



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 19, 2016

Nancy Diamond, Esq.
822 G Street, Suite 3
Arcata, CA 95521

Re: Your Request for Advice
Our File No. A-16-111

Dear Ms. Diamond:

This letter responds to your request for advice on behalf of the Redwood Coast Energy Authority (RCEA), a joint powers authority, regarding the application of Government Code Section 1090.¹ Please note that we are only providing advice under Section 1090 and not under any other general conflict of interest prohibitions such as common law conflict of interest.

We have also forwarded your request to the Attorney General's Office and the Humboldt 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

Does the Local Energy Authority Network Energy US ("LEAN") or RCEA have a conflict of interest under Section 1090 that prohibits RCEA from entering into a services contract with LEAN?

CONCLUSION

Because LEAN was never hired by or compensated by RCEA and LEAN did not exert considerable influence on the contracting decisions of RCEA, LEAN would not be considered a public officer or employee of RCEA for purposes of Section 1090. Since LEAN is not subject to Section 1090 under these facts, neither LEAN or RCEA will have a conflict of interest.

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

FACTS

- RCEA is comprised of the County of Humboldt, Cities of Arcata, Blue Lake, Eureka, Ferndale, Fortuna, Rio Dell, Trinidad and the Humboldt Municipal Water District. Its purposes, among others, authorize RCEA to act as a community choice aggregator under Public Utilities Code § 366.2 et seq.²
- The RFP outline was prepared by RCEA staff who had been in formally sharing work efforts with staff from the neighboring Counties of Mendocino and Lake for community choice aggregation (“CCA”) program development within each agency’s respective jurisdiction. Neither agency is a part of the JPA. This multi-agency cooperative effort was initiated at the staff level and never formalized the rough respective Board action.
- As part of this shared staff effort, RCEA agreed to draft the RFP for later use by the counties at their discretion.
- Mendocino County had previously entered into a formal contract with LEAN³ to assist in its CCA program development. You clarified on June 2, 2016, that Mendocino retained LEAN only for preliminary CCA communications and outreach to “inform stakeholders about CCA plans currently under consideration within Mendocino County, and to assess levels of support.” This did not include, for example, technical feasibility analyses, CCA formation services or CCA operation services which would be the subject of the RCEA RFP that would be shared with Mendocino. Mendocino has not yet become a community choice aggregator.
- Paragraph 33 of the contract between Mendocino County and LEAN provides that “Other tax supported agencies within the State of California who have not contracted for their own requirements may desire to participate in this contract. The CONTRACTOR is requested to service these agencies and will be given the opportunity to accept or reject the additional requirements. If the CONTRACTOR elects to supply other agencies, orders will be placed directly by the agency and payments made directly by the agency.”
- Mendocino County staff offered the services of LEAN to assist RCEA staff in drafting the RFP. RCEA did not enter into a contract with LEAN. Rather there was a provision in the LEAN/Mendocino contract that allowed Mendocino to loan LEAN to other agencies. You noted in your June 2, communication that LEAN did receive compensation from Mendocino for the work it did for RCEA, but that RCEA will not reimburse Mendocino for any payments it may make to LEAN. Furthermore, it was your understanding that LEAN did not anticipate ever being paid by Mendocino for the work it did for RCEA as it was not part of the Mendocino-LEAN contract scope of services. LEAN did not forward to Mendocino the product it gave to RCEA.

² A community choice aggregator is a local governmental agency who purchases electricity and other necessary electric services on behalf of the electric customers within its jurisdiction, in place of the investor-owned utility company.

³ LEAN is non-profit membership organization registered in the state of California and provides CCA education, advocacy, formation and operational services to municipal clients.

- At its September 21, 2015 Board meeting, the RCEA Board of Directors approved an outline of the CCA program RFP. The RCEA Executive Director's staff report stated: "RCEA has begun working with Lake and Mendocino County on RFP development RCEA is also receiving support on RFP development from LEAN Energy US, a nonprofit, membership organization dedicated to the accelerated expansion and competitive success in clean energy CCA nationwide."
- Also on September 21, 2015, LEAN contacted RCEA to inquire about the status of the RFP and whether RCEA needed LEAN's assistance. RCEA staff sent LEAN the draft outline submitted to the RCEA Board and responded with, "Attached is the laundry list of CCA start-up and operations needs that I came up with that we will want RFP respondents to address. It would be helpful to have any input you have at this stage of 1) items I've left off, and/or 2) any thoughts on logically grouping/ordering/combining/expanding items on the list." On October 16, 2015, LEAN sent RCEA expanded language for the RFP scope of services.
- RCEA completed a draft of the RFP further revising the text provided by LEAN and distributed it on October 26, 2015 to Lake County, Mendocino County and LEAN, among others. RCEA's Executive Director followed up with LEAN on November 9, 2015, asking if LEAN had any comments, to which LEAN never responded. LEAN never asked for payment and was not paid by RCEA for the work it provided on October 15, 2015. RCEA had no other contact with LEAN while preparing the RFP.
- A draft RFP was presented to the RCEA Board at its November 30, 2015 meeting, at which time it was approved. The final RFP was formally distributed on December 1, 2015. Proposals were received from four different entities including TEA, the successful bidder. TEA is a not for profit, power marketing corporation owned by eight municipalities and state chartered electric utilities. TEA proposed a partnership with LEAN and Noble Americas Energy Solutions, LLC,⁴ each entity to provide a different component of the total scope of services sought by RCEA. TEA offered either to act as the prime contractor for the team of three entities, or, at RCEA's choice, RCEA could contract individually with each of the three entities. RCEA has not to date formally entered into a contract, or contracts, under either scenario, pending receipt of an Advice Letter on the potential conflict of interest question.

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

⁴ Noble Americas Solutions, LLC is a large, national electric service provider that focuses on customer and data management services in the CCA context.

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.)

Is LEAN 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.4th 682, 690-693; see also *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 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).⁵)

“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 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

⁵ 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.”

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, 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*⁶ 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 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 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.)”

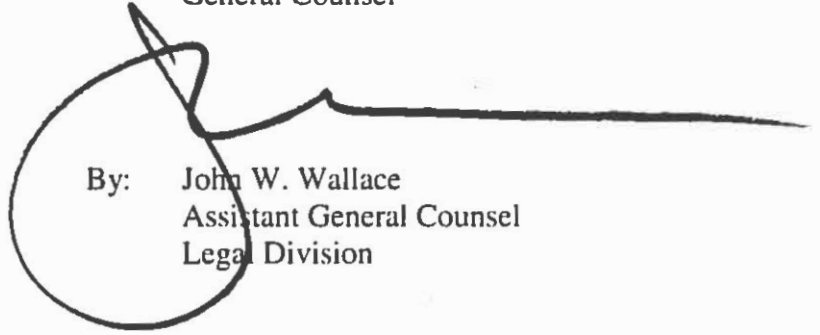
Your facts differ from *Chadwick* in that LEAN never contracted with RCEA and never served RCEA either in an employment or contractor capacity. In addition, LEAN’s voluntary input into the RFP consisted of comments of a minimal nature. Because LEAN, as an independent contractor to other entities, was never hired or compensated by RCEA and did not exert considerable influence over the contracting decisions of RCEA, it will not be subject to the provisions of Section 1090 under these facts. Since LEAN is not subject to Section 1090, neither LEAN nor RCEA will have a conflict of interest under these facts. However, we advise RCEA to be aware that independent contractors who exert considerable influence over its contracting decisions may be subject to Section 1090 and to take appropriate precautions in its contracting practices.

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

⁶ *Davis v. Fresno Unified School District, supra*. See also, *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235.

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, consisting of a large, stylized loop on the left and a long, horizontal stroke extending to the right.

By: John W. Wallace
Assistant General Counsel
Legal Division

:jgl