

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

BILL LOCKYER
Attorney General

OPINION	:	No. 01-1006
	:	
of	:	May 3, 2002
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BILL LOCKYER	:	
Attorney General	:	
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THOMAS S. LAZAR	:	
Deputy Attorney General	:	
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THE HONORABLE DARIO J. FROMMER, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following question:

May a workforce investment board continue to contract with a newly elected city council member for the performance of employment development services, which he has provided to the board for over five years prior to his election, where the board was created by a joint powers agreement between the city and two other public agencies, the agreement provides for the administration of all contracts by the city's employees, including the ministerial execution of all contracts by the city manager, and the city council does not review, consider, approve, administer, or monitor performance of any board contract?

CONCLUSION

A workforce investment board may continue to contract with a newly elected city council member for the performance of employment development services, which he has provided to the board for over five years prior to his election, where the board was created by a joint powers agreement between the city and two other public agencies, the agreement provides for the administration of all contracts by the city's employees, including the ministerial execution of all contracts by the city manager, and the city council does not review, consider, approve, administer, or monitor performance of any board contract.

ANALYSIS

The cities of Burbank, Glendale, and La Canada-Flintridge have entered into a joint powers agreement creating the Verdugo Workforce Investment Board ("Board") to administer a federal program (29 U.S.C. § 2864) providing employment and job training services in their communities.¹ Pursuant to the agreement, Glendale's employees manage the services approved by the Board, including the execution by the city manager of all Board contracts with private vendors.

A newly elected member of the Glendale City Council has been contracting with and providing services to the Board since 1983. These contracts have been executed on behalf of the Board by the Glendale city manager. May the Board continue to contract with this contractor now that he is on the Glendale City Council? We conclude that it may.

Government Code section 1090² provides in pertinent 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."

The purpose of section 1090 "is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct." (*Stigall v. City*

¹ While the federal law was renamed in 1998, it has retained its basic purposes and programs. We do not view any changes resulting from the new federal legislation as material to our analysis.

² All references hereafter to the Government Code are by section number only.

of Taft (1962) 58 Cal.2d 565, 569; see *Thompson v. Call* (1985) 38 Cal.3d 633, 646; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 659; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 215.)

Here, the new contract would not be “made” by the city council member in his official capacity but rather only in his private capacity. Thus, although he would clearly be financially interested in the contract, he would not be contracting with himself as proscribed by section 1090.

Section 1090 also applies where the contract would be made “by any body” of which the officer is a member. Would the Glendale City Council participate in making the contract in question? We are given that the city council does not review, consider, approve, administer, or monitor the performance of any Board contract. The city council does not attempt to influence the Board in any way concerning developing, negotiating, executing, or performing any contract. Under these circumstances, the proposed contract cannot be said to be “made” by the Glendale City Council for purposes of section 1090.

We reject the suggestion that because the Glendale city manager actually executes the Board’s contracts, the contracts are “made” by the Glendale City Council. It is the joint powers agreement that gives the Glendale city manager the power and ability to execute the Board’s contracts. It is the Board that approves the contracts, not the Glendale city manager. The city manager executes the contracts as a ministerial act on behalf of the Board. Accordingly, we do not believe that the Glendale city manager’s execution of the contracts constitutes the Glendale City Council’s participation in the making of the contracts. The rationale for the section 1090 prohibition is not served by applying the statute here.

We find support for our determination in several prior opinions. In 57 Ops.Cal.Atty.Gen. 458 (1974), we concluded that a county purchasing agent with independent authority to contract could execute a contract with a county supervisor for goods or services without violating section 1090 since the board of supervisors would not be participating in the making of the contract. Similarly, we concluded in 21 Ops.Cal.Atty.Gen. 90 (1953) that a city treasurer could deposit funds in a bank in which a city council member was a stockholder and director. “The significant fact in each of these opinions is the independent status of the party contracting on behalf of the governmental agency.” (*Id.* at p. 92; see also 14 Ops.Cal.Atty.Gen. 78 (1949); 3 Ops.Cal.Atty.Gen. 188 (1944).)

In the present situation, the council member providing the contract services is not a member of the Board. We note that if he were to become a Board member, his future contracts with the Board could nevertheless be executed under the terms and conditions of section 1091.2. Section 1091.2 provides a specific exemption for workforce investment

board contracts as follows:

“Section 1090 shall not apply to any contract or grant made by local workforce investment boards created pursuant to the federal Workforce Investment Act of 1998 except where both of the following conditions are met:

“(a) The contract or grant directly relates to services to be provided by any member of a local workforce investment board or the entity the member represents or financially benefits the member or the entity he or she represents.

“(b) The member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.”

We conclude that a workforce investment board may continue to contract with a newly elected city council member for the performance of employment development services, which he has provided to the board for over five years prior to his election, where the board was created by a joint powers agreement between the city and two other public agencies, the agreement provides for the administration of all contracts by the city’s employees, including the ministerial execution of all contracts by the city manager, and the city council does not review, consider, approve, administer, or monitor performance of any board contract.
