

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

619-236-6220

DATE: October 17, 2014
TO: City Councilmembers
FROM: City Attorney
SUBJECT: Conflicts of Interest Under California Government Code section 1090

At the San Diego City Council (City Council) meeting of September 30, 2014, a contract item on the City Council Agenda was returned to staff due to the financial conflict of interest of a Councilmember. Councilmember Alvarez asked this Office to provide a legal memorandum on California Government Code section 1090 (Section 1090), in particular discussing the principle that the financial conflict of one Councilmember prevents the City Council from taking action on an item.

This memorandum provides a brief summary of the State's financial conflict of interest laws, in particular the distinction between conflicts involving contracts as addressed in Section 1090 as opposed to other governmental decisions, addressed in the Political Reform Act (PRA) (Cal. Gov't Code §§ 87100-87500). Any time a public official has a potential financial conflict involving a contract, analysis must be done under both the Section 1090 and the PRA. Although similar, the statutes are not identical.

The PRA prohibits public officials from participating in governmental decisions in which they have a financial interest. Cal. Gov't Code § 87100. The PRA applies to any "governmental decision" that may have a financial impact on the government official, thus potentially covering everything from broad legislative decisions, such as community plan amendments, to very narrow situations, such as permit issuance or contract approval. *Id.* The Fair Political Practices Commission (FPPC) is the civil enforcement agency for the PRA and publishes the administrative regulations, the FPPC Regulations, which provide more detailed guidance in applying the PRA to any particular set of facts. *See* <http://fppc.ca.gov>. Under the PRA, if a councilmember has a disqualifying financial conflict, the councilmember is required to recuse. Cal. Gov't Code § 87105. However, the City Council may nonetheless act on the item.

Section 1090 is similar to the PRA, prohibiting a public official from participating in the making of a contract when the official has a disqualifying conflict of interest. Cal. Gov't Code § 1090. However, there are important distinctions in a Section 1090 analysis. First, section 1090 applies

only to financial conflicts related to *contracts*. *Id.* For any action being undertaken other than on a contract, the PRA is the applicable statutory body of law and, under the PRA, the conflicted Councilmember can recuse and the City Council can still move forward.

Second, under Section 1090, where the conflicted official is a member of a body, such as the City Council, the body itself is precluded from making the contract, regardless of whether the conflicted official actually participates (*Thomson v. Call*, 38 Cal. 3d 633, 645, 649 (1985); *Finnegan v. Schrader*, 91 Cal. App. 4th 572 (2001)¹), unless the financial conflict can be determined a “remote interest” as provided in Government Code section 1091 or a “non-interest” as provided in Government Code section 1091.5². If the Councilmember’s financial interest fits one of the remote interest exceptions, then the City Council may still act, provided the Councilmember recuses and the financial conflict is noted in the record. If the Councilmember’s financial interest meets one of the non-interest exceptions, then the Councilmember need not recuse and the City Council may consider the matter. Thus, it is only when the Councilmember’s financial conflict does not meet either a remote or non-interest exception that the City Council is precluded from acting on a contract under Section 1090.

The consequences of a Section 1090 violation are severe. The contract approved in violation of Section 1090 is void and unenforceable. *Thomson v. Call*, 38 Cal. 3d at 646. The Section 1090 prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. *Id.* at pp. 646-49. In addition, a willful violation of Section 1090 is a crime, subjecting the public official to potential fine, imprisonment and forever being disqualified from holding office in the State of California. Cal. Gov’t Code § 1097.

If there is any doubt about the ability to act on a particular matter, both the FPPC and the City’s Ethics Commission have helplines and also provide advisory opinions, which should be sought before action is taken, that can provide protection when relied upon by the affected Councilmember. See <http://www.sandiego.gov/ethics/about/help.shtml>, the Ethics Commission webpage for help and advice, and <http://fppc.ca.gov> for the FPPC’s help information. However, reliance on the advice of either the City Attorney or even personal legal counsel is not a defense in any prosecution of a violation of the financial conflict of interest laws. *People v. Chacon*, 40 Cal. 4th 558 (2007).

¹ This disqualification of the entire City Council is also provided in the City’s Ethics Ordinance, “It is unlawful for any contract to be made by the *City* Council or any board or commission established by the *City* Council if any individual member of the body has a financial interest in the contract.” San Diego Municipal Code § 27.3560(b).

² Attached for reference is an excerpt from the California State Attorney General’s Conflict of Interest Guidelines, directly addressing Section 1090 conflicts and the various remote interest and non-interest exceptions. The complete document can be found at <http://oag.ca.gov/conflict-interest>.

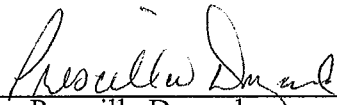
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As a reminder to Councilmembers, in monitoring pending action items for potential financial conflicts, it is important to pay special attention to contract matters. Once a financial conflict is identified, further review must be done to see if the financial conflict falls within either a remote or non-interest exception. Only in those instances may the Councilmember recuse and allow the City Council to consider the matter.

JAN I. GOLDSMITH, CITY ATTORNEY

By  _____
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Chief Deputy City Attorney

PMD:hm

Doc. No.: 878606

cc: Mayor Kevin L. Faulconer

Andrea Tevlin, Independent Budget Analyst

Stacey Fulhorst, Executive Director, San Diego Ethics Commission

Attachment

MS-2014-22

VII. CONFLICTS OF INTEREST IN CONTRACTS

Government Code Section 1090 et seq.¹³

A. Overview

The common law prohibition against “self-dealing” has long been established in California law. (*City of Oakland v. California Const. Co.* (1940) 15 Cal.2d 573, 576.) The present Government Code section 1090, which codifies the common law prohibition as to contracts, can be traced back to an act passed in 1851. (Stats. 1851, ch. 136, § 1, p. 522.) Frequently amended in its details, the basic prohibition has remained unchanged. And, this office and the courts often refer to very early cases when discussing this fundamental precept of conflict-of-interest law. (See, e.g., *Berka v. Woodward* (1899) 125 Cal. 119.)

Section 1090 essentially prohibits a public official from being financially interested in a contract in both the official’s public and private capacities. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1073.) As the California Supreme Court has stated, the purpose of section 1090 is to make certain that “every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.” (*Thomson v. Call* (1985) 38 Cal.3d 633, 650.) Eliminating temptation for public officials, avoiding the perception of impropriety, and obtaining their undivided loyalty have been deemed as extremely important public policy goals in California. (*Id.* at p. 648.) Because these goals are of the utmost importance, it is of no import whether actual fraud or dishonesty is involved in the contract process, whether the contract is fair to the public agency, or whether the public agency loses money from the contract.

Importantly, the Political Reform Act (Gov. Code section 81000 et seq.) enacted by initiative in 1974, did not repeal section 1090. Rather, in analyzing whether a conflict of interest exists, one must consider both the Political Reform Act and section 1090. Even if a contract is permissible under section 1090, it may be prohibited by the Political Reform Act. (See *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1092 [discussing relationship between Section 1090 and the Political Reform Act]; 59 Ops.Cal.Atty.Gen. 604 (1976); see also Chapter I of this Guide for a discussion of the conflict-of-interest provisions in the Political Reform Act.)

B. The Basic Analysis

Section 1090 provides that an officer or employee may not make a contract in which he or she is financially interested. Following is a brief outline of the analysis one should undertake to determine whether section 1090 is implicated in a particular governmental decision.

¹³ All further statutory references in this Chapter are to the Government Code unless otherwise indicated.

1. *Who is the individual with the potential conflict of interest?*
(See Section C of this Chapter)

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed, at both the state and local level. It also applies to certain consultants and independent contractors.

Board members are conclusively presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified himself or herself from any and all participation in the making of the contract. Therefore, if a board member is financially interested in the contract and no exception applies, section 1090 prohibits the contract from being made.

However, when an employee, as opposed to a board member, is financially interested in a contract, the employee's agency may still enter into the contract, as long as the employee plays no role whatsoever in the contracting process.

2. *Does the decision at issue involve a contract and is that contract ultimately executed?*
(See Section D of this Chapter)

If no contract is involved, or if a contract in which an officer or employee has a financial interest is not ultimately executed, no violation exists.

3. *Is the individual making or participating in making the contract?*
(See Section E of this Chapter)

Any participation by a financially interested officer or employee in the process by which such a contract is developed, negotiated, and executed is a violation of section 1090.

4. *Does the official have a financial interest in the contract?*
(See Section F of this Chapter)

Section 1090 does not define when an official is financially interested in a contract. However, the courts have applied the prohibition to include a broad range of interests.

5. *If the official is a board member, does a remote interest exception apply?*
(See Section H of this Chapter)

The remote interest exceptions in section 1091 enumerate specific interests that trigger abstention for board members, but that do not prevent the board from making a contract.

6. *For all officials, does a non-interest exception apply?*
(See Section I of this Chapter)

The interests in section 1091.5 are deemed "non-interests" in that, once disclosed, they do not prevent an officer, employee, or board member from participating in a contract.

7. *Can the limited “rule of necessity” be applied?
(See Section K of this Chapter)*

There is a limited “rule of necessity” to the application of section 1090 where the contract is for essential services and no other source is available or where the official or board is the only one authorized to act.

8. *If a contract has been made in violation of section 1090, what are the consequences?
(See Section M of this Chapter)*

Generally, any contract made in violation of section 1090 is void and cannot be enforced. In addition, an official who willfully commits a violation may be subject to criminal sanctions.

C. Persons Covered

Virtually all board members, officers, and employees are public officials within the meaning of section 1090. (See, e.g., *Thomson v. Call* (1985) 38 Cal.3d 633 [council member]; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [council member]; *People v. Vallerga* (1977) 67 Cal.App.3d 847 [county employee]; *People v. Sobel* (1974) 40 Cal.App.3d 1046 [county employee]; *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533 [contract city attorney]; 70 Ops.Cal.Atty.Gen. 271 (1987) [contract city attorney].) Beginning in 1986, section 1090 became applicable to school boards under Education Code section 35233. Section 1090 also applies to members of advisory bodies, if they participate in the making of a contract through their advisory function. (*City Council v. McKinley, supra*, 80 Cal.App.3d 204; 82 Ops.Cal.Atty.Gen. 126 (1999).)

Independent Contractors

Courts have concluded that independent contractors, who serve in advisory positions that are frequently held by officers and employees, are subject to section 1090. Specifically, “independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency’s contracts.” (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; see also *California Housing Financing Agency v. Hanover* (2007) 148 Cal.App.4th 682 [concluding that an independent contractor who performed a public function by participating in the making of contracts was an “employee” for purposes of inclusion under section 1090]; *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533; *People v. Gnass* (2002) 101 Cal.App.4th 1271; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 206-207; 70 Ops.Cal.Atty.Gen. 271 (1987).) As this office stated “[i]t seems clear that the Legislature in later amending section 1090 to include ‘employees’ intended to apply the policy of the conflicts of interest law . . . to independent contractors who perform a public function and to require those who serve the public temporarily the same fealty expected from permanent officers and employees.” (46 Ops.Cal.Atty.Gen 74 (1965).)

However, the holding in *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469 is worth noting on this point. In that decision the court addressed whether a would-be contractor could participate in a conspiracy to violate section 1090. The court concluded that because a would-be contractor could not make a government contract, he could not violate section 1090, and therefore could not conspire to do so. But the *Klistoff* court did not address the circumstances under which a contractor would be subject to the prohibitions of section 1090.

D. Contract Defined

To determine whether a decision involves a contract, one should refer to general contract principles. (See 89 Ops.Cal.Atty.Gen. 258, 260 (2006); 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) However, the provisions of section 1090 may not be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose. (See *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1333; *People v. Honig* (1996) 48 Cal.App.4th 289, 314; see also *People v. Gnass* (2002) 101 Cal.App.4th 1271.) Several situations involving potential contracts under section 1090 that may not be readily apparent are described below.

Development Agreements and Subdivision Improvement Agreements

Development agreements between a city and a developer are contracts for purposes of section 1090. (78 Ops.Cal.Atty.Gen. 230 (1995); see also 85 Ops.Cal.Atty.Gen. 34 (2002).) Similarly, a subdivision improvement agreement constitutes a contract under section 1090. (See 81 Ops.Cal.Atty.Gen. 373 (1998); 89 Ops.Cal.Atty.Gen. 193 (2006); 89 Ops.Cal.Atty.Gen. 278 (2006); but see § 1091.1 [special exemption from section 1090 for public officials who must deal with government entities regarding the subdivision of land they own or in which they have an interest].)

Grants and Donations

Grants and donations generally are contracts. (See *People v. Honig* (1996) 48 Cal.App.4th 289 [rejecting a claim that a grant was not a contract within the meaning of section 1090].) The benefit to the public from an expenditure of funds for a public purpose is in the nature of consideration, and the funds expended are therefore not a gift. This office has concluded that section 1090 applied to a donation of city funds to a nonprofit entity where the executive director was the spouse of a member of the city council. (89 Ops.Cal.Atty.Gen. 258 (2006).) Likewise, this office opined that a city's future grant of public funds to a nonprofit corporation would be subject to section 1090 because the corporation's executive director was a newly-elected member of the city council. (85 Ops.Cal.Atty.Gen. 176 (2002); but see §§ 1091, subd. (b)(1) and 1091.5, subd. (a)(8) for possible exceptions.)

Payment of Spousal Expenses

Payment of spousal expenses involves the making of a contract. For example, section 1090 prohibits a hospital district from paying the expenses for a board member's spouse to accompany the board member to a conference. The board member has a financial interest in the payment of his or her spouse's expenses and that the payment itself constitutes a contract. (75 Ops.Cal.Atty.Gen. 20 (1992).)

Civil Service Appointment

A civil service appointment is an employment contract. (See 59 Ops.Cal.Atty.Gen. 223 (1960).)

Certificate of Public Convenience and Necessity

A certificate of public convenience and necessity generally is not a contract. This office has concluded that a certificate of public convenience and necessity from a city to operate an ambulance service is not a contract, but rather is in the nature of a license that is regulatory in nature. The same analysis applies to the rate schedule that regulates the prices that the ambulance company can charge its riders. (84 Ops.Cal.Atty.Gen. 34 (2001).)

Modification, Extension or Renegotiation of Existing Contract

A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of section 1090].) Further, where an existing contract requires periodic renegotiation of payment terms, the modification of such terms constitutes the making of a contract. (81 Ops.Cal.Atty.Gen. 134 (1998).) Likewise, sending the payment issue to arbitration or merely allowing the existing terms to continue untouched and intact also constitutes the making of a contract. (89 Ops.Cal.Atty.Gen. 49 (2006); 81 Ops.Cal.Atty.Gen. 134 (1998)). Similarly, modification of a collective bargaining agreement by a school district is making a contract. (65 Ops.Cal.Atty.Gen. 305, 307 (1982); 89 Ops.Cal.Atty.Gen. 217 (2006).)

E. Making or Participating in Making a Contract

Having determined that a contract is involved, the next issue is whether the contract was "made" in his or her official capacity. Importantly, the use of the term "made" in the statute indicates that a contract must be finalized before a violation of section 1090 can occur.

Participating in Making a Contract

Significantly, section 1090 reaches beyond the officials who actually execute the contract. Officials who participate in any way in the making of the contract are also covered by section 1090. The courts have established a broad standard for an official's involvement or participation in the making of a contract in section 1090:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

(*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.)

Participation Is Presumed for Board Members

When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency's contracts irrespective of whether he or she actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).) *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, exemplifies constructive participation in the making of a contract. There the court held that a member of the board of a special district who applied for and was offered the position of district manager while still serving on the board violated section 1090. (See also 84 Ops.Cal.Atty.Gen. 126 (2001) [section 1090 prohibited a community college board of trustees from contracting with a board member to serve as a part-time or substitute instructor]; see also Cal.Atty.Gen., Indexed Letter, No. IL 91-210 (February 28, 1991) [interpreting section 1090 to prohibit a contract between the school district and a member of its governing board to serve as a substitute school teacher]; § 53227 [prohibiting an employee of a local agency from simultaneously serving on the legislative body of the local agency]; Ed. Code, §§ 35107, subd. (b) and 72103, subd. (b) [applying the same prohibition to school and community college employees].)

This absolute prohibition applies regardless of whether the contract is found to be fair and equitable. (*Thomson v. Call* (1985) 38 Cal.3d 633; *People v. Sobel* (1974) 40 Cal.App.3d 1046). Also, a board may not avoid a section 1090 conflict by delegating decision-making authority to another individual or body. (87 Ops.Cal.Atty.Gen. 9 (2004); 88 Ops.Cal.Atty.Gen. 122 (2005).)

However, where the contract is not under the jurisdiction of the board member, the contract is not automatically prohibited by section 1090. (See 81 Ops.Cal.Atty.Gen. 274 (1998) [contracts of County Housing Authority Commission were independent from the county board of supervisors and consequently could employ a member of the board of supervisors as its executive director]; 85 Ops.Cal.Atty.Gen. 87 (2002) [city council member could contract with joint powers authority because it was independent of its city council members]; 21 Ops.Cal.Atty.Gen. 90 (1953) [contracts of the City Treasurer were not under the supervision or control of the city council]; 3 Ops.Cal.Atty.Gen. 188 (1944) [a head court house gardener who owned a private nursery was not disqualified from selling nursery supplies to the county of which he was an employee because of the discretion vested in the county purchasing agent];

17 Ops.Cal.Atty.Gen. 44 (1951) [county supervisor not precluded from contracting for construction work with a school district since the contracts for school buildings or school construction are entered into by Boards of School Trustees without control or supervision of the County Board of Supervisors].)

Where one agency's decision to contract is subject to review and modification by another agency, both agencies are participating in the making of the contract. (See 77 Ops.Cal.Atty.Gen. 112 (1994) [concluding that although a city airport commission had the power to award a contract for the construction of a new airport terminal, the contract could not be awarded to an architectural firm where a member of the firm simultaneously was a member of the city's art commission, because pursuant to the city charter the design of the terminal also had to be approved by the art commission; see also 87 Ops.Cal.Atty.Gen. 92 (2004) [member of health care district could not lease space in a hospital because a health care district was required to approve all leases of hospital property].)

Participation by Employees

When an employee, rather than a board member, is financially interested in a contract, the employee's agency is prohibited from making the contract only if the employee was involved in the contract-making process. Therefore, as long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested. (See 80 Ops.Cal.Atty.Gen. 41 (1997) [firefighters permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacity]; 63 Ops.Cal.Atty.Gen. 868 (1980) [real estate tax appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal]; but see Pub. Contract Code, § 10410 [prohibiting contracts between state employees and state agencies]; see also Chapter VIII of this Guide.)

Persons in Advisory Capacities

The section 1090 prohibition also applies to persons in advisory positions to contracting agencies. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley* (1978) 80 Cal.App.3d 204.) This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, etc., even though they have no actual power to execute the final contract. However, because advisory boards do not actually enter into contracts, members with a financial interest in a contract may avoid a conflict by disqualifying themselves from any participation in connection with the contract. (82 Ops.Cal.Atty.Gen. 126 (1999).)

F. Presence of Requisite Financial Interest

For section 1090 to apply, the public official in question must have a financial interest in the contract in question. Although the statute does not specifically define "financial interest," an examination of case law and the statutory exceptions to the basic prohibition indicate that the

term is to be liberally interpreted. (See *People v. Deysher* (1934) 2 Cal.2d 141, 146, [stating "[h]owever 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."].) Further, "the certainty of financial gain is not necessary to create a conflict of interest The government's right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty." (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

The definitions of the remote and non-interest exceptions contained in sections 1091 and 1091.5 should be consulted for guidance to determine what falls within the scope of the term "financial interest" as used in section 1090. (See 85 Ops.Cal.Atty.Gen. 34 (2002).) Financial interest includes both direct and indirect interests in a contract. (See *Thomson v. Call* (1985) 38 Cal.3d 633, 645, citing *Moody v. Shuffleton* (1928) 203 Cal. 100.) Also, an official may have a financial interest in a contracting party even though he or she will not derive a personal benefit. For example, a public official who is a supplier of goods or services to the contracting party may have a financial interest in that party even though the supplier will not receive any business under the contract in question. (See also § 1091, subd. (b)(6) [remote interest exception for specified individuals when they receive no income under the contract].)

Prior to 1963, section 1090 applied to all interests, not merely financial ones. But in 1963, the Legislature amended section 1090 to limit its coverage to a financial interest in a contract. However, since most reported cases prior to 1963 involved financial interests, these older cases still represent viable interpretations of the law. Even where these cases do not involve a financial interest, they are still instructive on the issue of whether there is a sufficient connection between the contract and the interest held by the official to bring the transaction under section 1090. Therefore, when conducting research on whether an official is financially interested in a contract under section 1090, earlier cases and opinions may be helpful.

Although special statutory exemptions may negate the full effect of the section 1090 prohibition, the following economic relationships generally constitute a financial interest: employee, attorney, agent, or broker of a contracting party; supplier of services or goods to a contracting party; landlord or tenant of a contracting party; and, officer or employee of a nonprofit corporation that is a contracting party. Below is a discussion of several decisions and opinions in which the public officials in question have possessed the requisite financial interest.

Complex Multi-Party Transaction

In *Thomson v. Call* (1985) 38 Cal.3d 633, the Court found that a complex multi-party transaction involving the sale of property from a city council member through an intermediary corporation to the city constituted a violation of section 1090. The corporation obtained the land to convey to the city for use as a park and the corporation was to be issued a use permit for construction of a high-rise building on adjacent property. If the corporation failed to obtain the council member's property, the corporation was to pay to the city a sum of money with which it could acquire the land through eminent domain. Had there been no discussions between the city and the corporation regarding the property to be acquired for the park prior to the corporation's acquisition of the council member's property, the section 1090 prohibition might not have been

invoked. However, in *Thomson*, the Court found that the purchase by the corporation of the council member's land was part of a pre-arranged agreement with the city. And under these circumstances, the Court concluded that the city council member was financially interested in the contract that conveyed the land to the city.

Primary Shareholder in Contracting Party

In *People v. Sobel* (1974) 40 Cal.App.3d 1046, section 1090 was applied to remedy a classic self-dealing situation. There, a city employee, involved in purchasing books, awarded contracts to a corporation in which, unknown to the city, he and his wife were the primary shareholders.

Shareholder Insulated from Contract Payments

In *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, the court concluded that a public official, who was a shareholder in an insurance brokerage firm, had a financial interest in the firm despite the creation of a financial arrangement which would assure that payments under an insurance contract with a county would not be used to pay the shareholder's compensation or the business expenses of the brokerage firm. The court concluded that the volume of business to the firm affected the value of the interested official's investment in the firm. Thus, to the extent that the firm benefitted by increased business, so did the official, despite the fact that the benefit was in some way indirect.

In 84 Ops.Cal.Atty.Gen. 158 (2001), this office reached a similar conclusion. There, a city councilman owned 48 percent of the shares of an architectural corporation, with the remaining shares owned by three other licensed architects. This office concluded that one of the other three architects could not establish a separate firm for the purpose of contracting with the city to provide architectural services utilizing the corporation's resources even if the corporation would bill the firm for its pro rata share of the resources, and the new corporation would not share in the profits of the firm from the city's contracts. Under these circumstances, the financial identity between the corporation and the separate firm would be too pervasive to allow such contracts and the original corporation would likely benefit indirectly from the city's business.

Pro Bono Legal Services

In 86 Ops.Cal.Atty.Gen. 138 (2003), this office considered whether it would violate section 1090 for a city council to enter into a contract with a law firm, of which a city council member is a partner, to represent the city in a lawsuit. Under the proposed agreement, the law firm would receive no legal fees and would bear all litigation expenses normally borne by the client. Nonetheless, the opinion concluded that the council member had a financial interest in the contract and that such an arrangement would violate section 1090 because success in the litigation could be financially advantageous to the law firm and inure to the councilmember's personal benefit by enhancing the value of his interest in the firm.

Contingent Payment

In *People v. Vallerga* (1977) 67 Cal.App.3d 847, the court found that a county employee had a financial interest in a contract where his private consulting contract was contingent upon the execution of the county's contract with the city. The court found that the requisite financial interest existed where the contracting entity is in a position to render actual or potential pecuniary gain to the official by virtue of the award of the contract.

Creditor-Debtor Relationship

In *People v. Watson* (1971) 15 Cal.App.3d 28, the court concluded that a creditor-debtor relationship constituted a financial interest within the meaning of section 1090. (See also *Moody v. Shuffleton* (1928) 203 Cal. 100.) The defendant was a harbor commissioner whose corporation had loaned money to a corporation which subsequently was attempting to negotiate a lease with the commission. While the loan was still outstanding, defendant voted as a commissioner to approve the proposed lease, thereby violating section 1090.

Spousal Property and Employment

An official also has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).) For example, a city employee has a financial interest in her husband's private sector employment because the financial success of the husband's firm and his continued employment and compensation affect the city employee. (85 Ops.Cal.Atty.Gen. 34 (2002).) The reach of this financial interest is broad. (See 75 Ops.Cal.Atty.Gen. 20 (1992) [concluding the payment of expenses for a board member's spouse to accompany the board member to a conference was a financial interest covered by section 1090].) But note, since the spouse's property is attributed to the official, exemptions that would be applicable if the official possessed the interest directly also apply to the spouse's property. (See 78 Ops.Cal.Atty.Gen 230 (1995); 81 Ops.Cal.Atty.Gen. 169 (1998); see also Section H and Section I of this Chapter for a discussion of the exemptions.)

Public Officers to Receive Commission

In 66 Ops.Cal.Atty.Gen. 376 (1983), this office concluded that the terms of the compensation package for the city attorney and other city personnel made them financially interested in all land development contracts to which the city was a party. Compensation for these officials was tied to increases in land value, based on the approval of land developments. The opinion pointed out that in approving land developments, a number of policy issues, aside from land value, must be considered, e.g., the ratio between commercial and residential development, density factors, etc. In basing compensation solely on land values, there was an incentive to consider only land value factors.

Employee of Contract Provider

In 58 Ops.Cal.Atty.Gen. 670 (1975), this office advised that a local mental health director was in violation of section 1090 where he also was employed by the contract provider of mental health services to the county. In his official position, he was required to advise the county board of supervisors regarding contracts for mental health services, and in his private capacity he received a fixed yearly salary from the contract provider. Thus, he was interested in the county's contracts for mental health services in both his public and private capacities.

Extortion in the Awarding of a Contract

Under *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, an official who extorts payments from a contractor has a financial interest in the contract under section 1090. The presence of such payments means that the motivation for the contract is personal greed, not the best interests of the public.

Campaign Contributions

Campaign contributions generally are not financial interests under section 1090. (See *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1231.) However, when a governmental decision is made because of a campaign contribution and the contribution is made in anticipation of, or as a result of, the decision, a there is a prohibited financial interest. (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186, Cal.App.4th 1114 [finding that the specific facts presented gave "rise to the inference that the campaign contributions [at issue] constituted prohibited financial interests" under section 1090].)

G. Temporal Relationship between Financial Interest and the Contract

The essence of the section 1090 prohibition is to prevent self-dealing in the making of public contracts. In determining whether self-dealing has occurred, the timing of events may be crucial. Factors such as the date that the official assumed or resigned from office, the date the contract was executed and the duration of the contract are important and may prove to be dispositive.

Contract Executed Before Official is Elected or Appointed May Be Permissible

An official who has contracted in his or her private capacity with the government agency before the official is elected or appointed does not violate the section, and the official may continue in his or her position as the contracting party for the duration of that contract. The official's election or appointment does not void it. (*Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops.Cal.Atty.Gen. 176 (2002); 84 Ops.Cal.Atty.Gen. 34 (2001).) However, if the contract is extended, amended, or renegotiated, the prospect of a section 1090 violation is once again present.

Because Participation is Defined Broadly, Later Resignation May Not Be Sufficient

As discussed previously, participation in the making of a contract is defined very broadly. Simply resigning a public post may not cure a conflict in all situations. Timing is essential. Therefore, although an official or employee may resign from his or her position, that resignation may not be sufficient to avoid a section 1090 violation when the person has been involved in the contracting process. In *Stigall v. City of Taft* (1962) 58 Cal.2d 565; the Court concluded that where a council member had been involved in the preliminary stages of the planning and negotiating process, but had resigned from the council prior to its vote on the contract, the council member had been involved in the making of the contract. In *City Council v. McKinley* (1978) 80 Cal.App.3d 204, the court followed this reasoning and stated:

If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and effecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit nor the intent of the law which precludes an officer from involving himself in the making of a contract.

(*Id.* at p. 212; 81 Ops.Cal.Atty.Gen. 317 (1998) [council member could not participate in the establishment of a loan program and then leave office and apply for a loan]; 66 Ops.Cal.Atty.Gen. 156 (1983) [county employees could not propose agreement for consultant services, then resign, and provide such consulting services].)

Since board members are conclusively presumed to have made all contracts under their jurisdiction, it is possible that a court could conclude that a board member had, as a matter of law, participated in the making of any contract, the planning for which had been commenced during the board member's time in office. In the case of a financially-interested board member, the official generally cannot avoid the conflict by disqualification; rather he or she must resign from office or eliminate the private interest to avoid the proscription of section 1090. (See *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572.) Further, a new contract between the board member and the public agency that the board member represents may not be executed. (See also Pub. Contract Code, §§ 10410, 10411 [regarding state employees discussed in Chapter VIII of this Guide].)

In the case of an employee, a contract may be renegotiated, so long as the employee totally disqualifies himself or herself from any participation in his or her public capacity, in the making of the contract. When a contractor serves as a public official (e.g., a city attorney) and renegotiates a contract, this office recommends that such contractors retain another individual to conduct all negotiations. In so doing, the official would minimize the possibility of a misunderstanding about whether the contractor's statements were made in the performance of the contractor's public duties or in the course of the contractual negotiations. However, in the absence of special circumstances, the fact that a contract city attorney's advice to initiate or

defend litigation would increase the amount of payments under an existing contract, generally would not violate section 1090, so long as the services are contemplated in the original executed contract.

In 86 Ops.Cal.Atty.Gen. 187 (2003), this office concluded that there was no “reach-back period” (such as the 12-month period for income under the Political Reform Act) within the context of section 1090. The opinion concluded that only during the pendency of the business relationship was there a financial interest from which the official might benefit directly or indirectly. However, if the business relationship is not terminated in a manner that removes “the possibility of any personal influence, either directly or indirectly” the prohibition of section 1090 would remain in effect. (See, e.g., 89 Ops.Cal.Atty.Gen. 69 (2006).)

H. Remote Interests of Members of Boards and Commissions (§ 1091.)

The remote interest exception applies only to members of multi-member bodies; it does not apply to individual decision makers or employees. When a board member has a remote interest, the board member may disqualify himself or herself from any participation in the making of the contract and permit the remainder of the body to decide all issues involved in its making. If a member of a board has an interest that is not either a remote interest or a non-interest (see post Section I of this Chapter), the contract may not be made unless it is subject to the rule of necessity. (See Section K of this Chapter.)

The “remote interest” always refers to the private interest an official has in the contract. The official’s public interest either exists or does not. An official whose interest falls into one of the “remote interest” categories must do the following: (1) disclose the official’s interest to his or her agency, board, or body, and (2) have the interest noted in the official records of that body. (§ 1091, subd. (a).) Further, the interested official must completely disqualify himself or herself, and must not influence or attempt to influence the other board members. (§ 1091, subd. (c); see also 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 87 Ops.Cal.Atty.Gen. 23, 25-26 (2004); 83 Ops.Cal.Atty.Gen. 246, 248 (2000); 78 Ops.Cal.Atty.Gen. 230, 237-238 (1995).)

An official who intentionally fails to disclose the existence of a remote interest before action is taken on the contract in question would violate section 1090 and would be subject to criminal prosecution. However, such a violation would not void the contract unless the private contracting party knew of the official’s remote interest at the time of contracting. (§ 1091, subd. (d).) If an official with a remote interest in a contract fails to disqualify himself or herself, or if the official influences or attempts to influence a colleague’s vote on the matter, the official may not enjoy the benefit of the remote interest exception. (§ 1091, subd. (c).)

When an official has a remote interest, the board or agency may take action on the contract, if it acts in good faith and if the vote to approve the contract is sufficient without counting the vote or votes of those with remote interests. And, any officials with the requisite financial interest cannot participate at any stage of the contracting process.

The Remote Interests

The term “remote interest” has a special statutory meaning in section 1090. It is a term of art having an assigned meaning that is not always consistent with its “common” meaning. Below is a brief summary and elaboration of the remote interest exceptions.

1. **Officer or Employee of a Nonprofit Corporation or 501(c)(3) Entity** – An officer or employee of a nonprofit corporation or Internal Revenue Code section 501(c)(3) entity has only a remote interest in the contracts, purchases, and sales of that nonprofit entity. (§ 1091, subd. (b)(1).) Such a contract might involve the provision of services or the making of a grant to the nonprofit. (85 Ops.Cal.Atty.Gen. 176 (2002); cf. § 1091.5, subd. (a)(8) [concerning “noncompensated officers” of specified tax-exempt corporations].)

2. **Employee or Agent of a Private Contracting Party** – An employee or agent of a private contracting party has a remote interest when all of the following factors are present:
 - (1) the private contracting party has 10 or more other employees;
 - (2) the official/employee has been an employee or agent of that party for at least 3 years prior to the initial term in office;
 - (3) the officer owns less than 3 percent of the shares of stock of the contracting party;
 - (4) the employee or agent is not an officer or director of the contracting party; and,
 - (5) the employee or agent did not directly participate in formulating the bid of the contracting party.

(§ 1091, subd. (b)(2).) For example, the interest of a council member is remote when the employer has hundreds of employees, the council member had been employed by the company for more than 30 years prior to his election to the city council, he owned less than 3 percent of the company’s stock, and he was neither an officer nor a director of the company. (89 Ops.Cal.Atty.Gen. 49 (2006); see also 88 Ops.Cal.Atty.Gen. 106 (2005).)

The statute allows some latitude in computing the three-year period, to permit an employee of a business that has gone through a reorganization, to count time employed before the change, as long as the “real or ultimate ownership of the contracting party” remains substantially unchanged. “Real or ultimate ownership” is defined to include the

“stockholders, bondholders, partners, or other persons holding an interest.”
(§ 1091, subd. (b)(2).)

Also, note that a person is an agent of the contracting party only if an agency relationship has been created authorizing the person to represent the principal in specified contexts. (See Civ. Code, § 2295; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 85 Ops.Cal.Atty.Gen. 176 (2002).)

3. **Employees or Agents; Special Exception** – An official of a local agency in a county with a population of 4,000,000 or less who is also an employee or agent of the contracting party has a remote interest if specified statutory conditions are satisfied. (§ 1091, subd. (b)(3).) The following conditions must be present: (1) the official must be an officer in the local agency located in a county with a population of 4,000,000 or less; (2) the contract must be competitively bid [and not for personal services], and the contracting party must be the lowest bidder; (3) the official must not hold a primary management position with or ownership interest in the contracting party, and must not be an officer or director of the contracting party; (4) the official may not have directly participated in formulating the bid of the contracting party; and, (5) the contracting party must have at least 10 other employees.

4. **Parent** – Parents have only a remote interest in the earnings of their minor children for personal services. (§ 1091, subd. (b)(4).) However, an official does not automatically have a financial interest in the contracts of his or her adult children under section 1090, rather a specific financial interest must be found in the transactions between the adult child and the parent. (92 Ops.Cal.Atty.Gen. 19 (2009); see also 88 Ops.Cal.Atty.Gen. 222 (2005); but see Chapter XIII of this Guide because the common law prohibition may require disqualification in these circumstances.)

5. **Landlord or Tenant** – A public official who is a landlord or tenant of a contracting party has a remote interest in the contracts of that party. (§ 1091, subd. (b)(5); see also 89 Ops.Cal.Atty.Gen. 193 (2006).)

6. **Attorney, Stockbroker, Insurance, or Real Estate Broker/Agent** – A board member who is an attorney for a contracting party, or an agent/broker of a contracting party may have a remote interest in the contract. (§ 1091, subd. (b)(6).)

This remote interest exception applies to the attorney of a contracting party, or an owner, officer, employee, or agent of a firm that renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker, or real estate agent/broker. The remote interest exception applies when the individual has a 10 percent or greater interest in the law practice, or firm, stock brokerage firm, insurance firm, or real estate firm, but only if the individual will receive no remuneration, consideration, or commission as a result of the contract. (*Id.*) But, attorneys and agent/brokers who have less than a 10 percent ownership interest in their firm and receive no compensation have a non-interest. (See § 1091.5, subdivision (a)(10).)

Utilizing this exception, this office found that a city council member only had a remote interest in the client of a law firm in which his spouse was a partner, because the law firm would receive no remuneration from the contract as its representation concerned matters unrelated to the contract. (78 Ops.Cal.Atty.Gen. 230 (1995).) This opinion was issued prior to the addition of the 10 percent ownership provision in subdivision (b)(6), so the opinion does not address that criteria.

7. **Corporation Formed to Sell Agricultural Products or to Supply Water** – A member of a nonprofit corporation formed under the Food and Agricultural Code or Corporations Code has a special remote interest designation for the sole purpose of selling agricultural products or supplying water. (§ 1091, subd. (b)(7).)
8. **Supplier of Goods and Services** – An official has only a remote interest in a party that seeks to contract with the official's government agency when the official has been a supplier of goods or services to the contracting party for at least five years prior to the official's election or appointment to office. (§ 1091, subd. (b)(8); see also 86 Ops.Cal.Atty.Gen. 118 (2003).)

The five year requirement has been discussed and analyzed. For example, in 85 Ops.Cal.Atty.Gen. 176 (2002), this office opined on a situation in which a council member had provided services in connection with a single project for more than five years, but for less than five years with the current contracting party. It concluded that the five-year requirement for this exemption may not be met by totaling the time the council member has provided subcontracting services on the project; rather, the official must have provided goods or services to the contracting party in question for at least five years. (See also *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 217-218.) Additionally, the five-year period runs from the board member's most recent term, as opposed to the initial term. (86 Ops.Cal.Atty.Gen. 187 (2003); cf. § 1091, subd. (b)(2) [referring to a 3 year period from the "initial" term].)

9. **Party to a Land Conservation Contract** – An official who enters into a contract or agreement under the California Land Conservation Act of 1965 has only a remote interest in that contract. (§ 1091, subd. (b)(9).) (But note Cal.Atty.Gen., Indexed Letter, No. IL 73-197 (November 9, 1973) [concluding county supervisors who had previously made land conservation contracts could not vote to abolish future use of the Land Conservation Act in their county because of the common law prohibition against conflicts of interest].)
10. **Director or 10-Percent Owner of Bank or Savings and Loan** – A board member who is a director, or holds a 10 percent ownership interest or greater in a bank or savings and loan has only a remote interest in the contracts of parties who are depositors or borrowers at the official's institution. (§ 1091, subd. (b)(10).)

It is important to understand that this exception addresses the circumstance wherein a customer of a bank is preparing to enter into contract with a government agency, and a director or 10 percent owner of the bank is a member of a government board. This exception does not address the circumstance in which the bank itself wishes to contract with a government agency. (For officers, employees and persons holding less than a 10-percent ownership interest, see section 1091.5, subd. (a)(11); for competitively bid banking contracts, see section 1091.5, subd. (b).)

11. **Employee of Consulting, Engineering, or Architectural Firm** – An engineer, geologist, or architect who provides services to a consulting, engineering, or architectural firm has a remote interest in the firm so long as he or she does not serve as an officer,

director, or in a primary management capacity. (§ 1091, subd. (b)(11).) Although there are no cases or opinions on point, this exception would appear to provide a remote interest exception for the employee if the firm were contracting directly with the body or were indirectly involved as a supplier of goods or services to a contracting party.

12. **Housing Assistance Contracts** – There is a limited exception that provides that an elected officer has a remote interest in a specific housing assistance contracts. (§ 1090, subd. (b)(12).)
13. **Salary or Payments from Another Government Entity** – When a board member receives salary, per diem, or reimbursement for expenses from another government entity, the board member has a remote interest in contracts between the two agencies if the contract involves the department that employs the board member. (§ 1090, subd. (b)(13); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081 [stating “[i]f the contract involves no financial gain, but is with or affects the official’s own department, the official’s interest is remote”].)

However, when the contract does not involve the department that employs the board member, the board member has a non-interest under section 1091.5, subdivision (a)(9). (See Section I, subsection 9 of this Chapter.) Also, this exception cannot be used to permit a board member to enter into a contract with his or her own board. (89 Ops.Cal.Atty.Gen. 217, 221 (2006); 85 Ops.Cal.Atty.Gen. 6, 7 (2002); 83 Ops.Cal.Atty.Gen. 246, 249 (2000).)

Applying this exception, this office concluded that a city council, one member of which is a deputy sheriff, may enter into a contract with the sheriff to provide police services to the city, so long as the deputy sheriff discloses the interest to the city council which is noted in its official records, and the deputy sheriff completely abstains from any participation in the matter. (83 Ops.Cal.Atty.Gen. 246 (2000).)

14. **Shares of a Corporation When the Shares Derived from Former Employment** – An official owning less than three percent of the shares of a contracting party that is a for-profit corporation, has a remote interest in the corporation provided that the ownership of the shares derived from the person’s former employment with the corporation. (§ 1091, subd. (b)(14); see also 88 Ops.Cal.Atty.Gen. 106, 110 (2005).)
15. **Settlement of Litigation** – A board member who is a party to litigation involving his or her body or board has a remote interest in connection with a settlement agreement if specified conditions are satisfied. (§ 1091, subd. (b)(15).) This remote interest exception was enacted subsequent to this office’s opinions in 86 Ops.Cal.Atty.Gen. 142 (2003) and 91 Ops.Cal.Atty.Gen. 1 (2008), and, therefore, supersedes those opinions to the extent they conflict with the exception.

16. **Investor-Owned Utilities** – An officer or employee of an investor-owned utility that is regulated by the Public Utilities Commission has a remote interest in a contract between the utility and enumerated governmental entities if specified conditions are satisfied. (§ 1091, subd. (b)(16).)

I. **Non-Interests (§ 1091.5.)**

Section 1091.5 delineates situations that might technically create a conflict of interest under section 1090, but which the Legislature has decided as a matter of policy are exempt from its operation. Unlike the “remote interest” exceptions, a non-interest exemption does not require abstention or, except in very limited circumstances, disclosure.

However, an interest that is a non-interest under section 1091.5 might still create a disqualifying interest for an official under the Political Reform Act. That Act’s provisions must be consulted before proceeding with any transaction in which an official may have conflicts of interest since the Political Reform Act supersedes other conflict-of-interest laws where inconsistencies exist. (§ 81013.)

The non-interests that fall into the section 1091.5 exception are as follows.

1. **Corporate Ownership And Income** – An official has a non-interest in a business corporation, in which he or she owns less than 3 percent of its shares, as long as the official’s total annual income from dividends and stock dividends from the corporation amounts to less than 5 percent of his or her total annual income and any other income he or she receives from the corporation also amounts to less than 5 percent of his or her total annual income. The official who fails any of the three parts cannot qualify for the non-interest exemption with regard to that corporation. (§ 1091.5, subd. (a)(1).) This exemption does not apply to an ownership interest in a limited partnership, because the Legislature expressly limited the exemptions to for-profit corporations and specified nonprofit organizations. (89 Ops.Cal.Atty.Gen. 69, 74-75 (2006).)
2. **Reimbursement of Expenses** – An official has a non-interest in reimbursement for his or her actual and necessary expenses incurred in the performance of his or her official duties. (§ 1091.5, subd. (a)(2); but see 75 Ops.Cal.Atty.Gen. 20 (1992 [concluding this exception does not include payments for the expenses of an official’s spouse].)
3. **Public Services** – An official has a non-interest in the receipt of public services provided by his or her agency or board as long as he or she receives them in the same manner as if he or she were not a public official. (§ 1091.5, subd. (a)(3).)

The California Supreme Court has read this exception to establish the following rule:

If the financial interest arises in the context of the affected official’s or employee’s role as a constituent of his or her public agency and recipient of its services, there is no conflict so long as the services are broadly available to all others similarly situated,

rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.

(*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1092.) Thus, the Court held that “where retirement board trustees approve contracts in which their only financial interest is an interest in benefits shared generally with their constituency at large,” this exception applies and such actions are excluded from Section 1090.

The exception applies to “public utilities such as water, gas, and electricity, and the renting of hangar space in a municipal airport on a first come, first served basis. The furnishing of such public services would not involve the exercise of judgment or discretion by public agency officials. Rather, the rates and charges for the services would be previously established and administered uniformly to all members of the public.” (81 Ops.Cal.Atty.Gen. 317 (1998).) Therefore, obtaining a government loan was not a public service within the meaning of this exemption because it involved the exercise of discretion to determine the recipient of the service. (*Id.* at p. 320; see also 80 Ops.Cal.Atty.Gen. 335 (1997) [concluding that the public service in question actually amounted to private construction services for a member of the governing board on unique terms and, therefore, did not qualify under the exemption].)

Further, this office has concluded that the placement of advertising in a city newsletter constituted a public service subject to this exemption. (88 Ops.Cal.Atty.Gen. 122 (2005).) The decisions at issue did not involve discretionary or highly customized services benefitting one or more council members. And the advertising was available to anyone at a predetermined rate based solely upon the size and duration of the advertisement. Therefore, this exemption applied. (*Ibid.*)

Public agencies provide many kinds of “public services” that only a limited portion of the public needs or can use. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 515 [reclaimed water provided to wholesale purveyors]; 89 Ops.Cal.Atty.Gen. 121 (2006) [limited airport hangar space provided to public based on square footage and residency status].) However, the critical issue for this exception is that the services are directed at the community, and not a specific individual. (88 Ops.Cal.Atty.Gen. 122 (2005); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1088 [“[w]hat matters is not the breadth of the actual recipient class, but that the service has not been intentionally designed to limit that class and is broadly available to all those potentially within it.”].)

4. **Landlords and Tenants of Government** – Public officials who are landlords or tenants of governmental entities have a non-interest in the government entities’ contracts, unless the subject matter of the contract is the very land for which the official is either the landlord or tenant. In the latter case, the official has a remote interest rather than a non-interest, and the provisions of section 1091 control. (§ 1091.5, subd. (a)(4).)

5. **Public Housing Tenants** – A tenant in a public housing authority has a non-interest in agreements regarding that housing if he or she is serving as a member of a board of commissioners, or of a community development commission. (§ 1091.5, subd. (a)(5).)
6. **Spouses** – A non-interest exists when both spouses in a family are public officials. One spouse has a non-interest in the other’s employment or holding office if it has existed for at least one year prior to his or her election or appointment to office. (§ 1091.5, subd. (a)(6).)

In *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App.4th 655, the court narrowly construed the exception to mean that one spouse could retain his or her employment even though the other spouse was a member of a board that participated in the employment contract so long as the terms of the employment did not change. Thus, there could be no promotion or similar change in status:

Applying this exception, this office concluded that the spouse of a school board member could have his or her teaching contract annually renewed so long as the spouse was not promoted or appointed to a new position. (69 Ops.Cal.Atty.Gen. 255 (1986).) But, the board of trustees of a community college district may not approve a selective reclassification of a classified employee’s position, if the employee’s spouse is a member of the board of trustees and the reclassification makes the employee eligible for an increase in salary. (84 Ops.Cal.Atty.Gen. 175 (2001).) Similarly, the spouse of a member of a school board may not be hired by the district, whether as a substitute teacher or in any other employment capacity. (80 Ops.Cal.Atty.Gen. 320 (1997).)

However, this office has concluded that the “rule of necessity” may allow for certain contracts to be made, even when they cannot qualify as a non-interest under this exception. (See 69 Ops.Cal.Atty.Gen. 102 (1986) [concluding a school district may contract on an annual basis with a tenured teacher who was the spouse of a board member, until the board member could qualify for this exemption; 65 Ops.Cal.Atty.Gen. 305 (1982) [finding a superintendent who was interested in his or her spouse’s school employment could utilize the rule of necessity].)

7. **Unsalaries Members of Nonprofit Corporations** – A non-interest exists when a public official is an unsalaried member of a nonprofit corporation provided the official’s interest is disclosed to the board at the time the contract is first considered and is noted in its official records. (§ 1091.5, subd. (a)(7).)

The reference to “members” refers to persons who constitute the membership of an organization, rather than to those individuals that serve on its board of directors. (See 65 Ops.Cal.Atty.Gen. 41 (1982) [concluding that a member of a nonprofit was similar to a shareholder of a corporation, as opposed to a member of the board of directors or other corporate officer].) This conclusion is consistent with the legislative history, which reveals the intent to permit members of a council with ties to the Boy Scouts and YMCA to vote on contracts for use of public facilities by such organizations. (See Legislative

History, Stats. 1977, ch. 706 (Sen. Bill No. 711).) For the exception to apply, the person, who is a member of the organization, may not simultaneously hold a salaried position with the organization.

(Note section 1091, subdivision (b)(1) and section 1091.5, subdivision (a)(8) concern “officers” as opposed to “unsalaried members” of nonprofit corporations.)

8. **Non-compensated Officers of Tax-Exempt Corporations** – A noninterest exists when a public official is a non-compensated officer of a nonprofit, tax-exempt corporation which, as a primary purpose, supports the functions of a public body or board, or to which the public body has a legal obligation to give particular consideration. For example, a nonprofit symphony association may be organized to support the publicly operated symphony hall and symphony orchestra. Such interest, if any, must be noted in the official records of the public body. An officer is non-compensated even though he or she receives reimbursement for travel or other actual expenses incurred in performing the duties of his or her office. (§ 1091.5, subd. (a)(8); compare with § 1091, subdivision (b)(1) concerning “officers of nonprofit corporations” and § 1091.5, subdivision (a)(7) concerning “unsalaried members of nonprofit corporations.”)

9. **Contracts between Government Agencies** – An officer or employee of one government agency is not interested in the contracts of the other government agency, unless the contract directly involves the department that provides the salary, per diem or reimbursement to the officer or employee in question. The interest must be disclosed to the board when the contract is considered, and the interest must be noted in its official record. (§ 1091.5, subd. (a)(9); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081 [stating this exception applies when “the contract involves no direct financial gain, does not directly affect the official’s employing department, and is only with the general government entity for which the official works”].)

When the official in question is a member of the governing board, and not a member of a “department” of the agency, the official would have a non-interest in the contract between the two agencies. For example, a member of a county board of supervisors who also serves as a member of a children and families commission has a non-interest in contracts between the two agencies because the “department” limitation does not apply.

Applying this exception, this office evaluated whether a deputy county counsel, who was elected to a city council, could participate in negotiations on a contract with the county to provide law enforcement services to the city. This office concluded that the city council member was covered by this exception because the contract between the city and the county did not involve a contract with the County Counsel’s Office (i.e. the department that employed the council member). (85 Ops.Cal.Atty.Gen. 115 (2002); see also *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1303-1305.) If the contract had involved the department that employed the council member, the official would have had a remote interest in the contract of the employer pursuant to section 1091, subdivision (b)(13).

10. **Attorney, Stockbroker, Insurance or Real Estate Broker/Agent** – A governmental official has a non-interest when he or she is the attorney of a contracting party, or an owner, officer, employee, or agent of a firm that renders or has rendered service to the contracting party in the capacity of stockbroker, insurance agent/broker, or real estate agent/broker.

For the non-interest exception to apply, two conditions must be present. First, these individuals may not receive any remuneration, consideration, or a commission as a result of the contract. Second, these individuals must have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm. (For attorneys and agent/brokers who are board members and have more than a 10 percent ownership interest in their firm, see § 1091, subd. (b)(6).)

11. **Officers, Employees and Owners of Less Than 10 Percent of a Bank or Savings and Loan** – A government official who also is an officer or employee, or who owns less than 10 percent of a bank or savings and loan, has a non-interest in the contracts of parties who are depositors or borrowers at the official's institution. (§ 1091.5, subd. (a)(11).)

It is important to understand that this exception addresses when a customer of a bank is preparing to enter into contract with a government agency, and an officer, employee or someone owning less than 10 percent of the bank is a government official. This exception does not address when the bank itself wishes to contract with a government agency. A narrower exemption relating only to competitively bid contracts is set forth in 1091.5, subdivision (b); and appears to be subsumed within the exemption described here. (For directors or persons holding more than a 10-percent ownership interest, see the remote interest exception in section 1091, subdivision (b)(10).)

12. **Nonprofit Organization Supporting Public Resources** – An officer, director, or employee has a non-interest in the contracts of a nonprofit, tax-exempt corporation where the corporation has as one of its primary purposes the conservation, preservation, or restoration of park and natural lands or historical resources for public benefit, and where the officer, director or employee is acting on behalf of the corporation pursuant to an agreement between the corporation and a public agency to provide services related to such resources. (§ 1091.5, subd. (a)(12).)
13. **California Housing Finance Authority** – An officer, employee, or member of the Board of Directors of the California Housing Finance Agency has a non-interest in a loan product or program if specified conditions are satisfied. (§ 1091.5, subd. (a)(13).)

J. Special Provisions for Specific Situations

1. **Subdivision of Land Permitted** – There is a special exemption from section 1090 for public officials who must deal with government entities regarding the subdivision of land that they own or in which they have an interest. Such an official may subdivide lands that he or she owns, or has an interest in, without violating section 1090. He or she must,

however, fully disclose the nature of his or her interest in such lands to the body that has jurisdiction over his or her subdivision, and abstain from voting on any matter concerning it. (§ 1091.1.)

2. **Local Workforce Investment Boards** – Section 1090 does not apply to any contract or grant made by local workforce investment boards established by the federal Workforce Investment Act of 1998, unless specified statutory conditions are met. (§ 1091.2.)
3. **County Children and Families Commission** – Section 1090 does not apply to any contract or grant made by a county children and families commission established by the California Children and Families Act of 1998, unless specified statutory conditions are met. (§ 1091.2.)
4. **Landowner Voting Districts** – There is a remote interest exception for board members of a special district that serves a population of less than 5,000 persons, is a landowner voting district, and does not distribute water for any domestic use so long as other specified conditions are satisfied. (§ 1091.4.)
5. **Organizations Potentially Affected by Eminent Domain** – An officer who is also a member of the governing body of an organization that has an interest in, or to which the public agency may transfer an interest in, property that the public agency may acquire by eminent domain is prohibited from voting on any matter affecting that organization. (§ 1091.6.)

K. Limited Rule of Necessity

This office and the courts have applied a limited “rule of necessity” to the application of section 1090 where public policy concerns authorize the contract and to ensure that essential government functions are performed despite the conflict of interest. (See 69 Ops.Cal.Atty.Gen. 102, 109 (1986).) The “rule of necessity” has two facets. (*Ibid.*)

Contracts for Essential Services Where No Other Source is Available

The first facet of the rule of necessity concerns situations where a board must contract for essential services and no source other than that which triggers the conflict is available. For example, a city can obtain nighttime service from a service station owned by a member of the city council, where the town was isolated and his station was the only one open. (4 Ops.Cal.Atty.Gen. 264 (1944); see also 42 Ops.Cal.Atty.Gen. 151, 156 (1963) [concluding a coroner may be able to contract with his or her own mortuary when there are no alternative locations for holding bodies]; 76 Ops.Cal.Atty.Gen. 118, 120-123 (1993) [finding a city council member who had an interest in a local cable franchise may be able to renew a cable contract with the city if there is no other source for this essential service]; but see § 29708 [prohibiting a county officer or employee from presenting a claim to the county for other than his or her official salary].)

Utilizing this facet of the rule of necessity, this office concluded that a health care district can advertise on a local radio station even though a member of the health care district was employed by the station. The opinion concluded that certain physicians and services were available only periodically and were subject to scheduling changes. Radio advertising was the only feasible way to convey information about these services in a timely and efficient manner as there were no local television stations, and the two local newspapers were published weekly. (88 Ops.Cal.Atty.Gen. 106 (2005).)

Where Official or Board is the Only One Authorized to Act

The second facet of the rule of necessity focuses on the performance of official duties, rather than upon the procurement of goods and services. It permits an official to carry out the essential duties of his or her office despite a conflict of interest where he or she is the only one who may legally act. (See 69 Ops.Cal.Atty.Gen. 102, 109 (1986).) For example, a Superintendent of Education can enter into a memorandum of understanding with school employees, despite the fact that he was married to a permanent civil service school employee. (65 Ops.Cal.Atty.Gen. 305 (1982); see also 69 Ops.Cal.Atty.Gen. 102 (1986) [rule of necessity allows a school board to enter into a memorandum of understanding with a teachers' association even when a board member is married to a tenured teacher].) Similarly, a community college board can negotiate with its faculty for salary and benefits even though a board member is a retired faculty member whose health benefits are tied to current faculty benefits. (89 Ops.Cal.Atty.Gen. 217 (2006).) Also, a city council member who has an interest in a local cable franchise can use the rule of necessity to dispose of his interest where the council is required to approve such disposition. (76 Ops.Cal.Atty.Gen. 118, 123-125 (1993).)

Practical Effect of Utilizing the Rule of Necessity

When the rule of necessity is applied to a member of a multi-member board, as opposed to a single official or employee, this office has concluded that the interested board member must abstain from any participation in the decision. In other words, the effect of the rule of necessity is to permit the board with an interested member to make a contract, even though the interested board member must disqualify himself or herself from participating in its making. In the case of a single official or employee, application of the rule of necessity permits the official or employee to participate in the making of the contract. (See 89 Ops.Cal.Atty.Gen. 217 (2006) [board member abstention; 88 Ops.Cal.Atty.Gen. 106, 112 (2005) [board member abstention]; 69 Ops.Cal.Atty.Gen. 102, 112 (1986) [school board trustee abstention]; 67 Ops.Cal.Atty.Gen. 369, 378 (1984) [board member abstention]; 65 Ops.Cal.Atty.Gen. 305, 310 (1982) [superintendent of schools permitted to participate].)

L. Effect of Special Statutes

Some statutes may contain special provisions that alter or eliminate the general rule in section 1090 in a specific situation. For example, Education Code section 35239 provides that governing board members of school districts with an average daily attendance of 70 or less may contract with their districts under specified circumstances.

Also, financially interested members of Project Area Committees do not violate section 1090 by making recommendations to the redevelopment agency because the Legislature specifically envisioned their participation in the redevelopment process in Health and Safety Code section 33000 et seq. (82 Ops.Cal.Atty.Gen. 126, 130 (1999); see also 51 Ops.Cal.Atty.Gen. 30, 30-31 (1968).) For special rules concerning hospitals and health care districts, see Health and Safety code section 37625 (municipal hospitals), Health and Safety Code section 1441.5 (county hospitals), and Health and Safety Code section 32111 (health care districts).

However, note that such special statutes may not take precedence over the Political Reform Act unless they are adopted in accordance with the procedures set forth in section 81013.

M. Consequences for Violations of Section 1090

1. A contract made in violation of section 1090 is void and unenforceable.

Section 1092 provides that every contract made in violation of section 1090 may be avoided by any party except the official with the conflict of interest. (But see § 1092.5 [exception concerning good faith of parties involved in the lease, sale, or encumbrance of real property].) Despite the wording of the section “may be avoided,” case law has historically interpreted contracts made in violation of section 1090 to be void, not merely voidable. (*Thomson v. Call* (1985) 38 Cal.3d 633; *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323; *People ex rel. State of Cal. v. Drinkhouse* (1970) 4 Cal.App.3d 931.) A contract can be void even if made without the participation of the official with the conflicting interest if he or she is a member of the contracting body. (§ 1092, subd. (a); *Thomson v. Call* (1985) 38 Cal.3d 633.)

Statute of Limitations Is Four Years

In 2007, the Legislature amended section 1092 to provide that legal challenges to contracts made in violation of section 1090 must be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, the violation. (§ 1092, subd. (b).) Thus, although a contract made in violation of section 1090 is void and disgorgement of the contract proceeds is automatic, the passage of time can render such a contract immune from challenge. (*Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350.)

Results in Disgorgement of Contract Benefits

Contracts in violation of section 1090 are contrary to the public policy of California. Therefore, courts have consistently found that no recovery should be had for goods and services provided to the public agency pursuant to a contract that violates section 1090. (*See County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533 [requiring contractor to disgorge profits that ultimately flowed from public official’s violation of section 1090].) Further, the “agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract.” (*Thomson v. Call* (1985) 38 Cal.3d 633, 646; see also *Finnegan v. Schrader*

(2001) 91 Cal.App.4th 572, 583.) The disgorgement remedy is automatic. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1336.) And it applies without regard to the willfulness of the violation. "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 [city attorney required to forfeit to his public agency a finder's fee received in return for steering a contract to a private law firm].)

In addition to the contract being void under section 1092, section 1095 provides that payment of any warrant or other evidence of indebtedness against the state, city, or county that has been purchased, sold, received, or transferred contrary to section 1090 is specifically disallowed. Therefore, any claim to payment pursuant to a contract made in violation of section 1090, is effectively rendered worthless by this section. (But see § 1092.5 [exception concerning good faith of parties involved in the lease, sale, or encumbrance of real property].)

2. Willful violations by officials are subject to fines and imprisonment.

A willful violation of any of the provisions of section 1090 et seq. is punishable by a fine of not more than \$1,000 or imprisonment in state prison. (§ 1097.) For an official to act "willfully," his or her actions concerning the contract must be purposeful and with knowledge of his or her financial interest in the contract. (*People v. Honig* (1996) 48 Cal.App.4th 289, 334-339.) The statute of limitations for section 1090 prosecutions is three years after discovery of the violation. (*Id.* at p. 304, fn. 1; Penal Code, §§ 801, 803, subd. (c).) Additionally, such an individual is forever disqualified from holding any office in this state. (§ 1097.) When a state or local government agency is informed by affidavit that a board member or employee has violated section 1090, the agency may withhold payment of funds under the contract pending adjudication of the violation. (§ 1096.)

Officials who rely upon advice from a government lawyer (such as a city attorney) that a proposed transaction does not violate section 1090, may not avoid prosecution based upon the defense of entrapment by estoppel. The California Supreme Court was unwilling to allow an official to escape the rule that a citizen cannot rely on a private lawyer's erroneous advice as a defense to a general intent crime merely because that attorney happened to hold a governmental position. (*People v. Chacon* (2007) 40 Cal.4th 558.) The Court also noted the strong requirement for officials to avoid conflicts of interest, and the problem of an employee subordinate to the official acquiring reliable advice regarding an official's financial interests.

A person who does not possess a financial interest in the contract may not be prosecuted for aiding another to violate section 1090, unless that person acts with the purpose of facilitating the commission of the violation. (*D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861.)

VIII. CONFLICT-OF-INTEREST LIMITATIONS ON STATE CONTRACTS

Public Contract Code Sections 10365.5 and 10410-10430¹⁴

A. Overview

The Public Contract Code provides a two-level approach to potential conflict-of-interest situations within the making of state procurement contracts. Section 10410 covers potential conflicts by persons currently holding office and section 10411 concerns potential conflicts by those who have left state service. These sections generally cover all appointed officials, officers, and civil service employees of state government, with few exceptions. For example, the prohibitions do not apply to unsalaried members of part-time boards and commissions who receive payments only in connection with preparing for meetings and per diem for travel and accommodations. (§ 10430, subd. (e).) The Board of Regents for the University of California is also expressly exempted. (§ 10430, subd. (a).) Section 10430 also contains additional limited exceptions. The statute also contains a specific prohibition applicable to consultants involving “follow-on contracts.” These provisions of the Public Contract Code form a helpful adjunct to the provisions of Government Code section 1090, which also concern conflicts of interest in the contract-making process.

B. The Basic Prohibition for Current State Officers and Employees (§ 10410)

Reduced to its essentials, the prohibition on current state officers and employees provides that: (1) no state officer or employee (2) shall engage in any employment, activity, or enterprise (3) from which the officer or employee receives compensation, or in which he or she has a financial interest, and (4) which is sponsored or funded, in whole or in part, by any state agency or department through a contract. (§ 10410.) But there is an exception if the employment or enterprise is required as a condition of the individual’s regular state employment. Further, covered officials are specifically prohibited from contracting on his or her own behalf with a state agency as an independent contractor to provide goods or services. (*Ibid.*)

This prohibition does not appear to be a transactional disqualification provision, such as that contained in the Political Reform Act. Rather, it is a prohibition against state employees having specified financial interests. It prohibits an individual from engaging in certain activities that are supported, in whole or in part, by a state contract. By prohibiting the “activity,” the statute in effect prohibits the making of state contracts in which the individual has the specified interest. Thus, in many instances, the provisions of section 10410 will be duplicative of the provisions of Government Code section 1090. (See Chapter VII of this Guide.) However, the provisions of section 10410 apply only to state contracts and are different than the restrictions in Government Code section 1090 in certain respects.

¹⁴ All further statutory references in this Chapter are to the Public Contract Code unless otherwise indicated.

For example, section 10410 applies to procurement contracts for goods and services, as opposed to grants awarded to advance the public interest even if the grants are made pursuant to an executed contract. (88 Ops.Cal.Atty.Gen. 56 (2005); see also 74 Ops.Cal.Atty.Gen. 10 (1991); 63 Ops.Cal.Atty.Gen. 290 (1980); 58 Ops.Cal.Atty.Gen. 586 (1975).) Additionally, these prohibitions do not generally apply to the spouse of a state officer or employee. The spouse of a state employee may, therefore, contract to provide goods or services to the employee's department if the employee neither participates in the department's decision to enter into the contract nor engages in the spouse's business. (84 Ops.Cal.Atty.Gen. 131 (2001).)

With respect to the prohibition against state officers or employees contracting on their own behalf as independent contractors to provide goods or services, this office has orally advised that state employees who prepare educational film, video, and printed materials as a part of their state employment cannot contract with another department as independent contractors to provide similar services in their off-hours.

C. The Basic Prohibition for Former State Officers and Employees (§ 10411)

The prohibition applicable to former state officials is divided into two parts. (§ 10411.) First, there is a two-year prohibition against participating in a contract with which the official was involved during his or her state service. This prohibition provides that no retired, dismissed, separated or formerly employed state officer or employee may enter into a state contract in which he or she participated in any of the negotiations, transactions, planning, arrangements or any part of the decision-making process while employed in any capacity by an agency or department of state government. (*Id.*, subd. (a).) However, there is a two-year limit on the application of this statutory prohibition commencing on the date the person left state employment. (For application of similar provisions under Government Code section 1090, see *Stigall v. City of Taft* (1962) 58 Cal.2d 565 and 66 Ops.Cal.Atty.Gen. 156 (1983).)

Second, there is a one-year prohibition on former policy making officials contracting with their prior agencies. This prohibition establishes a one-year moratorium on any former state officer or employee, entering into a contract with his or her former agency, if the covered official held a policymaking position with the agency in the same general subject area as the proposed contract within 12 months prior to his or her departure from state government. (§ 10411, subd. (b).) However, the statute expressly exempts contracts for expert witnesses in civil cases and contracts for the continued services of an attorney regarding matters with which the attorney was involved prior to departing state service. (*Id.*)

D. Limitations on Consultants

Consultants are also similarly restricted. Generally, no person or firm that has been awarded a consulting services contract may be awarded a contract for the provision of services, procurement of goods or supplies, or any other related action that is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract. (§ 10365.5.) In other words, a contractor may not be hired to conduct a feasibility study or produce a plan, and then be awarded a contract to perform the recommended services. These

contracts are often referred to as “follow-on contracts.” The prohibition does not apply to architectural contracts covered by Government Code section 4525, or to specified subcontractors having less than 10 percent of the consulting contract. (§ 10365.5, subds. (b) & (c).) The term “consulting services contract” is defined in section 10335.5.

E. Penalties and Enforcement

Any contract made in violation of these prohibitions is void, unless the violation is technical and non-substantive. (§ 10420.) The state or any person acting on behalf of the state may bring a civil suit in superior court to have the performance of a contract temporarily restrained and ultimately declared void. (§ 10421.) Successful plaintiffs may be awarded costs and attorney’s fees, but defendants may not receive either. (*Id.*) A willful violation of the prohibitions is a misdemeanor, and persons involved in the corrupt performance of contracts are subject to felony penalties. (§§ 10422, 10423 & 10425.)
