



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

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William Roetzheim
Level 4 Ventures, Inc
william@level4ventures.com

Ashley DeFranco
Senior Attorney
Office of Systems Integration -- Legal Division
Ashley.DeFranco@osi.ca.gov

Re: Your Request for Advice
Our File No. A-23-050

Dear Mr. Roetzheim and Ms. DeFranco:

This letter responds to your joint request for advice regarding the conflict of interest provisions of the Political Reform Act (“Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

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).)

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.

QUESTION

Under the Act and Section 1090 is it permissible for Mr. Roetzheim, a subcontractor to the Office of System Integration (“OSI”) on the Child Welfare Services – California Automated Response and Engagement System information technology project (“CWS-CARES IT Project”), to sell, or otherwise permit the use of, an ExcelerPlan software license through his private business, Level 4 Ventures, Inc., to Deloitte Consulting LLP, a vendor for the project and continue to advise OSI in regard to Deloitte’s two OSI contracts?

CONCLUSION

No. In his role advising OSI on its contracts with Deloitte, Mr. Roetzheim is an independent contractor subject to Section 1090, and therefore may not participate in this official capacity in the making of contracts in which he has a financial interest. Moreover, Mr. Roetzheim may not sell or otherwise provide his business’s software to Deloitte because doing so will give Mr. Roetzheim a prohibited financial interest in the OSI contracts with Deloitte. In light of this conclusion, we do not further analyze whether he is disqualified under the Act based on his business and source of income interests if Deloitte becomes a source of income to his business.

FACTS AS PRESENTED BY REQUESTER

The Office of Systems Integration (OSI) and William Roetzheim submit this agreed upon statement of facts. Mr. Roetzheim is a subcontractor providing independent advisory services to the OSI related to the CWS-CARES IT Project. Mr. Roetzheim and the OSI seek advice relating to the sale of a software license by Mr. Roetzheim’s company, Level 4 Ventures, Inc. (“Level 4”), to Deloitte Consulting LLP (“Deloitte”). Deloitte contracts with the OSI to provide systems integration services for the CWS-CARES IT Project, and Mr. Roetzheim provides independent consulting advice to the OSI relating to the Deloitte contract and is a designated Form 700 filer for the Project.

OSI Background

The OSI is an agency within the state Health and Human Services Agency that manages a portfolio of large, complex information technology (IT) projects on behalf of other state departments. In this capacity, the OSI contracts with vendors to build and maintain IT systems. For example, the OSI is responsible for managing the CWS-CARES IT Project on behalf of the state Department of Social Services. The new CWS-CARES will replace the existing legacy system and will be used by counties, the state, and tribes in the provision of child welfare services in California.

CWS-CARES IT Project

The OSI contracts with multiple vendors to build the CWS-CARES. Three such contracts pertinent to this request for advice are 1) the OSI’s contract with Deloitte for systems integration services, 2) the OSI’s contract with Deloitte for implementation services, and 3) the OSI’s contract with Elyon Enterprise Strategies, Inc. (“Elyon”) for independent advisory services under which Mr. Roetzheim is a subcontractor. Copies of these contracts were included for review.

Deloitte's System Integration Services Contract

Deloitte performs as the primary systems integrator to build the new CWS-CARES. To ensure flexibility in meeting system user needs, the base contract is structured to identify the general work Deloitte is to perform. However, all tasks and work products must be agreed to by the parties in work order authorizations (“WOA”), which are incorporated as part of the base contract. Each WOA details the work to be performed, the fixed cost for performing the work, and the criteria upon which the state will accept the work.

Deloitte's Implementation Services Contract

Deloitte is tasked with managing all components of system implementation for the CWS-CARES, including development of all training material, delivery of training to users, and developing a detailed implementation plan for each county. Similar to Deloitte's System Integration Services contract, the base contract is structured to identify the general work Deloitte is to perform. However, all tasks and work products must be agreed to by the parties in WOAs, which are incorporated as part of the base contract. Each WOA details the work to be performed, the fixed cost for performing the work, and the criteria upon which the state will accept the work.

Elyon's Independent Advisor Contract

Elyon provides data and consulting advice to independently assess if the CWS-CARES IT Project is on track to deliver a service that meets the state's requirements. Mr. Roetzheim is a subcontractor under this contract. He is a designated Form 700 filer.

Mr. Roetzheim's OSI Role

Pursuant to the Elyon contract, Mr. Roetzheim provides independent advice to OSI executives regarding the CWS-CARES IT Project, including advice relating to both Deloitte contracts. Mr. Roetzheim provides the following services:

- Reviews draft WOAs, including those proposed under the Deloitte contracts, and advises the state regarding appropriateness of the vendor costs and changes to the proposed work.
- Prepares independent government cost estimates as part of budgeting. The independent cost estimates are developed by Mr. Roetzheim for the state using Mr. Roetzheim's cost estimation software called “ExcelerPlan.”²
- Provides vendor negotiation advice. The state is currently negotiating a contract amendment with Deloitte concerning Deloitte's Systems Integration Services contract. Mr. Roetzheim has provided extensive advice directly to OSI's decision makers related to Deloitte's

² ExcelerPlan is a software product used for cost estimating. It is used to determine the estimated level of effort for various workstreams using benchmark data. It then calculates a cost using this benchmark data and multiplies that by prevailing market rates.

proposed costs with respect to the proposed amendment. This advice has resulted in the state making changes to the costing structure of the proposed contract amendment with Deloitte.

ExcelerPlan Software License

Mr. Roetzheim is the sole owner of Level 4, an S-Corporation registered in California. Level 4's core business is selling ExcelerPlan and related consulting services. Level 4 seeks to sell a license of ExcelerPlan to Deloitte for \$25,000 per year. Mr. Roetzheim indicated that this is the standard per year license cost. The sale of the license is on hold pending this advice.

You request whether the sale of the ExcelerPlan license by Level 4 to Deloitte will prohibit Mr. Roetzheim from continuing to perform the tasks on the two Deloitte contracts. You also request whether his business may offer a sale at a reduced price, provide the license for free, or sell it to a third-party reseller who sells it to Deloitte.

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.)

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"];

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.)

Independent Contractors Subject to Section 1090

First, we examine whether this subcontractor role falls under the Section 1090 prohibitions applicable to public officers. In 2017, the California Supreme Court recognized that while not all independent contractors are covered by Section 1090's prohibitions, it does extend to those "who can be said to have been entrusted with 'transact[ing] on behalf of the Government.'" (*People v.*

Superior Court (Sahlolbei) (2017) 3 Cal.5th 230, 240, quoting *Stigall, supra*, 58 Cal.2d at p. 570.) The Court provided the following example of a situation in which the Section 1090 prohibitions would not apply: where a stationery supplier that sells paper to a public entity advised the public 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.” (*Id.*, at p. 240.) The Court further states that a contractor “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” and thus would be subject to Section 1090. (*Ibid.*)

Mr. Roetzheim’s duties as an independent contractor to OSI include reviewing and advising OSI on the WOAs (work order authorizations) and the appropriateness of the vendor costs as well as cost estimates under each Deloitte contract. He additionally has provided extensive advice directly to OSI on the proposed amendment to Deloitte’s Integration Services contract. Therefore, Mr. Roetzheim is a public officer entrusted with transacting on behalf of OSI and subject to Section 1090 in his role as an independent contractor to OSI on the Deloitte contracts.³ Under Section 1090, Mr. Roetzheim is prohibited from being financially interested in any contract “made by him” in his official capacity.

Participating in OSI ‘s Contract Decisions.

We next examine whether his duties include the “making” of the OSI contracts with Deloitte. The “making” of a contract has been interpreted to include planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids. (*Stigall, supra*, 58 Cal.2d at p. 569.) In his subcontractor role, Mr. Roetzheim is involved in providing on-going advice to OSI on the WOA’s, which must be agreed to by the parties and are incorporated as part of the base contract. He has also provided extensive advice to OSI regarding the current proposed amendment to Deloitte’s System Integration Services contract. Thus, he is participating in the “making” of the specifications for each of the contracts.

Financial Interest in the OSI Contracts with Deloitte

The next issue is whether Mr. Roetzheim would have a financial interest in the OSI contracts with Deloitte if he were to sell, or otherwise permit Deloitte to use the ExcelerPlan software license. We conclude that, based on California case law and past Attorney General Opinions, he would have a financial interest in the OSI contracts due to Deloitte’s use of his business’s software, even if the software were provided to Deloitte at no charge.

³ This conclusion is consistent with OSI’s designation of Mr. Roetzheim as a public official subject to the Act’s conflict of interest provisions pursuant to Section 82019(a)(3) applicable to a consultant in a position that entails the making or participation in the making of decision which may foreseeably have a material effect on any financial interest. The Court in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91, applied the “in pari materia” canon of statutory construction in determining that Section 1090 should be harmonized with the Act when possible. As explained by the court, “it is well established that Section 1090 and the Act are “in pari materia.” (*Ibid.*) “Statutes ‘in pari materi’ should be construed together so that all parts of the statutory scheme are given effect.” (*Ibid.*, citing *People v. Lamas* (2007) 42 Cal.4th 516, 525.)

Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn.5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36.:38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig, supra*, at p. 333.) In Section 1090 matters, courts have “looked past individual contracts and considered the relationships between all parties connected with them, either directly or indirectly, to determine if a conflict of interest existed.” (*People v. Gnass*, (2002) 101 Cal.App.4th 1271, p. 1294.)

In addition, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141, 146.) Further, “the certainty of financial gain is not necessary to create a conflict of interest... (t)he government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).) The Attorney General determined that a “financial interest” is still present when free legal services are provided due to the prestige, publicity and good will that may result for the law firm.(86 Ops.Cal.Atty.Gen 138, 140-141 (2003).) Additionally, we have advised that a consulting firm was disqualified from conducting the hiring process, on behalf of a public agency, for potential vendors even though the process would be conducted blindly because the consulting firm knew that it had financial interests in at least some of the potential vendors. (*Shons Advice Letter*, No. A-15-114.)

Mr. Roetzhiem, the sole owner of Level 4, will have a financial interest in Deloitte and any contracts with Deloitte if Deloitte purchases or otherwise obtains permission to use the software license through another party purchasing the license from Level 4. Even if the software is provided without charge, Mr. Roetzheim would still have an interest in contracts with Deloitte because Level 4 may have future profits resulting from Deloitte’s use and promotion of the software.

Therefore, Mr. Roetzheim may not advise OSI on the specific draft work order authorizations or provide vendor negotiation advice on the Deloitte contracts if he sells a license to Deloitte directly, receives income from another party for Deloitte’s use of the license, or if he provides the software to Deloitte without charge, as he would have a prohibited interest in any contract with Deloitte under each of these circumstances.

Moreover, we caution that Mr. Roetzheim may be prohibited from selling or providing the license to Deloitte even if he were to resign from his position as a consultant for OSI. As concluded in *Stigall, supra*, although an official or employee may resign from the position, resignation may not be sufficient to avoid a Section 1090 violation when the person has been involved in the contracting process. Accordingly, Mr. Roetzheim has been involved in OSI’s existing contracts with Deloitte, and he may wish to seek further advise before selling or providing Deloitte with the license should he resign from his consulting position.

Turning to possible exceptions to Section 1090, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed a “remote interest” under Section 1091, which is only applicable to members of multi-member bodies, or a

“noninterest” under Section 1091.5. If a “noninterest” is present, the contract may be made without the officer’s abstention, and generally, a noninterest does not require disclosure. However, none of the facts presented meet the requirements of these exceptions.

Rule of Necessity

Finally, we consider whether the “rule of necessity” might apply. The rule has been applied where public policy concerns authorize the contract and “ensures that essential government functions are performed even where a conflict of interest exists.” (*Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 322.) The rule of necessity has two facets: in procurement situations, it has permitted a government agency to acquire an essential supply or service despite a conflict of interest; in nonprocurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).)

There is no indication that OSI is attempting to acquire the software as an essential service, and the focus is on whether Mr. Roetzheim is the only one who may legally act to advise OSI. There are no facts presented that OSI is unable to locate another individual to provide Mr. Roetzheim’s services under the Elyon contract; nor is there any indication that he is the only person who may legally act in this role. The rule of necessity is not applicable to this decision.

The Act

In addition to Section 1090, the conflict of interest provisions in Section 87100 of the Act prohibit a public official from making, participating in making, or using the official’s position to influence a governmental decision in which the official has an interest. As noted previously, Mr. Roetzheim is subject to the Act’s conflict of interest provisions in his role as a designated Form 700 filer consultant to OSI. (Sections 82019(a)(3), 82048; Regulation 18700.3(a)(2).)

In light of our conclusion that he may not participate in contract decisions involving Deloitte to the extent that Deloitte is a client of his business, we need not further address whether he may be disqualified under the Act based on his business and source of income interests in regard to his consultant work on the Deloitte contracts. Please contact our office if you require further advice.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division