



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 15, 2015

Mr. Jeffrey A. Walter
Novato City Attorney
Walter & Pistole
670 W. Napa Street, Suite F
Sonoma, CA 95476

Re: Your Request for Advice
Our File No. A-15-050

Dear Mr. Walter:

This letter responds to your March 26, 2015 request that the Commission consider new facts to determine whether Councilmember Madeline Kellner and the Novato City Council continue to have a Section 1090¹ conflict of interest as concluded in our prior advice. (See *Kellner* Advice Letter, No. A-15-021). You are the City Attorney for the City of Novato.

To briefly recap, the Novato City Council is considering a contract between the City of Novato and LSA Associates, an environmental consulting firm that employs Councilmember Kellner's spouse as an associate biologist. In the *Kellner* Advice Letter, *supra*, we concluded that even though her spouse receives a base compensation that is not dependent upon or changed by securing a contract with the City of Novato, a Section 1090 conflict of interest nonetheless existed. We based our determination on the fact that the contract would contribute to the overall financial health of the firm, which could result in an increased contribution into her spouse's tax-deferred ESOP account. In addition, an increase in LSA's profitability could result in a year-end bonus for the firm employees, including her spouse.

Your letter asks us to reconsider our conclusion based on additional facts regarding the City Manager's role in the contract process. In particular, Municipal Code Section 2-5.8(s) authorizes the City Manager to enter into contracts for "any special and professional services" without receiving Council approval, if a third party (typically a developer) reimburses the City for the costs. The City Manager or his designee can negotiate, approve, and execute a contract with LSA without City Council involvement. You have therefore asked whether Section 1090 would still be implicated if, pursuant to Municipal Code section 2-5.8(s), the City Manager entered into a contract with LSA without involvement from the City Council.

In an analogous situation, Alpine County wished to obtain towing services and service station supplies from a County Supervisor who owned the only service station in a certain area of the County to avoid having to obtain them elsewhere. (57 Ops.Cal.Atty.Gen. 458, 459 (1974).) It

¹ All further statutory references are to the Government Code, unless otherwise indicated.

was proposed that in order to avoid a violation of Section 1090, the County Board of Supervisors should hire a County Purchasing Agent, as allowed under Section 25500, to purchase the services and supplies from the Supervisor. (*Ibid.*) Section 25501 set forth the Purchasing Agent's authority to make such purchases. (*Id.* at p. 460.) The Opinion concluded that the County Purchasing Agent had independent authority to contract, and thus could execute a contract with the County Supervisor for goods or services without violating Section 1090 because the Board of Supervisors would not be participating in the making of the contract. (*Id.* at p. 460-61; see also 21 Ops.Cal.Atty.Gen. 90 (1953) [City Treasurer can deposit funds in a bank in which a City Council member was a stockholder and director. "The significant fact in each of these opinions is the independent status of the party contracting on behalf of the governmental agency." (*Id.* at p. 92; 14 Ops.Cal.Atty.Gen. 78 (1949); 3 Ops.Cal.Atty.Gen. 188 (1944)].)

Turning to the present matter, the question is whether the City Manager has independent authority to contract with LSA, thus avoiding a Section 1090 violation because the Novato City Council would not be participating in the making of the contract. Section 34851 authorizes a City Manager form of government to be established by ordinance. When such ordinance is established, Section 34852 requires that it "define the powers and duties of the City Manager and may fix his compensation or the minimum amount he is to receive."

Novato City has a City Manager form of government. As required by Section 34852, the Novato Municipal Code sets forth the powers and duties of the City Manager. Municipal Code section 2-5.8 states, in relevant part:

Powers and Duties of City Manager. The city manager shall be the chief administrative officer of the city. He may head one or more departments and shall be responsible to the city council for the proper administration or all affairs of the city. To that end he shall have power and shall be required to:

...

s. *Authorization for Professional Services.* To approve and sign contracts for any special and professional services as follows:

1. If the service has been included in the city budget, up to twenty-five thousand (\$25,000.00) dollars; or
2. If all city funds being spent on the service are fully reimbursed by another party.

Importantly, the ability of the City Manager to authorize contracts for professional services under the circumstances specified is within the power and duties of the City Manager and not subject to the supervision or control of the City Council. Indeed, the City Manager is *required* to authorize such contracts. Such authority demonstrates the independent status of the City Manager when contracting on behalf of the City of Novato. (Cf. 87 Ops.Cal.Atty.Gen. 9, 12-13 (2004) [a

district superintendent's authority to contract remains subject to the review and ratification of the governing board under state law].)

Accordingly, Councilmember Kellner and the Novato City Council will avoid violating Section 1090 where the City Manager enters a contract with LSA, without involvement or oversight by the City Council, pursuant to his or her authority under Municipal Code section 2-5.8(s). Pursuant to the requirements of that ordinance, the service provided would have to be included in the City budget while not exceeding \$25,000 or all City funds used to pay for LSA's services would have to be fully reimbursed by a third party.²

You also state that there are situations where the City solicits proposals from qualified firms to perform services involving environmental or other scientific analysis and/or studies. In these situations, City staff negotiates the terms of those contracts and then submits the contracts to the City Council for its approval. Understanding that the *Kellner* Advice Letter, *supra*, precludes the City from contracting directly with LSA, you ask whether the principal consulting firm the City retains may hire LSA as a subconsultant under such circumstances. In some instances, the subconsultants' identities are known at the time the City Council approves the principal consultant's contract. In other instances, some or all of the subconsultants are not known or have not been retained by the principal consultant at the time the City Council approves the principal's contract.

As stated in the *Kellner* Advice Letter, *supra*, 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*, (1958) 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.) Courts have recognized that section 1090's prohibition must be broadly construed and strictly enforced. (See, e.g., *Stigall*, *supra*, at pp.569-571; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

There is little doubt that it would be difficult for Councilmember Kellner to exercise "absolute loyalty and undivided allegiance" to the City where she knows that LSA will be retained to be a subconsultant at the time the City Council approves the principal consultant's contract. In such instances, Section 1090 would preclude the City Council from any involvement in the contract process. And we are aware of no exceptions under Section 1090 that would allow an otherwise prohibited contract to be approved by the City Council based on its alleged lack of knowledge concerning the status of LSA as a subconsultant at the time it approves the principal consultant's contract.³

² We caution that our conclusion is limited to the two express situations listed Municipal Code section 2-5.8(s) where the City Manager operates entirely independent of the City Council.

³ Of course, we urge you to seek formal written advice whenever there is any question as to whether a proposed contract might violate Section 1090.

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

Sincerely,

Hyla Wagner
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl