



GOVERNMENT CODE SECTION 1090 THE BASICS & RECENT DEVELOPMENTS

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INTEREST IN PUBLIC CONTRACTS (GOV. CODE § 1090)



Financial Interest in Public Contracts Government Code § 1090

If:

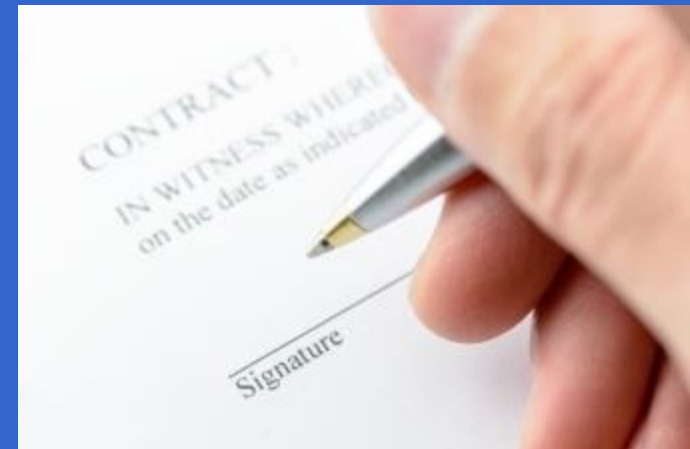
- A Public Official
- Who Has a Financial Interest
- Makes A Contract
- Then:
- Contract is VOID
- Penalties Apply





Financial Interest in Public Contracts Two Scenarios

- Member of multi-member board approving contract
- Individual official or advisory board member of Authority approving contract





Facts: Board member Jones owns the construction company that has been awarded the contract to remodel the Authority offices. She recuses herself from participating or voting to approve the contract.





Holding: The contract is void.

Analysis:

- Jones is financially interested in the contract.
- A Board member's interest in the contract prohibits the Board from entering into the proposed contract, even though the member does not participate in and abstains from the actual decision.



Employee Scenario

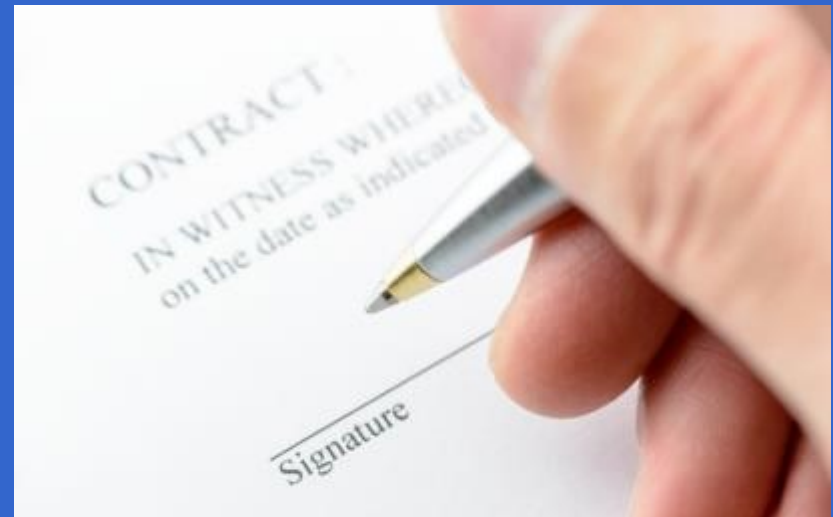
- Facts: A firefighter wants to contract to sell a unique fire protection device that he invented to the city's fire department. The decision would be made by the city manager without any input from the employee.
- Question: May the contract be made?



Employee Scenario

Answer: Yes, if he

- discloses his interest and
- disqualifies himself from participating in, or influencing the decision making process.



Contract Defined

- Use general contract principles
- Examples:
 - Construction contracts
 - Purchases
 - Development agreements
 - Civil service appointments
 - Grants and donations





“Making” the Contract

“Making” includes:

- Negotiations,
- Discussions,
- Reasoning,
- Planning, and
- The “give and take which goes beforehand in the making of the decision to commit oneself
.....”



- **Financial Interest**
 - Direct (contracting party)
 - Indirect (related to contracting party)
- **Effect**
 - Positive or negative
- **Certainty not required**





Remote Interest Exceptions

Requirements: 1091(b)

- Public disclosure noted on records
- No attempt to influence
- Board acts in good faith

16 Exceptions, including:

- Employees, in certain cases
- Suppliers, in certain cases
- (for at least 5 years before election/
appointment to office)



WARNING! THESE ARE FACT-SPECIFIC - CHECK WITH YOUR ATTORNEY



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MUNICIPAL LAW



“Non-Interest” Exceptions - § 1091.5

- **Requirements**
 - Some do not require disclosure or disqualification
- **14 Exceptions, including:**
 - Corporate ownership
 - Less than 3% of shares, and
 - Income of less than 5% of total
 - Expense reimbursements
 - Recipient of public services



Ramifications

- **Criminal**
 - Willful Violation = Felony
 - Lifetime bar to public office
- **Civil**
 - Contract = Void and unenforceable
 - Disgorgement of all money
 - Civil Penalties
- **Administrative Fines**





Recent Developments

- FPPC Administrative Enforcement & Advice
- Consultant coverage
- “Additional work” issue
- Private § 1092 Law suits



FPPC ADMINISTRATIVE ENFORCEMENT & LEGAL ADVICE

Prior to 2014, FPPC had authority over only the Political Reform Act.

AB 1090 (2013), eff. January 1, 2014 gave FPPC jurisdiction over § 1090 violations by adding civil and administrative penalties enforceable by FPPC initiated administrative or civil actions with penalties of \$10,000 or 3x the value of the financial benefit



FPPC ADMINISTRATIVE ENFORCEMENT & LEGAL ADVICE

District Attorney consent required for FPPC to investigate, prosecute and fine

As a result, no FPPC § 1090 enforcement actions

FPPC also has authority to issue opinions and advice regarding § 1090 AND ISSUES
ADVICE LETTERS REGULARLY USUALLY
6-10 EACH MONTH—**GREAT RESOURCE!**



CONSULTANT COVERAGE

People v. Superior Court (Sahlolbei) (2017)

3 Cal.5th 230

Public hospital employed Dr. Sahlolbie, a independent contractor surgeon, to recruit other doctors to staff the hospital. Sahlolbei arranged for contracts with doctors that included a kick-back to him. Charged with violating § 1090, claimed he was not subject to the law as an independent contractor



CONSULTANT COVERAGE

California Supreme Court rejected the doctor's claim. Independent contractors who act like public agency employees/officials with "responsibilities for public contracting similar to those belonging to formal officers" are covered by § 1090's prohibition on having a financial interest in the contract



CONSULTANT COVERAGE

But not ALL consultants are covered. Only those “entrusted with ‘transacting on behalf of the Government’ and turns on the “extent to which the person influences an agency’s contracting decisions.” “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....”



CONSULTANT COVERAGE

Consultants “make” contracts w/l the meaning of § 1090 if “their positions afford them the opportunity to influence execution of the contracts directly or indirectly to promote their personal interests.”



Consultants & “Additional Work”

- GC 1090 applies to officials, officers and employees.
- An outside consultant can be considered an “employee” under the law when that consultant acts in an advisory role and has the ability to “exert considerable influence” over the contracting decisions of the public agency. *Hub City Solid Waste Service, Inc. v. City of Compton*



Consultants & “Additional Work”

- If a consultant qualifies as an “employee” and worked on an RFP, design or planning of any kind for a future contract or “additional work,” the consultant has a conflict under GC 1090 because proceeding with the new contract or “additional work” would be considered to result from the “making of a contract” and the consultant is disqualified from the new contract or additional work.



- PGA Golfer and San Diegan Phil Mickelson acted as a consultant for the City of San Diego to revamp and improve the Torrey Pines Golf Course. A highly modified version of his plan---design---was adopted by the City. But, when he and his company bid on the actual work.....



CALIFORNIA

Fair Political Practices Commission

- The FPPC stymied Phil and ruled in an Advice Letter that he and his company could not bid on the actual project work because his work as a design consultant meant he had participated in “making” the contract.



Consultants & “Additional Work”

The rule: “Where a consultant makes a recommendation to a public agency that will create additional work and income for the consultant’s employer that is beyond the scope of the contract under which the consultant is rendering advice, then a conflict of interest arises.” (*Eckis Advice Letter, 93-270.*)



Consultants & “Additional Work”

Since the “Mickelson” Advice Letter, the FPPC has issued a series of Advice letters refining the notion of what constitutes offering a recommendation---“making” the subsequent contract---by consulting on prior related work.



Consultants & “Additional Work”

Sanchez Letter: Project design consultant not prohibited from contracting to provide engineering design services during construction of a project because the project was awarded to a construction contractor and “second” contract” responded to construction contractor’s requests, not the initial design. **“Intervening party or attenuation”**



Consultants & “Additional Work”

Kiernan Letter & Strkyer Letter & Stroud Letter

Consultant who provided “technical” advice or “needs assessment” could later contract for actual construction project work.



Consultants & “Additional Work”

Hypo:

Abel Engineering performs “needs assessment” work on electrical infrastructure at a district building. District then plans to hire a consultant to do design work for the project and then a construction company to do the project, itself. What can Abel Construction do?



Consultants & “Additional Work”

1. Needs assessment work. DONE.
2. Design work? YES.
3. Construction work? YES, unless hired to do design work (2.)

So, can do 1. and 2. OR 1. and 3. but not 1., 2., & 3.



Private § 1092 Law Suits

Gov. Code § 1092: “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.”

When a contract is “voided” or declared void, all benefits of the contract---profits, proceeds---are “disgorged” and returned to the government agency.



Private § 1092 Law Suits

Over the years, the appellate courts allowed, without challenge, private parties to bring suit under § 1092 to void a public agency contract (like a “private Attorney General” action). Once that practice was challenged, the appellate courts split, some allowing such suits to proceed, and another holding there is no such private right of cation.



Private § 1092 Law Suits

Why is this important?

Many times, the government entity does not believe the contract violates § 1090 and wants the contract to be performed. But, a citizen's group or individual who might oppose a project will sue asserting the contract is void under § 1090. This forces the government entity into court to defend the contract, along with the counter-party.



Private § 1092 Law Suits

San Diegans for Open Government v. ...City of San Diego

“Private taxpayers group” sued to invalidate a bond refund approval for San Diego’s Petco Baseball Park





Private § 1092 Law Suits

SDOG claimed the banks involved were “public officials” and could not serve as bond trustees---unlawful interest in bond transaction.

Superior Court tossed SDOG’s lawsuit, held no right to sue. Court of Appeal Reversed. California Supreme Court Granted Review. Expect a decision next summer.