



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 23, 2024

Alan J. Peake
City Attorney
City of Maricopa
1920 20th St.
Bakersfield, CA 93301

Re: Your Request for Advice
Our File No. A-24-006

Dear Mr. Peake:

This letter is in response 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 Kern 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 contractor American Ramp Company (American Ramp) from entering into a new agreement with the City of Maricopa (the City) to construct a bike track where American Ramp designed the bike track as a subconsultant for BHT Engineering, Inc. (BHT), which designed the City's expanded park project that included the bike track as the main feature among several other improvements in the overall project?

CONCLUSION

No. Pursuant to Section 1097.6(a), American Ramp is not an "officer" subject to Section 1090 because: (1) it was an independent contractor under the initial contract with the City which

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.

now seeks to contract with American Ramp for construction of a later phase of the same project; and (2) American Ramp's duties and services related to the initial contract did not include engaging in or advising on public contracting on behalf of the City. Accordingly, Section 1090 does not prohibit the City from contracting with American Ramp to construct the Track.

FACTS AS PRESENTED BY REQUESTER

The City of Maricopa owns and operates Maricopa City Park (the Park), an aging community park. In 2019, the City obtained an irrevocable dedication of three parcels totaling approximately 2.29 acres to be used for expansion of the Park. In March 2020, the City was awarded funding for the expansion of the Park by the California Department of Parks and Recreation under the 2018 Parks Bond Statewide Parks Development and Community Revitalization Program (the Grant). Construction of the expanded Park will consist of the design and installation of an asphalt pump bike track (the Track) and walking trail along with other associated improvements which will benefit the community along with full rehabilitation of the existing park to the south (the Project).

The City released a Request for Proposal (RFP) for design of the Project. Because the central focus of the Project was the design and construction of the Track, the successful bidder was required to have significant experience in the design and construction of similar type facilities. Potential respondents lacking required bicycle pump track design and construction experience were encouraged to affiliate with an experienced party to respond to the City's RFP. BHT responded to the RFP and included American Ramp as a subconsultant that had experience in the design of asphalt pump bike tracks. BHT's proposal was selected by the City to perform the design work on the Project.

The Track is the "main feature" of the Project. Part of BHT's initial design included the Track, plans and designs for which were done by American Ramp. Because it appeared that the cost of the entire Project might exceed the funds under the Grant and the City has no other funds available for constructing the Project, the City decided to split Project construction in two, with the primary feature of the Track being constructed first. Although there was some input from City staff and the City Council on some of the additional features to be added to the Park, the design of the Track was done by American Ramp through BHT. The Track was designed for the space available as well as the topography. The City Council approved the plans and specifications and authorized a call for bids for the Track phase of the construction. Sealed bids were opened by the City and only one was received from American Ramp for \$688,033.00, which was under the estimate for this part of the overall Project. American Ramp was not a part of the bidding process on behalf of the City, i.e., bid package creation, advertising, etc. The bid award has not been made by the City.

The City had limited contact with American Ramp throughout this process. Prior to the Project, City staff contacted American Ramp to ascertain what a pump track is and how it is constructed. Staff received general information and decided to make a pump track as part of the request for Grant funding for the Project. Once the Grant was received, BHT responded to the City's RFP and American Ramp was identified as a subconsultant on the design of the Track. The City had no input on the original design of the Track. The original design of the entire Project appeared to be over budget and the City requested that the Project, along with the Track, be downsized. There was no meeting between staff and American Ramp as to how the downsizing of the Track should take place. American Ramp was solely responsible for the Track's final design.

ANALYSIS

A. Independent Contractors under Section 1090.

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.)

B. American Ramp is Not an “Officer” Subject to Section 1090.

The Legislature recently enacted Section 1097.6, which codifies prevailing legal authority set forth in case law and FPPC advice letters relevant to the question at issue here: whether a subsequent contract with an independent contractor for a later phase of the same project violates Section 1090. Section 1097.6(a) provides:

- (1) For a public entity that has entered into a contract with an independent contractor to perform one phase of a project and seeks to enter into a subsequent contract with that independent contractor for a later phase of the same project, the independent contractor is not an “officer” under this article if the independent contractor's duties and services related to the initial contract did not include engaging in or advising on public contracting on behalf of the public entity.
- (2) For purposes of this section, “engaging in or advising on public contracting” means preparing or assisting the public entity with any portion of the public entity's preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity.

Here, the facts provided state that American Ramp was a consultant for the BHT contract, providing plans and designs for the Track, which was the primary feature among the Project’s several improvements designed by BHT. The City seeks to contract with American Ramp under a subsequent contract to construct a later phase of the same Project.

The facts provided further indicate that American Ramp did not engage in or advise on public contracting on behalf of the City. Under the initial design contract, American Ramp was a subconsultant directed by BHT, not the City. City staff’s contact with American Ramp was limited to ascertaining general information about pump tracks before the Project was conceived and before the City sought the Grant for the Project. American Ramp was not identified as a subconsultant on the design of the Track until after BHT responded to the City’s initial RFP. The City had no input on the design of the Track. American Ramp was solely responsible for the final Track design. The City did not consult with American Ramp after identifying budget concerns, the need to downsize the Project, or its decision to construct the Track first. These facts demonstrate that American Ramp’s duties and services related to the initial contract did not include engaging in or advising on public contracting on behalf of the City.

Pursuant to Section 1097.6(a), American Ramp is not an “officer” subject to Section 1090 because: (1) it was an independent contractor under the initial contract with the City which now seeks to contract with American Ramp for construction of a later phase of the same project; and (2) American Ramp’s duties and services related to the initial contract did not include engaging in or advising on public contracting on behalf of the City. Accordingly, Section 1090 does not prohibit the City from contracting with American Ramp to construct the Track.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

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