



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
1102 Q Street • Suite 3000 • Sacramento, CA 95811  
(916) 322-5660 • Fax (916) 322-0886

May 27, 2021

William Roetzheim  
Chief Executive Officer  
Level 4 Ventures, Inc.  
13518 Jamul Drive  
Jamul, CA 91935

Re: Your Request for Advice  
**Our File No. A-21-029**

Dear Mr. Roetzheim:

This letter responds to your request for advice regarding Government Code Section 1090.<sup>1</sup> Please note that we are only providing advice under Section 1090, and our analysis is based solely on the facts provided. Our advice, and any immunity it may provide, is as complete and accurate as the facts provided in your request for advice and in response to our requests for additional information. 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 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

Given Level 4 Ventures, Inc.'s current contract work for the Franchise Tax Board providing cost estimates relating to the Franchise Tax Board's Enterprise Data to Revenue Phase 2 Project, does Section 1090 prohibit Level 4 Ventures, Inc. ("Level 4") from serving as a subcontractor on a subsequent Franchise Tax Board contract to provide independent oversight, verification, and vendor validation related to the Project?

### CONCLUSION

No. Because Level 4 is not subject to Section 1090 on account of its current contract work relating to the Enterprise Data to Revenue Phase 2 Project based on the facts presented, Section 1090 does not prohibit Level 4 from serving as a subcontractor on the Franchise Tax Board's contract to provide independent oversight, verification, and vendor validation related to the Project.

---

<sup>1</sup> All statutory references are to the Government Code, unless otherwise indicated.

## FACTS AS PRESENTED BY REQUESTER

Among other services, Level 4 provides government agencies independent cost estimates on projects for budgeting purposes and support with vendor negotiations. You are the Chief Executive Officer and Chief Scientist of Level 4.

The Franchise Tax Board (“FTB”) is currently in the process of developing its Enterprise Data to Revenue Phase 2 Project (the “EDR2 Project”), a very large and complex effort involving new business technologies that will impact all FTB work systems. More specifically, the EDR2 Project would modernize the FTB’s systems by transitioning the FTB’s audit, legal, filing enforcement, and underpayment work systems to a new enterprise data, case management, and modeling platform.

### *The Cost Estimate Contract*

In December 2018, the FTB entered into a contract with Advance Technical Solutions, Inc. (“ATS”) for the provision of cost estimates, analysis of vendor proposals, and support with vendor negotiations related to the EDR2 Project (the “Cost Estimate Contract”). You state that Level 4 is a subcontractor to ATS on the Cost Estimate Contract, and that Level 4 is responsible for delivering all products and services set forth in the Cost Estimate Contract’s statement of work. The Cost Estimate Contract’s statement of work requires the provision of the following to the FTB:

- An independent cost estimate report for the EDR2 Project, including lifecycle, implementation, and deployment costs.
- Consultation necessary to support EDR2 Project costing efforts.
- Analysis of the functional and non-functional requirements for the EDR2 Project.
- Support for the EDR2 Project during normal business hours at the FTB’s Central Office Facility and other designated facilities.
- Knowledge transfer necessary to understand EDR2 Project deliverables.

The Cost Estimate Contract contemplates certain future tasks, including analysis of the selected vendor’s bid for the EDR2 Project, comparison of that bid with benchmark data, and analysis and support with respect to any EDR2 Project change orders, as well as the potential extension of the Cost Estimate Contract for years two and three of the EDR2 Project.

Pursuant to the Work Authorization issued under the Cost Estimate Contract, you presented a report on behalf of Level 4 to the FTB in April 2019 entitled “EDR2 Independent Cost Estimate for Independent QA Contract” (the “Oversight Contract Cost Estimate Report”), which included cost estimates for a potential future independent quality assurance contract and related assumptions, specifications, and recommendations as to the scope of work of that contract. Level 4 was paid \$11,476 for the report and presentation.

### *The Second Cost Estimate Contract*

The FTB has entered into a second contract with ATS related to the EDR2 Project, in which ATS subcontracted the work to Level 4, with a term of March 20, 2020 to June 30, 2021 (as amended) (the “Second Cost Estimate Contract”). The Second Cost Estimate Contract involves similar services to the original Cost Estimate Contract, except that the consulting services involve the State of California’s Project Approval Lifecycle Stage 4 (Readiness and Approval) and includes cost analysis in support of EDR2 Product negotiations. Bid Analyses prepared by Level 4 as part of those services each contained a statement excluding from the scope costs for support contract functions that might be contracted from a vendor other than the primary EDR2 Project contract vendor. The Second Cost Estimate Contract’s Statement of Work requires the provision of the following to the FTB:

- Independent cost estimate report(s) related to the Project Approval Lifecycle Stage 4.
- Consultation regarding Project costing efforts.
- Bidder cost analysis with benchmark data.
- EDR2 Project cost subject matter expertise in support of vendor negotiations.
- Support during normal business hours at the FTB’s Central Office Facility and other designated facilities.
- Knowledge transfer necessary to understand contract deliverables.
- Additional consultation related cost or risk management, as necessary.

### *The Oversight Contract*

The FTB has recently issued an Invitation for Bid for the provision of oversight and independent verification and validation of the EDR2 Project (the “Oversight Contract”). The Oversight Contract has not yet been awarded, and Level 4 is a subcontractor on a bid for that contract. The Oversight Contract Cost Estimate Report presented to the FTB in April 2019 has not been provided to the FTB procurement official who is conducting the Invitation for Bid for the Oversight Contract. The procurement official used a Request for Information and responses received to gather information for the development of that Invitation for Bid.

Prior to the FTB entering into the Cost Estimate Contract in December 2018, the FTB prepared a cost estimate for oversight of the EDR2 Project based on the oversight costs incurred for the Enterprise Data to Revenue Phase 1 Project (the “EDR1 Project”). Level 4 was not involved in the preparation of this cost estimate. The cost estimate did not include quality assurance costs because these services were not provided by the independent contractor that provided oversight of the EDR1 Project.

After entering into the Cost Estimate Contract, FTB desired to refine the then inchoate Oversight Contract to include quality assurance services, and to base the cost of those services on the complexity of the EDR2 Project.

The California Department of Technology has determined that the quality assurance services to be provided under the Oversight Contract are necessary to meet current state standards for oversight of projects the size of the EDR2 Project.<sup>2</sup> An estimate for the cost for such services was also necessary for inclusion as a line item in the FTB's Financial Analysis Worksheets to secure funding for the EDR2 Project and ancillary contracts.

As noted above, the Cost Estimate Contract contemplates, among other things, analysis and support with respect to any EDR2 Project change orders. The "Contractor's Responsibilities" under the Cost Estimate Contract are described as follows: "The Contractor will provide an Independent Cost Estimate Report and consultation as needed in support of Project costing efforts." Section J of the Cost Estimate Contract provides in pertinent part:

1. In the event that additional work must be performed which was wholly unanticipated and is not specified in the SOW, but which is the opinion of the State, is necessary to the successful accomplishment of the general scope of work outlined, the procedures outlined in this Section will be employed. However, no such changes may commence without the prior approval of the FTB Technical Contract via an FTB Work Authorization (Exhibit A).

Table 2 of the Cost Estimate Contract described "Unanticipated Tasks" as "Additional time and material hours to provide product support related to cost and risk." The cost estimate for quality assurance for the EDR2 Project fell into this category.

Accordingly, FTB amended the Cost Estimate Contract to increase the dollar amount of the contract to cover two unanticipated tasks, including the cost estimate for quality assurance services relating to the EDR2 Project. FTB then issued Work Authorization #1 under Amendment No. 1 to the Cost Estimate Contract, which summarized the additional services to be provided as "Prepare a cost estimate for an EDR2 Quality Assurance ancillary contract." The FTB's Technical Director of the EDR2 Project instructed you and Level 4 to take into account the complexity of the EDR2 Project by analyzing the functional and non-functional Project requirements when preparing the Oversight Contract Cost Estimate Report.

---

<sup>2</sup> You state that system integration projects of the magnitude of the EDR2 Project are typically required to employ some level of oversight. There are different types of oversight, and more information about required oversight is contained in Section 45 of the State Information Management Manual. According to the Director of FTB's Project Oversight and Guidance Unit, for a project of the magnitude of the EDR2 Project, it is understood from the point of initiating the project that quality assurance and independent verification and validation services will be required. Section 4940.3 of the State Administrative Manual provides as follows:

IV&V services are required for all reportable project classified as medium or high criticality and must begin on or before the proposed project start date as identified in Stage 4 [of the Project Approval Lifecycle] approval letter issued by the Department of Technology and must continue through the duration of the project unless other direction is provided by the Department of Technology.

The following email correspondence between you and the FTB's Technical Director of the EDR2 Project in April of 2019 included additional discussion of the work to be done:

EDR2 Project Technical Director: Based on the EDR2 Cost Estimate you prepared for us, are you able to tell about how much we should expect to pay for Quality Assurance (QA) on the project? I've updated the SOW [for EDR2] to state that the State will be establishing an independent QA contract. I now need a rough estimate of how much the QA contract will cost, so that I can include it as a separate line item on our Financial Analysis Worksheets and secure funding.

Level 4's William Roetzheim: Yes, no problem. But it will change when we make changes to the baseline assumptions (e.g., modify scope, remove scope, etc.) So it would be most efficient to do this after those scope changes to the EDR project were put back into the model. But I can do it now and update it later, if necessary. I think adding that is a good idea on this project. You may be working with a brand new vendor and you don't know at this point how strong their internal QA processes are. Worst case (or best case, depending on your perspective) you'll have some duplicative effort here, but I think it greatly reduces your overall risk.

EDR2 Project Technical Director: Would you be able to provide with the QA cost sometime early next week? I'm looking for both the estimated dollar amount and estimated number of hours.

The Oversight Contract Cost Estimate Report was provided to the EDR2 Project Technical Director on or about April 23, 2019 and used to prepare the Financial Analysis Worksheets in support of funding for the EDR2 Project.

With respect to the specifications and scope of the Oversight Contract, the FTB noted that its assigned procurement analyst for the Contract confirmed that no cost estimate report was used in the development of the Invitation for Bid for the Oversight Contract. The Request for Information related to the procurement was issued on May 7, 2020, and the process continued through early June of 2020, with eight responses received. The development of the Invitation for Bid started in approximately mid-August of 2020. The Invitation for Bid was released on February 12, 2021.

The team that developed the Invitation for Bid for the Oversight Contract utilized a Department of Technology template for the Invitation for Bid's format. In addition, FTB used State Information Management Manual 45A, which is the independent verification and validation Statement of Work template, as required by Section 4940.3 of the State Administrative Manual. According to the assigned procurement analyst, the FTB staff assigned to the procurement got their estimates and the information to develop the specifications and scope of work from the information provided by the Request for Information respondents. The Technical Director for the EDR2 Project stated that he did not provide the Oversight Contract Cost Estimate Report to the FTB staff assigned to the procurement, consult the Report when he reviewed the Invitation for Bid, or propose inclusion of any recommendation from the Report in the Invitation for Bid.

### *Level 4's Request for Formal Written Advice*

Due to Level 4's work associated with the EDR2 Project under the Cost Estimate Contract, the FTB has suggested that Level 4 obtain formal written advice regarding whether Section 1090 prohibits Level 4 from serving as a subcontractor on the Oversight Contract. You have requested formal written advice in accord with this suggestion, and you provided additional information on March 12, 2021, and March 30, 2021.

On April 12, 2021, the FTB confirmed it agreed to this request for formal written advice solely to enable Level 4 to obtain advice on the question presented, noting that the FTB does not take any position with respect to the Invitation for Bid or subsequent award of the Oversight Contract. FTB also reserves the right to require you to sign a conflict of interest statement regarding your financial interests in the event Level 4 is named as a subcontractor to the prime contractor that is ultimately awarded the Oversight Contract. The FTB provided further additional information on April 16, 2021.

## ANALYSIS

### *Section 1090*

Under Section 1090, public officers and employees, 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 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. 659-571; *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* (1996) 48 Cal.App.4th 289, 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. Vallergera* (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.) 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 "officers and 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, 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.)

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 the 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 a consultant who plays a limited technical role and is 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; *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.

#### *Section 1090 Does Not Prohibit Level 4 from Participating in the Oversight Contract*

At issue is whether Level 4 had responsibilities for public contracting on behalf of the FTB under the Cost Estimate Contract or the Second Cost Estimate Contract.

In accordance with the foregoing case law and advice letters, we apply a two-step analysis to determine whether a public entity that has entered into 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. (*Summerhill* Advice Letter, No. A-20-036.) 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.

Level 4 was not involved in the preparation of the FTB's initial cost estimate for oversight of the EDR2 Project, which began in December of 2018, and did not get involved in estimating oversight costs related to the Project until after the FTB's Technical Director for the EDR2 Project directed Level 4 to provide quality assurance cost estimates for the EDR2 Project in April of 2019.

Level 4 then prepared the Oversight Contract Cost Estimate Report because preparation of the Report was an "Unanticipated Task" covered under the Cost Estimate Contract, and the Contract was amended to cover the costs of that additional work by Level 4. The Technical Director stated that he did not provide the Report to FTB staff assigned to the Oversight Contract procurement, consult the Report when reviewing the Invitation for Bid, or propose inclusion of any recommendation from the Report in the Invitation for Bid. FTB staff assigned to the procurement got their estimates and the information to develop the specifications and scope of work for the Oversight Contract from information provided by respondents to the Request for Information associated with the Invitation for Bid. The Report was used to prepare the Financial Analysis Worksheets necessary to support funding of the Project. There is no indication that any work performed by Level 4 under the Second Cost Estimate Contract involved the Oversight Contract.

Because there is no indication that the FTB has entrusted Level 4 with transacting on its behalf, or that either the Cost Estimate Contract or the Second Cost Estimate Contract require Level 4 to make any decisions relating to the Oversight Contract, we find that Level 4 is not subject to Section 1090 with respect to the Oversight Contract due to its work performed under the Cost Estimate Contract or the Second Cost Estimate Contract based on the facts presented.<sup>3</sup> Thus, Section 1090 does not prohibit Level 4 from serving as a subcontractor on the Oversight Contract.

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

Sincerely,

Dave Bainbridge  
General Counsel

*Matthew F. Christy*

By: Matthew F. Christy  
Counsel, Legal Division

---

<sup>3</sup> Even if Level 4 is subject to Section 1090 with respect to the Oversight Contract, there is no indication Level 4 participated in the making of that Contract through its work performed on the Cost Estimate Contract or Second Cost Estimate Contract. Oversight of the EDR2 Project is required under state standards for a project of the EDR2 Project's size. FTB issued a Request for Information for the Oversight Contract, FTB staff used responses to that Request to develop the specifications and scope of the Invitation for Bid for that Contract. And the Technical Director for the EDR2 Project indicates that the Oversight Cost Estimate Report was not considered in the formulation of the Oversight Contract's Invitation for Bid. Therefore, Level 4 has not made or participated in the making of the Oversight Contract through its performance of the Cost Estimate or Second Cost Estimate Contract based on the facts presented.



MFC:dkv