



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 13, 2023

Lauren B. Langer
of BEST BEST & KRIEGER LLP
City of Downey
300 South Grand Avenue, 25th Floor
Los Angeles, California 90071

Re: Your Request for Advice
Our File No. A-23-119

Dear Ms. Langer:

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 Los Angeles 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 Downey enter a contract with a Firm to install a new pre-engineered metal building as part of the City's Space Shuttle Exhibit & Education Building Project when it entered a previous contract with the same Firm for the design and fabrication of the building or must the City contract for both services in the same contract?

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

The City may enter a second contract with the same Firm for the installation of the pre-engineered metal building notwithstanding the initial contract for the design of the building. Based upon the facts provided, the Firm would only be providing design services to the City under the first contract and would not be engaging in or advising the City on public contracting. Thus, the City is not prohibited from entering a second contract with the Firm for the installation of the building.

FACTS AS PRESENTED BY REQUESTER

The City of Downey (“City”) intends to improve the Columbia Memorial Space Center, which is commonly referred to as the City’s Space Shuttle Exhibit & Education Building Project (“Shuttle Exhibit Project”). The City is currently finalizing the design for the Shuttle Exhibit Project, which was anticipated to be competitively bid in November 2023, but may now be delayed because of other Project-related issues.

The Shuttle Exhibit Project is an addition to the campus of the Columbia Memorial Space Center comprised of a new pre-engineered metal building (“PEMB”) exhibit building, a smaller building of traditional construction to house two STEM learning spaces, and related site improvements. LPA Architects (“Architect”) is the architect of record currently responsible for the design of the Shuttle Exhibit Project. The PEMB will house the Space Shuttle Inspiration and other exhibits, as well as staff offices, storage, and support spaces (“Project PEMB”). The design, fabrication, delivery, and installation of the Project PEMB is not a service provided by the Architect, rather the City will need to hire a qualified firm (Firm) to perform the services related to the Project PEMB. PEMBs are typically first designed by the manufacturer who then also fabricate the steel and other associated design components. Generally, the specifications for the design of a PEMB are technical in nature and not proprietary.

The Architect has nearly completed the entire design of the Shuttle Exhibit Project but cannot complete the final design of the foundation and other associated site work for the Shuttle Exhibit Project until it receives the design of the Project PEMB from the selected Firm. The City has not been able to locate an engineer willing to only design and fabricate the PEMB (in which case the Architect would retain such an engineer as a subconsultant) citing insurance issues. The labor to install the Project PEMB makes up a small portion of the overall cost to construct Shuttle Exhibit Project, constituting approximately only 13% of the overall construction cost.

The City would like to implement a plan that has two components. The first involves the design and fabrication of the necessary structural elements for the Project PEMB. For this component, the City plans to issue a Request for Proposals (“RFP”), inviting qualified and properly firms to submit proposals to perform the services related to the Project PEMB. The selected Firm will be required to design, fabricate, and deliver the structural steel framing, metal wall panels, metal roof panels, and associated trim and accessories for the Project PEMB. The City would like to offer the Firm the option to perform the installation work, consistent with the Architect’s technical specifications for the Project PEMB, the Scope of Work attached to the RFP, and the form Engineering & Fabrication/Services Contract attached to the RFP but seeks the advice of the FPPC on how to properly do so.

The City proposes two options for the installation phase of the Project PEMB, either the Firm could bid for the installation phase after the design and fabrication are complete, or the Firm could agree in the initial contract to be the designated subcontractor on the installation phase and will subcontract with the general contractor chosen for the construction of the Shuttle Exhibit Project, in which case there would not be competitive bidding for the installation phase.

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.)

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 682 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.” (*Id.* at p. 245.)

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 City wants to hire a Firm to design and fabricate the Project PEMB and would also need a firm to install the Project PEMB along with the contractor that will be chosen to construct the Shuttle Exhibit Project. The City sees two options, either conduct a bidding process for a second contract for installation, or, if that is not permissible under Section 1090, contract with the initial Firm under one contract for all services. The Firm in this case would not be providing any advice on who to hire for the second contract or any criteria to be followed for installation in the second contract as the design of the Project PEMB is technical in nature.

Under these facts, the Firm's role in designing and fabricating the Project PEMB under the first contract is more akin to *Taber* - providing services to the City rather than advising on public contracting or transacting on behalf of the City. As such, the City would not be prohibited by Section 1090 to seek a second contract and conduct a bidding process that the Firm could participate in.

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

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