



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 2, 2015

Mr. Gary W. Schons
BEST BEST & KRIEGER LLP
655 West Broadway, 15th Floor
San Diego, California 92101

Re: Your Request for Advice
Our File No. A-15-114

Dear Mr. Schons:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code section 1090. Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Political Reform Act (the "Act")¹ and Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Marin 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).)

FACTS

You are the General Counsel for the Ventura County Medi-Cal Managed Care Commission ("Care Commission") which governs the Gold Coast Health Plan ("Plan"), a public agency. The Plan is in the process of securing the services of a corporate firm to provide consulting services to the Plan to assist it in locating and retaining a Pharmacy Benefits Manager ("PBM"). As contemplated, the consulting firm would contract with the Plan to prepare a Request for Proposal ("RFP") from PBM vendors, "score" the vendors' responses, provide a financial analysis of each vendor and report the results of this work to the Care Commission's board with a recommendation to aid the Care Commission in selecting and making a contract with a particular vendor. The Plan requires the specific expertise and specialized experience of a consulting firm to assist the Plan in the administration of its Medi-Cal managed care plan. The Plan is informed that more of these corporate consulting firms have a prior or pre-existing, and possibly on-going, business relationship

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 18110 through 18997 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.

with many of these PBM vendors and would therefore have a financial interest in any contract the Plan might enter into with such a consulting firm under Section 1090.

If it is determined that a corporate consultant comes within the definition of “officers and employees” in section 1090, the Plan is considering requiring that the identity of all PBM vendors who submit responses to the RFP be “blind” scored, analyzed and recommended, such that the corporate consultant would not know the identity of any of the PBM vendors, and therefore not be aware whether it had any financial interests in any particular PBM vendor in conducting its scoring, analysis and making its recommendation to the Care Commission. Additionally, the Plan will require any corporate consulting firm retained by the Plan to disclose in advance any “financial interest” in any potential vendor who might respond to the RFP.

ANALYSIS

Section 1090

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. 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.) We employ the following six step analysis.

Step One: Is the corporate consulting firm subject to the provisions of Section 1090?

Section 1090’s prohibitions apply to, among other positions, “city officers or employees.” A person who advises a city may fall within the scope of Section 1090. (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal. App. 4th 1114, pp. 1124-1125.) In particular, an independent contractor whose position carries the potential to exert influence over the contracting decisions of the agency is subject to Section 1090 and may not have personal interests in the contracts. (*Ibid.*; see also *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 693.) In *Hub City*, the court stated that a person’s status as an official under Section 1090 “turns on the extent to which the person influences an agency’s contracting decisions or otherwise acts in a capacity that demands the public trust.” (*Hub City, supra*, at p. 1125.) Corporate consultants are also included within Government Code Section 1090’s definition of “officers” or “employees.” (*Davis v. Fresno Unified School Dist.*, (2015) Cal. App.4th 261, pp. 299 -301.)

Here, once the corporate firm enters into the contract to provide consulting services related to locating and retaining a PBM vendor for the Plan, it will act as the Plan’s expert on selection of a

vendor for the Plan. The corporate firm would prepare an RFP from vendors, score the vendors' responses, provide a financial analysis of each vendor and report the results of this work to the Care Commission's board with a recommendation to aid the Care Commission in selecting and making a contract with a particular vendor. The corporate firm will participate in and have influence over contracting decisions the Care Commission will make. Consequently, as an independent contractor and advisor to the Plan, the corporate firm is subject to Section 1090.

Steps Two and Three: Does the decision at issue involve a contract that the corporate firm will participate in making?

To determine whether the decision involves a contract, general principles of contract law apply. (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) Even so, "specific rules applicable to sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*People v. Honig, supra*, at p. 351 citing *Stigall v. City of Taft, supra*, at pp. 569, 571.)

And with respect to the issue of making a contract, it is important to note that Section 1090 reaches beyond the officials who actually execute the contract. Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

(*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) And individuals in advisory positions can influence the development of a contract during these early stages of the contracting process even though they have no actual power to execute the final contract. (See, e.g., *Schaefer, supra*, 140 Cal.App.2d at p. 291; *City Council v. McKinley* (1978) 80 Cal.App.3d 204.)

Once the corporate firm enters into a contract with the Plan, it will then seek bids from vendors, who may ultimately enter into a contract with the Plan to provide pharmacy benefits management. As mentioned above, the corporate firm will be an integral part of this process because it will advise the Plan regarding the bids it obtains, present the relevant information, and guide the Plan's decision in selecting a vendor. Accordingly, the corporate firm will be participating in Plan decisions involving contracting with a PBM.

Step Four: Do the consulting firm's employees have a financial interest in the contract?

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest" (*People v. Honig, supra*, 48 Cal.App.4th at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*)

Although section 1090 nowhere specifically defines 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. (*Thomson v. Call, supra*, 38 Cal.3d at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

The main issue is whether the consulting firm will have a financial interest in the contract between the Plan and the PBM vendor that the consulting firm recommends. You state that the consulting firm does have a financial interest in some of the vendors that will be part of the bidding process as sources of income. Therefore, if one of the vendors is selected that the consulting firm has a financial relationship with there could be financial gain to the consulting firm. (*See e.g., Thomson, supra*, 38 Cal.3d at pp. 651-652 [financial interests generally involve the possibility of financial gain or loss].) Financial interests under Section 1090, while not explicitly defined, are viewed broadly. Under your facts, the consulting firm does have a financial interest in the possible vendors it may recommend, therefore Section 1090 does prohibit the consulting firm advising the Plan with respect to the PBM contract.

You also ask whether a blind selection system would allow the consulting firm to advise the Plan. A blind selection process does not change the analysis. Section 1090 does not contain an explicit knowledge requirement, but irrespective of this, you have stated that the consulting firm knows that it has an interest in potential PBM vendors. It will know that some of the applicants for the contract with the Plan are those vendors, therefore the consulting firm is aware and has reason to know it might be recommending a vendor in which it is financially interested regardless of whether the selection process is blind.

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

Sincerely,

Hyla Wagner
General Counsel



By: Sukhi K. Brar
Senior Counsel, Legal Division

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