



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 30, 2022

Scott Haskell Campbell
BEST BEST & KRIEGER LLP
300 South Grand Avenue 25th Floor
Los Angeles, CA 90071

Re: Your Request for Advice
Our File No. A-22-098

Dear Mr. Campbell:

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 this request for advice 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 Ventura 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 Gold Coast Health Plan ("GCHP") from contracting with a vendor to provide core claims processing services where that vendor has provided the software for those services under a previous contract with GCHP?

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

To the extent the software vendor will neither have duties to engage in or advise on public contracting on behalf of GCHP nor, in fact, engage in such conduct, the Act will not prohibit GCHP and the software vendor from subsequently contracting for core claims processing services.

FACTS AS PRESENTED BY REQUESTER

Ventura County Medi-Cal Managed Care Commission dba Gold Coast Health Plan (“GCHP”) is a public entity planning to undertake an Enterprise Transformation Project (“Project”), which will be bid in multiple phases. The first phase of the Project involves issuing an RFP seeking a contractor to provide Claims Processing Software (“Software”). The Software will include technology and licenses to be used as a technology platform for Business Processing Outsourcing (“BPO”), which includes core claims processing. Subsequent RFPs will be issued for the core claims processing services and other BPO services.

The Software RFP anticipates that one vendor may provide the Software and a different or the same vendor may subsequently be hired to operate the Software when providing the core claims processing services for GCHP. The Software RFP specifically states that the technology and licenses covered by the RFP “must be capable of being used by third party vendors who subsequently bid on the core claims processing services.” (RFP, § 2.2.1.) It also provides that proposers must “design the technology and licenses so that the procurement of services, labor and materials in the subsequent RFPs are not available from only one source and shall not propose technology and licenses such that only the [p]roposer can operate and use the technology and licenses.” (*Ibid.*) The vendor selected to provide the Software will not have any role in drafting the subsequent RFP to provide the core claims processing services, nor in selecting the vendor for those services. GCHP will supervise and oversee both the installation of the Software and the provision of the core claims processing services.

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 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 that “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.) 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.) 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.*)

Applying this standard in past advice letters, we have examined the role played by the contractor. For example, we 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’s 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 GCHP’s behalf. Here, GCHP is planning to undertake the Project in multiple phases, the first of which will involve contracting with a vendor for Software services to be used for core claims processing services and other BPO services in subsequent phases. You have indicated that the Software RFP requires that the technology and licenses provided by the Software vendor “must be capable of being used by third party vendors who subsequently bid on the core claims processing services” or be designed in such a way that procurement of services, labor and materials in subsequent RFPs are only available from one source—that is, the Software vendor. Further, the Software vendor will not have any role in drafting the subsequent RFP to provide the core claims processing services, nor in selecting the vendor for those services. To the extent that, as you indicate, the Software vendor will neither have duties to engage in or advise on public contracting on behalf of GCHP or in fact


engage in such conduct, the Act will not prohibit GCHP and the Software vendor from contracting on a subsequent phase of the Project.

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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