



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

May 23, 2024

Sonia R. Carvalho
City Attorney
BBK LLP
300 South Grand Avenue, 25th Floor
Los Angeles, California 90071

Re: Your Request for Advice
Our File No. A-24-041

Dear Ms. Carvalho:

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 Los Angeles 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 the Act and Section 1090, may the City of Pomona enter into a contract with a former employee's new business entity when said former employee helped the City develop an assistance program for low-income residents that is the subject of the contract?

CONCLUSION

Section 1090 prohibits the former employee from entering a contract to assist in the facilitation, administration, and coordination of a project they previously helped establish in their

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.

capacity as a public officer. Consequently, we do not need to further analyze whether such a contract is prohibited under the Act.

FACTS AS PRESENTED BY REQUESTER

On July 1, 2016, Benita DeFrank (“former employee”) was reclassified to the City of Pomona’s Neighborhood Services Director (“Director”) position. In addition to the duties listed in Director position description (attached to your request for advice), the former employee was specifically involved in the following matters to help the City develop a Universal Basic Income (“UBI”) or Universal Household Grant (“UHG”) assistance program for low-income residents:

- a) Researched local and national UBI programs (in coordination with the Finance Department) to incorporate best practices regarding fund disbursement and program development into any UBI program that might be established.
- b) Met with the Mayor regarding his thoughts for the program and to discuss the target population.
- c) Met with the American Rescue Plan (ARP) committee to discuss the proposed target population, ARP funding source, and program support.
- d) Met with representatives from the University of California at Los Angeles (UCLA) to have initial discussions regarding the research component of the program.
- e) Met with the Conrad Hilton Foundation regarding funding UCLA to carry out the research component of the UBI program.
- f) Represented the City at the regional Guaranteed Income Coordinating Counsel, where most local UBI programs operated by local government meet quarterly to learn from each other, and discuss evaluations and impact of UBI outcomes for the region.
- g) Drafted the request for proposals (“RFP”) for the Program Administrator and Card Disbursement entity. The former employee did not participate in the final analysis, decision making, or award regarding the selection.

In a follow-up email, you clarified that the former employee provided information from her research on UBI to the City Manager, who thereafter communicated that information to the Mayor. The Mayor was advocating for the program as one of the many items in the City’s American Rescue Plan expenditure spending plan.

On November 15, 2023, the former employee formed the Flourishing Communities Limited Liability Company located at 29307 Shady Lane, Murrieta, California 92563 (as Founder and Principal).

On December 31, 2023, the former employee retired from the City after 23 years.

On January 23, 2024, the City posted RFP Number 2024.03 (attached to your request for advice) seeking professional consultant services for the Neighborhood Services Department’s “Guaranteed Basic Income Pilot Flourishing Families Project (“project”). The following language in the RFP’s objective section is highlighted:

- a) The City is seeking a qualified entity to act as a consultant to assist in the facilitation, administration, and coordination of the project.

- b) The three-year project is funded through the ARP funds to assist eligible household with \$500 a month to 200 project participants over the course of 18 to 24 months.
- c) The consultant will work as a Project Manager in coordination with City staff to coordinate and oversee the efforts of the project team. In addition, the consultant shall also work with the City's Innovation Leadership Team to assist in the development of the City's Innovation Strategic Plan and creation of an Innovation Training Program that focuses on customer service and community engagement within the Pomona City Hall. This work is to be done under direction of the City, in collaboration with Ascendant Innovation LLC.

Ms. DeFrank did not draft the RFP. Additionally, the project is just getting underway and is not yet fully established. You also noted in your follow-up email that the former employee had discussed her intention to apply for the position as an independent contractor with the City Manager.

On February 18, 2024, the former employee submitted a response letter to the City's RFP (attached to your request for advice). This letter mentions she has "personal experience working collaboratively with many of the public agencies and community-based organizations based in" the City. She further mentioned that she has "connections with many regional and county-based public and private service providers", and she is "a recognized leader within the community" and has "established relationships that would assist with carrying out the project in a successful and timely manner."

ANALYSIS

Section 1090

Under Section 1090, public officials "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 a member." 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, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) Moreover, Section 1090 prohibits 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].)

Section 1090 reaches beyond the officials who execute the contract and courts have broadly interpreted "participation in the making of a contract" when applying it:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

(*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Thus, “participation in the making of a contract” is defined broadly and includes any act involving the planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids. (*Millbrae Assn. for Residential Survival v. Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. Taft, supra*, at p. 569.) “Essentially, if it is determined that an official participated in the transaction, *taken in its totality*, and it would or potentially could affect his personal financial interests, then the official would fall within the section 1090 proscription.” (77 Ops.Cal.Atty.Gen. 112, 116 (1994).)

Under Section 1090, leaving state employment may not avoid a Section 1090 violation when the person has been involved in the contract process. In *City Council v. McKinley* (1978) 80 Cal. App.3d 204, the court stated:

If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and affecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit or the intent of the law which precludes an officer from involving himself in the making of a contract.

(*Id.* at p. 212.)

The Attorney General’s Office has reached similar conclusions in past opinions. In 66 Ops.Cal.Atty.Gen. 156 (1983), the Attorney General opined that county employees could not propose an agreement for consulting services, then resign, and provide the proposed services. There, the Attorney General considered a scenario involving a HUD Community Development Block Grant Program and related services administered through the Riverside County Office of Community Development, headed by a director. The Office of Community Development’s director, deputy director, and the majority of the office’s staff initiated a proposal for the county to enter into a sole-source contract with them through which they would administer the Program in the future as a private corporation independent contractor rather than as county employees. In addition to their initially proposing the contract and much of its detail, the county employees initially discussed the matter with, and made comments and suggestions to appropriate county persons charged with investigating its feasibility and desirability and that they did so not as other parties to a contract but as county employees. In subsequent negotiations and discussions their participation was as private individuals and not as county employees.

The Attorney General concluded that such a contract would be unlawful. After discussing the broad interpretation that the courts had taken in determining when a public officer had taken part in the “making” of a contract for purposes of Section 1090, the Attorney General noted that it

was the county employees who had initially proposed an independent contractor take over administration of the Program and they had done so based on their own calculations of purported cost savings to the county. Thereafter, as county employees, they advised the county on much of the details of the contemplated contract. The Attorney General explained:

By that participation in the give and take that went into such “embodiments” of the contract as the negotiations, discussions, reasoning, planning, and drawing of plans and specifications, the county employees had the opportunity to, and did bring their influence to bear on the ultimate contract itself. While no fraud or dishonesty may have been involved, we are nonetheless satisfied that in so doing they participated, not in their personal capacities but in their official ones as county employees, in the “making of the contract” within the meaning of section 1090. Inasmuch as the opportunity for that participation followed by such participation itself is the litmus test for determining whether the proscription of the section is breached, we conclude that it was, and that any contract created under such circumstances would be void.

(66 Ops.Cal.Atty.Gen. at p. 159 (citation and footnote omitted).)

In 81 Ops.Cal.Atty.Gen. 317 (1998), the Attorney General rejected “the suggestion that section 1090 may only be violated when at the time the official was instrumental in setting up a government program, he subjectively intended to contract with the agency after leaving office.” (*Id.* at p. 320.) The Attorney General explained, “[t]he statute has never been so rigidly construed. Instead, we have looked to whether the official had the opportunity and did participate in the policy decision to create the government program under which the contract would later be executed.” (*Ibid.* (citations omitted).) Consequently, the Attorney General concluded that “a former member of a city council who participated in the planning, discussions, and approval necessary to implement a city loan program for developing businesses within the city is thereafter precluded from acquiring a loan under the program.” (*Ibid.*)

The circumstances at issue here are similar to those considered in the Attorney General Opinions discussed above. In her capacity as a public official, the former employee helped establish the City’s (and her former department’s) Guaranteed Basic Income Pilot Flourishing Families Project. The former employee performed extensive research, met with various organizations and individuals, discussed their findings regarding the project with the Mayor, drafted RFPs for positions related to the project, and indicated her intent to apply for the consultant position in her private capacity as an independent contractor. Essentially, the former employee is seeking to be compensated as an independent contractor to work on a program that she helped establish and from which she gained much of the expertise and experience that would qualify her for the position. If not for the project’s establishment, which the former employee had a significant role in, there would be no occasion for the City to publish an RFP to contract for “Guaranteed Basic Income Professional Consultant Services.” Now, in her private capacity, the former employee seeks to contract with the City to provide those consultant services. Like the county employee who could not propose an agreement for consulting services, then resign in order to provide those services, and also like the council member who could not help establish a loan program then leave office and apply for a loan through that program, the former employee here cannot take part in the establishment of a UBI/UHG program, then resign and contract with the City to provide consulting services as part of that program.

Based on this conclusion, we do not need to further analyze whether such a contract would be permissible under the Act.

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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