



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 29, 2024

Abel Salinas
Ethics Officer
Metropolitan Water District of Southern California
700 N. Alameda St. Los Angeles, CA 90012

Re: Your Request for Advice
Our File No. A-24-015

Dear Mr. Salinas:

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 Los Angeles 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 Metropolitan Water District of Southern California ("Metropolitan") from contracting with Carollo Engineers, Inc. as a design-build entity on future public works contracts utilizing a progressive design-build ("PDB") approach to the contract where Carollo Engineers, Inc. is employed as an independent contractor on the Sepulveda Feeder Pump Stations project ("Sepulveda Project") and its duties included assisting with Metropolitan's development of a request for qualifications (RFQ) "template" and a PDB contract "template" for use in future PDB approach projects?

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

No. Carollo Engineers' duties and services included advising Metropolitan on public contracting for the Sepulveda Project and the PDB approach templates and, therefore, is an officer subject to Section 1090. Carollo Engineers is disqualified from contracting with Metropolitan for a later phase of the Sepulveda Project. However, the facts do not indicate that Carollo Engineers has influence over the scope of future PDB projects due to this work. As a result, Carollo Engineers has not "participated in making" all future PDB approach RFQs and contracts, and Carollo Engineers is not disqualified from these projects based solely on its services on the PDB approach RFQ and PDB contract templates.

FACTS AS PRESENTED BY REQUESTER

The Metropolitan Water District of Southern California ("Metropolitan") is a regional wholesaler that delivers water to its 26 public member agencies. Metropolitan is governed by a 38-member board of directors ("Metropolitan Board"), representing each of Metropolitan's member agencies. Among the Metropolitan Board's responsibilities is evaluating and voting on contracts in connection with public works projects.

Under state public contracting laws, public agencies, including Metropolitan, have used a "design-bid-build" (also known as "DBB") approach to its construction projects. Under this approach, the public agency, frequently with the assistance of a design consultant, provides the design and project specifications, which are packaged into a "notice inviting bids" or "NIB," which may also require bidders to establish their "responsibility" to perform the construction work. The lowest responsive, responsible bidder, in response to the NIB, is awarded the construction contract. An entity that participated in the project design or the formulation of the NIB is prohibited from bidding on the project.

Alternative Project Delivery Method: Progressive Design Build

Due to recent legislation, Assembly Bill 1845,² Metropolitan is able to utilize three alternative delivery mechanisms for the construction of the Regional Recycled Water Program (now known as Pure Water Southern California) and drought-related projects: design-build, progressive design-build, and construction manager/general contractor. Similar legislation passed in 2022, SB 991, authorizes the use of PDB for public agency water projects.³ The focus of this request is on

² AB 1845 (Calderon), authorizing these three mechanisms for Metropolitan for a limited number of projects, was signed by Governor Newsom on September 13, 2022, and became law on January 1, 2023, codified at Article 121.1 of the Public Contract Code at Sections 21568 et seq.

³ SB 991 (Newman), a similar bill permitting the use of progressive design-build for the construction of up to 15 public agency water projects in excess of \$5 million per agency, was signed by the Governor on September 2, 2022, and went into effect on January 1, 2023.

Metropolitan's development of a request for qualifications (RFQ) "template" and a progressive design-build ("PDB") contract "template" in accordance with AB 1845.

For a design-build approach, a public agency selects one entity through a request for proposals ("RFP") process to perform the design and construction of a project under a single contract. A variation of this mechanism is the progressive design-build approach (PDB), which also involves a single contract. In the PDB approach, a public agency awards an initial ("Phase 1") design contract to a design-build entity ("DBE") that is selected through an RFQ process and then collaborates with the DBE on the design until it is sufficiently developed such that the public agency and the DBE can agree upon a guaranteed maximum price ("GMP") for construction.

Metropolitan's PDB Approach Templates: RFQ and PDB Contract

To utilize the PDB approach, AB 1845 required Metropolitan to develop an RFQ "template" with specified elements and seven categories of information that must be solicited from all RFQ respondents. At the close of the solicitation period, Metropolitan must review the submitted statements of qualifications ("SOQ") and select a DBE based solely on qualifications. Upon successful negotiations, Metropolitan enters into a Phase 1 contract with the DBE to perform design and preconstruction activities to establish the project's GMP. You clarified by email that if and when the parties are able to agree on a GMP, the original contract is amended to include the GMP and authorize the construction of the project. The legislation does not lay out what must be in the original "Phase 1" contract and what must be in the amended contract, other than that the latter must include the GMP.

Sepulveda Feeder Pumping Stations Project RFQ & Phase 1 Contract as Templates

The Sepulveda Feeder Pump Stations project (Sepulveda Project) was Metropolitan's first PDB project. The Sepulveda Project's RFQ and PDB contract were conceived as a template for future projects. To this end, Metropolitan engaged Carollo Engineers, Inc. ("Carollo Engineers")⁴ to serve as the "owner's advisor" for the development of the Sepulveda Project with the PDB approach. Carollo Engineers was selected based on the firm's familiarity with the Sepulveda Project and its expertise in design-build contracts. In the construction context, an owner's advisor is typically engaged to provide advice on the process associated with constructing a project, including the solicitation and/or contracting process.

Carollo Engineers' activities included the development of documents for the selection of a design-build entity (DBE), the development of a project schedule, and the preparation of cost estimates. Carollo Engineers were also tasked with "reviewing proposed plans, procedures, schedules, guidelines, and training material associated with the implementation and deployment of new work processes at Metropolitan for use of the progressive design-build project delivery method." You state that due to Carollo Engineers' role in assisting with the solicitation process, it

⁴ Carollo Engineers had an existing professional services agreement with Metropolitan. On September 13, 2022, the Metropolitan Board authorized an increase of \$690,000 to the existing agreement for the owner's agent services on the Sepulveda Project. We do not provide Section 1090 advice in regard to the amended agreement between Metropolitan and Carollo Engineers.

was understood from the onset that Carollo Engineers would be prohibited from seeking to perform any contract work (design or construction) on the Sepulveda Project.

Carollo Engineers' work was intended to be coordinated with Metropolitan's Office of the General Counsel, who in turn brought in outside counsel to "assist in-house counsel and staff with all aspects of implementing the alternative project delivery (ADP) mechanism legislation (AB 1845), including the development of new solicitation documents and procedures, and the drafting and/or negotiation of new ADP contract documents."

Carollo Engineers' Work on the Sepulveda Project: RFQ and PDB Contract

Between the execution of its owner's advisor agreement and the issuance of "RFQ 1340" for the Sepulveda Project, Carollo Engineers worked extensively with Metropolitan Engineering staff and in-house counsel, as well as outside counsel, on the RFQ documents and the Phase 1 PDB contract that accompanied the RFQ.

RFQ 1340, when issued, memorialized the prohibition on Carollo Engineers, as the owner's advisor, from submitting a statement of qualifications to become the DBE for the Sepulveda Project. However, while Carollo Engineers assisted Metropolitan extensively in the development of the initial RFQ template required by AB 1845 and provided input on the Sepulveda Project DBE contract, no determination was made with respect to Carollo Engineers' ability to enter into future contracts for other PDB projects.

With respect to the RFQ selection process, both AB 1845 and SB 991 are highly prescriptive. While these bills provided Metropolitan some latitude in determining which factors will be evaluated and the weighting of these factors, both require that the selection of a DBE be qualifications-based and that the RFQ template solicit, at a minimum, specific categories of information in assessing qualifications.

With regard to the RFQ 1340 selection process, Carollo Engineers' work included providing advice and/or drafting language with respect to the following:

- Evaluation criteria and respondent scoring and ranking, including the weighting of written submissions and interviews (mandated by AB 1845);
- Whether project cost estimates, which can be solicited under AB 1845, should be solicited and how they should be scored;
- How, when, and in what form to solicit cost data needed to negotiate the Phase 1 contract price;
- The conduct of respondent interviews, including advice on which Metropolitan individuals would participate.

With regard to the PDB contract terms and conditions, Carollo Engineers' work included providing advice and/or suggesting language on the following:

- Which types of terms and conditions should be included in the initial Phase 1 contract, and which should be deferred to the contract amendment after the GMP is established;
- Whether Metropolitan should propose and/or accept more contractor-friendly terms with respect to limitations on liability and indemnification;
- If and when liquidated damages should be imposed and in what amounts;
- The work that should be included in the Phase 1 scope of services; and
- Whether confidential meetings should be held with DBEs to discuss contract terms and conditions prior to the submission of SOQs.

While Metropolitan's Engineering staff and its in-house counsel solicited Carollo Engineering's advice, they adopted Carollo Engineers' recommendations selectively and exercised ultimate decision-making authority with respect to the RFQ and contract documents that were issued. The PDB contract was drafted by an outside law firm with extensive experience with alternative project delivery (ADP) contracts, and Carollo Engineers' input was secondary. In addition, the contract drew heavily from templates that are commonly used within the construction industry, including that of the Design-Build Institute of America, and was substantially modified in response to input solicited by Metropolitan from potential DBEs after the Sepulveda Project PDB contract was issued with the RFQ. Thus, although the Sepulveda Project PDB contract was, like the RFQ, conceived as a template, it will most likely be revised for future projects based on lessons learned and further input from in-house and outside counsel.

While the Sepulveda Project RFQ will serve as a template for future RFQs, this template will also be modified over time as Metropolitan gains more experience with the PDB delivery mechanism. Metropolitan has already engaged owner's advisors for other PDB projects and identified areas in which the template will be revised for future solicitations. As an example, Metropolitan chose not to solicit and score a preliminary cost estimate for the Sepulveda Project, but a subsequent owner's advisor has recommended obtaining such an estimate from RFQ respondents for a subsequent PDB project.

Carollo Engineers' Work Following the Issuance of RFQ 1340

Following the issuance of RFQ 1340, Carollo Engineers has continued to serve as the owner's advisor on the Sepulveda Project. With regard to the selection process, Carollo Engineers helped develop a "responsiveness checklist," performed reference checks on RFQ respondents, assisted in the development of interview questions, passively observed some of the interviews conducted, and provided advice to staff on the scoring and selection process. Once staff selected a DBE for a recommend Phase I contract award, Carollo Engineers provided some guidance on the negotiation of the contract, but it did not engage in negotiations with the selected entity on Metropolitan's behalf.

On September 12, 2023, Metropolitan's Board awarded a Phase I design-build services contract to J.F. Shea Construction Inc. for a not-to-exceed amount of \$9.8 million. The Metropolitan Board also authorized an increase of \$1.5 million to Carollo Engineers' owner's

advisor agreement. The description of the services to be provided by Carollo Engineers going forward include advising staff during Phase 1 of the Sepulveda Project, including facilitating project meetings, as well as “reviewing proposed plans, procedures, schedules, guidelines, and training material associated with the implementation and deployment of new work processes at Metropolitan for the use of the PDB project delivery method.”

Carollo Engineers is not currently providing advice on specific PDB projects other than the Sepulveda Project. If it were to do so in the future, it would be explicitly prohibited from pursuing a PDB contract for any such project.

Carollo Engineers’ Intent to Pursue Future PDB Project Contracts

Carollo Engineers has indicated to Metropolitan that it may pursue contracts for other PDB projects, including the upcoming proposed Pure Water Southern California project (“PWSC Project”).

In the past several months, Metropolitan has performed significant market and community outreach with respect to its proposed PWSC Project. This multi-phase project, which, if approved, is projected to be fully online by 2032, is in the initial planning phases. Metropolitan is currently planning to utilize the PDB delivery mechanism for the PWSC Project and to issue an RFQ for a Phase I contract in the next several months, with an anticipated contract award in late 2024. Metropolitan has entered into a professional services agreement with a firm other than Carollo Engineers to perform owner's advisor services for the PWSC Project.

Carollo Engineers has expressed an interest in participating in the submission of an SOQ for the Phase I PDB contract for the PWSC Project, potentially as a member of a team assembled for the purpose of obtaining such contract work. The scope of work for the DBE awarded the Phase 1 PDB contract is expected to include the following:

- Managing geotechnical and survey investigations of the treatment plant site to develop design criteria;
- Providing design information for permitting approvals;
- Completing water quality modeling through different treatment processes; and
- Developing 30% and 60% design documents (drawings and specifications) for the critical project components necessary to propose a GMP for construction.

Metropolitan is seeking advice with respect to Carollo Engineers’ ability to seek and obtain a contract for the PWSC Project work. Carollo Engineers has not performed any work to date on the PWSC Project. However, Metropolitan is uncertain whether Carollo Engineers’ role in developing the RFQ template, as well as providing advice on the PDB contract template, as described above, precludes Metropolitan from entering into a PDB contract with Carollo for the PWSC Project and, potentially, future PDB projects.

ANALYSIS

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 financial interests, other than remote or minimal interests, that prevent a public

officer or employee 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.)

Importantly, Section 1090 prohibits the use of a public position for 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 2017, the California Supreme Court recognized that “the Legislature did not intend to categorically exclude independent contractors from the scope of section 1090” in its language, applying the prohibition to “public officers and employees.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 238.) In this opinion, the Court held that Section 1090 applies to those independent contractors who are “entrusted with ‘transact[ing] on behalf of the Government.’” (*Id.* at p. 240, quoting *Stigall v. Taft, supra*, 58 Cal.2d at p. 570.) On this issue, the *Sahlolbei* Court explained:

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.

(*Sahlolbei, supra*, at p. 240.)

Notably, the 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. (*Sahlolbei, supra*, at pp. 244-45, referencing *California Housing Finance Agency, supra*, 148 Cal.App.4th at p. 693.) The Court stated, “[a]s we have explained, independent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf.” (*Id.*, at p. 245.)

The Legislature recently enacted Section 1097.6, which codifies prevailing legal authority set forth in case law and Commission advice letters relevant to 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.

Carollo Engineers assisted Metropolitan in preparing the Sepulveda Project RFQ and PDB contract, and through this process, also assisted Metropolitan in developing its PDB approach RFQ and PDB contract templates for future projects. Therefore, Carollo Engineers is an “officer” under Section 1097.6(a)(1) subject to Section 1090 in its role as owner’s advisor on the Sepulveda Project and in assisting on Metropolitan’s development of the RFQ and PDB contract templates. It may not be financially interested in a contract in which it has participated in its official capacity. (See Section 1097.6.) Accordingly, as Metropolitan stated in its Sepulveda Project RFQ, Carollo Engineers is prohibited from submitting a statement of qualifications to be a DBE on the same project.

However, at issue here is whether Carollo Engineers’ work in helping to form the PDB approach RFQ template and PDB contract template means that Carollo Engineers has “participated in making” any future PDB approach RFQs and PDB contracts. We advise that it does not.

Templates for Future PDB Projects: “Making and Participating in Making” a Contract

The *Sahlolbei* Court notes that Section 1090 is broadly construed to “ensure that the public has the official’s absolute loyalty and undivided allegiance.” (*Sahlolbei, supra*, p.239, citing *Stigall v. Taft, supra*, p. 569.) “Making a contract” is broadly construed as well to include preliminary discussion and specifications that form the final contract. The Court states:

To that end, we have held that the “making” of a contract for the purposes of section 1090 includes “planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids,” and not just the moment of

signing. (*Stigall*, at p. 571.) Building on *Stigall*, the Courts of Appeal have explained that 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 [115 Cal. Rptr. 532] (*Sobel*).)

(*Sahlolbei*, *supra*, p. 239)

Carollo Engineers participated in the preliminary discussions, planning, and specifications for the general PDB approach RFQ template and PDB contract template, but other than the Sepulveda Project, Carollo Engineers has not been involved in forming specific Metropolitan RFQs or PDB contracts. Nor do the facts indicate in this general participation context that Carollo Engineers was in a position to “influence the execution” of future RFQs or PDB contracts “directly or indirectly to promote its interests.”

Whether an officer’s participation in the formation of a program rises to the level of participation in making a specific underlying contract will depend on facts such as whether the scope of the specific contract was determined in the formation process. In the *Houston* Advice Letter, No. A-16-075, we advised that an officer who participated in the formation of a program did not “participate in the making” of a later employment contract for the program’s executive officer, where the program’s board had the discretion to determine if its administration would include a contract or a full-time executive officer.⁵ Metropolitan was selective in applying Carollo Engineers’ advice in forming the templates, used experienced outside counsel and known industry templates for the PDB contract, retained discretion over the templates, and intends to modify the templates for future projects as it gains experience and based on advice from other owner’s advisors. Further, unlike the facts in the *Adair* Advice Letter, No. A-21-137, [where the independent contractor advised the county in drafting its cannabis marketing RFPs to restrict the types of applicable bidders to its advantage] there are no facts indicating Carollo Engineers’ advice or role in creating the templates would promote or advantage its interests in a future PDB project. Additionally, we have advised that when the independent contractor is not in a position to leverage influence over the scope of a subsequent project (“where no evidence of self-dealing exists”), no interest would be served by disqualifying the independent contractor from responding to a design-build request for proposals based solely upon services it provided in a prior contract related to the *same* project. (See *Stroud* Advice Letter, No. A-18-276 and *Nakamura* Advice Letter, No. A-20-033.)⁶

⁵ In contrast, where an official supervised the formation documents of a similar program that required the board to appoint an executive officer, the official “influenced the decisions concerning the final JPA agreement that included the requirement of an executive officer through her participation in the planning, preliminary discussions and negotiations.” (*Norvell* Advice Letter, No. A-20-087.)

⁶ Similarly, Section 1097.6(b) provides that an independent contractor who is an officer (engaged in or advised the agency on public contracting) related to an initial contract may enter into a subsequent contract for a later phase of the same project if the independent contractor did not engage in or advise on the making of the subsequent contract. “Engaging in or advising” in this context does not include participation “limited to conceptual, preliminary, or initial plans or specifications” so long as “all bidders or proposers for the subsequent contract have access to the same information, including all conceptual, preliminary, or initial plans or specifications” thus limiting any advantage to the independent contractor related to this role. (Section 1097.6(b)(2).)

Here, Carollo Engineers worked with Metropolitan to establish a PDB process, but there are no facts indicating that Carollo Engineers has influence over the scope of a future PDB project due to this template work. As a result, Carollo Engineers has not “participated in making” all future PDB approach RFQs and contracts, and Carollo Engineers is not disqualified from future PDB projects, such as the PWSC Project, based solely on its services on the PDB approach RFQ and PDB contract templates.

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

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