STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

August 25, 2015

Amy R. Webber
Deputy City Attorney
Long Beach City Attorney's Office
333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664

Re: Your Request for Advice
Our File No. A-15-127

Dear Ms. Webber:

This letter responds to your request for advice on behalf of Robert E. Cendejas regarding the conflict of interest provisions of Government Code section 1090 ("Section 1090").[1] Please 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.

Regarding 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 Los Angeles 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 preclude the City of Long Beach from entering a sales tax sharing agreement with a corporation where such agreement will result in financial gain for a City consultant who advises and assists the City on such matters?

CONCLUSION

Yes. As explained below, Section 1090 precludes the City of Long Beach from entering a sales tax sharing agreement with a corporation that results in the financial gain for a City consultant who advises and assists the City on such matters.

FACTS

You are a Deputy City Attorney writing on behalf of Robert E. Cendejas, a consultant for the City of Long Beach (the "City"). For several years, Mr. Cendejas has consulted the City on issues concerning sales and use tax on an as-needed basis. Among other things, he has assisted with

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

potential or proposed sales tax rebate transactions with companies and for sales and use tax matters before the State Board of Equalization. A substantial part of the work is in support of the City's economic development incentive program that provides for sales tax sharing.

Mr. Cendejas is the City's "key source of information, sometimes general, sometimes specific on some, but not all, sales tax agreements." (See 2nd Response to FPPC, 8/13/15.) In addition, "[t]he City has two sales tax revenue sharing policies, one of which the consultant assisted in developing." *(Ibid.)* The policy Mr. Cendejas assisted in developing is the one "associated with the current issue," and "written by City staff in 2008 as a result of a specific sales tax agreement with which the consultant was involved." (*Ibid.*) "The 2008 policy is the basis for the type of individual company sales tax agreement with which the Consultant typically assists the City . . .." (*Ibid.*)

Mr. Cendejas stated that he was recently approached by an accounting firm representing a large corporation (the "Corporation") with a proposal for a new tax sharing agreement. The Corporation would locate its sales operations in the City, potentially generating an estimated $3.5 million in new local 1% sales tax proceeds annually. The proposed transaction would result in a payment to the Corporation by the City of an amount equivalent to a substantial portion of the local 1% sales tax generated by the Corporation's sales in Long Beach.

Mr. Cendejas is a partner in a private business entity. It has been proposed that after the City enters into the contract with the Corporation, the City would then enter into a separate agreement with the partnership to pay him (and his partners) an ongoing service fee that is a percentage of the new local 1% sales tax generated by the Corporation, which would compensate him for, among other things, finding the Corporation, negotiating a tax rebate percentage, and other ongoing services related to the tax sharing agreement. This "finder's fee" would be paid on a contingent basis if and only if the Corporation and the City execute the tax sharing agreement and only for as long as it continued, potentially 20 to 40 years. The fee to Consultant's business entity could be over $400,000 a year.

Mr. Cendejas has advised the City that the sales tax sharing agreement between the City and the Corporation and the finder's fee contract between the City and his partnership must both be consummated for either of the agreements to be valid.

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. 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 to determine whether Mr. Cendejas has a conflict of interest under Section 1090.

Step One: Is Mr. Cendejas subject to the provisions of Section 1090?

Section 1090 provides, in part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

Courts have found independent contractors serving in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278 ["statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] . . . [¶] A person merely in an advisory position to a city is affected by the conflicts of interest rule"].) "[I]t seems clear that the Legislature in later amending Section 1090 to include 'employees' intended to apply the policy of the conflicts of interest law . . . to independent contractors who perform a public function and to require those who serve the public temporarily the same fealty expected from permanent officers and employees." (46 Ops.Cal.Atty.Gen 74 (1965); see also *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300 [with respect to civil actions, the term "employees" in Section 1090 applies to consultants, including corporate consultants, hired by local government agencies].)

Here, the City has engaged the services of Consultant Cendejas for several years to provide advice and assistance relating to sales and use tax. He has been a key source of information for certain sales tax agreements and helped develop one of the City's tax revenue sharing policies. It is plain that he performs a public function and exerts a sufficient amount of influence in those areas to come within the reach of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that "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*, *supra*, at pp. 569, 571.)

Here, there are two contracts at issue – the tax sharing agreement between the City and the Corporation and the contract between the City and Mr. Cendejas's partnership. Accordingly, this step is met.

Steps Three and Four: Is Mr. Cendejas making or participating in making contracts in which he has a financial interest?

Initially, 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 [member of Park and Recreation Board who owned a landscape architectural firm participated in the making of a contract in violation of Section 1090 where he was also a member of a committee created to advise the Board on the design, architecture, landscaping and technical planning of a Japanese garden]; see also 81 Ops.Cal.Atty.Gen. 317, 318-19 (1998) [after leaving office and establishing a private business, Section 1090 precluded former council member from participating in City's loan program where he had been involved in the "planning, discussions, and approval necessary to implement [the] loan program" and "had the opportunity and did participate in the policy decision to create the government program under which the contract would later be executed"].)

Initially, we note that Mr. Cendejas has been a long-time consultant for the City on issues concerning sales and use tax with a large share of his work focusing on the City's economic development incentive program that provides for sales tax sharing. According to the facts, he even helped developed the sales tax revenue sharing policy in 2008 that is associated with the current proposed agreement between the City and the Corporation. And he typically assists the City with issues related to this sales tax revenue sharing policy. Based on these facts, it would be difficult to conclude that Mr. Cendejas did not participate in the contract between the City and the Corporation that concerns the tax revenue sharing policy he helped to develop.

The next issue is whether Mr. Cendejas will financially benefit from the contract between the City and the Corporation. According to the most recent indication from Mr. Cendejas, the agreement between the City and the Corporation would not contain express terms referring to him or the City's contract with his partnership. If this is the case, it does not appear that he has a financial interest in the contract itself such that the City would be precluded by Section 1090 from entering into it. But the analysis does not end here.

A separate contract is contemplated between the City and Mr. Cendejas's partnership. This contract would be the means by which to compensate Mr. Cendejas (and his partners) for, among other things, finding the Corporation, negotiating a tax rebate percentage with the Corporation, and other ongoing services related to the tax sharing agreement. The compensation would be in the form of an ongoing service fee that is a percentage of the new local 1% sales tax generated by Corporation. And it would be paid on a contingent basis for services, if and only if, the tax sharing agreement between the City and the Corporation is executed and only for as long as it continued. It is estimated the annual fee could be over $400,000 a year.

The contract between the City and the Corporation, standing alone, does not violate Section 1090 because there are no express terms suggesting that Mr. Cendejas will financially benefit from the contract itself. But it is clear from the facts that despite the lack of such express terms, implicit in that contract are the terms of the contract between the City and Mr. Cendejas's partnership. Indeed, Mr. Cendejas stated that "the sales tax sharing agreement with Corporation and the agreement with the [partnership] must both be consummated for either of the agreements to be valid." And the fee that the partnership would receive would be for services, if and only if, the tax sharing agreement is executed and only for as long as it continued.

Mr. Cendejas seeks to personally benefit from the very policy he assisted the City in developing and for which he has provided advice. This is the type of conduct Section 1090 attempts to thwart, and we recognize the enduring policies underlying Section 1090 that "no man can serve two masters," and that officials making contracts must not be distracted by personal financial gain but give absolute loyalty and undivided allegiance to the best interest of the agency they serve. (See, e.g., *Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569; *City of Imperial Beach v. Bailey*, *supra*, 103 Cal.App.3d at p. 196; *City Council v. McKinley*, *supra*, 80 Cal.App.3d at p. 212.) Given the specific facts in the matter before us, we believe the policies underlying Section 1090 were meant to prohibit the present activity.

Accordingly, the contract between the City and the Corporation will violate Section 1090 so long as the City also enters into a separate contract with Mr. Cendejas's partnership to compensate him for the initial contract.[2]

Step Five: Does either a remote interest or non-interest exception apply?

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5.

If a "remote interest" is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted

[2] This result does not change even if the contracts are executed by the City Manager as authorized by the City Council. In addition, any claim that Section 1090 is not applicable to Mr. Cendejas because the City will enter into a contract with the entity in which he has a financial interest is without any legal basis. (See, e.g., *CHFA v. Hanover* (2007) 148 Cal.App.4th 682; *Hub City v. City of Compton* (2010) 186 Cal.App.4th 1114, 1125-1127 [corporation's status as the contracting entity with the city immaterial where its President was intricately involved in the city's waste management decisions, proposed the franchising, and was thus influential in the ensuing contract].)

in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a "noninterest" is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

You have provided no facts to suggest that any of the exceptions would apply to this situation.

Step Six: Does the rule of necessity apply?

In limited circumstances, a "rule of necessity" applies to allow making a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government agency may acquire an essential service, despite the existence of a conflict, when no source other than that which triggers the contract is available; the rule "ensures that essential government functions are performed even where a conflict of interest exists." (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.)

You have provided no facts to suggest the "rule of necessity" would apply in the present situation.

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

Sincerely,

Hyla P. Wagner
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl