



# A Quick Guide to Section 1090

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## What is “Section 1090”?

Government Code Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”<sup>1</sup>

## What is the purpose of Section 1090?

Section 1090 “codifies the long-standing common law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities.”<sup>2</sup>

The prohibition is designed to apply to any situation that “would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [public entity concerned].”<sup>3</sup> Section 1090’s goals include eliminating temptation, avoiding the appearance of impropriety, and assuring the public of the official’s undivided and uncompromised allegiance.

Furthermore, Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.”<sup>5</sup>

## What if a contract violates Section 1090?

A contract that violates Section 1090 is void.<sup>6</sup> The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable or are plainly to the public entity’s advantage.<sup>7</sup>

## What are the consequences of a violation?

Apart from voiding the contract, where a prohibited interest is found, the official who engaged in its making is subject to a host of civil and (if the violation was willful) criminal penalties, including imprisonment and disqualification from holding public office in perpetuity.<sup>8</sup> The FPPC also may impose administrative penalties for violations of Section 1090<sup>9</sup>

## How is Section 1090 applied and analyzed?

Courts have recognized that Section 1090's prohibition must be broadly construed and strictly enforced.<sup>10</sup> "An important, prophylactic statute such as Section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled."<sup>11</sup> With this in mind, the determination of whether Section 1090 prohibits a particular contract generally requires the following questions to be analyzed:

### 1. Is the official subject to the provisions of Section 1090?

Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local level.

#### ***Independent Contractors***

In addition, the California Supreme Court recently affirmed that Section 1090's reference to "officers" applies to "outside advisors [independent contractors, including corporate consultants] with responsibilities for public contracting similar to those belonging to formal officers."<sup>12</sup> In other words, liability extends only to independent contractors who can be said to have been entrusted with "transact[ing] on behalf of the Government."<sup>13</sup>

Occasionally, the Commission receives a request for advice asking whether a public entity that has entered a contract with an independent contractor to perform one phase of a project may enter a second contract with that independent contractor for a subsequent phase of the same project. In these situations, we generally employ a two-step test.

The first step, just discussed, is a determination of whether the independent contractor had responsibilities for public contracting on behalf of the public entity under the initial contract. If the answer is "no," the independent contractor is not subject to Section 1090 and the public entity may enter the subsequent contract with them for the same project. However, if any part of their contractual duties or responsibilities under the first contract involved public contracting, then the independent contractor is subject to Section 1090, and the analysis proceeds to the second step.

Under the second step, the analysis focuses on whether the independent contractor participated in making the subsequent contract for purposes of Section 1090, as discussed below, through its performance of the initial contract. If the answer is "no," the public entity may enter the subsequent contract with them for the same project. However, if the independent contractor is found to have participated in the making of the contract for purposes of Section 1090, the public entity may not enter into the subsequent contract.

## **2. Does the decision involve a contract?**

To determine whether a contract is involved in a decision, the Section 1090 analysis applies general principles of contract law<sup>14</sup>, while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’”<sup>15</sup> Under general principles of law, a contract is made on the mutual assent of the parties and consideration.

## **3. Is the official making or participating in the making of a contract?**

Section 1090 reaches beyond the officials who participate personally in the execution of the contract to include officials who participate in the making of the contract.

In *Sahlolbei, supra*, the Supreme Court explained that Section 1090 is to be construed broadly, including the meaning of what constitutes the “making” of a contract:

Recognizing the prophylactic purposes of conflicts statutes, the case law makes clear that section 1090 should be construed broadly to ensure that the public has the official’s “absolute loyalty and undivided allegiance.” (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) The focus is on the substance, not the form, of the challenged transaction, “disregard[ing] the technical relationships of the parties and look[ing] behind the veil which enshrouds their activities.” (*People v. Watson* (1971) 15 Cal.App.3d 28, 37.) To that end, we have held that the “making” of a contract for the purposes of section 1090 includes “planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids,” and not just the moment of signing. (*Stigall*, at p. 571.) Building on *Stigall*, the Courts of Appeal have explained that officials can be liable if they “had the opportunity to, and did, influence execution [of the contract] directly or indirectly to promote [their] personal interests.” (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)<sup>16</sup>

Therefore, “the test is whether the officer or employee participated in the making of the contract in (their) official capacity.”<sup>17</sup>

A decision to modify, extend or renegotiate a contract constitutes involvement in the making of a contract under section 1090.<sup>18</sup>

When members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member participates in the making of the contract.<sup>19</sup> In most cases, this presumption cannot be avoided by having the interested board member abstain from the decision. Rather, the entire governing body is precluded from entering the contract.<sup>20</sup> However, if an agency

employee is financially interested in a contract, the employee's agency is not prohibited from making the contract so long as the employee does not participate in his or her official capacity.<sup>21</sup>

A governing body cannot avoid application of Section 1090 by delegating its contracting authority to another individual or body.<sup>22</sup> However, it may avoid violating Section 1090 if the contract is made by an "independent" government official and that official does not have a conflict of interest.<sup>23</sup>

Resigning from a governmental position may not be sufficient to avoid a violation.<sup>24</sup>

#### **4. Does the official have a financial interest in the contract?**

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest," and officials are deemed to have a financial interest in a contract if they might profit from it in any way.<sup>25</sup> Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General Opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain.<sup>26</sup> "However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void."<sup>27</sup>

Employees generally have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment.<sup>28</sup> A member of a governing body always has a financial interest in his or her spouse's source of income for purposes of Section 1090.<sup>29</sup>

#### **5. Does a statutory exception apply, such as a remote or noninterest exception?**

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest" under Section 1091, or a "noninterest" under Section 1091.5. If a "remote interest," is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract.<sup>30</sup> If a "noninterest" is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require disclosure.<sup>31</sup>

Remote interests apply only to members of multi-member bodies. Common remote interests in contracts include those situations where an official is:

- An officer or employee of a nonprofit corporation.

- Employed by a private contracting party that has 10 or more employees (other than the official) where he or she has been employed for at least three years prior to initially joining the public body, owns less than 3% of the stock, is not an officer or director, and did not directly participate in formulating the bid of the private contracting party.
- A landlord or tenant of a contracting party.
- A supplier of goods or services that have been supplied to the contracting party by the official for at least five years prior to his or her election or appointment to office.

Common noninterests in contracts include those situations where an official is:

- A recipient of public services generally provided by the public body or board of which they are a member, on the same terms and conditions as all other recipients.
- A noncompensated officer of a nonprofit tax-exempt corporation, which has at least one primary purpose that supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration.

## 6. Does the “Rule of Necessity” Apply?

In limited cases, the “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit.<sup>32</sup> The rule has been applied where public policy concerns authorize the contract and “ensures that essential government functions are performed even where a conflict of interest exists.”<sup>33</sup> The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so.<sup>34</sup>

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<sup>1</sup> Gov. Code Section 1090(a).

<sup>2</sup> *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072.

<sup>3</sup> *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.

<sup>5</sup> *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.

<sup>6</sup> *Thomson, supra*, 38 Cal.3d at p. 646.

<sup>7</sup> *Id.*, at pp. 646-649.

<sup>8</sup> See Gov. Code Section 1097; *People v. Honig* (1996) 48 Cal.App.4th 289, 317.

<sup>9</sup> Gov. Code Section 1097.1.

<sup>10</sup> *Stigall, supra*, 58 Cal.2d at pp. 569-571.

<sup>11</sup> *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1334.

<sup>12</sup> *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 237-240.

<sup>13</sup> *Id.* at p. 240.

<sup>14</sup> 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).

<sup>15</sup> *People v. Honig, supra*, 48 Cal.App.4th at p. 351 citing *Stigall, supra*, 58 Cal.2d at pp. 569, 571.

<sup>16</sup> *Id.* at p. 239.

<sup>17</sup> *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1292, quoting *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 236-237.

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- <sup>18</sup> *City of Imperial Beach, supra*, 103 Cal.App.3d at p. 191.
- <sup>19</sup> *Thomson, supra*, 38 Cal.3d at pp. 645, 649.
- <sup>20</sup> *Id.* at pp. 647-649.
- <sup>21</sup> See, e.g., *County of Marin v. Dufficy* (1956) 144 Cal.App.2d 30, 37 (Section 1090 would not apply to a county physician's lease of office space to the county because the physician did not act in his official capacity with respect to the lease).
- <sup>22</sup> See 87 Ops.Cal.Atty.Gen. 9 (2004); 88 Ops.Cal.Atty.Gen. 122 (2005).
- <sup>23</sup> See e.g., 81 Ops.Cal.Atty.Gen. 274 (1998); 57 Ops.Cal.Atty.Gen. 458 (1974).
- <sup>24</sup> See, e.g., 66 Ops.Cal.Atty.Gen. 156, 159 (1983) (county employees could not propose agreement for consultant services, then resign, and provide such consulting services).
- <sup>25</sup> *People v. Honig, supra*, 48 Cal. App. 4th at p. 333.
- <sup>26</sup> *Thomson, supra*, 38 Cal.3d at pp. 645, 651-652.
- <sup>27</sup> *People v. Deysher* (1934) 2 Cal.2d 141, 146.
- <sup>28</sup> 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).
- <sup>29</sup> See 78 Ops.Cal.Atty.Gen. 230, 235 (1995).
- <sup>30</sup> Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005).
- <sup>31</sup> *City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.
- <sup>32</sup> *Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.
- <sup>33</sup> *Ibid.*; see also 69 Ops.Cal.Atty.Gen. 102, 109 (1986).
- <sup>34</sup> *Lexin, supra*, 47 Cal.4th at p. 1097.