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BILL LOCKYER
Attorney General

OPINION	:	No. 03-201
of	:	June 20, 2003
BILL LOCKYER Attorney General	:	
THOMAS S. LAZAR Deputy Attorney General	:	

THE HONORABLE TOM TORLAKSON, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

May a city council enter into a public works contract with a prime contractor who is the lowest bidder for the project if the city's mayor is an officer, shareholder, and employee of a listed subcontractor of the prime contractor and the mayor has not been a supplier of goods or services to the prime contractor for at least five years prior to his election to office?

CONCLUSION

A city council may not enter into a public works contract with a prime contractor who is the lowest bidder for the project if the city's mayor is an officer, shareholder, and employee of a listed subcontractor of the prime contractor and the mayor has not been a supplier of goods or services to the prime contractor for at least five years prior to his election to office.

ANALYSIS

We are informed that a city has solicited bids for a public works project. The prime contractor who has submitted the lowest bid for the project has listed a cement company as a subcontractor.[1] The mayor of the city is the controller of the cement company, as well as a stockholder in the company and an employee of the company. May the city council contract with the prime contractor notwithstanding the fact that the mayor is an officer, shareholder, and employee of a listed subcontractor for the project? We conclude that it may not.

Government Code section 1090[2] provides in part:

> "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

In 66 Ops.Cal.Atty.Gen. 156, 157-158 (1983), we found that section 1090 was enacted to prevent "self-dealing" in contracts by public officials:

> "Section 1090 of the Government Code codifies the common law prohibition and the general policy of this state against public officials having

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[1] Under the Subcontracting Fair Practices Act (Pub. Contract Code, §§ 4100-4114), a prime contractor must list in his or her bid for a public works project the names and addresses of the subcontractors for the project in order to prevent "bid shopping." (See *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.* (1969) 71 Cal.2d 719, 726, fn. 7; *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 368-369; *E.F. Brady Co. v. M.H. Golden Co.* (1997) 58 Cal.App.4th 182, 189-190; *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1438; *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 661, fn. 1.)

[2] All further statutory references are to the Government Code unless otherwise indicated.

> a personal interest in contracts they make in their official capacities. [Citations.] Mindful of the ancient adage, that 'no man can serve two masters' [citation], 'a self-evident truth, as trite and impregnable as the law of gravity' [citation], the section was enacted to insure that public officials 'making' official contracts not be distracted by personal financial gain from exercising absolute loyalty and undivided allegiance to the best interest of the entity which they serve, and at least with respect to those contracts, it does so by removing or limiting the *possibility* of their being able to bring any direct or indirect personal influence to bear on an official decision regarding them. [Citations.] The mechanism of the section is one of prohibiting public officials from being personally financially interested as private individuals in any such contract. . . ."

Thereafter, in 76 Ops.Cal.Atty.Gen. 118, 119 (1993), we additionally noted:

> ". . . Section 1090 is concerned with financial interests, other than remote or minimal interests, which would prevent officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their public agencies. [Citation.] Moreover, when section 1090 is applicable to one member of the governing body of a public entity, the proscription cannot be avoided by having the interested member abstain; the entire governing body is precluded from entering into the contract. [Citations.] A contract which violates section 1090 is void. [Citation.]" (Fn. omitted.)

Undoubtedly, the city's public works contract constitutes a "contract" for purposes of section 1090. (See *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1178; 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) The mayor, as an officer, shareholder, and employee of a listed subcontractor, would clearly be "financially interested" in the contract since the contract would result in earnings for the company of which he is an officer and shareholder, as well as in his own salary as an employee of the company. (See *Thomson v. Call* (1985) 38 Cal.3d 633, 645-646; *Frazer-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 214-215; 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Significantly, the prohibition of section 1090 cannot be avoided or satisfied by the mayor's abstaining from voting on the contract or by his avoiding any participation in negotiating the contract. (*Thomson v. Call, supra,* 38 Cal.3d at p. 649; *Frazer-Yamor Agency, Inc. v. County of Del Norte, supra,* 68 Cal.App.3d at pp. 211-212; 85 Ops.Cal.Atty.Gen. 6, 7 (2002).) Moreover, the fact that the terms of the contract might be

advantageous to the city would not diminish or negate section 1090's prohibition. As the Supreme Court observed in *Thomson v. Call, supra,* 38 Cal.3d 633:

> "In *Stigall* we relied in part on the reasoning of the United States Supreme Court on a federal penal statute under which a contract was declared to be unenforceable because of a conflict of interest: ' "The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." ' (*Stigall, supra,* 58 Cal.2d at p. 570, quoting *United States v. Mississippi Valley Generating Co.* (1961) 364 U.S. 520.) Implicit in this reasoning is the assumption that the purpose of such statutes is 'not only to strike at actual impropriety, but also to strike at the appearance of impropriety.' (*City of Imperial Beach, supra,* 103 Cal.App.3d at p. 197 [construing § 1090].)
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> "It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance that the violation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved. Nor is an actual *loss* to the city or public agency necessary for a section 1090 violation. In *Stigall*, for example, a city councilman had a financial interest in a plumbing company which submitted the *lowest* bids for a municipal contract. Taxpayers sued to have the contracts declared void. They did not allege 'actual improprieties,' nor did they contend that the contract was unfair, unjust, or not beneficial to the city. (58 Cal.2d at p. 568.) On these facts, we nonetheless concluded that the contract violated section 1090, reasoning that the 'object of these enactments is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct.' [Citations.] And in *Shuffleton, supra,* we observed that 'it matters not how fair upon the face of it the contract may be, the law will not suffer [the official] to occupy a position so equivocal and so fraught with temptation.' (203 Cal. at p. 105.)

> "In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of its validity. [Citation.]" (*Id.* at pp. 648-649; fns. omitted.)

It must be recognized, however, that the Legislature has expressly defined certain "remote interests" and "noninterests" as not coming within section 1090's general prohibition. If a "remote interest" is present, as defined in section 1091, the contract may be executed if the officer (1) discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the body's official records, and (3) the officer completely abstains from any participation in the making of the contract. (See 83 Ops.Cal.Atty.Gen. 246, 248 (2000); 78 Ops.Cal.Atty.Gen., *supra,* at pp. 235-237; 65 Ops.Cal.Atty.Gen. 305, 307 (1982).) If a "noninterest" is present, as defined in section 1091.5, the contract may be executed without the abstention of the officer or employee, and generally a noninterest does not require disclosure. (See *City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 515; 83 Ops.Cal.Atty.Gen., *supra*, at p. 247; 78 Ops.Cal.Atty.Gen. 362, 369-370 (1995).)

The only remote interest or noninterest exception that appears to have any possible relevance to the present situation is the remote interest specified in section 1091, subdivision (b)(8):

> "That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office."

Here, it is conceded that the mayor has *not* been a supplier of goods or services to the prime contractor for at least five years prior to his election to office. Hence, this remote interest exception is inapplicable under the facts presented.

Finally, we reject the suggestion that, because the city is obligated to award the contract to the lowest responsible bidder (Pub. Contract Code, § 20162), the "rule of necessity" would permit the city council to accept the prime contractor's bid despite the mayor's conflict of interests. The rule of necessity was described in *Eldridge v. Sierra View Local Hospital District* (1990) 224 Cal.App.3d 311, 321, as follows:

> "The rule of necessity provides that a governmental agency may acquire essential goods or services despite a conflict of interest, and in nonprocurement situations it permits a public officer to carry out the essential

> duties of his/her office despite a conflict of interest where he/she is the only one who may legally act. The rule ensures that essential government functions are performed even where a conflict of interest exists. [Citation.]"

Accordingly, as long as other responsible bids are submitted, as they were here, the rule of necessity has no application. (See *Thomson v. Call, supra,* 38 Cal.3d at pp. 648-649; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 568; 76 Ops.Cal.Atty.Gen., *supra*, at pp. 121-123; 65 Ops.Cal.Atty.Gen., *supra*, at p. 310.)

We conclude that a city council may not enter into a public works contract with a prime contractor who is the lowest bidder for the project if the city's mayor is an officer, shareholder, and employee of a listed subcontractor of the prime contractor and the mayor has not been a supplier of goods or services to the prime contractor for at least five years prior to his election to office.

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