Date of Hearing: April 10, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING
Marc Berman, Chair
AB 626 (Quirk-Silva) – As Amended March 21, 2019

SUBJECT: Conflicts of interest.

SUMMARY: Provides that a public officer or employee shall not be deemed to be financially interested in a contract, pursuant to Government Code Section 1090 (Section 1090), if the officer or employee's financial interest in the contract is that of an engineer, geologist, architect, land surveyor, or planner in performing preliminary design services, preconstruction services, or assisting with plans, specifications, or project planning services on any portion or phase of a project when proposing to perform services on any subsequent portion or phase of the project.

EXISTING LAW:

1) Prohibits members of the Legislature and state, county, district, judicial district, and city officers or employees, pursuant to Section 1090, from being financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Prohibits state, county, district, judicial district, and city officers or employees from being purchasers at any sale made by them in their official capacity, or from being vendors at any purchase made by them in their official capacity. Prohibits an individual from aiding or abetting a violation of Section 1090.

2) Enumerates various financial interests for which an officer or employee is deemed not to be interested in a contract pursuant to Section 1090.

3) Provides that a contract made in violation of Section 1090 may be voided by any party to the contract, except for the officer who had an interest in the contract in violation of Section 1090, as specified.

4) Provides that a person who willfully violates Section 1090, or who willfully aids or abets a violation of Section 1090, is punishable by a fine of not more than $1,000 or by imprisonment in the state prison, and is forever disqualified from holding any office in the state. Gives the Fair Political Practices Commission (FPPC) the authority to commence an administrative or civil enforcement action for a violation of Section 1090 and related laws, as specified.

5) Permits the FPPC to issue an opinion or advice with respect to a person's duties under Section 1090 and related laws, as specified.

FISCAL EFFECT: Unknown

COMMENTS:

1) **Purpose of the Bill**: According to the author:

> Recently, design professional consultants (engineers, geologists, architects, land surveyors, and planners) are increasingly being subjected to the terms of

Government Code Section 1090 and precluded from participating in subsequent phases of a public works project if they had any involvement in an earlier phase.

Current law requires that any project affecting infrastructure in California must be designed, overseen, and inspected by the most qualified and competent professionals available.

Precluding design professionals from working on subsequent phases of a project limits the pool of qualified consultants who may propose during any phase, meaning that projects may not be developed with the most qualified and competent professionals, thus depriving the public of the best and safest infrastructure possible, as well as potentially increasing project cost.

2) **Government Code Section 1090**: Section 1090 generally prohibits a public official or employee from making a contract in the person's official capacity in which the person has a financial interest. In addition, a public body or board is prohibited from making a contract in which any member of the body or board has a financial interest, even if that member does not participate in the making of the contract. Contracts that are made in violation of Section 1090 can be voided by any party to the contract except the officer interested in the contract, as specified. The prohibitions against public officers being financially interested in contracts that are contained in Section 1090 date back to the second session of the California Legislature (Chapter 136, Statutes of 1851). A public official can be subject to felony penalties for a violation of Section 1090 even if the official did not intend to secure any personal benefit, did not intend to violate Section 1090, and did not know that their conduct was unlawful.

   Unlike conflicts of interest under the Political Reform Act, it is generally not sufficient for public officials who have financial interests in contracting decisions under Section 1090 to recuse themselves from participating in those decisions in order to avoid the conflicts. Instead, under Section 1090, the board or body of which the official is a member continues to be prohibited from making a contract in which one of its members is financially interested *even if* that member does not participate in the decision. This policy reflects a concern that remaining board members' knowledge of their fellow member's interest could lead the board to favor an award that would benefit the recused member.

   State law recognizes two categories of exceptions to Section 1090: "remote interests" and "non-interests." State law lists 15 types of financial interests that the Legislature has chosen to exclude from the scope of Section 1090, commonly referred to as "non-interests." Examples of "non-interests" include: an ownership interest of less than 3% of a for-profit corporation, as specified; interest in a spouse's employment, if the spouse has held the same job for at least one year before the official took office; or that of a public official being reimbursed for their actual expenses related to the performance of official government duties.

   By contrast, where a government official has a "remote interest," the official must take three steps before the body on which the official sits may vote on that contract. First, the official must disclose the interest to the governmental body. Second, the interest must be noted in the governmental body's official records. Finally, the official with the "remote interest" must abstain from participating in making the contract. State law lists 17 situations that qualify as "remote interests," including that of an engineer, geologist, architect, or planner employed by

an engineering, architectural, or planning consulting firm. While the willful failure of an officer to disclose a remote interest in a contract subjects that officer to the penalties outlined above, the contract itself is not subject to cancelation due to the violation unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

When considering whether a public official is involved in the making of a contract for the purposes of Section 1090, legal opinions generally have broadly construed the "making" of a contract to include governmental actions that go beyond the award of the contract. For example, courts have found that for the purposes of Section 1090, the "making" of a contract includes preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Association for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222.) In an informal opinion from 1993, the California Attorney General concluded that a *former* member of a city planning commission would violate Section 1090 if he entered into a contract with the city to be a consultant with respect to the city's general plan revision, because when the person was still on the planning commission, it had adopted a policy to use consultants rather than employees for the plan revision. (Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (Jan. 26, 1993).)

Furthermore, courts have interpreted Section 1090 to apply to the actions of consultants to and independent contractors of public agencies in situations where the consultant or contractor serves as a trusted advisor to the governmental body and where the consultant or contractor carries out public contracting duties on the government's behalf. (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533. *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261. *People v. Superior Court (Sahlolbei)* (2017) 3 Cal. 5th 230.) In those situations, the courts have concluded that the contractors' considerable influence over the decision making of the governmental body meant that the contractors were serving as public employees, and were therefore subject to Section 1090's prohibition on public employees being financially interested in any contract made by them in their official capacity.

3) **Infrastructure Projects and Section 1090**: In light of the information outlined above about the broad construction of Section 1090, an entity that is hired by a governmental body to advise the body on a project can have a Section 1090 conflict that prohibits the entity from being awarded contracts for subsequent phases of the same project. In the case of infrastructure projects, a contractor that provides preconstruction services can be considered to have been involved in the making of the subsequent contract for construction services because the preconstruction work can set the parameters for subsequent work. In such a circumstance, the contractor that provided preconstruction services could be barred by Section 1090 from being awarded a contract for the construction of that project.

In 2017, for example, the FPPC issued an advice letter concluding that an architectural firm that was awarded a contract to perform a jail needs assessment for a county was prohibited by Section 1090 from being awarded a subsequent contract to prepare plans and specifications for a new jail facility, and for related architectural services through construction of the new facility (*Simon* Advice Letter, No. A-17-148). In reaching that conclusion, the FPPC noted that the architectural firm "was integrally involved in the preliminary discussions, negotiations, reasoning, planning, and specifications that will result in the contract for the architectural design of a new jail," and thus the firm "has the potential

to exert considerable influence over the County's decisions concerning the new…jail."

The fact that a contractor provided preconstruction services to a governmental body, however, does not necessarily mean that the contractor has a conflict under Section 1090 when it comes to subsequent contracts on the same project. Rather, courts and the FPPC have concluded that a contractor for a public agency is not considered a public employee for the purposes of Section 1090 if the contractor does not exert considerable influence over the decision making of the agency.

Since the FPPC was given the authority to issue legal advice regarding Section 1090 and related laws through the passage of AB 1090 (Fong), Chapter 650, Statutes of 2013, the FPPC has issued more than 300 advice letters relating to Section 1090. Since the start of 2017, the FPPC has issued approximately 20 letters in situations where governmental bodies sought advice about whether a contractor or consultant who performed preliminary work on a project would be eligible to be awarded a contract for subsequent work on the same project. In a significant majority of those letters, the FPPC concluded that Section 1090 did *not* prohibit a contractor or consultant who performed preliminary work from being awarded a subsequent contract for additional work on the same project. That fact seems to suggest that Section 1090 does *not* impose a de facto ban on contractors being awarded multiple contracts for different portions of the same project. On the other hand, the FPPC's analysis of whether Section 1090 applies to a contracting situation is very fact specific, so it could be difficult for a contractor or consultant to determine whether their participation in early phases of a project would jeopardize their ability to be awarded contracts for subsequent phases of the same project. The absence of such certainty could limit the pool of bidders for work on early phases of projects. Additionally, the time and uncertainty associated with needing to get an advice letter from the FPPC before awarding certain contracts for public projects could lengthen the time necessary to complete those projects and could further reduce the pool of willing bidders for public contracts.

In light of the foregoing information, there may be policy benefits associated with having clearer rules describing the circumstances under which a consultant or contractor's participation in an early phase of a project will prevent that consultant or contractor from being awarded contracts for subsequent aspects of the same project.

4) **Arguments in Support**: The two co-sponsors of this bill, the American Council of Engineering Companies, California and the American Institute of Architects, California, write in a joint letter of support:

> Public agencies are experiencing an alarming contracting issue when seeking to partner with private engineering and architectural firms on public work infrastructure projects.
>
> When they seek to contract with engineers, land surveyors, architects, and geologists, these professionals are increasingly – and inappropriately – being subjected to the terms of [Section 1090] by the [FPPC]. As a result, well-qualified firms are being precluded from participating in subsequent phases of work if they had any involvement in an earlier phase.
>
> Engineers and architects conceive, design, and build much of the state's

infrastructure projects and systems, including roads, buildings, airports, tunnels, dams, bridges, and water treatment systems. The public is at great risk if qualified firms are prohibited from working on certain phases of our projects.

Public agencies should be free to choose through a competitive process who the most qualified firm is to partner with them and deliver projects to their constituents.

5) **Arguments in Opposition**: In opposition to this bill, the Associated General Contractors of California writes:

The stated purpose of AB 626 is to enable design professional[s] to perform all phases of public works construction projects, including design and construction management services, without violating the conflict of interest provisions in Government Code section 1090. However, under current law, design professionals can provide all such services without violating the conflict of interest laws provided they do so under a single contract. Indeed, it is a typical and common practice for design professionals to enter into contracts with public owners that call for both design phase and construction phase services as part of a single contract for services. Thus, the bill does not solve any problem in that regard. On the other hand, the bill creates a serious problem in the context of design-build that would inject fundamental unfairness in the process.

Specifically, under the current conflict of interest laws, a design professional who provides preliminary, or concept, design and related services to a public owner is precluded from participating as a member of a design-build team that will submit a proposal for the project and potentially win the award to be selected as the design-builder to deliver the project. This is because, unlike where a design professional has a single contract with a public owner for multi-phase services, the design professional would have one contract with the public owner and a second contract with the design-builder. Because it would have a financial interest in the second contract, the design professional would be in violation of the current conflict of interest law. Moreover, through this conflict of interest protection, fairness and integrity in the design-build process is protected. If a design professional who provides preliminary design services to the public owner is allowed to be part of a design build team, that design-builder will have an unfair advantage over other design-builders because it will have inside information about the project that is unavailable to other proposers. The design-builder also may receive a higher score because the public owner's engagement of the design professional may be seen as an implied endorsement. These risks of unfairness and harm to the integrity of the process are exactly what can happen if the bill is passed.

REGISTERED SUPPORT / OPPOSITION:

Support

American Council of Engineering Companies, California (co-sponsor)
American Institute of Architects, California (co-sponsor)
Coachella Valley Water District
Structural Engineers Association of California

Opposition

Associated General Contractors of California
California Association of Sheet Metal & Air Conditioning Contractors, National Association
California Chapters of the National Electrical Contractors Association
California Legislative Conference of Plumbing, Heating & Piping Industry
Construction Employers' Association
Northern California Allied Trades
Southern California Contractors Association
United Contractors
Wall and Ceiling Alliance
Western Wall and Ceiling Contractors Association

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