



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

June 22, 2023

Joan L. Cassman
City Attorney
City of Millbrae
425 Market Street, 26th Floor
San Francisco, CA 94105

Re: Your Request for Advice
Our File No. A-23-086

Dear Ms. Cassman:

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 Mateo 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

Under Section 1090, may the City of Millbrae enter a contract with West Yost & Associates, Inc. for program management services to implement a Supervisory Control and Data Acquisition ("SCADA") Master Plan, which West Yost & Associates, Inc. created and contained a recommendation to procure such program management?

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, the City may not enter a contract with West Yost & Associates, Inc. for project management services to implement the SCADA Master Plan as West Yost took on the role of an advisor to the City in the initial contract by recommending the hiring of a project manager, contracting methods, and related services the City should procure. Thus, West Yost is a contractor subject to Section 1090 and cannot enter into the subsequent contract to implement the SCADA Master Plan that they created under the initial contract.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Millbrae (“City”) and are seeking advice on behalf of the City under Section 1090. The City is interested in contracting with West Yost & Associates, Inc. (“West Yost”) to provide program management services to implement a SCADA Master Plan (“Plan”) that West Yost prepared. A SCADA Master Plan is generally an organized set of engineering documents, recommendations, and guidelines to generate the design framework and roadmap for capital expense projects related to SCADA.

On March 29, 2019, the City issued an RFQ for As-Needed Municipal Engineering Design, Traffic, Transportation and Geotechnical Engineering Services. The RFQ also included construction management services for the installation of needed improvements but did not specifically mention the Plan or its implementation. West Yost responded to the RFQ with a proposal that highlighted, among other things, West Yost’s SCADA Master Planning Services. On August 27, 2020, the City entered into an agreement with West Yost (“2020 Agreement”), referencing and incorporating the RFQ and West Yost’s proposal to develop a Plan, which was designated as Task Order #5 and only included the development of the Plan, not the project management of the Plan’s implementation.

West Yost then submitted the Plan in December 2022. The Plan contained a recommendation that states, “it is West Yost’s recommendation that the City execute key projects as an overall Program Implementation Plan and select a Program Manager to assist in the management, design and delivery of the projects.” The recommendation also included recommended contracting methods and related services the city should procure.

The City now seeks to issue a task order under the 2020 Agreement directing West Yost to perform the program management services for the implementation of the Plan. The City plans to develop a scope of work for that implementation that includes the following tasks: (1) coordinate and lead project kickoff and biweekly progress meetings, (2) develop and submit progress reports, (3) conduct internal and external shareholder outreach, (4) provide engineering services, (5) develop solicitation documents, review proposals and assist with contractor selection, (6) Programmable Logic Controller and/or Human Machine Interface programming and configuration, (7) SCADA software procurement assistance.

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.)

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].)

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 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.

Here, the very nature of a SCADA Master Plan requires the development of a framework to implement projects related to SCADA. A SCADA Master Plan includes various recommendations, and this Plan specifically included recommendations to hire a project manager to implement the Plan as well as contracting methods and related services the City should procure. Based on these facts, the contract with West Yost, that included the requirement they prepare the Plan, provided West Yost with duties to advise the City on public contracting; therefore, West Yost is subject to Section 1090.

The next issue is whether West Yost participated in making the subsequent contract to implement the Plan 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.)

As noted above, West Yost had to make recommendations to the City given that is the very nature of a SCADA Master Plan. West Yost recommended the City hire a project manager and recommended contracting methods and related services the City should procure. In other words, the subsequent contract is simply a contract to implement the Plan that West Yost created under the initial contract as recommended by West Yost. Therefore, West Yost will be considered to have participated in the making of the subsequent contract under Section 1090.

Accordingly, Section 1090 prohibits the City from entering a subsequent contract with West Yost for project management services to implement the Plan that West Yost created under the initial contract with the City.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Valerie Nuding
Counsel, Legal Division

VN:aja