
New Bill Addresses Independent Contractor Conflicts of Interest and Provides Safe Harbor

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Assembly Bill (AB) 334, which became effective on January 1, 2024, clarifies conflict of interest rules for independent contractors, particularly in relation to projects that have multiple phases.

Background

Government Code section 1090 (Section 1090) generally prohibits public officials and employees from having personal financial interest in contracts made in their official capacities and imposes severe penalties for violations, including voiding of contracts, civil penalties, criminal prosecution, and perpetual disqualification from public office. Section 1090 had been interpreted broadly by the courts over the past decade to apply to independent contractors in particular circumstances. Courts in cases such as *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, found that contractors would typically be prohibited under Section 1090 from performing pre-project consulting services and then later serving as the contractor for project implementation. Courts have been concerned that work on early stages of a project may influence the award of future contracts to the same contractor.

A series of cases involving lease-leaseback (LLB) construction contracts expanded the reach of Section 1090 as applied to independent contractors. Under an LLB contract, a school district leases a school site to a contractor for a nominal amount, and the contractor undertakes the school construction and leases the building back to the district. Section 1090 conflict of interest problems arose from the fairly common practice in LLBs at the time whereby the contractor served as a pre-construction consultant and then later, under a separate contract, as the contractor. (See [2015 Client News Brief No. 30](#), [2016 Client News Brief No. 25](#), [2017 Client News Brief No. 32](#).)

The extension of Section 1090 to independent contractors engaged in more than one stage of a contract served to complicate contracting and had broad and potentially unintended consequences for various types of contracts. There were potential implications not only for contractors but also for architectural, engineering, environmental, land surveying, and construction management firms performing work on multiple stages of a project. Perhaps less obviously,

the court rulings could potentially limit contracts for consulting services entirely unrelated to construction and facilities.

Clarity and Safe Harbor Under AB 334

AB 334 provides clarification by codifying a new Government Code section 1097.6 which specifies when independent contractors will not be subject to Section 1090, confirming the ability of contractors and consultants to work on multiple phases of a project. The author of the bill indicated that it is intended to address prior case law, including *Davis*, as well as to codify the volume of Fair Political Practices Commission (FPPC) guidance that has been issued on Section 1090 issues.

AB 334 frees independent contractors from the reach of Section 1090 when the independent contractors' duties and services related to the initial contract do not involve "engaging in or advising on public contracting" on behalf of the public entity. A contractor cannot prepare or assist in preparing the request for proposals, request for qualifications, or any other solicitation for subsequent contracts related to the same project for which the contractor is initially retained. However, there is no violation under Section 1090 under the following circumstances:

- The contractor's involvement:
 - consisted of "planning, discussions, or drawing of plans or specifications"
 - was limited to "conceptual, preliminary, or initial plans or specifications"
 - occurred during an "initial stage" of a project; and,
- All bidders for the subsequent contract are provided access to the same information.

AB 334 provides safe harbor for contractors who act in good-faith reliance on the statute. If specific terms are included in the initial contract, and a contractor complies with those terms, then the contractor is not subject to civil, criminal, or administrative prosecution. The specific terms to include in the initial contract are spelled out in the statute, and generally require the contractor to affirm they will not assist the public entity in preparation of solicitation materials, will limit their participation in project plans to preliminary planning, and will work with the public entity to make all preliminary plans available to other bidders of subsequent projects. If the specified contractual language is missing from the initial contract, there will still be no violation if the contractor complies with the new law.

Takeaways

This new law reduces concerns about the reach of Section 1090 to certain independent contractors and reopens the door to contractors being able to engage both in pre-project consultation and planning and later in implementation of that project without significant exposure for conflict of interest violations.

Client News Brief

If you have any questions about AB 334, Government Code section 1090, or conflicts of interest generally, please contact the authors of this Client News Brief or any attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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