



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 13, 2023

Warren T. Green
Inland Empire Utilities Agency
Manager of Contracts, Procurement
6075 Kimball Avenue
Chino, CA 91708

Re: Your Request for Advice
Our File No. A-23-140

Dear Mr. Green:

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 San Bernardino 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

Does Section 1090 prohibit the Inland Empire Utilities Agency ("IEUA") from entering into contracts with three independent contractors for the design/design-build services phase of the Chino Basin Program (the "Program") where the IEUA already entered into contracts with the three contractors related to early stages of project discussion and development?

CONCLUSION

No. As explained in more detail below, while each of the independent contractors are subject to the provisions of Section 1090 based on their duties to assist IEUA with public

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.

contracting under their current contracts, IEUA may enter into subsequent contracts with the independent contractors for the Program's design/design-build services because the independent contractors are not participating in making those contracts through the performance of services they are providing under the current contracts.

FACTS AS PRESENTED BY REQUESTER

You are the Manager of Contracts, Procurement for the Inland Empire Utilities Agency ("IEUA"), which is currently engaged in the development of a significant and complex series of water-related projects referred to as the Chino Basin Program (the "Program"). IEUA has engaged several consultants in the early stages of project discussion and development.

IEUA initiated the Program as a proactive investment in managing the water quality of the Chino Groundwater Basin and in meeting regional water supply reliability needs. The Program's major elements include the Advanced Water Purification Facility ("AWPF"), aquifer replenishment wells, and external recycled water supplies from City of Rialto and the Western Riverside County Regional Wastewater Authority ("WRCRWA").

IEUA retained the professional services of Brown and Caldwell ("BC"), and their subconsultant Water Systems Consulting ("WSC") to prepare the preliminary design of the Program elements. In addition, IEUA has utilized the professional services of GEI Consultants to support in the planning and facilitating agreements with various State and local agencies.

The scope of work under the current contracts for BC, WSC, and GEI is as follows:

1. The BC team has been performing preliminary technical consulting work for the Program since early 2019, with emphasis on the AWPF element and related infrastructures. The current work elements being performed for IEUA by BC includes: developing and evaluating facility alternatives; conceptual designs and cost estimates and documentation of the design criteria and approach used to evaluate aquifer replenishment alternatives; preliminary design of the AWPF; and preliminary design and cost estimating of pump station and pipeline to connect the City of Rialto recycled water to the AWPF.²

2. WSC, BC's subconsultant,³ has been performing preliminary design of a pump station and pipeline to connect the City of Rialto recycled water to the AWPF as well as design and bidding support for the three exploratory aquifer replenishment wells.

WSC prepared the bid documents which include the technical specifications for the drilling of the three exploratory aquifer replenishment wells. During the bid phase, WSC attended a pre-bid job walk with IEUA staff and supported IEUA during the bid phase by responding to questions from the drillers. Drilling the three exploratory aquifer replenishment wells is planned to obtain

² You anticipate that BC will be interested in pursuing the design/design construction of one of the three major technical components of the Program consisting of the AWPF, Rialto Conveyance, and the Aquifer Replenishment Wells.

³ WSC's scope of work is contained in BC's contract with IEUA. WSC provides its work product and reports to BC.

specific hydrogeological data needed to ultimately design the permanent aquifer replenishment wells. In the future, WSC may be interested in the contract for the design of the permanent aquifer replenishment wells.

3. The only contribution GEI has made to the preliminary Program design services is attributed to a single employee from GEI who provided a peer review of the bid documents for the drilling of the exploratory wells. The employee's role was limited to providing quality assurance and quality control (peer review) of the bid documents since the scope of work is very specialized and is considered as a highly specialized type of work to the IEUA, which strategically requested the peer review by the consultant (GEI) separate from the design consultant who prepared the bid documents (WSC).

GEI has mainly provided support in the development of agreements with various state agencies such as an exchange agreement between Department of Water Resources (DWR) and Metropolitan Water District (MWD) to facilitate the proposed Chino Basin Program – State Water Project water exchange, an operations agreement between DWR and California Fish and Wildlife (CDFW) to facilitate pulse flows as a result of the water exchange, and an operations agreement with MWD to facilitate the water exchange.

GEI has also provided support in engagement with state agencies to develop public benefits contracts with DWR, CDFW, and State Water Regional Control Board to administer emergency response, ecosystem, and water quality benefits. In addition, GEI prepares progress reports and adaptive management actions as required by the Water Storage Investment Program (WSIP) regulations. GEI has staff who are subject matter experts on the administration of the WSIP regulations.

The agreements GEI is assisting with are not associated with the design/design construction services GEI would potentially propose for future Program phases. In addition, you confirmed that none of the services being performed by BC, WSC, and GEI under their current contracts involves assisting IEUA with the making of contracts for the design/design-build services for future phases of the Program.

The current contracts with each of these consultants will be completed prior to the future Program procurements in question. In addition, none of the three consulting teams will have any role in the preparation of the contracts related to the future contracts for the design/design-build services phase of the Program. IEUA will review all of the work products, which will also be peer reviewed by IEUA's Owner Engineering firm, and the work products will be referenced in the future Request for Proposals ("RFPs"). In addition, all of the work products will be publicly posted utilizing PlanetBids during the subsequent round of RFPs. The solicitation period will be adequate to give enough time to all potential bidders to review said packages. IEUA alone, without input from any subcontractors, will make all of the decisions about the scope of work in subsequent Program contracts, which will be executed utilizing the IEUA's Engineering Design Guidelines and Procurement Ordinance as the foundation.⁴

⁴ The Engineering Consultant Guidelines communicate design preferences of the IEUA to its consulting engineers/designers to improve consistency and efficiency to project deliveries. The IEUA's Procurement Ordinance is

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 any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective agencies. (*Stigall v. 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.)

A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable or are plainly to the public entity’s advantage. (*Id.* at pp. 646-649.) In addition, courts have recognized that Section 1090’s prohibition must be broadly construed and strictly enforced. (*Stigall, supra*, at pp. 569-571; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-580; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) An important, prophylactic statute such as Section 1090 should be construed broadly to close loopholes and should not be constricted and enfeebled. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1334.)

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”].)

Section 1090 provides, in part, that “[m]embers 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.”

Independent Contractors Subject to Section 1090

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City, supra*, at pp. 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291.) The rule applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

The first issue is whether any of the three subcontractors are considered to be an “officer” subject to the provisions of Section 1090 as a result of their duties under the current contracts. On this issue, the California Supreme Court held that the term “officers” in Section 1090 applies to “outside advisors [independent contractors] with responsibilities for public contracting similar to those belonging to formal officers.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230,

237-240.) There, the Court explained that Section 1090 applies in that 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.) Thus, Section 1090 liability extends only to those independent contractors entrusted with “transact[ing] on behalf of the Government.” (*Id.* at p. 240.)

WSC (Water Systems Consulting)

According to the facts, WSC is performing preliminary design services for the Program under the initial contract. WSC also prepared the bid documents, which included the technical specifications, for the drilling of three exploratory aquifer replenishment wells. During the bid phase, WSC attended a pre-bid job walk with IEUA staff and supported IEUA during the bid phase by responding to questions from the drillers. These facts plainly show that WSC has public contracting duties under the initial contract that it is required to perform on behalf of IEUA; it is therefore considered an “officer” subject to the provisions of Section 1090 under the initial contract.

BC (Brown and Caldwell)

The facts state that under the initial contract, BC has performed preliminary technical consulting work for the Program including the development and evaluation of facility alternatives as well as the preliminary design of the AWPf and pump station and pipeline that will ultimately connect the City of Rialto recycled water to the AWPf. These facts state that BC’s actual duties under the initial contract did not include engaging in or advising IEUA on public contracting for any future design/design construction contracts by, for example, preparing a Request for Proposals or by assisting IEUA in selecting a contractor for the Program.

However, it is significant that the scope of work for BC’s subcontractor, WSC, is contained in BC’s contract with IEUA, and that WSC provides its work product and reports to BC. Because the provisions of Section 1090 are to be broadly construed and strictly enforced, we find that BC has public contracting duties by virtue of its subcontract with WSC and is therefore considered an “officer” subject to the provisions of Section 1090.

GEI (GEI Consultants)

Under the current contract, a GEI employee provided a peer review of the bid documents prepared by WSC for the drilling of the exploratory wells. GEI has also assisted IEUA in the development of agreements with various state agencies such as an exchange agreement between DWR and MWD and has assisted with state agency public benefit contracts to administer emergency response, ecosystem, and water quality benefits. Therefore, GEI is considered an “officer” subject to the provisions of Section 1090 because it has public contracting duties under the current contract that it is required to perform on behalf of IEUA.

Accordingly, based on the facts provided, WSC, BC and GEI are all subject to Section 1090.

Participating in Making a Contract

The next issue is whether, for purposes of Section 1090, any of the three independent contractors participated in making the proposed design/design construction contracts concerning the three major technical components of the Program (AWPF, Rialto conveyance, and the permanent aquifer replenishment wells) through the services they have provided under their initial contracts. Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, 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.)

Importantly, the Supreme Court explained that “Section 1090 prohibits officials from being ‘financially interested in any contract made by them in their official capacity.’ Officials make contracts in their official capacities within the meaning of section 1090 if their positions afford them ‘the opportunity to ... influence execution [of the contracts] directly or indirectly to promote [their] personal interests’ and they exploit those opportunities.” (*Sahlolbei, supra*, at p. 246 quoting *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052 [“[T]he evidence was ample to support the conclusion that the defendant had the opportunity, whatever his job classification, to direct a steady flow of [public money] to a concern in which he was interested, personally, and that he did so”].)

WSC (Water Systems Consulting)

While WSC prepared the bid documents, including the technical specifications, for the drilling of three exploratory aquifer replenishment wells, you state that WSC may be interested in the future contract to design the permanent aquifer replenishment wells, a separate and distinct contract. There are no facts suggesting WSC has been in a position to influence the contract for the permanent wells, much less that it has done so. In fact, WSC was never in a position to influence that contract because you state that drilling the three exploratory wells will provide specific hydrogeological data needed to ultimately design the permanent aquifer replenishment wells. In addition, you confirmed that WSC will have no role in preparing any of the contracts related to the future contracts for the design or construction phase of the Program, including design of the permanent wells.

Because there are no facts indicating WSC has had any opportunity to influence the execution of the future contract for the design of the permanent aquifer replenishment wells through services it has provided under the initial contract, Section 1090 would not prohibit IEUA from entering into a subsequent contract with WSC for that specific contract or any of the other contracts related to the design or design-build services for the Program.

BC (Brown and Caldwell)

There are no facts suggesting BC has participated in the making of any of the future design/design-build contracts for the Program. While BC has performed preliminary technical consulting work for the Program including the development and evaluation of facility alternatives as well as the preliminary design of the AWPF and pump station and pipeline that will ultimately connect the City of Rialto recycled water to the AWPF, these facts do not suggest that it has had the

opportunity to influence any of the future contracts in its favor, or that it has actually done so, through services provided under the initial contract.

Moreover, while the work products from the consultants, including BC, will be referenced in the future Requests for Proposals after being reviewed by IEUA (and its Owner Engineering firm), you state that none of the services being provided by the consultants under their current contracts involves assisting IEUA with the preparation of the future Program contracts and that IEUA alone, without input from the consultants, will make all of the decisions about the scope of work in those contracts. Therefore, Section 1090 would not prohibit IEUA from entering into a subsequent contract with WSC for any of the future contracts related to the design/design-build services for the Program.

GEI (GEI Consultants)

As with the other independent contractors, IEUA is prohibited from entering into any subsequent contract with GEI that GEI participated in making under the current contract. For example, just as WSC would not be able to enter into the contract to drill the exploratory wells because it prepared the bid documents for the drilling of those wells, neither would GEI because of its duties to review the bid documents.

However, IEUA may enter into a subsequent contract with GEI for other design/design-build services of the Program. You confirmed the exchange agreement and public benefit contracts that GEI assisted IEUA in making are for services that are not associated with the design or design-build services for which GEI would potentially submit a bid, and there are no facts indicating that GEI has had a role in advising IEUA on design/design-build contracts unrelated to the exploratory wells. Therefore, based on these facts and for the same reasons provided above, IEUA may enter into a subsequent contract with GEI for design/design-build services associated with the Program.

To reiterate, the purpose of Section 1090 is to prohibit self-dealing. Here, there are no facts suggesting that any of the independent contractors have been in a position to leverage, or did leverage, their public positions in order to improperly influence the scope of work for the contracts relating to the Programs future design/design-build services. And where no evidence of self-dealing exists, no interest is served by disqualifying any of the independent contractors from bidding on those future contracts solely based upon services provided in prior contracts. (See, e.g., *Stroud* Advice Letter, No. A-18-276.)⁵

⁵ We note that the Legislature enacted a new statute under AB334, Government Code Section 1097.6, effective January 1, 2024, which is intended to clarify the law in this type of situation to assist in the determination whether Section 1090 prohibits a public entity from entering into a contract with an independent contractor for a subsequent phase of a project as a result of an initial contract with that independent contractor for the same project. We further note that our conclusion in this matter would not change under the new law.

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:aja