



DENNIS J. HERRERA  
City Attorney

JOHN I. KENNEDY  
Deputy City Attorney

DIRECT DIAL: (415) 554-3978  
FACSIMILE: (415) 255-3139  
E-MAIL: John.Kennedy@sfgov.org

## MEMORANDUM

TO: WILLIAM LIEBERMAN  
Deputy Director for Planning  
Municipal Transportation Agency

FROM: JULIA M.C. FRIEDLANDER  
JOHN I. KENNEDY  
Deputy City Attorneys

DATE: March 30, 2006

RE: Financial Conflict Laws Affecting Pedestrian Master Plan Project Advisory  
Committee Members

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### QUESTION PRESENTED

You have asked for a written opinion regarding the ability of the Pedestrian Master Plan Project Advisory Committee (the "Advisory Committee") to advise the Municipal Transportation Agency (the "MTA") regarding an outreach contract that may be awarded to help the MTA develop the Pedestrian Master Plan (the "Plan").

### SHORT ANSWER

State and local law generally require members of public advisory bodies to abstain from participating in providing advice about any part of the contracting process related to a government contract in which the member or an organization with which the member is associated might have a financial interest. While some exceptions to this general rule exist, the safest course here is for the MTA not to take issues of contract formulation before the Advisory Committee. The MTA could still continue to present to the Committee broad issues of general policy for discussion and possible action so long as the Advisory Committee does not discuss or take action on issues related to the contracting process, including, but not limited to, reviewing or commenting upon the number and types of proposed contracts that should be solicited, or the terms of a request for proposals, the scope of work, or the required content for proposals.

### BACKGROUND

The MTA is developing the City's first Plan. The Plan will provide a comprehensive framework for improving pedestrian safety, mobility, and walkability. The MTA's Planning Division is developing the Plan with the assistance of the Advisory Committee, the Pedestrian Safety Advisory Committee and the Technical Advisory Committee. The Advisory Committee consists of eight City and Transportation Authority representatives and eight citizen organizational representatives. The Plan will ultimately be considered for approval by the MTA Board of Directors and the San Francisco Board of Supervisors.

As part of the development of the Plan, the MTA or the Transportation Authority may issue a contract to an outside entity to assist with outreach efforts. You have indicated that some

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private citizen members of the Advisory Committee, or organizations they are associated with, may be interested in competing to receive this outreach contract.

**DISCUSSION**

California Government Code section 1090 and San Francisco Campaign and Government Code section 3.206 prohibit any public official or employee from making any contract in which the individual has a financial interest. These prohibitions apply if all of the following are satisfied: (1) the person is an official or employee of a government entity; (2) the official or employee has a private financial interest in the contract; and (3) the contract is made by the public official or employee in his or her official capacity or by the body or board of which the official or employee is a member.

A conflict of interest under these sections requires that an individual choose between maintaining a private interest and remaining a public official or employee. In other words, the individual must resign from his or her public position or divest him or herself of the private financial interest. Violations of these sections may subject a public official or employee to severe civil and criminal sanctions. Contracts and grants made in violation of these sections are void.

The City Attorney's Office "Good Government Guide" contains a thorough discussion of these and other conflict of interest rules. The Guidebook is available on the City's Attorney's website located at [www.sfgov.org](http://www.sfgov.org). We recommend that Advisory Committee members review the discussion contained in Part Two of the Good Government Guide.

**A. APPLICATION OF SECTIONS 1090 AND 3.206 TO THE OUTREACH CONTRACT.****1. Are the private citizen members of the Advisory Committee public officials for purposes of Section 1090?**

Here, the threshold question is whether members of advisory bodies such as the Advisory Committee, are "public officials" within the meaning of these sections if they are not City employees. The California Supreme Court has suggested that consultants and advisers who are involved in the preliminary planning for a contract, including discussions, negotiations, reasoning or the drawing of plans and specifications for a contract, may be public officials within the meaning of Section 1090. *See Stigall v. City of Taft*, (1962) 58 Cal.2d 565, 569-571. The Attorney General has also opined on whether Section 1090 applies to people serving in an advisory capacity. In its guide to State conflict rules, published in 1998, the Attorney General stated, "the prohibition contained in Section 1090 also applies to persons in advisory positions to contracting agencies." *See* Cal. Dept. of Justice, pamp. 1998, p. 48. Likewise, the Attorney General has concluded that section 1090 applies to members of *advisory bodies*. *See* Cal. Atty. Gen. Ops. 99-304. Although Attorney General opinions are not binding on courts, courts often look to them for guidance in interpreting state law. In this instance, a court would likely conclude that the private citizen members of the Advisory Committee are public officials subject to the limitations of sections 1090 and 3.206.

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**2. Do the private citizen members have a financial interest in the contract that is prohibited under Section 1090?**

The next question is whether a private citizen member of the Committee who may bid on the outreach contract, or who is associated with an organization that may bid on the contract, has a prohibited financial interest in the contract. Although Section 1090 does not define the term financial interest, courts have stated that the law is "concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of [the City]" when making a contract. *See People v. Honig*, (1996) 48 Cal.App.4th 289, 315.

If a member of the Committee would bid personally on the contract, then there is no question that he or she would have a financial interest in the contract. If a member of the Committee is associated with an organization that may bid on the contract, whether the member is financially interested in the contract depends on the manner in which the person is associated with the organization. For example, the application of these laws differs if a person is an employee or officer of an organization, rather than merely a part of an organization's general membership (i.e. a dues paying member with no voting rights). Courts and the legislature have determined that an individual who is an employee of an organization or who sits on the organization's board of directors has a financial interest in the organization and accordingly a financial interest in any contract awarded to the organization. *See Cal. Gov't Code §1091(b)(1)*. Conversely, the legislature has concluded that association with an organization as only a dues paying member or volunteer does not create a financial interest in such a contract. *See Cal. Gov't Code §1091.5(a)(7)*.

The extent to which any individual member of the Advisory Committee has a financial interest in the outreach contract because of his or her association with an organization that may wish to compete for the contract must be evaluated based on the facts and circumstances of each member. Please contact us if you would like us to evaluate the financial interest of individual members of the Advisory Committee. Finally, please note that if there is a question about a member who is associated with more than one organization that may bid on the contract, we would need to consider his or her association with each organization.

**3. Is the outreach contract being made by the Advisory Body?**

The final question is whether the Advisory Body is "making" the outreach contract. Courts have construed the making of a contract broadly to include all of the planning and preliminary steps that go into the formation of a contract. *See Stigall v. City of Taft*, (1962) 58 Cal.2d 565, 569. Accordingly, a court will likely conclude that advice provided to the MTA and Transportation Authority by the Advisory Committee related to the outreach contract would constitute making the contract. *See Cal. Atty. Gen. Ops. 99-304*.

**4. Consequences of a prohibited financial interest.**

As explained above, sections 1090 and 3.206 generally require a public official who has a financial interest in a contract to choose between divesting him or herself of the financial interest or stepping down from his or her public position. Failing to do so prohibits the contract from going forward. The legislature has created some statutory exceptions to this general rule for "remote interests" and "non-interests," which if applicable permit a contract to go forward as if it was not being made by the financially interested official. An individual with a "remote interest"

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may simply (1) disclose the interest to the body or board of which he or she is a member, and (2) abstain from participating in the matter (rather than divesting himself or herself of the personal financial interest). *See* Cal. Gov't Code §1091. A member with a "non-interest" may participate in the consideration of a contract. *See* Cal. Gov't Code §1091.5. Under some circumstances, the member with a non-interest must: (1) disclose his or her interest to the body or board prior to any consideration of a contract, and (2) ensure that such interest is noted in the body's or board's official records. *See id.*

The Attorney General has concluded that an advisory body may still act, and the board or commission it advises may still enter into a contract *so long as any financially interested member of the advisory body abstains from all discussions regarding the contract in which the member has a financial interest.* *See* Cal. Atty. Gen. Ops. 99-304 (emphasis added). Thus, in contrast to other public officials, a person serving in a purely advisory capacity may address a conflict of interest under sections 1090 and 3.206 by abstaining from participation in the decision without needing to find an applicable remote interest exception. By abstaining, the financially interested person is not deemed to have made the contract.

**B. OPTIONS ON HOW TO PROCEED.**

Because contracts made in violation of sections 1090 and 3.206 are deemed void, the legally safest course is for the MTA not to take issues of contract formulation before the Advisory Committee. The MTA could still continue to present to the Advisory Committee broad issues of general policy for discussion so long as issues related to the contracting process, including, but not limited to, reviewing or commenting upon the number and types of contracts which should be solicited, the terms of a request for proposals, or bid submittals, are not discussed.

As an alternative, the MTA may present to the Advisory Committee issues related to the contract if all necessary steps are taken to ensure that any member of the Committee who may either bid on a contract personally or who is associated with an organization that may bid on the contract abstains from the Advisory Committee's discussions. We could work with you to ensure that all such steps are taken.

We understand that members of the Advisory Committee have proposed temporarily resigning in order to permit them to participate in the Advisory Committee's discussions about the contract as a member of the public. Although we are not aware of any court cases or Attorney General opinions analyzing such a situation, a court would likely conclude that such an action would violate sections 1090 and 3.206. Courts construe conflict of interest laws such as sections 1090 and 3.206 broadly in order to effectuate the purpose and intent of the laws. *See People v. Honig*, (1996) 48 Cal.App.4th 289, 315. By only temporarily resigning, the members of the Advisory Committee could be attempting to subvert the intent of these laws by creating a perception that they are no longer members of the committee. It is unlikely that a court would permit such an action to occur.

We hope this general advice is useful. Please do not hesitate to contact us if you have additional questions.