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

January 24, 2022

Andrew Morris
Town of Mammoth Lakes
P.O. Box 1609
Mammoth Lakes, CA, 93546

Re: Your Request for Advice
Our File No. A-22-003

Dear Mr. Morris:

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 Mono 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 Town of Mammoth Lakes from entering into an agreement with a contractor to construct certain streets and other infrastructure, where the plans for such infrastructure were prepared under a previous agreement by a related entity that is under common ownership with, and has some of the same corporate officers as, the proposed contractor?

CONCLUSION

No. As explained below, because the initial agreement with the related entity did not require it to engage in or advise on public contracting on behalf of the Town, the related entity was not subject to Section 1090 as an independent contractor for the Town. Therefore, Section 1090 does

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

not prohibit the Town from now entering a subsequent agreement with the proposed contractor based on the services provided by the related entity under the initial contract.

FACTS AS PRESENTED BY REQUESTER

You serve as town attorney for the Town of Mammoth Lakes, a four-season mountain resort community located in the eastern Sierra Nevada. The Town purchased approximately 25 acres of vacant land (the "Parcel") with the intention of constructing affordable housing on the Parcel. In October of 2021, the Town entered into a disposition and development agreement ("DDA") with an entity known as Pacific West Communities, Inc. ("PWC") to construct the Parcel's affordable housing.[2] While the DDA also requires PWC to design all of the infrastructure to serve the Parcel, it only requires that PWC construct certain portions of the infrastructure, including some of the public streets that will go through the Parcel. Other Parcel-related streets and infrastructure will be constructed and paid for by the Town, following the usual bidding process specified in the Public Contract Code.

PWC has contracted with JK Architecture Engineering ("JKAE") to design the affordable housing and all of the streets and other infrastructure for the Parcel, including both the improvements to be constructed by PWC and those to be constructed by the Town. PWC is ultimately responsible for JKAE's work, and personnel from both PWC and JKAE are working closely with Town staff to ensure that the designs meet the Town's needs.

PWC has a sister company called Pacific West Builders, Inc. ("PWB"). PWB and PWC are both solely owned by the same person. All of the corporate officers of PWB are also corporate officers of PWC, although PWC has additional corporate officers who are not officers of PWB. The Town has been informed that PWB would like to bid on the construction of the streets for the Parcel which will be constructed by the Town.

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) 103 Cal.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.)

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[2] The DDA, which you provided in follow-up correspondence, states PWC intends to develop the Parcel with up to 450 residential units.

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 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 initial question in this matter is whether the October 2021 DDA between the Town and PWC entrusted PWC with responsibilities or duties for public contracting on behalf of the Town such that it would be covered by Section 1090.[3] 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

[3] We note your request asks whether the Town may enter a subsequent contract with PWB, the "sister company" of PWC, to construct those portions of Parcel's infrastructure that the Town is responsible to construct. The facts state that PWB and PWC are both solely owned by the same person and the corporate officers of PWB are also corporate officers of PWC. Therefore, for purposes of Section 1090, the financial ties between the two companies render them inseparable, and to the extent Section 1090 applies, both PWB and PWC have and would have a financial interest in any contract awarded to either entity. (See, e.g., *Ramirez* Advice Letter, No. A-21-053.)

> 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.

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

Accordingly, the key determination in extending Section 1090's prohibitions to an independent contractor is whether the independent contractor was hired to engage in or advise on public contracting that they are expected to carry out on the government's behalf. The examination of the role of a contractor in *Taxpayers Action Network v. Taber Construction, Inc.,* (*Taber*) (2019) 42 Cal.App.5th 824 is instructive on this issue. There, a school district seeking 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 single firm to complete the whole modernization project, but the process would involve two contracts entered into at different times, due to a requirement that the first contract be approved by a state architect prior to the execution of the second contract. The court determined that there "was no evidence Taber could have used its preconstruction consulting work to improperly influence the School District to enter into the [second contract] with Taber, because … Taber was 'already selected for the whole project'" by the time Taber provided the preconstruction consulting services. (*Id*. at p. 835.) In examining if Taber was hired to engage in or advise on public contracting on behalf of the School District, the court states:

> The School District did not contract with Taber in the PSAs for Taber to select a firm to complete the HVAC project. Rather, the School District contracted with Taber for Taber to provide preconstruction services in anticipation of Taber itself completing the HVAC project. Taber provided those 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.

(*Ibid*.)

In response to the plaintiff's argument that Taber's participation in the planning stages of the second contract resulted in a Section 1090 violation under *Stigall's* broad interpretation of the "making of a contract" to include involvement in its "planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids," the court responded with a careful comparison the role of the contractor in each case:

> In *Stigall*, it was Black's participation in the planning of the civic center building before any contractors were selected and his participation in the selection of his firm's bid, activities undertaken in his official capacity as a city council member in charge of the building committee, that concerned the court. There is no similar situation here. There is no evidence, for example, that Taber drafted the RFQ/P's [request for qualifications and proposals] to its own advantage or participated in the School District's selection of the

> construction firm to complete the HVAC project, much less that it did either of these things in an official capacity for the School District.

(*Id.* at p. 838.)

The current situation is similar to *Taber* in that there are no facts suggesting the Town hired PWC to engage in or advise on public contracting on behalf of the Town. For example, the DDA did not require PWC to prepare an RFP for the construction of those streets of the Parcel to be constructed by the Town; nor did it require PWC to assist the Town in selecting a contractor for that project. Instead, the DDA required PWC to construct the Parcel's affordable housing, design all of the Parcel's infrastructure, and construct certain portions of that infrastructure. PWC provided these services in its capacity as the intended provider of design and construction services to the Town, not in an official capacity status for the Town – in other words, PWC has done business in its private capacity as a provider of services *to* the Town under the DDA.

Accordingly, because the DDA does not require PWC to engage in or advise on public contracting on behalf of the Town, neither PWC nor PWB is subject to Section 1090.[4]

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

[4] Similarly, there is no suggestion from the facts that PWC's design subcontractor, JKAE, had any duties to engage in or advise on public contracting on behalf of the Town. Therefore, for all of the same reasons, JKAE is not subject to Section 1090 and may be included as a subcontractor in any agreement between PWB and the Town to construct certain portions of the Parcel's infrastructure.