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OPINION	:	No. 12-409
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THE HONORABLE MICHAEL HESTRIN, RIVERSIDE COUNTY DISTRICT ATTORNEY, has requested an opinion on the following question:

Does Government Code section 1090 prohibit an arrangement under which a contract city attorney’s compensation for providing the city with additional “bond counsel” services is based on a percentage of the city’s bond issuances?

CONCLUSION

Government Code section 1090 prohibits an arrangement under which a contract city attorney’s compensation for providing the city with additional “bond counsel” services is based on a percentage of the city’s bond issuances.

ANALYSIS

Cities without sufficient legal work to support the employment of a full-time city attorney often contract with a private attorney to perform city attorney legal services at an agreed-upon rate.¹ We are informed that many such contract city attorneys include in their services contracts a provision that, should the city issue bonds² during the contract period, the contract attorney will also act as “bond counsel” for the city and be paid a percentage of the bond issuance for providing such services.³ We are asked whether such an arrangement violates Government Code section 1090, which dictates that specified public officials, including “city officers or employees[,] shall not be financially interested in any contract made by them in their official capacity.”⁴

While the term “bond counsel” lacks a universally accepted meaning and may be used in a variety of ways,⁵ we do not believe the precise nature of the work performed is determinative for purposes of analyzing the question posed. What matters is that the lawyer in question is a contract city official who will be paid for his or her bond services

¹ 28 Ops.Cal.Atty.Gen. 362, 364 (1956).

² “To issue a bond is to borrow money. A bond is simply the evidence of the debt, in the same way that a promissory note is evidence of the obligation to repay an ordinary loan. The issuance of bonds in connection with a borrowing results in the creation of securities evidencing the loan that can be bought and sold, i.e. ‘traded.’ The buyers of bonds are thus investors, both individual and institutional, who loan money to the public agency issuer (or through the public agency issuer to conduit borrowers) through the purchase of bonds.” (Cal. Debt & Investment Advisory Com., Cal. Debt Issuance Primer (2005) “Bond Issuance: Definition and Purpose,” p. xiii (available at <http://www.treasurer.ca.gov/cdiac/debtpubs/primer.pdf>.)

³ We note at the outset that we are not asked about, and therefore do not address, employment contracts that contemplate additional legal services that may involve contracts but are performed for an agreed-upon hourly fee.

⁴ Gov. Code, § 1090.

⁵ Traditionally, the designation “bond counsel” referred to an attorney who rendered a bond opinion, which generally is “an objective legal opinion with respect to the validity of bonds and other subjects, particularly the tax treatment of interest on the bonds.” (Nat. Assn of Bond Lawyers, *The Function & Responsibilities of Bond Counsel* (3d ed. 2011), p. 6.) Modern bond counsel often perform additional services such as preparing associated legal documents, assisting with obtaining required governmental approvals, and providing advice regarding the structure of the bond issuance and related financial vehicles. (*Id.* at pp. 7-9.) In some instances, it appears that the term “bond counsel” is used to refer to any attorney working on a bond issuance in any capacity.

only if the city issues bonds, and will be paid more if the bond issuance amount is higher. Is such a compensation scheme permissible under Government Code section 1090? For the reasons that follow, we conclude that it is not.

Government Code section 1090

Government Code section 1090 (section 1090) codifies “[t]he truism that a person cannot serve two masters simultaneously.”⁶ It “was enacted to insure that public officials ‘making’ official contracts not be distracted by personal financial gain from exercising absolute loyalty and undivided allegiance to the best interest of the entity which they serve, and at least with respect to those contracts, it does so by removing or limiting the possibility of their being able to bring any direct or indirect personal influence to bear on an official decision regarding them.”⁷

In analyzing a conflict question under section 1090, we must first ascertain whether the individual at issue is a public official—such as a city officer or employee—covered by section 1090. In this instance, we readily conclude that a city attorney is a city officer,⁸ whether he or she is employed by the city directly as a full-time city attorney, or a private attorney hired to perform that function by contract.⁹ As we have previously observed, the Legislature, in amending section 1090 to apply to employees in addition to officers, “intended to apply the policy of the conflicts of interest law . . . to independent contractors who perform a public function and to require of those who serve the public temporarily the same fealty expected from permanent officers and employees.”¹⁰ Thus, private attorneys hired by contract to work as city attorneys are subject to section 1090’s anti-conflict restrictions.¹¹

⁶ *Thomson v. Call* (1985) 38 Cal.3d 633, 637.

⁷ 66 Ops.Cal.Atty.Gen. 156, 157 (1983).

⁸ Gov. Code, tit. 4, div. 3, pt. 3, ch. 7 (including city attorney as an officer of a city); Gov. Code, § 41801 (“The city attorney shall advise the city officials in all legal matters pertaining to city business”).

⁹ *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 693.

¹⁰ 46 Ops.Cal.Atty.Gen. 74, 79 (1965).

¹¹ Government Code section 1097 makes willful violation of section 1090 a crime. (Gov. Code, § 1097.) Although we do not here address potential criminality, we note that one appellate court has held that independent contractors are not employees within the meaning of section 1090 for the purposes of criminal prosecution. (*People v. Christiansen* (2013) 216 Cal.App.4th 1181, 1190.)

The question then becomes whether the contract city attorney, who has become a city official by virtue of his or her services contract with the city,¹² improperly participates in the making of *another* contract in which he or she is financially interested when providing bond counsel services contingent on the city's issuance of bonds. To answer this question, we must determine (1) whether the city's bond issuance is a public contract, (2) whether performing bond counsel legal services constitutes the "making" of such a contract, and (3) whether the city attorney's existing legal services contract with the city, which provides that the attorney is to be paid based on a percentage of the bond issuance amount, confers on the attorney a prohibited financial interest in the contemplated bond issuance contract.

City bond issuances are public contracts

We first consider whether a city's issuance of bonds amounts to a contract within the meaning of section 1090. "In determining whether a contract is present for purposes of the statutory prohibition, we apply traditional contract principles."¹³ At its most basic, "[a] contract is an agreement to do or not to do a certain thing,"¹⁴ and the elements of a contract are capable parties, their consent, a lawful object, and sufficient consideration.¹⁵ The selling of bonds satisfies these elements. Cities may authorize the issuance of bonds,¹⁶ and the bonds may be sold at public or private sale.¹⁷ A bond forms a contract when the buyer pays for the bond that the issuer delivers. The bond is the issuer's

¹² We acknowledge that—at the time a contract city attorney negotiates an initial services contract with the city—he or she is not acting as the city attorney but rather as a private attorney engaged in an arm's-length transaction with a prospective public agency client. Thus, assuming the attorney does not already serve the city in some other relevant capacity (e.g., city council member), section 1090 has no application to the making of the original services contract, whatever the terms might be. Further, during the term of the original services contract, the contract attorney may negotiate and agree with the city to perform and be compensated for services beyond his or her previously agreed-upon duties. (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 539-40 ["public officials, such as city attorneys, are not prohibited from entering into contracts with their public agencies to be paid additional compensation for services beyond their regular duties"].)

¹³ 84 Ops.Cal.Atty.Gen. 34, 36 (2001).

¹⁴ Civ. Code, § 1549.

¹⁵ Civ. Code, § 1550.

¹⁶ Gov. Code, §§ 5850, 5852, 5853, 43600 et seq., 50665.1 et seq., 53506 et seq., 54300 et seq.

¹⁷ Gov. Code, §§ 5903, subd. (b), 43627, 50665.13, 54418.

contractually enforceable promise to make payments as set forth in the bond. Courts have accordingly construed the issuance and delivery of bonds as a contract¹⁸ and subjected them to the general rules applicable to contracts, such as the prohibition against impairment of contract.¹⁹ Thus, we conclude that bonds are public contracts upon issuance and therefore subject to the strictures of section 1090.

Participation in the “making” of the bond contract

Would the contract city attorney hypothesized in this question be involved in the making of that contract? We believe so. The “making” of a contract is interpreted broadly in the context of section 1090. As our Supreme Court has observed, “we are not here concerned with the technical terms and rules applicable to the making of contracts. The Legislature instead seeks to establish rules governing the conduct of governmental officials. In this sense, is an act done or an agreement ‘made’ only when the final, objective affirmation is communicated? It is true that no rights and duties accrue and no contract is technically made until such time, but the negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense.”²⁰

Because a city attorney “advise[s] city officials in all legal matters pertaining to city business”²¹ and the services contract in this example contemplates the city attorney providing “bond counsel” services, we believe that he or she would be involved in the “preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids”²² surrounding the bond issuance and, therefore, would be participating in the making of that public contract within the meaning of section 1090.

¹⁸ *May v. Board of Directors of El Camino Irr. Dist.* (1949) 34 Cal.2d 125, 128-133.

¹⁹ *State School Bldg. Finance Committee v. Betts* (1963) 216 Cal.App.2d 685, 691 (“The laws under which public bonds are issued become a part of the contract between the bondholders and the issuing authority, and no change in these laws may be permitted to impair the bond obligation”); see also Gov. Code, § 54640 (“Subject to any contractual limitations binding upon a bondholder or his trustee, any bondholder or his trustee has the remedies set forth in this article”).

²⁰ *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.

²¹ Gov. Code, § 41801.

²² *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.

Financial interest

Turning now to the question of financial interest, we find that interest evident, even inherent, under the described contingent arrangement. Contrary to the urging of several commenters, the contract city attorney need not be a *party* to the bond contract for section 1090 to apply. “A public officer need not acquire an interest in a contract (as in the case of self-dealing) or share in the contract’s profits to come within the Government Code section 1090 proscription.”²³ Rather, an official “has an interest the moment he places himself in a situation ‘where his personal interest will conflict with the faithful performance of his duty as trustee.’”²⁴ As with other terms and elements of the statute, “the term ‘financially interested’ in section 1090 cannot be interpreted in a restricted and technical manner.”²⁵ “The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official’s loyalties and compromise the undivided representation of the public interests the official is charged with protecting.”²⁶ “Put in ordinary, but nonetheless precise, terms, an official has a financial interest in a contract if he might profit from it.”²⁷

Under this broad definition, the city attorney here is financially interested in the bond contracts. The attorney will be paid only if the bonds issue, and the attorney will be paid correspondingly more for a larger bond issuance, thereby giving rise to a temptation to influence the bond issuance process in a way that would maximize his or her compensation—even if the issuance of bonds, or the issuance of a larger amount of bonds, may not be in the city’s best interest.²⁸ This is precisely the kind of financial

²³ *People v. Wong* (2010) 186 Cal.App.4th 1433, 1450-1451.

²⁴ *People v. Darby* (1952) 114 Cal.App.2d 412, 426.

²⁵ *People v. Honig* (1996) 48 Cal.App.4th 289, 315.

²⁶ *Lexin v. Superior Court (Lexin)* (2010) 47 Cal.4th 1050, 1075.

²⁷ *People v. Honig, supra*, 48 Cal.App.4th at p. 333.

²⁸ We emphasize that it is the fact that the city attorney has a financial interest in the bond *contract*, rather than the contingent nature of the compensation, that presents a problem under section 1090. Several commenters point to *Campagna v. City of Sanger, supra*, 42 Cal.App.4th 533, correctly noting that the court there found no violation of section 1090 where Campagna, acting as city attorney, negotiated a contract between his own firm and the city to provide additional litigation services on a contingent basis. (*Id.* at p. 540.) But the court there did find a violation of section 1090 based on Campagna contracting with another law firm, which was also providing the city litigation services, for his own firm to receive a referral fee. (*Id.* at p. 541.) Because Campagna was acting in his capacity as city attorney when making the referral fee contract, and the contract was not for Campagna’s firm to provide additional legal services to the city, Campagna’s

motive that section 1090 seeks to prevent.

Our finding of a financial motive under these circumstances comports with our earlier opinion in 66 Ops.Cal.Atty.Gen. 376 (1983).²⁹ There, a city proposed to hire by contract a team of three individuals: a redevelopment agency consultant, a redevelopment agency financial officer, and a city attorney (who would also fill the roles of city administrator and redevelopment agency counsel). The team would be paid based on the potential increase in value of parcels within the redevelopment agency's boundaries.³⁰

We found that the proposed arrangement would violate section 1090 because the team members were city officers or employees for purposes of section 1090 and the team's "personal interests in compensation [were] likely to conflict with the faithful performance of their duties."³¹ For example, the "city attorney/city administrator may be

financial interest in the referral fee contract violated section 1090. (*Ibid.*) Thus, in both *Campagna v. City of Sanger* and here, the section 1090 violation stems not from the contingent nature of the fee, but from the financial interest in a contract made on behalf of the city.

²⁹ Several other cases have addressed scenarios that are not precisely on point, but discuss the need for city attorneys to avoid any financial interest in contracts in which they play an advisory role in their official capacity. (See *People v. Gnass* (2002) 191 Cal.App.4th 1271 [contract city attorney, also acting as attorney for city's public financing authority, had financial interest potentially in violation of section 1090 by encouraging financing authority to enter into joint powers agreements for purpose of issuing bonds, because of his likely appointment and compensation as disclosure counsel for the bond issuance]; *Campagna v. City of Sanger, supra*, 42 Cal.App.4th 533 [contract city attorney was entitled to negotiate employment contract with city including litigation services to be provided on a contingency fee basis, but violated section 1090 by negotiating—in his capacity as city attorney—a contract that included a referral fee paid to him by another firm that contracted to provide the city litigation services on a contingency fee basis]; 46 Ops.Cal.Atty.Gen., *supra*, 74 [city attorney advising city whether to form improvement district and issue bonds violates section 1090 by forming an association with special bond counsel employed by interested land developer or bond underwriters seeking approval of the district and proposed bonds]).

³⁰ Specifically, for any parcel that experienced an increase of at least \$300,000 in its assessed value over the course of a year, the consultant would be paid a fee of four percent of the increased value. The consultant would keep half of this fee, and split the other half between the other two team members. (66 Ops.Cal.Atty.Gen., *supra*, at p. 377.)

³¹ 66 Ops.Cal.Atty.Gen., *supra*, at p. 382.

confronted with a land use contract allowing heavy industry and bringing a substantial increase in tax base or a land use contract on the same parcel permitting light industry and causing only a slight rise in tax base; the former may mean noise, pollution or congestion and the latter may mean an improved city environment. Will a potential financial interest in the contract which produces the greater tax base increase lure him or her to favor that contract over the other? Will he or she be tempted to champion the city's interest in commercial development over the city's interest in parks, greenbelts and other educational or recreational uses which do not add taxes to the city's coffer[?] In our view, section 1090 prohibits such conflicts."³²

We reached this conclusion even though the team would not be a party to any of the contracts, nor have a direct financial interest in the contracts. In fact, the financial benefit to the team of any given contract would have been difficult to predict.³³ But "[t]he temptation to suggest, negotiate or approve contracts likely to generate increased tax assessments is alluringly present in this proposed arrangement. It is our view that participation of the aforementioned officers or employees in public contracts which may cause the value of parcels to increase would violate section 1090."³⁴

The situation here is analogous, and the financial interest more direct. The incentive created by this compensation structure—in which the contract city attorney would be paid for his or her bond work only if the city issues bonds and would be paid more the larger the bond issuance—puts the attorney “in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good.”³⁵ The city attorney, who must provide the city with unbiased advice, instead has “a ‘personal interest which might interfere with the unbiased discharge of his duty to the public or prevent the exercise of absolute loyalty and undivided allegiance to the best interests of the governmental unit which he represents.’”³⁶ Section 1090 forbids the “creation of a situation whereby [the official] becomes interested in a public contract.”³⁷

³² 66 Ops.Cal.Atty.Gen., *supra*, at p. 381.

³³ 66 Ops.Cal.Atty.Gen., *supra*, at p. 382 (“While compensation would not be generated except in cases where the increase exceeded \$300,000, we cannot speculate as to how many or how few transactions would involve such amounts. Even the most unlikely project may be surprisingly successful”).

³⁴ 66 Ops.Cal.Atty.Gen., *supra*, at p. 382.

³⁵ *Terry v. Bender* (1956) 143 Cal.App.2d 198, 208.

³⁶ *People v. Elliott* (1953) 115 Cal.App.2d 410, 418, quoting *Raymond v. Bartlett* (1946) 77 Cal.App.2d 283, 286.

³⁷ *People v. Darby*, *supra*, 114 Cal.App.2d at p. 426.

Statutory exceptions inapplicable

Having found a financial interest within the meaning of section 1090, we next consider whether one of the codified exceptions to section 1090 nonetheless renders that financial interest permissible.³⁸ The two codified exceptions to section 1090 related to salary received from a public entity are most relevant, but neither applies here.

First, Government Code section 1091.5 specifies certain types of interests in a public contract that—because they are sufficiently minimal or attenuated—do not constitute improper financial interests under section 1090.³⁹ Among these is the interest described in subdivision (a)(9) of that statute as “[t]hat of a person receiving a salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.”⁴⁰

The Supreme Court has explained that the statutory exception for this type of interest “applies to at least two archetypal scenarios. The first, the scenario the Legislature expressly contemplated, involves a first party contract: an official has an existing employment relationship with government entity A and also, in a separate capacity, has the power to make or influence contracts made by A (other than those sought by his or her own specific department).”⁴¹ For instance, a city council member who is also employed by the same city’s police department may, in his capacity as city council member, make contracts on behalf of the city other than with the police department.⁴² The second scenario “involves a second party contract: an official who makes or influences contracts on behalf of government entity A is put in a position of considering a contract with government entity B, for which he or she also works.” Under

³⁸ *Lexin, supra*, 47 Cal.4th at p. 1074 (“To determine whether section 1090 has been violated, a court must identify (1) whether the defendant government officials or employees participated in the making of a contract in their official capacities, (2) whether the defendants had a cognizable financial interest in that contract, and (3) (if raised as an affirmative defense) whether the cognizable interest falls within any one of section 1091’s or section 1091.5’s exceptions for remote or minimal interests”).

³⁹ Gov. Code, § 1091.5, subd. (a) (“An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following . . .”).

⁴⁰ Gov. Code, § 1091.5, subd. (a)(9).

⁴¹ *Lexin, supra*, 47 Cal.4th at p. 1083.

⁴² *Id.* at p. 1080.

this theory, we have previously concluded that a deputy county counsel who also serves on a city council may lawfully participate in making a contract for law enforcement services between the city and county because the contract does not involve the county counsel's office.⁴³

“In each of these scenarios, section 1091.5(a)(9) is a defense if one's financial interest in a proposed contract is only the present interest in an existing employment relationship with a first or second party to the proposed contract, and thus an interest in whatever indirect or incidental benefits might arise from the simple fact of contracting with or on behalf of one's employer. It does not extend further to contracts that more directly affect one's interests by involving one's own department, or most directly affect one's interests by actually altering the terms of one's employment; such interests directly implicate the ‘two masters’ problems section 1090 was designed to eliminate.”⁴⁴ Thus, the financial interest covered by section 1091.5, subdivision (a)(9) “is an interest in an existing employment relationship,”⁴⁵ but “direct changes to personal compensation” are not permitted under this provision.⁴⁶ The exception does not apply here because the city attorney's interest in the contract under consideration—the bond contract—is not limited to a present interest in an existing employment relationship with the city, but would, if executed, actually affect a direct change in the city attorney's personal compensation.

The second exception, Government Code section 1091, subdivision (b)(13), addresses the situation where a contract involves an official who is a member of a board. Government Code section 1091 provides that “an officer shall not be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract,” the interest is disclosed, and the officer abstains from participation in the contract.⁴⁷ One remote interest specified is “[t]hat of a person receiving salary, per diem, or reimbursement for expenses from a government entity.”⁴⁸ This exception does not apply here because the contract attorney acts as an individual city officer rather than as a member of a board.⁴⁹

⁴³ 85 Ops.Cal.Atty.Gen. 115, 117–119 (2002).

⁴⁴ *Lexin, supra*, 47 Cal.4th at p. 1084.

⁴⁵ *Id.* at p. 1079.

⁴⁶ *Id.* at p. 1085.

⁴⁷ Gov. Code, § 1091, subd. (a).

⁴⁸ Gov. Code, § 1091, subd. (b)(13).

⁴⁹ We also reject the related assertion that a financial interest within the meaning of section 1090 excludes any and all compensation from a public entity for work provided to that public entity. The language of section 1090 does not support this reading, nor do the

One other exception—not limited to section 1090, but applying generally to the sale of public securities—bears mention. Government Code section 1102 provides, “Notwithstanding any provision of law to the contrary, a member of the legislative body of any public body or any officer or employee thereof shall not be deemed interested in a contract for the sale of any public securities issued by such public body; provided, that such public securities are sold at public sale to the highest bidder after notice inviting bids has been published as required by the law under which said bonds are issued, or for one time in a newspaper of general circulation not less than five (5) days prior to the date of such sale.” The definition of “public securities” includes bonds.⁵⁰ In view of its language relating to the publicity of the sale of public securities, this section appears to address potential conflicts of interest that might arise with respect to the purchase of securities, rather than conflicts that might arise as a result of participating in the consideration and preparation of bonds. But we acknowledge that one could read this section to mean that officers or employees of public bodies are never considered interested in contracts for the sale of bonds so long as the bonds are sold under the enumerated conditions. Given this ambiguity, we look beyond the plain language of the statute.⁵¹

Government Code section 1102 appears in a very brief article entitled “Sales of Public Securities,” and section 1102’s title is “Interest in sale of securities issued by public body.” Additionally, the uncodified portion of the law indicates that it was

government salary exceptions discussed above. (See *Lexin, supra*, 47 Cal.4th at p. 1084, fn. 15 [“The Lexin defendants’ position—that section 1091.5(a)(9) insulates any interest, so long as it is an interest in government salary—is thus considerably too broad. It would permit board members to freely select and hire themselves out for any number of new government positions, or to act in their official capacities to modify their own individual salaries without resort to the rule of necessity. This is not now, nor has it ever been, the law”].) Our opinion regarding the redevelopment team (66 Ops.Cal.Atty.Gen. 376, *supra*) confirms this interpretation as well. If any compensation received from a public entity was universally excluded from section 1090’s coverage, we would have sanctioned the compensation structure there based on the increase in tax base. We did not, and we believe that accepting such a premise would undermine section 1090’s clear purpose to protect the public from government officials having financial interests in public contracts.

⁵⁰ Gov. Code, § 1100.

⁵¹ *Flannery v. Prentice* (2001) 26 Cal.4th 572, 579; see also *People v. Ramirez* (2009) 45 Cal.4th 980, 987 (“If, however, the language supports more than one reasonable interpretation, we look to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy”).

enacted as urgency legislation to enable municipalities to continue issuing public securities to fund essential projects while eliminating the “theoretical conflict of interest” presented by financial syndicates bidding on such securities.⁵² The syndicates comprised “many member firms, corporations and partnerships, one or more of which may have shareholders, officers, employees and members who may serve in an official capacity” with the government body issuing securities.⁵³ Given the impracticability of ascertaining “whether any of such persons serve in an official capacity with a public body offering public securities for sale to finance works, improvements, structures, and facilities necessary for the peace, health and safety of the citizens of the State,” the law clarified that such officials were not financially interested in the public securities.⁵⁴

Considering this evidence of the statutory purpose, we believe that section 1102 is intended to address an officer’s and employee’s interests as a shareholder, officer, employee or member of a firm, corporation, or partnership that purchases, directly or through a syndicate, bonds sold by their public employer or by a public body in which they hold an official position. Even if Government Code section 1102 were to apply outside that context, we believe it would not extend beyond financial interests obtained as, or derived from, a bond purchaser and certainly does not exempt financial interests like the one described in this inquiry.⁵⁵

Other considerations

Before leaving the topic, we address the contention, pressed by several commenters, that a contract city attorney receiving contingent payment for bond work under the contemplated circumstances is simply the intended result and implementation of the original, bargained-for city attorney services contract made while the attorney was acting in his or her private capacity and, therefore, does not run afoul of section 1090. Supporters of this position rely on a line of Fair Political Practices Commission (Commission) advice letters that find or imply that the arrangement described here does not violate the Political Reform Act. Because “the Political Reform Act is the principal California law governing conflicts of interest in the making of all government decisions,”

⁵² Stats. 1958, 1st Ex. Sess. 1985, ch. 53, § 1, pp. 257-258.

⁵³ *Id.* at p. 258.

⁵⁴ *Id.* at pp. 257-258.

⁵⁵ 46 Ops.Cal.Atty.Gen., *supra*, at p. 80 (“The policy of section 1102 is obviously to substitute, as a safeguard for the public welfare, the protections inherent in competition. The rationale is that the natural antagonisms between the interests of the buyers and of the seller of bonds will, in a competitive market, insure the seller the highest net return for its bonds”).

and “[s]ection 1090 is the principal California statute governing conflicts of interest in the making of government contracts,” the two are generally considered together and read as consistent “to the extent their language permits.”⁵⁶ On this basis, it is argued that our analysis should therefore align with that of the Commission’s advice letters.

We disagree; this is an instance where the language of section 1090 compels a different conclusion than reached under the Political Reform Act. Although the Political Reform Act and section 1090 further similar and related purposes—and thus can be said to be in *pari materia*⁵⁷—the two legal regimes are not identical, and section 1090’s focus on public contracts, as opposed to the Political Reform Act’s focus on governmental decisions, is determinative here.

Under the Political Reform Act, a percentage-based fee paid to bond counsel is “government salary,” which is exempt from the Act’s conflict-of-interest rules.⁵⁸ The Commission has reasoned that so long as a contract for additional services—for instance, bond counsel services in addition to city attorney services—is made ahead of time by disinterested government officials, the contractor’s provision of the additional services is merely implementation of the original contract and does not implicate the Political Reform Act’s conflict-of-interest provisions.⁵⁹

But section 1090’s focus on contracts introduces a different consideration, which does not permit the same conclusion reached under the Political Reform Act. Whereas the Political Reform Act is not concerned with the substance of the attorney’s additional services, that issue is dispositive under section 1090. Thus, although it may often be the case that a city attorney may lawfully provide additional services contemplated in the original city attorney services contract without running afoul of section 1090—i.e., because no new contract would result—the facts here posit a *new* contract (the bond contract).

The fact that the bond-related legal work was considered in the original city attorney services contract does not eliminate this violation of section 1090, nor alleviate the concerns upon which it is based. Clearly, the bond contract is a separate and different contract from the city attorney’s legal services contract. Because it is, section 1090

⁵⁶ See *Lexin, supra*, 47 Cal.4th at p. 1091.

⁵⁷ *Ibid.*

⁵⁸ Fair Political Practices Commission, Ritchie Advice Letter, No. 79-045, Mar. 19, 1979.

⁵⁹ Fair Political Practices Commission, McEwen Advice Letter, No. I-92-481, Mar. 5, 1993.

requires a separate assessment of the city attorney's financial interest in that subsequent bond contract. While it so happens that the city attorney's services contract is the basis for the city attorney having a financial interest in the subsequent bond contract, nothing in section 1090, or the authorities construing it, supports the conclusion that one contract can immunize the participation in later public contracts from section 1090's strictures. Analogies to the aforementioned advice letters on the Political Reform Act, therefore, fail.

Again, the Political Reform Act and section 1090 are not identical.⁶⁰ Although Government Code section 81013 provides that the Political Reform Act prevails where it conflicts with other laws, it also provides, "Nothing in this title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title." Thus, section 1090 may impose requirements stricter than those found in the Political Reform Act so long as those requirements do not prevent individuals from complying with the Political Reform Act.⁶¹ Here they do not. A contract city attorney who refrains from providing bond services to the same city for a fee contingent on whether and in what amount bonds are issued does not violate any aspect of the Political Reform Act.⁶²

⁶⁰ See *Lexin, supra*, 47 Cal.4th at p. 1091 ("to the extent their language permits, we will read section 1090 et seq. and the Political Reform Act as consistent"), italics added.

⁶¹ See *People v. Honig, supra*, 48 Cal.App.4th at pp. 325-328 (rejecting contention that settled meaning of "financially interested" in section 1090 was superseded by the Legislature defining "financial interest" in the Political Reform Act in a more limited manner).

⁶² We note that the Fair Political Practices Commission, in response to a question whether a conflict of interest was created by the same law firm contracting with a city to serve as city attorney and bond counsel, explicitly stated in the McEwen advice letter that it was *not* addressing potential conflicts under section 1090. (Fair Political Practices Commission, McEwen Advice Letter, No. I-92-481, Mar. 5, 1993 ["QUESTION 3. ¶ Is a conflict of interest created when a law firm contracts with a city or redevelopment agency to serve in multiple capacities, specifically, to provide professional services as city attorney, special agency counsel, and bond counsel? ¶ CONCLUSION 3. ¶ The Commission has no jurisdiction to render advice on the propriety of holding multiple public offices with overlapping jurisdictions. We strongly recommend you contact the Attorney General's office for the purpose of obtaining a written opinion with respect to other provisions of the law such as Government Code 1090 and the laws governing incompatible offices and activities"].)

We stress that our conclusion does *not* mean that contract city attorneys may never advise municipal clients on a decision that may create the need for additional legal services. Indeed, to some extent, any advice a contract city attorney gives the city can have a potential financial effect on the contract attorney’s compensation. Most commonly, recommendations about whether to pursue litigation result in litigation fees for the contract attorney. However, litigation does not in itself form a separate public contract as does a city’s issuance of bonds.⁶³ And while litigation often involves various related contracts—such as hiring experts or settlement contracts—the contract city attorney does not generally stand to be paid more or less based on whether the city signs those related contracts or what terms are included.⁶⁴ Thus, we do not believe that typical services contracts for contract city attorneys—even when they contemplate additional services—will implicate section 1090, because they generally do not provide for a *financial interest in specified future public contracts*.

Finally, the concerns regarding the financial motive of the contract city attorney are not alleviated, as several have suggested, by the assertion that payment based on a percentage of the bond issuance is tied to the amount of work required and the degree of malpractice exposure. Such considerations do not eliminate the financial incentives built into the contract structure here. In any event, section 1090’s conflict-of-interest restrictions do not apply with any less force because the price paid is justifiable or fair.⁶⁵

⁶³ We acknowledge a passage in our conflicts-of-interest guide that states “in the absence of special circumstances, the fact that a contract city attorney’s advice to initiate or defend litigation would increase the amount of payments under an existing contract, generally would not violate section 1090, so long as the services are contemplated in the original executed contract.” (California Attorney General’s Office, *Conflicts of Interest* (2010) pp. 66-67.) But again, because providing additional service for litigation does not, in itself, form a separate public contract, such advice about whether to pursue litigation falls outside the scope of section 1090. In any event, we view the compensation method discussed in this opinion as a special circumstance.

⁶⁴ We assume here that the contract attorney’s compensation scheme does not include contingencies or other terms that would give the contract attorney a financial interest in settlement contracts.

⁶⁵ See *Thomson v. Call*, *supra*, 38 Cal.3d at p. 649 (“if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity”). In any event, we are informed that the amount of work required for bond counsel is often unrelated to the size of the bond issuance; large issuances may be structured in traditional ways familiar to bond counsel whereas smaller issuances might be novel or complex, requiring more work.

And although attorneys are subject to ethical guidelines,⁶⁶ the existence of such guidelines does not excuse compliance with section 1090, which addresses the special issue of financial interest in government contracts. “[A]n impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.”⁶⁷ Again, section 1090 addresses what might happen as much as what actually happens,⁶⁸ and is “aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer’s undivided and uncompromised allegiance.”⁶⁹

In sum, we conclude that Government Code section 1090 prohibits an arrangement under which a contract city attorney’s compensation for providing the city with additional “bond counsel” services is based on a percentage of the city’s bond issuances.⁷⁰

⁶⁶ E.g., Rules Prof. Conduct of State Bar (available at <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx>) (applicable to all attorneys); Nat. Assn. of Bond Lawyers, *The Function & Responsibility of Bond Counsel* (3d ed. 2011), pp. 15-20 (applicable to bond attorneys).

⁶⁷ *Stigall v. City of Taft, supra*, 58 Cal.2d at p. 570.

⁶⁸ *United States v. Mississippi Valley Generating Co.*(1961) 364 U.S. 520, 549–550.

⁶⁹ *People v. Honig, supra*, 48 Cal.App.4th at p. 314.

⁷⁰ We do not conclude here that a contract city attorney is always barred from providing an opinion as to the validity of a city’s bond issuance. Performing this service—in one’s capacity as the city attorney without additional contingent compensation based on whether and under what terms the city enters into a separate contract—is not objectionable under our analysis because, absent the arrangement for additional compensation, the city attorney would have no financial interest in the bond contract.