STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 15, 2018

Jose M. Sanchez
Interim City Attorney
City of Turlock
555 Capitol Mall, Suite 1200
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-18-157

Dear Mr. Sanchez:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code section 1090. Please 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

Regarding our 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 Stanislaus County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (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." (See Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the City of Turlock from contracting with Carollo Engineers to provide engineering design services during construction of a project if Carollo previously provided pre-construction design services that served as a basis for the contract to perform the actual construction of the same project.

CONCLUSION

No. Based on the facts provided, Section 1090 does not prohibit the City from entering this contract with Carollo because it did not participate in the making of the engineering design services contract through its performance of the pre-construction design services required by the initial contract.

FACTS AS PROVIDED BY REQUESTOR

You are the Interim City Attorney for the City of Turlock seeking advice on behalf of the City regarding the conflict of interest provisions under Section 1090. We take verbatim the following facts from your letter:

> The City is currently engaged in developing the North Valley Regional Recycled Water Project (hereafter the "Project"). The Project includes the construction of approximately seven miles of pipeline and related structures for the conveyance of tertiary recycled water from the City of Turlock to the recently constructed recycled water pump station at the City of Modesto Jennings Facility. The City contracted with a consulting engineering firm for engineering and design services for the Project that included professional services up to and including the award of bid for the Project ("Pre-Construction Design Services"). The City selected Carollo Engineers ("Carollo") to perform the Pre-construction Design Services and entered into a contract with Carollo to perform said services. The City recently opened bids for the construction of the Project, and is ready to proceed with selection of a general contractor to build the Project. To assist with construction, the City will need to retain a consultant to perform both engineering design services during construction ("EDSDC") and construction management services ("CMS").[1]
>
> For complex projects, such as the Project, the design process continues during construction. Final project drawings, plans, and written specifications (Contract Documents) are prepared in order to allow a basis for competitive bid and award of a contract to a responsible and responsive construction contractor submitting the lowest price. The application and interpretation of Contract Documents continues throughout the construction process. EDSDC consists of reviewing and responding to the construction contractor's submittals, requests for information, and proposed changes orders, as well as preparing design clarifications and attending on-site construction progress meetings. These are engineering decisions that directly impact and modify the final design based on actual conditions encountered during the construction process.
>
> There are cases when bankruptcy, inferior performance, death, or another inability would cause the owner to select an engineer other than the design engineer to provide EDSDC, though the standard industry best practice is for the engineer who performed the Pre-Construction Design Services to also provide the EDSDC. This is because the engineer who provided the Pre-Construction Design Services understands the design intent, and can interpret the Contract Documents

[1] Carollo does not seek to provide services relating to the actual construction or construction management.

> to make sure the responses to the contractor's inquiries and proposed changes meet the overall project objectives developed and vetted with the project's owner during the extensive design-review process. If anyone other than the original engineer provides the EDSDC, that new engineer would not be aware of the decision making that went into the creation of the Contract Documents. This in turn would create an inefficient and more costly method of project delivery, as the new engineer would need to review and become familiar with the contract documents, meeting notes, and other background information that informs the subsequent design decisions made by the design engineer and owner. Without the benefit of experience, the new engineer could make decisions, responses, and interpretations that are not consistent with the project goals or intent.

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.)

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."

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291 ["statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.] ... [¶]... A person merely in an advisory position to a city is affected by the conflicts of interest rule"].)

The California Supreme Court recently affirmed this long-standing rule when it held that "[i]ndependent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 245 [physician working as an

independent contractor for District Hospital and "tasked with engaging in and advising on physician recruitment" is expected to be faithful to the public in performing those duties and comes within the scope of Section 1090.) This applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

Here, the City contracted with Carollo to engage in and advise on "[f]inal project drawings, plans, and written specifications (Contract Documents) . . . in order to allow a basis for competitive bid and award of a contract to a responsible and responsive construction contractor." Under these facts, Carollo comes within the ambit of Section 1090.

The determinative question therefore is whether Carollo's work on the initial contract constitutes making or participating in making the second contract for engineering design services during the construction phase. We do not believe it does.

In *Sahlolbei*, *supra*, the Supreme Court explained that "Section 1090 prohibits officials from being 'financially interested in any contract made by them in their official capacity.' Officials make contracts in their official capacities within the meaning of section 1090 if their positions afford them 'the opportunity to ... influence execution [of the contracts] directly or indirectly to promote [their] personal interests' and they exploit those opportunities." (*Sahlolbei*, *supra*, at p. 246 quoting *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) 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*, *supra*, at p. 569.)

The scope of what it means to participate in the making of a contract was illustrated by the *Stigall* matter, where a demurrer to the complaint that alleged a violation of Section 1090 was sustained by the trial court and subsequently reversed by the California Supreme Court. There, a city councilmember who oversaw the council's building committee owned more than 3 percent of a plumbing company. (*Stigall*, *supra*, at pp. 567.) The building committee had responsibility for drawing of plans and specifications in connection with the construction of a civic center. (*Ibid.*) After bids for the civic center's construction had been submitted, it was revealed that the councilmember's company was the low bidder for the plumbing. (*Ibid.*) The councilmember resigned from the council after objections resulted in a new round of bidding. (*Ibid.*) After this resignation, the construction contract was awarded to a general contractor that included the former councilmember's plumbing company as a subcontractor. (*Ibid.*)

In determining whether the councilmember "made" the contract for purposes of Section 1090, the Supreme Court stated it must "construe its statutory meaning to encompass the planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids, in all of which [the councilmember] participated." (*Id.* at p. 571.)

In the *Davis* matter, a school district owned land and leased it to a contractor that would build school facilities on the site, and lease the improvements and site back to the district. (*Davis*, *supra*, at p. 271.) The contracts were a site lease and a facilities lease (collectively, the Lease-Leaseback Contracts). (*Ibid.*) But prior to awarding the Lease-Leaseback Contracts, it was alleged

the district had entered into a different agreement with the contractor to serve as a consultant to develop plans, specifications and other construction documents for the new school facilities. (*Id.* at p. 295.) Under this scenario, the court of appeal found that, for purposes of demurrer, the allegations were sufficient to show the contractor participated in making of the Lease-Leaseback Contracts. (*Id.* at p. 301.)

In the *Chadwick* Advice Letter, No A-15-147, an independent contractor was involved in designing a golf course project that it then wished to bid on and build. There, the contractor entered into a contract with the city to develop a general plan that would lay out the design of a reconstructed golf course. The contractor advised the city, worked closely with city staff and the project manager, and ultimately designed and developed the plan that later became the RFP. The contractor had been intricately involved in designing the RFP and the RFP was specific on exactly how the project was to be completed. We concluded that Section 1090 applied to prohibit the independent contractor from bidding on the city contract.

The present situation is distinguishable from those matters. In all of them, the independent contractors plainly had the opportunity to participate in their official capacities in the making of subsequent contracts in which they had a financial interest. Here, by contrast, Carollo's initial contract with the City required that it prepare final project drawings, plans, and written specifications (Contract Documents) that would serve as a basis for the award of a contract to a construction contractor who will actually build the Project. Carollo has no financial interest in this contract because it does not seek to build the Project.

Instead, Carollo seeks to provide the engineering design services during construction of the Project, responsible for reviewing and responding "to the construction contractor's submittals, requests for information, and proposed changes orders, as well as preparing design clarifications and attending on-site construction progress meetings." It is plain that Carollo's pre-construction design services did not determine the scope of the engineering design services during construction, which is dependent upon inquiries and requests from the contractor who builds the project. In fact, these engineering services during construction would simply be a continuation of the same pre-construction design services Carollo has already provided.

Your facts state that it is the standard industry best practice to select the engineer who performed the pre-construction design services to then do the engineering design services during construction. Having performed the pre-construction design services, Carollo will obviously be in a better position than other engineers to understand the design intent, interpret the Contract Documents and ensure responses to the contractor's inquiries and proposed changes meet the overall project objectives. That Carollo may be in a favorable position to perform these responsibilities is simply a byproduct of its participation in making a different contract in which it has no financial interest. In this case, no interest is served in disqualifying Carollo from subsequently bidding on the contract for engineering design services during construction based upon its participation in making a different contract for the actual construction of the Project.

Accordingly, the conflict of interest provisions of Section 1090 do not prohibit the City from entering a contract with Carollo for the engineering design services during construction of the Project.

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

Sincerely,

Brian G. Lau
Acting General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl