STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 3, 2023

Daniel S. Hentschke
Assistant City Attorney
Santa Barbara
PO Box 1990
Santa Barbara, CA 93102

Re: Your Request for Advice
Our File No. A-23-062

Dear Mr. Hentschke:

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.

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 Santa Barbara 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

Under Section 1090, where the Santa Barbara Public Works Department first contracted with an engineering firm to provide services that included drafting a request for proposals for firms that could provide construction management services on a project, may the Public Works Department decline to issue the RFP and instead enter a second contract with the engineering firm to provide construction management services?

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[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. Because the engineering firm had duties to engage in or advise on public contracting on behalf of the Santa Barbara Public Works Department, including the drafting of an RFP that would have established the criteria for other companies seeking to provide construction management services to the agency, in accordance with California case law, Section 1090 prohibits the second contract between the agency and the engineering firm.[2]

FACTS AS PRESENTED BY REQUESTER

The Santa Barbara Public Works Department ("City") contracts with a variety of qualified engineering and other professional services companies for as-needed services. The contracts all use the same or similar contract templates and formats. The contracts are generally for three-to-five year periods with a not-to-exceed amount. The City chooses as-needed professional service providers from a list of qualified firms that have responded to the City's request for qualifications. This list is updated from time to time. When the City has a project that requires as-needed services, Public Works staff will either assign the work to an existing as-needed contractor through a task order or will enter a new contract with a provider on the qualified provider list. Selection is done by City staff with approval at the department director or senior management level. Final approval by the City Council is required if the contract amount is greater than $35,000.

It is common for the City to have several contracts with the same professional or general service provider for different City projects. All on-call consultants work under the direction of City staff and do not make procurement decisions, but do administer contracts, particularly when providing construction management services.

First Contract with MEG ("Agreement No. 26,813")

Mimiaga Engineering Group ("MEG") is a small engineering firm that currently provides as-needed services to the City under Agreement No. 26,813 relating to the City's Desalination Plant Product Water Pump Station Upgrades Project ("Project"). The scope of services under current Agreement No. 26,813 includes:

- Preliminary Engineering
- Design Stage
  - Agreement No. 26,813 specifies that this "may include preparing . . . contract bidding documents."
- Permits
- Bidding Stage
  - Agreement No. 26,813 states that MEG shall "[a]ssist the City in answering bidder's questions in writing, as well as verbally, attend pre-bid conferences, and/or job walks."
- Construction Stage
- Construction Management
- Specific Studies

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[2] We note that we express no opinion on the City declining to issue the RFP, and that the conclusion that the City may not enter the second contract with the engineering firm stands regardless of whether the RFP is issued or not.

- Conducting Investigations or Studies

Under Agreement No. 26,813, MEG has performed project management services and facilitated the project by providing:

- Oversight of the design engineer;
- Grant administration assistance;
- Reviewing design deliverables;
- Facilitating City decision-making and approvals (including 100% plans, specifications, and cost estimates);
- Facilitating environmental review and permitting;
- Publicly bidding the construction contract and processing the contract award;
- Identifying future consultant support needs;
- Soliciting a proposal from consultants by City staff from the City's on-call consultant list; and
- Drafting contracts between the City and the selected consultants.

Like all other as-needed service providers, MEG is expressly precluded from making contracting decisions on behalf of the City. The City's standard contract template for Design Professionals (i.e., engineers, architects, landscape architects, and land surveyors) expressly states, "Design Professional is an independent contractor. Neither Design Professional nor any of Design Professional's officers, employees, agents, or subcontractors, if any, is an employee of the City by virtue of this contract or performance of any work under this contract. It also states, "Design Professional is an independent Design Professional and is not an agent or employee of the City for any purpose." The contract addresses potential conflicts of interest and states, "Design Professional will not make or participate in making or in any way attempt to use Design Professional's position to influence a governmental decision in which Design Professional knows or has reason to know Design Professional has a direct or indirect financial interest other than the compensation promised by the contract. Design Professional will not have such interest during the term of this contract. Design Professional will immediately advise the City if Design Professional learns of such a financial interest of Design Professional's during the term of this contract. If Design Professional's participation in another City project would create an actual or potential conflict of interest, in the opinion of the City, the City may disqualify Design Professional from participation in such other project." The contract also warrants that "during the term of this contract, Design Professional will not obtain, engage in, or undertake any interests, obligations or duty that would be in conflict with, or interfere with, the services or duties to be performed under the provisions of this contract."

The City's initial task order for MEG under Agreement No. 26,813 also included preparing an RFP for construction management services for the Project. MEG drafted an RFP and shared it with the City. However, before an RFP was issued and for reasons discussed below, the City determined MEG to be the most qualified consultant from its list of on-call engineering consultants and requested that MEG prepare a proposal to provide construction management and inspection services during construction of the Project.

Proposed Second Contract with MEG

MEG previously provided construction management services to the City several years ago during the Desalination Plan Reactivation Project. They also provide operations and maintenance support for the Desalination Plant under Agreement No. 26,813 and previous agreements. As a result, MEG is intimately familiar with the Desalination Plant, which is a unique facility. Because this Project is making significant modifications to the Desalination Plant by replacing and upgrading the pumps/variable frequency drives, replacing the discharge header, installing a 5,000-gallon surge tank, and modifying the plant's supervisory control and data acquisition system, the City believes it is crucial to the Plant's success to have a construction manager with extensive experience with and knowledge of the Desalination Plant. The former City staff member who oversaw the Desalination Plant Reactivation Project is no longer with the City, so MEG's institutional knowledge about the Plant fills an important gap for the City.

Based on these considerations, and as noted above, the City determined MEG to be the most qualified consultant from its list of on-call engineering consultants and requested that MEG prepare a proposal to provide construction management and inspection services during construction of the Project. The contract would have MEG provide construction management, inspection, material acceptance testing, building department plan review of project plans, oversite of other City Project consultants, and administration of the project grant fund agreement for the Project. City staff negotiated the contract and prepared the proposed Agreement.

In response to a request for additional information, you clarified that although the City never issued an RFP for construction management services drafted by MEG pursuant to the initial Agreement No. 26,813 Task Order, MEG *did* draft an RFP and discussed and shared it with the City. The RFP included a proposed description of services to be provided by the selected consultant. The RFP also contained proposed criteria for selecting a consultant, including—among other criteria—knowledge of local conditions, responsiveness and availability to City staff, and understanding of the Project.

ANALYSIS

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 financial interests, other than remote or minimal interests, that prevent a public officer or employee from exercising absolute loyalty and undivided allegiance in furthering the best interests of their 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.)

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.)

Importantly, 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].)

Independent Contractors Subject to Section 1090

In 2017, the California Supreme Court recognized "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." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 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, emphasis added, 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.)

Notably, the Court specifically rejected a "considerable influence standard" (i.e., that contractors come within the scope of Section 1090 when they occupy positions "that carry the potential to exert 'considerable influence' over public contracting") in determining whether Section 1090 applies to a particular independent contractor. (*Sahlolbei*, *supra*, at pp. 244-245, 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.) Further, "[o]fficials 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." (*Id.* at p. 246, quoting *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

Applying this standard, in *Taxpayers Action Network v. Taber Construction, Inc.,* (*Taber*) (2019) 42 Cal.App.5th 824, the court found that where a school district contracted with Taber Construction, a contractor, to provide preconstruction services, it was not precluded from entering

into a second contract with the same contractor for construction of the project when there was "no evidence that Taber was transacting on behalf of the School District when it provided those preconstruction services" and instead, the evidence showed that "Taber was transacting business as a provider of services to the School District." (*Id.* at p. 838.) The court based this finding on the fact that Taber had a contractual duty to provide preconstruction services, not to select a firm to complete the project, and Taber provided those services (planning and setting specifications) in its capacity as the intended provider of construction services to the School District, not in a capacity as a de facto official of the School District." (*Ibid.*) The *Taber* court also agreed with the trial court's reasoning that although the preconstruction services and construction services technically involved two contracts, the firm at issue had effectively already been chosen for the second contract at the time the first contract was made. (*Id.* at pp. 831-832) Therefore, the firm could not have influenced the School District's decision to select the firm for the second contract. (*Id.* at p. 832.)

Applying this standard in past advice letters, we have examined the role played by the contractor. For example, we have found that an independent contractor involved in design and construction services on a housing project, including construction of public streets, was not subject to Section 1090 with respect to a subsequent construction contract for additional public streets, where no facts suggested that the town hired the contractor to engage in or advise on public contracting on behalf of the town. (See *Morris* Advice Letter, No. A-22-003.) The analysis states:

> For example, the DDA [the contract] did not require PWC [the contractor] to prepare an RFP for the construction of those streets of the Parcel to be constructed by the Town; nor did it require PWC to assist the Town in selecting a contractor for that project. Instead, the DDA required PWC to construct the Parcel's affordable housing, design all of the Parcel's infrastructure, and construct certain portions of that infrastructure. PWC provided these services in its capacity as the intended provider of design and construction services to the Town, not in an official capacity status for the Town – in other words, PWC has done business in its private capacity as a provider of services *to* the Town under the DDA.

(*Morris* Advice Letter, No. A-22-003, at p. 8)

In contrast, where the facts showed that an independent contractor played a role as an advisor to the county in drafting its cannabis marketing RFPs and advised that the county restrict the types of applicable bidders, we concluded the independent contractor was subject to Section 1090. The contractor was in a role such that its duty was to advise the county on the county's behalf. It is notable that the independent contractor's advice resulted in a considerable advantage to the independent contractor and its affiliate organization in the county's subsequent RFPs. (*Adair* Advice Letter, No. A-21-137.)

Based on the above, the key determination in extending Section 1090's prohibitions to an independent contractor in this matter is whether the independent contractor had duties to engage in or advise on public contracting – duties that the contractor was expected to carry out on the City's behalf.

Agreement No. 26,813 and MEG's work under that initial contract are unlike the circumstances considered in *Taber*, in which it could not reasonably be said the contractor was

hired to engage in or advise on public contracting on behalf of the government entity. (*Taber*, *supra*, 42 Ca.App.5th at p. 836.) MEG's contractual duties include administration of contracts and participation in contracting discussions pursuant to which other independent contractors provide various services. Agreement No. 26,813 also provided that the scope of services "may include preparing . . . contract bidding documents." MEG has also publicly bid the construction contract and processed the contract award, identified future consultant support needs, solicited proposals for consultant services, and drafted contracts for those consultant services. Additionally, MEG was originally intended to draft the RFP for the new contract, making clear that MEG was not "already selected for the whole project" at the outset of Agreement No. 26,813. (*Id.* at p. 835.) In fact, as clarified in follow-up correspondence, MEG *did* draft an RFP that was shared with the City before the City decided to forgo the RFP process and hire MEG as the most qualified firm for the role. For these reasons, it is apparent that MEG's role under Agreement No. 26,813 involved engaging in or advising on public contracting *on behalf of* the City, not merely providing services *to* the City. Accordingly, Section 1090 prohibits the City's hiring of MEG for the construction management services contract unless an exception applies.

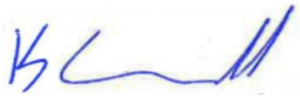
Under the "rule of necessity," a government agency may acquire "essential" goods and services from a conflict-producing source. The purpose of the rule is to allow essential government functions to be performed even where a conflict of interest exists. (*Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321.) The rule of necessity is a strict one, applying only in cases of "actual necessity after all possible alternatives have been explored" and "only in cases of real emergency and actual necessity." (97 Ops.Cal.Atty.Gen. 70, 75-76 (2014).) In 97 Ops.Cal.Atty.Gen. 70, *supra*, the Attorney General opined that the rule of necessity did not apply because "there are other businesses in the general vicinity—albeit outside the city limits—that can provide products and services of the sort that the [disqualified business] provides. And, although we have been told that no other business within the city supplies 'the same unique retail products,' the rule of necessity will not apply as long as the city can locate another business that can supply the products it requires." (*Ibid.*)

Here, you have indicated the City believes it is crucial to the Plant's success to have a construction manager with extensive experience with and knowledge of the Desalination Plant and that MEG fills an important gap for the City based on the firm's institutional knowledge about the Plant. Consequently, the City believes MEG is the most qualified firm on its list of on-call engineering consultants. Although MEG's institutional knowledge of the Plant and the Project may make the firm uniquely qualified to provide construction management services, the facts do not indicate that all possible alternatives have been explored and that no other business can provide the necessary construction management services the City requires. Accordingly, the rule of necessity does not apply to the present circumstances and Section 1090 prohibits the City from contracting with MEG for construction management services on the Project, given MEG's prior contractual duties to engage in and advise on public contracting on behalf of the City and its drafting of an RFP for the prospective contract.

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
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