

Site Project Authority Conflicts of Interest--Section 1090

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PROCUREMENT POLICY

In addition to the Authority's Conflict of Interest Code and conduct standards applicable to Stakeholders through their designating agencies, Stakeholders shall . . . promote fair and open competition while a procurement is being conducted

No Stakeholder shall participate in the selection, award, or administration of a bid or contract if the individual has a real or apparent conflict of interest as determined by the Authority Board.

A conflict of interest would include . . . a circumstance in which a Stakeholder, any member of the Stakeholder's family, the Stakeholder's business partner, or an organization that employs or is about to employ any of the parties indicated herein has a financial interest or other personal benefit from the Professional Service provider or other contracting party considered for a contract.

Section 1090 Prohibition

“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.”

(Gov. Code § 1090(a))

Section 1090 Penalties

Contract is voidable “at the instance of **any party**.”

(Gov. Code § 1092(a))

“Every officer or person prohibited by the laws of this state from making or being interested in contracts . . . who willfully violates any of the provisions of those laws, is **punishable** by a **fine** of not more than one thousand dollars (\$1,000), or by **imprisonment** in the state prison, and is **forever disqualified from holding any office** in this state.”

(Gov. Code § 1097(a))

Section 1090 Policy

“[T]he purpose of Government Code section 1090 is not only to strike at actual impropriety, but also to strike at the appearance of impropriety.”
(*City of Imperial Beach v. Bailey*)

EXAMPLE

City Council Member owned land acquired by City for use as a Park.

Member did not participate in discussions and abstained from votes.

Member sought advice from City Attorney.

Member negotiated price based on comps/Fair Market Value.

(Thomson v. Call)

RESULT

Council member forced to repay the City the \$260,000 purchase price, plus interest.

City kept the land.



FACTORS

1. Did the public official participate in making the contract?
2. Did the public official have a financial interest in the contract?
3. Does an exception apply?

EXCEPTIONS

Remote Interest Examples (Applicable only to officers)

That of an employee or agent of the contracting party (see below). (1091(b)(3))

That of a landlord or tenant of the contracting party. (1091(b)(5))

That of a supplier of goods or services if supplied to the contracting party by the officer for at least 5 years prior to assuming office. (1091(b)(8))

And about a dozen others.

EXCEPTIONS

Non-Interest Examples (Applicable to officers and employees)

That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board. (1091.5(3))

That of a nonsalaried member of a nonprofit corporation, provided that this interest is disclosed . . . at the time of the first consideration of the contract, and provided further that this interest is noted in its official records. (1091.5(7))
(Emphasis added.)

And about a dozen others.

EXCEPTIONS

Rule of Necessity

In the interest of the provision of essential government functions, a public agency may acquire essential goods or services from a conflicted source. (*Eldridge v. Sierra View Local Hospital Dist.*)

It applies only in cases of “actual necessity after all possible alternatives have been explored” and “only in cases of real emergency and necessity.” (69 Ops.Cal.Atty.Gen. 102; 4 Ops.Cal.Atty.Gen. 264)

APPLICATION

1. Landowner, Ag Corp, owns land in Water District.
2. Vice President of Ag Corp is a member of the WD Board.
3. Land Corp, a subsidiary of Ag Corp, proposes to grant WD an option to purchase land for use as a groundwater recharge facility. Option would cost \$10,000.

Can WD and affiliate Land Corp enter into the Option Agreement?

APPLICATION

No

Public Officials “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.”



APPLICATION

But the Director is a VP of Ag Corp. Land Corp is a separate entity.

“We must disregard the technical relationship of the parties” when conducting a Section 1090 analysis. (*People v. Honig*)

“However . . .winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection made, a conflict of interest is established. (*People v. Watson*)

This applies also to trusts, closely held corporations, conduits, etc.

APPLICATION

But the Director recused himself and did not participate in the formation of the option agreement or its approval.

“Significantly, when section 1090 is applicable to one member of a board or commission, the proscription cannot be avoided by having the interested member abstain.” (*70 Ops.Cal.Atty.Gen. 45*)

“It is not her participation in the voting which constitutes the conflict of interest, but her potential to do so.” (*City of Imperial Beach v. Bailey*)

Mere membership on a governing board that approves a contract constitutes participation in the making of a contract, even if the financially interested party abstained. (*Fraser-Yamor Agency v. County of Del Norte*)

APPLICATION

But \$10,000 for the option is well below fair market value for the property. It is the best deal available to WD, WD really wants the land, and WD approached Land Corp.

“[I]f the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of its validity”. (*Thomson v. Call*)

APPLICATION

Slight change in facts:

WD Board member is not an officer of Ag Corp, but an employee.

Can WD and Land Corp enter into the Option Agreement?

APPLICATION

MAYBE

“‘Remote interest’ means . . . That of an employee or agent of the contracting party . . .”

(Gov. Code § 1091(a))

APPLICATION

IF

1. The contracting party has 10 or more other employees; and
2. The official was an employee of the contracting party for at least three years prior to the officer initially accepting public office; and
3. The official owns less than 3 percent of the shares of stock of the contracting party; and
4. The employee/official is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party; and
5. The remote interest was disclosed to the board and noted in the official records; and
6. The Board authorizes the contract without counting the vote of the member with the remote interest.

APPLICATION



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BEST PRACTICES

Identify conflicts immediately.

Do not participate in any discussions, deliberations or negotiations.

Promptly notify Executive Director and General Counsel.

QUESTIONS?
