

Local Agency Contracting with Independent Contractors

WEDNESDAY, NOVEMBER 8, 2023 | 12:00 PM – 1:00 PM

THANK YOU FOR JOINING US!



Host & Moderator

MELISSA KUEHNE
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Institute for Local Government



LUNCH & LEARN OVERVIEW

Welcome & Introductions

Presentation: Local Agency Contracting with Independent Contractors

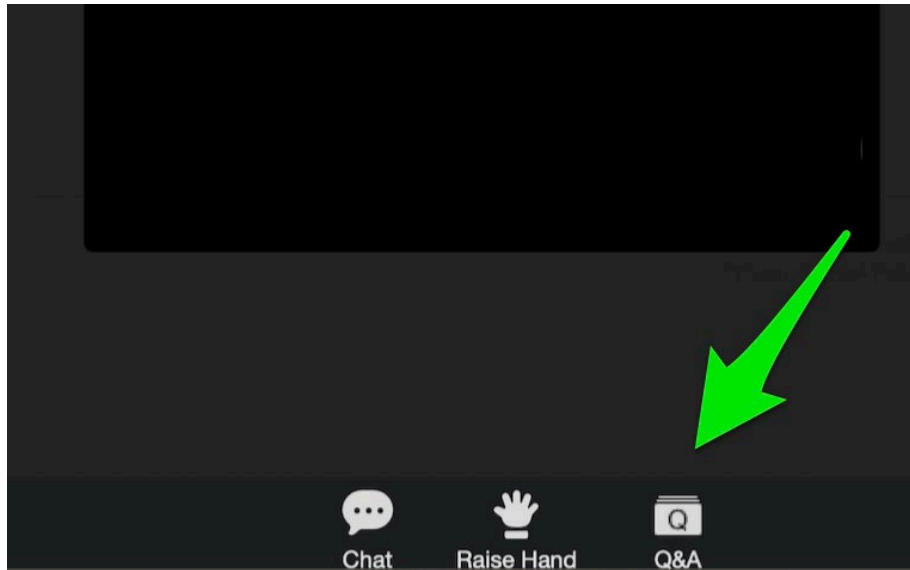
Discussion & Audience Q&A

Wrap Up & Adjourn

We welcome your written questions and comments in the Q&A throughout Lunch & Learn

TECH OVERVIEW & HOUSEKEEPING

- All webinar participants will be on **MUTE** for the duration of the event.
- Please type any questions for into the **Q&A BOX** at any time during the session.



- A recording of the session will be available shortly after the webinar.

ABOUT ILG



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- The Institute for Local Government is the non-profit training and education affiliate of three statewide local government associations
- Together with our affiliates, we serve over 2,500 local agencies – cities, counties and special districts
- We provide practical and easy-to-use resources so local agencies can effectively implement policies on the ground



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Our mission is to help local government leaders **navigate complexity**, **increase capacity & build trust** in their communities

TODAY'S PRESENTERS



CATHERINE GROVES
Senior Counsel, San Francisco
Hanson Bridgett



TREVOR TANIGUCHI
Associate, Sacramento
Hanson Bridgett



Local Agency Contracting with Independent Contractors

CATHERINE J. GROVES & TREVOR T. TANIGUCHI

Conflicts of Interest Laws

- Enacted to address inevitable conflicts of interest
 - Government decision-making (PRA)
 - Public contracts (Section 1090)
- Focus today is Section 1090 and recently enacted legislation – AB 334 (Rubio, 2023)
- Levine Act – AB 1439 (Glazer, 2022)

No Self-Dealing in Contracts

- You “shall not be financially interested in any contract made” in your official capacity, or by any body or board of which you are a member. Government Code §1090 et seq.
- Gov’t Code 1090 does not define “financial interest”
- “the statute not only strikes at situations that do involve actual fraud and dishonesty, but also at those in which the possibility exists for personal influence of an interested (officer) to be brought to bear, either directly or indirectly, on an official decision.” (66 Ops.Cal.Atty.Gen. 156, 160 n.3 (1983).)

No Self-Dealing in Contracts

- Official Subject to Section 1090?
 - Officers
 - Employees
 - Consultants
 - In role of agency staff

No Self-Dealing in Contracts

- Making or Participating in Making a Contract
 - Virtually any involvement qualifies
 - “An official (or a public employee) may be convicted of a violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to and did influence execution directly or indirectly to promote his personal interest.” (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052)
 - Includes “preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids” (*Millbrae Ass’n. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222.)

What if there is a Section 1090 conflict?

- Is there a remote interest?
- Is there a non-interest?
- For members of a legislative body: agency cannot execute contract or must resign.
- Staff are permitted to recuse themselves from contracting process.

No Self-Dealing in Contracts

- Can you get advice?
 - YES! A.B. 1090 (2013) allows the FPPC to
 - Provide opinions and advice
 - Bring civil and administrative enforcement actions, after consultation with D.A.
- Penalties & consequences of violation
 - Contract = void **and** refund money
 - Felony: imprisonment and fines (\$5,000-\$10,000)
 - Attorneys' fees
 - Can never hold another public office

HYPOTHETICAL #1

The City of Gotham intends to award a 5-year agreement to a Best Consulting, LLC for on-call management support services. There is no guaranteed compensation, but the agreement has a maximum not to exceed amount of \$1M.

A Gotham Council Member is an executive of Best Consulting, LLC, but oversees the company's engineering unit, and has not involvement with the management support services unit of the company. Additionally, the Council Member has recused themselves from all decisions and discussions regarding the agreement and is planning on recusing themselves when the agreement is presented to the Council for approval.

May the City enter into the agreement with Best Consulting, LLC?

HYPOTHETICAL #1: ANSWER

- No. The Council Member has a financial interest in the company and thus has a financial interest in the proposed contract between the City and the company.
- Recusal does not cure the 1090 issue – the City may not enter into the agreement. No remote interest or non-interest exception applies.

1090 and Consultants

Are consultants covered by 1090?

- Initial statute only applied to “officials”
- *Shaefer v. Berinstein* applied it to non-officials (1956) 140 Cal.App.2d 278
- 1963 Amendment added “employee” to statute [Stats. 1961, Ch. 2172]
- Recent court decisions have broadened reach of the statute to include consultants and corporations providing consulting services

Case 1: People v. Superior Court (Sahlolbei) (2017) 3 Cal.5th 230

- Doctor, an independent contractor at public hospital, served on hospital's medical staff advisory committee on hiring
- Doctor recommended hiring of a new doctor, then skimmed share of new doctor's compensation via contract
- CA Supreme Court rejects claim that 1090 doesn't apply to independent contractors
- Court rejects use of common law definition of "employee" and disapproves *Christiansen* to the extent inconsistent
- Court finds that not all independent contractors are subject to 1090

Case 1: People v. Superior Court (Sahlolbei)

- Independent contractors that “transact on behalf of the Government” are covered
- To the extent an individual “influences an agency’s contracting decisions or otherwise acts in a capacity that demands the public’s trust” they are covered by 1090
- Court declines to adopt test of whether the contractor occupies a position that carries the potential to exert “considerable influence”
- Focus is whether they “engage in or advise on public contracting” on the public’s behalf

Case 2: California Taxpayers Action Network v. Taber Construction, Inc. (2019) 42 Cal.App.5th 824

- School district published 2 RFPs to modernize HVAC systems at 8 schools.
- The RFPs explained that the school district intended to select a single firm to complete the modernization project, but the process would involve two contracts entered into at different times.
- The parties would first enter into a preconstruction services agreement, and later enter into a lease-leaseback agreement.
- School district selected Taber for the preconstruction services agreement and later entered into a lease-leaseback agreement with Taber.
- Plaintiff sued alleging second agreement – lease-leaseback violated Section 1090.

Case 2: *California Taxpayers Action Network v. Taber Construction, Inc.* (2019) 42 Cal.App.5th 824

- Violation of Section 1090?
- Key factors highlighted by Court:
 - School district intended to hire 1 contractor to do entire project, even though project consisted of two contracts entered into at different times.
 - No evidence that Taber used its role in the first contract to improperly influence second contract.
 - Taber was not hired to engage or advise on public contracting on behalf of the school district.
- Consultants providing services to a public agency rather than providing services on behalf of a public agency are not public officials under Section 1090.

What specific actions constitute “participation”?

Easy:

- Negotiations
- Drafting contracts or specifications
- Planning
- Preliminary discussions

(*Stignall v. Taft* (1962) 58 Cal.2d 565)

What specific actions constitute “participation”?

More difficult “participation” questions:

- Development of capital improvement plan
- Providing technical advice as sub-consultant
- Continuing services that were provided pre-bid (such as construction management)
- Services in successive phases of project

HYPOTHETICAL #2

The Gotham Recreation and Park District hired Design Dragon last year to evaluate the agency's website and backend hardware, software and hosting services, and propose options for redesigning the look and feel and backend support for the website.

Now staff wants to award a contract to Design Dragon for website redesign services as well as software hosting maintenance and support services.

Is this OK?

HYPOTHETICAL #2: ANSWER

- Until the recent passage of AB 334, the answer to this question has been no based on FPPC advice letters
- Consultants who exert considerable influence over the contracting decisions of a public agency in a way that is more than ministerial and goes beyond mere technical input
- In general, contractors/consultants hired to assess or design a system were prohibited from being hired under a subsequent contract to build or implement the system

New Legislation – AB 334 (Rubio, 2023)

- Provides statutory clarification on Section 1090 – Gov't Code section 1097.6.
- Independent consultants may enter into additional contracts for subsequent phases if their duties from the initial contract do not include “engaging in or advising on public contracting on behalf of the public entity.”
- “Engaging in or advising on public contracting” means preparing or assisting the public entity with any portion of the public entity’s preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract.

AB 334 (Rubio, 2023) – Continued

- Independent contractors that are “officials” may enter into a subsequent contract if they do not “engage in or advise on the making of the subsequent contract.”
- Initial stage work does not constitute engaging in or advising on the making of the subsequent contract if participation is limited to “conceptual, preliminary, or initial plans or specifications” and all bidders/proposers of subsequent procurement have access to all materials.
- New Safe Harbor Language to include in contracts. (Gov’t Code section 1097.6(c)(1).

AB 334 (Rubio, 2023) – Continued

- New Safe Harbor Language to include in contracts. (Gov't Code section 1097.6(c)(1).)
- (1) the initial contract between the public entity and the independent contractor includes a statement identical or substantially similar to the sample included in the law, which provides that:
 - The contractor's duties and services shall not include preparing or assisting the public entity with any portion of the public entity's preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity;
 - The public entity shall at all times retain responsibility for public contracting, including with respect to any subsequent phase of this project;

AB 334 (Rubio, 2023) – Continued

- Safe Harbor Cont.
 - Contractor/consultant's participation in the planning, discussions, or drawing of project plans or specifications shall be limited to conceptual, preliminary, or initial plans or specifications; and
 - The contractor/consultant shall cooperate with the public entity to ensure that all bidders for a subsequent contract on any subsequent phase of this project have access to the same information, including all conceptual, preliminary, or initial plans or specifications prepared by contractor pursuant to this agreement.
- (2) the contractor did not breach the contractual obligations in the aforementioned statement.

AB 334 Impacts On Future Procurements

- Takes effect January 1, 2024.
- What about follow-on work?
- What about contracts executed between now and the effective date?
- Is life safe for the sub-consultant?

HYPOTHETICAL #3

The Gotham Water District hired Expert Engineers to prepare the entire bid package, including all bidding instructions and procedures for a new water treatment plant.

Expert Engineers submitted the low bid for the water treatment plant construction and the water district intends to award a contract to them.

Can they?

HYPOTHETICAL #3: ANSWER

- NO – the contractor prepared the entire bid package.

HYPOTHETICAL #4

Trusty Architects and Engineers have been hired by the City of Gotham to provide design and engineering services for a new City Hall, including the development of schematic designs, preliminary drawings and blueprints. Trusty is also contracted to assist the City through the state's regulatory and permitting process.

After Trusty completes its work, the City bids the project and selects a contractor to build the new City Hall Trusty designed and engineered. The City would now like to hire Trusty for a new scope of work to oversee the construction management of the construction project.

May it do so?

HYPOTHETICAL #4: ANSWER

- YES – assuming the following facts:
 - Trusty was not hired/contracted to advise in a procurement capacity on behalf of the City for the City Hall Project.
 - Trusty did not conduct the City Hall Procurement on behalf of the City.
 - All potential contractors had access to the same information as Trusty for the subsequent procurement.

Campaign contributions as conflicts, aka “Pay-to-Play” rules, Levine Act

- Levine Act recently revised by **AB 1439**, effective January 1, 2023.
- Applies to **elected or appointed officers; candidates for elective office**
- Applies to proceedings involving a license, permit, or other entitlement for use.
 - Includes: business, professional, trade, land use licenses/permits; entitlements for use; nonexempt contracts; franchises
 - Excludes: competitively bid contracts; contracts for labor/personnel employment

Campaign contributions as conflicts, aka “Pay-to-Play” rules, Levine Act

- Officers are prohibited from:
 - Accepting, soliciting, or directing more than \$250 from any party, participant, or agent of a party/participant to a proceeding while the proceeding is pending and for **12 months after** the final decision.
 - Making, participating in making, or influencing the decision if the officer received more than \$250 from any party, participant, or agent of a party/participant to a proceeding within the **preceding 12 months.**

Levine Act Cont'd.

- May **cure violations by returning** the contribution within specified time period.
- FPPC: recusal not required for contributions received in 2022 exceeding \$250.
- CA AG Opinion No. 23-101. AB 1439 is not retroactive; does not apply to contributions made before January 1, 2023.

Take Aways

- Section 1090 conflicts are complex and often require legal guidance.
- Don't be afraid to ask FPPC for advice.
- AB 334 provides clarification, but is not a blanket approval of all follow-on contracts.

AUDIENCE Q&A

What questions or comments do you have for us?



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