



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811

February 5, 2026

Daniel G. Sodergren
City Attorney
City of Pleasanton
P.O. Box 520
Pleasanton, CA 94566-0802

**Re: Your Request for Advice
Our File No. A-25-141**

Dear Mr. Sodergren:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code. 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Alameda 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 Pleasanton (the City) from entering into an energy services contract with a company (Company) under which the Company will provide preliminary program development work that contemplates that the contract will be amended at a later date to include implementation of the project's work?

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 18104 through 18998 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.

CONCLUSION

No. Based on the facts provided, the City would maintain discretion to implement the project, to amend the contract, and to determine the desired scope and phasing for implementation of the project. Moreover, the Company would not charge the City for its preliminary assessments, and if the City does not enter the amendment, the City would not be liable to the Company for any fees or penalties. The Company would have no ability to use its position under the initial contract to improperly influence the City to enter an amended contract. Accordingly, the Company would not be an “officer” under Section 1097.6, and Section 1090 would not prohibit the City from contracting with the Company for its initial services or from amending the contract to implement the project.

FACTS AS PRESENTED BY REQUESTER

A. Energy Conservation Contracts.

Chapter 3.2 of Division 5 of Title 1 of the Government Code (sections 4217.10 - 4217.18) (Energy Conservation Law) establishes a process for public agencies to develop energy conservation, cogeneration, and alternate energy supply projects at public facilities. Section 4217.12, which relates to energy service contracts, provides:

- (a) Notwithstanding any other provision of law, a public agency may enter into an energy service contract and any necessarily related facility ground lease on terms that its governing body determines are in the best interests of the public agency if the determination is made at a regularly scheduled public hearing, public notice of which is given at least two weeks in advance, and if the governing body finds:
 - (1) That the anticipated cost to the public agency for thermal or electrical energy or conservation services provided by the energy conservation facility under the contract will be less than the anticipated marginal cost to the public agency of thermal, electrical, or other energy that would have been consumed by the public agency in the absence of those purchases.
 - (2) That the difference, if any, between the fair rental value for the real property subject to the facility ground lease and the agreed rent, is anticipated to be offset by below-market energy purchases or other benefits provided under the energy service contract.
- (b) State agency heads may make these findings without holding a public hearing.

B. The City's Energy Conservation Project.

Under the authority set forth in the Energy Conservation Law, the City is interested in completing various energy conservation projects at certain City facilities. The City recently issued a request for qualifications for this work.²

The City is interested in possibly entering a single contract with one of the energy services companies that submitted a proposal (the Company).

Under the proposed contract: (1) the Company would conduct engineering site assessments, develop a preliminary scope of work and funding plan options, and engage City stakeholders to assess which projects are feasible and desirable; and (2) the Company would then complete a detailed assessment to finalize program pricing, savings, a detailed scope of work and technical specifications. The Company would agree to provide these services at no up-front cost to the City; however, the Company would be entitled to receive a 5 percent profit fee and recouped project development costs upon implementation of the project.

After these services are completed, the proposed contract provides that it will be amended to include implementation of the project by the Company which would include final design, engineering, permits, fees, approvals, project management, installation, startup, training, checkout, warranty and insurance.

Prior to entering an amendment to the contract for implementation, the City is aware that it must make the findings required under Section 4217.12. Under the contract, the City will have sole discretion as to whether to enter the amendment, and if it does so, the desired scope and phasing for implementation of the project. If the City does not enter the amendment, the City would not be liable to the Company for any fees or penalties.

ANALYSIS

A. Section 1090.

Section 1090 generally prohibits public officers or employees, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is "concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of" their respective agencies. (*Stigall v. City of 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.)

² Section 4217.16 provides:

Prior to awarding or entering into an agreement or lease, the public agency may request proposals from qualified persons. After evaluating the proposals, the public agency may award the contract on the basis of the experience of the contractor, the type of technology employed by the contractor, the cost to the local agency, and any other relevant considerations. The public agency may utilize the pool of qualified energy service companies established pursuant to Section 388 of the Public Utilities Code and the procedures contained in that section in awarding the contract.

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 applies to officials who participate in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 239, citing *Stigall, supra*, at p. 569.)

Section 1090 prohibits the use of a public position for self-dealing. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124 [independent contractor leveraged his public position for access to city officials and influenced them for his pecuniary benefit]; *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682, 690 [“Section 1090 places responsibility for acts of self-dealing on the public servant where he or she exercises sufficient control over the public entity, i.e., where the agent is in a position to contract in his or her official capacity”]; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090 [The purpose of Section 1090 is to prohibit self-dealing, not representation of the interests of others].)

B. Independent Contractors Under Section 1090.

In 2017, the California Supreme Court held that “the Legislature did not intend to categorically exclude independent contractors from the scope of section 1090” in its language, applying the prohibition to “public officers and employees.” (*Sahlolbei, supra*, at p. 238.) In this opinion, the Court held that Section 1090 applies to those independent contractors who are “entrusted with ‘transact[ing] on behalf of the Government.’” (*Id.* at p. 240, quoting *Stigall, supra*, 58 Cal.2d at p. 570.) On this issue, the *Sahlolbei* Court explained:

So, for example, a stationery supplier that sells paper to a public entity would ordinarily not be liable under section 1090 if it advised the entity to buy pens from its subsidiary because there is no sense in which the supplier, in advising on the purchase of pens, was transacting on behalf of the government.

In the ordinary case, a contractor who has been retained or appointed by a public entity and whose actual duties include engaging in or advising on public contracting is charged with acting on the government’s behalf. Such a person would therefore be expected to subordinate his or her personal financial interests to those of the public in the same manner as a permanent officer or common law employee tasked with the same duties.

(*Sahlolbei, supra*, at p. 240.)

In determining whether Section 1090 applies to a particular independent contractor, the *Sahlolbei* Court explicitly rejected a “considerable influence standard” under which contractors would come within the scope of Section 1090 when occupying positions “that carry the potential

to exert ‘considerable influence’ over public contracting.” (*Sahlolbei, supra*, at pp. 244-45, referencing *California Housing Finance Agency, supra*, 148 Cal.App.4th at p. 693.) The Court stated: “[a]s we have explained, independent 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.” (*Id.* at p. 245.)

C. The Intended Provider of Services Under the Second Contract.

The Legislature enacted Section 1097.6, which codifies prevailing legal authority set forth in case law and FPPC advice letters relevant to the question at issue here: whether a subsequent contract with an independent contractor for a later phase of the same project violates Section 1090. Section 1097.6(a) provides:

- (1) For a public entity that has entered into a contract with an independent contractor to perform one phase of a project and seeks to enter into a subsequent contract with that independent contractor for a later phase of the same project, the independent contractor is not an “officer” under this article if the independent contractor’s duties and services related to the initial contract did not include engaging in or advising on public contracting on behalf of the public entity.
- (2) For purposes of this section, “engaging in or advising on public contracting” means preparing or assisting the public entity with any portion of the public entity’s preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity.

The issue, therefore, is whether, by entering into such an agreement, the Company would have duties to engage in or advise on public contracting on behalf of the City to be considered an “officer” under Section 1097.6, and therefore subject to Section 1090.

Here, the facts provided state that the Company would provide initial services that include preliminary site, scope of work, funding, feasibility and desirability assessments. Based on these preliminary assessments, the Company would provide a detailed assessment to finalize program pricing, savings, scope of work and technical specifications. The Company would not charge the City for this preliminary work, but the Company would be entitled to receive a 5 percent profit fee and recouped project development costs if the project is implemented. If the City decides to implement the project, the contract would be amended for the Company to provide final design, engineering, permits, fees, approvals, project management, installation, startup, training, checkout, warranty and insurance. The City would maintain sole discretion to amend the contract and implement the project.

These facts indicate that the Company would not be transacting on behalf of the City by determining the scope of an amended contract. On the contrary, the City would be under no obligation to the Company regarding the decision to amend the contract or implement the project. Based on the facts provided, the Company would have no ability to use its position under the initial contract to improperly influence the City to enter an amended contract.

Accordingly, the Company would not be an “officer” under Section 1097.6, and Section 1090 would not prohibit the City from contracting with the Company for its initial services or from amending the contract to implement the project.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

JF:aja