



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 24, 2023

Anne E. Branham
Best Best & Krieger
3390 University Avenue, 5th Floor
Riverside, California 92502

Re: Your Request for Advice
Our File No. A-23-066

Dear Ms. Branham:

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, 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 Tehama 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 Resource Conservation District ("RCD") from contracting with independent contractors to assist the RCD in writing the technical portions of local, state and federal grant applications in exchange for a subsequent contract to perform work under the grant, if successful?

CONCLUSION

No. As explained below, so long as the RCD agrees under the initial contract to enter a subsequent contract with the same independent contractor to perform the work under the grant, if

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.

successful, Section 1090 would not prohibit the RCD from entering the subsequent contract. We caution, however, that there must be an agreement between the RCD and the independent contractor under the initial contract that the same independent contractor will be selected to perform the work under the grant.

FACTS AS PRESENTED BY REQUESTER

Your office provides special legal services for the Resource Conservation District (“RCD”) of Tehama County. The RCD is a special district that relies on grant funding for many of its functions. The RCD does not, as a general matter, have the technically trained staff or funding available to hire third party consultants to help write technical portions of local, state, and federal grant applications (including discussion of engineering, environmental, and biological topics).

Often, to adequately respond to these grant applications, the pool of qualified grant writing consultants (i.e., trusted experts in various fields) is very limited. The entities funding these grants also frequently ask for an identification of the project team, and the District has received feedback specifically indicating that use of external specialist staffing resources (such as engineers) is an appropriate way for the District – which has very limited in-house staffing – to demonstrate sufficient expertise in the required areas to receive grant funding.

The RCD would like to know whether it is appropriate to rely on consultants who are willing to write these technical portions of grant applications in exchange for subsequently being hired on to work on RCD projects that are dependent on grant funding. This could be through an informal arrangement with the consultant, with no written contract and no up-front consideration, or it could be through a more formalized contractual agreement with the consultant for nominal consideration. In either instance, the idea would be that if the grant is successful, the consultant who assisted with that grant would be brought on in some capacity to assist with (and be compensated fairly) for the work under the grant.

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.)

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.)² Section 1090 would apply in such a situation because “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...” (*Sahlolbei, supra*, at p. 240.)³

Here, the RCD intends to have independent contractors write the technical portions of grant applications in exchange for subsequently being hired for compensation to perform work under the grant, if successful. Under one scenario, the RCD would have an informal arrangement with the independent contractor to do the work with no written contract or up-front consideration, but an understanding that the independent contractor would perform work under the grant, if successful. An initial question, therefore, is whether this arrangement would constitute 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 v. City of Taft* (1962) 58 Cal.2d at 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

² As an example, the court in *Sahlolbei* explained that “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.” (*Sahlolbei, supra*, at p. 240.)

³ Note that the *Sahlolbei* court specifically rejected a “considerable influence standard” (i.e., that contractors come within the scope of Section 1090 when they occupy positions “that carry the potential to exert ‘considerable influence’ over public contracting”) in determining whether Section 1090 applies to a particular independent contractor. (*Id.* at pp. 244-45, citing *California Housing Finance Agency, supra*, 148 Cal.App.4th at p. 693.)

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 an independent contractor agrees to do grant application work, without a written contract or up-front consideration, with the understanding that it will ultimately secure work under a successful grant application, constitutes a contract under Section 1090.

The next issue is whether by entering into such an agreement, the independent contractor would have duties to engage in or advise the RCD on public contracting under the agreement, making them subject to Section 1090. A recent appellate court case with similar facts provides guidance in the present matter. In *Taxpayers Action Network v. Taber Construction, Inc.*, (*Taber*) (2019) 42 Cal.App.5th 824, 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 alleged that Section 1090 prohibited the school district from entering the subsequent contract with Taber where 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,’” such as when it has been hired to engage in or advise on public contracting. (*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, the independent contractor would be hired to help write technical portions of local, state, and federal grant applications for the RCD in exchange for subsequently being hired to work under the grant, if successful. As in *Taber*, the independent contractor would not be transacting on behalf of the RCD because the contract for grant application assistance would not require the independent contractor to select a firm to do the work under a

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).)

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.)

successfully obtained grant; instead, the RCD would contract with the independent contractor to provide those services in anticipation of the same independent contractor performing the work under the grant. In this way, the independent contractor would not be able to use its position under the initial contract to improperly influence the RCD to enter into the subsequent contract because the same independent contractor would already have been selected to perform the work.

Accordingly, Section 1090 does not prohibit the RCD from contracting with independent contractors to assist in writing the technical portions of local, state and federal grant applications in exchange for subsequently being hired for compensation to perform work under the grant.⁶

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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⁶ We caution that there must be an agreement between the RCD and the independent contractor under the initial contract that the same independent contractor will be selected to perform the work under the grant, if successful. To evidence the agreement, it is advisable that the agreement should be in writing. To the extent there is no initial contract agreeing to select the independent contractor if the grant is successful, the independent contractor is potentially prohibited from subsequently being awarded the work in light of the work performed on the grant application.