



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 01, 2021

Scott Adair
Director of Economic Development
County of Humboldt
825 5th Street STE 112
Eureka, CA 95501

Re: Your Request for Advice
Our File No. A-21-137

Dear Mr. Adair:

This letter responds to your request for advice for Humboldt County (“County”) 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 Humboldt 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).)

QUESTIONS

1. Is the Humboldt County Growers Alliance (“HCGA”) subject to Section 1090 in its role as an independent contractor for the County related to the County’s current cannabis marketing services request for proposals?

2. If yes, is the County prohibited from entering into a cannabis marketing services contract with HCGA’s partner organization, North Coast Small Business Resource Center, doing

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 18109 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.

business as Humboldt County Community Business Development Center (“HCBDC”) under Section 1090, if HCBDC submits a proposal without the participation of HCGA, specifically in regard to supplying staffing services?

CONCLUSIONS

1. Yes. HCGA is an independent contractor subject to Section 1090 due to its role in advising the County on its request for proposals for marketing services related to the County’s cannabis marketing strategy.

2. Yes. Section 1090 prohibits the County from contracting with HCBDC due to HCGA’s shared financial interest in the contract. Removing HCGA’s name or staffing resources from the proposal will not alter the inter-relationship and expectation of mutual benefit between the two organizations.

FACTS AS PRESENTED BY REQUESTER

Humboldt County Growers Alliance (“HCGA”), founded in 2017, is a non-profit trade association representing 260 licensed cannabis operators in Humboldt County. HCBDC, is a 501(c)(3) entity that shares an office, staff and is a “partner organization” of HCGA. The executive director for each HCGA and HCBDC is Natalynne DeLapp.

In March 2019, the County adopted “Project Trellis,” a program to provide business resources to local cannabis businesses through cannabis business micro-grants, marketing and a local equity program funded by the County’s cannabis tax allocation. This matter involves the marketing portion of Project Trellis and the County’s attempts to develop a cannabis marketing strategy and procure an entity to further refine and implement the strategy.

In September 2019, the County released a Marketing Request for Proposals (“RFP 1”) to procure proposals from “qualified full-service marketing agencies and/or marketing consultants” to create and implement a County collective cannabis branding, promoting, and marketing strategy. Over twenty proposals were received, including one by HCBDC, identifying itself as “an arm of HCGA.” Most of the proposals came from entities outside the County. A Marketing Ad Hoc Committee was formed to review and rank submissions and make recommendations to County staff. After reviewing the proposals, County staff determined the Marketing RFP process was not ready, placed the process on hold, and the Ad Hoc Committee was dissolved.

In April 2020, the County commissioned HCGA, the nonprofit trade association, to create a County Cannabis Marketing Assessment (“Marketing Assessment”) to “guide marketing planning through a strategic framework based on research.” The marketing assessment was to provide “[r]ecommendations for a planning and strategic programmatic framework for a Collective Cannabis Branding, Promoting and Marketing Strategy for Humboldt County” and “a series of policy recommendations.”

In October 2020, County staff met with Natalynne DeLapp, HCGA and HCBDC Executive Director, and Ross Gordon, HCGA Policy Director, to discuss public response and feedback to HCGA’s Marketing Assessment and steps forward. Executive Director DeLapp provided County

staff with the following four recommendations: “Option 1: No project, Option 2: Board of Supervisors Created Committee, Option 3: Government-Run Program, Option 4: Open up an RFP to Humboldt County nonprofit organizations to come up with a plan for how an organization would implement the marketing efforts.” HCGA’s “Option 4” included criteria by which to judge the capacity of an organization to fulfil its responsibilities.

In November 2020, County staff and HCGA presented the Marketing Assessment to the County Board of Supervisors. The Marketing Assessment provided 80 pages of data related to marketing the County’s cannabis industry. It also studied four regional marketing initiatives (such as Kona Coffee), identified eight findings related to those programs, and made thirty recommendations. Based on the Marketing Assessment recommendations and findings, County staff recommended the County abandon its former RFP process and issue a new RFP using the Marketing Assessment as the RFP framework. Staff further recommended, reflecting HCGA’s discussion of “steps forward” and “Option 4” noted above, the RFP “be directed toward Humboldt County based non-profit organizations who include members from, or collaborate with, the County’s cannabis business community and whose organizations mission or purpose includes providing service to the cannabis community and/or marketing Humboldt county products.”

In May 2021, the County issued a second Marketing Request for Proposal (“RFP 2”). This request sought proposals only from “Qualified Humboldt County-based nonprofit entities” to work with County staff. RFP 2 included a framework for the proposal to be built around the recommendations and findings of the Marketing Assessment. RFP 2 states, “Successful applicants for the Humboldt County Cannabis Marketing Campaign RFP will utilize the recommendations of the Humboldt County Marketing Assessment to guide their proposal.”

Only one proposal, the “HCBDC/HCGA marketing proposal,” was received in response to RFP 2. In the proposal, HCBDC describes “How HCBDC and HCGA Work Together.” HCBDC states in this proposal that it has an agreement with HCGA to “provide all staffing needs as the “Marketing Management Organization” under the anticipated contract, with a staffing services and financial agreement to be finalized based on the scope of services with the County. HCBDC’s proposal further describes HCGA as a “partner” organization, with the two organizations having a “developed understanding to facilitate collaboration, share resources and improve services provided by each organization.”

On September 28, 2021, due to its concerns that the relationship between HCGA and HCBDC may present a conflict of interest under Section 1090, the County vacated the RFP 2 process. The existing proposal from HCBDC/HCGA was rejected and disqualified. You confirmed by email that the RFP 2 process is no longer active, and that your request relates solely to the County’s current request for proposals, (“RFP 3”).

On September 29, 2021, the County released the third request for cannabis marketing proposals. Instead of limiting proposals to County-based nonprofit organizations, RFP 3 limits proposals to entities connected to a County-based entity. It seeks proposals from “a qualified Humboldt County-based entity” to work with County staff and leadership to develop a branding initiative for County grown cannabis, and related products and services. The RFP specifies that while collaborations with out of area agencies are acceptable, the “contracting agency” needs to be

a local entity that has a local office and staff. Similar to RFP 2, the “proposer” is to utilize and employ the recommendations in the County’s Marketing Assessment.

ANALYSIS

Section 1090

In this matter, we must determine if HCGA is subject to Section 1090 due to its role as an independent contractor for the County related to the County’s cannabis marketing request for proposals, and if so, if the County is prohibited from entering into contract with HCGA’s partner organization, HCBDC under Section 1090.

Section 1090 generally prohibits a public officer or employee from making or participating in the making of a contract in which he or she is financially interested. Section 1090 is concerned with financial interests, other than remote interests and noninterests, that prevent a public officer or employee from exercising absolute loyalty and undivided allegiance in furthering the best interests of his or her agency. (*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) 103Cal.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.)

Importantly, 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].)

The California Supreme Court stated in its recent case, that [t]he focus is on the substance, not the form, of the challenged transaction, “disregard[ing] the technical relationship of the parties and look[ing] behind the veil which enshrouds their activities.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 239 quoting *People v. Watson* (1971) 15 Cal.App.3d 28, 37.) Thus, the courts broadly construe Section 1090 and its key terms, “officer or employee,” “making or participating in the making of a contract,” and “financial interest.” Under Section 1090 the “making” of a contract includes “planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids,” and not just the moment of signing. (*Stigall, supra*, at p. 571.) Officials can be liable if they “had the opportunity to, and did, influence execution [of the contract] directly or indirectly to promote [their] personal interests.” (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) And, a “financial interest” is broadly interpreted to include indirect interests and future expectations of profit or loss. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645–646.)

Independent Contractors Subject to Section 1090

Although Section 1090 refers to “officers or employees” of government entities, the California Supreme Court has recognized that independent contractors fall within the scope of Section 1090 where the independent contractor has duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230.). The Court in *Sahlolbei* provided the following guidance:

... 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.

(*Id.* at p. 240.)

HCGA Status as an Independent Contractor under Section 1090

In this matter, the facts indicate HCGA is an independent contractor subject to Section 1090 due to its role in advising the County on the County’s request for proposals for cannabis marketing services. HCGA advised the County on its planning, preliminary discussions, and specifications for the County’s solicitation of bids in RFP 2. The facts show that HCGA advised the County in its meeting with County staff on “steps forward” with its “Option 4” that RFP bidding should be limited to Humboldt County nonprofit organizations. These are specifications to HCGA’s advantage, as evidenced by the facts. Staff followed this advice in the resulting RFP 2 and attracted only one bid, from HCGA’s partner organization, HCBDC. In revising its bid, the County is now limiting the RFP 3 bidding to Humboldt County-based entities, or to outside the area entities so long as the “contracting agency” is a local entity that has a local office and staff. It appears that RFP 3 is similarly based upon HCGA’s advice to limit the solicitation of bids. And, like the earlier limitation, this specification would also benefit HCGA and its partner organization, HCBDC, as they share a local Humboldt County office and staff.

HCGA and HCBDC: Related Entities

Next, we examine whether the County is prohibited from entering into contract with HCGA’s partner organization, HCBDC under Section 1090 for RFP 3. Specifically, you wish to know if HCBDC may submit a proposal under RPF 3 without the participation of HCGA in supplying staffing resources. Based on the above finding, under Section 1090, the County is prohibited from entering into a contract in which its independent contractor HCGA has a financial interest.

Based on the facts provided, HCGA has a financial interest in HCBDC for purposes of Section 1090, and the County may not enter into the marketing services agreement with HCBDC under Section 1090. HCGA has a financial interest in HCBDC because of its “partner” relationship (shared staff and resources and an “understanding to collaborate and improve services provided by each organization”), and, as such, HCGA has a financial interest in a contract between the County and HCBDC. Prohibited financial interests are not limited to express agreements for benefit and need not be proven by direct evidence and extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances. (*People v. Honig*, 48 Cal. App. 4th 289, 315.) As the Court stated in *Sahlolbei*, quoting several earlier cases, officials cannot “change hats” to obscure the substance of their actions. (*Sahlolbei, supra, at p. 246.*) Reducing HCGA’s role in a future proposal by HCBDC does not change the substance of the inter-relationship of the two organizations and expectation of mutual benefit in the contract at issue.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

LKH:dkv