



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 29, 2018

Jack Grossman, Esq., P.E.
Executive Vice President
HSE Engineers, Inc.
10569 Old Placerville Road
Sacramento, CA 95827

Re: Your Request for Advice
Our File No. A-17-167(a)

Dear Mr. Grossman:

This letter responds to your request for advice regarding Government Code Section 1090 *et seq.*¹ on behalf of HydroScience Engineers, Inc. (HSE), dated August 21, 2017.²

Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the Commission) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Any advice we provide assumes your facts are complete and accurate.

Please note that our advice is based solely on Government Code Section 1090. We therefore offer no opinion on under other bodies of law governing general conflicts of interest, such as the Political Reform Act, Public Contract Code, or common law.

Finally, regarding advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Sacramento County District Attorney's Office, which we have done. (Section 1097.1, subd. (c)(3).) We did not receive a written response from either entity. (Section 1097.1, subd. (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." (See Section 1097.1, subd. (c)(5).)

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.

² This advice letter supersedes the FPPC's unpublished advice letter dated August 16, 2017, provided to you on behalf of HSE. (*HSE Engineers, Inc. Letter*, No. A-17-167 (Unpublished).)

QUESTION

Does Section 1090 prohibit the City of Belmont (the City) from entering a prospective contract for design, bid, and construction and engineering support services related to the rehabilitation of the City's North Road Pump Station (Contract 2) with HSE where HSE previously provided an assessment and inventory of all the City's Pump Stations, including the North Road Pump Station, pursuant to a prior contract with the City (the Assessment Contract or Contract 1)?

CONCLUSION

No. Section 1090 does not prohibit the City from entering into Contract 2 with HSE because, based on the facts provided, HSE did not participate in the making of Contract 2 through its performance of Contract 1, HSE did not impose considerable influence over the City regarding Contract 2, and HSE derived no unfair advantage in procuring Contract 2 by the work it performed under Contract 1.

FACTS

A. City of Belmont's Sewer Pump Stations.

The facts you provide state that the City of Belmont operates 11 sanitary sewer Pump Stations, including the North Road Pump Station located at the corner of North Road and El Camino Real on the border with the City of San Mateo. Based on existing conditions, there is a medium to high likelihood that the North Road Pump Station could fail. Two new developments are currently being built that will significantly increase flows to the North Road Pump Station, and that Pump Station's current capacity will not be sufficient to handle the increased flows.

B. Contract 1: Assessment and Inventory of All Pump Stations.

In May 2016, the Belmont City Council authorized the City Manager to enter the Assessment Contract with HSE. Under that contract, HSE was required to: evaluate the condition of all eleven of the City's Pump Stations, including the North Road Pump Station; make recommendations for improvements to those Pump Stations to meet current and future needs; provide planning level cost estimates for recommended improvements; and submit a report to the City containing its evaluation of each Pump Station. In April of 2017, HSE submitted its "Pump Station Assessment and Inventory Report" to the City pursuant to the Assessment Contract. The City paid HSE \$134,624 for its work under Contract 1.

C. Contract 2: The North Road Pump Station.

In July 2017, the City issued a Request for Proposals for Contract 2 for the City's North Road Pump Station (the RFP). HSE's entire 212-page Report was included as an attachment to the Contract 2 RFP. Contract 2 will require the selected proposal team to: conduct an evaluation of the North Road Pump Station; prepare a pre-design report which will provide design recommendations for that Pump Station; prepare a final design package for that Pump Station's rehabilitation upon

approval of the pre-design report; and provide construction and engineering support services for the Pump Station's eventual rehabilitation.

D. Distinctions Between the Two Contracts.

Contract 1 was not a Master Plan that set design criteria, nor did it provide recommendations that could provide HSE an advantage in providing engineering services for the North Road Pump Station design, or any of the other ten Pump Stations inventoried.

Some common subject matter exists between the HSE Report and Contract 2, but the scope of work is different in many ways. For instance, under Contract 2, the selected engineer would be required to perform an independent evaluation of the Pump Station. The updated evaluation under Contract 2 is significantly more detailed than the evaluation in the Report. Contract 2 would require updating flow capacity requirements and preparing a detailed pre-design report that contains definitive criteria and design recommendations. This would require, among other things, a survey and a geotechnical investigation, neither of which HSE conducted in preparation of the Report. Contract 1 did not include preparation of plans or specifications for the North Road Pump Station, and it was limited to a preliminary layout of the Pump Station, sufficient only to determine the planning level capital cost.

HSE used information provided by the City to estimate the cost of improving the Pump Station within its current structure. The City could use the HSE's cost of improvement estimate at its discretion, such as implementing a more comprehensive upgrade that would require a new replacement structure. The City had significant input in the Report's final recommendations. For example, in the preliminary draft of the Report, the City changed the priority of Pump Station improvements. HSE subsequently incorporated the change in its final Report. HSE had initially recommended that the North Road Pump Station be the second Pump Station to be improved, not the first. City engineering staff, not HSE, revised this priority and made the North Road Pump Station the subject of Contract 2.

The City included a copy of the Report with the RFP. Providing background information in an RFP is standard industry practice. The RFP scope of work requires the engineer to review prior reports. Pre-proposal meetings, which typically occur at the facility site, help familiarize prospective RFP respondents with the project. Including the Report in the RFP allows respondents to attend the pre-proposal meeting with essential background information, and eliminates any potential advantage to HSE, which prepared the Report.

You state that HSE is not in the construction contracting business; it does not make bids or construct facilities.

ANALYSIS

A. HSE is Not Subject to Section 1090.

1. Legal standard for independent contractor under Section 1090.

Interpreting the term “employees” as used in Section 1090, the California Supreme Court recently affirmed the long-standing rule from case law that independent contractors are not categorically excluded from Section 1090: “Liability under the statute can extend to independent contractors who have duties to engage in or advise on public contracting.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 233.) For example, an independent contractor for a state or local government agency that “has a hand in designing and developing the plans and specifications for the project,” has made or participated in the making of a contract for the construction of the project and is therefore prohibited from entering a contract to complete the project. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300-301.)

However, not *all* independent contractors are covered by *section 1090*. (*Sahlolbei, supra*, at p. 240.) “An individual’s status as an official under [*section 1090*] turns on the extent to which the person influences an agency’s contracting decisions or otherwise acts in a capacity that demands the public trust.” (*Ibid*, quoting *Hub City Solid Waste Services, Inc. v. City of Compton (Hub City)* (2010) 186 Cal.App.4th 1114, 1125.) In *Hub City*, the court held that an independent contractor that exerts “considerable influence over the contracting decisions of a public agency” is subject to Section 1090. (*Hub City, supra*, at pp. 1124-1125.)

Previously, we have advised that consultants who play a limited technical role and are removed from influencing the contracting decisions of a public agency may not be subject to Section 1090. (*La Salle Advice Letter*, No. A-17-074 and *Green Advice Letter*, No. A-16-084.) Likewise, in the *Chadwick Advice Letter*, No. A-15-147, we determined that only the primary consultant and a “highly involved sub-consultant” were subject to Section 1090. The sub-consultants who provided technical input, reports, and similar information in a support role to the consultants, were not subject to Section 1090.

Generally, an independent contractor is prohibited from a subsequent project to complete a project only if the contractor has had extensive involvement in the initial design and development of the project and the nature of the contractor’s involvement gives the contractor an unfair advantage in the subsequent award of the contract.

2. HSE did not exert influence over the City’s contracting decisions and the scope of work in Contract 1 creates no unfair advantage to HSE for Contract 2.

Based on the facts provided, which includes copies of the Report and Contracts 1 and 2, HSE did not exert “considerable influence over the contracting decisions of a public agency” related to Contract 2 because of the work it perform in Contract 1. Moreover, HSE did not “engage in or advise on public contracting” based on the scope of work it performed in Contract 1. The subject of Contract 1 was an assessment and inventory report. It was not a Master Plan that set design criteria, nor did it involve recommendations that could give HSE an advantage in providing

engineering services for the North Road Pump Station design, or any of the other ten Pump Stations assessed and inventoried.

The facts you provided do not show that the Report and the work that is the subject of Contract 1 creates an unfair advantage in the selection processes for Contract 2. The two contracts involve separate and distinct scopes of work. For example, in Contract 2, the selected engineer will be required to perform an independent evaluation of the Pump Station. This updated evaluation is significantly more detailed than the evaluation included in the Report, and will require updating flow capacity requirements and the preparation of a detailed pre-design report that contains definitive criteria and design recommendations. This will require, among other things, a survey and a geotechnical investigation, neither of which HSE conducted in preparation of the Report.

Contract 1 did not include preparation of plans or specifications for the North Road Pump Station. Contract 1 was limited to a preliminary layout of the Pump Station sufficient only to determine planning level capital cost. The RFP scope of work requires site visits to determine the best placement of the Pump Station. HSE used information provided by the City to estimate the cost of improving the Pump Station within its current structure. HSE's estimate does not constitute considerable influence over the City's decisions about improving the Pump Station.

The City included a copy of the Report with the RFP. Providing background information in an RFP is standard industry practice. The RFP scope of work requires the engineer to review prior reports. Pre-proposal meetings, which typically occur at the facility site, help familiarize prospective RFP respondents with the project. Including a copy of the Report in the RFP allows the potential respondents to come to the pre-proposal meeting with necessary background information, and the sharing of this information, to the extent is relevant to the scope of work to be undertaken, creates a level playing field among the respondents and removes any perceived unfair advantage that HSE could have preparing the Report.

The facts you provide show that City staff provided the information HSE used to develop the study, and had significant input in the Report's final recommendations. For instance, HSE initially recommended that the North Road Pump Station be the second Pump Station improved, not the first. But City engineering staff, not HSE, revised this priority and made the North Road Pump Station the subject of Contract 2. The City's decision to change priority of improvements further shows that HSE did not influence the City's contracting decisions regarding Contract 2.

C. HSE Did Not Participate in the Making of Contract 2.

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.)

As discussed above, HSE provided a Report that allowed City staff to develop a preliminary budget for capital improvements and prioritize those improvements. The work HSE performed under Contract 1 and the work required under Contract 2 are distinctly different in scope, detail and purpose. For instance, HSE did not prepare any plans or specifications for the Pump Station. The Report contained only a possible layout of improvements sufficiently detailed to determine a

preliminary budgetary cost estimate. The Report shows no elevations, survey information, or engineering drawing sections, and no geotechnical information. The Report is not a plan or a specification for the North Road Pump Station. The scope of work contained in the RFP for the Pump Station requires the successful respondent to make a *de novo* evaluation of the Pump Station rehabilitation, including its location.

The facts you provide state that HSE is not in the construction contracting business; it does not make bids or construct facilities. Moreover, HSE derived no apparent advantage regarding Contract 2 for the work performed in Contract 1. For example: (1) HSE did not have preliminary discussions with the City regarding Contract 2, but rather became aware of it upon receipt of the RFP; (2) HSE engaged in no negotiations with the City regarding Contract 2; (3) HSE did not consult with the City regarding Contract 2; and (4) HSE engaged in no planning with the City regarding Contract 2. Thus, the facts you provide show that HSE had no advantage over other potential respondents in procuring Contract 2.

If you have other questions on this matter, then please contact me at (916) 327-5525.

Sincerely,

Brian G. Lau
Assistant General Counsel

By:



John M. Feser Jr.
Senior Counsel, Legal Division

JMF:jgl