



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 13, 2020

Kotaro Nakamura
Principal Architect
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363 Fifth Avenue, Suite 202
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Re: Your Request for Advice
Our File No. A-20-033

Dear Mr. Nakamura:

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 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 from contracting with RNT Architects ("RNT") to perform design-build services on a project where RNT has already performed services on the same project under a previous contract with the Balboa Park Conservancy, a nonprofit entity?²

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 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.

² For convenience and efficiency, we consolidated your three hypothetical scenarios as they all pertain to a contract between the City and RNT.

CONCLUSION

No. As explained below, Section 1090 does not prohibit the City from entering a contract with RNT to perform design-build services on a project where RNT has already performed services on the same project under a contract with the Conservancy.

FACTS AS PRESENTED BY REQUESTER³

You are a licensed architect and part-owner of RNT seeking advice at the request of the Public Works Department of the City of San Diego. In 2016, the Conservancy, a nonprofit entity, entered into a contract with RNT for the concept design of the restoration of the Botanical Building. RNT provided the concept design in August of 2016.

In August of 2019, the State of California, represented by State Senator Tony Atkins and State Assemblymember Todd Gloria, announced the funding of \$8.26 million to restore the Botanical Building project. The City of San Diego Public Works Department was designated as the managing agency. The funding has a 3-year deadline for expenditure set to expire June 30, 2022. In October of 2019, the Conservancy authorized RNT to proceed with up to 60% design documents under the initial 2016 contract with the intent that those documents would become a part of the City Public Works Design-Build Request for Proposals. Additional philanthropic funds were used to pay for those design fees.

On April 17 and May 6, 2020, the Director of the City's Parks and Recreation Department, Andy Field, and the Conservancy's Director of Planning, Design and Programs, Jackie Higgins, provided additional information. On December 18, 2008, the Balboa Park Committee⁴ adopted a report in which it recommended and asked the Mayor and City Council to support the formation of a Balboa Park Task Force ("BPTF") to study how to address the deferred maintenance in Balboa Park. The BPTF was appointed by then Mayor Jerry Sanders and had its first meeting on October 19th, 2009. The BPTF studied for several months and made many recommendations, one of which was a recommendation that a new public-benefit private non-profit organization 501(c)(3) be established. Formed in 2011, the Conservancy has never had any City appointed board members or staff.

The Conservancy board was always outside of the City organizations and was not approved or funded by the Mayor or the City Council. Although it has applied for and has been awarded at least three government grants, approximately 96% of the Conservancy's income is from private funds and earned revenue.

The Balboa Park Conservancy was formed to fill the gap between municipal and destination levels of maintenance in Balboa Park. The Conservancy compliments the work of City's Parks and

³ The City concurs with the facts herein.

⁴ The Committee was a volunteer advisory committee appointed by the Mayor included some City staff and officials.

Recreation Department, working in partnership to provide critical funding, expertise, and resources to help enhance and sustain Balboa Park as a global destination.

The original 2016 contract with RNT was the result of an open bid process where multiple teams were asked to bid on preparing the conceptual design drawing and renderings for the restoration of the Botanical Building. The RNT team was selected as a result of that open bid process. The scope of work included historical research on the original structure from 1915, preliminary assessments of existing conditions, and recommendations on how to bring the building up to code while retaining the original design intent in alignment with Department of Interior standards, as this building is a historic landmark.

The Botanical Building project is a restoration project and there is very limited leeway in the design. The design scope of work is fairly set and straight forward, because for the most part it is replicating and restoring the 1915 design, in accordance with Department of Interior standards. Consequently, RNT does not really have much influence over that scope of work, and because the construction part of this project is a City of San Diego Public Works project, the City controls the scope of work for the project. RNT's services in the subsequent contract would simply be a continuation of the services it provided in the initial contract.

ANALYSIS

The Conservancy

As an initial matter, your facts state that in February of 2016, the nonprofit Conservancy entered into the first contract with RNT for the concept design of the restoration of the Botanical Building. It is unclear, however, whether the Conservancy, which you state was formed upon recommendations by a task force appointed by the Mayor to fill the gap between municipal and destination levels of maintenance in Balboa Park, is a governmental entity for purposes of the Political Reform Act ("the Act").⁵

The Commission has established criteria for determining whether an entity, such as a nonprofit entity, is governmental in character for purposes of the Act. In its opinion, *In re Siegel* (1977) 3 FPPC Ops. 62, the Commission determined whether the Pico Rivera Water Development Corporation, a nonprofit corporation, should be considered a local government entity by applying a four-part test: 1) Whether the impetus for formation of the entity originated with a government agency; 2) Whether the entity is substantially funded by, or its primary source of funds is a government agency; 3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and 4) Whether the entity is treated as a public entity by other statutory provisions.

However, as discussed below, even assuming solely for purposes of this advice that the Conservancy were considered a local government entity under the Act, Section 1090 would not prohibit the City from entering the second contract with RNT. Therefore, it is not necessary to

⁵ In this regard, Mr. Field, Director of the City's Parks and Recreation Department, stated that whether the Conservancy is considered a government entity concerns legal opinions that the City cannot provide.

proceed with the *Siegel* analysis, and we make no determination about the governmental character of the Conservancy using the *Siegel* factors.

Section 1090

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 v. Taft* (1962) 58 Cal.2d 565, 569.) 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.)

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

Independent Contractors Subject to Section 1090

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291 [“statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] ... [¶] A person merely in an advisory position to a city is affected by the conflicts of interest rule”].) This long-standing rule was recently affirmed by the California Supreme Court (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230), and it applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

The purpose behind this inclusiveness of the definition is to ensure that independent contractors who are essentially performing a public function, though temporarily, provide the same “fealty expected from permanent officers and employees.” (46 Ops.Cal.Atty.Gen 74 (1965).) In *Hub City*, the court stated that a person’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.” (*Hub City, supra*, 186 Cal.App.4th at p. 1125.)

Here, RNT had responsibilities under the initial contract with the Conservancy to provide both the concept design and 60% design documents for the Botanical Building project with the intent that those documents would become a part of the City’s design-build Request for Proposals. Assuming for the sake of this advice only that the Conservancy were a local government entity, RNT would be subject to Section 1090 due to its responsibilities to assist in the preparation of the City’s design-build Request for Proposals concerning the Botanical Building project.

Participating in Making a Contract

Assuming RNT were subject to Section 1090, the next issue would be whether, for purposes of Section 1090, RNT made or participated in making the proposed design-build contract for the Botanical Building project through the services it provided under the initial contract. Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

Furthermore, in *Sahlolbei, supra*, the Supreme Court explained that “Section 1090 prohibits officials from being ‘financially interested in any contract made by them in their official capacity.’ Officials *make* contracts in their official capacities within the meaning of section 1090 if their positions afford them ‘the opportunity to ... influence execution [of the contracts] directly or indirectly to promote [their] personal interests’ and they exploit those opportunities.” (*Sahlolbei, supra*, at p. 246 quoting *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

Under the initial contract, RNT provided both the concept design and 60% design documents for the Botanical Building project. According to the facts, RNT did not have an opportunity to influence the subsequent contract because the Botanical Building project is a restoration project and there is very limited leeway in the design. Indeed, the design scope of work is fairly set and straightforward, because it is intended to replicate and restore the 1915 design, in accordance with Department of Interior standards. RNT now seeks to propose on the City’s design-build Request for Proposals related to the same project which would simply be a continuation of the services it provided under the initial contract.

As mentioned, the purpose of Section 1090 is to prohibit self-dealing. According to your facts, because of the nature of this restoration project, RNT was not in a position to leverage influence over the scope of the proposed subsequent contract for its own pecuniary benefit. And where no evidence of self-dealing exists, no interest would be served by disqualifying RNT from proposing on the 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.)

Accordingly, even assuming for purposes of this advice only that the Conservancy were a local government entity, Section 1090 would not prohibit the City from entering the design-build contract with RNT related to the Botanical Building project.

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:aja