



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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April 10, 2017

Michael J. Ciccozzi  
County Counsel  
County of El Dorado  
330 Fair Lane  
Placerville, CA 95667

Re: Your Request for Advice  
**Our File No. A-17-049**

Dear Mr. Ciccozzi:

This letter responds to your request for advice regarding Government Code Section 1090, *et seq.*<sup>1</sup> 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.

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 El Dorado 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 preclude Vanir from contracting with the County for construction management services for the Project, based on the scope of services provided to the County by Vanir pursuant to a prior contract and preparation of the Operational Assessment and Facility Study for the Sheriff's Department?

### CONCLUSION

No. Under Section 1090, Vanir is not making or participating in making a contract for construction management services while acting in an official capacity.

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<sup>1</sup> Government Code Sections 1090 through 1097.5. 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.

## FACTS

The County has for many years recognized the need for adequate facilities to house the operations of the Sheriff's Department. In 2008, the El Dorado County Grand Jury issued its report entitled "El Dorado County Sheriff's Building," finding that growth in the County has rendered the existing Sheriff's headquarters facility inadequate to properly handle all operations due to the facility's lack of space and recommending consolidation of central operations into a new facility.

In 2012, the County hired as a consultant the firm Vanir Construction Management, Inc. ("Vanir") to perform a conditions assessment study of several County facilities, which included the Sheriff's Administration Building. The Conditions Assessment Report prepared by Vanir noted deficiencies and the remaining useful life of the building systems in those existing facilities, and also included recommendations for addressing the deficiencies and the associated repair or replacement cost.

In February 2013, the County entered into an agreement with Vanir to prepare an Operational Assessment and Facility Study for the Sheriff's Department (Agreement No. 289-S1310). The agreement had a cost estimate of \$28,380, and outlined the following tasks:

- *Operational Assessment* - Vanir will work with a core team from the County to further define the vision of the project, including preparation of building/space survey and conducting meetings and interviews with key agencies/individuals as determined by the Sheriff's Department to solicit their input. All aspects of the project will be discussed and a road map will emerge that will establish the direction of the project;
- *Facility Study* - Vanir will assist the Sheriff's Department in: developing a vision statement, establishing space/office standards for the department operations, determining co-location of divisions on the site, facility model, short-term and long term plan, and sustainability;
- *Site Requirements* - Vanir will prepare a site and facility concept plan, including determining the size of the site required for short and long term response to the facility needs (Vanir also organized a tour of a neighboring county's sheriff's facility as a part of this process);
- *Cost Analysis* - Vanir will provide site development and building construction cost, preliminary design criteria, life cycle cost analysis, and assist the County in evaluating development and financing options;
- *Final Report* - Vanir will prepare a report consolidating the results of the assessment and facility study.

The Final Report was completed in or about August 2013.

In March 2016, the Board of Supervisors certified the Environmental Impact Report in conjunction with the acquisition of the land for a new facility to replace the existing Sheriff's

Administration facility and to also consolidate other Sheriff functions into one new replacement Public Safety Facility Project (“Project”). In June 2016, the Grand Jury issued two reports concerning the Sheriff’s facility. In the first report entitled “Sheriff’s Headquarters; How Old is Too Old?, Case 15-08,” the Grand Jury concluded that “[t]he current facility used for the Sheriff’s headquarters is visibly overcrowded and is a substandard work environment.” The Grand Jury recommended replacement of the Sheriff’s facility with one that would house all department operations. The second report entitled “Proposed Public Safety Headquarters, Case 15-09,” referred to the needs assessment study prepared by Vanir in 2013 “to determine the operations and functions required of a Sheriff’s headquarters.”

The County is using design-build for construction of the Project.<sup>2</sup> The County retained the firm Architectural Nexus to prepare criteria documents and to serve as the design criteria consultant for the Project. In January, 2017, the County issued a Request for Proposal (“RFP”) for construction management services for the Project. Vanir submitted a proposal. The County will select and award a contract to the design-builder in the Summer of 2017, at which point, project design work will begin.

## ANALYSIS

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.”

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.”

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<sup>2</sup> Design-build is a method project delivery where one entity works under a single contract with the project proponent to provide both design and construction services.

The term “public official” is interpreted broadly under Section 1090 and includes “independent contractors who perform a public function” and “whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency.” (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4<sup>th</sup> 1114, 1124-1125; citing *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4<sup>th</sup> 682, 690-693; see also *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4<sup>th</sup> 261, at pp. 300-301.) It is also clear that Section 1090 applies to independent contractors as well as corporate consultants. (*Davis supra*, at p. 300.)

The purpose behind this inclusiveness of the definition is to ensure that independent contractors who are essentially performing a public function, though temporarily, provide the same “fealty expected from permanent officers and employees.” (46 Ops.Cal.Atty.Gen 74 (1965).) In *Hub City*, the court stated that a person’s status as an official under Section 1090 “turns on the extent to which the person influences an agency’s contracting decisions or otherwise acts in a capacity that demands the public trust.” (*Hub City, supra*, at p. 1125.)

We note that common considerations articulated in case law as to whether a contractor or consultant would be subject to Section 1090 have included: the potential to exert considerable influence; acting in a capacity that demands a level of public trust; and involvement in decisions that are more than ministerial and go beyond mere technical input.

Vanir, as a consultant, had the potential to exert considerable influence over the County’s decisions concerning the new Sherriff’s facility, by working closely with County staff on the operational assessment, facility study, and site requirements. Vanir also provided a cost analysis and worked with County staff in evaluating development and financing options for the Sherriff’s headquarters. Because Vanir was involved in decisions that are more than ministerial and go beyond mere technical input, and acted in an advisory capacity with the capability of exerting influence over the County staff’s decisions concerning the new Sheriff’s headquarters, it served in a position that demanded a high level of public trust, and is 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 County 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.)

We find, under the facts you have provided, that the County and Vanir may enter into a contract for construction management without violating Section 1090, because Vanir did not play any role in the development of the RFP, nor did it play any role in the design or technical specifications of the underlying project.

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

Sincerely,

Hyla P. Wagner  
General Counsel



By: Zachary W. Norton  
Senior Counsel, Legal Division

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