

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 334 (Blanca Rubio)
Version: June 7, 2023
Hearing Date: July 6, 2023
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Public contracts: conflicts of interest

DIGEST

This bill specifies that an independent contractor is not a public officer for the purpose of a state law prohibiting conflicts of interests in public contracts, subject to certain conditions, and provides a safe harbor for parties who rely in good faith on the bill's requirements, subject to certain conditions.

EXECUTIVE SUMMARY

Existing law generally prohibits a public official or employee from making a contract in the person's official capacity in which the person has a financial interest. To avoid even the appearance of impropriety – which can erode the public trust as much as actual conflicts of interest – the prohibition is broad, and includes conflicts of interest in the preparation of a contract and participation in the bid solicitation process. Case law has also extended the law's prohibition on public officials or employees to include independent contractors retained or appointed by a public entity when their duties include engaging in or advising on public contracting.

According to the author and sponsor, there is currently ambiguity in the law regarding when independent contractors are considered to have a conflict of interest – thereby preventing them from entering into a contract with a public entity – as a result of the contractor's work on a prior phase of the same project. Although the Fair Political Practices Commission (FPPC) has issued comprehensive administrative guidance on the matter, the FPPC's guidance does not have the force of statute and would not, for example, bind a district attorney who sought criminal penalties for a violation under a different interpretation of the law. The author and sponsor state that this ambiguity is preventing local entities from entering into contracts with independent contractors who are the best candidates for the job, even if the contract complies with the FPPC's guidance.

This bill is intended to provide clarity in public contracting by codifying the FPPC's guidance, along with related case law, into a unified statute setting forth when an independent contractor's work on an earlier phase of a project disqualifies them from working on a subsequent phase. The bill also provides safe harbors for persons who rely on the bill's requirements in good faith.

This bill is sponsored by the American Council of Engineering Companies of California and is supported by almost 30 local governments and agencies and professional organizations. There is no known opposition. The Senate Elections and Constitutional Amendments Committee passed this bill with a vote of 7-0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits members of the Legislature, state, county, district, judicial district, and city officers or employees from being financially interested in any contract made by them in their official capacity, or by any body or board of which they are members; and a state, county, district, judicial district, and city officers or employees from being purchasers at any sale or vendors at any purchase made by them in their official capacity. (Gov. Code, § 1090 (Section 1090).)
- 2) Provides that an officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of 1) if the officer has only a remote interest, as defined, in the contract and the fact of the interest is disclosed to the body or board of which the officer is a member, the interest is noted in the official record, and the body or board approves or ratifies the contract by a good faith vote of its membership sufficient for that purpose without counting the interested person's vote. (Gov. Code, § 1091.)
- 3) Provides penalties for a violation of 1) as follows:
 - a) Every officer or person prohibited from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of those provisions of those laws, is punishable by a fine of not more than \$1,000 or by imprisonment in the state prison, and is forever disqualified from holding any office in this State.
 - b) An individual who willfully aids or abets an officer or person in violating a prohibition by the laws of the state pursuant to 3)(a) is punishable by a fine of not more than \$1,000 or by imprisonment in a state prison, and is forever disqualified from holding any office in this State. (Gov. Code, § 1097.)

- 4) Grants the FPPC jurisdiction to commence an administrative or civil action against a person from engaging in a violation of 1), as specified and subject to procedural requirements. (Gov. Code, §§ 1097.1-1097.5.)
- 5) Requires, notwithstanding any other provision of law, the selection by a state or local agency head for professional services of private architectural, landscape architecture, engineering, environmental, land surveying, or construction management firms to be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.
 - a) In order to implement this method of selection, state agency heads contracting for such services shall adopt by regulation, and local agency heads may adopt by ordinance, procedures that assure that these services are engaged on the basis of demonstrated competence and qualifications for the types of services to be performed and at fair and reasonable prices to the public agencies.
 - b) The procedures must assure maximum small business firms, as defined.
 - c) The procedures shall specifically prohibit practices which might result in unlawful activity and government agency employees from participating in the selection process when those employees have a relationship with a person or entity seeking a contract under this section which would subject those employees to prohibitions on conflicts of interest. (Gov. Code, § 4526.)

This bill:

- 1) Provides that, for a public entity that has entered into a contract with an independent contractor to perform one phase of a project and seeks to enter into a subsequent contract with that independent contractor for a later phase of the same project, the independent contractor is not an "officer" under this article if the independent contractor's duties and services related to the initial contract did not include engaging in or advising on public contracting on behalf of the public entity.
- 2) Defines, for purposes of 1), "engaging in or advising on public contracting" as preparing or assisting the public entity with any portion of the public entity's preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity.
- 3) If an independent contractor is an officer under 1), then it is not a violation of Section 1090 for the public entity to enter into a subsequent contract with that independent contractor for a later phase of the same project if the independent contractor did not engage in or advise on the making of the subsequent contract during its performance of the initial contract.

- 4) States, for purposes of 3), that an independent contractor does not “engage or advise on the making of the subsequent contract” by participating in the planning, discussions, or drawing of plans or specifications during an initial stage of a project if that participation is limited to conceptual, preliminary, or initial plans or specifications and all bidders or proposers for the subsequent contract have access to the same information, including all conceptual, preliminary, or initial plans of specifications.
- 5) Provides that a person who acts in good faith in reliance on 1)-4) is not in violation of Section 1090 and shall not be subject to criminal, civil, or administrative enforcement under Section 1090 if both of the following conditions are met:
 - a) The initial contract between the public entity and the independent contractor contains a statement that reads, or is substantially similar to:

“Contractor/consultant’s duties and services under this agreement shall not include preparing or assisting the public entity with any portion of the public entity’s preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity. The public entity entering this agreement shall at all times retain responsibility for public contracting, including with respect to any subsequent phase of this project. Contractor/consultant’s participation in the planning, discussions, or drawing of project plans or specifications shall be limited to conceptual, preliminary, or initial plans or specifications. Contractor/consultant shall cooperate with the public entity to ensure that all bidders for a subsequent contract on any subsequent phase of this project have access to the same information, including all conceptual, preliminary, or initial plans or specifications prepared by contractor pursuant to this agreement.”
 - b) The independent contractor is not in breach of the obligations specified in 5)(a).
- 6) Provides that, if a person who acts in good faith in reliance on 1)-4) but does not include the language set forth in 5)(a) in the contract between the public entity and the independent contractor, it is a complete defense to a violation of Section 1090 in any criminal, civil, or administrative if either of the following applies:
 - a) The independent contractor is not an officer pursuant to 1).
 - b) If the independent contractor is an officer pursuant to 1), the independent contractor did not engage in or advise on the making of the subsequent contract as provided in 3).

COMMENTS

1. Author's comment

According to the author:

AB 334 will clarify Government Code section 1090 according to previous court rulings and FPPC guidance regarding arrangements with independent contractors and will return control to public agencies to once again determine for themselves their own contracting decisions. Public agencies will still retain the right to set their own contract requirements or disallow contracts for any reason they desire.

2. Background on the restrictions and requirements for government contracts

As explained by the FPPC:

Government Code Section 1090 [(Section 1090)] prohibits an officer, employee, or agency from participating in making government contracts in which the official or employee within the agency has a financial interest. Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local level.

“Making” a contract includes final approval of the agreement, as well as involvement in preliminary discussion, planning, negotiation, and solicitation of bids.

A broad range of agreements are considered a contract under Section 1090. Generally, there is a contract when an offer is made and accepted and there is something of value bargained for and exchanged by each party. This includes written contracts, purchase of goods or services, employment agreements, leases, development agreements, etc...

Violations of Section 1090 can result in the voiding of contracts, criminal, civil, and administrative penalties, as well as a ban on holding public office.¹

Section 1090 arises from “the general principle that no man can faithfully serve more than two masters whose interest are or may be in conflict,” and is therefore “concerned with *any* interest, other than perhaps a remote or minimal interest, which would

¹ FPPC, Section 1090 (2023), <https://www.fppc.ca.gov/learn/section-1090.html>. All links in this analysis are current as of June 30, 2023.

prevent the officials from exercising absolute loyalty and undivided allegiance to the best interests of the city.”² Courts have interpreted Section 1090’s proscriptions broadly; while the statute refers only to contracts “made,” the term has been held to “encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids.”³

In 2017, the California Supreme Court held that Section 1090’s restrictions extend to an independent contractor “who has been retained or appointed by a public entity and whose actual duties include engaging in or advising on public contracting,” because such a contractor “is charged with acting on the government’s behalf.”⁴ The FPPC has since set forth a two-step analysis to determine whether an independent contractor is covered by Section 1090. The first step “is a determination of whether the independent contractor had responsibilities for public contracting on behalf of the public entity under the initial contract.”⁵ If “any part of their contractual duties or responsibilities under the first contract involved public contractor,” the analysis moves onto the second step.⁶ In the second step, “the analysis focuses on whether the independent contractor participated in making the subsequent contract for purposes of Section 1090...through its performance of the initial contract.”⁷ If so, the independent contractor may not enter into the subsequent contract with the public entity.⁸

According to the author, the FPPC’s guidance regarding when independent contractors are covered by Section 1090 provides useful clarity to agencies and independent contractors. But the FPPC is not the only agency that enforces Section 1090; a willful violation of Section 1090 may be prosecuted as a misdemeanor in an action brought by the Attorney General or a district attorney.⁹ According to the author, the risk of prosecution deters agencies from entering into contracts that comply with the FPPC’s guidelines. Stakeholders also point out that the current ambiguity regarding Section 1090’s scope creates a conflict with the requirement that local agencies select private architectural, landscape architecture, engineering, environmental, land surveying, and construction management firms on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the job;¹⁰ they argue that applying overly stringent restrictions on when independent contractors may prevent local agencies from selecting the best, most qualified firm for the job.

² *Thomson v. Call* (38 Cal.3d 633, 647-648).

³ *Millbrae Ass’n for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 22, 237.

⁴ *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 240.

⁵ FPPC, An Overview of Section 1090 and FPPC Advice (Oct. 2020), p. 4, available at <https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/section-1090/Section%201090%20-%20Overview%20-%20Oct%202020.pdf>.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Id.* at p. 5.

⁹ Gov. Code, § 1097.

¹⁰ *Id.*, § 4526.

3. This bill codifies FPPC guidance and case law on Section 1090

This bill is intended to give local agencies and independent contractors legal clarity when entering into subsequent contracts on the same project. The bill incorporates current FPPC guidance and case law into a new section in the Government Code that specifically addresses independent contractors.

First, the bill implements the FPPC's two-step analysis to determine whether Section 1090 applies to the contracts. The bill provides that an independent contractor who worked on one phase of a project is not considered an "officer" for purposes of Section 1090 if the contractor's duties and services in the first phase did not include engaging in or advising on public contracting on behalf of the public entity. "Engaging in or advising on public contracting" means preparing or assisting the public entity with any portion of its preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity. The bill then provides that, even if an independent contractor is an "officer" under step one, the public entity may enter into a subsequent contract with the independent contractor if the independent contractor did not engage or advise in the making of the subsequent contract during its performance of the initial contract. "Engaging in or advising on the making of the subsequent contract" does not include participating in the planning, discussions, or drawing of plans or specifications during an initial stage of a project if that participation is limited to conceptual, preliminary, or initial plans or specifications and all bidders or proposers for the subsequent contract have access to the same information, as specified.

Next, the bill establishes two safe harbors. The first provides that a person who acts in good faith reliance on the framework above is not in violation of Section 1090 and related statutes if two conditions are met. First, the initial contract must contain a statement identical or substantially similar to the following:

Contractor/consultant's duties and services under this agreement shall not include preparing or assisting the public entity with any portion of the public entity's preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity. The public entity entering this agreement shall at all times retain responsibility for public contracting, including with respect to any subsequent phase of this project. Contractor/consultant's participation in the planning, discussions, or drawing of project plans or specifications shall be limited to conceptual, preliminary, or initial plans or specifications. Contractor/consultant shall cooperate with the public entity to ensure that all bidders for a subsequent contract on any subsequent phase of this project have access to the same information, including all conceptual, preliminary, or initial plans or specifications prepared by contractor pursuant to this agreement.

Second, the contractor must comply with the terms of the statement, above, i.e., not bid for a contract in which they assisted with the public entity's preparation of a request for proposal or qualifications or other solicitations regarding a subsequent agreement.

The second safe harbor is narrower: it provides that, if a person acts in good faith reliance on the framework above but the initial contract does not include the statement, it is a complete defense to an alleged violation if the independent contractor either did not qualify as an officer under step one of the framework, or the independent contractor did not engage in or advise on the making of the subsequent contract under step two of the framework. This provision will ensure that parties who executed the *initial* contract before this bill took effect – and therefore had no reason to add the contractual language above – but who would qualify for this bill's protections can raise their compliance with this bill as a defense.

4. Arguments in support

According to the FPPC:

Under existing law, a state or local government officer or employee is generally prohibited from participating in making a government contract in which the officer or employee is financially interested. In some cases, if an independent contractor engaged in, or advised on, the making of a subsequent contract while performing duties and services under an initial contract for the same project, the independent contractor may be prohibited from being hired for that subsequent contract, since they had participated in the making of a government contract in which they would have a financial interest.

Existing law does not state the specific types of activities that constitute engaging in, or advising on, a subsequent contract for an independent contractor, creating uncertainty as to what activities during performance of the initial contract are permissible in this context. AB 334 would address this issue by clarifying the circumstances under which an independent contractor's activities during the initial contract would not bar the independent contractor from being hired for a subsequent contract for the same project. The bill would also add safe harbor provisions to protect independent contractors who are complying in good faith with these provisions from prosecution, or provide them with a complete defense.

SUPPORT

American Council of Engineering Companies of California (sponsor)
American Institute of Architects
American Public Works Association
American Society of Civil Engineers

Associated General Contractors of California and the Associated General Contractors of America, San Diego Chapter
Association of California Cities – Orange County
Association of California Water Agencies
California & Nevada Civil Engineers and Land Surveyors Association
California Association of Recreation and Park Districts
California Geotechnical Engineers Association
California Land Surveyors Association
California Municipal Utilities Association
California Special Districts Association
California State Association of Counties
City of Belmont
City of Mountain View
City of Norwalk
City of Redwood City
City of San Marco
City of Thousand Oaks
Coachella Valley Water District
County of Del Norte
Fair Political Practices Commission
Irvine Ranch Water District
Lake Shastina Community Services District
League of California Cities
McKinleyville Community Services District
Orange County Sanitation District
Structural Engineers Association of California
Water Replenishment of Southern California

OPPOSITION

None known¹¹

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 626 (Quirk-Silva, 2019) would have provided that an officer or employee shall not be deemed to be interested in a contract if their interest is in that of an engineer, geologist, architect, landscape architect, land surveyor, or planner in performing its

¹¹ The California District Attorneys Association opposed a prior version of the bill but formally removed its opposition following the May 30, 2023, amendments.

services, including, but not limited to, master planning, capital improvement planning, entitlement, environmental, assessments, feasibility studies, conceptual analysis, surveying, preliminary design services, preconstruction, or assisting with plans, specifications, or project planning services on any portion or phase of a project when proposing to perform services on any subsequent portion or phase of the project, if the work product for prior phases is publicly available, as specified. AB 626 died in the Assembly Appropriations Committee.

SB 704 (Gaines, Ch. 495, Stats. 2015) provided that an officer or employee shall not be deemed to be interested in a contract if their interest is in that of an owner or partner of a firm serving as an appointed member of an unelected board or commission of the contracting agency if the owner or partner recuses himself or herself from providing any advice to the contracting agency regarding the contract between the firm and the contracting agency and from all participation in reviewing a project that results from that contract.

PRIOR VOTES:

Senate Elections and Constitutional Amendments Committee (Ayes 7, Noes 0)

Assembly Floor (Ayes 66, Noes 0)

Assembly Appropriations Committee (Ayes 16, Noes 0)

Assembly Elections Committee (Ayes 7, Noes 0)
