



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 10, 2022

Dean Derleth
City Attorney
City of Corona
400 S. Vicentia Avenue
Corona, California
92882-2187

Re: Your Request for Advice
Our File No. A-22-099

Dear Mr. Derleth:

This letter responds to your request for advice on behalf of the City of Corona 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 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

May the City contract with Andritz Separation Technologies, Inc. ("Andritz") to complete the repair of the City's biosolids dryer ("Biosolids Dryer"), given that Andritz drafted a report recommending replacement equipment and certain upgrades to the Biosolids Dryer that was

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.

included in the City's Request for Proposals ("RFP") for repair of the Biosolids Dryer, and given that the City received no proposals in response to the RFP?

CONCLUSION

Yes. As explained below, because the initial contract did not require Andritz to engage in or advise on public contracting on behalf of the City, Andritz was not subject to Section 1090 as an independent contractor for the City. Therefore, Section 1090 does not prohibit the City from entering a contract for the repair of the Biosolids Dryer, based on the preliminary services it provided under the initial contract.

FACTS AS PRESENTED BY REQUESTER

The City operates the Biosolids Dryer at its Water Reclamation Facility, where the Biosolids Dryer processes municipal sludge. On January 10, 2020, the Biosolids Dryer suffered a natural gas explosion resulting in significant damage to the furnace, ductwork, separation equipment, and solids handling equipment that required the City to cease operation of the Biosolids Dryer. The City hired Andritz to conduct a forensic examination of the Biosolids Dryer and develop recommendations regarding the necessary repairs. Specifically, the City's purchase order for the work to be performed by Andritz described the services as follows:

- Phase I. Plant condition assessment, and design and supply of replacement parts, keeping in mind likely outcomes from Phase III work (example – replacement Pre-Separator will need to be strengthened for future implementation of safety devices).
- Phase II. Forensic examination and determination of the cause of the event, coordinated with the City's insurance carrier.
- Phase III. Recommendations for any upgrades to safety systems such as explosion vents, explosion suppression, gas monitoring and software to bring the plan into compliance with the latest National Fire Protection Association requirements.

Andritz completed the services and provided the City with an "Accident Inspection Report" ("Report") that detailed its findings regarding the cause of the explosion and included a list of recommended replacement equipment as well as recommended upgrades to safety systems. On March 16, 2022, the City issued an RFP for "Biosolids Dryer Reconstruction," seeking proposals to repair or replace equipment damaged in the explosion as necessary to enable the City to resume operation of the Biosolids Dryer. The Report prepared by Andritz was included as Appendix B to the RFP, but Andritz did not draft or assist the City in drafting the RFP. The Scope of Work set forth in the RFP required proposers, among other things, to conduct a site reconnaissance of the Biosolids Dryer, perform research of records, and submit a letter either "recapitulating or recommending modifications to" the design criteria itemized in Andritz's Report.

Only two firms attended the pre-bid meeting for the RFP. Neither firm submitted a proposal for the work, as each firm expressed to the City that due to the technical challenges of the project as well as the potential risks involved in rebuilding a facility that suffered an explosion, the best course of action would be to demolish the Biosolids Dryer and rebuild it. However, Andritz does believe that the Biosolids Dryer can be rebuilt and is willing to perform the work.

Due to matters regarding insurance coverage, if there is an avenue for repairing the Biosolids Dryer (rather than rebuilding it), the City desires to pursue that avenue. The City is now seeking advice from the FPPC as to whether it may contract with Andritz to complete the Biosolids Dryer repair work, given that the City received no proposals in response to the RFP.

ANALYSIS

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. 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.)

The term “public official” is interpreted broadly under Section 1090 and includes “independent contractors who perform a public function” and “whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency.” (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; citing *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 690-693; see also *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, at pp. 300-301.) It is also clear that Section 1090 applies to independent contractors as well as corporate consultants. (*Davis, supra*, at p. 300.)

Independent Contractors Subject to Section 1090

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City, supra*, at pp. 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291 [“statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] ... [] A person merely in an advisory position to a city is affected by the conflicts of interest rule”].) This long-standing rule was affirmed by the California Supreme Court (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230), and it applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

The purpose behind this inclusiveness of the definition is to ensure that independent contractors who are essentially performing a public function, though temporarily, provide the same “fealty expected from permanent officers and employees.” (46 Ops.Cal.Atty.Gen 74 (1965).) In *Hub City*, the court stated that a person’s status as an official under Section 1090 “turns on the extent to which the person influences an agency’s contracting decisions or otherwise acts in a capacity that demands the public trust.” (*Hub City, supra*, at p. 1125.)

The determinative question is whether Andritz’s work on the previous contract constitutes making or participating in making the current contract for repair of the Biosolids Dryer. Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal. App.3d 1046, 1052.) Therefore, participation in the making of a contract is defined

broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, 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.)

In *Sahlolbei, supra*, the Supreme Court concluded that Section 1090's reference to "officers" applies to "outside advisors with responsibilities for public contracting similar to those belonging to formal officers" (*Id.* at p. 237), and held that not all independent contractors are covered by Section 1090; instead, "independent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." (*Id.* at p. 245.)

Furthermore, in *Sahlolbei, supra*, the Supreme Court explained that "Section 1090 prohibits officials from being 'financially interested in any contract made by them in their official capacity.' Officials *make* contracts in their official capacities within the meaning of section 1090 if their positions afford them the opportunity to ... influence execution [of the contracts] directly or indirectly to promote [their] personal interests' and they exploit those opportunities." (*Sahlolbei, supra*, at p. 246 quoting *People v. Sobel, supra*, at p.1052.)

In this instance, the facts provided do not show that Andritz engaged in or advised on public contracting based on the scope of work it performed in the first contract. The City, not Andritz, determined the scope of work in the first contract. The subject of the first contract was the preparation of an "Accident Inspection Report" that detailed its findings regarding the cause of the explosion that damaged the Biosolids Dryer and included a list of recommended replacement equipment as well as recommended upgrades to safety systems to make the Biosolids Dryer operational.

Also, the fact that the City included the "Accident Inspection Report" with the RFP does not provide Andritz with an unfair advantage over other potential contractors as providing background information in an RFP is standard industry practice. Including a copy of the "Accident Inspection Report" in the RFP allows the potential contractors to ascertain the necessary background information to assist in the preparation of their bids. In fact, the sharing of this information, to the extent it is relevant to the scope of work to be undertaken, creates a level playing field among the respondents and removes any perceived unfair advantage that Andritz could have obtained as the result of its preparation of the report.

The services Andritz provided in the initial contract did not determine the scope of the subsequent contract for repair work it now seeks to enter into with the City. The City, not Andritz or any other outside consultant, established the scope of work for the second contract. The City prepared a detailed RFP, and included the Report prepared by Andritz as Appendix B to the RFP for the "Biosolids Dryer Reconstruction", but Andritz did not draft or assist the City in drafting the RFP.

In this case, the facts provided indicate that Andritz is not subject to Section 1090 because it had no responsibilities for public contracting on behalf of the City for the work it performed in preparing the Report assessing the explosion and damage to the Biosolids Dryer. Andritz's prior work did not require it to make any decisions on the City's behalf regarding contracting, and the City, not Andritz, made the decisions relevant to the second RFP.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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