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MEMORANDUM OF LAW

DATE: July 27, 2016

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Potential Conflict of Interest in Hiring the Program Manager for the Plaza de Panama Project

INTRODUCTION

Mayor Kevin Faulconer recently announced his desire to proceed with improvements to Balboa Park commonly referred to as the Plaza de Panama project, which was tied up in litigation for the last four years. The City is considering hiring the original program manager the project, KCM Group, Inc. (KCM), to oversee the update and completion of the design of the project and to provide support during construction. KCM is a consultant to the Plaza de Panama Committee (Committee), a non-profit corporation formed to lead the fundraising effort for the project and to design and construct the project in cooperation with the City. A recent opinion of the Fair Political Practices Commission (FPPC) involving a subconsultant on another City project, the Torrey Pines North Golf Course, raises the question whether hiring KCM will similarly create a conflict of interest under state law.

In January 2010, former Mayor Jerry Sanders identified the Plaza de Panama project as the signature project to be completed in time for the centennial celebration of Balboa Park in December 2014. The Committee was formed under the leadership of Dr. Irwin Jacobs to raise money and coordinate efforts to meet the December 2014 deadline. The Committee hired a team of consultants, including KCM, to plan and design the project and to meet with community groups and stakeholders. Over the next 30 months, the Committee and its team attended about 150 meetings with recognized City advisory bodies, community groups, and other institutions, organizations, and individuals. Report to Council No. 12-080 (June 19, 2012).

In July 2011, the City and the Committee entered into a Memorandum of Understanding (MOU) to work together to further explore, analyze and develop the project. San Diego Resolution R-306926 (July 25, 2011). The MOU was not intended to be binding on either party, but merely an "expression of mutual cooperation and intent." MOU § 6.4. This Office issued a Memorandum of Law explaining that because the MOU did not commit the City to doing the project, the MOU could be approved before the Environmental Impact Report (EIR) was

certified. 2011 City Att'y MOL 131 (2011-7; July 5, 2011). The Save Our Heritage Organisation (SOHO) immediately filed suit alleging that the MOU was an unlawful pre-commitment to the Plaza de Panama project. SOHO prevailed in the litigation, the MOU was set aside, and the City settled the litigation with a payment of attorney's fees. San Diego Resolution R-308942 (May 15, 2014). Nonetheless, the Committee's work on the project continued.

In July 2012, the City Council approved the EIR and authorized the Mayor to enter into the Plaza de Panama Improvement Agreement (Improvement Agreement) with the Committee. SOHO filed suit again, alleging (1) the EIR was deficient, (2) certain findings made by the City Council regarding impacts to historical resources were unsupported, and (3) the proposal to charge for parking violated the Statutes of 1870. The Superior Court agreed with SOHO on its second argument, holding that there was no substantial evidence that there would be "no reasonable beneficial use" of the property without the project as required by the Municipal Code's provisions on historical resources. The Superior Court ordered the City's site development permit be rescinded. The City appealed. The Court of Appeal reversed, holding that there was substantial evidence to support the City Council's findings because the Municipal Code only required that the existing use be unreasonable, not that there was no existing beneficial use at all. *Save Our Heritage Organisation v. City of San Diego*, 237 Cal. App. 4th 163 (2015). The California Supreme Court denied SOHO's petition for review.

Although the Improvement Agreement was signed by all parties in July 2012, construction never started because of the litigation with SOHO and the subsequent appeal. The Improvement Agreement required the Committee to design and construct the project and to pay all associated costs except for City staff time, City-issued permits, and the cost to construct the parking garage. The City was to issue bonds to finance construction of the garage, with parking revenue generated by the garage dedicated to repaying those bonds. If the City failed to raise at least $14 million through the issuance of bonds, the Committee had the right to terminate the Improvement Agreement and walk away from the project. It is our understanding that the City and the Committee are considering alternatives to using the Improvement Agreement to deliver the project. One possible alternative is for the City to take over the lead of the project from the Committee, and contract directly with KCM.

QUESTION PRESENTED

Do state conflict of interest laws prohibit KCM from resuming its work as program manager for the Plaza de Panama project under contract with the City?

SHORT ANSWER

Very unlikely, because it does not appear that KCM is a public officer or employee, or that KCM will be participating in the making of a contract in an official capacity within the meaning of section 1090. The Political Reform Act does not prohibit KCM or its Principal from negotiating the contract with the City. However, because of the unusual circumstances surrounding this project and the severe consequences for violations, we recommend asking the FPPC for a more definitive answer if the City wants to hire KCM.

ANALYSIS

I. KCM is probably not a public officer or employee under section 1090.

The first step in a section 1090 analysis is to determine whether the person or company in question is a "public officer or employee." Section 1090 of the California Government Code prohibits public officers and employees from having a financial interest in any contract made by them in their official capacity. Public officers and employees include independent contractors who serve in an advisory position if the person's "official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency." *Hub City Solid Waste Services, Inc. v. City of Compton*, 186 Cal. App. 4th 1114, 1124-25 (2010). Corporate consultants can likewise be subject to section 1090. *Davis v. Fresno Unified School District*, 237 Cal. App. 4th 261, 301 (2015). If the person or company is not a public officer or employee, section 1090 does not apply. *See Willis Advice Letter*, No. A-15-163 (Sept. 9, 2015).

Regarding the Torrey Pines North Golf Course project, the City asked the FPPC whether Schmidt Design Group (Schmidt) and its subconsultants who collectively created the General Development Plan (GDP) for the project were eligible to compete for the next contract to implement the GDP and construct the project. The FPPC concluded that Schmidt and Lagardere Unlimited (Lagardere), one of Schmidt's subconsultants owned by PGA golfer Phil Mickelson, were public officers or employees subject to the restrictions in section 1090. The FPPC reasoned that Schmidt's and Lagardere's substantial interaction with City staff and the community, and their roles in developing the project gave them "the potential to exert considerable influence over the contracting decisions" of the City as proscribed by *Hub City*. The FPPC concluded that the other subconsultants were not public officers or employees because their work was mainly technical in nature and did not involve significant interaction with City staff or the community.

There is a significant difference between the roles of Schmidt and Lagardere on the Torrey Pines North Golf Course project and KCM's work on the Plaza de Panama project. Neither the Committee nor KCM were under contract with the City while the project was being developed. The 2011 MOU was set aside by the Court. Our understanding is that the City has done little, if any work under the 2012 Improvement Agreement because the project was on hold pending the outcome of the litigation with SOHO. However, like Schmidt and Lagardere on their project, KCM played a central role as program manager in developing the Plaza de Panama project and had substantial interaction with City staff and the community while working on the project. We are not aware of any court decisions under section 1090 addressing a situation like this where the consultant in question was very involved in the planning and development of the project but neither an actual officer or employee of the public agency nor under contract with a public agency at the time.

Because we have not found prior decisions on point, we turn to the purpose of the statute to determine whether section 1090 was intended to apply to consultants in this situation. *See People v. Cruz*, 13 Cal. 4th 764, 774-75 (1996). Section 1090 "targets any interest which would prevent a public official from exercising absolute loyalty and undivided allegiance to the governmental entity he or she serves." *People v. Wong*, 186 Cal. App. 4th 1433, 1451 (2010).

> Section 1090 is aimed at *any* interest, other than an interest that is too remote or speculative, that could compromise a public official's judgment or cast doubt on whether he executed his duties with the utmost allegiance, diligence, and loyalty to his office . . . [S]ection 1090 stands as a prophylactic against the temptations that might corrupt or influence public officials.

Carson Redevelopment Agency v. Padilla, 140 Cal. App. 4th 1323, 1330 (2006).

> The statutory prohibition protects the expenditure of public money by eliminating temptation, avoiding the appearance of impropriety, and assuring the public entity of the official's undivided and uncompromised allegiance.

Klistoff v. Superior Court, 157 Cal. App. 4th 469, 482 (2007).

The purpose behind section 1090 weighs against applying it to KCM in this instance. At least until July 2012 when the Improvement Agreement was executed, neither the Committee nor KCM were working for the City. The City and the Committee were cooperating on the project, as generally stated in the MOU set aside by the Court, with all the consultant work on the project being paid for by the Committee. Applying section 1090 to this situation would create an unreasonable expectation that the Committee and its consultants owed the City "absolute loyalty and undivided allegiance" even though they were working without compensation from the City as part of a philanthropic effort. KCM would probably not be considered a public officer or employee while it worked on the project prior to July 2012 because they were not under contract with the City.

The relationship between the City, the Committee and KCM changed in July 2012 when the Improvement Agreement was executed. Arguably the Committee and KCM became public officers or employees once the agreement was signed. But even then, the Improvement Agreement did not establish a typical relationship between a public agency and its consultant, where the agency directs and pays for the consultant's services. The Committee promised to pay for all costs associated with design and construction of the project, including any cost overruns. The City's obligation was capped at whatever funds it could raise from the issuance of bonds for the construction of the parking garage. And we note that other than authorizing the issuance of bonds (San Diego Ordinance O-20205 (Oct. 5, 2012)), the City never fulfilled its obligations under the Improvement Agreement because of the SOHO litigation. It is our understanding that the City never paid the Committee or KCM for their work on the project. KCM was probably not a public officer or employee subject to section 1090 even after July 2012 because the Improvement Agreement was never fully implemented.

II. It is very unlikely that KCM will be participating in the making of a contract in an official capacity by agreeing to serve as project manager for the City.

Even if KCM is considered to be a public officer or employee, KCM must participate in the making of a contract while acting in its "official capacity" to violate section 1090. The making of a contract includes any act involving "preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids" related to the contract. *Millbrae Ass'n. for Residential Survival v. City of Millbrae*, 262 Cal. App.

2d 222, 237 (1968). The making of a contract also occurs if a public officer "had the opportunity to, and did, influence execution [of the contract] directly or indirectly to promote his personal interests." *Wong*, 186 Cal. App. 4th at 1450 [citations omitted] (Commissioner was paid $100,000 to influence city officials negotiating a contract amendment).

For the City to hire KCM to resume its work as program manager, the Committee will need to assign KCM's existing subcontract to the City or the City will need to enter into a new contract with KCM. Either way, the City will need to make changes to KCM's scope of work to account for the four years of delay caused by the SOHO litigation. For example, KCM will need to evaluate whether changes in State storm water regulations, prevailing wages, and equipment and material costs will impact the design or the cost estimates for the project. The design and construction schedules will need to be updated. The City may need to renegotiate the cost of KCM's services as well, as its hourly rates have likely changed since 2012. While KCM's role as program manager will essentially remain the same, some contractual changes will need to be made for the City to hire KCM.

It is questionable whether KCM's involvement in the changes the City needs to make to KCM's contract would be considered to be participating in the making of a contract under section 1090. Cases where consultants were found to be subject to section 1090 are similar to the situation with the Torrey Pines North Golf Course, where consultants participate in the planning stages of a project and then pursue a separate, second contract to implement the project plan they developed. *See Davis*, 237 Cal. App. 4th at 301; *Schous Advice Letter* No. A-15-114 (Sept. 2, 2015); *Fowler Advice Letter* No. A-15-228 (Jan. 15, 2016); *Chadwick Advice Letter* No. A-16-090 (July 14, 2016). KCM is already under contract with the Committee to manage the planning, design, and construction of the project. There is a reasonable argument that the contract has already been made, and the City is merely hiring KCM to pick up where it left off. Again, we have not located any court decisions under section 1090 addressing a situation like this where a public agency assumes a private contract.

However, not only must the public officer or employee participate in the making of the contract for a violation to occur, the contract must also be made in the officer's or employee's "official capacity." A public officer negotiating a contract with a public agency on his or her own behalf is not acting in an official capacity. *Campagna v. City of Sanger*, 42 Cal. App. 4th 533, 540 (1996). In *Campagna*, a private attorney serving as a deputy city attorney for the City of Sanger negotiated a contingency fee agreement between the city and his law firm, in association with a San Francisco based law firm. The agreement explained how the contingency fee would be calculated, but not how the contingency fee would be split between the two law firms. The deputy city attorney made a separate oral agreement with the San Francisco firm that his firm would receive 35% of the contingency fee if the case settled. When the case did settle, the City of Sanger objected to paying the deputy city attorney (who had since become a Judge) alleging a conflict of interest. The trial court ruled in favor of the attorney, and the city appealed. The appellate court reversed, finding a violation of section 1090 as to the fee agreement with the San Francisco firm:

> Although respondent [deputy city attorney] was entitled to negotiate with appellant [City of Sanger] regarding compensation for litigation related services beyond his basic retainer agreement without violating section 1090 or the Political

> Reform Act, he negotiated his compensation with Hoberg [San Francisco law firm] - not with appellant. Respondent violated section 1090 when he entered into the referral fee agreement.

Campagna, 42 Cal. App. 4th at 542.

The same Court later clarified its decision in *Campagna* in a subsequent case:

> We held the contingency fee agreement (to the extent it was between the city and Campagna's firm) did not violate the statute because Campagna had not negotiated it in his official capacity. That is, he was negotiating *with* the city (on behalf of his firm) and not *for* the city (as its attorney). [citation omitted]. We also held, however, that Campagna *was* acting in his official capacity when he negotiated the contingency fee agreement between the city and the San Francisco firm and, by extension, when he negotiated the referral fee agreement with the firm.

People v. Gnass, 101 Cal. App. 4th 1271, 1291 (2002).

We interpret *Campagna* to mean that when a public officer is negotiating the terms of a contract that relates to that officer's employment with the public agency, the officer is not acting in an official capacity within the meaning of section 1090. In such situations, the public officer is negotiating on his or her own behalf, not on behalf of the public agency. Section 1090 is only intended to apply when the public officer is working or negotiating on the public agency's behalf. With regard to the Plaza de Panama project, if the City wants to contract directly with KCM to be the program manager, KCM will be negotiating with the City on its own behalf, not for the City as its consultant. We do not believe KCM will be making a contract in an official capacity, and therefore no conflict of interest under section 1090 should occur.

Because the circumstances surrounding this project are so unusual, however, we recommend asking the FPPC whether section 1090 prevents the City from hiring KCM to resume its work as program manager for the Plaza de Panama project. We caution that relying on legal advice from our Office is not a defense to a violation of section 1090. *See People v. Chacon*, 40 Cal. 4th 558 (2007). Further guidance from an agency charged with enforcing section 1090 is prudent on this project.

III. It is very unlikely KCM or its Principal will have a conflict of interest under the Political Reform Act.

The Political Reform Act provides that "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Cal. Gov't Code § 87100. Public officials include consultants working for local agencies. Cal. Gov't Code § 82048. A consultant is an individual who, pursuant to a contract with a state or local agency:

(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.

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

Because a consultant is defined as an individual, these conflict of interest provisions do not apply to corporations. *Davis*, 237 Cal. App. 4th at 297. Therefore, as a corporation KCM cannot have a conflict of interest under the Political Reform Act. We assume, however, that the City wants to ensure that the Principal of KCM who has been instrumental in developing the project so far, will remain on the project and he is an individual.

Even if the 2012 Improvement Agreement, which was not fully implemented due to the SOHO litigation, makes the Principal of KCM a public official under the Political Reform Act, it is very unlikely the City's hiring of KCM is a conflict of interest. As with section 1090, "[t]he prohibition found in section 87100 does not apply to actions by public officials relating to the making of their own compensation or employment contracts." *Campagna*, 42 Cal. App. 4th at 539. The Principal of KCM will be negotiating with the City regarding his and his firm's employment, not negotiating on behalf of the City. It is not unlawful for a public official to negotiate his or her own compensation. *Id*.

If the City hires KCM as program manager, then the Principal will likely be subject to the conflict of interest provisions in the Political Reform Act. The FPPC has determined 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." *See Ferber Advice Letter*, No. A-98-118 (May 26, 1998). The Plaza de Panama project is a substantial undertaking that will certainly take longer than a

year, has been the subject of two lawsuits, received significant media coverage, and involves one of the City's most prominent park and tourist attractions. If the City hires KCM, the Principal's role as program manager will likely require him to comply with the Public Works Department's conflict of interest code and the filing of FPPC Form 700.

CONCLUSION

We do not believe hiring KCM to resume its work on the Plaza de Panama project will result in a conflict of interest. KCM is probably not a public officer or employee subject to section 1090. Even if KCM is a public officer or employee, State conflict of interest laws do not prohibit them from negotiating contracts with public agencies on their own behalf. However, because of the unusual circumstances surrounding this project and the severe consequences for violations, we recommend the City or KCM ask the FPPC for a more definitive answer if the City wants to hire KCM.

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