



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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Re: Your Request for Advice
Our File No. A-24-067

Dear Messrs. Phelps and Alfonso:

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 Diego 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 of San Diego ("City") from entering into a contract to lease property ("the Property") where the brokerage firm is Jones Lang LaSalle Brokerage, Inc., ("JLL Brokerage") a subsidiary of Jones Lang LaSalle Inc. ("JLL"), and the City currently has a contract for consulting services with Jones Lang LaSalle Americas, Inc., ("JLL Americas") another subsidiary, to provide space optimization analysis services.

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. As explained below, while JLL Americas entered into an agreement with the City to conduct an optimization analysis of its office space, JLL Americas did not have duties to engage in or advise on public contracting on behalf of the City such that it is considered an “officer” under Section 1097.6. The facts additionally indicate that the City’s decisions regarding leasing the property were unrelated to the duties and services of JLL Americas’ Advisory Team. Accordingly, Section 1090 does not prohibit the City from entering into a lease of the Property, where JLL Brokerage, a subsidiary of JLL, represents the Property owner.

FACTS AS PRESENTED BY REQUESTER

JLL Corporate Background

As noted above, JLL is the parent company of subsidiary corporate affiliates, JLL Americas and JLL Brokerage. Both JLL Americas and JLL Brokerage report their respective financials on a consolidated basis to JLL, whose CEO has common oversight over the subsidiaries. This matter involves the JLL Americas’ Advisory Team and the JLL Brokerage’s Brokerage Team. Each Team reports up through their separate divisions within JLL.

The Advisory Contract: Hybrid Work Study

JLL Americas, Inc., through its Advisory Team, and the City entered into a contract, which was executed on December 19, 2022, and approved on January 3, 2023 (the “Advisory Contract”). The Advisory Contract scope provides that Matthew Do, managing director, and the Advisory Team, “will perform due diligence, research, and analysis to develop a program and strategy that utilizes city spaces more optimally by employing office sharing, hoteling, and remote/hybrid work models.” The Advisory Contract’s stated goal is “to provide a complete portfolio and workplace analysis, strategy, and pilot program,” and is accordingly divided into four phases: (I) Data collection on the City’s current supply, (II) Data collection and analysis on future demands, (III) Pilot program planning, and (IV) Pilot program implementation. The contract states that the Advisory Team will “conduct a critical analysis of the City’s current and future downtown office space needs.”²

The Advisory Contract specifies that the Advisory Team’s Phase I duties include identifying all City-owned and leased buildings, defining square footage, and determining departmental uses. For City-leased office space, the Advisory Team’s duties include defining rents, determining lease terms, and identifying tenant improvement allowances. Phase II duties include interviews and employee surveys examining demand and workplace standards, hybrid workplace visioning, and examining options for new office space. Phase III includes departmental consolidations, while Phase IV, the Pilot Program, includes recommendations to implement workplace changes, including office design, desk sharing, and occupancy planning.

² Advisory Contract Recitals, p. 1.

The Advisory Contract states that the contractors, the Advisory Team, “are independent contractors and not agents of City” and that any provisions that may appear to give the contractor the ability “to exercise any control over the performance of the Contract, shall mean only that Contractor shall follow the direction of City concerning the end results of the performance.”³

The Advisory Team performed due diligence, research, and conducted surveys and interviews with City employees on office space usage. Management and staff from the City’s Development Services Department (“DSD”) were involved in these interviews and surveys. The Advisory Team delivered its initial draft report providing analysis regarding the City’s office portfolio, workspace usage, and employee work habits (comprising Phase I and II) to the City’s Department of Real Estate and Airport Management (“DREAM”) on September 1, 2023. The draft report went through multiple iterations before a final revision was delivered on February 19, 2024, which DREAM presented to the City Council on March 18, 2024. The report provided “a comprehensive analysis of the City’s current and future space demand by employees, and their departments, located Civic Core and adjacent leased office locations.” The report included information on both the current and estimated future demand for office space, taking into account departmental demands, and information from interviews and surveys of employees and management. Recommendations included implanting flexible workspaces and desk sharing. The report did not address either the Property or DSD’s plans to relocate. The report did not call out the Property or put it forward in any way. You also state that any decisions related to information provided in the report were and will be made by the City with substantive review by City decision-makers.

In regard to the Property discussed below, you note that the Advisory Contract does not include any duties and services related to engaging in or advising the City on public contracting on behalf of the City as it relates to the Property. The Advisory Contract also does not include preparing or assisting the City with any portion of the City’s preparation of a request for proposal or any other solicitation. The City, at all times, retains responsibility for public contracting, including with respect to subsequent phases of the Advisory Contract. You also state that the Advisory Contract does not allow JLL Americas through the Advisory Team to make governmental decisions, approve rates, rules, or regulations, adopt or enforce laws, issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement, or authorize the City to enter into, modify, or renew a contract other than the Advisory Contract and its four phases.

Under the Advisory Contract, the Advisory Team report did not make recommendations to the City, nor did the Advisory Team advise on City real estate transactions, though its analysis indicated that the City could reduce its existing real estate through the use of hybrid workspace. The Advisory Team is currently in the Advisory Contract’s pilot planning phase, which is conducting data collection on space sharing and does not include advice or analysis on City real estate transactions. In a follow-up email, you state DREAM staff has confirmed that the Advisory Team did not provide advice on lease terms or tenant improvements in prospective transactions; the Advisory Team only advised on those items in existing City leases and City-owned properties. You note that the Advisory Team has performed other real estate consulting services for the City, under other services contracts with the City, wholly unrelated to the Property.

³Advisory Contract, Exhibit C, Article XIII, §13.3

Contract to Lease Space for DSD

The City's main DSD office space is currently at 1222 1st Avenue. Since 2015 the City has been looking to move DSD to new office space. This search was due to the City's internal concerns and not due to services provided by the Advisory Team. In a follow-up telephone conversation, you explained that DSD did relocate to a new office in 2019, but subsequently returned to its original offices after the new space proved to be inadequate. You also stated that the relocation is a separate undertaking from the hybrid work-study provided by the Advisory Team.

In June 2023 DSD requested that DREAM provide a survey of available office space in the 40,000 to 60,000 square foot range, focusing on downtown San Diego and Mesa Valley submarkets. On or about June 20, 2023, DREAM provided DSD with a matrix detailing multiple properties matching DSD's criteria. After review, DSD instructed DREAM to arrange tours of several properties of interest, including the Property.

On or about June 28, 2023, a City real estate agent within DREAM contacted the JLL Brokerage, Brokerage Team to inquire about the Property. In a follow-up email, you clarified that the Brokerage team represents the owner of this property, as the owner's commercial real estate agent. Richard Gonor, an Executive Vice President for JLL who specializes in the leasing and sales office properties downtown and central San Diego submarkets, and his team, the Brokerage Team, are separate from the Advisory Team. As explained above, while the Brokerage Team and the Advisory Team are part of subsidiary businesses that report to JLL, the two subsidiaries and their respective Teams do not have overlap, in personnel or function.

On July 7, 2023, the City first toured the Property, as well as multiple other facilities over the next few weeks. Ultimately, the City determined the Property would be the best location for DSD and on July 25, 2023, the City provided the Brokerage Team with a request for proposals to lease two floors within the Property, which the Brokerage Team responded to on behalf of the Property owner the next day, July 26, 2023. After multiple rounds of negotiations, the City and Property owner, represented by the Brokerage Team, had agreed in principle to the key lease pricing, terms, and conditions by September 1, 2023. On September 19, 2023, the Brokerage Team sent an initial draft lease to the City, which the parties proceeded to negotiate. On January 12, 2024, following lease negotiation, the Property owner signed the lease, which was provided to the City for execution. If the lease between the Property owner and the City is ultimately approved, the Brokerage Team will receive a commission for the completed transaction from its client, the Property owner, not from the City. On March 21, 2024, the lease was presented to the City's Land Use & Housing Committee and was approved by the Committee to move forward to full City Council for consideration.

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 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. 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.) “The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official’s loyalties and compromise the undivided representation of the public interests the official is charged with protecting.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1075.) 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 2017, the California Supreme Court recognized “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, emphasis added, quoting *Stigall, supra*, 58 Cal.2d at p. 570.)

We examine whether JLL Americas had duties to engage in or advise on public contracting on behalf of the City under the Advisory Contract, such that it is an “officer” under Section 1097.6, and subject to Section 1090’s prohibitions.

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. Pursuant to Section 1097.6(a)(1), an independent contractor whose duties under an initial contract did not require it to engage in or advise on public contracting *on behalf of the public entity* will not qualify as an “officer,” and therefore not be subject to Section 1090.⁴ 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

⁴ “Engaging or advising on a public contracting” means to prepare or assist the public entity in preparing solicitation materials (e.g., a request for proposals or request for qualifications) for a subsequent contract. (Section 1097.6(a)(2).)

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 City’s lease agreement for the Property is not a “later phase” of the City’s contract with JLL Americas’ Advisory Team. The facts indicate that City has been looking to move DSD to new office space since 2015 due to the City’s internal concerns and that the relocation is a separate undertaking from the hybrid work-study provided by the Advisory Team. Further, JLL Americas’ Advisory Team did not have a duty, nor did it engage in advising, the City in its lease negotiations with the Brokerage Team. The Advisory Team did not have any duties under the contract, nor did it perform any services related to, advising the City on public contracting as it relates to the Property. The Advisory Team’s Report did not call out the Property or put it forward in any way. The Advisory Team’s duties included defining rents, determining lease terms, and identifying tenant improvement allowances for leased office space. However, as noted above, the Advisory Team did not provide advice on lease terms or tenant improvements in prospective transactions; the Advisory Team only advised on those items in existing leases and City-owned properties. As such, the Advisory Team provided services under the initial contract in its capacity as a consultant, not in a capacity as an official of the City. The services provided by the Advisory Team related to a hybrid work-study, and not the relocation of DSD and the lease of the Property.

Accordingly, because JLL Americas, through the work of the Advisory Team, does not qualify as an “officer” under Section 1097.6, Section 1090 does not prohibit the City from entering into a lease of office space at the Property with an owner represented by JLL’s subsidiary, JLL Brokerage.

If you have other questions on this matter, please contact me by email at znorton@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division