THIRD INTERIM REPORT

FOR

IMPERIAL IRRIGATION DISTRICT

REGARDING THE REMEDIATION OF ZGLOBAL'S CONTRACTS

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I. BACKGROUND

A. First Interim Report: No Conflicts Relating to Coachella Energy Storage Partner's (CESP) Battery Storage Contract with IID

In our first Interim Report dated October 24, 2017, we addressed the question of whether two Imperial Irrigation District (IID) directors had financial interests in a battery storage project approved by the IID board on April 14, 2015. Those making the claim alleged IID rejected three cheaper offers before awarding the battery contract to Coachella Energy Storage Partners, LLC (CESP), which was partially owned by former IID Director Mike Abatti. Our report explained the allegations were materially incorrect. We found the IID "**directors did not have financial interests in the battery storage project, and there were not three cheaper proposals."**

The two IID directors' previous financial dealings with individuals, entities, and/or properties connected to the battery project were not in fact related to the battery storage project. The battery project contract did not mention the directors, any entities or individuals connected to the directors, or the transactions which formed the basis for the allegations against the directors. There was no evidence – circumstantial or otherwise – showing a connection between any financial benefit received by the directors and the battery contract. In the absence of such evidence, California law requires there be evidence of a promise by the directors to act in a certain manner relating to the battery project (*e.g.* voting for approval) in exchange for a financial benefit to the directors. We found no such evidence indicating a *quid pro quo* influencing IID's actions with respect to the contract. Thus, the directors did not have an improper financial interest in the CESP battery project.

We also pointed out that members of the public were misled as to the considerations which led IID to choose CESP's proposal. CESP's base proposal

had the lowest cost, met IID's objectives, was well-designed and was to be built in partnership with a contractor who held the requisite licenses. The remaining proposals were costlier or had indeterminate costs, lacked features IID deemed necessary and several of the proposers lacked requisite licensing themselves or through a partnered contractor. IID thus selected CESP's proposal as the best-fit, lowest-cost option.

Once IID entered negotiations with CESP, it then selected options which raised the price of the project but gave IID benefits such as a 20-year guarantee. Unfortunately, certain interested parties cited the final price from CESP, including options, and compared that to the base proposal prices of other vendors. This "apples-to-oranges" comparison suggested that the IID board awarded the battery contract to an undeserving vendor, when in fact CESP had the most cost-effective bid *at the stage its proposal was accepted*.

B. Second Interim Report: No Conflicts from IID Officials' Decision Making Relating to Former Contractor, ZGlobal, Inc.

In our second Interim Report dated November 13, 2017, we addressed allegations by Renova Solar CEO Vincent Battaglia against IID's general counsel, an IID director and the remaining members of IID leadership as stated in a complaint he filed with the Fair Political Practices Commission (FPPC). Our investigation revealed Battaglia's claims were meritless.

Mr. Battaglia has a colorful and under-appreciated history with IID: he has long been at the helm of an aggressive public relations campaign to pressure IID leadership into continuing, beyond the boundaries established by state law, a net metering program for IID customers to connect their solar panels to IID's grid. Mr. Battaglia's company sells solar panels and installation services to homeowners in the Imperial and Coachella valleys. IID later adopted a program that would continue to reward its ratepayers for contributing solar energy to IID's grid without

exceeding limited subsidies mandated by the state of California. IID's net energy billing program removes participation caps and rewards ratepayers at cost for their contributed energy. Mr. Battaglia nonetheless continued to campaign aggressively against IID for not continuing the original net metering program, despite having met state-mandated limits on the program.

We analyzed Mr. Battaglia's letter to the FPPC to determine the validity of his allegations against IID. His allegation against IID's general counsel failed to consider that the complained-of financial relationship with a former IID contractor ended *before* IID's general counsel began his tenure at IID. Mr. Battaglia's allegation against an IID director similarly failed for being unsupported by the circumstances of the transaction at issue and for lack of supporting evidence indicating the existence of an improper financial interest. Therefore, IID was not responsible or in any way liable for any acts or omissions relating to the alleged conflicts of interests. We found that Mr. Battaglia's allegations, as described in his complaint to the FPPC, were unsupported by the circumstances of the transactions at issue and by the evidence – or lack thereof – provided by Mr. Battaglia.

C. Third Interim Report Preview

While the Third Interim Report was being prepared, another allegation was made asserting that six years ago the IID board conferred an $8.43-million benefit to a solar project developer. According to this allegation, the IID board agreed to sell 1,400 acres of farmland to a solar developer for $5.77 million, who then sold the land to another company for $14.2 million. The claim was that the IID board "**left millions of dollars on the table**." In the Preview of the Third Interim Report, we concluded that the allegation that IID left millions of dollars on the table, like the earlier claim that the IID board accepted a $6 million higher bid, is factually incorrect. We concluded there was no "flipping." We concluded that the Solar

Gen 2 project achieved an important IID goal of connecting renewable energy to the CAISO grid through the IID transmission lines. Finally, we concluded that the sale of the land for the Solar Gen 2 project allowed IID to satisfy IID's water delivery obligation to the Coachella Valley Water District at a savings of up to $50 million.

II. THE FACTS

A. The Relationship between ZGlobal and IID

(1) The Inception

ZGlobal, Inc.'s ("ZGlobal") relationship with IID dates back to 2005, not long after the company's formation. A California corporation, it was founded by Ziad Alaywan ("Alaywan"), ZGlobal's president and a professional engineer who, among other qualifications, was on the team that formed the California Independent System Operator (CAISO) and a member of its executive team for a decade prior to his forming ZGlobal.

In 2005, that was a key credential. The fledgling CAISO had commenced operations in 1998 as the state restructured its wholesale electricity industry, and it was charged with overseeing the operation of California's bulk electric power system, transmission lines and electricity market generated and transmitted by its member utilities, which is to say, it is a statewide "balancing authority." Then and now, IID works alongside the CAISO as a part of the nation's electrical power grid.

Critically, however, IID has long resisted membership in the CAISO (which is to say, resisted losing its own, separate balancing authority), in order to ensure its ratepayers are not made to contribute to the statewide expense and administration of electrical distribution in addition to its own, as is imposed on the CAISO's member-utilities. Nowhere is this difference more compellingly

illustrated than in comparing electricity rates enjoyed by IID, which are half of those paid by customers of neighboring San Diego Gas & Electric and Southern California Edison, both members of the CAISO.

Preserving IID's independence from the CAISO has been a priority of this publicly elected board since the latter's creation. Certainly, at the 2005 inception, securing an "alumnus" of the CAISO formation team as a consultant was invaluable, and a key professional relationship for an entirely different energy manager, general manager and group of directors.

(2) The Relationship Through 2013

The relationship routinely continued for seven years, ZGlobal assisting IID with projects on a case-by-case basis. ZGlobal also continued with its successful outside consulting work, providing services to private clients both in Imperial County and elsewhere within California and the western region of the United States. Some of these outside clients, by virtue of being in the energy field, did work with IID.

Significantly during this time, 13-year employee and Imperial County native and resident Jesse Montaño left IID to become an officer of ZGlobal in 2010.

(3) Carl Stills as Energy Manager

On February 1, 2013, IID General Manager Kevin Kelley appointed Carl Stills as interim energy manager, which appointment was later made permanent. Our investigation indicates that this personnel change reflected longstanding dissatisfaction with the functioning of the Energy Department. This included, among other things, getting to the root of, and correcting IID's operation of a portion of the bulk power system, and its possible contribution to the cascading blackout event in California that occurred on September 8, 2011, at the time being investigated by the Federal Energy Regulatory Commission (FERC).

In due course, Stills began a very public reorganization of the Energy Department, which in one context he described as: "[W]e tore [the Energy Department] apart and put it back together in a manner we thought would correct everything."[1] A 40-year employee of IID, Mr. Stills' reorganization plan called on support from a number of chosen, former IID employees (individually or through their companies) notably Arn Lahde, Frank Barbera (F & B Enterprises) and Jesse Montaño (ZGlobal).

Among a number of tasks arising from this overarching Energy Department rebuild (copiously detailed and documented, and correctly brought to the board throughout), ZGlobal was tasked with rebuilding "IID's System Operations Center (SOC)," perhaps the most critical Energy Department function under FERC scrutiny following the 2011 outage. As presented for approval to the board, Mr. Stills summarized: "Mr. Montano … will be responsible for assisting the manager, SOC on all IID system operation duties."[2]

Importantly, at the conclusion of the SOC engagement on August 29, 2014, ZGlobal left behind a reconstituted SOC, correctly and fully functioning, that satisfied FERC post-outage scrutiny and routinely received high marks in regulatory audits that have followed.

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[1] IID's Energy Manager talks reorganization, The Desert Review (July 23, 2013), https://www.thedesertreview.com/iids-energy-manager-talks-reorganization/ (visited December 3, 2017).

[2] See Imperial Irrigation District Board of Directors Agenda of January 21, 2014, p. 255.

B. Challenges Faced By a "Reorganized" Energy Department

(1) IID Launches its Salton Sea Initiative

On a parallel path, in the second half of 2013, IID unveiled its Salton Sea Restoration and Renewable Energy Initiative (SSRREI).[3] The SSRREI was a critical "coming together" of IID's Water and Energy departments premised on restoration of the receding Salton Sea by making it smaller but sustainable, by siting renewable energy projects (including geothermal power plants) on exposed lakebed (the "playa") to serve as groundcover to mitigate air emissions. Notably, "[t]he Initiative will first focus on developing up to 1,700 megawatts of new geothermal energy at the Sea – enough to power more than one million homes. Not only is there more geothermal generating capacity in the Imperial Valley than anywhere else in the U.S., but geothermal energy can be produced with minimal impact on landscape and habitat. It also provides a steady, reliable source of energy to the state electricity grid that is not subject to weather or seasonal fluctuations."[4] In short, the transmission of electricity from Imperial and Riverside county resources to the nation was the linchpin of this critically important endeavor.

(2) The CAISO eliminates IID Maximum Import Capacity

Unbeknownst to IID, on July 30, 2014, the CAISO completely "eliminated" IID's Maximum Import Capacity (MIC), which in short meant that no energy sourced in IID's service area could be sold to other users of the grid, effectively gutting the SSRREI. The CAISO issued an announcement purportedly based on the early retirement of the San Onofre Nuclear Generating Station (San Onofre) forecasting additional deliverability from the Imperial Zone above the existing 462

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[3] The substantial investment of IID in, and sheer magnitude of the SSRREI and its priority to IID is amply shown by the compilation of materials available at http://www.iid.com/energy/salton-sea-initiative.

[4] Ibid.

MW MIC at zero deliverability. IID was stunned to learn of this decision to zero out the MIC, which negated any chance to develop geothermal on the playa and dashing the promise of the SSRREI.

For the remainder of 2014, the IID board sought answers to the MIC issue from the Energy Department, and none were forthcoming. In fact, Mr. Stills enlisted ZGlobal to educate the board on the significance of MIC. Also during this time, the board called on the Energy Department to respond vigorously to this development, which it did not do to the board's satisfaction.

(3) IID vs. CAISO

Without progress from the Energy Department, General Manager Kevin Kelley and the board sought guidance from then-general counsel Ross Simmons. Upon his recommendation the board retained outside counsel, and after continued review and analysis, the decision was made that redress was only possible through the courts. The IID filed a federal court complaint against the CAISO on July 16, 2015. The IID also engaged outside counsel to direct a California Public Records Act request to CAISO, which similarly devolved into litigation.

With these general legal matters in process during the first half of 2015, including the CAISO litigation preparation, exposure of the Energy Department's shortcomings was inevitable. It was this six-month run-up to the CAISO litigation that revealed the depth and severity of the institutional competency issues within the Energy Department. On nearly a daily basis, operational deficiencies were learned. The breadth of the issues, and number of employees involved led management to conclude that the Energy Department's post-reorganization deficiencies were not only pervasive, but worsening.

C. The Decision to Engage ZGlobal

It was in this context the IID general manager decided to replace the Energy Department's upper management overseeing IID's transmission function. The

institutional risks of this managerial vacuum required a seamless transition. To meet that immediate need, the IID needed to find replacements readily familiar with IID's transmission systems and operations. Recognizing this, IID turned to ZGlobal. ZGlobal was the obvious and correct choice for a number of reasons. Its employees were already familiar with IID's transmission operations and staff level transmission employees. ZGlobal knew of the critical MIC issues because it was already engaged by the Energy Department specifically to address these issues, which were still in progress. Finally, Mr. Alaywan's professional credentials, his reputation, and his prior experience with CAISO gave the IID instant credibility in the ongoing disputes with CAISO.

From all of the information at our disposal, we are satisfied that (i) ZGlobal was engaged not as a first but as a last resort, inasmuch as there was literally no other entity or group that could provide any hope of a seamless transition in transmission planning, and (ii) based on its success in performing nearly the exact function in restoring IID's SOC in 2013 and 2014, ZGlobal was a sensible choice to support the personnel transition.

Therefore, it was out of necessity IID turned to ZGlobal at a critical hour in its struggle to retain control of its balancing authority and in its drive to save the Imperial Valley from a catastrophic environmental disaster at the Salton Sea. It was also in this context that conflict issues arose under Government Code Section 1090.

III. APPLICABLE LAW

A. Independent Contractors Involved in the Making of a Public Contract on Behalf of a Public Agency May Not Have a Financial interest in that Contract

Cal. Gov. Code Section 1090 et. seq. "governs conflicts of interest in the making of government contracts." *Lexin v. Sup. Ct.*, (2010) 47 Cal. 4th 1050, 1091.

It embodies "the truism that a person cannot serve two masters simultaneously…" *Id*. at 1073. Section 1090 forbids public officials from engaging in any contract in which they have a financial interest when they act in their official capacities:

> 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. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

The defining characteristic of an improper financial interest is whether it has the "potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting." *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal. App. 4th 208, 221. That the interest "might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good." *Id*. (*citing Lexin*, 47 Cal. 5th at 1075).

An official makes contracts within his or her official capacity within the meaning of Section 1090 if it is established he or she had "the opportunity to, and did, influence execution directly or indirectly to promote his personal interest." *People v. Superior Court (Sahlolbei)* (2017) 3 Cal. 5th 230, 233. "Officials cannot 'hide behind labels and titles' or 'change hats' to obscure the substance of their actions." *Id*. (citations omitted).

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B. Public Agencies May Void Contracts Made in Violation of Section 1090 and Disgorge Any Profits Earned Therefrom, Regardless of Whether the Violation Was Willful or Even Beneficial to the Agency

Cal. Gov. Code Section 1092(a) provides a remedy for public agencies whose contracts have been comprised by the influence of conflicted public officials. IID may void any such contract:

> "Every contract made in violation of any of the provisions of Section 1090 **may be avoided at the instance of any party except the officer interested therein**. No such contract may be avoided because of the interest of an officer therein unless the contract is made in the official capacity of the officer, or by a board or body of which he is a member." (emphasis added).

Section 1092(b) places a four-year time limit to bring suit to void the contract "after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation [of Section 1090]." Section 1092.5 applies an exception to the rule for the lease, sale, or encumbrance of real property to protect the interests of "good faith lessee, purchaser, or encumbrancer where [the same] paid value and acquired the interest without actual knowledge of a violation [of Section 1090]." Put simply, public contracts for the lease, sale, and encumbrance of real estate cannot be voided if the lessee, purchaser, or encumbrancer of the property was unaware of the conflict of interest at the time of the transaction. Neither of these limitations and exceptions are applicable to IID's contracts as analyzed herein.

Despite the wording of Section 1092(a), "may be avoided at the instance of any party," courts have repeatedly interpreted Section 1092 to be void, instead of voidable. *See e.g. People v. Deysher* (1934) 2. Cal. 2d 141, 146; *Thomson v. Call* (1985) 38 Cal. 3d 633, 646; *City of Imperial Beach v. Bailey* (1980) 103 Cal. App. 3d 191, 197. A void contract is inherently unenforceable because it has no legal

existence for any purpose, and may not serve as the foundation for any action. *See e.g. R.M. Sherman Co. v. W.R. Thomason, Inc.* (1987) 191 Cal. App. 3d 559, 563. By contrast, a voidable contract is void as to one party who has acted wrongly, and may be cancelled by any innocent party to the contract. *See e.g. BGJ Assoc., LLC v. Wilson* (2003) 113 Cal. App. 4th 1217, 1226-1230.

Because any contracts in violation of Section 1090 are void, IID would be able to prevent any further performance under those contracts and recover whatever payments IID made, while the contracting party would be required to disgorge its profits. *See generally Thomson*, 38 Cal. 3d at 646-47. In *Thomson*, a property holdings corporation purchased a parcel of land from a councilmember, then conveyed the property back to the city council during the councilmember's term. The councilmember thus sold property to the city through an intermediary while he was on the city council. He was required to disgorge his profits from the sale of the parcel, while the city retained title to the parcel. *Id*. at 637-38.

The councilmember in *Thomson* appealed the disgorging of his profits to the California Supreme Court and was unsuccessful:

> "Clearly, no recovery could be had for goods delivered or services rendered to the city or public agency pursuant to a contract violative of section 1090 or similar conflicts of interest statutes. Moreover, the city or agency is entitled to recover any consideration which it has paid, **without restoring the benefits received under the contract**. *Id*. at 646-47 (citations omitted) (emphasis added).

The *Thomson* court admitted the rule was "harsh under the facts of this case," but found it to be "consistent with a long, clearly established line of cases" finding, "*courts will not entertain any rights growing out of such a contract, or permit a recovery of quantum meruit or quantum valebat*." *Id*. at 647 (*quoting County of Shasta v. Moody* (1928) 90 Cal. App. 519, 523-24) (emphasis original).

In applying the rule, the court recognized a number of policy concerns, such as "eliminating temptation, avoiding the appearance of impropriety, and assuring the [agency] of the officer's undivided and uncompromised allegiance…" *Id*. at 648.

California courts have consistently interpreted the *Thomson* case to require disgorgement of profits be applied automatically. *See e.g*. *Carson Redevelopment Agency v. Padilla*, 140 Cal. App. 4th 1323, 1336. In *Carson*, a city successfully sued to disgorge profits from a developer who obtained a rental assistance loan from the city after paying extortion payments levied by the city's mayor pro tempore. *Id*. at 1327-28. Despite the developer's lose-lose situation, the court required disgorgement of profits without consideration of whether a fairer remedy existed: "*Thomson* gave its imprimatur to a long line of cases applying that remedy, and it approved that remedy against [the defendant in the case]. *Thomson* considered a flexible rule, but then decided against it for policy reasons after considering the unacceptable ramifications of such a rule." *Id*. The *Carson* court thus held, "as a policy matter, [automatic disgorgement] is the most effective way to give Section 1090 all the teeth that it needs." *Id*.

The disgorgement remedy also applies regardless of whether the Section 1090 violation was willful. "A person who violates section 1090, regardless of whether the violation is intentional, forfeits any rights or interests flowing from the illegal contract." *Campagna v. City of Sanger* (1996) 42 Cal. App. 4th 533, 538. Likewise, disgorgement applies regardless of whether the contract was free of fraud, dishonesty, or was otherwise advantageous to the public agency. The Supreme Court in *Thomson* held Section 1090 "cannot turn on the question of whether actual fraud or dishonesty was involved. Nor is an actual loss to the city or public agency necessary…" 38 Cal. 3d at 648.

The *Thomson* court cited cases illustrating California's bright line rule, regardless of intent or actual harm done. *Id*. at 648-49. In one such case, the

California Supreme Court disgorged profits from and invalidated a contract for plumbing services between a city and a plumbing company. *Stigall v. Taft* (1962) 58 Cal. 2d 565, 568-69. Although the contract at issue was the lowest bid, a councilmember owned 3 percent of the plumbing company. *Id*. at 567. Because "the object of [Section 1090] is to remove or limit the *possibility* of any personal influence… as well as to void contracts which are actually obtained through fraud and dishonest conduct," the *Thomson* court invoked the *Stigall* court's application of the bright line rule and concomitant disregarding of the otherwise meritorious contract. *Thomson*, 38 Cal. 3d at 648 (*citing Stigall*, 58 Cal. 2d at 568-69). *Stigall* thus illustrates the principle that an improper financial interest, no matter how small relative to the contract and how beneficial the contract is to the public agency, invalidated the contract and required automatic disgorgement. 58 Cal. 2d at 568-69.

Thomson v. Call continues to be the seminal case by which remedies for Section 1090 violations are evaluated. *See e.g. Lexin*, 47 Cal. 4th at 1073-74 (explaining and applying the rule of *Thomson*'s "harsh consequences"); *Eden Township*, 202 Cal. App. 4th at 218-20 (relying upon *Lexin*).

C. Independent Contractors Who Function as De Facto Officers or Employees of a Public Agency or Were Actually Involved in the Making of Contracts are Subject to Section 1090

California courts and public agencies have long understood that consultants with advisory duties on public contracts are within the purview of Section 1090. A California Attorney General's office opinion from 1965, cited by the California Supreme Court in a recent case to discuss a typical example of a conflict-bound consultant, explains that city attorneys and other non-employee consultants hired by public agencies are public officials for Section 1090 purposes with respect to

the matters on which they were retained to provide advice. See 46 Ops.Cal.Atty.Gen. 79.

The California Supreme Court has recently confirmed Section 1090 can be applied to independent contractors: "…we conclude the Legislature understood Section 1090's reference to 'officers' to apply to outside advisors…" *Sahlolbei*, 3 Cal. 5th at 237. An independent contractor is considered a public official when, he or she is "entrusted with 'transacting on behalf of the Government.'" *Id*. at 240 (*citing Stigall*, 58 Cal. 2d at 570). The Supreme Court explained its reasoning:

> "In the ordinary case, a contractor who has been retained or appointed by a public entity and whose actual duties include **engaging in or advising on** public contracting is charged with acting on the government's behalf. Such a person would therefore be expected to subordinate his or her personal financial interests to those of the public **in the same manner as a permanent officer or common law employee tasked with the same duties**." *Id*. (*citing* 46 Ops.Cal.Atty.Gen. 79).

Therefore, "the fact that an official's written duties do not extend to contracting is irrelevant if the official was actually involved in the making of any public contracts and, in doing so, exploited an official position." *Id*. at 246. Indeed, the Public Reform Act already defines "public official" to include any "officer, employee, or *consultant* of a state or local government agency." Cal. Gov. Code § 82048(a) (emphasis added).

In *Sahlolbei*, an independent contractor was held criminally liable for violations of § 1090 after he, as the chief of staff of the public agency's board of directors, pressured the board into hiring someone whose salary he siphoned 25 percent of for himself. Because the contractor was a key player in the agency's contracting decisions and in fact convinced the board of directors to hire the person whose salary he siphoned money from, the contractor was considered a public

official for purposes of Section 1090. His act of siphoning a portion of the employee's salary was an improper financial interest in a transaction in which he was involved on behalf of the public agency.

Here, if an independent contractor for IID were granted authority to engage or advise the decision-making process for IID contracts, or was actually involved in the decision-making process, that independent contractor could be held liable for Section 1090 violations if the contractor held non-excepted financial interests in the contracts. Whether the contract results in a net benefit for IID is irrelevant. California courts have crafted a bright-line rule to prohibit any involvement by any interested official whose involvement would create the appearance of impropriety, and have extended the rule to apply to contractors whose role assumes responsibilities of public officials.

IV. LEGAL ANALYSIS

A. Ziad Alaywan of ZGlobal Was Entrusted with Transacting on Behalf of IID's Energy Department as a Result of the Service Contract He Signed on ZGlobal's Behalf with IID

Ziad Alaywan, as president and CEO of ZGlobal, became an IID public official under Section 1090 on October 19, 2015, when he entered into the master agreement between Imperial Irrigation District and ZGlobal, Inc., for Transmission Engineering, Planning, and Related Services ("Master Agreement").

IID hired ZGlobal to provide "transmission, engineering, planning and related services" for IID's Energy Department with the understanding that ZGlobal would be "responsible for transitioning IID away from ZGlobal services during the term of this agreement." (Master Agreement Attachment A). ZGlobal agreed to "use its commercially reasonable best efforts to ensure that IID is able to perform the services itself and without ZGlobal's support at the expiration of the term.

(Master Agreement Attachment A). Further, ZGlobal was to "notify IID of commercially reasonable methods of improving its performance of services." (Master Agreement 5.1).

ZGlobal would jointly designate with IID "key ZGlobal positions" within the Energy Department "as critical to providing the Services throughout the Term." (Master Agreement 6.1). Such designated ZGlobal employees were required to "refrain from performing any work for ZGlobal that was "incompatible, inconsistent or in conflict with the performance of services provided to IID." (Master Agreement 6.1). ZGlobal and IID identified four service categories in which ZGlobal could assign its staff: "Power Engineering," "Strategic Planning," "Market Analytics" and "Infrastructure Development." (Master Agreement Attachment A). ZGlobal listed all of its personnel for hire to IID, from Mr. Alaywan himself as "President & CEO Operations" to several tiers of engineers per category and even as far down to "QA / QC" personnel. (Master Agreement Attachment A). In other words, the Master Agreement allowed ZGlobal to fill the recently vacated leadership positions in IID's Energy Department with ZGlobal's employees.

Mr. Alaywan was thus given significant latitude under the Master Agreement to provide the agreed-upon services to IID and to "perform the Services as it deems appropriate." (Master Agreement Attachment A). In addition to assigning "key ZGlobal positions," Alaywan was additionally authorized to "designate six (6) employees" who were to be "dedicated exclusively to IID matters." (Master Agreement Attachment A). The Agreement also authorized ZGlobal to "perform new or additional services beyond the scope of the service being provided…" upon request by IID. (Master Agreement 3.2). To facilitate ZGlobal's services, IID granted ZGlobal "a perpetual worldwide royalty free non-exclusive license to use ** all commissioned work (any work specially ordered by

IID) or any part thereof to the extent necessary to provide the services to IID." (Master Agreement 7.4).

Mr. Alaywan agreed at the outset to avoid entangling ZGlobal into contracts that could violate Section 1090. ZGlobal was responsible for "independently examin[ing] government regulations applicable to its business that may affect the Services..." (Master Agreement 13.3). Indeed, ZGlobal employees who relocated to Imperial County to work as full-time IID employees agreed to "submit Form 700 if requested by IID." (Master Agreement Attachment A). Form 700 is a financial interest disclosure form provided under California law by the Fair Political Practices Commission, and must be filed by "employees, appointed officials, and consultants filing under a conflict of interest code."[5] IID thus understood that ZGlobal's employees would potentially be subject to Section 1090 because of the leadership roles they were expected to fill within the Energy Department.

In summary, Alaywan held a key advisory role within IID's Energy Department as evidenced by the Master Agreement. Alaywan, by virtue of his leadership of ZGlobal and IID's reliance upon ZGlobal in Energy Department matters, was entrusted with engaging in and advising on public contracts as contemplated by *Sahlolbei*. *See e.g.* 230 Cal. 5th at 240.

Indeed, IID management expected to follow Alaywan's advice and, by extension, that of his employees, in making decisions on Energy Department contracts. Alaywan himself is a licensed professional engineer with over 30 years of experience and holds numerous leadership positions. Most notably, Alaywan was a founding member of the California Independent System Operator, and

[5] See http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Form%20700/2016-17/Form_700_2016_2017.pdf

served as a managing director for engineering and market operations therein.[6] IID management recognized Alaywan's expertise, hired his consulting firm to conduct deep analysis of transmission engineering data in a mission-critical lawsuit against the California Independent System Operator, and utilized his expertise again to quality-check the work product of the Energy Department's most senior employees. By the time IID management retained ZGlobal per the Master Agreement, IID had come to rely on the advice of Alaywan and his firm.

Given IID's previous successful association with ZGlobal, it is reasonable to infer that IID entered into the Master Agreement to tap into Alaywan's expertise within IID's Energy Department after IID was forced to remove several senior staff members for systemic incompetence. Any reasonable analysis of the Master Agreement between IID and ZGlobal for long-term consulting services, and the context thereof, reveals Ziad Alaywan was a public official within the purview of Section 1090.

B. Alaywan was Sufficiently Involved in the Making of IID's Public Contracts to be Considered a Public Official for Section 1090 Purposes

Alaywan was thus "actually involved in the making of public contracts [for IID] and in doing so [arguably] exploited an official position." *People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal 5th 230, 240.

On January 26, 2016, Mr. Alaywan was involved in making three Net Energy Metering public contracts for IID with Imperial Valley College (IVC) for a total of 2.5 MW of electricity. (Interconnection Agreements for Net Metering)

On May 8, 2016, Mr. Alaywan was involved in making a public contract for IID consisting of an Interconnection Agreement with Regenerate Power LLC

[6] See e.g. https://www.zglobal.biz/ziad

known as the Seville Phase 3 Solar Generating Facility (Community Solar) consisting of 70MW.

On May 26, 2016, Mr. Alaywan was involved in making a public contract for IID consisting of a Second Amendment to the Valencia I, 2 and 3 Feed-in-Tariff Power Purchase Agreements. (2nd Amendment to the Valencia I, 2 and 3 Feed-in-Tariff Power Purchase Agreements)

On August 16, 2017, Mr. Alaywan was involved in making a public contract for IID consisting of Virtual Net Billing Contract for Imperial Valley College for 2.5MW of electricity. (Virtual Net Billing Contract for Imperial Valley College)

C. Alaywan was Financially Interested in Public Contracts of the IID Energy Department in Which He Participated

Mr. Alaywan held a financial interest in the GL IVC Solar, LLC, which is the system owner of a photovoltaic electric generation system at IVC. GL IVC Solar, LLC, is party to a power purchase agreement with IVC.

Mr. Alaywan held a financial interest in Green Light Energy Corp., which was a party to a purchase power agreement and an interconnection agreement with IID for the Valencia I solar project.

Mr. Alaywan held a financial interest in Apex Energy Solutions, LLC, and Solana Energy Farms 1, LLC, which in turn owns the real property to be used for a 70 MW solar project known as Seville 3.

Mr. Alaywan held a financial interest in Green Light Energy Corp., which was a party to a purchase power agreement and an interconnection agreement with IID.

In concluding there are credible issues, IID does not conclude in this report that Mr. Alaywan has violated Gov. Code Section 1090. IID is of the

settled opinion that it must take corrective action to ensure no improper benefit is taken from a contract that arguably transgresses Section 1090.

V. RESOLUTION

A. IID Remediation of 1090 Claims by Good Faith Settlement

Given the facts and law applicable as explained further below, we suggest IID enter into a good faith settlement to facilitate remedial action on all contracts subject to Section 1090 violations.

The concept of a good faith settlement originates from Cal. Code Civ. Proc. § 877.6, which states in relevant part:

> "…a settling party may give notice of settlement to all parties and to the court, together with an application for determination of good faith settlement and a proposed order. The application shall indicate the settling parties, and the basis, terms, and amount of the settlement…
>
> A determination by the court that the settlement **was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor** for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (emphasis added).

"As understood in law, good faith has a settled and well-defined meaning, which generally imports that in any given case the transaction was honestly conceived and consummated without collusion, fraud, knowledge of fraud, and without intent to assist of a fraudulent or otherwise unlawful design." *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.* (1985) 38 Cal. 3d 488, 505. In the context of a settlement, good faith requires an amount that "appears to be within the reasonable range of the settling party's proportionate share of comparative liability…" *North*

County Contractor's Ass'n v. Touchstone Ins. Svcs. (1994) 27 Cal. App. 4th 1085, 1089-90. In turn, whether the proposed settlement amount is reasonable depends on a slew of factors:

> "(1) a rough approximation of plaintiff s total recovery and the settling party's proportionate liability; (2) the amount paid in settlement; (3) recognition that a settling party should pay less in settlement than if they were found liable following trial; (4) any allocation of the settlement proceedings among multiple plaintiffs; (5) the settling parties; (6) financial condition and insurance policy limits, if any; and (7) evidence of any collusion, fraud, or tortious conduct between the settling defendant and the plaintiffs designed to make the non-settling parties pay more than their fair share." *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.* (1985) 38 Cal. 3d 488, 499 (numbering added).

There are a few limitations to a good faith settlement. A settlement must not be "so far out of the ballpark in relation to [the *Tech-Bilt*] factors." *Id*. at 499-500. "[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." *Id*. at 499.

A good faith settlement thus "leaves substantial latitude to the parties." *Id*. at 500. Courts have expressed confidence in allowing parties to freely pursue settlements:

> When testing the good faith of a settlement figure, a court may enlist the guidance of the **judge's personal experience and of experts in the field**. Represented by knowledgeable counsel, settlement negotiators **can predict with some assurance** whether a settlement is within the reasonable range permitted by the criterion of good faith. The danger that a low settlement violates the good faith clause will not impart uncertainty **so long as the parties behave fairly** and the courts maintain a realistic awareness of settlement imponderables." *Id*. at 500-01 (emphasis added).

Given the myriad issues between ZGlobal, its related entities and business partners who contracted with IID, and IID itself, a good faith settlement provides the best opportunity for IID to take remedial action against contracts with Section 1090 issues. We propose hiring a local mediator with impeccable credentials to reach a settlement with respect to any and all such contracts. Our analysis of the legal issues surrounding Section 1090, as applied to Mr. Alaywan below, makes clear he was subject to Section 1090. He, therefore, cannot profit from or recover consideration from any contracts that were in violation of Section 1090. Although there are mitigating issues, IID will ultimately extract a favorable settlement from ZGlobal.

B. Mr. Alawayn's Positions on the Issues

IID invited Ziad Alawayn to provide his position on the 1090 issues. The following was provided by his legal counsel in response to IID's invitation:

> *ZGlobal provides its analysis of the background, relevant events and legal issues relating to ZGlobal's work for IID since October 2015. There has been no violation of Government Code §1090. ZGlobal and IID agreed to an arrangement (largely at the behest of IID) for the use of ZGlobal personnel in an "embedded" capacity, beginning in late 2015. Under this arrangement six ZGlobal personnel worked full time under the sole direction of IID management at IID facilities ZGlobal's principal, Ziad Alaywan was initially reluctant to agree to any contract which would result in possible conflicts of interest and the consequent necessity of ZGlobal's abandoning its ongoing consulting work for its clients who had dealings with IID. IID's general counsel, Ross Simmons, proposed a solution similar to a "Chinese wall" (similar to the practice in which the lawyers representing clients with possible conflict issues are "walled off" from the rest of their firm to protect exchanges or communication that may lead to possible conflicts of interest). This arrangement recused the embedded ZGlobal personnel from working on any IID matter involving potential conflicts with ZGlobal's consulting clients. The embedded ZGlobal employees were thus insulated from doing work relating directly to contracts with other*

ZG clients. IID entered into a contract which addressed any potential conflict issues by requiring disclosure by ZGlobal of its clients who might be involved in present or future dealings with IID, and recusal of embedded ZGlobal personnel from involvement in contractual recommendations or pre-contract decision-making at IID.

Acting in good faith, and in reliance on the assurances of IID's counsel that these proposed procedures obviated any possibility of ethical or legal impropriety, Ziad Alaywan, on behalf of ZGlobal, agreed to this arrangement.

Now, over two years later, after having sought ZGlobal's help and repeatedly assured ZGlobal of the working arrangement's ethical propriety and legality, IID appears to be questioning whether there have been §1090 violations. The unfairness is clear. IID is now questioning whether ZGlobal's agreement to a contractual arrangement which IID, through its counsel recommended as a legal measure to obviate any possible violation, has transgressed.

ZGlobal's work for IID, both before and after October 2015, has been exemplary. ZGlobal's studies and suggestions have saved IID, and consequently its Imperial County ratepayers, hundreds of millions of dollars. Whenever IID has asked for help, ZGlobal has responded. Its reward is now to have its integrity impugned, its motives questioned, and the agreed payment for its legitimate work stinted and withheld.

ZGlobal's conduct has been fully transparent. In its "Proposed Option" submitted 9/21/2015 at IID's request to IID, ZGlobal set out a list of over 62 clients including Green Light Imperial and Renewables LLC. It listed under "Our Solar Projects," the Greenlight portfolio of 80 MW PV Solar facilities. Under "Our Energy Storage Projects" it described Greenlight's Clarksville Battery Storage projects. Ziad Alaywan specifically provided a hand written list of ZGlobal clients in the Imperial Valley, which included: Gestamp Solar, Imperial Water Venture, Green Light Energy Corp., Regenerate Power, Sol Orchard, CESP, T Solar, Cal Energy, Ormat, Energy Source, G. Builders, and Southern Co. / First Solar.

Through the two year relationship governed by the contractual regime, ZGlobal has updated IID on its consulting clients' identities and projects. It has recused itself on multiple occasions from work which would create a conflict of interest between a consulting client and IID;

and it has scrupulously adhered to the "walled-off" procedure agreed by itself and IID.

In September of 2015, and before the signing the Master Service Agreement ("MSA") with IID, ZGlobal (ZG) disclosed a list of their clients in the Imperial Valley (Exhibit 2). It was the recommendation of the IID's general counsel to design the MSA in such way as to allow ZG to support IID, while at the same time allowing it to continue to provide consultant services to its other clients. To implement this proposal, IID proposed a framework in which ZG would specify ZG engineers by name, share these names with IID and "wall-off' these engineers from other ZG activities. This measure was to specifically ensure that there was no conflict of interest. The MSA drafted by IID was designed to ensure transparency and avoid conflicts of interest.

On October 19, 2015, ZG signed a 3-year consultant agreement ("MSA") (Exhibit 3) to provide specific technical assistance that did not include contract negotiation or contractual decision-making involvement. (See Exhibit 4 for specific MSA Tasks). As agreed, the MSA between IID and ZG stipulated that ZG would "wall-off' the ZG engineers who were dedicated exclusively to IID work.

During the two years from Oct 19, 2015 through October 31, 2017, and based on the IID proposal and the MSA, a process was put in place to ensure that the ZG engineers who were dedicated to IID would not (1) perform any other Non IID work and (2) not perform work related to other ZG clients.

ZG adhered to these requirements by:

- *Periodically disclosing to IID the names of ZG engineers who were "walled-off' from other ZG activities and disclosing to IID all ZG engineers who were performing non-IID related work (See Exhibits 8 to 14).*
- *While at IID and in accordance with the MSA, ZG disclosed the names of the projects that ZG engineers worked on. The embedded ZG engineers recused themselves from working on the Valencia and Seville projects.*

ZG has disclosed potential conflicts, and when necessary, recused from work involving potential conflicts.

C. Dispute Resolution Under the Master Agreement

Section 17 of the Master Agreement provides for the parties to resolve any disagreement arising under the agreement by mediation before turning to litigation. Section 17 provides, in pertinent part:

> **17. DISPUTE RESOLUTION**
>
> **17.1 General.**
> Any dispute or controversy between the Parties with respect to the interpretation or application of any provision of this Agreement or the performance by ZG or IID of their respective obligations hereunder will be resolved as provided in this Article.
>
> **17.2 Informal Dispute Resolution.**
> Each Party agrees that before initiating any litigation, the Parties will first attempt to resolve their dispute through mediation using a qualified and experienced third-party mediator in a location to be mutually determined by the Parties or, if the Parties cannot agree, in Imperial County, California. The costs of such mediation will be equally divided between the Parties. Each Party will designate a duly authorized officer or representative with authority to bind the Party and meet with the mediator in good faith. In the course of mediation, the Parties agree to exchange informally such information as is reasonably necessary and relevant to the issues being mediated. If such mediation is unsuccessful, then either Party will have the right to initiate litigation in the appropriate court as provided herein. In such event, no part of the mediation, including the statements made by the Parties or the mediator, will be admissible against either Party in the litigation.

D. Mediation with the Honorable Irma E. Gonzalez (Ret.)

The parties have agreed, as provided in Section 17 of the Master Agreement, to resolve all outstanding Government Code Section 1090 issues by mediation. The parties have agreed to appear before the Honorable Irma E. Gonzalez (Ret.), who has agreed to oversee the mediation process directed to reach an agreed-upon

solution. Two mediation sessions have been set in San Diego for January 11 and 18, 2018.

Judge Gonzalez' judicial career spans nearly 30 years. Judge Gonzalez was appointed to the United States District Court for the Southern District of California in 1992, serving as Chief Judge from 2005 to 2012. Prior to her appointment to the federal bench, Judge Gonzalez worked as an Assistant U.S. Attorney in the District of Arizona and the Central District of California, as well as an attorney in private practice. She later served as a U.S. Magistrate judge and a San Diego County Superior Court judge. Judge Gonzalez is highly regarded by counsel for her fairness and deep knowledge of legal issues, and she brings an experienced approach to resolving even the most complex and contentious disputes. Judge Gonzalez has agreed to act as the mediator to resolve the issues in this matter.