



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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July 14, 2016

Scott Chadwick  
Chief Operating Officer  
City of San Diego  
202 C Street, MS 94  
San Diego, CA 92101

Re: Your Request for Advice  
**Our File No. A-16-090**

Dear Mr. Chadwick:

This letter responds to your request for advice regarding Government Code Section 1090.<sup>1</sup> On June 8, 2016, you requested that we consider additional information provided by the Kaufman Legal Group representing Stack Traffic Consulting, Inc. (STC).<sup>2</sup> On June 24, 2016, we received additional information and argument from George Yin representing STC which is also considered herein. We have also forwarded your request to the Attorney General's Office and the San Diego County District Attorney's Office and we did not receive a written response from either entity. (See Section 1097.1(c)(4).)

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. Finally, Section 1090 advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

### QUESTION

Would STC's performance of the City's Traffic Signal Communications Master Plan contract in 2014 (*Contract #1*) create a Section 1090 conflict of interest for STC in contracting with the City to provide as-needed consulting services contract based on the Master Plan ("*Contract #2*")?

### CONCLUSION

Yes. Section 1090 prohibits the City from contracting with STC to provide as-needed consulting services under *Contract #2* since STC created the Traffic Signal Communications Master Plan on which a substantial part of the as-needed consulting services contract is based.

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<sup>1</sup> 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.

<sup>2</sup> You noted that Stack Traffic Consulting, Inc. and STC Traffic, Inc. are, and have been since 2015, the same company. Thus, any reference to STC covers both Stack Traffic Consulting, Inc. and STC Traffic, Inc.

## FACTS

*Contract #1*:<sup>3</sup> On January 27, 2014, the City executed a contract with STC to prepare the City's Traffic Signal Communications Master Plan. According to the summary of the contract in your letter requesting advice, under *Contract #1*, STC was required to:

- (1) Take inventory of the existing communications infrastructure.
- (2) Compile infrastructure records and map them on Geographic Information Systems ("GIS") using Environmental Systems Research Institute ("ESRI") software.
- (3) Identify the communications infrastructure necessary to connect the approximately 500 existing offline signals. You stated items (1), (2), and (3) were reports regarding deficiencies in existing infrastructure.
- (4) Recommend communication paths and infrastructure to accommodate the future roadways. You stated that while the item requested a recommendation, it was limited to communication paths and infrastructure to accommodate new roadway improvements.
- (5) Make recommendations for upgrades to traffic signal controllers, fiber optic multiplexors, wireless equipment, etc., to reflect current industry standards with the goal of increasing equipment availability, increasing system capacity, reducing maintenance needs and system down time. You stated item 5 requested a recommendation on upgrades, but STC did not have the option of recommending that the City not upgrade the system. The decision to upgrade the system had already been made by City staff. This item directed STC to tell the City what is needed to upgrade the system to industry standards.

On December 2, 2014, the Master Plan prepared by STC was publicly released. The Executive Summary of the Master Plan stated:

"The City of San Diego has initiated the most significant investment in its history, in state-of-the-art traffic signal systems technology and Intelligent Transportation Systems (ITS), through the development of the Traffic Signal Communications Master Plan (TSCMP). The benefits of the plan are drastic, great, and wide ranging. Through modernization of the traffic signal system in San Diego, traffic signals throughout the community will be coordinated and this will increase public safety, shorten commutes, reduce greenhouse gasses, and increase mobility at intersections for all modes of travel including motorists, bicyclists, pedestrians, transit, and emergency vehicles.

"The Plan's purpose is to guide the City on implementing traffic signal communications and ITS technology improvements and includes resource allocation related to improvement prioritization, funding sources, and staff levels.

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<sup>3</sup> Other portions of the Master Plan, both RFPs, and both contracts are referenced or quoted in the analysis below and are not repeated in the factual summary.

“The plan is ground-breaking in many ways: the breadth of technology proposed includes every critical element of the traffic signal system, the technology is state-of-the-art, the area of deployment covers the entire City and all 1531 traffic signals, and the plan is scheduled for complete implementation in three phases by 2025.”

*Contract #2*: In late January 2015, the City issued a subsequent RFP for as-needed consulting services for the Intelligent Transportation Systems (“ITS”) project. This RFP references the Master Plan in the Project Background and the Scope of Services sections. After a competitive process, STC was awarded the contract, and on December 21, 2015, the City executed *Contract #2*.

The City became concerned about possible Section 1090 issues before going forward with the second contract and therefore is seeking written advice from the Commission. You stated that no work has been performed under *Contract #2* and no funds have been spent. The issuance and award of any task orders have been suspended. The City will not proceed with any work or expenditure under the contract until advice is received. You stated that an as-needed contract is characterized by no description of the work to be performed since it is undetermined at the time of contract award.

## 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.) Your question involves application of the analysis and conclusions in the *Chadwick* Advice Letter, No. A-15-147 (hereafter *Chadwick 1*).

### ***1. Is STC 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.”

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.4<sup>th</sup> 682, 690-693; see also *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4<sup>th</sup> 261, 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).<sup>4</sup>)

“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.)

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 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.)

Following the *Davis* case, in the *Chadwick* Advice Letter, No. A-15-147 (hereafter “*Chadwick I*”), we applied Section 1090 to a city contractor and a city subcontractor:

“[A] contractor was involved in designing a project that it then bid on to build. Schmidt Design contracted with the City to develop a general plan that would lay out the design of reconstructed golf course. Schmidt Design advised the City, worked closely with City staff and project manager, and ultimately designed and developed the plan that became the RFP. The threshold question is: Does Section 1090 consider a corporate consultant that advises a public entity on the design phase of a project to be an ‘employee’? The *Davis*<sup>5</sup> court answered that question in the affirmative, as must we.

“Schmidt Design, as the primary consultant, was in a position to interact with and advise the City on its policy goals, create a design that interprets and applies the City’s stated plan for the golf course, and work closely with the project manager and other staff to ensure the City and community supported the

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<sup>4</sup> In 46 Ops.Cal.Atty.Gen 74 (1965), the Attorney General’s Office clarified the scope of this definition.

“It seems clear that the Legislature in later amending section 1090 to include ‘employees’ intended to apply the policy of the conflicts of interest law, as set out in the *Schaefer* and *Terry* cases, to independent contractors who perform a public function and to require of those who serve the public temporarily the same fealty expected from permanent officers and employees. It is a fundamental rule for the interpretation of a statute that it is presumed to have been enacted or amended in the light of such existing judicial decisions as have a direct bearing upon it. [Citations.]. Except where the statutory language is clear and explicit, courts construe statutes with a view to promoting rather than to defeating their general purpose and their underlying policy.”

<sup>5</sup> *Davis v. Fresno Unified School District, supra*. See also, *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235.

design. Because Schmidt Design contracted with the City and acted in an advisory capacity with the capability of exerting influence over the City staff's decision making, it is subject to Section 1090.

“The courts focus the inquiry regarding whether an independent contractor is considered an ‘employee’ under Section 1090 on the scope of influence the independent contractor holds in advising the public entity. The court in *Hub City* determined that an independent contractor that exerts considerable influence over the contracting decisions of a public agency is subject to Section 1090. (*Hub City Solid Waste Services, Inc. v. City of Compton* [2010] 186 Cal.App.4th [1114] at pp. 1124-1125.) Similarly, in *Schaefer*, the court found that a contractor who was ‘merely in an advisory position’ was also subject to Section 1090. (*Schaefer v. Berinstein, supra*, 140 Cal.App.2d at p. 291.) Unlike the other subconsultants, Lagardere Unlimited was highly involved with the City as an advisor and was influential in the City’s decision-making.<sup>6</sup> Lagardere Unlimited is therefore also subject to Section 1090.

“The remaining subconsultants that contracted with Schmidt Designs and provided technical input, submitted reports, and similar information to support the GDP were significantly more removed from directly advising City staff and therefore did not exert considerable influence. Based on the aforementioned case law, including *Davis*, and because the remaining subconsultants performed their duties for and through Schmidt Design, we find that as a group, they are not subject to Section 1090.”

In addition, in the *Fowler/Kieser* Advice Letter, No. A-15-228, the same analysis was applied to the City of Santa Rosa’s proposed award of a contract to update the City’s development impact fees to a firm that 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. This is factually similar to the current situation. Moreover, as noted above, in our advisory function we do not conclude or suggest that the contracting process was in fact improperly slanted in favor of STC.

Essentially, your question is whether STC fits under the *Chadwick I* analysis applied to the prime contractor and the major subcontractor (Section 1090 applied) or the majority of the other subcontractors (Section 1090 did not apply). While some of the duties performed by STC under *Contract #1* could be considered technical input, submitting reports, and similar information to support the Master Plan Contract, STC was also the prime contractor in developing the City’s Master Plan which the Master Plan itself describes as “the most significant investment in its history in state-of-the-art traffic signal systems technology,” a plan that covers “every critical element of the traffic signal system, the technology is state-of-the-art, the area of deployment covers the entire

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<sup>6</sup> Public Contract Code Section 10365.5 draws a similar line in State contracting. It provides in pertinent part: “(a) No person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract. (b) Subdivision (a) does not apply to any person, firm, or subsidiary thereof who is awarded a subcontract of a consulting.

City and all 1531 traffic signals, and the plan is scheduled for complete implementation in three phases by 2025.”<sup>7</sup>

The express tasks in *Contract #1* go beyond mere technical input, submitting reports, and similar information. For example, STC identified the communications infrastructure necessary to connect the approximately 500 existing offline signals and recommended communication paths and infrastructure to accommodate the future roadways. STC also made recommendations for upgrades to traffic signal controllers, fiber optic multiplexors, wireless equipment, etc. The Master Plan, the ultimate product of *Contract #1*, contains, in addition to identification of system deficiencies, almost 50 pages of suggestions and recommendations organized under chapters identified as: System Deficiencies and Resolution; Future Road Network Communications Infrastructure; Communications Equipment Upgrades Recommendations; ITS Element Recommendations; Implementation Phasing Plan; and Next Steps. Specific suggestions in the Master Plan (also reflected in *Contract #2* scope of services below) include: CCTV Cameras, ATC Controllers, Detection Systems, and Changeable Message Signs. Therefore, based on the content of the Master Plan, STC’s work was substantial and not merely an inventory of existing communication infrastructure.

Therefore, we find that STC, is subject to the provisions of Section 1090.

With respect to Mr. Yin’s letter, we disagree with the argument that these facts are distinguishable from *Chadwick 1* in any significant way.

1. The analysis in *Chadwick 1* regarding Schmidt was not a litmus test to be applied here. As noted above, *Chadwick 1* also concluded that Lagardere Unlimited, a subcontractor, was subject to Section 1090 because they were highly involved with the City as an advisor and were influential in the City’s decision-making. In this case STC was a prime contractor (not a subcontractor like Lagardere) in preparing the Master Plan which set the foundation for “the most significant investment in [the City’s] history, in state-of-the-art traffic signal systems technology and Intelligent Transportation Systems (ITS), through the development of the Traffic Signal Communications Master Plan (TSCMP).” *Contract #2* was an implementation of the Master Plan. STC’s services were not mere technical input or submission of reports and similar information.

2. We agree that STC did not have the option of recommending that the City not upgrade the system. The application of Section 1090 is based on the ability of STC to be the successful bidder on the *Contract #2* RFP through work performed under *Contract #1*. As Mr. Yin notes, STC made recommendations on upgrades and staffing, including the hiring of an “as-needed consultant.” Finally, it is clear that the Master Plan was prepared with an expectation that future work would be required. For example, the Master Plan provides:

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<sup>7</sup> Mr. Yin in his June 24, 2016 letter states that STC did not exercise judgment on behalf of the City nor did it advise the City generally on matters of public policy. Whether an independent contractor is considered an “employee” under Section 1090 is based on the influence the independent contractor holds in advising the public entity. As noted above, STC prepared the Master Plan on which *Contract #2* was based and in that capacity was potentially able to exert significant influence over *Contract #2* and could have shaped recommendations in the Master Plan to benefit its own future bid on *Contract #2*. Thus, STC, in its capacity as a public agency contractor, is subject to Section 1090.

#### “ES Implementation Phasing

“Transforming the existing network, composed of thousands of field devices spread over 370 square miles, requires a phased approach where critical deficiencies are addressed first, followed by a strategic conversion of the remaining communication infrastructure.

“The objective is to complete the TSCMP in 10 years, by year 2025. This plan revolves around technological advances that necessitate change in a timely manner, in order to keep as relevant as possible. It is also recognized that the recommendations of the TSCMP are largely unfunded and it will take time to build the proper funding into the City’s Capital Improvement Program (CIP). The technology identified by the TSCMP is critical for the operation and maintenance of the City’s traffic signal network which provides for safe and efficient mobility for all modes of travel. Implementing this plan expeditiously will provide the greatest return on investment through reduced traffic congestion, fewer crashes, greater productivity, lower transportation costs, and lower greenhouse gas emissions.

“Phase 1: Critical Deficiencies (Year 1-3) - This includes repairing and/or establishing communications to the 500 plus communication deficiencies identified throughout the City. The Traffic Management Center will also be implemented in Phase 1.

“Phase 2: Central Business District (Year 3-6) - As a best practice, the transformation of the legacy network shall begin centrally and expand outward into peripheral networks. Phase 2 constitutes Ethernet upgrades of nearly 500 intersections contained by the Central Business District (i.e. Downtown).

“Phase 3: Peripheral Networks (Year 6 -10) -The final phase of the communications overhaul will call for the replacement of existing hubs and extending Ethernet communication to each intersection serviced by the HUB. The implementation of phase 3 focuses on the remaining 500 or so intersections with the advantage of new Ethernet networks to connect to in the interior of the City.

#### “E6 Staffing Recommendations

“The operations and maintenance (O&M) staff for traffic signals have overlapping areas of responsibility and staff skills are complementary. The most well managed systems occur when operations engineers and maintenance technicians work side by side. The following are recommendations for O&M staffing:

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“The City should contract the services of an on-call ITS and traffic signal operations engineering firm to provide highly technical services. This would provide much needed staff support during the TSCMP implementation. This would also provide flexibility in staffing levels as needed as in-house staffing levels are met.”

The fact that STC did not directly control the *Contract #2* process does not support a conclusion that STC had no financial interest in *Contract #2*.<sup>8</sup>

## ***2. Does the decision 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.) There is no dispute that *Contract #2* between STC and the City would be a contract subject to Section 1090.

## ***3. Is the official making or participating in making a contract?***

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Tafi, supra* at 569.)

STC was integrally involved in the city’s adoption of the Traffic Signal Communications Master Plan. As noted above, the ultimate product of *Contract #1*, the Master Plan, contains, in addition to identification of system deficiencies, almost 50 pages of what appear to be suggestions and recommendations organized under chapters identified as: System Deficiencies and Resolution; Future Road Network Communications Infrastructure; Communications Equipment Upgrades Recommendations; ITS Element Recommendations; Implementation Phasing Plan; and Next Steps. Specific suggestions in the Master Plan (also reflected in *Contract #2* scope of services below include: CCTV Cameras, ATC Controllers, Detection Systems, and Changeable Message Signs. STC, through the Master Plan, also made recommendations on upgrades and staffing, including the hiring of the “as-needed consultant” at issue in this letter.

Moreover, *Contract #1* and *Contract #2* appear to cover the same subject matter. For example, *Contract #1* required:

- 1.6 Task 6 - ITS Element Recommendations. Stack will prepare a report detailing how other ITS devices, such as CMS and video can be integrated into the existing/proposed communications infrastructure.

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<sup>8</sup> Mr. Yin, in his letter, states that at the time of the *Contract #2* RFP process, STC’s Master Plan activities were already completed and its contractual relationship (pursuant to *Contract #1*) with the City had terminated. The fact that STC had completed the Master Plan before the RFP for *Contract #2* was prepared is not determinative. For example, a “council member could participate in all negotiations giving a contract its substance and meaning, be instrumental in establishing specifications and schedules most advantageous to his or his firm’s particular mode of operation, participate in the selection of his or his firm’s offer, resign just prior to formal acceptance of that offer and execute the contract as the other party thereto . . . .” (*Stigall supra* at 570.) In this case, *Contract #2* was based on the Master Plan prepared by STC under *Contract #1* and the gap between the performance and anticipated performance of the two contracts is not determinative.

Deployment strategies for video and CMS are based on an identified need for these elements at prioritized locations. The communication Master Plan should strive for an Ethernet platform for all newly deployed devices (especially video). The implementation of IP based communications allows for all IP compatible devices to be readily connected to the network including: Ethernet switches, IP cameras, external encoders for video detection to analog cameras, battery back-up systems, conflict monitor units, various detection systems including vehicle and pedestrian, changeable message signs, radar feedback signs, and more. These systems provide specific functions that support advanced traffic operations including: real-time video monitor of intersection operations, adaptive traffic control operation, dynamic messages for traveler information, and support for special event operations.

*Contract #2* appears to be implementation of some of the proposals in the Master Plan developed under *Contract #1*. The RFP for *Contract #2* provides at Section 3: Project Description the following:

- 3.1 Project Background. The City is seeking to establish an As-Needed Contract with a highly qualified Consultant to provide support in the planning, design, and implementation of ITS elements and an upgraded traffic signal communications network.

The City of San Diego recently completed its first Traffic Signal Communications Master Plan. This Plan identified deficiencies, needs, and enhancements to the City's traffic signal communications network. In addition, the Plan also identified many new ITS elements and new technologies that can become extremely valuable traffic management tools when added onto a robust and efficient communications system. The enhanced communications system will primarily serve the City's Transportation & Storm Water Department, but it will also create great connectivity opportunities for other departments within the City, and potentially, other agencies in the region as well.

Section 1 of *Contract #2* describes the scope of service under *Contract #2* in pertinent part as follows:

- "1.1. Under the general supervision of the City Mayor or his designated representatives, STC Traffic, Inc. [Design Professional] shall provide as-needed Professional Services by Task Orders on an hourly basis. Professional Services may include, but are not necessarily limited to, the preparation of reports, grant applications, schematics, studies, design and/or construction documents relating to ITS elements such as CCTV cameras, 2070 ATC controllers, detection systems, changeable message signs, and adaptive traffic control systems; central management systems; fiber optic, copper and wireless systems; network & system integration; traffic signal timing optimization; traffic signal interconnect; new traffic signals and traffic signal upgrades; or other services necessary to complete the Tasks.

This is not a coincidental case of a contractor successfully bidding on two unrelated contracts with the same municipality. Rather the two contracts concern similar scopes of work and STC had the opportunity in performing *Contract #1* to affect the scope of *Contract #2*. In other words, participation in *Contract #1* was akin to preliminary discussions, negotiations, compromises,

reasoning, planning, drawing plans and specifications for *Contract #2*. (See, *Millbrae Assn. for Residential Survival, supra*; see also *Stigall v. City of Taft, supra* at 569.) Thus, through their substantial involvement in assisting the City with preparing the Master Plan under *Contract #1*, and the relationship of *Contract #2* to *Contract #1*, STC participated in making *Contract #2* for purposes of Section 1090.

Mr. Yin cites two advice letter and an opinion to support his argument that STC had no participation in making *Contract #2*. However, none of the cited authorities are factually similar to the facts here. The authorities all relate to single contracts. This ignores the significance of STC's work on the prior contract which resulted in the Master Plan.

1. The *Ansolabehere* Advice Letter No. A-15-180(a) and A-16-029 concerned a Planning Commissioner who had no involvement with a potential contract with his spouse's employer. We stated:

"You noted that the Planning Commission will not be making any recommendations regarding the selection of a consultant (or consultants) for the Plan. The City's RFP process for The Plan is exclusively performed by the City Council and City staff. No advisory bodies, including the Planning Commission, are involved in that process. Once a firm is selected, that firm will purely assist City staff in the review and processing of the proposed Plan. Therefore, the official will not be participating in a contract for purposes of Section 1090. Consequently, we do not further consider the application of Section 1090 to the Plan."

There was no indication that the Planning Commission worked on the foundation of the contract about which the question was based. If that had been the case, the conclusion would likely have been different.

2. Similarly, in the *Drexel* Advice Letter, No. 1-14-075 and in 80 Ops. Cal. Atty. Gen., the questions concerned single contracts and the private conduct of officials contracting with their agencies. Section 1090 reaches beyond the officials who actually execute the contract to 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, supra* at 1052.)

The crux of the question in this case is whether STC was acting in an official capacity in completing the Master Plan under *Contract #1* with the City, thereby creating the conflict of interest for STC bidding on *Contract #2*. Mr. Yin focuses on the bid and execution process for *Contract #2* without fully considering that *Contract #2* was based on the Master Plan that was the product of STC's *Contract #1*. Thus, we conclude that by STC's substantial involvement in assisting the City

with preparing the Master Plan under *Contract #1*, STC participated in making *Contract #2* for purposes of Section 1090.

**4. Does the official 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*, 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. (See e.g., *Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerger* (1977) 67 Cal.App.3d 847, 867, fn. 5.)

Since STC stands to financially gain from *Contract #2*, it has a financial interest in *Contract #2* under Section 1090.

**5. Remote interest and non-interest exceptions and the Rule of Necessity?**

There are several statutory exceptions to the prohibition in Section 1090:

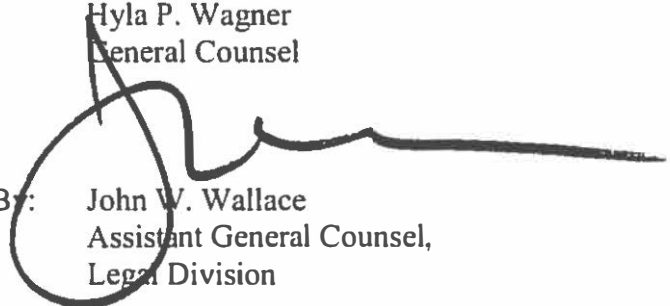
- The remote interests in Section 1091 apply only to the members of a body or board which STC would not be here.
- None of the non-interest exceptions in Section 1091.5 appear to apply.
- Additionally, the “rule of necessity” occasionally applies to allow a body to enter into a contract in which a member has a prohibitive conflict of interest and there is no alternate source for the contract.

Section 1090 therefore prohibits the City from contracting with STC to provide as-needed consulting services under *Contract #2* since STC created the Traffic Signal Communications Master Plan on which a substantial part of the as-needed consulting services contract is based.

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

Sincerely,

Hyla P. Wagner  
General Counsel

By:  John W. Wallace  
Assistant General Counsel,  
Legal Division

JWW:jgl