STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

February 21, 2023

Mitchell D. Dean
DGR Dean Gazzo Roistacher LLP
440 Stevens Avenue, Suite 100
Solana Beach, California 92075

Re: Your Request for Advice
Our File No. A-22-127

Dear Mr. Dean:

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 San Diego 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, may the City of El Cajon hire Natelson-Dale to be the consultant to prepare an Implementation Plan, a follow-up document to the Economic Development Specific Plan (EDSP), which Natelson-Dale prepared with no knowledge of an Implementation Plan in the future?

---

[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

Yes. Because Natelson-Dale was not aware of the necessity for an Implementation Plan at the time of creating the EDSP and has no duties to engage in or advise on the hiring of a consultant to create the Implementation Plan, Section 1090 does not apply and Natelson-Dale may be considered in the City's hiring process for a consultant to create the Implementation Plan.

FACTS AS PRESENTED BY REQUESTER

You are requesting advice on behalf of City of El Cajon ("City") Assistant City Manager, Vince DiMaggio. The City previously retained financial account firm, Natelson-Dale, to prepare an Economic Development Specific Plan ("EDSP"). The EDSP contained nine overarching broadly worded policy goals for attracting economic development to the City. Within each policy were a series of specific goals related to the individual policy.

The EDSP was presented to City Council by the City Manager's office as a final work product, the EDSP was a "purely conceptualized document." When the EDSP was presented, there were no budget requests or authorizations for any additional staffing to address implementing the EDSP. It was anticipated that City Council would review the EDSP and, if supportive of the goals contained therein, would direct staff to examine ways to implement the policy. The City Council could have also altered some EDSP policies, rejected them, or tabled the entire effort. Nowhere in the EDSP is any implementation plan mentioned.

City Council directed staff to move forward with developing ways to implement the policies outlined in the EDSP. Based on comments received from City Council, the City Manager's office determined that a subsequent Implementation Plan was needed. This was not anticipated at the time that Natelson-Dale was hired and was not recommended by Natelson-Dale as part of the EDSP. The Implementation Plan will include specific action items, some requiring City Council approval and/or budget approval, in order to "give life to" the EDSP and affirmatively move towards the goals set forth in the EDSP.

The City would like to hire Natelson-Dale as a consultant to prepare the Implementation Plan, noting that they had no knowledge the plan would be necessary and no involvement with the decision to prepare the Implementation Plan as a result of the EDSP.

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].)

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. (*Id.* at p. 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."

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, 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.

Here, Natelson-Dale created the EDSP, which is the source of the goals that necessitate the Implementation Plan, however, the EDSP was created with the intent that it would be a final document. There was no indication at the time of hiring Natelson-Dale that an Implementation Plan would be needed, nor was there any recommendation within the EDSP that one be created. The City Council, after reviewing the EDSP, decided to request an implementation plan and they will be the decision making authority as to who is hired to complete that plan. Natelson-Dale has no input on the decision of the Council to hire a consultant to create the Implementation Plan.

Because Natelson-Dale was not aware of the necessity for an Implementation Plan at the time of creating the EDSP, and has no duties to engage in or advise on the hiring of a consultant to create the Implementation Plan, they are not subject to Section 1090 in this matter and may be considered in the City's hiring process for a consultant to create the Implementation Plan.

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

Sincerely,

Dave Bainbridge
General Counsel

By: Valerie Nuding
Counsel, Legal Division

VN:aja