



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 15, 2021

Leticia Ramirez
City Attorney
City of Tracy
333 Civic Center Plaza
Tracy, CA 95376

Re: Your Request for Advice
Our File No. A-21-053

Dear Ms. Ramirez:

This letter is in response to your request for advice on behalf of the City of Tracy (the City) regarding Government Code Section 1090, et seq. Please note that we provide advice under the Act and Section 1090 only, not under any other body of law.¹ Our advice is based solely on the facts provided. Thus, our advice is as complete and accurate as the facts provided in the request for advice. If the facts underlying these decisions change, then you should contact us for additional advice.

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 San Joaquin 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. Are Jacobs Engineering Group Inc./Jacobs Project Management Company (Jacobs) and CH2M Hill (Hill) considered the same legal entity for purposes of Section 1090?
2. Does Section 1090 preclude the City from contracting with Jacobs for construction management services for a Wastewater Treatment Plant project based on the pre-construction design services provided to the City by Hill under a prior 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 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.

CONCLUSIONS

1. Yes. The parent company Jacobs and its wholly owned subsidiary Hill are considered the same interest under Section 1090, and an interest in one entity includes an interest in the other.

2. No. Section 1090 does not prohibit the City from entering a contract with Jacobs for construction management services on the project because Hill, a subsidiary of Jacobs, had no responsibilities for public contracting on the City's behalf in performing the prior work.

FACTS AS PRESENTED BY REQUESTER

A. Hill's Pre-Construction Design Services on the Project – June 2017.

The City is currently expanding its Wastewater Treatment Plant in multiple phases. Phase 2B of the project includes construction of a primary clarifier, a bar screen, a digester, an electrical controls building and miscellaneous improvements (the Project). In June 2017, the City contracted with Hill, a consulting engineering firm, for pre-construction engineering and design services for the Project. Hill is the design engineer of record for the Project.

B. Merger by Hill and Jacobs – December 2017.

On December 15, 2017, Hill and Jacobs finalized an Agreement and Plan of Merger under which Jacobs acquired all of Hill's outstanding shares in a cash and stock transaction. The transaction provided for the merger of Hill with and into a wholly owned subsidiary of Jacobs, with Hill continuing as a surviving company and a direct, wholly owned subsidiary of Jacobs. Hill remains a separate legal entity with its own Tax ID number.

C. The City's RFP for Construction Management Services.

The City recently opened bids for the construction of the Project and is ready to proceed with selection of a general contractor to build the Project. The City independently prepared the bid package seeking potential bidders using the City's standard bid forms, including Hill's design specifications in the package. The City will independently award the construction contract to the lowest responsive and responsible bidder. Neither Hill nor Jacobs have any role in selecting the construction contractor or performing any construction activities related to the Project.

To assist with construction, the City is retaining a consultant to perform construction management services. The City issued a Request for Proposals (RFP) for construction management services related to the Project on October 20, 2020. Neither Hill nor Jacobs participated in any way in the development and issuance of this RFP. The City received three proposals on the RFP due date of November 9, 2020. Upon City review of proposals received, Jacobs is one of the finalists based upon the qualification-based evaluation process stated in the RFP.

ANALYSIS

A. Section 1090.

Section 1090 generally prohibits a public officer or employee from making or participating in the making of a contract in which he or she is financially interested. Section 1090 is concerned with financial interests, other than remote interests and noninterests, that prevent a public officer or employee from exercising absolute loyalty and undivided allegiance in furthering the best interests of his or her agency. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) The focus is on the substance, not the form, of the transaction, “disregard[ing] the technical relationship of the parties and look[ing] behind the veil which enshrouds their activities.” (*People v. Watson* (1971) 15 Cal.App.3d 28, 37.)

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 independent contractor that exerts “considerable influence over the contracting decisions of a public agency” is subject to Section 1090. (*Hub City Solid Waste Services, Inc. v. City of Compton (Hub City)* (2010) 186 Cal.App.4th 1114, 1124-1125.)

B. Under Section 1090, Jacobs and Hill Have the Same Interests; an Interest in Either Entity Includes an Interest in the Other.

The first issue is whether Jacobs, as a contractor and consultant of the City, would have a “financial interest” under Section 1090 if it were awarded the construction management services contract on the Project because Hill, which performed preconstruction engineering and design services on the Project, is a wholly owned subsidiary of Jacobs. The courts have interpreted “financial interest” broadly in the context of Section 1090 to include “indirect interests and future expectations of profit or loss.” (*Sahlolbei, supra* at p. 239, citing *Thomson v. Call* (1985) 38 Cal.3d 633, 645–646.) Whether a proscribed financial interest exists in a public contract is primarily a question of fact. (See, e.g., *People v. Vallerga* (1977) 67 Cal.App.3d 847, 864-866.)

In *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, the court found a financial interest even where the county official had a 40 percent stock interest in an insurance company that provided health and accident insurance to the official’s county, the contracts at issue did not result in commissions to the official, nor did the commissions offset expenses for the agency. (*Id.* at pp. 217-218.) The court determined the official had a financial interest in the agency related to the insurance contracts due to the impacts of the contracts on the agency’s financial health and concluded that the county could no longer contract with the insurance company. (*Ibid.*)

In Attorney General Opinion, 84 Ops.Cal.Atty.Gen. 158 (2001), a more distant relationship between a public official and the contracting firm was examined. The official was a 48 percent stockholder, chief executive officer, president, and lessor to an architecture corporation. To avoid a conflict-of-interest prohibition, one of the three other

licensed stockholders of the corporation sought to set up a separate firm to contract with the city. The Attorney General found that, even where the official would not be an owner of the separate firm and the corporation would not share in the profits of the firm, “the financial identity between the corporation and the separate firm would be too pervasive to allow such contracts.” (*Id.* at 162.) The Attorney General’s reasoning focused on the city contract’s indirect and direct impacts on the financial health of the corporation, in which the official had a financial interest.

Based on the foregoing legal authority, the financial ties between the parent company Jacobs and its wholly owned subsidiary Hill render the two entities inseparable under Section 1090. To the extent Section 1090 applies, both Hill and Jacobs have and would have a financial interest in any contract awarded to either entity.

C. Section 1090 Does Not Preclude the City from Contracting with Jacobs for Construction Management Services on the Project.

The next question is whether Section 1090 precludes Jacobs from entering a contract for construction on the Project when Hill entered a prior contract for preconstruction design services on the Project. 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 the same 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 Jacobs/Hill is not subject to Section 1090 because it had no responsibilities for public contracting on behalf of the City for the preconstruction design work it performed on the Project. Hill’s prior work did not require it to make any decisions on the City’s behalf. The City, not Hill, made the decisions relevant to the RFP for construction. The facts do not indicate that the City entrusted Hill with transacting on its behalf. Under the preconstruction design contract, Hill performed engineering design work 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. There is nothing in the facts to indicate that Jacobs/Hill, as the Project’s design engineer, participated in the proposed construction management contract. For these reasons, we find that Jacobs/Hill is not subject to Section 1090 and thus may contract with the City for construction management services on the Project.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division