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MEMORANDUM OF LAW

DATE: December 21, 2015

TO: James Nagelvoort, Public Works Department Director

FROM: City Attorney

SUBJECT: Applicability of Conflict of Interest Laws to Consultants Working on the Capital Improvement Program

INTRODUCTION

City staff often uses consultants to assist them in preparing the City's Capital Improvement Program (CIP). These consultants perform various tasks for the City at the program level, such as planning the overall CIP and conducting facility assessments. In addition, the City often uses consultants in the CIP project's pre-design phase by preparing bridging documents, preliminary designs, project studies and general development plans for parks and recreation CIP projects.

The issue often arises on whether these consultants (and their sub-consultants), who assist the City with preparing the overall CIP or in the pre-design phase of a CIP project have a conflict of interest under California Government Code sections 1090 and 87100 that precludes them from competing for subsequent CIP work. Currently, the City prohibits all consultants and sub-consultants from participating in subsequent work if they assisted the City with CIP programming or pre-design work.

A few months ago, the City received an opinion from the California Fair Political Practices Commission (FPPC) regarding the applicability of the conflict of interest laws on the Torrey Pines North Golf Course Improvement project. (Attached as "Exhibit A" is a copy of the letter from the FPPC to Chief Operating Officer Scott Chadwick that is dated on September 29, 2015.) The opinion clarified with specificity which consultants had a conflict of interest on the project and provided the City with a general framework of how the FPCC analyzes conflict of interest issues.

QUESTIONS PRESENTED

Does State conflict of interest law prohibit consultants (and their sub-consultants) who assist the City with CIP Programming or pre-design on a CIP project from working on the design or construction of the CIP project?

SHORT ANSWERS

It depends on whether the consultant is in a position to exert influence over City staff. Consultants and their sub-consultants who advise and work closely with City staff in developing the CIP and working on pre-design of CIP projects are deemed to have a financial interest and prohibited by California Government Code section 1090 (Section 1090) from working on subsequent CIP work. However, consultants and their sub-consultants, who merely provide technical data and reports may participate in subsequent CIP work.

ANALYSIS

California Government Code sections 1090 and 87100 generally prohibit individuals from participating in the making of public contracts or governmental decisions in which they have a financial interest.

I. Section 1090

Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they have a financial interest. California Government Code section 1090(a) states:

> Members of the Legislature, state, county, district, judicial district, and city officers or employees 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 members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

California Government Code §1090(a).

"The purpose of 1090 is to prevent a situation where a public official would stand to gain or lose something with respect to the making of a contract over which in his official capacity he would exercise some influence." *People vs. Gnass,* 101 Cal. App. 4th 1271, 1297 (2002). Moreover, the intent of Section 1090 is "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." *City of Imperial Beach vs. Bailey,* 103 Cal. App. 3d 191, 197 (1980).

A. Consultants Subject to Section 1090

Section 1090 applies to consultants if they act in advisory role and possess the ability to exert considerable influence over the contracting decisions of a public agency. *Hub City Solid*

Waste Services, Inc. vs. City of Compton, 186 Cal. App. 4th 1114, 1124-1125 (2010). In *Hub City*, the City of Compton (Compton) hired a consultant to advise them on the management of their waste management department. Subsequently, Compton experienced an unexpected $5 million liability that lead the consultant to propose to the city that they award his company a franchise to operate the waste management for the city as a cost reduction measure. Compton accepted this cost reduction proposal and awarded the franchise at a public hearing. Four years later, Compton sought to terminate the franchise agreement after the consultant was convicted in federal court for bribery in connection with securing a trash contract with the City of Carson. The consultant then sued Compton for a breach of contract and Compton counterclaimed that the franchise agreement was void because it violated Section 1090.

The consultant argued to the court that he was not subject to Section 1090 because he was not an officer or an employee of Compton. The *Hub City* Court disagreed and held that Section 1090 may apply to a person who serves in an advisory position to a city, even if the person is an independent contractor, when the person "exerts considerable influence over the contracting decisions of a public agency." *Id.* at 1124-1125. The court reasoned that Compton's consultant fell within the purview of Section 1090 because he supervised city staff, negotiated contracts, purchased supplies and acquired real estate on the city's behalf. Moreover, the court found that Compton's consultant had a unique understanding of Compton's in-house waste management system and greatly influenced staffing decisions.

Similarly, in *Davis vs. Fresno Unified School District,* 237 Cal. App. 4th 261 (2015), the court held that Section 1090 applies to corporate consultants that are hired by local agencies. In *Davis*, the Fresno Unified School District hired a corporate consultant under a pre-construction services agreement[1] to assist the school district with reviewing and commenting on the plans and specifications for a new middle school. The school district then entered into two lease-back agreements with their retained consultant. The lease-back agreement obligated the consultant to build the middle school at a guaranteed maximum price and then to lease back the site to the school district in exchange for the lease payments, which equaled to the total cost of construction.

The court ruled that the proposed leaseback was not a true lease back as authorized under California law.[2] But in addition, the court held that Section 1090 also encompasses corporate consultants hired by local governments. *Id.* at 300. The court reasoned that corporate entities are just as capable of influencing decisions as an individual consultant and the corporate veil should not be used to insulate individuals from an otherwise prohibited conflict of interest. *Id.*

In the case of the Torrey Pines North Golf Course, the City asked the FPPC whether the consultants the City used to create the project's General Development Plan could compete for the design and construction of the project. The FPPC informed the City that the prime consultant and those sub-consultants who were in a position to interact and advise the City on its policy goals

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[1] Pre-construction service agreements are generally associated with construction manager at risk construction contracts. These agreements often include within their scope of services the following tasks: design review, value engineering, cost estimation, solicitation of sub-contracted trades and materials, bidding, and preparation of a final guaranteed maximum price proposed for construction services.

[2] A leaseback agreement is an agreement where one sells an asset and leases it back to the seller at a long term rate.

were subject to Section 1090 because they were in a position to exert influence over the City's decision making.

However, FPPC also stated that the sub-consultants that only provided technical input and submitted reports were not covered by Section 1090. The FPPC reasoned that these sub-consultants were not in a position to influence the decision making process because they did not provide advice and had limited interaction with City staff.

B. Consultant Prohibited in Participating in Subsequent Work

If a consultant is subject to Section 1090 because of their ability to exercise considerable influence over City decisions, the City must then determine if the Consultant is participating in the "making of a contract." For purposes of Section 1090, "making a contract" is defined broadly to cover any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. *Millbrae Ass'n. for Residential Survival vs. City of Millbraw*, 262 Cal. App. 2d 222, 237 (1968).

In most cases, Section 1090 will preclude consultants from competing for subsequent work if they assisted the City with CIP programming or performed pre-design work. These consultants often work with the City to understand the need for each project, establish the project's performance requirements, work on the long term financing of the CIP, long term planning, drawing plans and specifications, and solicitations for the project. If a consultant is subject to Section 1090 and assists the City with the preliminary discussions, negotiations, comprises, reasoning, planning, drawing plans and specifications, and solicitations for the project, there is a conflict of interest in the subsequent work.

Therefore, Section 1090 would preclude to consultants and their sub-consultants who advise and work closely with City staff in developing the CIP and working on pre-design of CIP projects from competing for subsequent contracts to design or build the project. However, consultants and their sub-consultants, who merely provide technical data and reports may be able to compete for subsequent work because they are not subject to Section 1090.

II. Section 87100

Consultants who are not subject to Section 1090, may still be subject to California Government Code section 87100 (Section 87100). Section 87100 prohibits any public official, including consultants, from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. A consultant is subject to Section 87100 if they are under contract and make a governmental decision or serve in a staff capacity with the agency and participate in the making of a governmental decision. Cal. Code Regs. title 2, § 18700.3.

A consultant would be a designated employee under Section 87100 if he or she makes a governmental decision on one of the following:

(A) Approve a rate, rule, or regulation;

(B) Adopt or enforce a law;

(C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;

(D) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

(E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

(F) Grant agency approval to a plan, design, report, study, or similar item; and

(G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof.

Cal. Code Regs. title 2, § 18700.3(a)(1).

In addition, a consultant would be a designated employee under Section 87100 if they serve in staff capacity and participate in the making of government decision. Cal. Code Regs. title 2, § 18700.3(a)(2). A consultant is deemed to have participated in the making of a government decision if they provide the City with information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review. Cal. Code Regs. title 2, § 18704(b). In order for a contractor to be considered as participating in a governmental decision they must work on more than one project or a limited range of projects. FPPC Advice Letter No. A-98-118. Also, the contractor's duties must also be those of a quasi-staff member whose position is listed in the agency's conflict of interest code. *Id.* However, Section 87100 only applies to individuals and not corporate entities. *Davis,* 234 Cal. App. 4th at 297.

With most CIP projects, those sub-consultants who are providing only technical data and reports, will most likely not be subject to Section 87100. These sub-consultants will not be performing any of the specified acts in Section 87100 and will not be advising the City on the making of a governmental decision. The FPPC reached a similar conclusion regarding a group of sub-consultants on the Torrey Pines North Golf Course project because their services were "project based, limited and not on-going."

CONCLUSION

Consultants and their sub-consultants who advise and work closely with City staff in developing the CIP and working on pre-design of CIP projects would be prohibited from competing for subsequent CIP work because they would have been deemed to have a financial interest in the contract. But, consultants and their sub-consultants, who merely provide technical data and providing reports may not be subject to Section 1090 or Section 87100 and could compete for subsequent CIP work.

Therefore, the City may amend its contract language to allow sub-consultants who performed technical work for the City during CIP programming or pre-design to compete for CIP subsequent work. However, we caution the City on allowing prime consultants, who performed technical work during CIP programming or pre-design, to compete for subsequent CIP work because a violation of Section 1090 has serious consequences. Such a decision should be made on a case by case basis, where our office can provide further analysis under Section 1090. Moreover, we caution that you cannot rely on this opinion as a defense in any prosecution of a violation of the financial conflict of interest laws. *People v. Chacon*, 40 Cal. 4th 558 (2007). Our office is ready to assist your department with drafting any changes to our current contract language regarding conflict of interest.

JAN I. GOLDSMITH, City Attorney

By /s/
Mark M. Mercer
Deputy City Attorney

ML-2015-21

Doc. No.: 1146355
Attachment: Exhibit A

STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 29, 2015

Scott Chadwick
Chief Operating Officer
City of San Diego
525 B Street, Suite 750
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-15-147

Dear Mr. Chadwick:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act")[1] and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

We have forwarded your request to the Attorney General's Office and the San Diego County District Attorney's Office and we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that 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 either Section 1090 or the Act prohibit the City of San Diego from contracting with Schmidt Design, the consultant, or any of the subconsultants, for the build phase of a golf course plan when those same parties were integral to the design phase?

CONCLUSION

As explained below, Section 1090 bars such a contract as between Schmidt Design and the City, and between Lagardere Unlimited (Phil Mickelson Design) and the City, but neither Section 1090 nor the Act applies to the other subconsultants.

FACTS

[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 18110 through 18997 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.

You are the Chief Operating Officer of the City of San Diego writing on behalf of the City. The City has for several years been working on the initial stages of the Torrey Pines North Golf Course Improvements ("Project"). Phil Mickelson, PGA golfer and owner of Lagardere Unlimited, approached the Mayor regarding his interest in redesigning the golf course. As a result of this interest, combined with the City's Golf Division and City Council's directives, the City began the preliminary design, called the General Development Plan ("GDP"), in 2012. The City contracted with Schmidt Design Group as the prime landscape architectural consultant. Schmidt Design contracted with several subconsultants including: Lagardere Unlimited (golf course architectural services), Brent Harvey Consulting (irrigation), Helix Environmental (environmental), Burkett & Wong (civil engineering) ASM Affiliates (cultural), and Geocon Incorporated (geotechnical).

Schmidt Design's scope of work included: providing detailed site analysis, creating various graphics for City review, meeting coordination, working with the Golf Course Architect (Lagardere Unlimited) and the city's project manager to develop the GDP, providing community meetings facilitation, preparing cost estimates for the project, assisting with visual simulations, providing a detailed tree inventory for the entire course, presenting the GDP to various City committees and boards for approval, processing the Coastal Development Permit, providing a photo survey of the project, assisting with the preparation of the Mitigated Negative Declaration in conjunction with the City's Development Service Department (DSD), and providing detailed graphics for the landscape development package. Schmidt Design also worked with Lagardere Unlimited, the Golf Course Architectural subconsultant, on preparation of the GDP, preliminary planting plans and detailed cost estimates.

To develop the GDP, Schmidt Design contracted with several subconsultants. Some subconsultants provided Schmidt Design with technical specifications, plans, and analyses and submitted their reports directly to Schmidt Design. Lagardere Unlimited, however, had more involvement and influence in the project and met not just with Schmidt Design, but with city staff and the community as well. Lagardere Unlimited's work included developing an overall design (GDP) for the golf course, including moving or replacing bunkers, providing women's tees at each hole, reviewing golf course routing and changing hole layout as required; providing detailed site analysis; reduction in turf areas, researching golf course playability; reviewing view corridors; participating in community meetings, attending the City's various review boards and commissions; preparing cost estimates; and providing visual simulations of proposed changes to the course for the GDP. Lagardere Unlimited also coordinated and collaborated with Schmidt Design, the design team, and City staff, which included extensive meeting with and advising City staff.

The design team, including the City's project manager and staff, worked together to present ideas to the community and gain its support. By working with the City's staff, Schmidt Design was able to interact with the City regarding its policy considerations and develop a GDP that was in line with those goals. Together with the Project Manager, the consultant and subconsultants interfaced with the community, developed the GDP based on the City's goals, and worked together to create the final design. As a team, in conjunction with the City, they all developed the GDP.

The Parks and Recreation Board approved the final GDP in November, 2013. The Parks and Recreation Department staff reviewed the GDP and determined the elements that were workable

and those that needed improving. In October of 2014, using the consultants' design and research efforts as well as the approved GDP, the City assembled and issued a Request for Proposals ("RFP"), which received only two bids. Both bids were significantly over the proposed budget so the City rescinded the RFP. After eventually added funding, the City reissued the RFP. Schmidt Design was either a consultant or subconsultant on one of those initial bids. Information regarding the other subconsultants on the initial bids is not available.

The current RFP scope of work includes: a complete cart path system, rebuilding fairway bunkers, reconstructing or redesigning greens, rebuilding greenside bunkers, leveling and constructing tees, and replacing the aging irrigation system. Council also asked that a GDP or Master Plan be prepared for each of the City's three golf courses, including Torrey Pines North. The bid proposals are due in September, 2015. The City anticipates that Schmidt Design or others of the subconsultants mentioned above may bid on the project (or be included in the bid as subconsultants).

ANALYSIS

Section 1090

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 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.) 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.)

We employ the following six-step analysis to determine whether Section 1090 prohibits a public entity from entering into a contract.

Step One: Are the consultants subject to the provisions of Section 1090?

Section 1090 provides, in part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees 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 members."

Courts have long found that independent contractors that serve in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291 ["statutes prohibiting personal interests of public officers in public contracts are strictly enforced. [Citation.]

. . . [¶] A person merely in an advisory position to a city is affected by the conflicts of interest rule"].) "[I]t seems clear that the Legislature in later amending Section 1090 to include 'employees' intended to apply the policy of the conflicts of interest law . . . to independent contractors who perform a public function and to require those who serve the public temporarily the same fealty expected from permanent officers and employees." (46 Ops.Cal.Atty.Gen 74 (1965).)

While the courts have had many opportunities to find that individual consultants are subject to Section 1090, a recent opinion found that Section 1090 also applies to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.) In *Davis*, a school district owned land and leased it to a contractor that would build the project on the site, and lease the improvements and site back to the district. (*Id.* at 271.) The contracts were a site lease and a facilities lease (collectively, the Lease-Leaseback Contracts). *Ibid.* Also before the court was the following information:

> Prior to receiving the award of the Lease-Leaseback Contracts, the school district employed the contractor under a separate and distinct Pre-Construction Services Agreement to provide professional consulting services to the school district relative to the development of the build project's plans, specifications, and other construction documents.

(Appellant's opening brief at p. 14.)

The decision before the appellate court was a narrow one: whether to overturn the trial court's grant of defendant's (the school district) demurrer. Based on the facts before it, the appellate court found that, as to the Section 1090 cause of action, plaintiff and appellant "stated a violation of Government Code section 1090 by alleging facts showing Contractor, as a consultant to [the school district], participated in the making of a contract in which Contractor subsequently became financially interested." (*Davis, supra*, 237 Cal.App.4th at p. 271.) In overturning the trial court's ruling, the court found that "technical definitions of the term 'employee' taken from other areas of law should not be used to limit the scope of Government Code section 1090. Therefore, we join the courts in *Hanover* and *Hub City* in concluding that, in civil actions, the term 'employees' in Government Code section 1090 encompasses consultants hired by the local government." (*Id.* at p. 301.)

The court further stated that "the allegations that Contractor served as a professional consultant to [the school district] and had a hand in designing and developing the plans and specifications for the project are sufficient to state that Contractor (1) was an 'employee' for purposes of Government Code section 1090 and (2) participated in making the Lease-leaseback Contracts." (*Id.*)

The facts here are strikingly similar: a contractor was involved in designing a project that it then bid on to build. Schmidt Design contracted with the City to develop a general plan that would lay out the design of reconstructed golf course. Schmidt Design advised the City, worked closely with City staff and project manager, and ultimately designed and developed the plan that became the RFP. The threshold question is: 'Does Section 1090 consider a corporate consultant that advises a public entity on the design phase of a project to be an 'employee'? The *Davis* court answered that question in the affirmative, as must we.

Schmidt Design, as the primary consultant, was in a position to interact with and advise the City on its policy goals, create a design that interprets and applies the City's stated plan for the golf course, and work closely with the project manager and other staff to ensure the City and community supported the design. Because Schmidt Design contracted with the City and acted in an advisory capacity with the capability of exerting influence over the City staff's decision making, it is subject to Section 1090.

The courts focus the inquiry regarding whether an independent contractor is considered an "employee" under Section 1090 on the scope of influence the independent contractor holds in advising the public entity. The court in Hub City determined that an independent contractor that exerts considerable influence over the contracting decisions of a public agency is subject to Section 1090. (*Hub City Solid Waste Services, Inc. v. City of Compton, supra,* 186 Cal.App.4th at pp. 1124-1125.) Similarly in *Schaefer*, the court found that a contractor who was "merely in an advisory position" was also subject to Section 1090. (*Schaefer v. Berinstein, supra,* 140 Cal.App.2d at p. 291.) Unlike the other subconsultants, Lagardere Unlimited was highly involved with the City as an advisor and was influential in the City's decision-making. Lagardere Unlimited is therefore also subject to Subject 1090.

The remaining subconsultants that contracted with Schmidt Designs and provided technical input, submitted reports, and similar information to support the GDP were significantly more removed from directly advising City staff and therefore did not exert considerable influence. Based on the aforementioned case law, including *Davis*, and because the remaining subconsultants performed their duties for and through Schmidt Design, we find that as a group, they are not subject to Section 1090.

Step Two: Does the decision involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that "specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*People v. Honig*, supra, at p. 351 citing *Stigall*, supra, at pp. 569, 571.) We have previously found that a request for proposal is a contract under Section 1090 because the public entity will contract with the winning bidder. (See *Kies* Advice Letter, A-14-101.) Additionally, the resulting contract between the successful bidder and the City would be subject to Section 1090.

Step Three: Is the official making or participating in making a contract?

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.)

Here, we have found that both Schmidt Design and Lagardere Unlimited are acting as public officials for purposes of Section 1090. Schmidt Design and Lagardere Unlimited were also integrally involved in preparing the GDP, which the City then used to develop the RFP. You informed us that, together with the project manager, Schmidt Design and Lagardere Unlimited interfaced with the community, developed the GDP based on the City's goals, and worked together with the design team to create the final design. The City staff approved that design and with some changes, it became the basis for the RFP. Thus, through their substantial involvement assisting the City with preparing the RFP, Schmidt Design and Lagardere Unlimited will have participated in making the ultimate contract for purposes of Section 1090.

Step Four: Does the official have a financial interest in 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*, *supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 nowhere specifically defines the term "financial interest," case law and Attorney General Opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (See e.g., *Thomson*, *supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5.)

If Schmidt Design and Lagardere Unlimited contract with the City as a consultant or subconsultant for the build-phase, each stands to gain from that contract. Thus, each has a financial interest under Section 1090.

Step Five: Does either a remote interest or non-interest exception apply?

There are several statutory exceptions to the prohibition in Section 1090. The remote interests in Section 1091 apply only to the members of a body or board, and do not apply to employees (as here). None of the non-interest exceptions in Section 1091.5 appear to apply. Additionally, the "rule of necessity" occasionally applies to allow a body to enter into a contract in which a member has a prohibitive conflict of interest and there is no alternate source for the contract. This rule also does not apply.

Section 1090 therefore prohibits the City from contracting with Schmidt Design and Lagardere Unlimited should they successfully bid on the Torrey Pines re-build project.

The Act

Section 87100 prohibits any public official, including a consultant, from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. The analysis of whether a person who has a contract with a public entity is a "consultant" for purposes of Section 87100 is distinct from the inquiry under Section 1090. (See *Ennis* Advice Letter, A-15-006.) If a person is considered a consultant for purposes of the Act, he or she is subject to the conflict of interest provisions therein and, if conflicted, must recuse him or herself from any governmental decisions, including influencing

decisions. The following discussion applies only to the subconsultants as a group, except Lagardere Unlimited[2], as Section 1090 prohibits both Schmidt Design and Lagardere Unlimited from contracting with the City on this project.

The Act defines "public official" to include "every member, officer, employee or consultant of a state or local government agency." (Section 82048.) In addition, the Act defines the term "designated employee" to include "any officer, employee, member, or consultant" of any agency who meets specified criteria. (Section 82019, emphasis added.) The Act requires each agency to adopt a conflict-of-interest code, which sets forth positions within the agency for which Statements of Economic Interests must be filed. (Section 87300.) Typically an agency's conflict of interest code includes designations for consultants to the agency.

A "consultant" is an individual who works pursuant to a contract with an agency and is both a public official and designated employee under the Act if he or she engages in the following activities under the contract:

> (1) Makes a governmental decision whether to:
>
> (A) Approve a rate, rule, or regulation;
>
> (B) Adopt or enforce a law;
>
> (C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
>
> (D) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
>
> (E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
>
> (F) Grant agency approval to a plan, design, report, study, or similar item;
>
> (G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or
>
> (2) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18704(a) and (b) or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Section 87302.

(Regulation 18700.3(a).)

Thus, there are two ways that an individual can become a "consultant." First, an individual is a "consultant" if he or she, pursuant to a contract with a government agency, makes government decisions as described in Regulation 18700.3(a)(1). Alternatively, an individual may be a "consultant" if he or she, pursuant to a contract with a government agency, serves in a staff capacity

[2] In this section, we use the term "subconsultants" with the understanding that Lagardere Unlimited is not included, per the Section1090 discussion above.

and either participates in governmental decisions (as defined) or performs the same or substantially all the same duties that would otherwise be performed by an individual in a position listed in the agency's conflict-of-interest code.

1. Makes government decisions

As described in Regulation 18700.3(a)(1) above, if an individual is performing services under a contract with a government agency and "makes a government decision" for the agency as listed in that provision, he or she is a "consultant." This does not seem to be the case in relation to the relationship between the subconsultants and the City that you describe. Rather than actually "making" government decisions of the type listed above in a contracting capacity with the government agency, the subconsultants are instead providing the primary consultant with technical information and reports to create a complete picture for the entire design team. Therefore, we look to the second manner in which an individual may become a consultant under Regulation 18700.3(a)(2).

2. Serves in a staff capacity

The Commission has construed the phrase "serves in a staff capacity" in Regulation 18700.3(a)(2) to include only those individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental agency. Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. Based on your facts, the subconsultants are not acting in a staff capacity.

We have previously found that a contractor serves in a staff capacity when the contract calls for work to be performed "over more than one year" on "high level" projects (*Ennis* Advice Letter, *supra*, No. A-15-006; see also *Ferber* Advice Letter, No. A-98-118). We have further advised that a contractor does not act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438), where the relationship between the contractor and the agency would last only 12 - 16 months with no ongoing relationship contemplated (*Harris* Advice Letter, No. A-02-239) and where, under a multi-year contract, the contractor would perform only on a sporadic basis. (*Maze* Advice Letter, No. I-95-296; *Parry* Advice Letter, No. I-95-064.)

Under your facts, the work is project-based, limited, and not on-going. These facts do not meet the threshold test for "serving in a staff capacity" under the Act.

Additionally, the court in *Davis* found that the Act's definition of "consultant" refers to individuals. To the extent that either the subconsultants are corporations or limited liability companies (as in *Davis*), they are not "public officials" subject to the conflict of interest provisions in the Act. (*See Davis, supra*, 237 Cal.App.4th at p. 297.)

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

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HMR:jgl