



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, and Wood

From: Angela Brereton, Chief of Enforcement
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Subject: Update Re: Voiding of Contracts that Violate Government Code Section 1090

Date: January 25, 2022

INTRODUCTION

This memorandum follows the Commission's request at the November 2021 Commission meeting regarding the legal effect of Commission civil and administrative action on seeking declaratory relief to void contracts that violate Section 1090.

Section 1090, et al., do not grant administrative or civil authority to the Commission to pursue declaratory relief to void contracts that violate Section 1090. Additionally, the most recent California Supreme Court case on this issue acknowledges that only parties to the contract have standing to void a contract that violates Section 1090.

BACKGROUND

The Commission is charged with the duty to administer, implement, and enforce the provisions of the Political Reform Act.¹ As of January 1, 2014, Assembly Bill 1090 authorized the Commission limited jurisdiction to seek and impose administrative and civil penalties against a public official who violates the prohibition against being financially interested in a contract, or who causes another person to violate the prohibition. AB 1090 also required the Commission to obtain written authorization from the district attorney of the county in which the alleged violation occurred to investigate and prosecute administrative or civil Section 1090 violations.

The Enforcement Division recently brought the first agreed upon stipulation in an administrative action involving a violation of Section 1090 to the Commission for approval. The Enforcement Division has not yet pursued a civil action for a Section 1090 violation.

¹ The Political Reform Act—sometimes simply referred to as the Act—is contained in Government Code sections 81000 through 91014. The regulations of the FPPC are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. Unless otherwise noted, all statutory references are to the Government Code, and all regulatory references are to Title 2, Division 6 of the California Code of Regulations.

Prior to AB 1090, enforcement of Section 1090 did not allow for any administrative or civil penalties.² Consequently, expanding the Commission's jurisdiction has allowed cases that do not rise to the level of criminal violations to be investigated and prosecuted at either the administrative or civil level. However, the legislation included limitations on the Commission's jurisdiction.

LIMITED JURISDICTION

In order to enforce Section 1090 violations, either in an administrative action or a civil action, the Commission must obtain prior written authorization from the district attorney of the county in which the alleged violation occurred.³ The following parameters also apply:

Administrative Action:

- An administrative decision issued by the Commission is not admissible in any proceeding other than a proceeding brought by the Commission. (Section 1097.1, subdivision (d).)
- All administrative procedures, due process protections, subpoena powers and authority to grant immunity that apply to prosecution of violations of the Act apply to the Commission's administrative prosecution of Section 1090 violations. (Section 1097.2.)
 - In an administrative action, the Commission may require a violator to:
 - Cease and desist the violation.
 - File any required reports, statements, or other documents or information.
 - Pay a monetary penalty of up to \$5,000 per violation. (Section 83116.)
- The Commission cannot bring a 1090 administrative action if the Commission has already brought a 1090 civil action against the person for the same violation (Section 1097.2, subdivision (g).)
- Administrative actions for Section 1090 violations are subject to the Act's five-year statute of limitations. (Section 1097.2, subdivision (h), citing Section 91000.5.)

Civil Action

- The maximum civil fine is not to exceed the greater of \$10,000 or three times the value of the financial benefit received by the defendant for each violation. (Section 1097.3, subdivision (a).)
- The Commission cannot bring a civil action if the Commission has already brought an administrative action against the person for the same violation, (Section 1097.3, subdivision (b).) or if the Attorney General or a district attorney

² See 2013 Legis. Bill Hist. CA A.B. 1090, Bill Analysis, August 30, 2013. See also, FPPC 2013 News Release; Governor Signs Bill to Expand FPPC Conflict of Interest 1090 Advice and Enforcement Authority.

³ Section 1097.1, subd. (b).

is pursuing a criminal 1090 prosecution of that person. (Section 1097.1, subdivision (b).)

- Civil actions for Section 1090 violations are subject to a four-year statute of limitations. (Section 1097.3, subdivision (c).)

For both administrative and civil actions, the Commission is authorized to obtain a judgment in superior court for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties imposed pursuant to Section 1097.1, 1097.2, or 1097.3. (Section 1097.4; also see Section 1097.5.)

None of the code sections identified above grant administrative or civil authority to the Commission to pursue declaratory relief to void contracts that violate Section 1090.

VOIDING CONTRACTS THAT VIOLATE SECTION 1090

Section 1092 controls voiding contracts that violate Section 1090. Section 1092 predates the Commission receiving limited jurisdiction of Section 1090 violations.

Under Section 1092, every contract that violates Section 1090 may be avoided at the instance of any party except the interested officer.⁴ Such an action must be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, the contract violated Section 1090.⁵

Section 1092, subdivision (a), uses the wording “may be avoided,” which case law has interpreted to mean contracts that violate Section 1090 are void, not merely voidable.⁶ But Section 1092 does not require the public agency that is a party to a contract that violates Section 1090 to pursue voiding the contract.⁷

Case law has provided that “[t]he penalty for a [Section 1090] violation is substantial: The interested official must disgorge any profits earned, and may not recover any consideration paid, under the contract.⁸ However, nothing in the plain language of either Section 1090 or Section 1092 grants nonparties to the contract the right to sue on behalf of a public entity that is entitled to bring a claim under Section 1092, but has not done so. And the most recent California Supreme Court case on the issue, *San Diegans for Open Government v Public Facilities Financing Authority of City of San Diego*, 8 Cal.5th 733, ruled that only parties to the contract

⁴ Section 1092, subd (a).

⁵ Section 1092, subd (b).

⁶ *Thomson v. Call* (1985) 38 Cal.3d 633, 646, fn. 15 [214 Cal.Rptr. 139, 699 P.2d 316], citing *People v. Deyscher* (1934) 2 Cal.2d 141, 146 [40 P.2d 259], *Berka v. Woodward* (1899) 125 Cal. 119 [57 P. 777], and *Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 601 [229 P. 1020].

⁷ *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679, 687 [190 Cal.Rptr.3d 876].

⁸ *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2019) 8 Cal.5th 733, 737 [257 Cal.Rptr.3d 43, 455 P.3d 311], citing *Thomson*, at pp. 646–652.

have standing under Section 1092 to void a contract that violates Section 1090, reversing previous court decisions.⁹

In *San Diegans for Open Government*, a citizens' taxpayer organization sued to void a contract allegedly made in violation of Section 1090.¹⁰ The trial court concluded that Section 1092 only conferred standing on the parties of the challenged contract. However, the Court of Appeals, 4th District, reversed this decision, holding the term "party" under Section 1092 to mean any litigant with an interest sufficient to support standing in the contract in violation of Section 1090. Ultimately, the Supreme Court reversed, concluding the organization did not have standing under Section 1092 to bring a private right of action voiding the contracts because it was not a party to the contracts.¹¹

Of note, the court majority held that because violations of Section 1090 can be enforced by the Attorney General, district attorneys and the Fair Political Practices Commission, and that the parties to the violating contract can void it under Section 1092, no compelling reason exists to include a private right of action for nonparties to sue to avoid public contracts.¹² But the California Supreme Court Chief Justice expands upon this idea in the concurring and dissenting opinion, stating "... neither the FPPC nor criminal prosecutors can offer the public the remedy available under section 1092: avoidance of the contract. Although the penalties afforded in FPPC or criminal actions are not insubstantial ..., their target are the officials themselves, not the resulting contracts foisted on the public."¹³

CONCLUSION

The Commission has authority to enforce Section 1090 in both administrative and civil actions, as detailed in Section 1090, et al. While courts have held contracts that violate Section 1090 are void, only parties to the violating contract have standing to bring an action to declare the contract void and seek disgorgement.

Should the Commission wish to expand its jurisdiction to include authority to void contracts that violate Section 1090 when a party is unwilling or unable to do so, the Commission would need to seek such authority through legislative action.

⁹ *Id.* at p. 733, citing *Holloway v. Showcase Realty Agents, Inc.* (2018) 22 Cal. App. 5th 758 [231 Cal. Rptr. 3d 872].

¹⁰ *San Diegans for Open Government*, *supra*, 8 Cal.5th 733.

¹¹ *Id.* at pp. 746–747.

¹² *San Diegans for Open Government*, *supra*, at p. 745.

¹³ *Id.* at p. 753.