



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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November 12, 2019

Prabhakar Somavarapu  
District Engineer  
10050 Goethe Road  
Sacramento, Ca 95827-3553

Re: Your Request for Advice  
**Our File No. A-19-175**

Dear Mr. Somavarapu:

This letter responds to your request for advice on behalf of the Sacramento Regional County Sanitation District ("Regional San") regarding the conflict of interest provisions of Government Code Section 1090. 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.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Riverside 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

Does Section 1090 prohibit any of the identified consultants who provided services to Regional San for its recycled water project to submit proposals to be Regional San's Construction Program Management Office ("C-PMO") consultant for the same project?

### CONCLUSION

No. Based on the facts provided, Section 1090 does not prohibit any of the identified consultants who provided services to Regional San for its recycled water project to submit proposals to be Regional San's C-PMO consultant for the same project.

## FACTS AS PRESENTED BY REQUESTER

You are the District Engineer for Regional San seeking advice concerning the conflict of interest provisions under Section 1090.

The South Sacramento County Agricultural and Habitat Lands Recycled Water Program (the "Project") is being developed by Regional San. The Project has the potential to deliver up to 50,000-acre feet per year of recycled water to irrigate more than 16,000 acres of permanent agriculture and habitat conservation lands in Southern Sacramento County, in lieu of pumping groundwater. The Project also proposes to implement wintertime irrigation to provide further groundwater recharge.

Regional San will receive \$280.5 million in Proposition 1 Water Bond grant funding for the Project, through the State of California's Water Storage Investment Program ("WSIP"). WSIP funding was awarded based on the public benefits expected as a result of the Project, which is expected to cost approximately \$300 million.

### Initial Contracts

#### *Woodard & Curran*

Regional San entered into a contract with Woodard & Curran<sup>1</sup> on November 14, 2014, to provide engineering services for the Project's Facilities Plan Development. The Project's scope of services included developing a facility plan report, preparation of an EIR, and stakeholder and public outreach support.

The contract was amended in 2016 to expand the scope of services primarily to include assistance with environmental documentation and wastewater petition for change process,<sup>2</sup> and again in 2017 to include assistance with the development and submittal of a grant application for WSIP funding. In 2018, the contract was amended a third time primarily to require continued assistance with the WSIP grant application preparation and implementation.

On April 25th, 2019, the contract was amended for the fourth and final time primarily to require Woodard & Curran to support efforts related to implementing the recently awarded WSIP grant and to serve as the Administrative Program Management Office ("A-PMO") consultant for the Project. The scope of work of the A-PMO consultant includes helping secure the Water Rights Petition from the State Water Resources Control Board, assisting with WSIP requirements such as negotiating contracts and funding agreements with the State Department of Fish and Wildlife, State Water Resources Control Board, and California Water Commission, as well as supporting WSIP

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<sup>1</sup> The contract was initially entered into with RMC Water and Environment who merged with Woodard & Curran in 2016.

<sup>2</sup> A petition for change to reduce the amount of treated wastewater that would flow into the Sacramento River was prepared for the State Water Resources Control Board. The amended contract required Woodward & Curran to provide support during the petition process.

recordkeeping & reporting requirements, assisting in the development of a recycled water utility organization and governance structure, developing a groundwater accounting and conjunctive use program, supporting groundwater modeling efforts and developing a groundwater monitoring plan, assisting with ecological plan development and implementation, supporting landowner and stakeholder outreach, including farmer agreements and providing oversight of CEQA and Environmental Permitting activities.

### *Jacobs Engineering*

Jacobs Engineering (formerly known as CH2M Hill), a sub-consultant under the contract, has performed specific tasks, such as groundwater and surface water modeling and other technical work to support the development of the facility plan and the WSIP grant application. Jacobs Engineering was also recently authorized to assist with identifying recycled water demand and pump station requirements, drawings of on-site connections, assisting with groundwater accounting, supporting review of the ecological plan and environmental documents and some element of the landowner outreach activities. These recently authorized activities have not yet been undertaken by Jacobs.

Under the contract, neither (Woodard & Curran or sub-consultant Jacobs Engineering) has engaged in any formal design or construction planning related to the Project, nor will they be involved in developing the RFP for the C-PMO consultant services. They previously developed the Project's EIR, the facilities plan, and supported the WSIP grant submittal.

### *Carollo Engineers*

In addition, the consulting firm of Carollo Engineers, Inc., provided engineering design services for Regional San's Tertiary Treatment Facilities ("TTF") project, one of the major components of Regional San's wastewater treatment plant upgrade and entirely separate from the instant Project. Under that contract, Carollo was responsible for preparing a preliminary design report, and ultimately a complete package of biddable plans, for the TTF project. In addition, the contract required Carollo to assist Regional San during the bid and award phase of the TTF project, including responding to bidder questions, attending the pre-bid meeting, and preparing addenda and conformed documents.

During the preliminary design phase of the TTF project, Carollo was asked to produce a technical memorandum that summarized and evaluated preliminary design concepts for the Project's pump station. This technical memorandum was developed because Regional San initially considered including the full design and construction of the pump station with other TTF components. However, Regional San ultimately decided not to include it in this portion of work within the TTF project. The pre-design concepts presented in the memorandum are based on information from the Project's planning-level documents and EIR that had been prepared by Woodard & Curran.

### **C-PMO Contract**

Under the proposed C-PMO contract, the consultant would be required to manage and support design, construction, start-up testing, and commissioning the hard facilities that make up

the Project in close coordination with the A-PMO. The C-PMO consultant will be responsible for developing the basis of design that is based on the planning level information developed by the A-PMO. They will also provide some preliminary design support functions such as geotech studies and surveys. However, the C-PMO consultant will not provide any detailed design services for the individual projects that will make up the overall Project.

### **Additional Information<sup>3</sup>**

In general, the A-PMO is responsible for administration of the WSIP grant and development of other non-construction aspects of the Project, which includes: water rights, environmental permitting, CEQA, ecological plan, utility governance, recycled water pricing, groundwater monitoring and accounting contracting with state agencies and landowners.

The C-PMO is responsible for the “capital” side of the Project, which includes managing the engineering, design, construction, start-up testing of the pipelines and pump stations that will deliver the recycled water to agricultural users.<sup>4</sup>

It is not anticipated that there would be direct overlap between the A-PMO contract and the C-PMO contract. However, there will need to be coordination between the two since some of the administrative functions of the A-PMO will inform the design and construction.<sup>5</sup>

You also stated that while Woodard & Curran’s efforts may have helped inform the size and scope of the project through their planning efforts, neither Woodard & Curran nor Jacobs or Carollo were in a position to influence or impact the scope of services to be provided by the C-PMO because decisions involving the scope of services were made by Regional San staff.

### **ANALYSIS**

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with 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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

Importantly, 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

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<sup>3</sup> The additional information was provided through emails from Mike Crooks on October 18 and 25.

<sup>4</sup> In other words, the C-PMO will be responsible for the actual construction aspects (physical improvements implemented by the C-PMO) as opposed to the non-construction aspects for which the A-PMO is responsible.

<sup>5</sup> It was further explained that the A-PMO will be able to provide input to the C-PMO concerning the design packages only to ensure the system meets the functional, financial (grant funding), and regulatory compliance requirements of the program.

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 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.”

### **Independent Contractors Subject to Section 1090**

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, supra*, at pp. 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”].) This long-standing rule was recently affirmed by the California Supreme Court (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230), and it applies equally to corporate consultants. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300.)

In *Sahlolbei, supra*, the Supreme Court concluded that Section 1090’s reference to “officers” applies to “outside advisors with responsibilities for public contracting similar to those belonging to formal officers” (*Id.* at p. 237), and held that not all independent contractors are covered by Section 1090; instead, “independent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf.” (*Id.* at p. 245.)

#### *Woodard & Curran*

Consultant Woodard & Curran entered into a contract with Regional San regarding the Project in 2014, and the contract was subsequently amended four times, including in April 2019 to make Woodard & Curran the Project’s A-PMO consultant. In that role, Woodard & Curran has responsibilities that include assisting with contract negotiations and funding agreements with various state agencies as well as supporting landowner outreach, including agreements between Regional San and impacted farmers. Based on these facts, Woodard & Curran is subject to Section 1090 due to its responsibilities to assist Regional San with public contracting.

#### *Jacobs Engineering*

Jacobs Engineering is a sub-consultant under the contract between Regional San and Woodard & Curran. In that role, it has performed specific tasks that include groundwater and surface water modeling and other technical work to support the development of the facility plan and the WSIP grant application. Although it was recently authorized to perform other services, including landowner outreach activities, it will not undertake to perform these services during the

pendency of the requested advice. So long as Jacobs-Engineering does not perform services on behalf of Regional San where it would engage in or advise on public contracting, it is not subject to Section 1090.

### *Carollo*

Carollo is responsible for the design of Regional San's TTF project, which is an entirely separate project from the instant Project. Under its contract with Regional San, Carollo was responsible for preparing a preliminary design report with biddable plans for the TTF project. In addition, the contract required Carollo to assist Regional San during the bid and award phase of the TTF project, including responding to bidder questions, attending the pre-bid meeting, and preparing addenda and conformed documents. Pursuant to these facts, Carollo is subject to Section 1090 because it was responsible for advising Regional San on public contracting matters.

Accordingly, based on the facts provided, consultants Woodard & Curran and Carollo are subject to Section 1090.

### **Participating in Making a Contract**

The next issue is whether, for purposes of Section 1090, Woodard & Curran or Carollo made or participated in making the proposed contract for a C-PMO consultant through the services they have provided under their initial contracts. Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract 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, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

Furthermore, in *Sahlolbei, supra*, the Supreme Court explained that "Section 1090 prohibits officials from being 'financially interested in any contract made by them in their official capacity.' Officials *make* contracts in their official capacities within the meaning of section 1090 if their positions afford them 'the opportunity to ... influence execution [of the contracts] directly or indirectly to promote [their] personal interests' and they exploit those opportunities." (*Sahlolbei, supra*, at p. 246 quoting *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

Under its initial contract, Woodard & Curran has developed a facility plan report, prepared the EIR, and engaged in public outreach support. In addition, it is responsible for administration of the WSIP grant and development of other non-construction aspects of the Project including environmental permitting, utility governance, recycled water pricing, groundwater monitoring, and contracting with State agencies and landowners. In contrast, the C-PMO consultant will be responsible for aspects of the Project's actual construction including managing the engineering, design, construction, start-up testing of the pipelines and pump stations as opposed to the non-construction aspects of the Project that Woodard & Curran have been performing under the initial contract.

According to your facts, although some of the administrative functions performed under the initial contract by Woodard & Curran will inform the design and construction of the Project, Woodard & Curran was not in a position to influence or impact the scope of services to be provided by the C-PMO consultant because decisions involving the scope of services were made by Regional San staff. The performance of the services to be performed by the C-PMO are essentially a continuation of the services already provided by Woodard & Curran under the initial contract.<sup>6</sup> (See *Sanchez* Advice Letter, No. A-18-157; *Stroud* Advice Letter, No. A-18-276 [consultant who provided environmental analysis and preliminary designs that did not set the project's design was not prohibited under Section 1090 from performing the project's engineering design services, which were simply a continuation of the design services it already performed].)

With respect to Carollo, the initial contract with Regional San required that it provide engineering design services for its TTF project, which is separate from the Project at issue here. Under that contract, however, Carollo prepared a technical memorandum that summarized and evaluated preliminary design concepts for the Project's pump station that were based on information from the Project's planning-level documents and EIR that had been prepared by Woodard & Curran. According to your facts, preparation of the technical memorandum for the Project's pump station did not put Carollo in a position to influence or impact the scope of services to be provided by the C-PMO consultant. Similar to Woodard & Curran, performance of the services to be performed by the C-PMO would essentially be a continuation of the services already provided by Carollo under the initial contract.

To reiterate, the purpose of Section 1090 is to prohibit self-dealing. Here, there are no facts suggesting that either Woodard & Curran or Carollo leveraged their public positions for access to Regional San officials in order to influence them for their own pecuniary benefit. That these consultants may now be in a favorable position to be the C-PMO consultant is simply a byproduct of their performance of services on the Project in a previous contract. And where no evidence of self-dealing exists, no interest is served by disqualifying either Woodard & Curran or Carollo from bidding on the contract for C-PMO services solely based upon services provided in prior contracts. (See *Stroud* Advice Letter, *supra*.)

Accordingly, Section 1090 does not prohibit Regional San from entering into a contract with Woodard & Curran, Jacobs Engineering or Carollo to perform as the C-PMO consultant for the Project.

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<sup>6</sup> We note that Woodard & Curran is still performing A-PMO services under the initial contract.

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

Sincerely,

Dave Bainbridge  
General Counsel

By:   
Jack Woodside  
Senior Counsel, Legal Division

JW:sal