



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 24, 2023

Charles Nesbit
Project Manager
69-825 Highway 111
Rancho Mirage, California, 92270

Re: Your Request for Advice
Our File No. A-23-085

Dear Mr. Nesbit:

This letter responds to your request for advice on behalf of the City of Rancho Mirage (“City”) 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 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

Where the City hires a design firm to provide an initial concept design or rendering for a public information sign based on City staff’s description, does Section 1090 prohibit the City from contracting with the same design firm to design and build the sign?

CONCLUSION

No. The design firm will be tasked only with providing an initial concept design or rendering for the new sign based on City staff’s instructions. The design firm would not be tasked with drafting the design/build Request for Proposal, nor would it be

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.

selecting the firm or limiting the firms that may provide the design/build services. Therefore, under these facts, Section 1090 would not apply to the design firm as it is not entrusted with transacting on behalf of the government in providing the initial concept design or rendering.

FACTS AS PRESENTED BY REQUESTER

The City needs to replace a public information sign located at the City Library with a high definition “LED” sign and monument. To receive bids for the design, the City needs to first supply a general concept design or rendering for approval by the City Council.

Due to the anticipated cost of less than \$2500 for this part of the process, the City policy is to approach one design firm for this service. The City will provide the design firm with a general description of what the replacement sign will entail. You clarified in a phone conversation that the job of the design firm is to provide a single page “cartoon rendering” of the information provided by City staff.

Once the general concept is approved, the City will proceed with a Request for Qualifications and then a Request for Proposals (RFP) from design/build firms. The City is aware that there are a limited number of qualified design/build firms in the area. The approved general concept rendering will be a part of the RFP. However, you note that the firm awarded with the design/build project is not necessarily tied to the approved general concept.

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.)

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”];

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.)

Independent Contractors Subject to Section 1090

The California Supreme Court held that Section 1090 does not apply to all independent contractors, but it does apply to those who are entrusted with transacting on behalf of the government. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230.)² The Court stated that Section 1090 applies in such a situation because “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.)³

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 a construction 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 [the contractor] was transacting on behalf of the School District when it provided those preconstruction services” and instead, the evidence showed that “[the contractor] 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 the construction contractor had a contractual duty to provide preconstruction services, not to select a firm to complete the project, and 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.*)

Applying the *Sahlolbei, supra* standard in past advice letters, we have examined the role played by the contractor to determine the application of Section 1090. 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. (*Morris Advice Letter*, No. A-22-003.)

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

² As an example, the court in *Sahlolbei* explained that “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.” (*Sahlolbei, supra*, at p. 240.)

³ Note that the *Sahlolbei* 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 pp. 244-45, citing *California Housing Finance Agency, supra*, 148 Cal.App.4th at p. 693.)

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 has duties to engage in or advise on public contracting that the contractor is expected to carry out on the agency's behalf. Here, the City intends to have a design firm provide a single page "cartoon rendering" of the information provided by City staff so that the City Council may approve the concept and move forward with the project. As in *Taber*, the design firm would not prepare the RFP or assist the City in selecting a contractor for the project. Rather, the design firm would provide a visual depiction of the City staff's information about the new sign. The bidder selected through the RFP process would then provide the sign design, specifications and build the sign. Under these facts, the design firm does not have duties to engage in or advise on public contracting that the contractor is expected to carry out on the agency's behalf.

Accordingly, Section 1090 does not prohibit the City from hiring a design firm to provide an initial concept design or rendering for the public information sign based on City staff's description, and then entering into a later contract, through its RFP process, with the same design firm to design and build the sign.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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