



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 15, 2016

Caroline L. Fowler
City Attorney
100 Santa Rosa Avenue, Room 8
Santa Rosa, CA 95404

Walter Kieser
Senior Principal
Economic & Planning Systems, Inc.
One Kaiser Plaza, Suite 1410
Oakland, CA 94612

Re: Your Request for Advice
Our File No. A-15-228

Dear Ms. Fowler and Mr. Kieser:

This letter responds to your request for advice regarding Government Code Section 1090.¹ The Fair Political Practices Commission (the "Commission") is 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.

When a request for advice involves potential issues raised under Section 1090, we are required to forward a copy of the request to the Attorney General's Office and the local district attorney prior to proceeding with the advice. (Section 1097.1(c)(3).) Accordingly, we have forwarded your request to the Attorney General's Office and the Alameda County District Attorney's Office. We did not receive a written response from either entity. (Section 1097.1(c)(4).) The following advice is not admissible in a criminal proceeding against any individual other than the requestor. (Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the City of Santa Rosa from awarding a contract to update the City's development impact fees to Economic & Planning Systems, Inc. ("EPS") because EPS was intricately involved in the development and formation of that contract through its performance of a preceding contract with the City to review the City's development impact fees?

CONCLUSION

Yes. Section 1090 prohibits the City from awarding the contract to update the City's development impact fees to EPS.

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

FACTS

Ms. Fowler is the City Attorney for the City of Santa Rosa, and Mr. Kieser is a Senior Principal with EPS. EPS is a land economics consulting firm that provides services related to real estate development market analysis, public/private partnerships, and the financing of government services and public infrastructure. The firm was founded in 1983, has offices located in Los Angeles, Oakland, Sacramento, and Denver, and serves clients throughout the country and abroad. Mr. Kieser authorized me to speak with Ms. Fowler and her staff about EPS's work on behalf of the City.

From 1995 to 1997, EPS assisted the City in its creation of several of its development impact fee programs, and in 2004, EPS assisted the City in a substantial update of its development impact fee programs. In early 2015, the City's Assistant City Manager conducted an informal competitive bidding process for a contract to conduct a Development Impact Fee Review (the "Fee Review Contract") on behalf of the City. As part of this process, Assistant City Manager Regalia contacted EPS about submitting a bid for the Fee Review Contract.

On April 16, 2015, the City entered into the Fee Review Contract with EPS. The purposes of the Fee Review Contract were to teach City Councilmembers about the City's development impact fees and nexus studies and to evaluate those fees and studies in preparation for the City's upcoming update of those fees and studies.

The Fee Review Contract incorporated a Work Plan that EPS prepared, dated February 6, 2015. The Work Plan expressly provided that an objective of the fee review "will be to generate options and technical recommendations for the fee update process." The Work Plan called upon EPS to work closely with the City Council, City staff, and community stakeholders and to offer opportunities for members of each group to provide input on the upcoming fee update process.

The Work Plan also described the work products that EPS would deliver throughout the fee review process. Under the Work Plan, EPS would provide research and findings regarding alternative funding or financing opportunities related to the fee programs, a Technical Memorandum summarizing recommendations for the fee update process, a summary document to be used as a reference in the fee update process, and two study session presentations to the City Council. The study session presentations introduced EPS staff and City staff as members of a joint team, included suggestions to improve development feasibility, and reviewed the funding and financing requirements for necessary infrastructure projects.

After EPS completed the fee review process, the City prepared and issued a request for proposals to update its development impact fees and nexus studies (the "Update RFP"). Although twenty two prospective contractors reviewed the Update RFP online, EPS submitted the only bid on the Update RFP.

Based on the relationship described above, in a separate letter, the City Attorney also requested our advice regarding whether Section 1090 prohibited awarding the Update RFP to EPS. The City has delayed awarding the Update RFP pending its considering this advice. This letter addresses both requests for advice.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the public entity's advantage. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) 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.) A contract that violates Section 1090 is void. (*Thomson, supra*, at p. 646.)

We employ the following analysis to determine whether an official has a conflict of interest under Section 1090.

Is EPS subject to the provisions of Section 1090?

Section 1090 provides in pertinent part:

"Members 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."

Thus, Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. At issue is whether a corporate consultant, such as EPS, is an "employee" subject to Section 1090.

Independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency's contracts. (*Hub City Solid Waste Service, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125, citing *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 693). A corporate consultant working as an independent contractor for a covered government entity may be an "employee" for purposes of civil liability under Section 1090. (*Chadwick* Advice Letter, No. A-15-147; *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300-301; *Hub City, supra*, 186 Cal.App.4th at pp. 1124-1125.)

EPS is a corporate consultant that provides expertise in land economics and the financing of government services and public infrastructure. Because EPS is a corporate consultant that carries the potential to exert considerable influence over the City's contracting decisions, EPS is an "employee" subject to civil liability under Section 1090.²

² For purposes of criminal liability under Section 1090, a corporate consultant working as an independent contractor for a covered government entity is not an "employee." (*Davis, supra*, 237 Cal.App.4th at pp. 300-301; *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469, 479-482; see also *People v. Christiansen* (2013) 216 Cal.App.4th 1181, 1189.) Thus, EPS is not subject to criminal liability under Section 1090.

Does the decision at issue involve a contract or contracts?

We have previously found that a request for proposal, such as the Update RFP, is a contract under Section 1090 because the public entity will contract with the winning bidder. (See *Chadwick Advice Letter, supra*). Additionally, the resulting contract between the successful bidder and the City would be subject to Section 1090.

Is EPS making or participating in making a contract or contracts?

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (*Hub City, supra*, 186 Cal.App.4th at pp. 1124-1125, citing *California Housing Finance Agency, supra*, 148 Cal.App.4th at pp. 692-693.) An independent contractor's status as an official under Section 1090 turns on the extent to which the independent contractor influences an agency's contracting decisions or otherwise acts in a capacity that demands the public trust. (*Ibid.*) A corporate consultant makes or participates in the making of a contract for purposes of civil liability under Section 1090 if the corporate consultant was intricately involved in the government entity's decisions relating to the contract. (*Chadwick Advice Letter, supra; Davis, supra*, 237 Cal.App.4th at pp. 300-301; *Hub City, supra*, 186 Cal.App.4th at p. 1125.)

Based on the facts presented, EPS was intricately involved in developing and forming the Update RFP due to its performance of the Fee Review Contract. The Fee Review Contract expressly provided that an objective of the process "will be to generate options and technical recommendations for the fee update process." The Contract required EPS to work closely with the City Council, City staff, and community stakeholders, and to provide members of each group the opportunity to provide input on the fee update process. EPS's work products under the Contract included research and findings regarding alternative funding or financing opportunities related to the impact fee programs, a Technical Memorandum summarizing recommendations for the fee update process, a summary document to be used as a reference in the fee update process, and the study session presentations. The study session presentations introduced EPS staff and City staff as members of a joint team, included suggestions to improve development feasibility, and reviewed the funding and financing requirements for necessary infrastructure projects.

Thus, we find that EPS was intricately involved in the developing and forming of the Update RFP. Therefore, EPS participated in the making of the Update RFP for purposes of civil liability under Section 1090.

Does EPS 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* (1996) 48 Cal.App.4th 289, 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 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.

(*Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallergera* (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).)

EPS is a corporate consultant that submitted the sole bid for the Update RFP, and EPS stands to earn revenue if the City awards the resultant contract to EPS. Therefore, EPS is financially interested in the Update RFP and the potential resultant contract.

Does either a remote or noninterest exception apply?

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "noninterest," as defined in Section 1091.5, or a "remote interest," as defined in Section 1091. None of these statutory exceptions to Section 1090's prohibition, however, applies to the present situation.

Does the rule of necessity apply?

In limited circumstances, a "rule of necessity" has been applied to allow making a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005). There are no facts, however, suggesting that the "rule of necessity" would apply in the present situation.

We conclude that Section 1090 prohibits the City from awarding the contract to update the City's development impact fees to EPS because a corporate consultant is an "employee" for purposes of civil liability under Section 1090, and because EPS was intricately involved in the making of that contract.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl