

# Navigating Pitfalls Under Government Code Section 1090

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# What We'll Cover

- Overview of Gov. Code § 1090
- How § 1090 applies to consultants and independent contractors
- How to navigate conflicts that arise when an official holds positions with two contracting public entities
- Five practice tips
- Your questions!

# Overview of Gov. Code § 1090

# Gov. Code § 1090

- Public officials including “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.”
- Public officials can include government consultants

# The Elements Of A Violation

1. The official participated in making a contract
2. The official acted in his official capacity when doing so
3. The official had a cognizable financial interest in the contract
4. The financial interest does not fall within an exception

# § 1090 Is Among the Harshes Conflict of Interest Laws In the Nation

- It doesn't matter if it is a good or bad contract
- Almost any participation counts
- It doesn't matter if there is actual fraud, dishonesty, unfairness or injury
- It doesn't matter if the official acted in good faith or on the advice of counsel
- One conflicted member disqualifies the entire board – recusal doesn't help

# § 1090 Is Among the Harshesht Conflict of Interest Laws In the Nation

## Consequences of a Violation:

- Contract is voidable
- May have to disgorge benefits of contract
- Knowing and willful violations punishable by
  - Fine of up to \$1,000
  - Imprisonment
  - Permanent disqualification from holding public office

# Who Can Bring A Challenge?

Almost Anyone:

- A party to the contract
- Probably taxpayers
- The Attorney General
- The District Attorney
- The Fair Political Practices Commission

# Making a “Contract”

“Contract” is construed broadly to include:

- Grants
- City Council’s contribution or grant of public funds to a nonprofit
- Development agreements
- Decision to pay travel expenses

# “Making” a Contract

Construed broadly to include any act involving:

- Preliminary discussions
- Negotiations
- Compromises
- Planning
- Creating plans/specifications
- Soliciting bids
- Even attempting to influence a related decision

# Qualifying Financial Interests

- Direct or indirect
- The possibility of gains or (maybe) losses
- Upshot: “However 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.”

*People v. Deysher*, 2 Cal. 2d 141, 146 (1934).

# Exceptions

## Remotes Interests

- Gov. Code § 1091
- Applicable only to members of boards or commissions
- Applicable only if member discloses her financial interest on the record and abstains from participating in making the contract

## Non-interests

- Gov. Code § 1091.5
- Applicable to officers, employees and consultants
- Person with non-interest may participate in the making of the contract IF she follows the requirements of the statute

# How § 1090 Applies To Consultants And Independent Contractors

# Consultant/Independent Contractor Liability

- § 1090 applies to consultants and independent contractors who have been entrusted to act on the government's behalf
  - Ask whether they exert influence over contracting decisions
- Corporate entities can be consultants for § 1090 purposes
- Consultants can be civilly and criminally liable for § 1090 violations

# Contracts Between Consultants And Public Entities

- A consultant may negotiate his own contract with a public entity IF:
  - He is acting in his private capacity
  - His compensation is not contingent on executing contracts with third parties
- The contract CAN provide additional compensation for the consultant to perform new services

# Contracts Between Consultants And Public Entities

- A consultant may not advise a public entity regarding a contract with a third party if the consultant has a financial interest in the contract
  - The consultant is likely financially interested if the contract results in additional work for the consultant
  - A violation is more likely to be found if the form of compensation (contingent v. flat rate) could influence the consultant's advice

# Contracts Between Consultants And Public Entities

- A consultant who advises a public entity on one phase of project may not enter into a contract to execute a later stage of the project unless:
  1. The consultant provides only limited, technical advice concerning the first phase
  2. The later contract results from de novo review, or
  3. The consultant will not gain or lose as a result of the new contract

# Navigating Conflicts Arising When An Official Holds Positions With Two Contracting Public Entities

# Conflicts Arising From Contracts Between Two Public Entities

When a person serves two public entities, and those entities seek to enter into a contract, conflicts may arise. For example:

- An employee of a public agency serves as a board member of another public entity
- A board member serves as a consultant to a public agency

# Conflicts Arising From Contracts Between Two Public Entities

Two exceptions may apply:

1. Different Department: a “non-interest” under Gov. Code § 1091.5(a)(9)

If a person receives salary, per diem or reimbursement for expenses from a public agency that may enter into a contract with another entity who the person serves as an official, that person will be deemed to have a “non-interest” in the contract IF the contract does not directly involve the department of the agency that employs the person

AND the person:

- Discloses the interest to the board at the time of consideration of the contract
- The board notes the interest in its official records

# Conflicts Arising From Contracts Between Two Public Entities

Two exceptions may apply:

2. Same Department: A “remote interest” under Gov. Code § 1091(b)(13):  
If a person is a member of a board, and receives salary, per diem or reimbursement for expenses from a department of another public agency that seeks to enter into a contract with the board, that person will be deemed to have a “remote interest” in the contract IF the person:
  - Discloses the interest to the board
  - Notes the interest in its official records
  - The board or body approves the contract without the vote of the person with the remote interest

# Practice Tips

# Practice Tip # 1:

- If a public entity may want to use the same consultant for an entire project, enter into a single contract covering the entire project
  - This avoids a conflict that may arise if (for example) the public entity wants the same consultant to both plan and implement a project
  - The contract can always provide that subsequent phases of a project are subject to contingencies
  - Structure compensation with conflicts in mind

# Practice Tip # 2

- If a consultant may advise a public entity concerning third party contracts, make sure that consultant's compensation is not tied to those third party contracts
  - Before entering into a contract with a consultant, consider whether the public entity will need or want the consultant's involvement or advice concerning third party contracts
  - Structure compensation with that possibility in mind

# Practice Tip # 3

- Vet contracts between government agencies
  - Before entering into contracts between government agencies, consider whether an employee or official of one serves the other in any capacity
  - If so:
    - Consider whether the remote or non-interest exceptions can cure the conflict and
    - Whether the contract could be approved without the involvement of that person, if necessary

# Practice Tip # 4

- If a consultant is negotiating the terms of his own contract with a public entity, that consultant should consider whether to retain an independent contractor to handle negotiations on his behalf
  - Doing so eliminates questions about whether the consultant was acting in his official capacity during negotiations

# Practice Tip # 5

- Considerations after identifying a 1090 problem in an existing contract:
  - Determine whether it is in the public entity's best interests to void the contract
  - If not, consider whether it is possible to ratify the contract
  - If not, consider the consequences of not taking steps to address the conflict

Any Questions???