



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 26, 2024

Scott Runyan
Principal Assistant County Counsel
County of San Bernardino
385 North Arrowhead Avenue, Fourth Floor
San Bernardino, California 92415-0140

Re: Your Request for Advice
Our File No. A-24-016

Dear Mr. Runyan:

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 San Bernardino County Fire Protection District ("SBCFPD") from contracting with Rain Industries, Inc. ("RAIN") to provide consulting services for the RAIN Pilot Deployment Project on Little Mountain, which will demonstrate the capability of autonomous aircraft known as RAIN to contain wildfires, given RAIN assisted SBCFPD with its successful grant application to fund the project through the Windward Fund?

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. As explained below, while RAIN entered into an agreement for purposes of Section 1090 to assist SBCFPD in preparing the grant, RAIN did not have duties to engage in or advise on public contracting *on behalf* of SBCFPD such that it is considered an “officer” under Government Code section 1097.6. Accordingly, Section 1090 does not prohibit SBCFPD from contracting with RAIN to provide consulting services for the project under the grant.

FACTS AS PRESENTED BY REQUESTER

SBCFPD staff contacted RAIN about its willingness to perform a demonstration of the capability of autonomous aircraft to contain wildfires as SBCFPD wishes to use advanced technology for the early detection of wildfires. RAIN made SBCFPD aware of a grant program by the Windward Fund that could pay for this project. Windward Fund is a 501(c)(3) organization which fiscally sponsors various conservation programs, connecting philanthropic donors and nonprofit organizations with shared goals of protecting the environment. RAIN provided input to SBCFPD on SBCFPD’s grant application to the Windward Fund for grant funds associated with the RAIN Pilot Deployment Project on Little Mountain.

On February 24, 2023, SBCFPD’s Chief Executive Officer, in accordance with County Policy No. 05-13, authorized SBCFPD to submit this grant application to the Windward Fund. On or about June 21, 2023, SBCFPD was notified that it was awarded a grant of \$546,353 to fund this project. Windward Fund has provided SBCFPD a proposed grant award agreement to accept the grant funds.

The Windward Fund’s proposed grant award agreement provides that the purpose of the grant is to fund SBCFPD’s “Little Mountain RAIN System project (the “Project”), as described in the proposal (SBCFPD) provided to WINDWARD dated February 2023....” SBCFPD’s grant application provided in part that:

- “To implement the Little Mountain autonomous aerial system pilot project which will utilize the Rapid Wildfire Containment System (RAIN) to pre-empt fires in the area through a network of connected autonomous aircraft known as the Rain MK2.”
- “The Little Mountain Project will utilize the Rapid Wildfire Containment System (RAIN) to pre-empt fires in the area which will be detected through a network of connected cameras known as the ALERTWildfire Camera Network which has cameras located on Little Mountain in the City of San Bernardino. If a fire is detected, an autonomous aircraft is launched which will deploy a compressed-air foam retardant to contain the ignition. The objective is to get to the ignition quickly and contain the blaze on the first response.”
- “Funding in the amount of \$546,353 is being requested to fund consultant services. SBCFPD may enter into a non-competitive contract with Rain Industries, Inc., (“Consultant”) based on the proprietary function of the Rapid Wildfire containment System that integrates early detection and rapid response to wildfire in which the project for this grant application is focused on. The Consultant will lead the effort to fully implement a demonstration of the RAIN system within a 3-phase plan.”

Consistent with the grant application and the proposed grant award agreement, SBCFPD staff has prepared a non-competitive agreement with RAIN for SBCFPD's RAIN Pilot Deployment Project on Little Mountain. As previously described, the project is a pilot project which will demonstrate the deployment of an autonomous aircraft known as RAIN. The RAIN aircraft (i.e. drone) was developed by Rain Industries, Inc. and will be used to contain a controlled burn on Little Mountain in the City of San Bernardino. This demonstration of wildfire containment will be led by RAIN and will occur in three stages: detection, response, and containment. RAIN will use a network of cameras known as the ALERTWildfire Camera Network which has cameras located on Little Mountain to detect any fires. If a fire is detected, RAIN is launched and will deploy a compressed-air foam retardant to begin to put the fire out and contain the ignition. The objective is to get to the ignition site quickly and contain the blaze on the first response.

SBCFPD has not entered into any written contracts with the Windward Fund or RAIN for this project. In addition, SBCFPD policy requires both the grant award agreement with the Windward Fund and the contract with RAIN to be approved by the SBCFPD Board of Directors. The grant award agreement between SBCFPD and the Windward Fund, and the contract between SBCFPD and RAIN will be considered for approval by the SBCFPD Board of Directors on the same Board meeting date and agenda item.

ANALYSIS

Section 1090 generally prohibits public officers, 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.)

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.) Moreover, Section 1090 prohibits 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].)

Independent Contractors Subject to Section 1090

In general, "[o]fficials 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." (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 246.)

While Section 1090 refers to “officers or employees” of government entities, the California Supreme Court confirmed that “the Legislature did not intend to categorically exclude independent contractors from the scope of section 1090.” (*Sahlolbei, supra*, at p. 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.)

In 2023, the Legislature passed AB 334 enacting Section 1097.6, effective January 1, 2024, which is intended to clarify the law in situations where a public entity that has entered a contract with an independent contractor to perform one phase of a project seeks to enter a second contract with that independent contractor for a subsequent phase of the same project. Pursuant to Section 1097.6(a)(1), an independent contractor whose duties under an initial contract did not require it to engage in or advise on public contracting *on behalf of the public entity* will not qualify as a “officer,” and therefore not be subject to Section 1090.²

According to the facts, SBCFPD had RAIN assist with SBCFPD’s grant application to the Windward Fund for grant funds to be used for the RAIN Pilot Deployment Project on Little Mountain.³ SBCFPD did not have a written contract with RAIN or provide any consideration for this assistance. However, because the grant application to the Windward Fund was for the express purpose of funding the RAIN project with RAIN as a consultant, the award of any grant to SBCFPD necessarily meant that SBCFPD would contract with RAIN to be the consultant for the project. An initial question, therefore, is whether this arrangement constituted a contract for purposes of Section 1090.

To determine whether a contract is involved in a decision, the Section 1090 analysis looks to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig*, (1996) 48 Cal. App. 4th 289, 351 citing *Stigall, supra*, 58 Cal.2d at pp. 569, 571, See also *Wilson* Advice Letter No. A-16-269). In this regard, “[a] contract is an agreement to do or not to do a certain thing.” (Civ. Code, § 1549.) “It is essential to a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and 4. A sufficient cause or consideration.” (Civ. Code, § 1550.)⁴

In the present situation, the elements necessary to form a contract are present. Therefore, consistent with the direction to avoid narrow and technical definitions of “contract,” we find the arrangement where RAIN agreed to provide assistance to SBCFPD regarding SBCFPD’s grant

² “Engaging or advising on a public contracting” means to prepare or assist the public entity in preparing solicitation materials (e.g., a request for proposals or request for qualifications) for a subsequent contract. (Section 1097.6(a)(2).)

³ RAIN actually made SBCFPD aware of the Winward Fund grant program that could be used to pay for the project.

⁴ The Attorney General cited to these contracting principles when determining whether a development agreement constituted a contract for purposes of Section 1090. (See 78 Ops.Cal.Atty.Gen. 230, 233 (1995).)

application for the express purpose of funding the RAIN project constitutes a contract under Section 1090 despite the lack of a written contract or up-front consideration.

The next issue is whether by entering into such an agreement, RAIN had duties to engage in or advise on public contracting on behalf of SBCFPD to be considered an “officer” under Section 1097.6, and therefore subject to Section 1090. *Taxpayers Action Network v. Taber Construction, Inc.*, (“*Taber*”) (2019) 42 Cal.App.5th 824, is instructive. There, a school district contracted with Taber Construction, a contractor, to provide preconstruction services with the express intent to enter a subsequent contract with Taber for construction of the project. The plaintiff argued that Section 1090 prohibited the school district from entering the subsequent contract with Taber alleging that Taber, through its provision of preconstruction services under the initial contract, “made” the subsequent contract. (*Id.* at p. 835.)

The court in *Taber* initially noted that Section 1090’s prohibition only applies when a contract is made by a financially interested party in its official capacity – and where that party is an independent contractor, Section 1090 only applies when the independent contractor is “entrusted with ‘transact[ing] on behalf of the Government.’” (*Id.* at p. 836, quoting *Sahlolbei, supra*, at p. 240.) The court then found that there was no evidence Taber was transacting *on behalf* of the school district because the contract for preconstruction services did not require Taber to select a firm to complete the project; instead, the school district contracted with Taber to provide preconstruction services in anticipation of Taber itself completing the project. (*Ibid.*) In this way, Taber “provided those services (including 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.*, emphasis in original.)⁵

The present situation is similar. As mentioned, RAIN agreed to provide assistance to SBCFPD regarding SBCFPD’s grant application to the Windward Fund for the express purpose of funding the RAIN project and RAIN’s consulting services.⁶ As in *Taber*, RAIN was not transacting on behalf of SBCFPD because the contract for grant application assistance did not require it to select a firm to be the consultant under the grant if awarded; instead, the grant application and proposed grant award agreement confirm that SBCFPD contracted with RAIN to provide those services in anticipation of RAIN performing the consulting work under the grant. In this way, RAIN provided the services under the initial contract in its capacity as the intended provider of consulting services under the grant, not in a capacity as a *de facto* official of SBCFPD. Indeed, RAIN had no ability to use its position under the initial contract to improperly influence SBCFPD to enter into the subsequent contract where RAIN had already been selected to perform the consulting work.

⁵ The *Taber* court also noted there was no evidence Taber could have used its preconstruction consulting work to improperly influence the school district to enter into the subsequent contract because Taber had already been selected for the entire project prior to providing the preconstruction services under the initial contract. (*Id.* at p. 836.) In addition, while the school district had not actually entered the subsequent contract with Taber and thus retained an “out” from entering it, that was no different than a single contract containing various “outs” for the school district or making the contract terminatable at the school district’s convenience. (*Id.* at pp. 832-33.)

⁶ This is confirmed by the grant application and the proposed grant award agreement which expressly provide “Funding in the amount of \$546,353 is being requested to fund consultant services. SBCFPD may enter into a non-competitive contract with Rain Industries, Inc., (“Consultant”) based on the proprietary function of the Rapid Wildfire containment System...”

Accordingly, because RAIN does not qualify as an “officer” under Section 1097.6, Section 1090 does not prohibit SBCFPD from contracting with RAIN to provide consulting services for the RAIN Pilot Deployment Project on Little Mountain.

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

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