



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 29, 2023

Rick Koon
District Manager
Cayucos Sanitary District
P.O. Box 333
Cayucos, CA 93430

Re: Your Request for Advice
Our File No. A-23-160

Dear Mr. Koon:

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 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 San Luis Obispo 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 Director Michael Shopshear from taking part in, or the Cayucos Sanitary District from entering into, contracts with Nelson’s Garage to service District vehicles given Director Shopshear is the owner of Nelson’s Garage?

CONCLUSION

Yes. Section 1090 prohibits Director Shopshear from taking part in contract decisions relating to the service of District vehicles at Nelson’s Garage. In addition, because there are

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.

alternative sources that are available to provide those services to the District, the rule of necessity does not apply to allow the District to enter those contracts with Nelson's Garage, as explained below.

FACTS AS PRESENTED BY REQUESTER²

The Cayucos Sanitary District's Board of Directors recently appointed Director Shopshear to its Board in October of 2023. Director Shopshear is the owner and operator of Nelson's Garage, which is the only auto mechanic garage in Cayucos. Cayucos Sanitary District's vehicles have historically been serviced by Nelson's Garage, since well beyond 2015, as it is the closest and most convenient location to do so.³

The District does not have a contract with Nelson's Garage to service the vehicles and District staff, not the board members, make the determination to take a vehicle to Nelson's Garage. Vehicles are regularly serviced for oil changes and brake checks and for any other issues that may arise on an as needed basis.

The District Board has authorized the District Manager to approve contracts, agreements and expenditures up to \$40,000. (See District Board Resolution 2012-7; Board of Directors Policy Handbook approved on December 16, 2021.) Therefore, once Nelson's Garage services or repairs a vehicle, it sends the District an invoice, which is paid by you as the District Manager.⁴ The extent of the Board's involvement in financial transactions under \$40,000 is limited to its review of the previous month's Financial Transaction Report, which is included in the general consent calendar at your regular monthly Board meetings.

Morro Bay, the City to the south of Cayucos and about a 10-minute drive away, does have auto mechanic garages that could service your vehicles. The District recently acquired quotes from two garages in Morro Bay for the same services Nelson's Garage routinely performs.

Perry's Automotive quoted the District a higher price than what it pays for the same service at Nelson's Garage. Rizzoli's Automotive quoted a lower price than what the District pays at Nelson's Garage, but after accounting for the added expense and inconvenience of having to shuttle a secondary staff member and a secondary District vehicle to/from a garage in another city (when a single staff member is currently able to walk for 5 minutes to pick up/drop off a District vehicle to be serviced at Nelson's Garage), you do not believe there is an economical or logistical benefit to having District vehicles serviced in another city.

In addition, however, if there were a sewer emergency while a critical District vehicle was in Morro Bay, it could impact your response time to the emergency, which could potentially lead to

² Amy Lessi, the District's Administrative Services Manager, provided supplemental facts by emails dated 11/8, 11/9 and 11/16.

³ The District's financial records only go back to 2015, but it has been taking the vehicles to Nelson's Garage much longer, likely since it opened in 1982.

⁴ The District's total expenditures at Nelson's Garage over the past three fiscal years are: FY 22/23: \$3,776.77; FY 21/22: \$5,142.16; and FY 20/21: \$4,282.23.

a sewage spill. The District owns 3 vehicles total, with varying assets to assist your staff with their daily operations and emergency responses: 1) a 2008 Ford F-550 (with a crane); 2) a 2009 Ford Ranger (with a trailer hitch for towing various equipment); and 3) a 2014 Ford F-350 (with a trailer hitch for towing various equipment.)

You have a staff member on call 24/7, available to respond in under 30 minutes in the most appropriate of the above-referenced District vehicles, to any sewer emergency. Most of the time, one staff member and one vehicle suffices in our response to an emergency alarm. However, in extreme cases (perhaps associated with extreme weather events, unpredictable failure of infrastructure, etc.) you need all three of your staff members and all three of your vehicles to sufficiently respond to a sewer emergency. In such case, you would consider all three of your vehicles to be critical to your emergency response. In cases when only one staff member/vehicle is required for an emergency response, you would still consider it to be critical to have the option to choose the most appropriate of your three vehicles for the response.

In an extreme case where all three staff members and all 3 vehicles would be necessary in an emergency response, and/or if a vehicle necessary for your emergency response were to be located at a garage in Morro Bay as opposed to around the corner from your response hub, it could potentially add about 30 minutes to your response time. In most sewer emergency responses, every minute counts, and those added minutes to your response time could mean the difference between a sewage spill and the prevention of a sewage spill.

ANALYSIS

Section 1090 generally prohibits public officers or employees, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is “concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective 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.)

When applicable, Section 1090’s command is absolute; neither the person with the prohibited financial interest nor any body of which the person is a member may enter into the contract. The prohibition cannot be avoided merely by having the financially interested officer or employee abstain from participating in the contracting process. (85 Ops. Cal. Atty. Gen. 176, 177 (2002) citing *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212; 78 Ops.Cal.Atty.Gen. 362, 368 (1995).) 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, 646-649.)

As the owner of Nelson’s Garage, Director Shopshear has a financial interest in all contracts between the District and Nelson’s Garage.⁵ The main issue here is whether under Section 1090 he

⁵ To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*Stigall, supra*, at p. 569.) Here, for purposes of Section 1090, there is no

would be considered to have participated in the making of any contract between the District and Nelson's Garage where staff makes the decision to take a vehicle there for service and you, as the District Manager, ultimately pay the invoice for the District.

When a governmental board ultimately has the authority over the contracts made by a subordinate decision maker, generally the board members have participated in the resulting contract thereby triggering Section 1090 by exercising their authority to review or not to review the contracts. (See *City of Imperial Beach v. Bailey*, *supra*, 103 Cal.App.3d at p. 195 [where the city council has authority to approve the city's unilateral action to set the rate charged to a concession stand, "it is not [the councilmember's] participation in the voting which constitutes the conflict of interest [under Section 1090], but [the councilmember's] potential to do so"]; 88 Ops.Cal.Atty.Gen. 122, 124 (2005) [a city council has indirectly participated in the city's decisions regarding advertising rates in the city's quarterly brochure because "in effect" the city council approves the advertising rates in approving the proposed revenue derived from advertising specified in the city budget]; 87 Ops.Cal.Atty.Gen. 9 (2004) [the governing board of a school district may not avoid Section 1090 by adopting a policy delegating to the district superintendent its authority to contract on behalf of the district].)

Here, the District Board has the authority to approve all contracts, such as those with Nelson's Garage, but chose by District Board Resolution to delegate approval authority for contracts up to \$40,000 to the District Manager. Therefore, because the ultimate power to execute any contracts with Nelson's Garage rests in the District Board, Director Shopshear is considered to have participated in any contract the District makes with Nelson's Garage concerning the service of District vehicles despite the fact that the District Board has delegated the authority to approve and pay those contracts to the District Manager.⁶

Accordingly, Section 1090 prohibits Director Shopshear from taking part in, and the District from entering into, contracts with Nelson's Garage for the service of District vehicles unless an exception applies.

The Legislature has created various statutory exceptions to the Section 1090 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. The circumstances presented here, however, do not fit any category statutorily defined as either a remote interest or noninterest.

In limited circumstances, however, a "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (See, e.g., 88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government agency may acquire an essential

question the District makes a contract with Nelson's Garage each time it takes a District vehicle there for service, and then pays Nelson's Garage for that service.

⁶ This is to be distinguished from situations where an official has independent legal authority pursuant to a statute or ordinance to contract on behalf of an agency. (See, e.g., 57 Ops.Cal.Atty.Gen. 458, 459 (1974) [county purchasing agent has statutory authority under Section 25500 to purchase goods or services for the county up to a specified amount; *Walter* Advice Letter, No. A-15-050 [city manager with independent statutory authority to approve contracts without city council approval could approve a contract in which a councilmember was financially interested as long as there was no involvement or oversight by the city council].)

service, despite the existence of a conflict, when no source other than that which triggers the contract is available; the rule “ensures that essential government functions are performed even where a conflict of interest exists.” (*Eldridge v. Sierra View Hospital Dist.*, 224 Cal. App. 3d 311, 322 (1990).) The mere fact that a proposed arrangement might be more convenient than other arrangements is not sufficient to invoke the rule of necessity. The rule may only be applied when all possible alternatives have been explored and the arrangement serves a real need. (See, e.g., 91 Ops.Cal.Atty.Gen. 08 (2008) [city may pay fee to councilmember for performing drug testing of a city employee who has been involved in a traffic accident where the councilmember is the only certified drug tester in the immediate area available to perform the test, where time is of the essence in performing the test, and where the councilmember is paid the same fee as any other tester operating under the contract]; *Headding* Advice Letter, No. A-16-219 [Fire Department may purchase emergency medications from councilmember who owns the only pharmacy to sell them in amounts small enough for the Fire Department to comply with the legal requirements for maintaining its ALS certification, which provides an essential emergency service to the public].) What these situations have in common is the exigency of the circumstances such that delaying action to contract with a non-conflicted source would be to the detriment of the public.

Necessity analyses are heavily fact-dependent. For example, an Attorney General opinion concluded that a city council could contract with a service station owned by one of its council members, which happened to be the only service station open at night, but “only in cases of real emergency and necessity.” (4 Ops.Cal.Atty.Gen. 264 (1944).) It cautioned that “[a]n event that can be reasonably anticipated, such as the repeated failure of a battery or the necessity for periodic service, would not be considered an emergency.” (*Ibid.*)

In our view, the rule of necessity does not apply here because there are other businesses in the general vicinity – albeit a 10-minute drive to Morro Bay – that can provide the same services to District vehicles that are currently provided by Nelson’s Garage. The fact that contracting with sources farther than Nelson’s Garage might result in increased costs or be less convenient does not negate the conflict. And although you stated that taking a District vehicle for service to Morro Bay could result in a delayed response to a sewer emergency *if* one were to occur while a vehicle is being serviced, a vehicle currently being serviced would not necessarily be available for an emergency response regardless of the location of the repair shop. Accordingly, we do not consider this contingency as constituting the type of “real emergency and necessity” required for the rule to apply.

We therefore conclude that, except in instances of actual necessity – which are not apparent here – Government Code section 1090 prohibits the District from contracting with a business owned by Director Shopshear, even if he disqualifies himself from any participation in the contracting decisions.⁷

⁷ Based on this conclusion, we do not provide any analysis under the Act.

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