



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 3, 2022

Carrie Purcell
Deputy Director – Program and Project Development Division
City of Sand Diego – Engineering & Capital Projects Department
525 B St., Suite 750, MS 908A
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-22-101

Dear Ms. Purcell:

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 from entering contracts with two firms for as-needed services regarding City-owned dams where the City has previously contracted with both firms and the work conducted by the firms under the earlier contracts may influence the work they are tasked with performing under the new contracts?

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 18104 through 18998 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.

CONCLUSION

No, Section 1090 does not prohibit the City from contracting with either firm for as-needed services as described based upon the earlier contracts because neither firm had duties to engage in or advise on public contracting on the City's behalf. However, we express no opinion regarding subsequent contracts based on the services provided under a contract to provide as-needed services other than the single prospective contract identified at this time. Subsequent contracts will need to be examined on a case-by-case basis depending on the nature of the services previously provided.

FACTS AS PRESENTED BY REQUESTER

The City of San Diego ("City") Public Utilities District ("PUD") owns and operates nine raw water reservoirs, each with a unique dam and outlet tower system to control reservoir water levels and drawdown capacities.

With respect to work involving the dams and outlet tower system, the City uses As-Needed Agreements ("Agreements") to hire consultants in advance, after which the City assigns services for various projects on a task-by-task basis as the tasks arise ("Task Orders"). Agreements include a capacity and duration limits. The procurement of each Agreement follows the same comprehensive interview process to obtain a design professional. For example, each design professionals submits a proposal for the advertised Agreement. From the received proposals, the City then selects which firm(s) will be invited for interview. The selected firm(s) will be determined from there and awarded Agreements with a "not-to-exceed" amount.

When multiple Agreements exist for the same discipline, the City evenly rotates the awarding of Task Orders between the contracted consultants until the Agreement duration expires or the not-to-exceed amount is reached. For example, if the City has an Agreement with "Design Professional," after Design Professional has been issued a Task Order, Design Professional will be placed at the end of the list for consideration to perform the next Task Order. This allows for a fair and even distribution of the Task Orders. At times, however, a contracted consultant will decline a task due to capacity constraints, which will also place the consultant at the end of the list for rotation of Task Orders.

Here, three consultants have been chosen, but not awarded, Agreements with the City's Engineering & Capital Projects Department ("E&CP") for planning and design services related to City-owned dams. Two of the firms—GEI Consultants, Inc. ("GEI") and HDR Engineering, Inc. ("HDR")—have previously entered Agreements with the City's Public Utilities District ("PUD"). You are seeking advice on whether GEI's and HDR's prior Agreements with PUD create conflicts of interest, such that E&CP entering Agreements with either firm would be prohibited under Section 1090. More specifically, the City is concerned about whether condition assessments of some City-owned dams, performed by GEI and HDR for PUD, could prohibit the firms from planning, designing, and performing repairs on the same City-owned dams for E&CP.

2016 GEI Contract

In 2016, PUD entered an Agreement with GEI for "As-Needed Consultant Services for Dam and Outlet Tower Condition Assessment." The scope of services included, but was not limited to:

- Full condition assessments of dams, outlet works, spillways, and other appurtenances;
- Estimating remaining service life;
- Determining if Critical Infrastructure Protection projects were needed to improve the system integrity, including analyzing through lifecycle cost analysis whether replacement or upgrade is more suitable; and
- Providing maintenance and repair recommendations to prolong the service life of the facility and its appurtenances.

To date, GEI has performed the following work under the 2016 contract:

- Condition assessments for various City-operated dams;
- Technical support for design and construction for San Vicente Raise; and
- Review of the City's 14 Dams Emergency Action Plan Development.

2019 HDR Contract

PUD has used HDR in the past for work on City-owned dams. PUD awarded a professional civil engineering services Agreement on April 4, 2019. The scope of services for the 2019 Agreement includes, but is not limited to:

- Soil and geotechnical engineering;
- Traffic engineering;
- Design, study and condition assessments for water, wastewater, and recycled water engineering;
- Survey engineering;
- Civil engineering;
- Electrical engineering;
- Mechanical engineering
- Corrosion engineering;
- Cost estimating
- Architectural engineering;
- Instrumentation and controls engineering;
- Construction management;
- Water and wastewater treatment process;
- Operation and maintenance training;
- Business case evaluations analyzing lifecycle viability of proposed project alternatives; and
- Solar feasibility assessment.

To date, HDR has done the following work under the 2019 PUD contract:

- Morena Dam Upstream Face Repairs Assessment;
- El Capitan Dam North Slope Stabilization Mitigation assessment;
- Design and construction support services for Lake Hodges Spillway Apron Repair and Near-Term Repair Improvements; and

- Design and construction support services for Murray Dam Near-Term Repairs Improvements.

2022 GEI Contract with HDR as Subcontractor

In April 2022, PUD entered another Agreement with GEI for “As-Needed Dam and Outlet Tower Condition Assessment,” in an amount not to exceed \$5,000,000, through a competitive process, to provide preliminary condition assessments on the City’s dams. The scope of the work relating to the contract includes:

- Condition assessment of the City’s existing water dam system and appurtenances;
- Risk assessments to help identify potential failures;
- Assisting the City in addressing stakeholders and regulatory concerns;
- Assisting the City in applying for and complying with federal and state grants;
- Developing near-term repair and replacement plans that will extend the services lives of these facilities; and
- Developing programmatic long-term plans to meet future demands, and to improve the efficiency, maintenance, and safety of these facilities in the future.

The As-Needed consultant will be used to provide specialized technical services in areas of dam and outlet tower condition assessment. Projects requiring professional engineering consulting support shall include, but are not limited to, dams, dam safety-related structures including outlet towers, maintenance and repair of facilities, and emergency PUD projects.

The tasks under the 2022 GEI contract with PUD where GEI is providing assessment services are not yet known.

Planned As-Needed Rotating Contract with GEI and HDR for Plan and Design Work on City-Owned Dams

E&CP recently selected and are in the process of awarding three As-Needed Consultant contracts to GEI, HDR, and a third firm for design work of City-owned dams. The three firms were chosen following a comprehensive application and interview process conducted by City employees familiar with the type of work involved. The firms were chosen based on their overall scores from the application and interview process.

The scope of work included in these E&CP As-Needed Consultant Agreements includes:

- Risk analyses and assessments;
- Additional condition assessments;
- Planning;
- Presentations to various community and advisory groups;
- Design of dam repairs and full dam design;
- Preparation of general development and site improvement plans (including demolition);
- Grading and drainage plans;
- Preparation of construction specifications;

- Cost estimates and economic analyses;
- Preparation of reports, studies and/or construction documents relating to the design and construction of dam facilities;
- General bidding assistance²; and
- Construction engineering support services.

The RFP advertisement process took place on September 30, 2021. The proposal due date was November 4, 2021. In response to the RFP, five firms responded for this specialized consultant services contract. Three firms were selected by a panel by reviewing submitted proposals and oral interview of the firms to score and rank the firms' qualifications. GEI and HDR were two of the three firms chosen for the E&CP design work.

In a follow-up email, you clarified that there would be nothing preventing the City from assigning a Task Order under the new Agreement to a different contractor for repair work than the contractor who performed the repair assessment that led to the repair work as a Task Order under the initial Agreement. For example, if GEI performed the initial repair assessment under the initial Agreement, the City could assign a Task Order to HDR or the third contractor to perform the actual repairs under the new Agreement. However, the ability to avoid using the same contractor for both phases would depend on the availability or work capacity of the other consultants.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers or employees, 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 a public officer or employee 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.)

Importantly, Section 1090 prohibits the use of a public position for 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

² This request for advice pertains strictly to the question of whether work performed by GEI and HDR under prior Agreements—which did not include “general bidding assistance” as a duty—would prohibit the City from entering new Agreements with those firms, which may involve work related to work they performed under the initial Agreements. As discussed below, duties to engage in or advise on public contracting may bring independent contractors within the scope of Section 1090. Accordingly, the advice provided in this letter is not applicable to future Agreements between the firms and the City subsequent to the single prospective Agreement you have already identified. Under those circumstances, the City may wish to seek additional advice.

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

In 2017, the California Supreme Court recognized “the Legislature did not intend to categorically exclude independent contractors from the scope of section 1090” in its language applying the prohibition to “public officers and employees.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 238.) In this opinion, the Court held that Section 1090 applies to those independent contractors who are “entrusted with ‘transact[ing] on behalf of the Government.’” (*Id.* at p. 240, emphasis added, quoting *Stigall, supra*, 58 Cal.2d at p. 570.) 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.

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

Notably, the Court specifically rejected a “considerable influence standard” (i.e., that contractors come within the scope of Section 1090 when they occupy positions “that carry the potential to exert ‘considerable influence’ over public contracting”) in determining whether Section 1090 applies to a particular independent contractor. (*Id.* at p. 244-45, referencing *California Housing Finance Agency, supra*, 148 Cal.App.4th at p. 693.) The Court stated, “[a]s we have explained, independent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf.”

Applying this standard, in *Taxpayers Action Network v. Taber Construction, Inc.*, (*Taber*) (2019) 42 Cal.App.5th 824, the court found that where a school district contracted with Taber Construction, a contractor, to provide preconstruction services, it was not precluded from entering into a second contract with the same contractor for construction of the project when there was “no evidence that Taber was transacting on behalf of the School District when it provided those preconstruction services” and instead, the evidence showed that “Taber was transacting business as a provider of services to the School District.” (*Id.* at p. 838.) The court based this finding on the fact

that Taber had a contractual duty to provide preconstruction services, not to select a firm to complete the project, and Taber provided those services (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.*) The *Taber* court also agreed with the trial court’s reasoning that although the preconstruction services and construction services technically involved two contracts, the firm at issue had effectively already been chosen for the second contract at the time the first contract was made. (*Id.* at pp. 831-832) Therefore, the firm could not have influenced the School District’s decision to select the firm for the second contract. (*Id.* at p. 832.)

Applying this standard in past advice letters, we have examined the role played by the contractor. For example, we have found that an independent contractor involved in design and construction services on a housing project, including construction of public streets, was not subject to Section 1090 with respect to a subsequent construction contract for additional public streets, where no facts suggested that the town hired the contractor to engage in or advise on public contracting on behalf of the town. (See *Morris* Advice Letter, No. A-22-003.) The analysis states:

For example, the DDA [the contract] did not require PWC [the contractor] 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.”

(*Morris* Advice Letter, No. A-22-003, p. 8)

In contrast, where the facts showed that an independent contractor played a role as an advisor to the county in drafting its cannabis marketing RFPs and advised that the county restrict the types of applicable bidders, we concluded the independent contractor was subject to Section 1090. The contractor was in a role such that its duty was to advise the county on the county’s behalf. It is notable that the independent contractor’s advice resulted in a considerable advantage to the independent contractor and its affiliate organization in the county’s subsequent RFPs. (*Adair* Advice Letter, No. A-21-137.)

Based on the above, the key determination in extending Section 1090’s prohibitions to an independent contractor in this matter is whether the independent contractor had duties to engage in or advise on public contracting – duties that the contractor was expected to carry out on the City’s behalf.

Here, the circumstances indicate that neither GEI nor HDR had duties to engage in or advise on public contracting on the City’s behalf under their existing Agreements. Rather, the facts are more similar to those considered in *Taber*, with GEI and HDR transacting business as a provider of services *to* the City, rather than on *behalf* of the City. Under the initial Agreements, both GEI and HDR had contractual duties to provide various services, including repair assessments, but such services did not include selecting firms for subsequent Agreements, contributing to the RFPs for

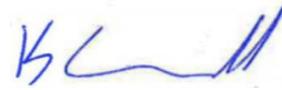
such Agreements, or advising or engaging in public contracting in any other way. Although a repair assessment provided as part of an assigned Task Order under the initial Agreements inherently involves advising on necessary repairs, it does not inherently involve advising on the creation of a contract. Accordingly, under Section 1090, the work previously performed by GEI and HDR under the prior Agreements does not prevent the City from entering a new as-needed consulting agreement with the firms for different services.

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

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Counsel, Legal Division

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