



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

May 22, 2019

Daniel G. Sodergren
City Attorney
P. O. Box 520
Pleasanton, CA 94566-0802

Re: Your Request for Advice
Our File No. A-19-057

Dear Mr. Sodergren:

This letter responds to your request for advice on behalf of the City of Pleasanton regarding the conflict of interest provisions of Government Code section 1090. Please 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.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Alameda 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 City of Pleasanton from entering into an energy services contract with the company that established the contract's scope of work as well as terms and conditions related to the implementation of the scope of work through its performance of services under a previous contract?

CONCLUSION

Yes. Section 1090 would prohibit the City from entering into the energy services contract with the company that established the contract's scope of work as well as terms and conditions related to the implementation of the scope of work through its performance of services under a previous contract.

FACTS

Government Code sections 4217.10 - 4217.18 establishes the Energy Conservation Law, a process for public agencies to develop energy conservation, cogeneration, and alternate energy supply projects at public facilities.¹ Under the authority set forth in the Energy Conservation Law, the City is interested in completing various energy conservation projects at some of its City facilities. Although not required to do so, the City invited certain qualified energy services companies to conduct preliminary assessments and submit proposals.

The City is considering two contracts with Syserco Inc., one of the energy services companies that submitted a proposal.

The first contract would be for: 1) the preparation of a detailed scope of work and firm-fixed implementation price for the proposed installation of energy/utility efficiency equipment; 2) the calculated cost savings as a result of implementing the scope of work; 3) a schedule for implementation of the project; and 4) terms and conditions related to the implementation of the scope of work.

The second contract would incorporate the scope of work and information produced as a result of the first contract and would be for: 1) engineering; 2) procurement; 3) installation; 4) construction; and 5) training services.

If the City enters into the first contract, it would not be legally obligated to enter into the second contract.

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 financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) 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.)

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."

¹ An "energy services contract" is defined as "... a contract entered into by a public agency with any person, pursuant to which the person will provide electrical or thermal energy or conservation services to a public agency from an energy conservation facility." (Section 4217.11 (t).) "Energy conservation services" are defined as "... the electrical, thermal, or other energy savings resulting from conservation measures, which shall be treated as a supply of such energy." (Section 4217.11(d).) An "energy conservation facility" is defined as "... alternate energy equipment, cogeneration equipment, or conservation measures located in public buildings or on land owned by public agencies." (Section 4217.11 (e).)

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 Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291 [“statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] ... [¶] A person merely in an advisory position to a city is affected by the conflicts of interest rule”].) This long-standing rule was recently affirmed by the California Supreme Court (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230), and it applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

The purpose behind this inclusiveness of the definition is to ensure that independent contractors who are essentially performing a public function, though temporarily, provide the same “fealty expected from permanent officers and employees.” (46 Ops.Cal.Atty.Gen 74 (1965).) In *Hub City*, the court stated that a person’s status as an official under Section 1090 “turns on the extent to which the person influences an agency’s contracting decisions or otherwise acts in a capacity that demands the public trust.” (*Hub City, supra*, 186 Cal.App.4th at p. 1125.)

Most recently in *Sahlolbei*, the California Supreme Court concluded that Section 1090’s reference to “officers” applies to “outside advisors with responsibilities for public contracting similar to those belonging to formal officers” (*Id.* at p. 237), and held that not all independent contractors are covered by Section 1090 – liability extends only to independent contractors who can be said to have been entrusted with “transact[ing] on behalf of the Government” (*Id.* at p. 240 quoting *Stigall, supra*, 58 Cal.2d at 570.)

With respect to making a contract, 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.)

Here, the first prospective contract would require Syserco to prepare the following: a detailed scope of work and firm-fixed implementation price for the proposed installation of energy/utility efficiency equipment; the calculated cost savings as a result of implementing the scope of work; a schedule for implementation of the project; and terms and conditions related to the implementation of the scope of work. The second contract would then incorporate the scope of work and information Syserco prepared under the first contract and would require it to perform engineering, procurement, installation, construction and training services.

As proposed, Syserco will be developing and drafting the scope of work on the City’s behalf that will establish the entire basis of the second contract. Based on the facts provided, Syserco would be subject to Section 1090 because, as a consultant under the initial contract, it would have responsibilities for public contracting similar to those belonging to the City’s formal officers. These responsibilities include preparing items such as a detailed scope of work and schedule for

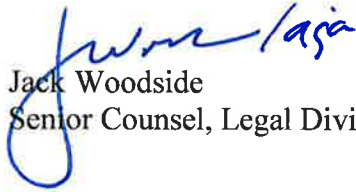
implementing the scope of work to be incorporated the second contract. The City would thus be entrusting Syserco to transact on its behalf. Moreover, based on these same facts, Syserco would directly participate in the making of the second contract through its performance of services under the first contract.

Accordingly, Section 1090 would prohibit the City from entering the second contract with Syserco where, as a consultant to the City under the first contract, Syserco established the second contract's scope of work as well as terms and conditions related to the implementation of the scope of work.²

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Jack Woodside
Senior Counsel, Legal Division

JW:aja

² We note that you have also asked whether provisions of the Energy Conservation Law create any exceptions to Section 1090. While we cannot opine as to the provisions of the Energy Conservation Law, we find no such exceptions within the provisions of Section 1090.