

Public Comment

for March 21, 2016

RCEA Board of Directors Meeting

From: rob@redwoodrob.com
Sent: Friday, March 18, 2016 7:57 AM
To: Fair Political Practices Commission; California Office of the Attorney General; Attorney General Kamala Harris; California Attorney General Public Inquiry Unit; Redwood Coast Energy Authority; Matthew Marshall; Susan Ornelas; Stephen Kullmann; Linda Atkins; Tiara Brown; Tim Marks; Dwight Miller; Lexie Fischer; Sheri Woo; Barbara Hecathorn; Marian Brady; Paul Pitino; Jean Lynch; Doug Brower & Dan Brown; Doug Strehl; Tim Marks; Mendocino County Board of Supervisors; John McCowen; Dan Hamburg; Carre Brown; Dan Gjerde; Tom Woodhouse; Rex Bohn; Estelle Fennell; Mark Lovelace; Virginia Bass; Ryan Sundberg; Jim Comstock; Jeff Smith; Jim Steele; Rob Brown; Anthony Farrington; Humboldt DA; David Eyesore; Don Anderson; Jeffrey S. Blanck; County Counsel; Teri Gridley Legal Office Services Manager; Anita Grant
Subject: NOTICE of conflict of interest violation

Fair Political Practices Commission
California Office of the Attorney General
Redwood Coast Energy Authority
Boards of Supervisors of the Counties of Mendocino, Humboldt and Lake
District Attorneys of the Counties of Mendocino, Humboldt and Lake
County Counsels of the Counties of Mendocino, Humboldt and Lake

This letter is submitted by Helping Hand Tools a California 501(c) non profit organization that regularly sues regarding energy generation matters that negatively affect our members and the environment. We are submitting this letter to you, on behalf of our directly affected members, in protest of the clear conflict of interest violation enumerated herein.

The Local Energy Aggregation Network Energy US (LEAN) was engaged in September or October 2015 as a consultant by the County of Mendocino to advise on the drafting of a Request for Proposals (RFP) for Community Choice Aggregation services, explicitly as part of a joint RFP drafting effort with the Redwood Coast Energy Authority (RCEA) and the County of Lake that concluded in December 2015. Significant portions of the technical scope of services requested by the RFP appear substantially similar to RFP language that LEAN has previously provided under contract to other local governments.

Shawn Marshall of LEAN subsequently advertised this in a highly public fashion in various venues, such as on industry stakeholder conference calls and in LEAN's regular newsletters:

"Mendocino has engaged LEAN to support community education effort, working on service RFP and program options with Lake and Humboldt Counties."

LEAN was also publicly thanked by the Lake County Board of Supervisors for their contribution to the RFP drafting, and Lake County staff has stated in writing that LEAN had donated 30 hours of staff time to the effort.

In January 2016, LEAN subsequently submitted a proposal to RCEA in response to the RFP in question, partnering with Noble Americas Energy Solutions and The Energy Authority. In doing so, LEAN and their team has egregiously violated California conflict of interest laws (the Political Reform Act, Government Code section 1090, common-law doctrine and related codes). It is unknown whether similar bids will be forthcoming in Lake and Mendocino Counties in response to their respective releases of the RFP as well.

California's conflict of interest law exist to ensure that public officials and consultants are absolutely and broadly prohibited from this type of "self-dealing," in which they would be tempted to compromise their duty to the public in order to derive private benefit.

We are first and foremost demanding that RCEA immediately disqualify any RFP response in which LEAN is proposed as a contracting party.

Relevant excerpts from the California Office of the Attorney General's Conflicts of Interest Guide and other published guidance are below (emphasis added):

The Political Reform Act (Gov. Code Section 81000-91015) provides that "no 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." (Section 87100.) In addition, the Act requires every public official to disclose those economic interests that could foreseeably be affected by the exercise of his or her duties. (Sections 87200-87313.) ... The term "public official", includes consultants: "'Public official at any level of state or local government' means a member, officer, employee, or consultant of a state or local government agency." (2 Cal. Code of Regs. Section 18701(a).)

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence and primarily for the benefit of the public... The decision-maker should not be tempted by his/her own personal or pecuniary interest and the doctrine will apply to situations involving a nonfinancial personal interest.

The essence of the section 1090 prohibition is to prevent self-dealing in the making of public contracts.

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As the California Supreme Court has stated, the purpose of section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity... Because these goals are of the utmost importance, it is of no import whether actual fraud or dishonesty is involved in the contract process, whether the contract is fair to the public agency, or whether the public agency loses money from the contract.

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Courts have concluded that independent contractors, who serve in advisory positions that are frequently held by officers and employees, are subject to section 1090. Specifically, "independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency's contracts." (Hub City Solid Waste Services, Inc. v. City of Compton (2010) 186 Cal.App.4th 1114, 1124-1125; see also California Housing Financing Agency v. Hanover (2007) 148 Cal.App.4th 682 [concluding that an independent contractor who performed a public function by participating in the making of contracts was an "employee" for purposes of inclusion under section 1090]; Campagna v. City of Sanger (1996) 42 Cal.App.4th 533; People v. Gnass (2002) 101 Cal.App.4th 1271; Schaefer v. Berinstein (1956) 140 Cal.App.2d 278, 291; Terry v. Bender (1956) 143 Cal.App.2d 198, 206-207; 70 Ops.Cal.Atty.Gen. 271 (1987).) As this office stated "[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).)

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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.

...
the provisions of section 1090 may not be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose.

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For section 1090 to apply, the public official in question must have a financial interest in the contract in question. Although the statute does not specifically define "financial interest," an examination of case law and the statutory exceptions to the basic prohibition indicate that the term is to be liberally interpreted. (See People v. Deysner (1934) 2 Cal.2d 141, 146, [stating "[h]owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void."].) Further, "the certainty of financial gain is not necessary to create a conflict of interest The government's right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty." (People v. Gnass (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

...

the following economic relationships generally constitute a financial interest: employee, attorney, agent, or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; and, officer or employee of a nonprofit corporation that is a contracting party.

...

Any contract made in violation of these prohibitions is void, unless the violation is technical and non-substantive. (§ 10420.) The state or any person acting on behalf of the state may bring a civil suit in superior court to have the performance of a contract temporarily restrained and ultimately declared void. (§ 10421.) Successful plaintiffs may be awarded costs and attorney's fees, but defendants may not receive either. (Id.) A willful violation of the prohibitions is a misdemeanor, and persons involved in the corrupt performance of contracts are subject to felony penalties. (§§ 10422, 10423 & 10425.)

It is worth noting that these conflict of interest laws and related jurisprudence is written quite broadly, in order to proscribe situations in which there is even a perception of indirect impropriety. In contrast, LEAN's actions as a government consultant in assisting with the drafting of an RFP and then submitting a bid to provide services under the RFP are a relatively straight-forward violation of both the purpose and letter of the law.

For a government consultant to be involved in the preparation of an RFP to which the consultant intends to bid to provide services introduces all manner of conflicts of interest. Besides the obvious conflict of suggesting contract language that benefits the consultant, the entire process may become a mechanism to unfairly pre-dispose other government employees and officials to the consultant's point of view on various matters. The conflict of interest compromises the consultant's ability to render neutral advice in this capacity, in favor of shaping the perceptions of various decision makers in a manner that favors the consultant's ultimate commercial interests. For example, LEAN may have unfairly influenced how officials view the reputation and capabilities of other companies in the market in favor of the companies which LEAN was intending to partner with for the proposal response.

For example, in the same October 2015 newsletter and webinar in which LEAN advertised their involvement in drafting Humboldt's RFP, Noble Americas Energy Solutions was invited to present on their utility data and billing services for CCAs. At the time, this appeared to be purely for the benefit of educating industry stakeholders. However, since Noble Americas Energy Solutions and LEAN partnered on the RFP response to Humboldt County, it calls into question whether or not LEAN was motivated to highlight Noble's services as part of a general marketing campaign for their benefit in a private capacity.

This is also highly troubling because LEAN advises numerous local governments throughout California on the formation of CCA programs. Their behavior in Humboldt and Lake Counties strongly suggests that LEAN is intending to derive substantial private benefit in their capacity as a government consultant by shaping the implementation process of CCAs to suit their own long-term contracting strategy.

Lastly, LEAN is a membership organization that derives their legitimacy as a neutral party by not competing against its members. Their website states: "LEAN does not bid as a commercial vendor for specific CCA functions, technical analysis, or for long-term operations services." It appears LEAN has violated their core mission by submitting a bid that is directly in competition with their other members for the "long-term" services that they claimed to be precluded from providing. Notably, the California CCA market is in a critical period of development, in which new ways of designing and implementing CCA programs are beginning to be offered by different companies – several of which are members of LEAN. By 'crossing the Rubicon' in offering to provide long-term CCA services in direct partnership with certain companies, LEAN has introduced a conflict of interest that entirely compromises their ability to fairly represent the array of companies and different service offerings to local governments.

We are requesting that the California Office of the Attorney General investigate and hold LEAN and their team accountable for any violations of California conflict of interest laws.

Additionally, we request the following from RCEA and the Counties of Lake and Mendocino: Any RFP response in which LEAN is proposed as a contracting party must be immediately disqualified.

1. **Written notice of this conflict of interest violation must be provided to all members of any RFP review committee.**
2. **Full public disclosure must be provided of what language in the RFP was provided by or suggested by LEAN.**
3. **Full public disclosure must be provided as to whether any language was excised from drafts of the RFP at LEAN's suggestion.**
4. **Full public disclosure must be provided as to whether LEAN was involved in the selection of the RCEA bid review committee or was otherwise made aware of the members of the review committee.**
5. **As a government consultant involved in the drafting of this RFP, LEAN should be subject to broad disclosure; LEAN's bylaws, all sources of income and donations, and the disposal of said revenues should be publicly disclosed.**

Respectfully,

Rob Simpson
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Cc: interested stakeholders in the California Community Choice Aggregation industry