



Public Contracting Update: How to Spot Conflicts of Interest with Independent Contractors and Avoid Violating Government Code 1090

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Did you know that an independent contractor can be considered a “public official” for the purpose of determining conflicts of interest under Government Code 1090? That is what the California Court of Appeals recently held in *Strategic Concepts, LLC v. Beverly Hills Unified School District*, which also confirmed several Court of Appeals decisions and mirrors the position of the California Fair Political Practices Commission (the State agency responsible for enforcing Government Code 1090).

Even the California Supreme Court has weighed in on this important issue, holding in *People v. Superior Court (2017) 3 Cal.5th 230 (Sahlolbei)* that Government Code 1090 may apply to independent contractors, in particular, “when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf.” The penalties for violating 1090 are severe. A contract that violates 1090 is deemed void, the California Fair Political Practices Commission has the authority to fine violators, and criminal sanctions may apply in extreme cases.

It is critical for public agencies to understand the nuances of Government Code 1090, when it applies to independent contractors, and how to avoid potential violations. Following is information on what public agencies need to know, steps for spotting 1090 issues, and a few practical suggestions for avoiding 1090 violations.

WHAT IS GOVERNMENT CODE 1090?

Government Code 1090 prohibits public officials, while acting in their official capacities, from making contracts in which they are financially interested. Under 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (People v. Honig (1996) 48 Cal.App.4 th 289, 333.) That makes sense. A public official or employee should not have a financial interest in any contract that he or she has authority to approve.

WHO IS COVERED BY GOVERNMENT CODE 1090?

Traditionally, the law considered “public officials” to be the awarding agency’s Board, Commission, or City Council. High-level public employees are also considered “public officials” with authority to make contracts for the purposes of 1090. However, recent case law, bolstered by advice letters from the California Fair Political Practices Commission, have expanded the definition of “public officials” to include independent contractors. This means that if an independent contractor had a financial interest in a contract that was approved by a public agency, and the independent contractor “participated” in the making of the contract, the contract would be void under Government Code 1090.

WHAT TYPES OF INDEPENDENT CONTRACTORS ARE COVERED BY 1090?

Government Code 1090 has been applied broadly to a range of independent contractors. In Hub City Solid Waste Services, Inc. v. City of Compton, awarding a contract to a waste management consultant violated 1090 when the consultant, already under contract, advised the city to hire his firm for a subsequent contract. In Sahlobei, mentioned above, a 1090 violation occurred when a physician

was an independent contractor for a public hospital and pressured the hospital to give another doctor a contract in which he (the independent contractor) had a financial interest. In Davis v. Fresno Unified School District, 1090 was violated when a contractor advised the District on development plans, specifications and construction documents, and then was later awarded a lease-leaseback agreement for the development of the same project. Also, the California Fair Political Practices Commission regularly publishes advice letters regarding 1090 and recently opined that a design firm involved in designing a golf course was prohibited from bidding on the construction of the golf course because the design firm was intricately involved in the design of the course which formed the basis for the RFP for the construction services.

HOW CAN 1090 PITFALLS BE AVOIDED?

First, keep in mind that a 1090 violation occurs at the time a contract is made. Thus, public agencies should be cautious when an independent contractor is currently under contract with the agency and is being considered for a new contract for services related to the scope of work of the current contract. Asking key questions can help assess potential problems in this scenario. For example, does the independent contractor’s original scope of work make it such that they have participated in the making of the second contract? Was their design used for the RFP? Did they do the underlying study upon which the RFP for the new contract was based? Did they advise agency staff on issues related to procurement of the new services and/or the new contract?

WHAT ARE THE LESSONS LEARNED?

As a best practice tip, whenever considering the approval of a contract with an independent contractor who

has previously been under contract with the agency, ask the essential question – might 1090 apply here? Make sure to understand the facts related to potential 1090 issues before presenting a contract to the Board for approval.

As a practical matter, public agencies could reconsider a common contracting approach which is to enter into numerous new and subsequent agreements with the same independent contractor to perform a range of different services. An alternative approach would be to consider having the independent contractor enter into one agreement with a preliminary scope of work that covers the full range of potential work and/or services for the project. Again, it is important to remember that the 1090 violation occurs at the point when the subsequent contract is made.

Finally, the California Fair Political Practices Commission regularly issues advice letters that can be searched to seek guidance on how 1090 has been applied to different factual situations. If an agency has time before a contract is approved, it is possible to request an advice letter from the Commission so they can provide guidance on whether a particular contract approval might violate 1090.

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