



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 22, 2019

Heather L. Stroud
City Attorney
City of South Lake Tahoe
1901 Airport Road, Suite 300
South Lake Tahoe, CA 96150

Re: Your Request for Advice
Our File No. A-18-276

Dear Ms. Stroud:

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 El Dorado 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 South Lake Tahoe from entering into a contract with Cardno for engineering design services for the A1 Tahoe Boulevard Safety and Mobility Project ("Project"), given that Cardno provided preliminary design services for the Project under a previous contract with the City?

CONCLUSION

No. Section 1090 does not prohibit the City from entering into a contract with Cardno for the engineering design services for the Project, as explained below.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of South Lake Tahoe seeking advice as to whether the City may enter a contract with Cardno for engineering design services with respect to the Project, which is part of the City's long-term effort to improve multi-modal transportation options,

including bicycle and pedestrian facilities, near the South Tahoe Middle School. The Project is funded, in part, by a federal Active Transportation Program grant administered by Caltrans.

2017 Contract for Preliminary Design Services

In October 2017, following a request for proposals to which two firms replied, the City executed a contract with the winning firm, Cardno, to provide environmental analysis and preliminary design services for the Project.¹ The scope of work for this contract involved project management and public outreach, site surveys, updating the concept plans, and preparing environmental documents.

With respect to the design services, the 2017 contract provided that Cardno was required to develop a concept plan to an approximately 15% design level that would reflect the proposed design in sufficient detail to be brought forward for a detailed environmental review, including “all proposed surface and underground improvements, general grading information, proposed BMPs, areas of disturbance, tree impacts, and ancillary measures (e.g., snow storage areas and construction staging and material storage areas).”

Under that contract, the Cardno team was expected to “collaborate closely with the City and coordinate with the other lead agencies to verify the type of environmental documentation and permitting requirements as part of other tasks.” Further, the contract stated Cardno would develop the Project description upon completion of the concept plan to represent the anticipated Project configuration and it would describe “construction activities, the location of staging and stockpile areas and access routes, required construction equipment and vehicles, number of construction personnel, and the project schedule, along with design criteria and/or special measures that may avoid or minimize impacts to biological, botanical, and cultural resources.”

2018 RFP for Engineering Design Services

In October 2018, the City issued the RFP for engineering design services for the Project and Cardno was the only firm to submit a proposal. According to RFP, the City seeks proposals from qualified consultants to prepare engineered plans, specifications, and estimates. The preliminary design plans prepared by Cardno under the previous contract were attached to the RFP, which states that the Project plans are currently at the 30% level and “were based on the selected preferred alternative as a result of the community outreach efforts by a project delivery team” that included Cardno. The RFP further states that the chosen consultant will be required “[s]tarting with the existing set of 30% preliminary plan drawings of the preferred alternative” to update the set to include “sheet index plan sheet, general notes sheet, plan and profile sheets, detail sheets, and temporary BMP plan.”

¹ In 2014, Design Workshop had a contract with the Tahoe Regional Planning Agency (TRPA), a governmental entity separate from the City, with respect to the A1 Tahoe Boulevard Safety and Mobility Project. Cardno was a subcontractor working on the concept plans for the Project.

2018 Proposed Contract for Engineering Design Services

You provided the proposed contract with Cardno for engineering design services for the Project which states that Cardno successfully assisted the City with the Phase 1 efforts, including the development of a concept plan, and that the “City is looking to accelerate the design phase for construction to be performed in the summer of 2019.”

The proposed contract states that Cardno’s primary point of contact is Mr. Peck who has been involved with the project since its original inception, and that “[t]his historical knowledge of the project will provide the City with a seamless transition to the design and allow for an accelerated project delivery process for construction in 2019.” An accelerated project delivery is anticipated because:

[b]ased on the extensive preliminary planning, design and coordination that the project has engaged in over the past several years, Cardno is proposing to eliminate the 60% design step/review and develop the 90% design set (permit set) directly from the updated preliminary plan set... By eliminating this step, the project schedule can be accelerated enabling construction during the summer of 2019.

Caltrans, which is funding the project, was required to explain why Cardno should be awarded the contract without another competitive bid. According to Caltrans, 14 firms took interest in the current RFP and 7 of those firms had proposed on past RFP’s with the City – but Cardno was the only consultant who ultimately submitted a proposal. Caltrans concluded, in part, that “Cardno recently completed the work successfully for the [Environmental Analysis & Preliminary Design] phase and showed no reasons that they would not be selected again to complete the [Engineered Plans, Specifications & Estimates] for the design that they started.”

By email dated January 24, 2019, you supplemented the facts stating that the design of the Project was not “set” by the preliminary design services performed by Cardno under the initial contract. You stated that the consultant chosen for the engineering design services contract will have discretion to change the design so long as it fits within the project scope and does not create new impacts over and above those identified in the environmental documents.

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.) 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.)

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.”

Independent Contractors Subject to Section 1090

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”].) This long-standing rule was recently affirmed by the California Supreme Court (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230), and it applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

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).) In *Hub City*, the court stated that a person’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.” (*Hub City, supra*, at p. 1125.)

Common considerations articulated in case law as to whether a contractor or consultant would be subject to Section 1090 have included whether the contractor: has the potential to exert considerable influence; is acting in a capacity that demands a level of public trust; and has a level of involvement in decisions that is more than ministerial and goes beyond mere technical input.

We have previously found that a firm that had prepared an operational assessment, facility study, and site requirements for a sheriff’s department headquarters had the potential to exert considerable influence over the County’s decisions concerning the new facility, and was thus subject to Section 1090. (See *Ciccozzi* Advice Letter, A-17-049.) In addition, a consultant who had the potential to exert considerable influence over the County’s decisions concerning the new County jail, by working closely with County staff over a 3-year period on a jail needs assessment, developing construction planning options, a facility needs assessment report, and a jail population analysis was found subject to Section 1090. (See *Simon* advice Letter, A-17-148.)

Here, Cardno entered a contract with the City in 2017 to provide environmental analysis and preliminary design services for the Project, which it had already been involved in and familiar with under a separate 2014 subcontract. As a consultant under the 2017 contract, Cardno had the potential to exert considerable influence over the City’s decisions as the contract required the Cardno team to collaborate closely with the City to develop a concept plan to an approximately 15% design level sufficient in detail to bring forward for a detailed environmental review. In addition, Cardno was required to coordinate with other agencies with respect to environmental documentation and permits.

Because Cardno was involved in decisions that were more than ministerial and go beyond mere technical input, acted in an advisory capacity with the capability of exerting influence over the City staff's decisions concerning the Project, coordinated with other agencies concerning aspects of the Project, and participated in community outreach efforts, it served in a position that demanded a high level of public trust. Therefore, under the 2017 contract, Cardno was acting as a public official for purposes of Section 1090, and is subject to Section 1090.

Participating in Making a Contract Under Section 1090

The determinative question is whether Cardno's work on the previous contract constitutes making or participating in making the current contract for engineering design services. Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract 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, 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.)

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.)

The scope of what it means to participate in the making of a contract was illustrated by the *Stigall, supra*, 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.)

Lastly, 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 the contractor participated in the making of the contract to build the project, and that Section 1090 applied to prohibit it 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, and did participate, in their official capacities in the making of subsequent contracts in which they had a financial interest. That is not the situation here.

Initially, the *Sanchez* Advice Letter, No. A-18-157 is instructive. There, a contractor that performed a city project's pre-construction design services then sought the subsequent contract for engineering design services on the same project. We found that the initial pre-construction design services performed did not determine the scope of the subsequent engineering design services contract. Instead, performance of those services would simply require a continuation of the pre-construction design services already provided.

The same is true in the present matter. Cardno's initial contract with the City required that it provide environmental analysis and preliminary designs, but this completed work did not "set" the Project's design. Instead, Cardno now seeks to perform the Project's engineering design services, which will simply be a continuation of the design services it already performed. The consultant ultimately chosen will have discretion to change the design. As in *Sanchez*, *supra*, the services Cardno provided in the initial contract did not determine the scope of the subsequent engineering design services contract it now seeks to procure.

Also, the fact that the City included the preliminary designs with the RFP does not provide Cardno with an unfair advantage over other potential contractors as providing background information in an RFP is standard industry practice. Including a copy of the preliminary designs in the RFP allows the potential contractors to ascertain the necessary background information to assist in the preparation of their bids. In fact, the sharing of this information, to the extent it 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 Cardno could have providing the preliminary design services. (See, e.g., *Grossman* Advice Letter, No. A-17-167(a).)

We note that Cardno did have extensive involvement in the initial design phase of the Project. For example, it appears to have performed more work than was required under the 2017 contract by completing the preliminary plans to the 30% design level instead of the contractually

agreed upon 15% design level. In addition, the completed preliminary plans were the selected preferred alternative that resulted from community outreach efforts in which Cardno participated. Cardno's extensive involvement in this Project is also apparent from the current proposed contract which states that Cardno's "historical knowledge of the project will provide the City with a seamless transition to the design and allow for an accelerated project delivery process for construction in 2019."

Notwithstanding this extensive involvement, it is the standard industry best practice to select the engineer who performed the preliminary design services to then do the engineering design services during construction. (See, e.g., *Sanchez, supra.*) Having performed the preliminary design services, Cardno will unquestionably be in a better position than other engineers to understand the design intent and the overall project objectives. As indicated by Caltrans, Cardno successfully completed the initial design phase and there is no reason they should not now be selected again to complete the design that they started. That Cardno may be in a favorable position to perform these services is simply a byproduct of its performance of services in a previous contract. In this case, no interest is served in disqualifying Cardno from subsequently bidding on the contract for engineering design services based upon its prior performance of design services.

Accordingly, Section 1090 does not prohibit the City from entering into a contract with Cardno for the engineering design services for the Project.

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

Sincerely,

Dave Bainbridge
General Counsel

By:  Jack Woodside
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