

Date of Hearing: July 15, 2015

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Sebastian Ridley-Thomas, Chair

SB 704 (Gaines) – As Amended July 8, 2015

SENATE VOTE: 38-0

SUBJECT: Public officers and employees: conflict of interest: contracts.

SUMMARY: Allows a governmental entity to enter into a contract with a firm where an owner or partner of the firm serves as an appointed member of an unelected board or commission to the governmental entity if the owner or partner recuses himself or herself from providing any advice to the contracting agency regarding the contract between the firm and the contracting agency, and if certain other conditions are met. Allows a governmental board or body to enter into a contract with a firm that employs a member of the board or body if the firm is a consulting engineering or architectural firm and the employee is a planner, or if the firm is a consulting planning firm and the employee is an engineer, geologist, architect, or planner, if certain conditions are met. Specifically, **this bill:**

- 1) Provides that the term "remote interest," for the purposes of Government Code Section 1090 (Section 1090) relating to conflicts of interest in contracts, includes the interest of an owner or partner of a firm who is serving as an appointed member of an unelected board or commission of the contracting agency if the owner or partner recuses himself or herself from providing any advice to the contracting agency regarding the contract between the firm and the contracting agency and from all participation in reviewing a project that results from that contract.
- 2) Provides that the term "remote interest," for the purposes of Section 1090, includes the interest of a planner employed by a consulting engineering or architectural firm, or the interest of an engineer, geologist, architect, or planner employed by a consulting planning firm, provided that the employee of the consulting firm does not serve in a primary management capacity and is not an officer or director of the consulting firm.

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) Provides that an officer shall not be deemed to be interested in a contract pursuant to Section 1090 if the officer has only a remote interest, as defined, in the contract. Requires that the remote interest be disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter that the body or board authorizes, approves, or ratifies

the contract in good faith by a vote of its membership, without counting the vote or votes of the officer or member with the remote interest.

- 3) Provides that the term "remote interest" includes, among other interests, the interest of an engineer, geologist, or architect employed by a consulting engineering or architectural firm. Provides that this remote interest applies only to an employee of a consulting firm who does not serve in a primary management capacity, and provides that it does not apply to an officer or director of a consulting firm.
- 4) Enumerates various financial interests for which an officer or employee is deemed not to be interested in a contract pursuant to Section 1090.
- 5) 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. Provides that the willful failure of an officer to disclose a remote interest in a contract does not void the contract unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.
- 6) 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.
- 7) Authorizes a person subject to Section 1090 to request the FPPC to issue an opinion or advice with respect to that person's duties under Section 1090 and related laws. Permits the FPPC to issue such an opinion or advice, subject to certain conditions.

FISCAL EFFECT: Unknown

COMMENTS:

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

[Section 1090] precludes owners of architectural firms (and others) to serve as appointed volunteers on local government bodies, such as design review boards and planning commissions, and to have a contract to provide services with the appointing jurisdiction if the project for which the services are provided goes before the board on which the architect sits.

If City A appoints architect and architectural firm owner Joan to its design review board, and Joan's business partner and fellow owner Tom gets a contract with City A to provide architectural services, Joan and Tom Architects has two options under existing law: Joan and Tom Architects gives up the contract or Joan resigns from the design review board....

This proposal would create a third option that would allow Joan and Tom Architects to keep the contract and allow Joan to continue serving on the design review board. The proposal would allow the conflict of interest (which is what the law considers this) to be legally resolved with Joan recusing herself when this project comes before the design review board.

- 2) **Government Code Section 1090:** Section 1090 generally prohibits a public official or employee from making a contract in his or her official capacity in which he or she 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. Violation of this provision is punishable by a fine of up to \$1,000 or imprisonment in the state prison, and any violator is forever disqualified from holding any office in the state. Additionally, contracts that are made in violation 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 his or her conduct was unlawful.

Unlike conflicts of interest under the Political Reform Act (PRA), it is generally not sufficient for a public official who has a financial interest in a contracting decision under Section 1090 to recuse himself or herself from participating in that decision in order to avoid the conflict. 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 recuses himself or herself from participating 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 which would benefit the recused member.

State law recognizes two categories of exceptions to Section 1090: "remote interests" and "non-interests." State law lists 14 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 corporation; 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 his or her actual expenses related to the performance of official government duties.

By contrast, where a government official has a "remote interest," he or she must take three steps before the body on which he or she sits may vote on that contract. First, the official must disclose the interest to the government body. Second, the interest must be noted in the government body's official records. Finally, the official with the "remote interest" must abstain from participating in making the contract. State law lists 16 situations that qualify as "remote interests," including that of an engineer, geologist, or architect employed by an engineering or architectural consulting firm. While the willful failure of an officer to disclose a remote interest in a contract would subject 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 (AG) 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).)

Of particular relevance for the purposes of this bill, a 1994 opinion by the California AG concluded that a governmental entity's review of work under a contract could be considered to be part of the "making" of a contract for the purposes of Section 1090 even if the entity reviewing the contract was not involved in the awarding of the contract and was not a party to the contract. In that opinion, the AG concluded that the San Francisco Art Commission (Art Commission) would violate Section 1090 if it considered and approved the design for a terminal at the San Francisco International Airport, because a member of the Art Commission was a partner at an architectural firm that was awarded the contract to design the terminal. Even though it was the San Francisco Airports Commission, and not the Art Commission, that awarded the contract to the architectural firm, the opinion found that the review and approval of the design by the Art Commission could be considered part of the "making" of a contract, because the review was similar to determining whether the original contract should be affirmed or modified (the Art Commission was required to review the design pursuant to the San Francisco city charter). As a result, the opinion concluded that the partner of the architectural firm would have to resign from the Art Commission before the Art Commission could consider the design of the airport terminal (77 Ops.Cal.Atty.Gen. 112 (1994)).

To the extent that design review boards, planning commissions, and similar bodies are composed of architects and other professionals who have expertise that may be relevant to the work of those boards and commissions, the broad construction of Section 1090 can create conflicts that limit the ability of those boards and commissions to perform their intended functions. In recognition of that fact, state law was previously amended to provide that the interest of an engineer, geologist, or architect employed by a consulting engineering or architectural firm is a "remote interest" under Section 1090, provided that the employee of the consulting firm does not serve in a primary management capacity, and is not an officer or director of the firm. This bill expands that remote interest such that it also applies to planners and to those employed by consulting planning firms.

Additionally, this bill creates a new "remote interest" under Section 1090, providing that the

interest of an owner or partner of a firm serving as an appointed member of an unelected board or commission of the contracting agency is a remote interest if the owner or partner recuses himself or herself from providing any advice to the contracting agency regarding the contract between the firm and the contracting agency and from all participation in reviewing a project that results from that contract.

- 3) **Arguments in Support:** The sponsor of this bill, the American Institute of Architects, California Council, writes in support:

SB 704 would allow and encourage more architects and other professionals to serve their local communities as volunteers on appointed boards and commissions such as design review boards and planning commissions.

These boards and commissions, and thus the communities they serve, benefit when architects and other professionals volunteer their time and expertise through service on these appointed bodies.

Unfortunately, existing law makes it difficult for owners of a firm to serve on these appointed bodies. The Government Code 1090 body of law does not allow an owner of a firm to serve as a volunteer on an appointed body and to have a contract with the local government that appointed him or her. As a result, architects and others who are active in their communities either do not seek to volunteer on these bodies or, if they do, resign from the body in order to enter into a contract to provide services or goods.

SB 704 proposes to allow owners of firms who serve as volunteers on appointed bodies or commissions to enter into a contract with the local government that appointed them so long as they recuse themselves if the subject of the contract ever comes before the board and commission on which they serve.

This is not a new idea. The [PRA] allows for similar types of conflicts to be resolved with the board or commission member recusing him or herself from participating in any decision on a matter in which the member has a financial interest. The [PRA] recusal option does not apply, however, if the matter is the result of a contract between the member and the local government that appointed the member.

In other words, if a city appoints an architect to a design review board, and then wants to give that architect a contract to design a facility at one of its parks, the architect would either have to resign from the design review board or not accept the contract. However, an architect who serves on the design review board may design a project for a private sector client and remain on the design review board when that project comes before the design review board for approval, so long as the architect recuses him or herself.

- 4) **Related Legislation:** SB 330 (Mendoza), which is also being heard in this committee today, provides, beginning in 2017, that an elected officer of a state or local governmental entity is

deemed to have a remote interest in a contract made by the governmental entity if the officer's spouse, child, parent, or sibling, or the spouse of the child, parent, or sibling, has a financial interest in the contract.

REGISTERED SUPPORT / OPPOSITION:

Support

American Institute of Architects, California Council (sponsor)

Opposition

None on file.

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