



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 5, 2016

Leon J. Page
Orange County Counsel
P.O. Box 1379
Santa Ana, CA 92702-1379

Re: Your Request for Advice
Our File No. A-16-044

Dear Mr. Page:

This letter responds to your request for advice on behalf of the Orange County Board of Supervisors and Chief Information Officer regarding Section 1090 and the provisions of the Political Reform Act (the "Act").¹ Please note that we do not advise on any other areas of law, including the 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.

In regard to our advice on Section 1090, we forwarded your request to the Attorney General's Office and the Orange County District Attorney's Office, and did not receive a response from either entity. (Section 1097.1(c)(3) and (4).) Additionally, please note that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (Section 1097.1(c)(5).)

QUESTIONS

1. Is Science Applications International Corporation ("SAIC") a public official for purposes of Section 1090 as regards its relationship with Orange County ("County") and the existing Scope 2 Services Agreement ("Xerox Agreement")?
2. Does Section 1090 prohibit the County from entering into a new contract with SAIC to perform the remaining Scope 2 services, previously set forth in the Xerox Agreement?
3. Does either 1090 or the Act prohibit the County from issuing work orders under the Scope 1 Services Agreement ("SAIC Agreement") terms, for SAIC to perform Scope 2 services?
4. Does the Act prohibit SAIC from entering into a new contract with SAIC to perform the remaining Scope 2 services, previously set forth in the Xerox Agreement?

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.

CONCLUSIONS

1. No. SAIC's role with the County in regards to the Xerox Agreement does not rise to that of a "public official" or "employee," and Section 1090 is not applicable.
2. No, so long as SAIC is not involved in the formation of the new Request for Proposal or resulting contract for the remaining Scope 2 services.
3. No. The SAIC Agreement contains the "work order" fees and terms for Scope 2 services to be performed by SAIC; therefore, utilizing these provisions of the Agreement does not violate Section 1090 or the Act.
4. SAIC is a corporation and therefore does not meet the Act's definition of "consultant." However, individual SAIC employees may qualify as "consultants" under the Act and have a disqualifying conflict of interest under the Act.

FACTS

In 2010 the County sought to outsource its information technology ("IT") enterprise services² to one or more vendors. Enterprise services include voice and data network services, internet access and data center management. The County developed a Request for Proposal ("RFP") for a managed services contract, splitting the scope of work between "Scope 1" and "Scope 2" services:

Scope 1 services:

- governance & relationship management³
- server hosting & storage
- Data Center operations management⁴
- monitoring and reporting
- service desk support
- application development and maintenance
- disaster recovery

² Enterprise services is an over-arching term for "an architecture combining engineering discipline and computer science to solve practical business problems. Enterprise services architecture generally includes high-level components and principles of object-oriented design employed to match the current heterogeneous world of IT architecture." (See www.Technopedia.com.) In the computing industry, "enterprise" is used to describe any large organization that utilizes computers. (www.Webopedia.com.)

³ This includes "requirements for contract management structure and practices, oversight roles and responsibilities, etc."

⁴ This includes "managing and supporting County databases, mainframe, servers, data storage and email services located at the County's data center and managing the data center facility."

Scope 2 services:

- managing existing voice and data networks and security;
- transforming from existing system to a new system; and
- the implementation of new county-wide converged voice and data network.

The County originally envisioned one agreement with a prime vendor for both scopes of service; and that the prime vendor would then contract with a sub-vendor to perform the Scope 2 services.

SAIC submitted a proposal to perform the Scope 1 services. Xerox State & Local Solutions, Inc. ("Xerox") submitted a proposal to perform Scope 1 and Scope 2 services. The County and SAIC discussed the option of SAIC acting as "prime vendor," with Xerox as its "sub-vendor," for the Scope 2 services. SAIC declined this arrangement due to its "grave concerns" after examining the price and design of Xerox's Scope 2 proposal. The County elected to enter into negotiations with SAIC for Scope 1 services; and Xerox for Scope 2 services.

In May 2013, the County entered into the Master Services Agreement ("SAIC Agreement") with SAIC as the "Vendor" to perform Scope 1 services. In September 2013, the County entered into a Master Services Agreement ("Xerox Agreement") with Xerox as the "Network Vendor" to perform Scope 2 services. The County states that all negotiations regarding Scope 1 and Scope 2 services were separate: Xerox performed its own negotiations absent participation by SAIC. SAIC did not contribute to the requirements set forth in the Scope 2 contract entered into by Xerox.

The County has maintained all management authority and control over Xerox and the Xerox Agreement. This includes: actions of final approval, making changes to the Xerox Agreement, exercising County rights and obligations, securing agreements, and directing Xerox to take actions to allow SAIC to perform its role.⁵

SAIC plays a "support role" to the County in terms of the Xerox Agreement.⁶ Schedule 2 of the SAIC Agreement sets out that SAIC's management of the Xerox Agreement "consists of those activities associated with providing the County technical, operational, transitional and transformational assistance with the network vendor (Xerox)."⁷ SAIC's duties do not include, nor has SAIC made, determinations of whether Xerox is in compliance with the terms of the Xerox Agreement. That is a determination left to the County. SAIC has provided the County with general process advice and feedback on technical issues as to the Scope 2 services.⁸

⁵ SAIC Agreement, Schedule 1, Relationship Management, Section 6.0, Management of Network Vendor Roles and Responsibilities. See further, Table 2, items 1 – 10.

⁶ *Id.*, Table 2, Item 1.

⁷ *Id.*

⁸ For example: providing advice and feedback on project management best practices; and implementation strategy for Scope 2 projects, such as firewall timing.

SAIC has not made recommendations to change the Xerox Agreement. While work orders are technically treated as amendments to the Xerox Agreement, and SAIC has been involved in drafting some work orders that implicate Scope 2 services; only the County drafts work orders amending the Xerox Agreement.

Following a series of ownership transfers, in July of 2015 the County agreed to the assignment of the Xerox Agreement to a new company. To summarize the chain of events: Xerox assigned the Xerox Agreement to its affiliate, XBS Disposition Subsidiary Two, LLC (“XBS”). Atos International IT Holdings Limited then acquired XBS and changed XBS’ name to Atos Governmental IT Outsourcing Services, LLC (“Atos”). Atos is now responsible for performing the Xerox Agreement. This entity is hereinafter referred to as “Atos/Xerox” for this letter’s purposes.

The County believes that Atos/Xerox has not performed the Scope 2 services to the expectations and requirements of the Xerox Agreement. SAIC has provided technical input as to Atos/Xerox milestones and “deliverables,” but SAIC has not advised the County as to whether Atos/Xerox should be terminated or replaced. The County is evaluating its options to replace Atos/Xerox and have the Scope 2 services provided by another vendor through a formal procurement process. The County anticipates that the procurement process will take two years.

The new RFP will focus on the remaining Scope 2 services to be completed: primarily maintenance services. Under the Xerox Agreement, Atos/Xerox would perform nearly all services relating to preparing the County for a new Scope 2 services vendor.⁹ SAIC, in regards to a new RFP, will continue to provide the County with technical input and raw data during the procurement process. Such advice would include technical advice on timing for implementing Scope 2 work, and monitoring the status of Scope 2 work in progress.¹⁰

The County might consider requesting SAIC’s input regarding technical assumptions,¹¹ when contemplating what duties a new Scope 2 vendor would be contracted to undertake. However, the County need not necessarily rely on SAIC for its input for all these purposes. The County might employ County staff, another vendor or sourcing advisor, or a specialized law firm to obtain that input for the new Scope 2 procurement process in addition to, or instead of, using SAIC.

Meanwhile, the County is in the midst of an IT voice and data network upgrade and believes that SAIC could perform the Scope 2 services on an emergency basis while the County goes through the formal procurement process. Under the SAIC Agreement, SAIC may perform “additional IT Services via County-approved work orders.”¹² The SAIC Agreement includes

⁹ Atos/Xerox Agreement Section 15.3.5 – “Preparation for Successor to this Agreement” specifically requires that Atos prepare and provide information necessary for the County to bring in any successor to Atos for Scope 2 services.

¹⁰ SAIC Agreement, Section 14.

¹¹ For example, timelines for achieving implementing Scope 2 work; labor expenditure requirements for Scope 2 work.

¹² SAIC Agreement, Schedule 3, Section 5.0 Hourly Service Fees.

“approved hourly rates for SAIC to assist or substitute for Xerox in performing Scope 2 services via work orders.”¹³

The County designated one SAIC employee, Richard Karam, as a consultant under the County’s conflict of interest codes. This employee is the County’s primary point of contact with SAIC for the network vendor (Atos/Xerox) management services described in the SAIC Agreement.¹⁴ In this role, he has provided technical feedback and status updates to the County regarding Atos/Xerox’s progress on its transformation schedules, and communicated with various County agencies regarding Scope 2 transformation schedules. He has direct communications with managers in the County IT department. Other SAIC employees have performed some of the same duties as County IT employees who are designated Form 700 filers. However, none of the SAIC employees have had direct control over vendors, or input on vendor products or services for County contracting purposes. County IT employees maintain this authority.

ANALYSIS

Section 1090

Section 1090 bars public officials, including city officers or employees, from being personally financially interested in the contracts they formed in their official capacities. (*Davis v. Fresno Unified School District* (2015) 237 Cal. App. 4th 261, 298; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072.) Section 1090’s goals include eliminating temptation, avoiding the appearance of impropriety, and assuring the public of the official’s undivided and uncompromised allegiance. (*Thomson v. Call* (1985) 38 Cal.3d 633, 648.) A contract that violates Section 1090 is void. (*Id.* at p. 646.)

The term “public official” is interpreted broadly under Section 1090 and includes “independent contractors who perform a public function” and “whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency.” (See *Hub City Solid Waste Services, 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, 690-693; see also *Davis, supra* at pp.300-301.) The purpose behind this inclusiveness of the definition is to ensure that independent contractors who are essentially performing a public function, though temporarily, provide the same “fealty expected from permanent officers and employees.” (46 Ops.Cal.Atty.Gen 74 (1965).)

“Participation in the making or forming of a contract,” also defined broadly in the Section 1090 context, includes involvement in 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.)

¹³ Section 7.4 Change Management Process, Schedule 3, Fees and Appendix 3.1, to Schedule 3.

¹⁴ SAIC Agreement, Schedule 1 Relationship Management, 6.0 Management of Network Vendor.

In the recent matter of *Davis, supra*, the court concluded that the allegations were sufficient to state that a contractor (1) was an “employee” for purposes of Government Code section 1090 and (2) participated in making the contracts where it was alleged that the contractor served as a professional consultant to the public entity and had a hand in designing and developing the plans and specifications for the project that the contractor later entered into contract to perform. (*Davis, supra*, at 301.)

a. Xerox Agreement

Applying these principles to the facts in this matter, SAIC did not act as a “public official” in its capacity as an independent contractor for the County, as to the Xerox Agreement. SAIC was not involved in the formation of the Scope 2 RFP, or the subsequent Xerox Agreement. The County prepared its RFP for the Scope 1 and Scope 2 services without input from SAIC. SAIC specifically rejected the role of “prime vendor” and the County maintained full authority and control over Atos/Xerox. Further, rather than exhibiting “considerable influence” over the County in its contracting decisions related to the Xerox Agreement, the County ignored SAIC’s grave concerns and accepted Xerox’s proposal. Under the SAIC Agreement, the County retained all final decision-making authority over Atos/Xerox. Therefore, SAIC is not a “public official” subject to Section 1090 in regards to the existing Xerox Agreement. SAIC did not play a role in designing or developing the specifications of the Xerox Agreement.

b. Work orders for Scope 2 services under the SAIC Agreement

The work order terms and fees for Scope 2 services were negotiated under the terms of the SAIC Agreement. Where a contract anticipates the payment of additional fees under certain circumstances that may arise and was negotiated by the consultant in its private capacity, there is no Section 1090 violation. (*Pansky* Advice Letter, No. 1-14-096; see also discussion of *Pansky* in *Page* Advice Letter, No. A-15-221.) Therefore, the County’s use of the work orders provision under the SAIC Agreement is not a Section 1090 violation.

c. Anticipated Request for Proposal for remaining Scope 2 work

The County plans to prepare a new RFP to complete the remaining Scope 2 services. SAIC continues to supply the County with technical input and raw data as part of the Scope 1 services. The County is considering requesting SAIC’s input on technical assumptions, and some of this data will be used in determining the duties of a new Scope 2 vendor. SAIC, to date, has not played a role in designing specifications for the new RFP. The County asserts that SAIC will not have a role in the future in the design specifications for the new RFP.

We find, under the unique facts you have provided, that the County and SAIC may enter into a future contract for Scope 2 services without violating Section 1090, so long as SAIC has had, and continues to have, a position strictly as the vendor of Scope 1 services under the SAIC Agreement and does not exercise influence over the County’s new RFP for Scope 2 services. This analysis changes if SAIC is involved in discussions, planning, or has a hand in the development of the RFP.

If SAIC were to participate, even in the preliminary stages, in the formation of the new RFP, SAIC would be deemed a “public official,” and viewed as participating in the making of a contract in violation of Section 1090. The Court in a recent case noted: “[t]he evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality.” (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330.) Here, SAIC may not participate in the formation of the new RFP in a role of advising the County, and then bid on it, for its own financial benefit.

Political Reform Act

The Act prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87100.) A “public official” includes every member, officer, employee or consultant of an agency. (Section 82048.) If a person is considered a “consultant” for purposes of the Act, he or she is subject to the conflict of interest provisions therein and, if conflicted, must recuse him or herself from any governmental decisions, including influencing decisions. The analysis of whether a person who has a contract with a public entity is a “consultant” for purposes of Section 87100 is distinct from the inquiry under Section 1090. (See *Emmis* Advice Letter, A-15-006.)

a. Consultant Under the Act

A “consultant”¹⁵ under the Act is an individual who works pursuant to a contract with an agency, if he or she engages in the following activities under the contract:

- (1) Makes a governmental decision whether to:
 - (A) Approve a rate, rule, or regulation;
 - (B) Adopt or enforce a law;
 - (C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
 - (D) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
 - (E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
 - (F) Grant agency approval to a plan, design, report, study, or similar item;
 - (G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

¹⁵ This definition is for purposes of Section 82019, “Designated employees” and Section 82048, “Public officials.” (See Regulation 18700.3(a).)

(2) Serves in a staff capacity with the agency *and in that capacity participates in making a governmental decision* as defined in Regulation 18704(a) and (b)¹⁶ *or performs the same or substantially all the same duties* for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Section 87302.

(Regulation 18700.3(a), *emphasis added*.)

Thus, there are two ways that an individual can become a “consultant.” First, an individual is a “consultant” if he or she, pursuant to a contract with a government agency, makes government decisions as described in Regulation 18700.3(a)(1). Alternatively, an individual may be a “consultant” if he or she, pursuant to a contract with a government agency, serves in a staff capacity and either participates in governmental decisions (as defined) or performs the same or substantially all the same duties that would otherwise be performed by an individual in a position listed in the agency’s conflict-of-interest code.

Because it is a corporation, SAIC itself does not meet the definition of “consultant” under the Act. (See *Davis, supra.*, p. 297; and see Regulation 18700.3) However, individual employees of SAIC, may meet the definition of “consultant.” (See *Hayden* Advice Letter, A-84-319; *Rose* Advice Letter No. A-84-307; and *Kaplan* Advice Letter, No. A-82-108.) One SAIC employee, Richard Karam, has been designated a “consultant” and is a “Code filer” under the County’s Conflict of Interest Code. This employee is the County’s primary point of contact with SAIC for the network vendor (Atos/Xerox) management services as described in the SAIC Agreement. No other SAIC employees have been designated “consultants” by the County.

Next, we examine whether other SAIC employees are likely to meet the “consultant” definition:

1. Makes government decisions

As described in Regulation 18700.3(a)(1) above, if an individual is performing services under a contract with a government agency and “makes a government decision” for the agency as listed in that provision, he or she is a “consultant.” The County has described, and the SAIC Agreement outlines, an arrangement where the SAIC employees are not charged with decision-making responsibilities, but rather provide technical input and reports to the county IT staff. Therefore, we look to the second manner in which an individual may become a consultant under Regulation 18700.3(a)(2).

¹⁶ § 18704. Making, Participating in Making, or Using or Attempting to Use Official Position to Influence a Government Decision, Defined. (a) Making a Decision. A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (b) Participating in a Decision. A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.

2. Serves in a staff capacity

The Commission has construed the phrase “serves in a staff capacity” in Regulation 18700.3(a)(2) to include only those individuals *participating in making a governmental decision*; or who are *performing substantially all the same tasks* that normally would be performed by one or more staff members of a governmental agency. The County, in requesting this advice, states that no other SAIC employees meet the definition of “consultant” under the Act, as follows:

Some SAIC employees may perform similar duties for the County as County employees in the County’s IT department, and many of the positions in the County’s IT department are designated Form 700 filers by the County’s conflict of interest code (with varying levels of required disclosure); however, County employees fulfilling the duties being performed by SAIC contractors could also be expected to have direct control over vendors, or input on vendor products or services in regard to County contracting. SAIC personnel do not have that control or that kind of input. Thus, SAIC employees are not fulfilling substantially the same duties as a County employee who might be a Form 700 filer.

Based on the facts presented by the County, additional SAIC employees are not making any government decisions enumerated in Regulation 18700.3(a)(1). Nor, are the SAIC employees, other than Richard Karam, serving in a staff capacity and performing substantially all the same duties as an agency designated “Code filer.” In the event that SAIC employees are acting in a staff capacity and providing information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review, those employees would meet the definition of “consultants.” (Regulation 18704(b).) We have no facts indicating that this is the case. Under these facts, no additional SAIC employees are determined to be consultants.

b. Conflict of Interest for Consultants

A public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official’s interests. (Section 87103.) The following financial interests that can give rise to a conflict of interest most relevant to Mr. Karam are:

- Any real property in which the public official has a direct or indirect interest of at least \$2,000. (Section 87103(b).)
- Any business entity in which the public official has a direct or indirect investment worth at least \$2,000 and any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)
- Any source of income, such as a business entity, from which the official has received income of \$500 or more within 12 months before the decision. This also includes income from any client of the business entity of at least \$500, provided to and received by the public official within 12 months before the decision is made. (Section 87103(c).)

- Any donor of gift(s) amounting to a total of at least \$460 within 12 months before a decision is made. (Section 87103(e).)
- A public official's own personal finances, or those of a member of his or her immediate family. (Section 87103.)

According to your facts, Mr. Karam has a financial interest in his employment at SAIC, which we will assume meets the \$500.00 threshold. Mr. Karam may not make, participate in making or in any way use or attempt to use his position to influence a governmental decision which may have a reasonably foreseeable, material financial effect on his own finances or on SAIC, as a source of income. Therefore, Mr. Karam must recuse himself from making or participating in making decisions relating to the new Scope 2 procurement process.

As to the "work orders" under the SAIC Agreement, the consultant's participation in the work orders will not present a conflict of interest due to the fact that the terms were already negotiated in the SAIC Agreement. Those terms were made by disinterested County officials and are part of the preexisting contract agreement. (See *Eckis* Advice Letter, No. A-93-270.) *Eckis* directly addressed this issue as it pertained to a contract city attorney/redevelopment agency counsel whose contract with the city also provided that the attorney's firm, for an additional fee, would represent the city/redevelopment agency in all litigation initiated by or against those entities:

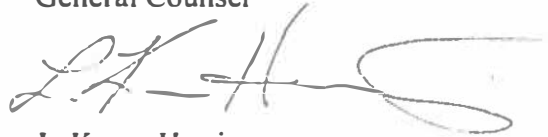
[W]here a governmental entity has already contracted to permit the consultant to make recommendations that result in the rendering of identified services for an agreed upon price, there is no conflict of interest. In that case, the consultant's participation in governmental decisions will not have a foreseeable financial effect on the consultant's employer. This is because, according to the *McEwen* advice letter [1-92-481], the agency's decision to pay the consultant's employer for the additional services contemplated by the contract was previously made by disinterested agency officials and the consultant's participation merely constitutes the implementation of that preexisting decision.

However, where a consultant makes a recommendation to a public agency that will create additional work and income for the consultant's employer that is beyond the scope of the contract under which the consultant is rendering advice, then a conflict of interest arises. (*In re Mahoney* (1977) 3 FPPC Ops. 69; *Rose* Advice Letter, No. A-84-306.) In that situation, the consultant's recommendation most likely will have a material financial effect on the consultant's employer. (See also, *Pansky*, *supra*.)

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 black ink, appearing to read "L. Karen Harrison", written over the typed name of the signatory.

By: L. Karen Harrison
Counsel, Legal Division

LKH: jgl