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MEMORANDUM OF LAW

DATE: January 3, 2006

TO: Debra Fischle-Faulk, Acting Director, Community and Economic Development

FROM: City Attorney

SUBJECT: Conflict of Interest Involving Maintenance Assessment District and Property and Business Improvement District Formation and Formation Consultants

INTRODUCTION

The purpose of this Memorandum of Law is to address the opinion issued by the California Attorney General on October 20, 2005 (88 Ops. Cal. Att'y Gen. 183 (2005)) [AG Opinion] (copy attached as Exhibit A) relating to conflicts of interest pursuant to California Government Code section 1090. The Attorney General opined that a person hired by a city as a consultant in the process of forming a Property and Business Improvement District [PBID] does not have a conflict of interest that would prevent that person from being hired after formation of the PBID by the nonprofit corporation under contract with the city to manage the PBID. It is the opinion of the City Attorney that the Attorney General's opinion did not take into consideration relevant facts relating to the consultant's role in the formation of the PBID. Consequently, the AG Opinion is incomplete and flawed.

Further, the very same conflict of interest question has arisen in the context of Maintenance Assessment Districts [MADs]. Like PBIDs, the formation of a MAD may involve the hiring of a consultant by the City. The AG Opinion is being offered by a consultant in the City of San Diego [City] as authority that there is no Government Code section 1090 conflict of interest for either the City, or a nonprofit corporation under contract with the City, to hire the same consultant who formed the MADs to manage the MADs upon formation. The AG Opinion is not applicable to MADs because, as stated above, not all the facts were before the Attorney General's Office for its analysis, and in addition, MAD statutory authority is distinguishable from PBID statutory authority.

QUESTIONS PRESENTED

1. Does a legal conflict of interest exist when a person hired by the City as a consultant in the process of forming a PBID is also hired after formation or renewal of the PBID by the nonprofit corporation under contract with the City to manage the PBID?
2. Does a legal conflict of interest exist when a person hired by the City as a consultant in the process of forming a MAD is also hired after formation of the MAD either by the City, or by the nonprofit corporation under contract with the City, to manage the MAD?

SHORT ANSWERS

1. A conflict of interest under California Government Code section 1090 exists when a person hired by the City as a consultant in the process of forming a PBID is also hired after formation or renewal of the PBID by the nonprofit corporation under contract with the City to manage the PBID.
2. A conflict of interest under Government Code section 1090 exists when a person hired by the City as a consultant in the process of forming a MAD is also hired after formation of the MAD either by the City, or by the nonprofit corporation under contract with the City, to manage the MAD.

FACTUAL BACKGROUND

A consultant in the City of San Diego has contracted with the City to assist in the formation of MADs. The consultant also assisted property owners in their dealings with the City in renewal of the only PBID in the City of San Diego. The level and duration of involvement by the consultant in the formation of these districts is quite extensive. Although the tasks vary depending on whether the district being formed is a MAD or a PBID, for the most part, a formation consultant's tasks are the same.

The consultant is involved in every detail of district formation, from conception through implementation. This process generally takes from six to twelve months. The consultant's involvement typically begins with the consultant's investigation into the affected property owners' interest in creating the district. This service includes meetings with community members and/or property owners, establishing preliminary boundaries, identifying services and service priorities, creating a proposed map of the district, conducting a survey and compiling the results, holding public meetings, establishing a property owner committee to review the proposal, and determining the feasibility of forming the district.

Further services include the creation of the district plan. The creation of the district plan includes but is not limited to presentation of the plan to stakeholders, finalizing district boundaries, working with assessment engineers by drafting key elements of a final assessment engineer's report and determining assessment methodology, submitting drafts of the plan to the property owner committee, mailing the plan to affected property owners, finalizing the plan, developing the ballot for election, and mailing materials for formation of the district. The entire

time the consultant is working with the affected property owners, the consultant is also working with City staff to facilitate the formation of the district.

The AG Opinion does not reference the extensive involvement of the consultant in the formation of a district or the consultant's role in defining the benefits and services that are later contracted out. This depth of involvement in every aspect of formation should be at the heart of any conflicts analysis. Because these facts appear to have been unknown to the Attorney General, the depth of the consultant's involvement could not have been taken into consideration in the analysis.

ANALYSIS

I. Statutory Schemes for MADs and PBIDs

The formation of MADs are governed by California Streets and Highways Code sections 22500 through 22679 (the Landscape and Lighting Act of 1972), California Constitution article XIII D [Article 13.D] (also known as Proposition 218), California Government Code sections 53750 through 53754, and San Diego Municipal Code [SDMC] sections 65.0201 through 65.0234 (certified copy attached as Exhibit B). The purpose of a MAD is to provide to a specified area improvements that are special benefits such as landscaping, lighting, installation of park and recreation improvements, as well as other improvements. The SDMC sets forth the procedures to hire consultants to form the districts as well as administer the district upon formation.

The formation of PBIDs are governed by California Streets and Highways Code sections 36600 through 36651, as well as Article 13.D, and California Government Code sections 53750 through 53754. The SDMC does not address these property based business improvement districts. PBIDs are formed to "promote the economic revitalization and physical maintenance of the business districts of its cities in order to create jobs, attract new businesses, and prevent the erosion of the business districts." Cal. Sts. & High. Code § 36601(b). PBIDs are distinguished from MADs in that the property owners are required to take the initiative to form the districts by presenting a petition for the assessment district to the City Council (Cal. Sts. & High. Code § 36621), where no such requirement exists for MADs.

The administration of a PBID or a MAD is usually performed by the City, however a private nonprofit entity may administer the districts. California Streets and Highways Code section 36651 provides for a private non-profit entity to administer a PBID. Also, SDMC section 65.0212 provides for the property owners to elect for a private non-profit entity to administer the contracts for goods and services. In that case, the City enters into a contract with the private nonprofit entity to administer the district. These contracts provide for the City to oversee and audit the private nonprofit entity's administration of the district in light of the City's ultimate responsibility to administer the assessment monies collected for the benefit of the districts.

II. Application of Government Code Section 1090 to PBID and MAD Consultants

California Government Code section 1090 [Section 1090] states in part,

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. . . .

In other words, Section 1090 precludes a public officer or employee from participating in the making of a contract in which he or she is financially interested. Although the term “financial interest” is not specifically defined in the statute, an examination of case law and statutory exceptions to the basic prohibition indicates that the term is to be liberally construed. *Thomson v. Call*, 38 Cal. 3d 633, 645 (1985). An official is considered to be participating in the making of a contract for purposes of Section 1090 when he or she is involved in any preliminary discussions, negotiations, compromises, planning, and solicitation of bids for government contracts. *Millbrae Ass’n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222 (1968). Any contract that is entered into in violation of Section 1090 is void and unenforceable. Cal. Gov’t Code § 1092. Additionally, an official who violates Section 1090 may be subject to criminal (Cal. Gov’t Code § 1097), civil, and administrative penalties.

A. The Consultant is a Public Officer Under Section 1090

Virtually all board members, officers, and consultants are public officials within the meaning of Section 1090. The Attorney General’s Office has specifically opined that consultants hired by a public agency are covered by Section 1090. 46 Ops. Cal. Att’y Gen. 74, 79 (1965). In that decision, the Attorney General wrote:

It 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 of those who serve the public temporarily the same fealty expected from permanent officers and employees.

Id. Therefore, MAD and PBID formation consultants who have been hired to temporarily perform a public function are covered by Section 1090. Note also that in the “Conflict of Interest” section of a standard contract between MAD consultants and the City, it specifically states that the consultant is subject to Section 1090.¹

B. The Consultants’ MAD and PBID Formation Services Involve “Participation in the Making of a Contract” Under Section 1090

Once it is determined that an individual is a public official for purposes of Section 1090, the next step is to determine if the official made a contract, or participated in the making of a contract, in his or her official capacity. California courts and Attorney General opinions have broadly defined what constitutes “participating in the making of a contract” for purposes of

¹ The City of San Diego did not hire the consultant for formation or renewal of the PBID. However, if hired, the formation consultant’s services would mirror those provided by the consultant in the formation of MADs.

Section 1090. In one case, the court held:

The decisional law . . . has not interpreted section 1090 in a hypertechnical manner, but holds that an official . . . 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, 40 Cal. App. 3d 1045, 1052 (1974) (emphasis added). In *Sobel*, the court defined the making of a contract to include any preliminary discussions, negotiation, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. *Id.* at 1052. In the formation of MADs and PBIDs for the City, the consultant's services involve "planning" and "preliminary discussions" related to the maintenance services that will be provided to the district if it is formed.

Here, the consultant's participation in the formation process for MADs and PBIDs includes participation in the planning of the district including formulation of the scope of services for the service contract. As discussed above, the consultant meets with the property owners, City staff, and the assessment engineer to identify the services and service priorities that will be provided if the district is formed. In promoting the formation of the district, the consultant has an opportunity to influence the service contract, directly and indirectly. Additionally, throughout the six to twelve month formation process of the district, the consultant has the opportunity to develop a sense of familiarity and relationship with the property owners who typically become the individuals of the nonprofit corporation that will let the contract to manage the district.

The application of Section 1090 is extremely broad, and is not limited to situations in which actual fraud or dishonesty is involved. "It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance that the violation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved." *Thomson*, 38 Cal. 3d at 648. Therefore, even assuming the consultant has acted completely in good faith, his or her participation in the planning for the districts and the service contracts constitute "participation in the making of a contract" for the purposes of Section 1090.

C. Section 1090 Applies to a Contract Between a Private Nonprofit Organization and the Consultant for Services to the MAD or the PBID

The AG Opinion discusses a hypothetical contract that is not a direct contract with the consultant as service provider and the City, but concerns a contract between a private entity and the consultant in its private capacity after it has served as the City's formation consultant. The AG Opinion states that pursuant to California Government Code section 36614.5, the employment contract the consultant negotiates with the private entity removes the employment contract from the requirements of Section 1090. 88 Ops. Cal. Att'y Gen. at 194. However, as discussed above, the AG Opinion fails to consider the extensive time, "planning" and

“preliminary discussions” the consultant provides during the formation process of the districts at issue. Although there are no California cases interpreting Section 1090 which are exactly like the fact situation at issue, it seems unlikely that a court would find those facts to preclude the application of Section 1090 to this situation. As stated, the Attorney General’s Office neglected to include certain facts that are necessary to a Section 1090 analysis.

Section 1090 prohibits a public official from having a financial interest in “any contract,” if the official made or participated in making the contract in his or her official capacity. Also, the services contract for a MAD or PBID is not a purely private contract. It is entered into by a private nonprofit corporation, *but that corporation in turn contracts with the City to administer the MAD or PBID*. The assessment monies that pay for the services are public funds, and the entire process is continually overseen by the City. Under those circumstances, the services contract cannot be characterized as a purely private matter.

The primary intent behind Section 1090 is to ensure that public officials are guided solely by the public interest, rather than by personal interests, when dealing with contracts in their official capacity. *Campagna v. City of Sanger*, 42 Cal. App. 4th 533 (1994). A situation involving a MAD or PBID formation consultant hired by the City who also performs maintenance service for the MADs or PBIDs, even if contracted through a nonprofit corporation, could potentially involve that consultant acting in his or her own interests, rather than in the best interests of the City or the district. The formation consultant would have quite an advantage over any other management consultant since the formation consultant would have been so heavily involved with the property owners and City staff in the formation, defining the services to be provided, gaining the advantage of knowledge of the district, familiarity with the property owners and an overall understanding of several aspects of the district. Because this is the exact situation that Section 1090 was created to avoid, it is unlikely that a court would be persuaded that Section 1090 does not apply because the City is not a direct party to the service contract.

Because of the nature of the extensive involvement of the consultant in the formation process, of which the Attorney General was unaware, the City Attorney will respectfully ask the Attorney General to reconsider his opinion in light of these additional facts. In the meantime, it is the opinion of the City Attorney that contracting for maintenance of a district with the consultant who assisted in the district’s formation is a conflict of interest under Section 1090.

III. San Diego City Council Policy 000-04 and City Administrative Regulation 95-60

Analysis of the issue under San Diego City Council Policy 000-04 (“Code of Ethics and Ethics Training”) and City Administrative Regulation 95.60 (“Conflict of Interest and Employee Conduct”) leads to the same conclusion. Council Policy 000-04 states:

[N]o elected official, officer, appointee or employee of the City of San Diego shall engage in any business or transaction or shall have any financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his or her official duties or would tend to impair his or her independence or judgment or action in the performance of such duties.

Id. at 1. Section 3.3 of Administrative Regulation 95.60 reads essentially the same. Our analysis under Section 1090 to this contractual situation is consistent with the Council Policy and Regulation. Although the Council Policy and Regulation do not carry the serious ramifications of a violation of Section 1090, a consultant, who is considered a public official, is nonetheless ethically bound by the Council Policy and Regulation and should take them into consideration when acting in his or her official capacity. The City specifically enacted this Council Policy and Regulation so that even an appearance of a conflict would not occur in City matters. This situation is one of those appearances of that conflict the City strives to prevent.

CONCLUSION

It is the opinion of the City Attorney that California Government Code section 1090 applies to a consultant hired by the City to assist in the formation of a MAD or PBID and precludes the consultant from later contracting to provide the maintenance services for that MAD or PBID. Even though the consultant would be contracting for the maintenance services with a separate nonprofit organization, the consultant's work for the City in forming the MAD or PBID constitutes participation in making of the later maintenance contract, and in turn precluding the consultant from securing that contract.

Accordingly, the City Attorney disagrees with the Attorney General's Opinion issued on October 20, 2005 (88 Ops. Cal. Att'y Gen. 183 (2005)). For the reasons outlined, the City Attorney will respectfully request that the Attorney General reconsider his opinion in light of the additional facts outlined above.

MICHAEL J. AGUIRRE, City Attorney

By
Michael J. Aguirre
City Attorney

HRM:rw:cfq:pev
Attachment
ML-2006-1