



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 19, 2023

Mary Horst
California Department of Food and Agriculture
Office of Environmental Farming and Innovation
1220 N Street
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-23-019

Dear Ms. Horst:

This letter is in response 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 Sacramento 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 the Act or Section 1090 prohibit the California Department of Food and Agriculture (CDFA) from approving a grant application from an applicant that employs Amrith Gunasekara as its contact person and project lead on the grant application, where Mr. Gunasekara previously worked for CDFA as Environmental Program Manager and was responsible for and participated in the development of the grant proposal at issue.

CONCLUSION

Yes. Section 1090 prohibits CDFA approving a grant application to Mr. Gunasekara's employer because he participated in the making of the grant agreement while he was employed at

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.

CDFA. Because Section 1090 prohibits Mr. Gunasekara from taking part in the grants applied for and awarded to the Foundation by CDFA, no further analysis under the Act is necessary.

FACTS AS PRESENTED BY REQUESTER

On or about August 31, 2022, CDFA's Office of Environmental Farming and Innovation (OEFI) announced it was soliciting grant applications for a Pollinator Habitat Program (PHP). Applications were due by November 23, 2022. On or about November 22, 2022, OEFI received a grant application from Jim Cranney, President the California Citrus Quality Council (CCQC). The CCQC proposed a partnership with CCQC, Xerces Society, Sunkist Growers, and the California Bountiful Foundation (the Foundation). The application states that the Foundation will "act as the administrative body for this project." The contact person listed for the Foundation is Mr. Gunasekara, Director of Science and Research. The grant application lists him as the "Secondary Contact" and "Project Lead."

Mr. Gunasekara previously worked for CDFA as an OEFI Environmental Program Manager and Science Advisor to the Secretary. As the Environmental Program Manager of OEFI, Mr. Gunasekara was required to file under CDFA's Conflict of Interest Code.

In his capacity as the Environmental Program Manager of OEFI, Mr. Gunasekara was responsible for and participated in the development of the grant proposal at issue here. He was at CDFA up through the time that public comment was received on the grant proposal. Mr. Gunasekara's CV, which was included in the grant application materials, indicates he worked at CDFA until April 2022 and he started with California Bountiful Foundation on April 14, 2022. According to CDFA personnel records, Mr. Gunasekara's last day at work with CDFA was April 13, 2022.

ANALYSIS

A. 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.) Grant agreements are generally considered contracts for purposes of Section 1090. (See *Honig*, supra, 48 Cal.App.4th at p. 350; 89 Ops.Cal.Atty.Gen. 258, 260-262 (2006).)

Under Section 1090, leaving state employment may not avoid a Section 1090 violation when the person has been involved in the contract process. In *City Council v. McKinley* (1978) 80 Cal. App.3d 204, 212, the court stated:

If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and affecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit or the intent of the law which precludes an officer from involving himself in the making of a contract.

Similarly, the Attorney General's Office has opined that county employees could not propose an agreement for consulting services, then resign, and provide the proposed services (66 Ops.Cal.Atty.Gen. 156 (1983)) and a council member could not participate in the establishment of a loan program and then leave office and apply for a loan (81 Ops.Cal.Atty.Gen. 317 (1998).)

Section 1090 reaches beyond the officials who execute the contract and courts have broadly interpreted "participation in the making of a contract" when applying it:

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.) Thus, "participation in the making of a contract" is defined broadly and includes 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 v. City of Taft, supra*, at p. 569.)

Here, you state that Mr. Gunasekara was responsible for and participated in the development of the grant proposal at issue and that he was at CDFA up through the time that public comment was received on the grant proposal. Based on the facts provided, Mr. Gunasekara previously participated in the making of the grant proposal. Thus, Section 1090 prohibits Mr. Gunasekara from taking part in the contracting process with respect to grants applied for and awarded to the Foundation by CDFA. Because a contract between CDFA and the Foundation would violate Section 1090 due to Mr. Gunasekara's involvement, the resulting contract would also be void under Section 1090.²

² We note that the remote interest for an employee of a nonprofit organization under Section 1091.5(a)(8) can apply only to the extent the official with an interest does not participate in the contract. Under the facts provided, Mr. Gunasekara has already participated in the contract at issue. Therefore, the remote interest does not apply even to the extent the Foundation is a nonprofit organization.

Because Section 1090 prohibits Mr. Gunasekara from taking part in the grants applied for and awarded to the Foundation by CDFR, no further analysis under the Act³ is necessary.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

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³ Under the Act, public officials who leave state service are subject to two types of post- governmental employment provisions known as the one-year and permanent bans. The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any proceeding involving specific parties before any court or state administrative agency, or assisting others in the proceeding, if the former employee participated in the proceeding while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).) As Mr. Gunasekara has already left the CDFR and has assisted the Foundation in applying for a grant in which participated as a state employee, we are unable to opine on the application of the permanent ban to Mr. Gunasekara as the Commission cannot provide advice on past conduct. (Regulation 18329(b)(6)(A).) However, we caution that to the extent a former official violates the Act’s revolving door provisions, any action taken by the CDFR related to the grant may be void or voidable under Section 91003(b).