

CONFLICTS OF INTEREST



2010

California Attorney General's Office

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.)
