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## CHAPTER 5:

# Fair Process Laws and Merit-Based Decision-Making

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## Chapter 5: Fair Process Laws and Merit-Based Decision-Making

### CONTENTS

<b>The Right to Fair and Unbiased Decision-Makers</b>	72
<b>Basic Rules</b>	72
<b>Effect of Violations</b>	73
Effect on Decision	73
Due Process Violations	73
<b>Vote-Trading</b>	74
<b>Basic Rules</b>	74
<b>Penalties</b>	74
<b>Personal Loans</b>	75
<b>Basic Rules</b>	75
<b>Penalties</b>	75
<b>Decisions May Not Benefit Family</b>	76
<b>Basic Rules</b>	76
<b>Penalties</b>	76
<b>Restrictions and Disqualification Requirements Relating to Campaign Contributions</b>	77
<b>Basic Rules</b>	77
Affected Officials	77
Kinds of Proceedings Affected	78
Actions That Must Be Taken	78
Disclosure	78
Disqualification	78
Avoiding Disqualification	79
No Contributions During the Proceeding	79
<b>Penalties</b>	79
<b>Agency Staff and Political Activities</b>	80
<b>Basic Rules</b>	80
Employment Decisions, Soliciting Support and Campaign Contributions	80
Engaging in Political Activities During Work Hours or While in Uniform	80
<b>Penalties</b>	80
<b>Holding Multiple Public Offices</b>	81
<b>Basic Rules</b>	81
<b>Special Issues</b>	82
Employees Who Run for the Governing Board of Their Public Agency Employers	82
Individual Agency Guidelines	82
<b>Penalties</b>	82

Competitive Bidding Processes for Public Contracts .....	83
Basic Rules .....	83
Exceptions .....	83
Emergency .....	83
Professional Services .....	83
Special Services .....	83
Design-Build .....	84
Penalties .....	84
Whistle-Blowing Protections .....	85
Basic Rules .....	85
Penalties .....	85
Endnotes and Additional Information .....	86

## The Right to Fair and Unbiased Decision-Makers

### Basic Rules

Although California statutes largely determine when public officials must disqualify themselves from participating in decisions, common law (judge-made law) and some constitutional principles still require a public official to exercise his or her powers free from personal bias—including biases that have nothing to do with financial gain or losses.



Under the common law doctrine, an elected official has a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of private interests.<sup>1</sup>

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*Local officials are much less constrained when the body is acting in a legislative, as opposed to quasi-judicial capacity.*

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In addition, constitutional due process principles require a decision-maker to be fair and impartial when the decision-making body is sitting in what is known as a “quasi-judicial” capacity. Quasi-judicial matters include variances, use permits, annexation protests, personnel disciplinary actions and licenses. Quasi-judicial proceedings tend to involve the application of generally adopted standards to specific situations, much as a judge applies the law to a particular set of facts.

The kinds of impermissible bias<sup>2</sup> include:

» **Personal Interest in the Decision’s Outcome.**

For example, one court found an elected official was biased and should not participate in a decision on a proposed addition to a home in his neighborhood when the addition would block the elected official’s view of the ocean from the official’s apartment.<sup>3</sup> Personal interest bias can also arise when hearing officers are selected and paid on an ad hoc basis, making their future work dependent on the public agency’s goodwill.<sup>4</sup>

» **Personal Bias.**

» **People.** Strong animosity about a permit applicant based on conduct that occurred outside the hearing is one example. Conversely, a strong personal loyalty toward a party could bias an official as well.<sup>5</sup>

» **Belief/Ideology.** Examples include strong ideological reactions to a proposed Planned Parenthood clinic or community center for a particular ethnic or religious group.

» **Factual Bias.** For example, information an official might receive outside the public hearing that causes the official to have a closed mind to any factual information that may be presented in a hearing. This is a variation of the “*ex parte* communications” doctrine, which suggests that, in quasi-judicial matters, all communications to decision-makers about the merits (or demerits) of an issue should occur in the context of the noticed hearing (as opposed to private meetings with either side of an issue, for example).<sup>6</sup>

» **Dual Role Influence.** Another example is when someone plays multiple roles in a decision making process. A court concluded that a business owner's fair hearing rights were violated when a public agency attorney made the initial decision to deny the renewal of the business's regulatory permit then acted as a legal adviser to a hearing officer reviewing that denial.<sup>7</sup>

When an official sits in a quasi-judicial capacity, that official's personal interest or involvement, either in a decision's outcome or with any participants, can create a risk that the agency's decision will be set aside by a court if the decision is challenged. Typically, having the official disqualify himself or herself removes the risk.<sup>8</sup>



Decision-makers are also well advised to step aside on participation in a quasi-judicial matter when the decision-maker has pre-judged the matter. Attributes of having "pre-judged the matter" include having a closed mind or a preconceived and unalterable view of the proper outcome without regard to the evidence.<sup>9</sup>

This rule does not preclude holding opinions, philosophies or strong feelings about issues or specific projects; it also does not proscribe expression of views about matters of importance in the community, particularly during an election campaign.<sup>10</sup> Also, local officials are much less constrained when the body is acting in a legislative, as opposed to quasi-judicial capacity.



#### FOR MORE INFORMATION

On fair decision-making and bias, see the following resources:

- » When an Elected Official Feels Passionately About an Issue: Fair Process Requirements in Adjudicative Decision Making," available at [www.ca-ilg.org/bias](http://www.ca-ilg.org/bias)
- » "When Your Decision Will Affect a Friend or Supporter," available at [www.ca-ilg.org/fairness](http://www.ca-ilg.org/fairness)
- » *Understanding the Basics of Local Agency Decision-Making, 2009*, available at [www.ca-ilg.org/decisionmaking](http://www.ca-ilg.org/decisionmaking)
- » *An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions, 2006*, available at [www.ca-ilg.org/ounce](http://www.ca-ilg.org/ounce)

For specific questions, please contact agency counsel.

## Effect of Violations

### Effect on Decision

An administrative decision tainted by bias will be set aside. The agency will have to conduct new proceedings free of the influence of the biased decision-maker.<sup>11</sup>

### Due Process Violations

If the violation rises to the level of a denial of due process under constitutional law, the affected individual(s) may seek damages, costs and attorney's fees.<sup>12</sup>



#### FOR MORE INFORMATION

On the effect of ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## Vote-Trading

### Basic Rules

The California law that prohibits public officials from asking for, receiving, or agreeing to receive bribes in exchange for their votes or other official actions also forbids them from giving, or offering or promising to give, “any official vote” in exchange for another public official’s vote on the “same or another question.”<sup>13</sup>



Like bribery, vote-trading is a form of “you-do-this-for-me, I-will-do-this-for-you” practice. In Latin, this is known as a *quid pro quo* (“this for that”). *Quid pro quos* are legally risky. Any time a public official stops making decisions based on what’s best for the public, the policy-making process is compromised.

Note that the Attorney General has concluded that the prohibition against vote-trading applies to exchanges of votes between *public officials* and not to commitments made by *jurisdictions* in an inter-agency agreement.<sup>14</sup>



#### FOR MORE INFORMATION

On vote trading, see [www.ca-ilg.org/votetrading](http://www.ca-ilg.org/votetrading).

For specific questions, please contact agency counsel.

### Penalties

Penalties for vote trading include “imprisonment in the state prison for two, three, or four years and . . . by a restitution fine of not less than two thousand dollars (\$2,000) or not more than ten thousand dollars (\$10,000) . . .”<sup>15</sup> A conviction for vote-trading will also lead to an immediate loss of office and permanent disqualification from holding any office in the state.<sup>16</sup>



#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## Personal Loans

### Basic Rules

Elected officials and others may not receive a personal loan from any officer, employee, member or consultant of the official's respective agency while in office.<sup>17</sup> There also are limits on elected officials' and others' ability to receive loans from those with contracts with the agency (except for bank or credit card loans made in the regular course of the company's business).<sup>18</sup> Personal loans over \$500 from others must meet certain requirements (for example, be in writing, clearly state the date, amounts and interest payable).<sup>19</sup> For further discussion of ethics laws related to personal loans and other economic interests, see chapter 2, pages 10-16.

### Penalties

These restrictions are part of the Political Reform Act.

Violations of these laws are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>20</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>21</sup>
- » Prohibition from seeking elected office in the future;<sup>22</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>23</sup> and
- » Jail time of up to six months.<sup>24</sup>



#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).



## Decisions May Not Benefit Family

### Basic Rules

An important part of a fair process is that everyone, irrespective of their personal relationship to decision-makers, will have the same access to public agency benefits and approvals.



An outgrowth of this principle is the rule that public officials must disclose their interests and disqualify themselves under the Political Reform Act and other laws (for example Government Code section 1090's prescription against interests in contracts) from participating in decisions that will have the result of their immediate family's expenses, income, assets or liabilities increasing or decreasing.<sup>25</sup> "Immediate family" includes one's spouse or domestic partner and dependent children.<sup>26</sup> For further discussion of conflict of interest disclosure and disqualification, see chapter 2, beginning on page 10.

Some jurisdictions have also adopted additional policies to prevent nepotism in hiring, promotions and appointments. For more information about hiring family members, see "Hiring: When a Relative Wants a Job," available at [www.ca-ilg.org/fairness](http://www.ca-ilg.org/fairness).

### Penalties

The disqualification requirements relating to family members are part of the Political Reform Act. A refusal to disqualify oneself is punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>27</sup>



These penalties can include any or all of the following:

- » Immediate loss of office;<sup>28</sup>
- » Prohibition from seeking elected office in the future;<sup>29</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>30</sup> and
- » Jail time of up to six months.<sup>31</sup>

If the family members' interest relates to an interest in a contract, penalties for violating Government Code section 1090 apply (for example, felony prosecution or refunds of amounts paid under the contract).<sup>32</sup> For more information about Government Code section 1090, see chapter 2, pages 20-22.

#### EFFECT ON AGENCY AND THOSE AFFECTED BY AGENCY'S DECISION

When a disqualified official participates in a decision, it can also void the decision.<sup>33</sup> This can have serious consequences for those affected by the decision as well as the public agency.



#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## Restrictions and Disqualification Requirements Relating to Campaign Contributions

### Basic Rules

Generally, the ethics laws with respect to campaign contributions emphasize disclosure rather than disqualification.<sup>34</sup> Disclosure enables voters to assess the degree an official could be influenced by campaign contributors who appear before the agency. Both financial and in-kind (goods and services) support must be disclosed.<sup>35</sup> These requirements are discussed on chapter 4, page 53.

Moreover, the courts have held the receipt of campaign contributions does not generally give rise to a duty to disqualify for bias. For example, a court determined an elected official who received a campaign contribution from a developer is not automatically barred from acting on the developer's land use permit application.<sup>36</sup> The court left open the possibility this scenario could, under certain circumstances, create a problem.

However, under limited (and sometimes counterintuitive) circumstances, *certain* local agency officials must disqualify themselves from participating in proceedings regarding licenses, permits and other entitlements for use if the official has received campaign contributions of more than \$250 during the previous twelve months from any party or participant.<sup>37</sup> Note campaign contributions may be both monetary (dollars) and "in-kind" (goods or services) contributions.<sup>38</sup>

In addition, these officials are prohibited from receiving, soliciting or directing a campaign contribution of more than \$250 from any party or participant in a license, permit or entitlement proceeding while the proceeding is pending and for three months after the proceeding.<sup>39</sup>

### Affected Officials

Generally speaking, this requirement does not apply to officials directly elected to the board of local agencies while acting in the scope of the office for which they were elected. *However, elected officials are covered by this prohibition when they sit as members of other boards to which they were not elected (such as joint powers agencies, regional government entities or local agency formation commissions).*<sup>40</sup>

Other covered officials include appointed board or commission members who become or have been candidates for elective office.<sup>41</sup>

These prohibitions apply only with respect to campaign contributions from persons who are financially interested in the outcome of the specified proceedings. Those interested persons include:

- » Parties to the proceeding (such as applicants for the permit, license or entitlement); and
- » Participants.<sup>42</sup>

A participant is a person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit or other entitlement for use and who has a financial interest in the outcome of the decision.<sup>43</sup> A person qualifies as a "participant" if he or she attempts to influence the officers or employees of the agency with respect to the decision or testifies in person before the agency with respect to the decision.<sup>44</sup>



### Extortion under California and Federal Law

A demand for campaign contributions can also constitute extortion. Extortion occurs when someone obtains money through threat of harm or under color of official right.<sup>45</sup>

**California Law.** Extortion under is a misdemeanor under California law.<sup>46</sup> Misdemeanors are punishable by up to six months in county jail, a fine of up to \$1,000 or both.<sup>47</sup> Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.<sup>48</sup>

**Federal Law.** To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a \$250,000 fine.<sup>49</sup>

### Kinds of Proceedings Affected

The general rule applies to all proceedings involving licenses and permits, including use permits. This includes:

- » Business, professional, trade and land use licenses and permits;
- » Land use permits;
- » Franchises; and
- » Contracts, other than competitively bid, labor or personal employment contracts.<sup>50</sup>

Examples of land use permits include conditional use permits,<sup>51</sup> zoning variances,<sup>52</sup> and tentative subdivision and parcel maps.<sup>53</sup> Examples of covered contracts include consulting contracts, whether engineering, architectural or legal.<sup>54</sup>

### Actions That Must Be Taken

#### Disclosure

When someone files a permit or license application, that individual must publicly report all covered officials to whom the individual made contributions of more than \$250 during the previous twelve months.<sup>55</sup> Likewise, a covered official must publicly disclose on the record of the proceeding any party or participant who has contributed more than \$250 during the previous twelve months to that official.<sup>56</sup> The disclosure must be made prior to the agency making any decision in the proceeding (without the covered official's participation).<sup>57</sup>



#### Disqualification

If prior to making a decision in the proceeding, a covered official knowingly receives more than \$250 in campaign contributions from a party during the previous twelve months, that official must disqualify himself or herself from participating in the proceeding.<sup>58</sup> Likewise, with respect to contributions received from a participant, the covered official must disqualify himself or herself if he or she has reason to know, prior to making a decision in the proceeding, that the participant is financially interested in the outcome of the proceeding.<sup>59</sup>

*(Note the disqualification requirement is triggered by actual receipt of campaign contributions, not simply asking for a contribution if the request is unsuccessful. Of course, there are significant ethical issues associated with soliciting campaign contributions from either parties or participants while a decision is pending).*

Disqualification means the official may not participate in making any decision in the proceeding, and may not in any way attempt to use his or her official position to influence the decision.<sup>60</sup>

### Avoiding Disqualification

A covered official may avoid disqualification if he or she returns the contribution, or that portion which is over \$250, within 30 days from the time the official knows or has reason to know of the contribution and the proceeding.<sup>61</sup>

### No Contributions During the Proceeding

While the permit or license proceeding is pending and for three months after the decision, covered officials must not solicit or receive campaign contributions from either parties or participants (persons who actively support or oppose a particular decision and are financially interested in the outcome).<sup>62</sup> This prohibition includes a prohibition against soliciting, receiving or directing contributions on behalf of another person or on behalf of a campaign committee.<sup>63</sup>

Likewise, all parties and participants are prohibited during this period of time from making contributions of more than \$250 to any officials involved in the proceedings.<sup>64</sup>

#### MORE ON FUNDRAISING

Even when the law does not constrain an official's political fund-raising activities (other than requiring disclosure of donors), it is important to be extraordinarily judicious in choosing those one will ask for campaign contributions.

If an individual or company has matters pending with one's agency, they (and others, including the media and one's fellow candidates) are going to perceive a relationship between the decision and whether they contribute to one's campaign. The unkind characterization for this dynamic is "shake-down."

Two important points to remember:

- ✓ Public officials who indicate their actions on a matter will be influenced by whether they receive a campaign contribution put themselves at risk of being accused of soliciting a bribe or extortion.
- ✓ The legal restrictions on campaign fund-raising are *minimum* standards.



#### FOR MORE INFORMATION

See the following resources:

- » "Raising Funds for Favorite Causes," available at [www.ca-ilg.org/fundraising](http://www.ca-ilg.org/fundraising)
- » Institute resources on ethics on the campaign trail, see [www.ca-ilg.org/campaigning-office](http://www.ca-ilg.org/campaigning-office)
- » "Campaign Contributions May Cause Conflicts for Appointees and Commissioners," available at [www.fppc.ca.gov](http://www.fppc.ca.gov)
- » *Campaign Disclosure Manual 2: Information for Local Candidates, Superior Court Judges, Their Controlled Committees and Primarily Formed Committees for Local Candidates*, 2007. Available at [www.fppc.ca.gov](http://www.fppc.ca.gov)

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

### Penalties

The disqualification requirements are part of the Political Reform Act. A refusal to disqualify oneself is punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.<sup>65</sup>

These penalties can include any or all of the following:

- » Immediate loss of office;<sup>66</sup>
- » Prohibition from seeking elected office in the future;<sup>67</sup>
- » Fines of up to \$10,000 or more depending on the circumstances;<sup>68</sup> and
- » Jail time of up to six months.<sup>69</sup>



#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).



## Agency Staff and Political Activities

### Basic Rules

There are a number of laws designed to insulate public employees from having to participate in the campaign activities of candidates for their agency's governing board.



### Employment Decisions, Soliciting Support and Campaign Contributions

California law forbids candidates and officials from conditioning employment decisions on support of a person's candidacy.<sup>70</sup>

Soliciting campaign funds from agency officers or employees is also unlawful.<sup>71</sup> There is an exception if the solicitation is made to a significant segment of the public that happens to include agency officers or employees.<sup>72</sup> Candidates also may not offer or arrange for an increase in salary for an agency employee in exchange for a political contribution.<sup>73</sup>

Note that members of the International City/County Management Association and the City Attorneys Department of the League of California Cities place a high value on these positions' independence from the political process. As a result, both organizations encourage their members not to make campaign contributions to local officials.<sup>74</sup>

### Engaging in Political Activities During Work Hours or While in Uniform

Engaging in political activities during work hours violates prohibitions against the political use of public resources.<sup>75</sup> Local agencies and school districts may impose additional restrictions on the political activities of employees during working hours or while on agency property.<sup>76</sup> Such restrictions can include wearing political buttons during work hours and displaying political signs at one's workstation.<sup>77</sup>

Additionally, California law prohibits employees or officers of local agencies from engaging in political activities of any kind while in uniform.<sup>78</sup>

For more information about the use of public resources for political purposes, see chapter 3, pages 36-37.

### Penalties

Violation of the prohibition against soliciting campaign funds from agency staff is punishable as a misdemeanor.<sup>79</sup> Offering or arranging a raise for an agency employee in exchange for a contribution is punishable by up to a year in county jail, a fine of up to \$5,000 or both.<sup>80</sup>



No penalties are specified in the code sections creating the prohibitions against conditioning employment decisions on political support or against engaging in political activities while in uniform.<sup>81</sup> Presumably violations would fall into the catchall penalty for misconduct in office, which is loss of office.<sup>82</sup>

Public officials face both criminal and civil penalties for using public resources for political benefit.<sup>83</sup> See chapter 3, page 35 for more details.



### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).



## Holding Multiple Public Offices

There is such a thing as too much public service; the law limits the degree to which public officials can simultaneously hold multiple offices. The reason is, when an official assumes a public office, he or she takes on responsibility to the constituents of that agency to put their interests first. When an official occupies multiple offices in multiple agencies, fulfilling that responsibility becomes more complicated, both legally and ethically.



Potential legal issues include:

- » Political Reform Act issues when the official is in the position of making decisions that affect the official's economic interests. This issue is covered in *chapter 2*;
- » Section 1090 issues when the official's position is such that the official has an interest in a contract in which the agency is involved. This issue is also covered in *chapter 2*; and
- » Incompatibility of office issues (for example, membership on the city council and serving on the board of another local agency) when the official's offices are such that the official may be subjected to conflicting loyalties.<sup>84</sup>

The incompatible office holding problem differs from a conflict of interest that involves a potential clash between one's private interest and one's public duties, incompatibility of offices normally refers to the "public-public" situation where no personal conflict of interest is involved. Instead there is a potential clash between one's responsibility to two sets of constituents.

### Basic Rules

California law prohibits public officers from simultaneously holding multiple offices that are "incompatible" with one another.<sup>85</sup> Offices are incompatible when:

- » Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body;
- » Based on the powers and jurisdiction of the offices, there is a possibility of significant clashes of duties or loyalties between the offices; or
- » Public policy considerations make it improper for one person to hold both offices.<sup>86</sup>

The notion underlying the prohibition is that it can be unfair and unwise to have decision-makers who are supposed to have just one agency's (and one agency's constituents') interests at heart assume multiple decision-making roles. As the Attorney General observed, the public is entitled to utmost loyalty from those who occupy offices.<sup>87</sup>

This restriction on holding multiple public offices only applies to positions that are considered to be *offices*—including appointed or elected members of a governmental board, commission, committee, or other body.<sup>88</sup> The restriction does not apply to positions of employment in an agency,<sup>89</sup> although employees may be prohibited from serving on the governing bodies of agencies in which they are employed.<sup>90</sup>

Note there can be specific legislative exceptions to this rule.<sup>91</sup> Under some circumstances, local agencies may allow simultaneous occupancy of what would otherwise be incompatible offices.<sup>92</sup>

*When one assumes a public office, one takes on responsibility to the constituents of that agency to put their interests first. When one occupies multiple offices in multiple agencies, that job becomes more complicated...*

## Special Issues

### Employees Who Run for the Governing Board of Their Public Agency Employers

Generally, an individual may not serve as an elected or appointed member of a local agency's governing board if he or she is an employee of the local agency.<sup>93</sup> If the employee does not resign, the individual's employment automatically terminates upon being sworn into office.<sup>94</sup> Volunteer firefighters are exempt from these provisions if the firefighter receives no salary.<sup>95</sup>

### Individual Agency Guidelines

Local agencies must adopt rules regarding incompatible activities.<sup>96</sup>



#### FOR MORE INFORMATION

On holding multiple offices see "Holding Two Positions" available online at [www.fppc.ca.gov](http://www.fppc.ca.gov).

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

## Penalties

If an official accepts a second office that is incompatible with an office he or she currently holds, employment in the prior office automatically terminates upon being sworn into the second office.<sup>97</sup>



#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## Competitive Bidding Processes for Public Contracts

### Basic Rules

Public contracting laws — including those adopted at the local level — are designed to give all interested parties the opportunity to do business with the government on an equal basis.<sup>98</sup>



This keeps contracts from being steered to businesses or individuals because of political connections, friendship, favoritism, corruption or other factors. It also assures that the public receives the best value for its money by promoting competition among businesses so the public can receive the best deal.<sup>99</sup>

Many competitive bidding requirements are locally imposed, for example by charter cities as part of their municipal affairs authority.<sup>100</sup> California law also authorizes local agencies to adopt procedures for acquisition of supplies and equipment.<sup>101</sup> Most of these purchasing ordinances require competitive bids for contracts in excess of designated dollar amounts.

For public works projects, California law defines when general law cities and counties must use competitive bidding. For general law cities, public works projects over \$5,000 are subject to the state's competitive bidding requirements.<sup>102</sup> For county projects, the threshold is based on population: \$6,500 (counties with populations of 500,000 or over),<sup>103</sup> \$50,000 (counties with populations of 2 million or over)<sup>104</sup> and \$4,000 (all other counties).<sup>105</sup> Note that it is a misdemeanor to split projects to avoid competitive bidding requirements.<sup>106</sup>

The contract for a competitively bid public project must be awarded to the lowest responsible bidder.<sup>107</sup> A responsible bidder is one who is able to perform the contract if awarded.<sup>108</sup>

### Exceptions

#### Emergency

Contracts may be awarded without competitive bidding if the legislative body makes a finding by a four-fifths vote that an emergency exists.<sup>109</sup>

#### Professional Services

Contracts for professional services such as private architectural, landscape architectural, engineering, environmental, land surveying, or construction management firms need not be competitively bid, but must be awarded on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.<sup>110</sup> However, if the professional services are too closely akin to the work typically performed by public works construction contractors (for example, some services performed by construction managers), then competitive bidding may be required.<sup>111</sup>



#### Special Services

The legislative body of any public agency may contract with and employ persons for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.<sup>112</sup> The test as to whether services are special services depends on the nature of the services, the necessary qualifications required of a person furnishing the services, and the availability of the service from public sources.<sup>113</sup>



## Design-Build

Design-build is a method of project delivery in which the design and construction functions are combined and contracted to a single entity (called the “design builder”). Cities, with approval of the city council, may use design-build contracting for building construction projects over one million dollars.<sup>114</sup> Counties, with approval of the board of supervisors, may use design-build contracting for building construction projects over \$2.5 million.<sup>115</sup> Cities and counties may award design-build projects using either the lowest responsible bidder or best value.<sup>116</sup>



### FOR MORE INFORMATION

On public agency procurement processes, see the Institute resources available at

[www.ca-ilg.org/post/fair-procurement](http://www.ca-ilg.org/post/fair-procurement).

## Penalties

An agency that improperly awards a bid to any bidder other than the lowest responsible bidder may be

liable for reimbursing the low bidder’s actual cost in submitting the bid, but will not be liable for the low bidder’s lost profits.<sup>117</sup>



### HONEST SERVICES, FRAUD AND EXTORTION

Under federal wire and mail fraud laws, the public has the right to the “honest services” of public officials.<sup>118</sup> The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.<sup>119</sup> That duty is violated when a public official makes a decision that is not motivated by his or her constituents’ interests but instead by his or her personal interests.<sup>120</sup> Specifically, honest services fraud refers to actions that constitute bribery and kickback schemes.<sup>121</sup>

“Kickbacks” (for example, receiving money back from proceeds paid to a company that does business with a public entity) in exchange for favorable contracting decisions is one area in which prosecutors have been particularly active.

The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a \$250,000 fine.<sup>122</sup>

An official’s refusal to award a contract unless the individual receives benefits can also be prosecuted as extortion.<sup>123</sup> To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a \$250,000 fine.<sup>124</sup>

**For more information** about honest services, fraud and extortion, see “Making a Federal Case Out of Corruption,” available at [www.ca-ilg.org/fedcase](http://www.ca-ilg.org/fedcase).

## Whistle-Blowing Protections

### Basic Rules

California whistle-blowing laws make it unlawful for employers to retaliate against employees who refuse to participate in unlawful activities.<sup>125</sup> Furthermore, if an employee can demonstrate by a preponderance of evidence that his or her whistle-blowing activities were a contributing factor in an adverse employment action, the burden of proof then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the action for “legitimate, independent reasons” even if the employee had not been a whistle-blower.<sup>126</sup> These protections apply specifically to local agency employees.<sup>127</sup>



California law requires employers to post the state attorney general’s whistle-blower hotline number at the workplace.<sup>128</sup> Any employee or member of the public can call the hotline at (800) 952-5225 to register their concerns about potentially unlawful practices.<sup>129</sup>



#### FOR MORE INFORMATION

On whistle-blower protections, see the following resources:

- » “For Whom the Whistle Blows,” available at [www.ca-ilg.org/whistle](http://www.ca-ilg.org/whistle)
- » *Walking the Line: What to do When You Suspect an Ethics Problem*, 2005. Available at [www.ca-ilg.org/WhatToDo](http://www.ca-ilg.org/WhatToDo)

### Penalties

Violation of whistle-blower protection laws is a misdemeanor.<sup>130</sup> The maximum criminal penalty for an individual is a year of jail time, a fine of \$1,000 or both.<sup>131</sup> In the case of corporations the criminal penalty is a fine of up to \$5,000.<sup>132</sup>



In addition, retaliation against an employee for whistle-blowing activities could result in a suit for violation of the employee’s civil rights.<sup>133</sup> Such actions carry the prospect of damages<sup>134</sup> and attorney’s fee awards.<sup>135</sup>



#### FOR MORE INFORMATION

On penalties for ethics law violations, see [www.ca-ilg.org/consequences](http://www.ca-ilg.org/consequences).

## Endnotes and Additional Information

**Note:** Sections in the California Code are accessible at <http://leginfo.ca.gov/>. Fair Political Practices Commission regulations are accessible at [www.fppc.ca.gov/index.php?id=52](http://www.fppc.ca.gov/index.php?id=52). A source for case law information is [www.findlaw.com/cacases/](http://www.findlaw.com/cacases/) (requires registration).

- 1 See *Nussbaum v. Weeks*, 214 Cal. App. 3d 1589, 1597-98, 263 Cal. Rptr. 360, 365-66 (4th Dist. 1989).
- 2 See *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1234 n.23, 97 Cal. Rptr. 2d 467 (2d Dist. 2000) (finding no common law bias).
- 3 See *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (finding common law bias).
- 4 *Haas v. County of San Bernadino*, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d. 341 (2002).
- 5 See *Breakzone*, 81 Cal. App. 4th at 1234 n.23, 97 Cal. Rptr. 2d at 490.
- 6 See, e.g., *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 89, 133 Cal. Rptr. 2d 234, 241 (2d Dist. 2003).
- 7 *Nightlife Partners*, 108 Cal.App.4th at 97-98, 133 Cal. Rptr. 2d at 248.
- 8 See *Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975); *Mennig v. City Council*, 86 Cal. App. 3d 341, 150 Cal. Rptr. 207 (2d Dist. 1978).
- 9 See *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 35 Cal. Rptr. 2d 782 (2d Dist. 1994) (where local ordinance called for "person" appealing planning commission decision to city council to show cause why the commission's action should be overturned, city council's decision to appeal the action to itself was an appearance of conflict of interest and was part of overall violation of developer's substantive and procedural due process rights).
- 10 *Fairfield v. Superior Court*, 14 Cal. 3d 768, 122 Cal. Rptr. 543 (1975).
- 11 See generally Cal. Civ. Proc. Code § 1094.5. See *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (requiring the council to rehear an appeal from the planning commission's decision and provide a fair hearing).
- 12 See 42 U.S.C. §§ 1983, 1988.
- 13 Cal. Penal Code § 86.
- 14 91 Cal. Op. Att'y Gen. 46 (2008).
- 15 Cal. Penal Code § 86.
- 16 See Cal. Pen. Code § 88. See also Cal. Elect. Code § 20 (making those convicted of a felony involving bribery, embezzlement, extortion or theft of public money ineligible for public office); Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 17 Cal. Gov't Code § 87460(a), (b).
- 18 See Cal. Gov't Code § 87460(c), (d).
- 19 See Cal. Gov't Code § 87461.
- 20 See generally Cal. Gov't Code §§ 91000-14.
- 21 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 22 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 23 Cal. Gov't Code § 91000(b).
- 24 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 25 2 Cal. Code Regs. § 18703.5.
- 26 See Cal. Gov't Code § 82029.
- 27 See generally Cal. Gov't Code §§ 91000-14.
- 28 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 29 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 30 Cal. Gov't Code § 91000(b).
- 31 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 32 See, e.g., *People v. Honig*, 48 Cal. App. 4th 289, 55 Cal. Rptr. 2d 555 (1996).
- 33 See Cal. Gov't Code § 91003(b).
- 34 This is a requirement of the Political Reform Act. See generally Cal. Gov't Code §§ 84100-511.
- 35 Cal. Gov't Code § 82015; 2 Cal. Code Regs. 18421.1.
- 36 *Woodland Hills Residents Association v. City Council*, 26 Cal. 3d 938, 164 Cal. Rptr. 255 (1980). But see Cal. Gov't Code § 84308; 2 Cal. Code Regs. §§ 18438.1-.8 (defining who is disqualified from acting on a land use entitlement application after receipt of a campaign contribution).
- 37 Cal. Gov't Code § 84308(c).
- 38 See Cal. Gov't Code § 82015; 2 Cal. Code Regs. § 18215.
- 39 See Cal. Gov't Code § 84308(b).

- 40 See Cal. Gov't Code § 84308(a)(3); 2 Cal. Code Regs. § 18438.1.
- 41 See Cal. Gov't Code § 84308(a)(4); 2 Cal. Code Regs. § 18438.1.
- 42 See Cal. Gov't Code § 84308(b), (c); 2 Cal. Code Regs. § 18438.4.
- 43 See Cal. Gov't Code § 84308(a)(2).
- 44 *Id.*
- 45 Cal. Pen. Code § 518; 18 U.S.C. § 1951.
- 46 Cal. Penal Code § 521.
- 47 Cal. Penal Code § 19.
- 48 Cal. Gov't Code §§ 3060-3074.
- 49 18 U.S.C. § 1951(a). *See generally* 18 U.S.C. § 3571(b).
- 50 See Cal. Gov't Code § 84308(a)(5); 2 Cal. Code Regs. § 18438.2.
- 51 Cal. Gov't Code § 65901.
- 52 Cal. Gov't Code § 65906.
- 53 Cal. Gov't Code §§ 66411-413.5.
- 54 Cal. Gov't Code §§ 4526, 37103, 53060.
- 55 Cal. Gov't Code § 84308(d); 2 Cal. Code Regs. § 18438.8.
- 56 Cal. Gov't Code § 84308(c).
- 57 *Id.*
- 58 *Id.*
- 59 *Id.*
- 60 *Id.*
- 61 *Id.*
- 62 Cal. Gov't Code § 84308(b).
- 63 *Id.*
- 64 Cal. Gov't Code § 84308(d).
- 65 *See generally* Cal. Gov't Code §§ 91000-14.
- 66 See Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).
- 67 See Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).
- 68 Cal. Gov't Code § 91000(b).
- 69 See Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding \$1,000, or both).
- 70 See Cal. Gov't Code § 3204, which reads as follows:  
No one who holds, or who is seeking election or appointment to, any office or employment in a state or local agency shall, directly or indirectly, use, promise, threaten or attempt to use, any office, authority, or influence, whether then possessed or merely anticipated, to confer upon or secure for any individual person, or to aid or obstruct any individual person in securing, or to prevent any individual person from securing, any position, nomination, confirmation, promotion, or change in compensation or position, within the state or local agency, upon consideration or condition that the vote or political influence or action of such person or another shall be given or used in behalf of, or withheld from, any candidate, officer, or party, or upon any other corrupt condition or consideration. This prohibition shall apply to urging or discouraging the individual employee's action.
- 71 See Cal. Gov't Code § 3205.
- 72 See Cal. Gov't Code § 3205(c).
- 73 See Cal. Gov't Code § 3205.5, which reads as follows:  
No one who holds, or who is seeking election or appointment to, any office shall, directly or indirectly, offer or arrange for any increase in compensation or salary for an employee of a state or local agency in exchange for, or a promise of, a contribution or loan to any committee controlled directly or indirectly by the person who holds, or who is seeking election or appointment to, an office. A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, a fine not exceeding five thousand dollars (\$5,000), or by both that imprisonment and fine.
- 74 The ICMA Code is available on the ICMA website at: <http://icma.org/codeofethics>.
- 75 See Cal. Gov't Code § 8314.
- 76 See Cal. Gov't Code § 3207 (providing that any city, county or local agency may prohibit or restrict officers and employees engaging in political activity during working hours and political activities on agency premises); Cal. Educ. Code § 7055; 5 U.S.C. §§ 7321-26 (prohibiting employees of state and local executive agencies who work in connection with programs financed in whole or in part by federal loans or grants from engaging in political activities while on duty).
- 77 *See. Cal. Teachers Ass'n v. Governing Bd.*, 45 Cal.App.4th 1383, 53 Cal.Rptr.2d 474 (1996); 5 C.F.R. § 734.306 example 16 (with limited exception, those employees working in connection with federally funded programs "may not wear partisan political buttons or display partisan political pictures, signs, stickers, or badges while he or she is on duty or at his or her place of work.").
- 78 Cal. Gov't Code § 3206. *See also* Cal. Gov't Code § 3302.
- 79 See Cal. Gov't Code § 3205
- 80 See Cal. Gov't Code § 3205.5, which reads as follows:  
No one who holds, or who is seeking election or appointment to, any office shall, directly or indirectly, offer or arrange for any increase in compensation or salary for an employee of a state or local agency in exchange for, or a promise of, a contribution or loan to any committee controlled directly or indirectly by the person who holds, or who is seeking election or appointment to, an office. A violation of this section is punishable by imprisonment in a county jail for a period not exceeding one year, a fine not exceeding five thousand dollars (\$5,000), or by both that imprisonment and fine.
- 81 See Cal. Gov't Code §§ 3204, 3206.

- 82 See Gov't Code §§ 3060-75. See also *Steiner v. Superior Court*, 50 Cal.App.4th 1771, Cal. Rptr.2d 668 (1996) (discussing the types of misconduct warranting removal from office under section 3060).
- 83 See Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- 84 See Cal. Gov't Code § 1126.
- 85 Cal. Gov't Code § 1099(a).
- 86 Cal. Gov't Code § 1099(a)(1)-(3).
- 87 91 Cal. Op. Att'y Gen. 25 (2008)
- 88 Cal. Gov't Code § 1099(a).
- 89 Cal. Gov't Code § 1099(c).
- 90 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).
- 91 See, e.g., Cal. Health & Safety Code § 6480(b) (relating to city officials serving on sanitary districts) See also 85 Cal. Op. Att'y Gen. 239 (2002) (noting the Legislature can create exceptions to the incompatibility doctrine).
- 92 See 66 Cal. Op. Att'y Gen. 293 (1983) (offices of city and county planning commission are incompatible but county and charter city may adopt legislation specifying otherwise).
- 93 See Cal. Gov't Code § 53227 (for cities, counties and special districts); Cal. Educ. Code §§ 35107(b)(1) (school districts), 72103(b)(1) (community college districts). See also 84 Cal. Op. Att'y Gen. 126 (2001) (community college board member may not become part-time instructor for district).
- 94 Cal. Gov't Code § 53227(a); Cal. Educ. Code §§ 35107(b)(1), 72103(b)(1).
- 95 See 85 Cal. Op. Att'y Gen. 230 (2002) ("salary" does not include per-call and equipment stipends).
- 96 Cal. Gov't Code § 1126.
- 97 Cal. Gov't Code § 1099(b) (noting that this position is enforceable through Civil Procedure Code section 803). *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 107 P.2d 388 (1940). See also Cal. Gov't Code § 1126.
- 98 See Cal. Pub. Cont. Code § 100.
- 99 *Id.*
- 100 *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 110 Cal. Rptr. 67 (4th Dist. 1973). See also Cal. Pub. Cont. Code § 1100.7.
- 101 Cal. Gov't Code §§ 54021-25.
- 102 Cal. Pub. Cont. Code § 20162.
- 103 Cal. Pub. Cont. Code § 20122.
- 104 Cal. Pub. Cont. Code § 20123.
- 105 Cal. Pub. Cont. Code § 20121.
- 106 Cal. Pub. Cont. Code § 20163.
- 107 Cal. Pub. Cont. Code § 20162.
- 108 See Cal. Pub. Cont. Code § 1103.
- 109 Cal. Pub. Cont. Code §§ 1102, 20168, 22050.
- 110 Cal. Gov't Code § 4526.
- 111 *City of Inglewood-Los Angeles County Civic Ctr. Auth. v. Superior Court*, 7 Cal. 3d 861, 103 Cal. Rptr. 689 (1972).
- 112 Cal. Gov't Code § 53060.
- 113 *Cal. School Employees Ass'n v. Sunnyvale Elementary Sch. Dist.*, 36 Cal. App. 3d 46, 60, 111 Cal. Rptr. 433, 442 (1st Dist. 1973).
- 114 Cal. Pub. Cont. Code § 20175.2.
- 115 Cal. Pub. Cont. Code § 20133.
- 116 Cal. Pub. Cont. Code §§ 20175.2, 20133.
- 117 *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.*, 23 Cal. 4th 305, 315-16, 96 Cal. Rptr. 2d 747 (2000).
- 118 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).
- 119 *U.S. v. Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).
- 120 *U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.*, 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).
- 121 See *Skilling v. U.S.*, 130 S.Ct. 2896, 2931(2010) (holding that in order to avoid unconstitutional vagueness, 18 USC §1346, defining "scheme or artifice to defraud," only criminalizes bribes and kick-back schemes).
- 122 18 U.S.C. §§ 1341 ("... shall be fined under this title or imprisoned not more than 20 years, or both."), 1343 ("shall be fined under this title or imprisoned not more than 20 years, or both.").
- 123 18 U.S.C. § 1951.
- 124 18 U.S.C. § 1951(a).
- 125 See Cal. Lab. Code § 1102.5(c) ("An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.").
- 126 Cal. Lab. Code § 1102.6.
- 127 See Cal. Lab. Code § 1106.
- 128 See Cal. Lab. Code § 1102.8 (requiring employers to post employees' rights and responsibilities under the whistle-blower laws, including the telephone number for the Attorney General's hotline).
- 129 See Cal. Lab. Code § 1102.7 (requiring the Attorney General to set up the hotline).
- 130 Cal. Lab. Code § 1103.
- 131 *Id.*
- 132 *Id.*
- 133 See, e.g., *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951(2006).
- 134 42 U.S.C. § 1983.
- 135 42 U.S.C. § 1988.

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