STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 3, 2023

Hoffman Advice Letter No. A-22-130(a) is SUPERSEDED by *Hoffman* Advice Letter No. A-22-130

Shiri Hoffman
Chief Deputy County Counsel
1600 Pacific Hwy #355
San Diego, California 92101

Re: Your Request for Advice
Our File No. A-22-130a

Dear Ms. Hoffman:

This letter supersedes the *Hoffman* Advice Letter, No. A-22-130. Following issuance of this letter, you provided information and clarification regarding the facts provided in your initial request that warranted reconsideration of the previous advice.

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, 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 San Diego 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).)

[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.

QUESTION

Under Section 1090, is San Diego County permitted to enter into or amend a contract with the San Diego Workforce Partnership ("SDWP") to implement behavioral health workforce initiatives identified in a report that the SDWP prepared on behalf of the County?

CONCLUSION

No, the County may not enter a contract with SDWP for consulting services to implement the behavioral health workforce initiatives that SDWP recommended in their report. SDWP would not be acting as a Workforce Development Board within the definition of the exemption in Section 1091.2 but would rather be acting in its nonprofit capacity so the exemption would not apply. Further, because SDWP took on the role of an advisor in the initial contract, which required that SDWP design strategies for the County to assist with recruiting and retaining its public behavioral health services staff, they cannot enter into the subsequent contract to implement the behavioral health workforce initiatives that SDWP recommended in their report under the initial contract.

FACTS AS PRESENTED BY REQUESTER

The San Diego Workforce Partnership, Inc. ("SDWP") is a California nonprofit public benefit corporation and serves as the only local Workforce Development Board for San Diego, pursuant to the federal Workforce Innovation and Opportunity Act of 2014 ("WIOA"). SDWP also performs services as a nonprofit organization outside of its work as a Workforce Development Board. The federal Workforce Investment Act of 1998 has now been superseded by WIOA. SDWP's Board of Directors is appointed by the Policy Board of the San Diego Consortium ("Consortium"), a joint powers agency formed by the City of San Diego and County of San Diego in 1974. The Executive Director of the Consortium serves as CEO of SDWP. As authorized by WIOA, a Partnership Agreement between the Consortium and SDWP designates SDWP as the Local Workforce Investment Area grant recipient and administrative entity. Pursuant to that agreement, SDWP and the Consortium work collaboratively to develop and implement the region's workforce development plan.

In November 2021, San Diego County entered into a consultant agreement with SDWP to evaluate, identify, and address public behavioral health workforce shortages in San Diego County. SDWP would also "design strategies that will assist to recruit and retain public behavioral health services staff to service the County of San Diego." The contract between SDWP and the County lists many goals and objectives SDWP was to address including: "assess the current behavioral health workforce and identify shortages in specific job classifications;" "provide a process map of strategies on how to meet the workforce needs;" "provide an implementation plan for innovative strategies to retain strategic behavioral health positions."

SDWP did extensive research and implemented pilot programs to conduct their evaluation. SDWP provided the results of its evaluation in a 92-page report with five recommendations, which the County Board of Supervisors received in October 2022 and directed the Chief Administrative Officer to return to the Board with plans to implement the report's recommendations. The recommendations include retaining a consultant "to evaluate San Diego County's documentation and monitoring practices" and "to conduct a formal analysis of what documentation and monitoring contributes to improved clinical outcomes."

Given SDWP's expertise and extensive research, as well as the fact its board serves as the only Workforce Development Board in the County, SDWP would be well-situated to assist the County in implementing the recommendations set forth in the report. If the County were to contract with SDWP for these services, SDWP would not be acting in its capacity as the Workforce Development Board, rather it would be acting in its independent capacity as a nonprofit organization.

ANALYSIS

Section 1090 covers contracts made by public officials, providing 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. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity."

Section 1090 generally prohibits public officers from being financially interested in contracts made by them in their official capacity or made by boards or commissions of which they are members. (87 Ops.Cal.Atty.Gen. 23, 24 (2004).) The purpose "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 of Taft* (1962) 58 Cal.2d 565, 569.) The statutory goal is "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (C*ity of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) A contract that violates Section 1090 is void and unenforceable. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) Importantly, Section 1090's prohibition applies regardless of whether the contract would otherwise be fair and equitable (*id*. at pp. 646-649), and a board member with a proscribed interest may not avoid the prohibition by abstaining from the decision-making process; the entire board is prohibited from executing the agreement if the prohibition is applicable. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest," and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

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].)

Section 1091.2 provides the following with respect to local workforce investment boards:

"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."

Section 1091.2 clearly states that Section 1090 does not apply to any contract made by a workforce investment board created pursuant to the federal Workforce Investment Act of 1998, except when a member of that board is seeking services from the board and fails to recuse himself from its decisions. (See e.g., *Highsmith* Advice Letter, No. A-16-150.) The federal Workforce Investment Act of 1998 was superseded by WIOA, which SDWP was formed under. However, in this situation, SDWP would not be performing the proposed services under their capacity as a Workforce Development Board, but rather under their capacity as a nonprofit organization. Because the work performed would not be as the Workforce Development Board, Section 1091.2 does not apply to this factual scenario and we must further determine whether Section 1090 prohibits the contract.

Independent Contractors Subject to Section 1090

Although section 1090 refers to "officers or employees" of government entities, the California Supreme Court has recognized "the Legislature did not intend to categorically exclude independent contractors from the scope of section 1090." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 238.) However, Section 1090 does not apply to all independent contractors - only those who are "entrusted with 'transact[ing] on behalf of the Government"' (*Id*. at p. 240, italics added, quoting *Stigall*, *supra*, 58 Cal.2d at p. 570.)

We therefore apply a two-step analysis to determine whether a public entity that has entered a contract with an independent contractor to perform one phase of a project may enter a second contract with the same independent contractor for a subsequent phase of the same project. The first issue is whether the independent contractor had responsibilities for public contracting on behalf of the public entity under the initial contract. If not, then the independent contractor is not subject to Section 1090 and the public entity may enter the subsequent contract. If so, then the second question is whether the independent contractor participated in making the subsequent contract for purposes of Section 1090 through its performance of the initial contract. If not, then the public entity may enter the subsequent contract. If so, then Section 1090 would prohibit the public entity from entering the subsequent contract.

The primary question in this matter is whether the initial November 2021 contract for evaluating and addressing public behavioral health workforce shortages between the County and SDWP provided SDWP with duties to engage in or advise on public contracting that they are expected to carry out on the County's behalf such that it would be covered by Section 1090. 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.
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> 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.)

section 1090 when they have duties to

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.
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> (*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 the county's behalf. 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 City's behalf.

It is plain from the initial contract that SDWP's duties involved more than just providing the County with an assessment of the issues concerning the County's public behavioral health workforce shortages – in fact, the contract required that SDWP design strategies for the County to assist with recruiting and retaining its public behavioral health services staff, including providing an implementation plan. This ultimately resulted in a 92-page report with five recommendations that included hiring consultants "to evaluate San Diego County's documentation and monitoring practices" and "to conduct a formal analysis of what documentation and monitoring contributes to improved clinical outcomes." Based on these facts, the contract provided SDWP with duties to advise the County on public contracting that it was to carry out in the same manner as a County employee. Therefore, SDWP is subject to Section 1090.

The next issue is whether SDWP participated in making the subsequent contract to implement the behavioral health workforce initiatives through its performance of the initial contract. For purposes of Section 1090, 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.)

Here, as mentioned, SDWP prepared a 92-page report with five recommendations that was received by the County Board of Supervisors in October 2022. Thereafter, the Board directed the Chief Administrative Officer to return to the Board with plans to implement the report's recommendations. In other words, the subsequent is simply a contract to implement the behavioral health workforce initiatives that SDWP recommended in their report under the initial contract. Therefore, SDWP participated in the making of the subsequent contract.

Accordingly, Section 1090 prohibits the County from entering a subsequent contract with SDWP for consulting services to implement the behavioral health workforce initiatives that SDWP identified in a report under the initial contract with the County.

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

Sincerely,

Dave Bainbridge
General Counsel

By: Valerie Nuding
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