STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 11, 2021

Jason Grani
Assistant Deputy Director
525 B St., Suite 750
MS# 908A
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-21-122

Dear Mr. Grani:

This letter responds to your request for advice 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.

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 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

Does Section 1090 prohibit the City of San Diego from contracting with RRM Design Group to perform design services for the Skyline Hills Fire Station project, or future fire station projects, where RRM provided architectural design services for undisclosed future fire station projects under a previous contract with the City?

CONCLUSION

No. As explained below, because the initial contract did not require RRM to engage in or advise on public contracting on behalf of the City, RRM was not subject to Section 1090 as an

[1] All statutory references are to the Government Code, unless otherwise indicated.

independent contractor for the City. Therefore, Section 1090 does not prohibit the City from entering a contract for the design of the Skyline Hills Fire Station, or future fire station projects, based on the architectural design services it provided under the initial contract.

FACTS AS PRESENTED BY REQUESTER

You are an Assistant Deputy Director with the City of San Diego requesting advice in conjunction with RRM Design Group ("RRM") about the conflict of interest provisions of Section 1090 based on the agreed upon facts herein.

RRM is an architectural and engineering professional services corporation. On September 23, 2015, the City issued a Request for Proposals ("RFP") for Fire Station Design Standardization, for architectural design services to provide 'standardized program to provide four templates to be used for future design-build fire station projects' and '100% design of the Home Avenue Fire Station' to the City Consultant Rotation List members.

RRM successfully proposed and entered into agreement with the City on March 10, 2016, to provide the Fire Station Design Standardization services and design of the Home Avenue Fire Station (Design Standards Contract).[2] Among other things, Article 1 of the contract required RRM to:

> …ensure that any plans and specifications prepared, required, or recommended under this Agreement allow for competitive bidding. The Design Professional shall design such plans or specifications so that procurement of services, labor or materials are not available from only one source, and shall not design plans and specifications around a single or specific product, piece of major equipment or machinery, a specific patented design, or a proprietary process…

Under the first part of the Design Standards Contract, RRM provided space needs analysis and programming services and developed Volume 1- Standardized Conceptual Plans and Volume 2 - Specifications. Volume 1 consisted of conceptual templates that captured the overall organization, sizing, and general system requirements to guide the design of future fire stations as bridging documents (Design Standards). Volume 1 also included conceptual civil site plans; architectural site and floor plans; conceptual structural plans; and mechanical, electrical, and plumbing system plans for several non-specific site configurations, but only work within the hypothetical site constraints.

Volume 2 consisted of three-part technical specifications defining the material and equipment prescriptive and performance requirements for future fire station projects. Volume 2 can be applied to any fire station project regardless of site size, but may be modified based on exterior design, site constraint, or building code response requirements. Both volumes were meant to be

[2] You state the RFP and contract did not provide for professional services in any capacity to provide public contracting responsibilities on the City's behalf, or to put together specific Fire Station bidding packages.

applied as reference documents on all new fire stations built through various delivery methods. The Design Standards alone could not be used as complete construction documents.[3]

On April 3, 2017, RRM completed the first part of the Design Standards Contract, which was presented to and made public at the City's Active Transportation and Infrastructure Committee meeting on October 25, 2017. The Design Standards were also included in the bid packages made public with Design-Build Request for Proposal for Fire Station 50 in 2018 and for Torrey Pines Fire Station in 2019.

The second part of the Design Standards Contract with the City was for the design of the Home Avenue Fire Station, using the newly created Design Standards. The City included one fire station for RRM to design because it assumed that once RRM completed the Design Standards they would be precluded from any future fire station projects due to Government Code section 1090. Other than the Design Standards Contract (which included design of the Home Avenue Fire Station), RRM was not contracted to provide any additional services related to the Design Standards either directly and/or indirectly for any other specific fire station project or potential project site. The Home Avenue Fire Station design is about 60% complete at this time.

On August 11, 2020, the City issued an RFP for the design of the Skyline Hills Fire Station. RRM had no previous knowledge of the project site or project scope of work prior to issuance of the Skyline Hills Fire Station RFP. The RFP did indicate the intended use of the Design Standards. RRM responded to the RFP and submitted a proposal to the City on September 18, 2020. On November 24, 2020, during the proposal review period, the City confirmed it anticipated that the Design Standards would be used for this project.

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. 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) 103Cal.App.3d 191, 197.)

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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id*. at pp. 646-649.)

Importantly, Section 1090 prohibits self-dealing. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124 [independent contractor leveraged his public position for access to city officials and influenced them for his pecuniary benefit]; *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682, 690 ["Section 1090 places

[3] According to the Executive Summary in Volume 1, the standardized plans are to be used as a starting point for the design of a station.

responsibility for acts of self-dealing on the public servant where he or she exercises sufficient control over the public entity, i.e., where the agent is in a position to contract in his or her official capacity"]; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090 [The purpose of Section 1090 is to prohibit self-dealing, not representation of the interests of others].)

Independent Contractors Subject to Section 1090

Although section 1090 refers to "officers or employees" of government entities, the California Supreme Court has recognized "the Legislature did not intend to categorically exclude independent contractors from the scope of section 1090." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 238.) However, Section 1090 does not apply to all independent contractors - *only* those who are "entrusted with 'transact[ing] on behalf of the Government'" (*Id*. at p. 240, italics added, quoting *Stigall*, *supra*, 58 Cal.2d at p. 570.)

We therefore 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.

The primary question in this matter is whether the initial March 2016 contract for architectural design services between the City and RRM provided RRM with responsibilities or duties for public contracting on behalf of the City such that it would be covered by Section 1090. On this issue, the *Sahlolbei* Court explained:

> So, for example, a stationery supplier that sells paper to a public entity would ordinarily not be liable under section 1090 if it advised the entity to buy pens from its subsidiary because there is no sense in which the supplier, in advising on the purchase of pens, was transacting on behalf of the government.
>
> In the ordinary case, a contractor who has been retained or appointed by a public entity and whose actual duties include engaging in or advising on public contracting is charged with acting on the government's behalf. Such a person would therefore be expected to subordinate his or her personal financial interests to those of the public in the same manner as a permanent officer or common law employee tasked with the same duties… Thus, for instance, a person who was initially hired as an officer or employee with responsibilities for contracting and then rehired as an independent contractor to perform the same duties and functions would be expected to continue to serve the public faithfully. Such a contractor would be subject to section 1090.

(*Sahlolbei*, *supra*, at p. 240.)

California Taxpayers Action Network v. Taber Construction, Inc. (*Taber*) (2019) 42 Cal.App.5th 824 is instructive on this issue. There, a school district that wanted to modernize the heating, ventilation, and air conditioning ("HVAC") systems of eight schools published two separate RFPs for the proposed project. The RFPs explained that the school district intended to select a firm to complete the modernization project, but the process would involve two contracts entered into at different times. The parties would first enter into a preconstruction services agreement,[4] and later enter into a lease-leaseback agreement. The school district selected defendant Taber for the preconstruction services agreement and the subsequent lease-leaseback agreement.

Plaintiff sued the school district and Taber alleging that based on Taber's provision of preconstruction services and advice to the school district under the initial preconstruction services agreement, Section 1090 prohibited the school district from awarding Taber the subsequent lease-leaseback contracts. Plaintiff further alleged that "[i]n performing its duties under the [preconstruction services agreement] ... [Taber] performed the functions and filled the roles and positions of officers, employees and agents of [the school district] who would ordinarily perform and provide the foregoing professional, design, and financial functions and advise the [School District] relative to same." (*Taber*, *supra*, 42 Cal.App.5th at p. 829.)

Looking to the *Sahlolbei* case, the court initially noted that Section 1090 only prohibits a contract made by a financially interested party when that party makes the contract in an "official capacity." (*Taber*, *supra*, 42 Cal.App.5th at p. 835.) It then explained that where the financially interested party is an independent contractor, Section 1090 applies only if the independent contractor can be said to have been entrusted with transacting on the Government's behalf. (*Ibid*. citing *Sahlolbei*, *supra*, at p. 240.) The court held that it could not reasonably be construed from the facts that Taber was hired under the initial contract to engage in or advise on public contracting *on behalf of the school district* because the school district did not contract with Taber to select a firm to complete the HVAC project – instead, the initial contract required that Taber provide preconstruction services (including planning and setting specifications) "in its capacity as the intended provider of construction services *to* the school district, not in a capacity as a de facto official *of* the school district."[5] (*Id*. at p. 836.) In sum, the court held there was no evidence Taber was transacting on behalf of the school district when it provided those preconstruction services – rather, the RFPs and initial contract show that Taber was "transacting business as a provider of services to the School District." (*Id*. at p. 838.)

The current situation is similar to *Taber* in that there are no facts suggesting the City hired RRM to engage in or advise on public contracting on behalf of the City. To be sure, the contract did not require that RRM prepare an RFP for the design of the Skyline Hills Fire Station; nor did it require RRM to assist the City in selecting an independent contractor for that project. Instead, the contract required RRM to prepare Design Standards that could be used as reference documents on

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[4] The preconstruction services agreement generally consisted of reviewing existing documents and site conditions, scheduling, estimating, and development of a guaranteed maximum price.

[5] The court also noted that the school district contracted with Taber for Taber to provide preconstruction services in anticipation of Taber itself completing the HVAC project.

all new fire stations built in the City. In addition, it required RRM to design of the Home Avenue Fire Station using the newly created Design Standards. RRM provided these services in its capacity as the intended provider of architectural design services to the City, not in an official capacity status of the school district. Put another way, there is no evidence RRM was transacting on behalf of the City when it provided the architectural design services – instead, the RFP and contract demonstrate RRM was doing business in a private capacity as a provider of services *to* the City.[6]

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

Sincerely,

Dave Bainbridge
General Counsel

By: Jack Woodside
Jack Woodside
Senior Counsel, Legal Division

JW:dkv

[6] This conclusion is reinforced by the lack of any indication of self-dealing by RRM. Indeed, the provision in Article 1 of the initial contract referenced above appears to protect against any attempt by an independent contractor of the City, including RRM, to do so.