



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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Mark Dowd
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155 Grand Avenue, Suite 800
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Re: Your Request for Advice
Our File No. A-20-059

Dear Messrs. Nelson and Dowd:

This letter responds to your request for advice on behalf of the Delta Conveyance Design and Construction Joint Powers Authority (“DCA”) and Jacobs Engineering Group Inc. (“Jacobs”) 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 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).)

QUESTIONS

1. May Jacobs enter into a new competitively solicited contract with the DCA for engineering services in connection with the final design and oversight of future projects within the Delta Conveyance program if Jacobs and its team performed preliminary design services for the

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.

project?

2. May Jacobs' subconsultants who performed preliminary design consulting services on the project enter into contracts to perform consulting services on the final design?

CONCLUSION

1. & 2. Yes. Section 1090 does not prohibit Jacobs and the subconsultants who performed preliminary design consulting services on the project from entering into a contract for services in connection with the final design and oversight of future projects within the Delta Conveyance program.

FACTS AS PRESENTED BY REQUESTER

The DCA was organized under the Joint Exercise of Powers Act, pursuant to the Joint Powers Agreement Forming the Delta Conveyance Design and Construction Joint Powers Authority ("Joint Powers Formation Agreement"), effective May 13, 2018. On October 26, 2018, the DCA entered into the Amended and Restated Joint Exercise of Powers Agreement ("JEPA Agreement") with the California Department of Water Resources ("DWR"), to outline the respective roles of the DCA and DWR for the Delta Conveyance Project, as defined below. DWR and the DCA then entered into an Amendment No. 1 to the JEPA Agreement to provide for the DCA's services to DWR in support of new planning and environmental work.

Background and Purposes

The DCA was formed for the purpose of designing and constructing a new Sacramento-San Joaquin Delta ("Delta") water conveyance facility ("Conveyance Project"), under the supervision of DWR. DWR has broad discretion to implement the Conveyance Project for the benefit of the people of the State of California. The Conveyance Project described in the JEPA was commonly known as the California WaterFix. Since its formation, the DCA had been engaged in start-up activities of establishing its internal structure, retaining experts, implementing systems and procedures, and other actions necessary before commencing its core function of design and construction activities for the approved California WaterFix project.

In early 2019, Governor Newsom's Executive Order N-10-19 set a new water policy for California and on May 2, 2019, DWR withdrew approval of the California WaterFix project and announced it would embark on new planning and environmental documentation for a potential Delta Conveyance Project. As reflected in JEPA Amendment No. 1, the parties intend for the DCA to provide design and site investigative services to support DWR's new planning and environmental work during the start-up phase of the Conveyance Project. DWR has formally begun its environmental review process under the recently issued Notice of Preparation for a potential Conveyance Project, and the DCA is providing design and site investigative services. Ultimately, if a new Delta Conveyance Project is approved after environmental review, the DCA will be expected to design and build the Conveyance Project as part of its core function of design and construction activities for an approved Conveyance Project.

EDM Services for the Planning Phase and a Potential Future Conveyance Project

On December 20, 2018, the DCA Board of Directors approved the execution of a five-year agreement with Jacobs for Engineering Design Management services (“EDM Agreement”). Under the EDM Agreement, Jacobs and a team of subconsultants² were authorized to provide conceptual level engineering work for the Waterfix project and support the DCA as an extension of DCA staff in project management of individual projects identified as part of the Waterfix project. Services were expected to be provided under the issuance of various task orders by the DCA.

In light of DWR’s withdrawal of approvals for California WaterFix, DWR’s May 2, 2019 letter and JEPA Amendment No. 1, the DCA is currently utilizing Jacobs and its subconsultants exclusively for conceptual design engineering services to assist DWR’s planning and environmental review process for a potential Conveyance Project. These services will allow DWR to consider the relevant options and complete necessary environmental review under the California Environmental Quality Act and other laws.

In early 2021, the DCA is expected to begin preliminary design of the Conveyance Project and will ultimately develop a preliminary design report for the Delta Conveyance program if it proceeds. The DCA expects to limit the Jacobs scope of services to preparation of the preliminary design report but may issue task orders for final design services as appropriate.

Except for retaining subcontractors to provide services within its scope of work, Jacobs does not have authority to contract on behalf of the DCA. Subcontractors lack any authority to contract on behalf of the DCA. Moreover, Jacobs’ and its subcontractors’ work is subject to technical and administrative oversight. Specifically, the DCA has engaged the services of a chief engineer. This chief engineer oversees and directs Jacobs’ and its subcontractors’ work. This oversight is in addition to that provided by other DCA staff, including its Executive Director and the DCA Board of Directors.

In the event DWR decides to move forward with a Conveyance Project, the DCA will be responsible for completing its design and construction under the terms of the JEPA as amended by JEPA Amendment No. 1 and as it may be further amended in the future. Except as noted above, it is likely the DCA would conduct a request for proposals or similar process to request and receive proposals or statements of qualifications for these final design and construction management services.

The DCA would like to ensure that Jacobs and its team of subconsultants are eligible to submit a proposal for final design and construction management services for projects identified for public competitive procurement. For construction management services, eligibility would be limited to projects where Jacobs has not served as the prime final designer. The size and complexity of any potential Conveyance Project necessitates specialized services that relatively

² A complete list of the parties performing services for the DCA under the EDM Agreement is as follows: Jacobs Engineering Group, Inc., WSP USA, Inc., Black & Veatch Corporation, GEI Consultants, Inc., McMillen Jacobs Associates, AnchorCM, BabEng, LLC, DJE Inc. dba Edelman, EETS, Inc., JMA Civil, Nazli Parvizi Consulting, Kearns & West, Inc., Lettis Consultants International, Inc., Moffatt and Nichol, Northwest Hydraulic Consultants, Inc., RiverSmith Engineering, Inc., MARRS Services, Inc., SRMK, Inc., and Wiseman Consulting.

few firms may be able to provide. This is especially true given the number of similar infrastructure projects currently under development that will necessarily limit the number of available firms.

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 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.) 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.)

The term “public official” is interpreted broadly under Section 1090 and includes “independent contractors who perform a public function” and “whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency.” (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; citing *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 690-693; see also *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, at pp. 300-301.) It is also clear that Section 1090 applies to independent contractors as well as corporate consultants. (*Davis supra*, at p. 300.)

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, supra*, at pp. 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.)

In *Sahlolbei, supra*, the Supreme Court concluded that Section 1090’s reference to “officers” applies to “outside advisors with responsibilities for public contracting similar to those belonging to formal officers” (*Id.* at p. 237), and held that not all independent contractors are covered by Section 1090; instead, “independent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf.” (*Id.* at p. 245.)

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.)

In this instance, the DCA contracted with Jacobs in 2018 for a five-year agreement to provide conceptual level engineering work for the Waterfix project. Since the termination of the WaterFix project in 2019, DCA has been utilizing Jacobs and its subconsultants exclusively for conceptual design engineering services to assist DWR's planning and environmental review process for a potential Conveyance Project.

Importantly, Jacobs and its subcontractors do not have any authority or duties under the 2018 agreement to contract on behalf of the DCA. You also note that, in addition to the oversight provided by DCA staff, including its Executive Director and the DCA Board of Directors, the DCA has engaged the services of a chief engineer, who oversees and directs Jacobs' and its subcontractors' work.

Accordingly, so long as Jacobs does not perform services on behalf of the DCA where it would engage in or advise on public contracting, it is not subject to Section 1090.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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