

# Caution Is Needed to Avoid Conflict-of-Interest Violations

## Office of the Inspector General



### Investigation Results

Former and current BART employees' participation in the making of District contracts led to conflict-of-interest violations or a potential violation. We received allegations claiming that a current and two former BART employees had a financial interest in contracts that they played a role in making for BART. We substantiated the allegations and provided those in BART with oversight responsibilities detailed reports of our findings and event timelines that

led to the violations. Two of the employees violated Government Code [§ 1090](#), which prohibits a public official's or their family members' financial interest in contracts made in the public official's official capacity. One of those employees also violated Government Code [§ 87100](#), which prohibits public officials from using their position to influence decisions that they know will financially benefit them, and Government Code [§ 87407](#), which prohibits public officials from making decisions in relation to prospective employment. The third employee violated the [District Employee Code of Conduct](#), but BART avoided a violation of Government Code § 1090 by disqualifying a firm that submitted a proposal to prevent a contract from being made with the firm after learning that the firm employed an immediate family member of BART's project manager for that procurement process.

Although each allegation had its own set of circumstances, we identified an overarching concern regarding employees' understanding of California Government Code § 1090. The law has evolved significantly over time through a series of amendments and California Attorney General opinions, making it technical and complex. Nonetheless, the code is strict and failure to follow it can be costly, as the penalties for violations include voiding the contract and disgorging the contractor of any monies received under the contract. We previously made recommendations that BART has already implemented, or is in the process of implementing, to help inform employees and contractors of Government Code § 1090 requirements and, thus, avoid violations.<sup>1</sup> Those recommendations also help address potential § 87100 and § 87407 violations as they may pertain to contracting.

Specific to this investigation are recommendations for voiding the contracts identified in our report and disgorging payments made under those contracts. Government Code [§ 1092\(a\)](#) says contracts that violate § 1090 "may be avoided," which case law has consistently interpreted to mean that contracts that violate the code are void, not merely voidable.<sup>2</sup> Further, pursuant to [County of San Bernardino v. Walsh](#), the appellate court ruled that compensatory and punitive damages are the penalties for violations of Government Code § 1090.<sup>3</sup>

<sup>1</sup> OIG Report: *Potential Conflict of Interest May Require Voiding a \$40 Million Construction Management Contract and Not Paying \$5.4 Million of Invoices* (April 8, 2022)

<sup>2</sup> *People ex rel. State of California v. Drinkhouse* (1970) 4 Cal.App.3d 931

<sup>3</sup> *County of San Bernardino v. Walsh*: <https://casetext.com/case/cty-of-san-bernardino-v-walsh>



Government Code § 1092(a) says contracts that violate § 1090 “may be avoided,” which case law has consistently interpreted to mean that contracts that violate the code are void, not merely voidable.<sup>4</sup> Further, pursuant to *County of San Bernardino v. Walsh*, the appellate court ruled that compensatory and punitive damages are the penalties for violations of Government Code § 1090.

We understand that a public agency that is party to a void contract is not obligated to bring any such claim it may have. However, the deterrence factor for violating § 1090 is lost when an agency opts not to make a claim. Not taking this type of action gives employees, contractors, and the public the perception that BART does not take conflict-of-interest violations seriously. We have investigated four conflict of interest allegations, three of which resulted in a substantiated § 1090 violation. This includes our [April 2022](#) conflict of interest report. We have two other allegations in process that, thus far, appear to support § 1090 violations. Our work shows that BART has not taken sufficient steps to prevent § 1090 violations from occurring and that they will continue to happen unless BART sends a strong message that it holds people accountable for Government Code § 1090 violations.

Our investigation also revealed a need for BART to address the concept of the “revolving door” whereby former employees may take advantage of their prior positions and inside knowledge to obtain new contracts with BART immediately or soon after leaving District service. Two of the violations noted in our investigation stem from employees who participated in the making of contracts for BART while working for the District, then obtaining work under those contracts soon after leaving District service. Government Code § 1090 remains attached to public employees even after employment.<sup>5</sup>

### Recommendations

1. From Allegation One, void the workplans awarded to the former employee’s firm and made under the contracts that the former employee participated in the making of while employed with the District.
2. From Allegation Two, void the contracts that the former employee participated in the making of while employed with the District.
3. Pursue disgorgement in the amount of \$1,249,066 for payments made under the voided workplans and contracts.
4. Update the District Contractor Code of Conduct and Employee Code of Conduct to ban former employees from entering into new contracts with the District for a minimum of one year post District employment.

*Management agreed with recommendations one, two, and four but did not agree to recommendation three. See page five for details.*

<sup>4</sup> *People ex rel. State of California v. Drinkhouse* (1970) 4 Cal.App.3d 931

<sup>5</sup> FPPC Benefitting from Contracts After Employment: <https://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/2021-/2021/21030.pdf>



**Allegation One:** A former BART employee violated California state law by participating in the making of contracts that financially benefitted the employee after resigning from the District.

**Finding Summary:** Allegation substantiated – The former employee’s newly established firm obtained subconsultant work under on-call agreements that the former employee participated in the making of while employed by the District. In May 2020, the then employee served on the evaluation committee that rated firms for BART’s on-call construction management contract awards. Prior to resigning from the District in September 2021, the employee established their own firm that could provide subconsultant work under those contracts. The former BART employee established this firm with an employee who had worked for a firm that was awarded one of the on-call contracts. Within two months of resigning from BART, the former employee’s firm was awarded two workplans, totaling \$2.2 million, under two of the on-call agreements that the former employee evaluated while still employed with the District. BART has paid \$1,041,309 to the former employee’s firm for work done under those workplans. The former employee said that it was not their intent to gain work under the contracts when they participated in the selection committee more than a year before their resignation. However, obtaining work under the agreements post District employment created Government Code § 1090 violations. The Fair Political Practices Commission (FPPC) has issued a series of advisory letters and the California Attorney General has issued opinions confirming that Government Code § 1090 prohibits public employees from financially benefiting from contracts that they participated in the making of even after they leave public service.<sup>6</sup>

**Allegation Two** A former BART employee violated California state law by participating in the making of contracts that financially benefitted them after resigning from the District.

**Finding Summary:** Allegation substantiated – In March 2021, the then employee participated in the making of four contracts with a combined value of \$747,000 after having accepted employment with the firm awarded those contracts. The employee approved two contract purchase requisitions, one recommendation to increase contract funding, and one request for the General Manager’s approval for a contract. The employee also referred BART to their prospective employer to discuss contracting for the employee’s services after leaving the District. While still working for the District, the former employee began discussing what their billing rates would be once they began work with that firm. BART cancelled this contract during our investigation. After retiring from District service, the former employee’s new employer began billing for the former BART employee’s services under the contracts. These events triggered violations of Government Code § 87407, prohibiting public official decision making in relation to prospective employment; Government Code § 87100, prohibiting public official decision making in relation to a known personal financial interest; and Government Code § 1090, prohibiting a public official’s financial interest in contracts made in their official capacity. BART has paid \$207,757 to the employee’s new employer for work done under those contracts.

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<sup>6</sup> FPPC Benefitting from Contracts After Employment: <https://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/2021-/2021/21030.pdf>



**Allegation Three:** An employee served as the project manager during BART's Request for Proposals (RFP) process while having conflicts of interest in the contracting process.

**Finding Summary:** Allegation substantiated – BART had to disqualify a firm that submitted a proposal in response to an RFP because an immediate family member of the BART employee who served as the project manager during the procurement process worked for that firm. The BART employee did not notify Procurement in a timely manner that two immediate family members who lived in the BART employee's home worked for firms that could potentially bid on the project. As the project manager, the BART employee developed the scope of work, the criteria for evaluating proposals received, and the scoring methodology; provided other input into Procurement's Source Selection Plan; and led the preproposal meeting for potential proposers. Three staff from the disqualified firm participated in the preproposal meeting. However, BART's project manager did not inform Procurement, as required by BART's Employee Code of Conduct, of the potential conflicts of interest until three months after the employee had performed a significant amount of work on the RFP. Because of that, BART had no choice but to disqualify the firm when it submitted a proposal to avoid a violation of Government Code § 1090. Since disqualifying the firm avoided a § 1090 violation and the recommendations from our [April 2022](#) report will help increase awareness as to when potential violations are to be reported, we do not have any recommendations regarding this allegation.



## BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDING & RECOMMENDATION

### Report Title: Caution is Needed to Avoid Conflict-of-Interest Violations

1	<b>Recommendation:</b>	From Allegation One, void the workplans awarded to the former employee's firm and made under the contracts that the former employee participated in the making of while employed with the District.
	<b>Responsible Department:</b>	Procurement
	<b>Implementation Date:</b>	01-31-2023
	<b>Corrective Action Plan:</b>	Management will cancel the workplans. Subcontractors will be paid for all work performed up to and including the cancellation date.
2	<b>Recommendation:</b>	From Allegation Two, void the contracts that the former employee participated in the making of while employed with the District.
	<b>Responsible Department:</b>	General Counsel and Labor Relations
	<b>Implementation Date:</b>	02-01-2023
	<b>Corrective Action Plan:</b>	All referenced agreements will be canceled.
3	<b>Recommendation:</b>	Pursue disgorgement in the amount of \$1,249,066 for payments made under the voided contracts or workplans.
	<b>Responsible Department:</b>	General Counsel; General Manager
	<b>Implementation Date:</b>	None
	<b>Corrective Action Plan:</b>	Management will not pursue disgorgement as it is not required by law. Although a problematic relationship as laid out in the report was created, the work itself was performed competently and has been paid for. Seeking repayment for these particular services, for which the District benefitted greatly, would be an unjust enrichment for the District (essentially getting this work done for free) and is likely to cause serious financial harm to the local businesses.
4	<b>Recommendation:</b>	Update the District Contractor Code of Conduct to ban former employees from entering into new contracts with the District for a minimum of one year post District employment.
	<b>Responsible Department:</b>	Administration; General Counsel; Internal Audit
	<b>Implementation Date:</b>	05-31-2023



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#### Corrective Action Plan:

BART management will update its Contractor Code of Conduct and Employee Code of Conduct to reflect the following:

#### Definitions:

BART employees who are/were required, or should be required, to submit a Form 700 are subject to a 12-month post-employment contracting prohibition, except for retired annuitant employment contracts, as described below.

Former BART employees who participated in any way in a procurement or in the issuance of a work plan under a contract are considered to have participated in the making of the respective contract or work plan.

Former BART employees that participated in the making of a contract or work plan cannot contract with BART (directly or indirectly as a subcontractor) on the specific contract or work plan for the life of the contract or work plan.

Former BART employees that were required to, or should have been required to, submit a Form 700 cannot contract with BART (directly or indirectly as a subcontractor) for 12 months after terminating BART employment, regardless of whether the former BART employee participated in the making of that contract, except that retirees may enter into retired annuitant employment contracts with BART, subject to CalPERS restrictions on employment after retirement.

Former BART employees who were not required to submit a Form 700, or not a maker of a specific contract, have no restrictions from contracting with BART (subject to other laws/ rules/ regulations).

Prime contractors or subcontractors will be required to disclose relationships with former BART employees through the District Contractor Conflict of Interest Declaration for 5 years after the employee's termination date from BART (C. Prior Employment: Employment in the past five years (5) or sixty (60) months of a District Official by Contractor.).