



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 9, 2015

Thomas A. Willis
Remcho, Johansen & Purcell, LLP
210 Dolores Avenue
San Leandro, CA 94577

Re: Your Request for Advice
Our File No. A-15-163

Dear Mr. Willis:

This letter responds to your request for advice on behalf of the Lew Edwards Group regarding the conflict of interest provisions of Government Code Section 1090.¹ Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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 Sonoma 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 Lew Edwards Group from contracting with the Sonoma County Library (with the Godbe Research firm as a subcontractor) to provide community outreach consulting services?

CONCLUSION

No. Where there is no public actor, Section 1090 does not prohibit the contract.

FACTS

The Sonoma County Library is a Joint Powers Agreement Special District that serves the cities of Cloverdale, Healdsburg, Rohnert Park, Petaluma, Santa Rosa, Sebastopol, Sonoma, the town of Windsor, and unincorporated areas of Sonoma County. The Library is governed by an eleven-member, city-appointed Library Commission.

¹ All statutory references are to the Government Code, unless otherwise indicated.

On June 1, 2015, the Library issued an RFP for a public outreach consultant to assist the Library in expanding public awareness of the Library's new services and strategic plan, survey the community and users, and advise the Library about the feasibility of new funding sources, including a possible revenue measure in 2016. The Library has selected the Lew Edwards Group ("LEG") to provide those services. LEG has proposed using Godbe Research as a subcontractor to perform the public survey (polling) component of the contract. The contract for consulting services, however, would be between LEG and the Library; Godbe would not be a party to the contract. The Library Commission must approve the contract with LEG.

Although neither LEG nor any of its principals or employees has previously acted as officers or employees of, or consultants to, the Library, the Library has asked LEG to seek advice on whether LEG and the Library may enter into a contract without violating Government Code 1090. The Library's request is based on the fact that LEG had identified Godbe Research as a subcontractor to provide the public survey (polling) component of the contract. Before the Library issued its RFP, one of Godbe's employees, Mr. Charles Hester, participated in two informal community group meetings that include Library staff to provide perspectives on the recently concluded 2014 election cycle and trends to consider for the future.

In 2014, the Library placed an unsuccessful revenue measure on the County-wide election ballot. Before placing the measure, the Library contracted with Godbe Research to conduct a poll in the County to evaluate the viability of a revenue measure. Godbe conducted the poll between March 14 and 18, 2014 and presented the results to the Library in April 2014. The polling and presentation were the extent of that contract between the Library and Godbe. After the ballot measure failed, the Library invited various members of the community to participate in a discussion regarding the reasons the measure failed and possible plans for the future.

Charles Hester is a Godbe Research employee. The Library's director invited him to participate in the discussion group, which he did, on two separate occasions. He did not participate as an employee of Godbe nor was he compensated for his time. Mr. Hester recalls that he participated in person in the first meeting and played an active role in providing analysis of the November 2014 election cycle and the lessons learned regarding the failed ballot measure, as a courtesy to and at the request of the Library. Mr. Hester participated in the second meeting by phone and had little or no involvement in the discussion. Mr. Hester recalls that although the Library Director may have mentioned that the Library might hire a marketing consultant at the second meeting, there was no discussion about the RFP or whether the scope would include services similar to Godbe's.

Additionally, during the community meetings, the Library Director did not discuss or solicit views on any specifics about the RFP, such as its content, timing, strategy, the selection process, or scope of work. The group took no vote or action, nor did it make any formal recommendations. Other than these two meetings, Mr. Hester had no other discussions or involvement with Library staff or the Commission. Mr. Hester received no compensation for his participation in the two meetings and was not acting in any official capacity on behalf of the Library.

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.)

For Section 1090 to apply, however, there must be a public actor (“[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees”) who is subject to the law and who has a financial interest in a contract he or she makes in his or her official capacity. 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 [“A person merely in an advisory position to a city is affected by the conflicts of interest rule”]; *City Council v. McKinley*, (1978) 80 Cal. App. 3d 204, 210-211 [for Section 1090 to apply, the tenure of office must not be transient, occasional, or incidental, and that the officer has been delegated some portion of the sovereign functions of the public body].) While it is clear that Section 1090 applies to independent contractors as well as corporate consultants, the contractor or consultant must, at the very least, be advising or influencing the public body. (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].)

Based on your facts, however, there is no such public actor. Neither Godbe Research as a corporate consultant nor Mr. Hester as its employee served in an advisory position or exerted influence over the Library or its decisions. Further, Mr. Hester did not become a public actor by participating in his private capacity in a community discussion group to explore library funding and discuss the failed ballot measure.

Because there is no person who is subject to Section 1090, we find that it does not apply here to limit LEG’s capacity to contract with the Library no matter its choice of subconsultants.

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

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in cursive script that reads "Heather M. Rowan".

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl