STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

December 27, 2022

Danielle Maland
Deputy County Counsel
County of Riverside

Re: Your Request for Advice
Our File No. A-22-122

Dear Ms. Maland:

This letter responds 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.

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 Riverside 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

Riverside County's initial contract with an engineering firm involved advising on a construction contract, including creating construction contract documents, reviewing bids, and making recommendations on the award of County contracts. Under Section 1090, may Riverside County now enter a second contract with the engineering firm for construction management services, including ensuring the construction is done in conformity with the construction contract documents the engineering firm created under the initial contract?

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[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.

CONCLUSION

No. Under the initial contract, the engineering firm had duties to engage in or advise on public contracting on the Counties behalf and did so by creating construction contract documents, reviewing bids, and making recommendations regarding those bids. As such, Section 1090 prohibits the County from contracting with the engineering firm again to perform construction management services related to the construction contract the engineering firm helped create and advised on.

FACTS AS PRESENTED BY REQUESTER

The County of Riverside entered into a Master Professional Service Agreement for Airport Engineering, Architectural, Planning and Environmental Services ("First Agreement") with an engineering firm, C&S Engineers, Inc. ("C&S"). Pursuant to the Agreement, the County entered into a work order agreement with C&S to provide services on a taxiway, hanger taxi lines, and apron pavement rehabilitation (public works) project at one of the County's airports, including the following:

1. Prepare grant application packages for the project, coordinate their execution, and submit to the funding agencies (FAA);
2. Provide a complete set of contract documents for the project with the intent that those documents would be used by contractors to bid on the construction of the project;
3. Receive and respond to questions from potential bidders regarding contract documents;
4. Upon receipt of bids, perform bid reviews;
5. Prepare final bid tabulation, recommendation/rejection of award to County, and a sample award letter; and
6. Upon award of contract, prepare conformed copies of contracts; coordinate contractor's execution of contract; review contractor's bonds, insurance certificates, and DBE plan; review contractor's submission with County; coordinate County's execution of the contract; and assist in distributing electronic copies of executed contracts to the contractor and FAA.

The County was awarded the FAA grant that C&S assisted in preparing the grant application packages. Since the County was awarded the FAA grant, the County is now able to move forward with the construction of the project. While not provided for in the First Agreement, the County now wants to enter into a second work order agreement with C&S to provide construction management services on the project to monitor the progress and quality of the contractor's work to determine if the work is proceeding in general conformity with the contract documents provided by C&S under the first work order agreement. The County is seeking advice on whether Section 1090 prohibits the County from entering into the second work order agreement with C&S on this project.

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 financial interests, other than remote or minimal interests, that prevent a public officer or employee 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, e.g., *Honig*, *supra*, 48 Cal.App.4th at p. 350; 89 Ops.Cal.Atty.Gen. 258, 260-262 (2006).)

Importantly, Section 1090 prohibits the use of a public position for self-dealing. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124 [independent contractor leveraged his public position for access to city officials and influenced them for his pecuniary benefit]; *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682, 690 ["Section 1090 places responsibility for acts of self-dealing on the public servant where he or she exercises sufficient control over the public entity, i.e., where the agent is in a position to contract in his or her official capacity"]; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090 [The purpose of Section 1090 is to prohibit self-dealing, not representation of the interests of others].)

Independent Contractors Subject to Section 1090

In 2017, the California Supreme Court recognized "the Legislature did not intend to categorically exclude independent contractors from the scope of section 1090" in its language applying the prohibition to "public officers and employees." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 238.) In this opinion, the Court held that Section 1090 applies to those independent contractors who are "entrusted with 'transact[ing] on behalf of the Government.'" (*Id*. at p. 240, emphasis added, quoting *Stigall, supra*, 58 Cal.2d at p. 570.) On this issue, the *Sahlolbei* Court explained:

> So, for example, a stationery supplier that sells paper to a public entity would ordinarily not be liable under section 1090 if it advised the entity to buy pens from its subsidiary because there is no sense in which the supplier, in advising on the purchase of pens, was transacting on behalf of the government.
>
> In the ordinary case, a contractor who has been retained or appointed by a public entity and whose actual duties include engaging in or advising on public contracting is charged with acting on the government's behalf. Such a person would therefore be expected to subordinate his or her personal financial interests to those of the public in the same manner as a permanent officer or common law employee tasked with the same duties.

(*Sahlolbei, supra*, at p. 240.)

Notably, the Court specifically rejected a "considerable influence standard" (i.e., that contractors come within the scope of Section 1090 when they occupy positions "that carry the potential to exert 'considerable influence' over public contracting") in determining whether Section

1090 applies to a particular independent contractor. (*Id.* at p. 244-45, referencing *California Housing Finance Agency*, *supra*, 148 Cal.App.4th at p. 693.) The Court stated, "[a]s we have explained, 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."

Applying this standard, in *Taxpayers Action Network v. Taber Construction, Inc.,* (*Taber*) (2019) 42 Cal.App.5th 824, the court found that where a school district contracted with Taber Construction, a contractor, to provide preconstruction services, it was not precluded from entering into a second contract with the same contractor for construction of the project when there was "no evidence that Taber was transacting on behalf of the School District when it provided those preconstruction services" and instead, the evidence showed that "Taber was transacting business as a provider of services to the School District." (*Id.* at p. 838.) The court based this finding on the fact that Taber had a contractual duty to provide preconstruction services, not to select a firm to complete the project, and Taber provided those services (planning and setting specifications) in its capacity as the intended provider of construction services to the School District, not in a capacity as a de facto official of the School District." (*Ibid.*) The *Taber* court also agreed with the trial court's reasoning that although the preconstruction services and construction services technically involved two contracts, the firm at issue had effectively already been chosen for the second contract at the time the first contract was made. (*Id.* at pp. 831-832) Therefore, the firm could not have influenced the School District's decision to select the firm for the second contract. (*Id.* at p. 832.)

Applying this standard in past advice letters, we have examined the role played by the contractor. For example, we have found that an independent contractor involved in design and construction services on a housing project, including construction of public streets, was not subject to Section 1090 with respect to a subsequent construction contract for additional public streets, where no facts suggested that the town hired the contractor to engage in or advise on public contracting on behalf of the town. (See *Morris* Advice Letter, No. A-22-003.) The analysis states:

> For example, the DDA [the contract] did not require PWC [the contractor] to prepare an RFP for the construction of those streets of the Parcel to be constructed by the Town; nor did it require PWC to assist the Town in selecting a contractor for that project. Instead, the DDA required PWC to construct the Parcel's affordable housing, design all of the Parcel's infrastructure, and construct certain portions of that infrastructure. PWC provided these services in its capacity as the intended provider of design and construction services to the Town, not in an official capacity status for the Town – in other words, PWC has done business in its private capacity as a provider of services *to* the Town under the DDA."

(*Morris* Advice Letter, No. A-22-003, p. 8)

In contrast, where the facts showed that an independent contractor played a role as an advisor to the county in drafting its cannabis marketing RFPs and advised that the county restrict the types of applicable bidders, we concluded the independent contractor was subject to Section 1090. The contractor was in a role such that its duty was to advise the county on contracting matters. It is notable that the independent contractor's advice resulted in a considerable advantage

to the independent contractor and its affiliate organization in the county's subsequent RFPs. (*Adair* Advice Letter, No. A-21-137.)

Based on the above, the key determination in extending Section 1090's prohibitions to an independent contractor in this matter is whether the independent contractor had duties to engage in or advise on public contracting – duties that the contractor was expected to carry out on the County's behalf.

Here, C&S's First Agreement involved preparing grant application packages, providing contract documents for use by contractors bidding on construction of the project, responding to bidders' questions regarding contract documents, reviewing bids, recommending bids to the County, and assisting in the finalization of the County's contract for construction services. These duties demonstrate that, under the First Agreement, C&S was not merely a "stationary supplier" providing a product or service *to* the County, but was expected to engage in or advise on public contracting *on behalf of* the County. As such, Section 1090 applies to C&S.

The County now wants to enter a Second Agreement with C&S. However, unlike in *Taber*, C&S was not effectively chosen for eventual construction management services when the County and C&S entered the First Agreement. A Second Agreement for construction management was not provided for in C&S's First Agreement and was identified as a needed service only after C&S commenced work and assumed an advisory position to the County that placed it into a position that could influence the scope and services needed to complete the project under the contemplated contract and any subsequent contracts. Under these circumstances, the potential for self-dealing, which Section 1090 aims to prevent, cannot be ignored. As in the *Adair* Advice Letter, No. A-21-137, however, C&S's duties under the First Agreement included engaging in and advising on public contracting on the County's behalf and the firm's prior work resulted in a considerable advantage with respect to the duties to be performed under the Second Agreement. Under the Second Agreement, C&S would be tasked with overseeing the work performed by a company whose bid the firm reviewed and possibly recommended to the County. C&S would also be responsible for reviewing the company's work for conformity with the contract documents provided by C&S under the First Agreement.

Most significantly, C&S's role in advising the County in regard to the initial construction contract requires that C&S performs this role on the County's behalf and to subordinate their financial interests to those of the public in the same manner as a permanent officer or common law employee tasked with the same duties. Considering their contracting authority under the First Agreement, C&S is precluded from entering a subsequent contract relating so closely to their duties and obligations under the First Agreement. Accordingly, under Section 1090, the County is prohibited from entering the Second Agreement with C&S.

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Kevin Cornwall
Counsel, Legal Division

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