids. (Sections 25530 and 25531.) The board has discretion to reject “any and all bids,” and withdraw the property from sale at the session if it “deems such action to be for the best public interest.” (Section 25534.) The process set forth in Section 25520 et seq. is described as a process that involves receiving competitive bids. (35 Ops.Cal.Atty.Gen 38, p 5 [determining that the method for selling county property in Section 25520 et seq. did not supersede or repeal the method in Section 25363 but did allow for more wide-spread notice and “and therefore the number of competitive bids likely to be received is greater.”])

At issue here is whether a County Board of Supervisors decision to sell the County property to the highest responsible bidder or reject all bids and withdraw the property from sale under the Section 25520 et seq. requirements noted above is a “purely ministerial decision” or is a contract decision analogous to the definition of a “competitively bid contract” in Regulation 18438.2(a)(3)(A), “a contract required by law to be awarded to the lowest responsible bidder with a responsive bid” such that it is not subject to the Section 84308 requirements and prohibitions.

We advise that this decision is not “purely ministerial” in that the County Board of Supervisors has the discretion to reject all the bids and withdraw the property from sale, and, under Section 25534, must determine that doing so is in the public’s best interest. This is consistent with past Commission advice that an officer is making a ministerial decision only when the officer has “little discretion” and there are “clear objective criteria” for a decision. (*Greenwald* Advice Letter, No. I-93-220.) The Commission has also advised that a decision is not “purely ministerial” where there are underlying decisions that are not ministerial that must be made. (*Roberts* Advice Letter, No. A-20-124 [where the terms and conditions that must be satisfied prior to filing a certificate of completion for a parks and recreation district involved establishing a park fee program and an evaluation of revenues, the decision whether the conditions had been met was not ministerial].)

However, this decision does involve a competitively bid contract, despite the fact that Section 25520 et seq. requires the sale of County real property be made by the Board of Supervisors to the “highest” responsible bidder with a responsive bid, as is appropriate for a sale of public real property. The decision to award a “competitively bid contract” is one the Legislature has determined is exempted from the requirements and restrictions in Section 84308. The definition of a “competitively bid contract” in Regulation 18438.2(a)(3)(A) reflects the commonly found requirement in competitively bid contract laws that the contract be awarded to the “lowest” bidder, in the context of a procurement contract for goods and services. There is no substantive difference between the two terms, as each arrives at the appropriate economic interests of the public in the context of the particular type of contract. Therefore, we advise that the County’s decision to award the sale of real property contract to the highest responsible bidder pursuant to the competitive bidding requirements in Section 25520 et seq. is exempt from Section 84308’s requirements and prohibitions. (Section 84308(a)(5) and Regulation 18438.2(a)(3)(A).)

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

KH:aja