STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 17, 2024

Katie Doerr
Deputy City Attorney
City of Santa Monica
1685 Main Street, Room 310
Santa Monica, California 90401

Re: Your Request for Advice
Our File No. A-24-040

Dear Ms. Doerr:

This letter is in response 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 City from entering a subsequent energy services contract with Scale Microgrid Solutions, LLC (Scale), a company that, under an initial agreement with the City, has (1) evaluated the City's energy data and site designs; (2) helped secure grant funding for the microgrid project; and (3) established the project scope of the energy services contract?

CONCLUSION

No. As explained below, for purposes of Section 1090, Scale entered into an initial agreement to, among other things, assist the City in preparing the scope of the second contract. Scale did not have duties to engage in or advise on public contracting *on behalf* of the City because

[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.

Scale is identified in the initial contract as the intended and exclusive provider of services under the second contract. Thus, Scale is not considered an "officer" under Section 1097.6 and Section 1090 does not prohibit the City from entering a second contract with Scale to provide energy services on the microgrid project.

FACTS AS PRESENTED BY REQUESTER

The City of Santa Monica is a California charter law city. Scale leases clean energy microgrids to public entities. The City and Scale seek to eventually execute an Energy Services Contract/License (License Agreement) under Section 4217, et al. Under the License Agreement, Scale would implement and maintain an individual microgrid at a City park that would provide backup power using renewable energy. Currently, the City and Scale have entered into an initial agreement (Initial Agreement) under which Scale has exclusively performed the following services: (1) evaluated the City's energy data and site designs; (2) assisted with securing grant funding for the microgrid project; and (3) established the project scope of the License Agreement.

Under the Initial Agreement, Scale is identified as the intended provider of services under the License Agreement. The first contract states that Scale is not only the intended provider, but the exclusive provider of services under the second contract.

Upon receiving grant funding, City and Scale would rely on the sole sourcing language in Section 4217 to execute the License Agreement without competitively bidding the microgrid project. Under the Initial Agreement, the City is precluded from entering an energy services license with any other vendor for at least 180 days after its expiration.

ANALYSIS

A. Section 1090.

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 any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of" their respective 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.) Section 1090 applies to officials who participate in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 239, citing *Stigall*, *supra*, at p. 569.)

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].)

B. Independent Contractors Under Section 1090.

In 2017, the California Supreme Court held 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." (*Sahlolbei*, *supra*, at p. 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, 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.)

In determining whether Section 1090 applies to a particular independent contractor, the *Sahlolbei* Court explicitly rejected a "considerable influence standard" under which contractors would come within the scope of Section 1090 when occupying positions "that carry the potential to exert 'considerable influence' over public contracting." (*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.)

C. *Taber* and the Intended Provider of Services Under the Second Contract.

The Legislature recently enacted Section 1097.6, which codifies prevailing legal authority set forth in case law and FPPC advice letters relevant to the question at issue here: 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.

Here, the facts provided state that under the Initial Agreement, Scale established the project scope of the License Agreement. The City now seeks to enter the License Agreement with Scale after Scale helped the City to determine the scope of the License Agreement. Scale has thus assisted the City in determining material terms of the License Agreement. However, under the Initial Agreement, Scale is identified as the intended and exclusive provider of services under the License Agreement. Therefore, the issue is whether, by entering into such an agreement, Scale had duties to engage in or advise on public contracting on behalf of the City to be considered an "officer" under Section 1097.6, and therefore subject to Section 1090.

Taxpayers Action Network v. Taber Construction, *Inc*., ("*Taber"*) (2019) 42 Cal.App.5th 824, is instructive. In *Taber*, 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 argued that Section 1090 prohibited the school district from entering the subsequent contract with Taber alleging that 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 the prohibition under Section 1090 applies only when a contract is made by a financially interested party in its official capacity – and where that party is an independent contractor, Section 1090 applies only when the independent contractor is "entrusted with 'transact[ing] on behalf of the Government.'" (*Id*. at p. 836, quoting *Sahlolbei*, *supra*, at p. 240.) The court then found that there was no evidence that 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.)[2]

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[2] 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.)

The present situation is similar. Under the Initial Agreement, Scale is not only the provider of services that precede the License Agreement, but it is also the exclusive provider of services for the subsequent License Agreement. As in *Taber*, Scale did not transact on behalf the City by determining the scope of the License Agreement. Rather, the City contracted with Scale to determine the scope of the second contract in anticipation of Scale providing the services under the second contract. Thus, Scale provided the services under the initial contract in its capacity as the intended provider of services under the second contract, not as a de facto City official. The facts provided indicate that Scale had no ability to use its position under the Initial Agreement to improperly influence the City to enter the subsequent contract because Scale had already been selected to provide the services under the License Agreement.

Accordingly, Scale is not an "officer" under Section 1097.6, and Section 1090 does not prohibit the City from contracting with Scale to provide services under the License Agreement.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

JF:aja