Navigating Conflict Issues in Engaging Professional Consultants

City Attorneys Department

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Conflicts of Interest Laws

- Enacted to address inevitable conflicts of interest
 - –Government decision-making (PRA)
 - –Public contracts (Section 1090)
- Focus today is Section 1090 and the related concept of "organizational conflicts of interest"

You "shall not be *financially interested* in any *contract made*" in your official capacity, or by any body or board of which you are a member.

Government Code §1090 *et seq.*





- Official Subject to Section 1090?
 - -Officers
 - Employees
 - -Consultants
 - In role of agency staff?
 - Independent contactors?
 - Corporations?



- Making or Participating in Making a Contract
 - Includes "preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids" (*Millbrae Ass'n. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222.)



- Can you get advice?
 - YES! A.B. 1090 (2013) allows the FPPC to:
 - Provide opinions and advice
 - Bring civil and administrative enforcement actions, after consultation with D.A.
- Penalties & consequences of violation
 - Contract = void and refund money
 - Felony: imprisonment and fines (\$5,000-\$10,000)
 - Attorneys' fees
 - Can never hold another public office



1090 and Consultants

Are consultants covered by 1090?

- Initial statute only applied to "officials"
- Shaefer v. Berinstein applied it to employees (1956) 140 Cal.App.2d 278
- 1963 Amendment added "employee" to statute [Stats. 1961, Ch. 2172]
- Recent court decisions have broadened reach of the statute to include consultants and corporations providing consulting services



Davis v. Fresno Unified School District (2015) 237 Cal.App.4th 261

Role of contractor in lease/leaseback deal:

- Contractor helped prepare construction documents
- Contractor entered into lease agreement to construct school using same documents

Arrangement found to violate 1090, as contractor helped to "make" contract.



Davis v. Fresno Unified School District

Court cites two cases re <u>individuals</u> acting as independent contractors:

- Hub City—President of LLC that advised city on trash issues steered contract to another firm he owned
- Hanover—Two individuals that steered contract to a corporation



 Davis court distinguished People v. Christiansen ((2013) 216 Cal.App.4th 1181), a criminal case, which refused to apply 1090 to a consultant with multiple conflicts, relying on the common law definition of "employee." The *Davis* court limited Christiansen to the criminal context.



Davis v. Fresno Unified School District

Davis court concludes that since "the statute's object is to limit the *possibility* of any influence, direct or indirect, that might bear on the individual's decision" 1090 would apply to the corporation in that case.

People v. Superior Court (Sahlolbei) (2017) 3 Cal.5th 230

- Doctor, an independent contractor at public hospital, served on hospital's medical staff advisory committee on hiring
- Doctor recommended hiring of a new doctor, then skimmed share of new doctor's compensation via contract



People v. Superior Court (Sahlolbei)

- CA Supreme Court rejects claim that 1090 doesn't apply to independent contractors
- Court rejects use of common law definition of "employee" and disapproves Christiansen to the extent inconsistent
- Court finds that not all independent contractors are subject to 1090



People v. Superior Court (Sahlolbei)

- Independent contractors that "transact on behalf of the Government" are covered
- To the extent an individual "influences an agency's contracting decisions or otherwise acts in a capacity that demands the public's trust" they are covered by 1090



People v. Superior Court (Sahlolbei)

- Court declines to adopt test of whether the contractor occupies a position that carriers the potential to exert "considerable influence"
- Focus is whether they "engage in or advise on public contracting" on the public's behalf

Alternative Project Delivery Methods

- Design-Bid-Build—Roles are clear
- Design/Build—Designer joins with contractor
- CM at Risk—Construction Manager can potentially self-award subcontract
- Lease/Leaseback—Avoids bidding, but we can't have contractor doing the design!

What specific actions constitute "participation"?

Easy:

- Negotiations
- Drafting contracts or specifications
- Planning
- Preliminary discussions
 (Stignall v. Taft (1962) 58 Cal.2d 565)

What specific actions constitute "participation"?

More difficult "participation" questions:

- Development of capital improvement plan
- Providing technical advice as subconsultant
- Continuing services provided pre-bid (such as construction management)
- Services in successive phases of project



FPPC Advice Letters

Breakdown of issues:

- When is "making a plan" not part of "making a contract"?
- What about follow-on work?
- Is life safe for the sub-consultant?



A Breath of Fresh Air!

- Sanchez Advice Letter (A-18-57)
 - Consultant (Carollo Engineers) provided engineering services to the City of Turlock during design phase of recycled water project
 - City wished to have Consultant provide services during the construction phase of the project
 - FPPC advised that this didn't violate 1090, because Consultant didn't participate in the making of the follow-on <u>engineering</u> contract, even if it participated in the construction contract



Organizational Conflicts of Interest

U.S. Office of Management and Budget: *Uniform Administrative Requirements, Cost Principles, And Audit Requirements For Federal Awards*(Title 2, Code of Federal Regulations, Part 200.112)

Federal Transit Administration, *Third Party Contracting Guidance*, Circular C 4420.1F Page VI-5

Organizational Conflicts of Interest

An organizational conflict of interest occurs when any of the following circumstances arise:

- Lack of Impartiality or Impaired Objectivity. When the contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the recipient due to other activities, relationships, contracts, or circumstances.
- Unequal Access to Information. The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
- <u>Biased Ground Rules</u>. During the conduct of an earlier procurement, the contractor has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.

[Federal Transit Admin., Third Party Contracting Circular]



Take-Aways

- New contracting approaches may raise unique issues
- Don't be afraid to ask FPPC for guidance
- Get a better answer by providing FPPC with a clear statement of the situation
- Be careful with follow-on contracts, especially for construction work
- Follow-on work is safer if contemplated in original contract
- Most planning work won't disqualify the consultant, but check to make sure FPPC agrees