



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 18, 2023

Jason Grani, PE
Interim Deputy Director
Engineering & Capital Projects Department
Architectural Engineering & Parks Division
525 B Street, Suite 750, MS 908A
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-23-153

Dear Mr. Grani:

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 San Diego contract with Michael Baker International, Inc. (MBI), an engineering professional services corporation, to provide an assessment and design of a structural seawall to stabilize seawall bluffs in the City, given that the work performed by the successful bidder would be based in part on a "Seawall Mapping and Failure Risk Analysis" report previously prepared by MBI?

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, the City may contract with MBI for this subsequent phase of the seawall stabilization project, given that MBI's prior contractual and performed duties did not involve engaging in or advising on public contracting *on behalf of* the City, but were instead focused on providing technical services *to* the City.

FACTS AS PRESENTED BY REQUESTER

In August 2018, the City of San Diego entered into an Agreement with Michael Baker International, Inc. (MBI), an engineering professional services corporation, for an As-Needed Municipal Storm Water Program Professional Services Contract ("Agreement") for design professional services for civil and environmental engineering services on an as-needed basis. MBI received a Notice to Proceed for services upon being issued Task Orders by the City to accomplish the Scope of Services delineated in the Agreement.

The anticipated general areas of work delineated in the Agreement were strategic planning, program assessment, storm water master planning, environmental monitoring, assessment services and permitting services, and storm water capital projects design. Per the Agreement, it was stated that the descriptions in the category areas are not exclusive or exhaustive, and additional areas may be identified in the future.

In December 2020, the City executed Task Order No. 45 in accordance with the Agreement set forth for MBI to perform work related to sea cave or seawall support in an amount of \$298,150. The purpose and objective of this task order was for MBI to provide technical support services to the City related to coastal erosion, including cliff, seawall, and sea cave failures. Furthermore, the City requested that MBI provide a technical report to include: seawall and erosion data surveys; water levels and wave force baseline and modeling including analysis to support and track the changes at the bluffs and seawalls over time; the structural analysis and evaluation of seawall failure potential; the assessment of potential threats to surrounding critical infrastructure; and the development of mitigation strategies and recommendations including associated detailed cost and schedule for implementation.

As part of the task order, MBI provided baseline predictions of wave runup and total water levels at Sunset Cliffs Blvd Seawall at both present sea level and future sea level conditions in support of a failure analysis of the existing Sunset Cliffs Blvd Seawall. MBI reviewed information provided by the City related to the existing bluff and existing seawall including existing drawings and geotechnical reports. The scope of work under this task order included the "reconnaissance of the existing conditions and publication of a report of findings and recommendations for existing wall improvements, bluff stability and general recommendations for bluff stabilization for the region where significant erosion has occurred." A portion of the scope relating to the geotechnical reconnaissance and structural planning study was performed by MBI's subconsultant, Allied Geotechnical Engineers, Inc. (AGE).

MBI's Analysis Report

In August 2021, MBI—as the prime consultant—prepared and submitted to the City the Sunset Cliffs Seawall Mapping and Failure Risk Analysis as part of the task order discussed above.

The MBI structural engineers performed preliminary structural evaluation of the seawalls, bluffs, and pocket beach sites in addition to evaluating the existing conditions and geotechnical survey. MBI's findings were used in the assessment of alternative solutions and recommendations related to the existing walls on site and new sea wall that may be required to improve resiliency at the site, ensure public safety, and protect existing infrastructure.

MBI's analysis study provided conclusions on failure and structural analysis, as well as recommendations on structural alternatives and associated permitting, cost, and schedule. Specifically, the report concludes by recommending two wall types around the pocket beach and cove area between Adair Street and Osprey Street along Sunset Cliffs Blvd as a design solution. The structural types MBI's analysis recommends were dependent on the proposed location, the available construction limits in relation to Sunset Cliffs Blvd, and the need to protect existing infrastructure. The analysis recommends a secant pile wall for the northern half of the bluffs, where bluffs have minimal clearance to the edge of Sunset Cliffs Blvd and a conventional concrete cantilever retaining wall for the southern half, where there is more room for construction. MBI's report addressed issues associated with the selection of different wall types, such as foundations, geotechnical issues (as evaluated in a geotechnical report), site constraints, durability, materials, aesthetics, constructability, and costs. The report also outlined required environmental permitting for recommended project implementation, along with associated cost and schedule implications.

Design of Sunset Cliffs Seawall Improvement Project

On May 30, 2023, the City requested proposals to provide civil engineering services for Design of Sunset Cliffs Seawall Improvement, Contract No. H2326167-M ("Design of Sunset Cliffs Seawall Improvement Project" or "Improvement Project"). MBI had previously contacted the City about a potential release of a Request for Proposals (RFP) for a standalone design project addressing the Sunset Cliff seawalls in July 2022, at which time the City recommended MBI contact the FPCC to rule out a 1090 conflict and confirm the firm's ability to compete in the RFP process of this project. The City included a redacted version (all cost and budget information was redacted) of MBI's *Sunset Cliffs Seawall Mapping and Failure Risk Analysis* report as part of the RFP and intended for the report to be utilized as a reference document for the basis of design. The objective for the Design of Sunset Cliffs Seawall Improvement project is similar to that of Task No. 45. The scope of work for the standalone project is to have a design professional provide assessment and design of a structural seawall to stabilize the bluffs based on evaluation of the existing bluff conditions as well as structural and geotechnical investigation, similar to those performed by MBI and AGE and reported in the *Sunset Cliffs Seawall Mapping and Failure Risk Analysis*. The chosen consultant will first need to confirm the conclusions made by MBI in the *Sunset Cliffs Seawall Mapping and Failure Risk Analysis*, which will serve as the basis of the project design. In a follow-up email, you explained that if MBI was the chosen consultant, this first step would essentially have been covered by their previous work in creating the *Sunset Cliffs Seawall Mapping and Failure Risk Analysis* report. The chosen consultant would then complete a full design (PSE and construction support) of this design basis. Furthermore, the standalone scope of work would include preparation of plans, specifications, and cost estimate for the design and construction, and the environmental permitting, and construction support services. The Improvement Project may include the concluded recommendations as provided in the *Sunset Cliffs Seawall Mapping and Failure Risk Analysis* report.

On July 6, 2023, MBI submitted a proposal for the Improvement Project. MBI's proposal references the Sunset Cliffs Seawall Mapping and Failure Risk Analysis report several times, including the identification of Key Personnel, Experience and Technical Competence, and Methodology to Accomplish Work sections.

The City believes MBI may be precluded from participating in the Design of Sunset Cliffs Seawall Improvement project on the basis of its contract terms with MBI and due to Section 1090.² Therefore, the City is requesting the FPPC provide formal advice on MBI's eligibility under the facts presented.

Documents attached to your request for advice included the City's initial contract with MBI, a copy of Task Order No. 45, the Seawall Mapping and Failure Risk Analysis, the City's RFP, and MBI's bid.

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 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. 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

² The advice provided in this letter is limited to whether Section 1090 permits the City to enter a second contract with MBI and, as such, we do not advise or otherwise comment on the relevance of a particular contract provision with regards to the permissibility of a second contract.

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, 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.)

At issue is whether MBI is an independent contractor subject to Section 1090 due to its role in preparing the *Sunset Cliffs Seawall Mapping and Failure Risk Analysis for the City*, such that it is prohibited from entering into contract with the City to provide civil engineering services for the Design of Sunset Cliffs Seawall Improvement Project. As set forth above, MBI will be subject to Section 1090 if MBI had duties to engage in or advise on public contracting that they were expected to carry out on the City's behalf.

Here, as in *Taber*, MBI had a contractual duty to provide design and engineering services on an as-needed basis, which resulted in the City issuing Task Order No. 45 and MBI preparing the *Sunset Cliffs Seawall Mapping and Failure Risk Analysis*. The scope of MBI's contractual and performed duties did not include drafting an RFP or selecting a firm to complete the Improvement Project. MBI acted in its capacity as the intended provider of design and engineering services to the City, not in a capacity as a de facto official of the City. (See *Taber*, *supra*, at p. 838.) Although a portion of the Improvement Project's scope of services would be considered essentially already completed if MBI was the selected contractor, based on the work already included in the *Sunset Cliffs Seawall Mapping and Failure Risk Analysis*, the provided facts do not indicate that MBI had duties to engage in or advise on the City's RFP for the Improvement Project.

Unlike the circumstances considered in the *Adair* Advice Letter, No. A-21-137, MBI has not advised the City to restrict the types of applicable bidders or assisted in drafting the RFP beyond preparing the *Sunset Cliffs Seawall Mapping and Failure Risk Analysis* that has been included as an attachment to the RFP. Although that document included project estimates, such as estimated construction costs, and permit and inspection costs, we think this information fell within the scope of services of the initial contract and is more similar to the type of services rendered in the *Morris* Advice Letter, No. A-22-003—that is, with MBI providing technical information *to* the City, as contracted, rather than advising on the RFP or assisting in selecting a contractor for subsequent contracts *on behalf of* the City. Accordingly, Section 1090 does not prohibit the City from contracting with MBI for Design of Sunset Cliffs Seawall Improvement Project.³

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

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

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³ We note that the Legislature has enacted a new statute under AB334, Government Code Section 1097.6, effective January 1, 2024. The statute is intended to clarify the law in this type of situation to assist in the determination whether Section 1090 prohibits a public entity from entering into a contract with an independent contractor for a subsequent phase of a project as a result of an initial contract with that independent contractor for the same project. We further note that our conclusion in this matter would not change under the new law.