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FAIR POLITICAL PRACTICES COMMISSION
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August 11, 2022

Warren Green
Manager of Contracts and Procurement
Inland Empire Utilities Agency
Municipal Water District
6075 Kimball Ave
Chino, California 91708

Re: Your Request for Advice
Our File No. A-22-067

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

Under Section 1090, may three contractors—Brown and Caldwell, Water Systems Consulting, and GEI Consultants—enter a Program Management/Owner Engineering Consulting services contract with the Inland Empire Utilities Agency (IEUA), given they have already contracted with IEUA to perform different services as part of the same project?

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

Based on the facts provided, Section 1090 does not prohibit Brown and Caldwell from contracting with IEUA for Program Management/Owner Engineering Consulting services because the scope of the company's duties do not appear to have involved the making of public contracts or transacting on behalf of IEUA; rather, Brown and Caldwell has rendered technical services *to* IEUA. In contrast, Water Systems Consulting and GEI Consultants appear to have engaged in or advised on public contracting, such that they have transacted *on behalf of* IEUA, rather than merely providing a service *to* IEUA. Accordingly, the Act prohibits Water Systems Consulting and GEI Consultants from entering the Program Management/Owner Engineering Consulting services contract with IEUA.

FACTS AS PRESENTED BY REQUESTER

The Chino Basin Project

The Chino Basin consists of about 235-square-miles of the upper Santa Ana River watershed. The Chino Basin is one of the largest groundwater basins in southern California. Cities and other water supply entities utilize groundwater for all or part of their municipal and industrial supplies; about 300 to 400 agricultural users continue to source their supply from the groundwater Basin. The Chino Basin is an integral part of the regional water supply system.

The Inland Empire Utilities Agency (IEUA) and local partners have developed long-term plans to implement a variety of new infrastructures to meet future needs for water reclamation and potable water supplies, while increasing resiliency and sustainability of the regional water resources management. The Chino Basin Program (CBP) is a first-of-its-kind program designed to help the region move beyond traditional water management practices and into a new era of water use optimization. The CBP promotes proactive investment in managing the water quality of the Chino Groundwater Basin and in meeting regional water supply reliability needs in the face of climate change, while leveraging California's interregional water supply system and the Chino Basin's future potential for water recycling to produce benefits to local, State, and federal interests.

The CBP operates through a series of PUT and TAKE operations. During a PUT operation, water will be recharged into the Chino groundwater basin. During a TAKE operation, the water recharged and stored from prior PUT cycles will be pumped from the Chino groundwater basin.

Forthcoming Program Management Contract

The IEUA is planning to solicit Program Management/Owner Engineering Consulting Services ("Program Management") to support the IEUA in the implementation of the CBP components. The schedule of these services is expected to be between five to eight years. Example scope elements, which will be included in the Program Management contract, are:

1. Manage deliveries of Program's various elements on behalf of IEUA including managing scope, schedule, budget, quality assurance, and communications with IEUA and Program stakeholders

2. Schedule and cost control, monitor progress and reporting (i.e., Project Management Functions); including project management function of each of the Program components taking into account resources for the day to day activities, quality control, quality assurance, cash flow, and coordination among various components
3. Establish and implement solicitations for third-party engineering or alternative delivery services for the design and construction of the CBP elements including Request for Proposals (RFPs) developments, selections, and contract negotiations.
4. Technical analyses, reviews, value engineering as related to Program elements
5. Permitting
 - Title 22 Engineer Report
 - Coordination of all permitting activities related to Program components
 - Compliance reporting (e.g., funding requirements)
 - Outreach support
6. Implementation Plan/Management Plan/QA Plan
7. Adherence to IEUA Labor Ordinances and labor requirements as stipulated by the loan and grants conditions
8. Construction Administration/Construction Management Services
 - Bid packages and alternative delivery (managing the bid and award phases and providing recommendations on alternative delivery methods)
 - Promotion of Program components to enhance interests by potential respondents
 - Engineering Services During Construction (e.g., submittal reviews on behalf of IEUA, inspection, scheduling, estimating, and claims administration services)
 - Startup and Commissioning and Project Closeout
9. Operations support for the AWPF and wells' operations
10. Establish performance requirements for various Program components
 - Bridging documents
 - Warranties & guarantees
 - Asset management
 - Engineering Design Guidelines
 - SCADA Standards
11. Coordinate with Third-Party Legal Team

Potential Project Bidders

The IEUA has developed a Request for Expression of Interest-Qualifications (“RFEOI-Q”) identifying the above scope of work. The Request asks that submissions include, among other information, the applicant’s general qualifications, project team experience, technical approach, and team and program resources. The specifications for the “General Qualifications” section asks that applicants include “[p]ast experience on IEUA contracts.”

The RFEOI-Q notes that “[r]espondents are subject to all federal, state and local conflict of interest laws, regulations, and policies applicable to public contracts and procurement practices, including but not limited to California Government Code [Section] 1090. IEUA is reviewing potential conflict of interest for Consultants currently assisting the [IEUA] in implementing the CBP including Brown and Caldwell (BC), Water Systems Consulting (WSC), and GEI Consultants

[(GEI)] under the California Government Code [Section] 1090. IEUA will announce the results of this review once completed.”

The three identified contractors—BC, WSC, and GEI—have contributed and continue to contribute significantly to the identification, development, and evaluation of CBP agreements, structure, and definitions of PUT and TAKE facilities. These entities are currently under active contracts with IEUA to support the CBP. The three contractors’ current involvements allow them significant understanding of the CBP components and their interconnectivities, and they are preparing documents that would require review and confirmation by the Program Manager being solicited. However, the contractors have not had direct contributions to the preparation of the RFEOI-Q or any step in the forthcoming procurement of the Program Manager. The scope of their work is detailed below.

BC

The BC team contributed and continues to contribute significantly to the identification, development, and evaluation of the CBP’s PUT and TAKE facilities. The BC team has been performing significant preliminary consulting work on the CBP since early 2019, and it is anticipated that the work will continue through the second quarter of 2023. The completed and soon to be completed work provides the BC team significant understanding of the Program components and their interconnectivities. The current work elements being performed by BC include:

- Evaluating the PUT and TAKE facility alternatives;
- Initial groundwater modeling to optimize locations of the PUT and TAKE wells (i.e., maximize basin storage capacity and no material physical injury to the basin);
- Conceptual designs and cost estimates and documentation of the design criteria and approach used to evaluate the PUT and TAKE program alternatives;
- Conducting multi-criteria analysis to evaluate PUT and TAKE alternatives; and
- Performing preliminary designs of the highest ranked PUT and TAKE alternatives.

WSC

IEUA’s contract with WSC describes the scope of the contract as follows:

This scope of work outlines a facilitated process for IEUA to develop and articulate a coherent strategy for successfully developing an integrated regional portfolio of water resource solutions that encompasses elements from the previously envisioned Chino Basin Program (Program Elements). The strategy is intended to engage, align, and build ownership among internal and external stakeholders, and establish initiatives, success measures and timelines for successfully delivering the Program Elements. This scope also includes tasks to develop and implement a supportive communications and engagement strategy.

The WSC contract details each of the tasks to be performed but, in general, the contract has WSC assisting IEUA in establishing a road map for the CBP, including:

- Operation, ownership, governance structure, financial model, and delivery method for each program component;
- Review of CBP functional needs and IEUA organizational needs and constraints;
- Gap analysis between CBP/IEUA resources and how to shape the Program structure;
- Capital delivery models for each Program components; and
- Identification/Review of the CBP's risks and mitigation measures (e.g., who will own and operate the infrastructure).

Additionally, WSC is a subconsultant to the BC team performing preliminary design services for the CBP. The WSC team has been performing significant consulting work to shape and enhance the CBP since early 2019 and it is anticipated that this work will continue for the next several months. The current work provides WSC significant understanding of the CBP components and their interconnectivities and is directly related to the scope elements that will be performed by the Program Manager.

In a follow-up email, you provided a copy of a workshop presentation prepared by WSC to illustrate the scope of their work. The presentation includes suggestions regarding certain IEUA contracting options (e.g., operations and management), and an envisioned program delivery strategy with supporting rationale and benefits. In the presentation, WSC also provides gap analysis regarding the CBP and notes “Program Management” as a “Program Need” to support the CBP and recommends establishing the responsibilities of the proposed external Program Manager. Thereafter, the presentation includes a “Draft Program Structure” that includes the proposed Program Manager position and proposes who they would work with and oversee, as well as their responsibilities and desired traits and characteristics.

GEI

The current work elements being performed by GEI include:

- Supporting IEUA on the California Water Commission (CWC) Proposition 1 Water Storage Investment Program (WISP), including:
 - Administering the CBP Early WISP Funding Agreement with the CWC;
 - Developing and implementing a CBP WISP Funding; and
 - Supporting IEUA for coordination and communications with CWC and other regulatory agencies/stakeholders;
- Supporting IEUA for CBP—State Water Project Water Exchange Agreements;
- Supporting IEUA with Member Agencies and other local agencies;
- Public benefits contract support, including:
 - Performing additional analyses as required and modeling to incorporate various Delta operational conditions;
 - Developing and implementing contracts with DWR, California Department of Fish and Wildlife, and State Water Resources Control Board to address emergency response, ecosystem, and water quality public benefits; and
 - Developing and implementing relevant adaptive management plans;
- Other state or federal funding opportunities support; and
- CBP planning and design support, including:

- Supporting with Program planning, coordination and communication, scheduling, reviews, budgeting and progress reporting;
- Performing reviews of design documentation and design performance requirements;
- Permitting support;
- Assisting IEUA in securing recycle water sources required for the AWPF; and
- Supporting CBP communications and outreach efforts.

The GEI team has been performing significant consulting work to enhance the CBP since early 2017 and it is anticipated that this work will continue through 2023.

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. City of 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 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].)

In determining whether a violation of Section 1090 has occurred, courts must identify (1) whether the defendant government officials or employees participated in the making of a contract in their official capacities, (2) whether the defendants had a cognizable financial interest in the contract, and (3) if raised as an affirmative defense, whether the cognizable interest falls within any one of Section 1091’s or 1091.5’s exceptions for remote or minimal interests. (*Lexin, supra*, 47 Cal.4th at p. 1074.)

Independent Contractors Subject to Section 1090

Although Section 1090 refers to “officers or employees” of government entities, the California Supreme Court has recognized “the Legislature did not intend to categorically exclude independent contractors from the scope of section 1090.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 238.) Rather, the *Sahlolbei* court believed it “stands to reason” the Legislature “intended to include outside advisors with responsibilities for public contracting similar to those belonging to formal employees, notwithstanding the common law distinction between employees and independent contractors.” (*Id.* at p. 237.) Accordingly, 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.) Further, “the fact that an official’s written duties do not extend to contracting is irrelevant if the official was actually involved in the making of public contracts and, in doing so, exploited an official position.” (*Id.* at p. 246.) “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*, 3 Cal.5th at p. 246.)

California Taxpayers Action Network v. Taber Construction, Inc. (Taber) (2019) 42 Cal.App.5th 824 is illustrative of the above principles. There, a school district that wanted to modernize the heating, ventilation, and air conditioning (“HVAC”) systems of eight schools published two separate RFPs for the proposed project. The RFPs explained that the school district intended to select a firm to complete the modernization project, but the process would involve two contracts entered into at different times. The parties would first enter into a preconstruction services agreement,² and later enter into a lease-leaseback agreement. The school district selected defendant Taber for the preconstruction services agreement and the subsequent lease-leaseback agreement.

Plaintiff sued the school district and Taber alleging that based on Taber’s provision of preconstruction services and advice to the school district under the initial preconstruction services agreement, Section 1090 prohibited the school district from awarding Taber the subsequent lease-leaseback contracts. Plaintiff further alleged that “[i]n performing its duties under the [preconstruction services agreement] . . . [Taber] performed the functions and filled the roles and positions of officers, employees and agents of [the school district] who would ordinarily perform and provide the foregoing professional, design, and financial functions and advise the [School District] relative to same.” (*Taber, supra*, 42 Cal.App.5th at p. 829.)

Looking to the *Sahlolbei* case, the court initially noted that Section 1090 only prohibits a contract made by a financially interested party when that party makes the contract in an “official capacity.” (*Taber, supra*, 42 Cal.App.5th at p. 835.) It then explained that where the financially interested party is an independent contractor, Section 1090 applies only if the independent contractor can be said to have been entrusted with transacting on the Government’s behalf. (*Ibid.*) The court held that it could not reasonably be construed that Taber was hired under the initial contract to engage in or advise on public contracting *on behalf of* the school district because the school district did not contract with Taber to select a firm to complete the HVAC project. Instead, the initial contract required that Taber provide preconstruction 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.”³ (*Id.* at p. 836.) In sum, the court held there was no evidence Taber was transacting on behalf of the school district when it

² The preconstruction services agreement generally consisted of reviewing existing documents and site conditions, scheduling, estimating, and development of a guaranteed maximum price.

³ The court also noted that the school district contracted with Taber to provide preconstruction services in anticipation of Taber itself completing the HVAC project.

provided those preconstruction services – rather, the RFPs and initial contract show that Taber was “transacting business as a provider of services to the School District.” (*Id.* at p. 838.)

With respect to BC, the facts are similar to *Taber* in that there does not appear to be any indication the IEUA hired BC to engage in or advise on public contracting. BC was not required to prepare the RFEOI-Q for the Program Management contract, nor has BC assisted IEUA in selecting a contractor for the contract. Rather, IEUA hired BC to perform work of an apparently highly technical nature analogous to preconstruction services considered in *Taber*, which included planning and setting specifications for the project. In other words, based on the facts provided, it appears BC provided engineering services *to* IEUA and not *on behalf of* IEUA. Accordingly, Section 1090 does not prohibit IEUA from contracting with BC on the Program Management contract.

In contrast, the work performed by WSC and GEI appears to be of a different nature. WSC was tasked with establishing a “road map” for the CBP, including advising on topics as broad as the operation, ownership, governance structure, financial model, and delivery method for each CBP component, as well as how to shape the CBP structure. More specifically, WSC has advised on CBP needs, including the need for a Program Manager, and has made recommendations regarding the position’s responsibilities and desired traits and characteristics. Similarly, IEUA’s contract with GEI tasks the company with administering funding agreements with the CWC, developing and implementing WISP funding, supporting IEUA with CBP/State Water Project Water Exchange Agreements and other local agencies, and providing IEUA support on various contracts with state and local agencies. Although you have indicated neither contractor has directly contributed to the preparation of the RFEOI-Q, it appears both WSC and GEI have been entrusted with engaging in and advising on public contracting *on behalf of* IEUA, rather than merely providing services *to* IEUA. Accordingly, Section 1090 prohibits IEUA from contracting with WSC or GEI on the Program Management contract.

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

Sincerely,

Dave Bainbridge
General Counsel

for

By: Kevin Cornwall
Counsel, Legal Division

KMC:aja