



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 5, 2021

Christian L. Bettenhausen
Westminster City Attorney
Jones & Mayer
3777 N. Harbor Blvd.
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Re: Your Request for Advice
Our File No. A-21-021

Dear Mr. Bettenhausen:

This letter responds to your request for advice on behalf of the City of Westminster regarding the Political Reform Act (the “Act”)¹ 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.

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 Orange 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) Would the Act’s conflict of interest provisions prohibit an independent contractor, paid by the City on an hourly basis pursuant to a City contract to oversee a project to redevelop the City’s Civic Center, from taking part in governmental decisions relating to the scope of the project given that those decisions could affect the total compensation the City would pay to the contractor under the contract?
- (2) Would the Act’s reporting provisions require the independent contractor to file Statements of Economic Interests disclosing compensation paid by the City pursuant to the contract?

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 (the “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. Section 1097.1 sets forth the Commission’s jurisdiction with respect to Section 1090 et seq.

- (3) If the City and the independent contractor execute the contract, would Section 1090 prohibit the contractor from analyzing and making recommendations relating to the project's scope given that those decisions may affect the contractor's total compensation under the contract?

CONCLUSIONS

- (1) No. The Act's conflict of interest provisions would not prohibit the independent contractor from taking part in decisions relating to the project's scope pursuant to the contract. However, if the decision at issue may result in any additional work and income for the contractor beyond that provided for in that contract, the City should seek further advice.
- (2) No. Although the Act's reporting provisions would require the independent contractor to file Statements of Economic Interests if the contract is executed, the contractor would not be required to report fees paid by the City to the contractor pursuant to the contract because those payments are excluded from the Act's definition of "income."
- (3) No. Section 1090 would not prohibit the independent contractor from analyzing and making recommendations relating to the project's scope pursuant to the contract.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Westminster. In 2017, the City entered into an exclusive negotiating agreement with a private developer, which has been extended through the present date. Under that agreement, the developer has the right to negotiate with the City concerning the potential sale and development of approximately 4.25 acres of real property owned by the City (the "Project"). That real property is located within the City's Civic Center and includes the land upon which the existing City Hall and Council Chambers and two large parking lots are located.

The Project would include both a public and private component: the private component would consist of approximately 100 residential units, associated parking, and open space; the public component would include, among other things, the construction of a new City Hall, Council Chambers, parking areas, and a public open space for the Civic Center. The Project would involve the construction of the new City facilities, relocation of City staff into the new facilities, the potential sale of approximately 250 city owned parking spaces to the nearby community college district, and other issues associated with financing the public portion of the Project.

Due to the complexity of the Project, and the fact that City staff is already overtaxed on other projects, the City Manager has decided to contract with an experienced independent contractor to serve as the City's project manager for the Project (the "Potential Project Manager Contract"). Because the Project is still in its early phases of design and development, it is unclear at this point how much time or effort will be required by the contractor to successfully complete the Project. The City has proposed compensating the contractor at an hourly rate and using the City's standard consultant contract. The Potential Project Manager Contract would include a cap on total hours, and the contractor would not be authorized to make independent decisions that would increase the amount the contractor would be paid by the City under the Contract. The Contract would require all work done by the contractor to be overseen by the City Manager and the City's

Community Development Director, and all final decisions to be approved by City staff or the City Council depending on the particular decision under consideration.

ANALYSIS

The Act

The threshold issue is whether the independent contractor that would oversee the Project on behalf of the City under the Potential Project Manager Contract would a “public official” subject to the Act’s conflict of interest and reporting provisions due to entering into that Contract.

The Act requires public officials to “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 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 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 the individual, pursuant to a

contract with an agency, makes a governmental decision as described in Regulation 18700.3(a)(1). Second, an individual may be a consultant if the individual, pursuant to a contract with an agency, serves in a staff capacity and either participates in governmental decisions, as defined in Regulation 18704(a) and (b), or performs the same or substantially all the same duties that would otherwise be performed by an individual in a position designated in the agency's conflict of interest code.

Pursuant to the Potential Project Manager Contract, the independent contractor at issue would serve as the City's project manager for the Project, advising the City in regard to the Project, a role typically performed by City staff. The City Manager has decided to contract with the contractor because the Project is complex, City staff does not have the excess capacity necessary to take on the Project, and the contractor is an experienced project manager. The contractor's work under the Contract would be overseen by City staff, and all final decisions would be approved by City staff or the City Council, indicating that the contractor's work would be treated similarly to work by City staff on a project. The facts presented provide no indication that the duties performed by the contractor under the Contract are dissimilar from those that would otherwise be performed by a designated employee of the City. Therefore, based on the facts presented, the contractor would be a "consultant" under the Act if the contractor enters into the Contract.

The Act's Conflict of Interest Provisions

The Act's conflict of interest provisions prohibit a public official from making, participating in making, or attempting to use the official position to influence a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests. (Sections 87100 and 87103.) An official's financial interests that may give rise to a disqualifying conflict of interest are identified in Section 87103 and include all the following:

- An interest in any business in which the official has an investment worth \$2,000 or more (Section 87103(a)), or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in any real property in which the official has an interest worth \$2,000 or more. (Section 87103(b).)
- An interest in any source of income aggregating \$500 or more in the 12 months prior to the decision. (Section 87103(c).)
- An interest in any source of a gift or gifts aggregating \$520 or more in the 12 months prior to the decision. (Section 87103(e).)
- An interest in the official's personal finances and those of immediate family members.² (Section 87103.)

Section 82005 defines "business entity" for purposes of the Act as "any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm,

² Section 82029 defines "immediate family" to mean the spouse and dependent children.

business trust, joint venture, syndicate, corporation or association.” The independent contractor’s work under the Potential Project Manager Contract would be a for profit enterprise, and the contractor would either be an employee of or hold a management position with that “business entity,” based on the facts presented. Therefore, the contractor would have a financial interest in the contractor’s consulting business under Section 87103(d) if the contractor enters into the Potential Project Manager Contract. Pursuant to Section 87103(a), the contractor would also have an interest in that business if the contractor has an investment in the business worth \$2,000 or more.

Section 82030 defines “income” for purposes of the Act, and subdivision (b)(2) of that section expressly provides that income does not include salary, reimbursement of expenses, and other specified payments received from a state, local, or federal government agency. Regulation 18232(a) defines “salary” from a state, local, or federal government agency to include fees paid to an individual who is a public official on account of being a consultant. Therefore, the payments that the independent contractor would receive from the City pursuant to the Potential Project Manager Contract would not be “income” under the Act. Accordingly, the contractor would not have a financial interest in the City as a source of income.

Thus, based on the facts presented, the independent contractor at issue would have a financial interest in the contractor’s consulting business, sources of income to the business other than the City, and a financial interest in the contractor’s personal finances and those of immediate family members with respect to decisions relating to the Project’s scope if the Potential Project Manager Contract is executed.

The Act’s conflict of interest provisions, however, would not prohibit the independent contractor from taking part in decisions relating to the Project’s scope if the City and the contractor negotiate the Potential Project Manager Contract, including its compensation terms, prior to the City commencing the Project. The *Eckis* Advice Letter, No. A-93-270, which analyzed a comparable circumstance, provides in pertinent part:

[W]here a governmental entity has already contracted to permit the consultant to make recommendations that result in rendering of identified services for an agreed upon price, there is no conflict of interest. In that case, the consultant’s participation in governmental decisions will not have a foreseeable financial effect on the consultant’s employer. This is because, according to the *McEwan* advice letter [I-92-481], the agency’s decision to pay the consultant’s employer for the additional services contemplated by the contract was previously made by disinterested agency officials and the consultant’s participation merely constitutes the implementation of that preexisting decision.

However, where a consultant makes a recommendation to a public agency that will create additional work and income for the consultant’s employer that is beyond the scope of the contract under which the consultant is rendering advice, then a conflict of interest arises. (*In re Mahoney* (1977) 3 FPPC Ops. 69; *Rose* Advice Letter, No. A-84-306.) In that situation, the consultant’s

recommendation most likely will have a material financial effect on the consultant's employer.³

This reasoning similarly applies to the question presented about whether the Act's conflict of interest provisions would prohibit the independent contractor at issue from taking part in decisions relating to the Project's scope because those decisions may affect the contractor's total hourly compensation under the Potential Project Manager Contract. If such a decision is made pursuant to that Contract, then there is no conflict of interest under the Act. Under the Contract, the contractor would render project-manager services relating to the Project for an agreed upon price. The City's decision to pay the hourly compensation set forth in the Contract will have been made at the time the City and the contractor enter into the Contract, and not at the later time when the City confers with the contractor regarding the Project's scope. However, if the decision relating to the Project's scope at issue may result in additional work and income for the contractor beyond that provided for in the Contract, then the contractor would likely have a conflict of interest under the Act, and the City should seek additional advice.

The Act's Reporting Provisions

Section 87300 requires every agency, including a city, to "adopt and promulgate a Conflict of Interest Code." Section 87302(a) requires a Conflict of Interest Code to enumerate all "positions within the agency, other than those specified in Section 87200, which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest" and to identify the specific types of interests that are reportable for those positions.

A person in a position designated in an agency's Conflict of Interest Code is known as a "designated employee." Section 82019 defines "designated employee," and subdivision (a)(3) of that section provides in pertinent part that a "consultant" is a designated employee if the consultant's position with the agency "entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest." Section 87302(b) requires that each designated employee, other than those specified in Section 87200, file Statements of Economic Interests as required by the Act.

The facts presented indicate the independent contractor at issue would be a "consultant," and thus a "designated employee" of the City if the Potential Project Manager Contract is executed. Therefore, if that Contract is executed, the Act would require the contractor to file Statements of Economic Interests pursuant to the City's Conflict of Interest Code and Section 87302(b).

As noted above, however, Section 82030's definition of "income" excludes "salary, reimbursements of expenses, and other specified payments" received from a local government agency, and Regulation 18232(a) defines "salary" from a local government agency to include fees paid by the agency to a consultant. Thus, the Act's reporting provisions would not require the

³ Based on the same reasoning, the Commission has made a similar determination regarding state and local agencies contracting with private bond counsel (*Ritchie* Advice Letter, No. 79-045; *McEwan* Advice Letter, *supra*) and real estate brokers (*Pardee* Advice, No. I-91-506), all of whom were compensated by the agency based on a percentage of the value of the bond or the real property at issue.

independent contractor to report fees paid by the City pursuant to the Potential Project Manager Contract on the contractor's Statements of Economic Interests.

Section 1090

Section 1090 generally prohibits public employees and officers, while working 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.)

Is the Independent Contractor Subject to Section 1090?

Interpreting "officers and employees" as used in Section 1090, the California Supreme Court has 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, 239.) 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.)

With respect to the Potential Project Manager Contract, the facts presented indicate the independent contractor at issue would have duties to engage in or advise on public contracting with respect to the Project and be involved in the design and development of plans and specifications for the Project under that Contract. Therefore, it appears the contractor would be subject to Section 1090 if that Contract is executed based on the facts presented.

Does Section 1090 Apply to Decisions Relating to the Project's Scope?

Decisions relating to the Project's scope clearly involve the Potential Project Manager Contract. Therefore, we next consider whether Section 1090 would prohibit the independent contractor from engaging in decisions relating to the Project's scope pursuant to the Contract because those decisions may lead to the contractor obtaining additional hourly compensation from the City under the Contract.

In 99 Ops.Cal.Atty.Gen. 35 (2016), the Office of the Attorney General considered whether Section 1090 prohibited a contract city attorney from providing the city with additional "bond counsel" services, with compensation for those services based on a percentage of the city's bond issuances, pursuant to provision of the city attorney's contract with the City contemplating the bond issuances. Because the compensation structure for the additional services created a situation in which the contract city attorney would be financially interested in the size of the City's bond issuances, the opinion concluded that "section 1090 prohibits an arrangement under which a

contract city attorney's compensation for providing the city with additional 'bond counsel' services is based on a percentage of the city's bond issuances."

That Attorney General opinion, however, distinguished situations in which a contract city attorney's advice on a decision may create the need for additional legal services:

We stress that our conclusion does *not* mean that contract city attorneys may never advise municipal clients on a decision that may create the need for additional legal services. Indeed, to some extent, any advice a contract city attorney gives the city can have a potential financial effect on the contract attorney's compensation. Most commonly, recommendations about whether to pursue litigation result in litigation fees for the contract attorney. However, litigation does not in itself form a separate public contract as does a city's issuance of bonds. And while litigation often involves various related contracts—such as hiring experts or settlement contracts—the contract city attorney does not generally stand to be paid more or less based on whether the city signs those related contracts or what terms are included. Thus, we do not believe that typical services contracts for contract city attorneys—even when they contemplate additional services—will implicate section 1090, because they generally do not provide a *financial interest in specified future public contracts*. (99 Ops.Cal.Atty.Gen. 35, *supra*, fns. omitted.)

Applying the reasoning from this Attorney General opinion to the facts presented, there is no indication decisions relating to the Project's scope would result in the independent contractor at issue being financially interested in any specific future public contract other than the Potential Project Manager Contract. Furthermore, there is no indication of self-dealing: the Contract would include a cap on the contractor's total hours, require all work done by the contractor to be overseen by the City Manager and the City's Community Development Director, and require all final decisions to be approved by City staff or the City Council depending on the particular decision under consideration. For these reasons, we conclude that Section 1090 would not prohibit the contractor from analyzing and making recommendations relating to the Project's scope pursuant to the Contract based on the facts presented.

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

Sincerely,

Dave Bainbridge
General Counsel

Matthew F. Christy

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