



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 25, 2020

Yolanda Summerhill
Assistant City Attorney
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

Re: Your Request for Advice
Our File No. A-20-036

Dear Ms. Summerhill:

This letter is in response to your request for advice regarding Government Code Section 1090, et seq.¹ We are not authorized to provide advice on any other laws that may apply such as common law conflict-of-interests provisions and any advice we provide assumes your facts are complete and accurate. (*In re Oglesby* (1975) 1 FPPC Ops. 71)

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

Does Section 1090 prohibit a professional engineering design firm Dudek from entering into a new agreement with the City of Newport Beach (the City), to enter a new contract if selected after a Request for Proposal (RFP) to prepare the final construction documents for three water main bay crossings (the final construction documents) where Dudek previously performed work for the City on the same three water main bay crossings, among others, in 2008 and 2017?

CONCLUSION

No. Section 1090 does not prohibit the City from entering a contract with Dudek for the final construction documents because Dudek is not subject to Section 1090. Based on the facts provided, Dudek had no responsibilities for public contracting on the City's behalf in performing the prior work. Thus, Section 1090 does not prohibit Dudek from participating in the RFP.

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.

FACTS AS PRESENTED BY REQUESTER

A. Dudek's 2008 Work – Visual Assessments of 9 Water Main Bay Crossings.

In 2008, the City entered into a professional services agreement² with Dudek, a California corporation, to evaluate nine water main bay crossings. Under the agreement, Dudek: (1) engaged in a visual inspection of the water main bay crossings; (2) reviewed existing construction documents pertaining to the water main bay crossings; (3) prioritized projects; and, (4) prepared a final report of their recommendations. These tasks involved visual assessments that did not require physical testing or analysis.

Specifically, Dudek's 2008 work involved evaluations of nine water main bay crossings. The City owns and maintains these potable water mains that are operated under various bays throughout the City. Some of these water mains were installed in the 1920s and have reached the end of their design life. The scope of work included visual inspection, review of existing construction documents and hydraulic analysis to prioritize projects.

B. Dudek's 2017 Work – Preliminary Design Report on 8 Water Main Bay Crossings.

In 2017, the City entered into a second agreement³ with Dudek for: (1) additional field evaluation and testing of eight water main bay crossings; (2) an assessment of the feasibility of rehabilitation or replacement construction methods such as subaqueous crossing, horizontal directional drilling and cured-in-place pipe lining; (3) recommendations for rehabilitation methods for each water main bay crossing; (4) a constructability analysis for the recommended improvements; (5) a proposal for new alignments for replacement water main bay crossings; (6) the creation of a construction phasing plan; (7) the preparation of a preliminary construction cost estimate; and (8) the preparation of a Preliminary Design Report.

C. Upcoming RFP – Final Construction Documents for 3 Water Main Bay Crossings.

The City now intends to issue an RFP to several engineering design firms for the preparation of the final construction documents for three of the water main bay crossings that will involve a method of construction recommended by Dudek's Preliminary Design Report. The City plans to invite five engineering design firms to submit proposals for the preparation of the final construction documents.

Dudek has not been involved in drafting the RFP for the preparation of the final construction documents. The method of construction that Dudek previously recommended is standard industry practice, not a proprietary method of Dudek. The City, not Dudek, made the decisions relevant to the upcoming RFP.

The work Dudek performed for the City in 2008 and 2017 is distinct from the scope of work under the City's upcoming project. Dudek is a professional engineering design firm and not a

² In December 2007, before it hired Dudek, the City requested Statements of Qualifications from four engineering firms to complete this 2008 evaluation.

³ In March 2017, before it hired Dudek, the City requested proposals from five firms to complete this preliminary design report.

construction contractor. Dudek was not a subcontractor for the work performed in 2008 and 2017 for the City, but rather was hired by the City to complete the specific tasks described above. The prospective RFP, on the other hand, would require the preparation of detailed specifications for construction. The 2008 and 2017 contracts involved engineering design services that were preliminary to preparation of final construction documents. Deliverables for these two contracts included professional recommendations and the preparation of a Preliminary Design Report and did not involve preparation of final construction documents.

The upcoming RFP is for the preparation of construction drawings and specifications (construction documents) for three of the water main bay crossings. These are detailed engineering plans and specifications that the City needs to solicit construction bids. Upon completion of the final construction documents, the City will solicit bids for the construction phase.

ANALYSIS

A. Section 1090.

Government Code section 1090 “codifies the long-standing common law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072.) 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.” (Section 1090(a).)

Section 1090 applies to any situation that “would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [public entity concerned].” (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Section 1090’s goals include eliminating temptation, avoiding the appearance of impropriety, and assuring the public of the official’s undivided and uncompromised allegiance. (*Thomson v. Call* (1985) 38 Cal.3d 633, 648.)

Furthermore, 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, supra*, 38 Cal.3d at p. 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.) This prohibition must be broadly construed and strictly enforced. (*Stigall, supra*, 58 Cal.2d at pp. 569-571; *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1334.)

The California Supreme Court has held that the term “officers” in Section 1090 applies to “outside advisors [independent contractors, including corporate consultants] with responsibilities for public contracting similar to those belonging to formal officers.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 237-240.) Thus, liability extends only to independent contractors entrusted with “transact[ing] on behalf of the Government.” (*Id.* 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.” (*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.)

B. Section 1090 Does Not Prohibit Dudek from Participating in the Upcoming RFP.

In accordance with the foregoing legal authority, we apply a two-step analysis to determine whether a public entity that has entered a contract with an independent contractor to perform one phase of a project may enter a second contract with that independent contractor for a subsequent phase of the same project. The first issue is whether the independent contractor had responsibilities for public contracting on behalf of the public entity under the initial contract. If not, then the independent contractor is not subject to Section 1090 and the public entity may enter the subsequent contract. If so, then the second question is whether the independent contractor participated in making the subsequent contract for purposes of Section 1090 through its performance of the initial contract. If not, then the public entity may enter the subsequent contract. If so, then Section 1090 would prohibit the public entity from entering the subsequent contract.

In this case, the facts provided indicate that Dudek is not subject to Section 1090 because it had no responsibilities for public contracting on behalf of the City for work performed in 2008 and 2017. Dudek’s prior work did not require Dudek to make any decisions on the City’s behalf. The City, not Dudek, made the decisions relevant to the upcoming RFP. The facts do not indicate that the City entrusted Dudek with transacting on its behalf. Dudek was neither a decisionmaker nor a construction contractor in 2008 and 2017. Rather, it performed work of a limited technical nature as a professional engineering design firm that included visual inspections, feasibility analyses, review of existing construction documents, and a preliminary design report that was *preliminary* to any project construction or preparation of final construction documents. For these reasons, we find that Dudek is not subject to Section 1090⁴ and thus may participate in the upcoming RFP.

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

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⁴ Dudek may also not be subject to Section 1090 because of the nature of its prior work. We have previously 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.) 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.