



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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June 8, 2020

Lance H. Olson  
Olson Hagel & Fishburn LLP  
555 Capitol Mall, Suite 400  
Sacramento, CA 95814

Re: Your Request for Advice  
**Our File No. A-19-221**

Dear Mr. Olson:

This letter is in response to your request for advice on behalf of City Innovate regarding the conflict of interest provisions of the Political Reform Act (the Act) <sup>1</sup> and Section 1090. Please note that our statutory authority to provide advice is limited to the Act and Section 1090. Our analysis is based solely on the facts you provide. Thus, our advice, and any immunity it may provide, is as complete and accurate as the facts provided in your request for advice. If the facts underlying this advice change, then you should contact us for additional advice.

Under Section 1090, 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 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

Whether City Innovate's STIR technology platform, along with its role in providing ancillary services through a contract with the City of West Sacramento (the City), will result in City Innovate: (1) qualifying as a "public official" for the purposes of the Act's conflict of interest provisions; or (2) qualifying as an "officer or employee" of the governmental entity under Section 1090.

### CONCLUSION

Based on the facts provided and responses to our inquiries, the exact nature and scope of the services City Innovate may provide is not clear. Accordingly, we can only generally conclude that Section 1090 will apply and prohibit future contracts between the City and another independent

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<sup>1</sup> 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 18110 through 18997 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.

contractor, which City Innovate has an interest in other than the subscription fee paid by the City, if City Innovate is in a position to influence future contracts between the City and the independent contractors that use the program. This is a determination that can be made only after the full nature of the work performed on the City's behalf is identified.

### **FACTS AS PRESENTED BY REQUESTER**

You state that City Innovate (CI) assists governments in California and nationally to acquire technology solutions through its Startup In Residence Technology Platform (STIR platform). Use of the STIR platform is provided to governmental entities (Entities) in exchange for a subscription fee, with a written agreement governing the use of the platform and the relationship between the parties. CI's contracts with Entities would be for five-year terms.

The methodology for the STIR platform is an emerging best practice model for government procurement called "challenge-based procurement." This procurement process does not specify the solution as in a traditional request for proposal (RFP), but rather describes the desired outcome for the solicitation. This approach requires responding vendors (Vendors) to prototype and demonstrate working solutions before receiving a contract award, as opposed to awarding contracts based on the evaluation of written proposals. This approach lowers the risk that a government entity may purchase a product or service that does not sufficiently address its needs. In return, the Vendors receive feedback from governmental entities, giving them the opportunity to create or refine a product or service with proven demand by the specific governmental entity and potentially others.

For example, a city may seek to improve its collection of parking meter fees. Without dictating how to accomplish that objective, the city would seek solutions from Vendors, which are often startup companies. Those Vendors could propose a software solution that would allow drivers to add time to their meters remotely.

The STIR platform gives governmental entities the ability to implement and manage the entire challenge-based procurement process on their own. This would include idea sourcing; developing challenge statements; issuing challenge-based RFPs; marketing the RFPs; receiving and scoring applications; selecting an awardee; supporting a voluntary 16-week co-creation period; evaluating performance; and contracting.

As part of the STIR platform, the governmental entities will receive informational and educational material regarding how to engage in the various stages of the procurement process. For instance, during the idea sourcing stage, the platform will allow the Member to categorize and manage the various ideas collected from government staff. CI will be providing instructional materials like webinars, articles, and guides with specifics on how to identify and source the ideas from the staff in an effective and productive manner.

The governmental entities will also receive technical support from CI, who will assist with any questions or issues relating to the use of the STIR platform and the challenged-based procurement method. CI would provide governmental entities with the tools that allow them to handle their procurement process in a more effective and efficient manner, in a similar way that tax software allows individuals and organizations lacking expertise to handle tax reporting on their own. The most significant difference is that CI will also hold an event each year to allow Entities

and the chosen Vendors to showcase their collaboration and to network with other Entities and Vendors using the STIR platform.

You state that a governmental entity's choice of vendors would not be limited by contracting with CI. Nothing in the member agreement requires the governmental entities to limit their choices. An analogous platform would be an employment website where the employer pays a fee to use the platform to look for suitable employee candidates but would not be precluded from using other methods to search for or choose prospective employees.

## ANALYSIS

### A. Section 1090.

Under Section 1090, public officers, while acting in their official capacities, are generally prohibited from making contracts in which they are financially interested. Section 1090 applies to financial interests, other than noninterests or remote 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.)

A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable or are plainly to the public entity's advantage. (*Id.* at pp. 646-649.) Courts have recognized that Section 1090's prohibition must be broadly construed and strictly enforced. (*Stigall v. City of Taft, supra*, at pp. 569-571; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-580; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) An important, prophylactic statute such as Section 1090 should be construed broadly to close loopholes and should not be constricted and enfeebled. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1334.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest," and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig, supra*, at p. 333.) Prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

The term "financially interested" must be liberally interpreted under Section 1090. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141, 146 ["(h)owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void"].) The phrase "financially interested" includes anything that would tie a public official's fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla, supra*, at p. 1334.) "The government's right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty." (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 [citations omitted].)

Interpreting the term “employees” as used in Section 1090, the California Supreme Court recently affirmed the long-standing rule from case law that independent contractors are not categorically excluded from Section 1090: “Liability under the statute can extend to independent contractors who have duties to engage in or advise on public contracting.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 233.) For example, an independent contractor for a state or local government agency that “has a hand in designing and developing the plans and specifications for the project,” has made or participated in the making of a contract for the construction of the project and is therefore prohibited from entering a contract to complete the project. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300-301.)

However, not *all* independent contractors are covered by Section 1090. (*Sahlolbei, supra*, at p. 240.) “‘An individual’s status as an official under [Section 1090] turns on the extent to which the person influences an agency’s contracting decisions or otherwise acts in a capacity that demands the public trust.’” (*Ibid*, quoting *Hub City Solid Waste Services, Inc. v. City of Compton (Hub City)* (2010) 186 Cal.App.4th 1114, 1125.) In *Hub City*, the court held that an independent contractor that exerts “considerable influence over the contracting decisions of a public agency” is subject to Section 1090. (*Hub City, supra*, at pp. 1124-1125.)

Previously, we have advised that consultants who play a limited technical role and are removed from influencing the contracting decisions of a public agency may not be subject to Section 1090. (*La Salle* Advice Letter, No. A-17-074 and *Green* Advice Letter, No. A-16-084.) Likewise, in the *Chadwick* Advice Letter, No. A-15-147, we determined that only the primary consultant and a “highly involved sub-consultant” were subject to Section 1090. The sub-consultants who provided technical input, reports, and similar information in a support role to the consultants, were not subject to Section 1090.

In this case, you compare City Innovate’s services to a program to handle tax reporting. However, based on the information you have provided and responses to our inquiries, the exact nature and scope of the services City Innovate may provide is not clear. Accordingly, we can only generally conclude that 1090 will apply and prohibit future contracts between the City and another independent contractor, which City Innovate has an interest in other than the subscription fee paid by the City, if City Innovate is in a position to influence future contracts between the City and the independent contractors who use the program.

However, we note that this is a determination that can be made only after the full nature of the work performed on the City’s behalf is identified. Generally, to the extent that the City’s subscription solely provides a program that will assist the City in identifying potential independent contractors, 1090 does not prohibit subsequent contracts with independent contractors who use the program. However, if City Innovate will receive additional compensation from the contractors using the program, or as a result of subsequent contracts between the City and independent contractors using the program, Section 1090 may apply. For example, if City Innovate receives additional compensation from independent contractors using the program and the City is agreeing to give any preferential treatment to independent contractors using the program, Section 1090 may apply. Also, if City Innovate will receive additional compensation from independent contractors using the program while performing any additional services for the City including but not limited to managing contracts, ranking or evaluating contractors, or promoting contractors that use the program, Section 1090 may apply.

**B. The Act.**

Under the Act, public officials must “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).)

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” (Section 87100.) “The Act's conflict of interest prohibitions apply only to public officials and only to governmental decisions that have a financial effect.” (Regulation 18700(b).) The term “public official” includes “every member, officer, employee or consultant of a state or local government agency.” (Section 82048(a).)

The term “consultant” is defined in Regulation 18700.3(a). Under this definition, an individual who works pursuant to a contract with an agency is a public official if he or she engages in the following activities under the contract:

(1) Makes a governmental decision whether to:

(A) Approve a rate, rule, or regulation;

(B) Adopt or enforce a law;

(C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;

(D) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

(E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

(F) Grant agency approval to a plan, design, report, study, or similar item;

(G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

(2) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18704(a) and (b) or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Section 87302.

Thus, there are two ways that an individual can become a “consultant,” and thus be a public official subject to the Act. First, an individual is a “consultant” if he or she, pursuant to a contract

with a government agency, makes government decisions as described in Regulation 18700.3(a)(1). Alternatively, an individual may be a “consultant” if he or she, pursuant to a contract with a government agency, serves in a staff capacity and either participates in governmental decisions, as defined, or performs the same or substantially all the same duties that would otherwise be performed by an individual in a position listed in the agency’s conflict-of-interest code.

In this case, as explained in the Section 1090 discussion above, a complete analysis under the Act requires more detailed and specific facts. Thus, to the extent that City Innovate is merely providing a program for the City’s use and limited technical support for that program, City Innovate and its employees are generally not public officials under the Act. On the other hand, if City Innovate makes recommendations to the City or evaluates contractors on its behalf, then City Innovate employees may be public officials and that would be precluded from taking part in future decisions that may have an additional financial effect on the employee or City Innovate.

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

Sincerely,

Dave Bainbridge  
General Counsel

*John M. Feser Jr.*

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

JMF:aja