



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 24, 2017

John Mulligan
Public Works Director
Public Works Department
1700 7th Street
Sanger, CA 93657-2804

Re: Your Request for Advice
Our File No. A-17-023

Dear Mr. Mulligan:

This letter responds to your request for advice on behalf of the City of Sanger regarding Government Code Section 1090, et seq.¹ Please note that this advice does not analyze any other area of law, including Public Contract Code or common law conflicts of interest. Please also note that we are 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.

As required by Section 1097.1(c)(3), we have forwarded your request to the Attorney General's Office and the Fresno County District Attorney's Office. We did not receive a written response from either entity. (See 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." (Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the City from entering into a new contract for the provision of City Engineer services (hereafter the "new City Engineer contract") with Yamabe and Horn Engineering, Inc. given that the firm currently provides those services to the City under the previous incarnation of that contract?

CONCLUSION

No. Section 1090 does not prohibit the City from entering into the new City Engineer contract with Yamabe and Horn Engineering, Inc. because the firm has not participated in the making of the City's decisions regarding that contract to date, so long as the firm continues to refrain from participating in the making of that contract.

¹ Government Code Sections 1090 through 1097.5. All statutory references are to the Government Code, unless otherwise indicated.

FACTS

In April 2013, the City entered into a contract with Yamabe and Horn Engineering, Inc. for the provision of City Engineer services, and the firm currently provides those services under that contract (hereafter the “current contract”). The current contract specifically identified Yamabe and Horn Engineering, Inc.’s employee, Josh Rogers, as the “designated City Engineer,” and required Mr. Rogers to be responsible for personally providing or supervising all of the firm’s work under the contract. The current contract provides that Mr. Rogers, is a “designated employee” under the City’s Conflict-of-Interest Code and requires him to file statements of economic interest.

The current contract’s scope of work is broad and includes a delegation of discretion and an assignment of duties comparable to that of other city engineers and their staffs. Included among the firm’s duties under the current contract is the provision of “federally funded capital project engineering services.” The City receives grants under the federally funded Community Development Block Grant (CDBG)² program, and is currently managing the completion of CDBG projects. Funding of the City’s CDBG projects to completion can take several years because its annual CDBG grants are relatively small. Because the City receives CDBG grants and utilizes contract engineering services, the CDBG program and the current contract both require the City to solicit and contract for those services in three-year increments.

Pursuant to this CDBG program requirement, the City recently issued a Request for Qualifications (RFQ) for City Engineer Services for the next three-year increment, as those services will include work related to the City’s CDBG projects. The new City Engineer contract is materially similar to the current contract, but it is a new contract rather than an extension or renewal of the current contract. You state that Yamabe and Horn Engineering, Inc., including Mr. Rogers, “took absolutely no part” in the RFQ process, including the determination of the need for an RFQ, its formulation, its issuance, and the City’s review and evaluation of responses to the RFQ.

After conducting the RFQ process and evaluating the responses received, the City desires to award the new City Engineer contract to Yamabe and Horn Engineering, Inc., with Mr. Rogers serving as the designated City Engineer. As further required by the CDBG program, Fresno County reviewed and approved the RFQ prior to its release, and the County has reviewed and approved the proposed award of the new City Engineer contract.

While neither Yamabe and Horn Engineering, Inc. nor Mr. Rogers participated in the RFQ process, the firm, in its role as City Engineer under the current contract, assisted the City in considering or prioritizing CDBG projects; presented reports to the City Council on potential CDBG projects; worked on the City’s five-year Capital Improvements Program, which includes CDBG projects; and assisted in planning work which included potential CDBG projects.

You are the Director of the City’s Public Works Department, and you provided supplemental information by phone on January 30, 2017.

² The United States Department of Housing and Urban Development administers the CDBG program to provide communities with resources to address a wide range of unique community development needs. The CDBG program provides annual grants on a formula basis to local governments and States to ensure decent affordable housing, provide services to the most vulnerable, and to create jobs through the expansion and retention of businesses, among other things.

ANALYSIS

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.”

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, and the prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.)

We employ the following six-step analysis to determine whether a potential public officer or employee has a conflict of interest under Section 1090.

Step One: Is the Yamabe and Horn Engineering, Inc. subject to Section 1090?

Section 1090 applies to consultants, including corporate consultants, who have “a hand in designing and developing the plans and specifications” for a public project. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.) This application recognizes that independent contractors, who serve the public temporarily, “owe the same fealty expected from permanent officers and employees.” (46 Ops.Cal.Atty.Gen. 74 (1965).) Accordingly, Section 1090 is applicable to independent contractors that serve in advisory positions and have the potential to exert considerable influence over the contracting decisions of a public agency. (*Stroud* Advice Letter, No. A-16-237; *Green* Advice Letter, No. A-16-084; See *Chadwick* Advice Letter, No A-15-147 citing *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125.)

Under the City’s current contract for the provision of City Engineer services with Yamabe and Horn Engineering, Inc., the firm exercises discretion and has assigned duties comparable to other city engineers and their staffs. Furthermore, the firm’s designee, Mr. Rogers, is required by the current contract to be a designated employee under the City’s Conflict of Interest Code and to file statements of economic interests. Therefore, Yamabe and Horn Engineering, Inc. is subject to Section 1090 because the firm has “the potential to exert considerable influence over the contracting decisions” of the City under the current contract, comparable to that of a permanent city engineer and staff.

Step Two: Do decisions regarding the selection of a new contract City Engineer involve a contract or contracts?

To determine whether a decision involves a contract, one should refer to general contract principles. (See 89 Ops.Cal.Atty.Gen. 258, 260 (2006); 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).)

The City is under contract with Yamabe and Horn Engineering, Inc. for the provision of City Engineer services pursuant to the current contract. The City has issued a RFQ for the new City Engineer contract, is in the process of selecting a contract provider, and desires to select Yamabe

and Horn Engineering, Inc. Therefore, contracts are involved in the City's decisions regarding the selection of a new contract provider of City Engineer services.

Step Three: Did Yamabe and Horn Engineering, Inc. participate in the making of the new City Engineer contract?

Participation in the making of a contract is defined broadly as any act involving 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.)

However, when an employee of an agency is financially interested in a contract, the employee's agency is only prohibited from making the contract if the employee was involved in the contract-making process while acting in their official capacity. As long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested. (See 80 Ops.Cal.Atty.Gen. 41 (1997) [firefighters permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity]; 63 Ops.Cal.Atty.Gen. 868 (1980) [real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal].)

Under the current contract, Yamabe and Horn Engineering, Inc. serves as the City Engineer with Mr. Rogers serving as its designated representative. You state that Mr. Rogers and the firm, in the role of providing City engineering services, "took absolutely no part" in the City's RFQ process, including the determination of the need for an RFQ, its formulation, its issuance, and the City's review and evaluation of responses to the RFQ. Based on these facts, neither the firm nor Mr. Rogers' performance of the current contract has affected the scope of work of the new City Engineer contract to date. Therefore, based on the facts presented, the firm, in its official capacity as the City Engineer, has not made or participated in the making of the new City Engineer contract for purposes of Section 1090.

Thus, we conclude that Section 1090 does not prohibit the City from entering into the new City Engineer contract with Yamabe and Horn Engineering, Inc. because the firm has not participated in the making of the City's decisions regarding that contract to date, so long as the firm continues to refrain from participating in the making of that contract.³ Accordingly, this Section 1090 analysis ends here.

³ The Political Reform Act prohibits a public official from making, participating in the making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) Mr. Rogers is subject to the Act's conflict of interest provisions because he is a designated employee of the City (see Sections 82019 and 82048); he has a business interest in Yamabe and Horn Engineering, Inc. because he is an employee of the firm (see Section 87103(a)); and a public official always has an interest in his or her personal finances and those of his or her immediate family (See Section 87103). Therefore, the Act prohibits Mr. Rogers from taking part in any decision that would have a reasonably foreseeable material financial effect on the firm or on his personal finances or those of his immediate family. Accordingly, Mr. Rogers should continue to avoid taking part in decisions related to the new City Engineer contract in order to avoid a violation of the Act.

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 "Matthew F. Christy". The signature is stylized and cursive.

By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl