

Date of Hearing: April 19, 2023

ASSEMBLY COMMITTEE ON ELECTIONS
Isaac G. Bryan, Chair
AB 334 (Blanca Rubio) – As Introduced January 30, 2023

SUBJECT: Public contracts: conflicts of interest.

SUMMARY: Specifies that an independent contractor is not a public officer for the purpose of a state law prohibiting conflicts of interests in public contracts, if certain conditions are met. Specifically, **this bill:**

- 1) Provides that an independent contractor who performs one phase of a project for a public entity, and who seeks to enter into a subsequent contract for a later phase of the same project, is not an “officer” for the purpose of a state law that prohibits public officers and 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, if either of the following conditions are met:
 - a) The independent contractor did not have responsibilities for public contracting on behalf of the public entity under the initial contract; or,
 - b) The independent contractor did not participate in making the subsequent contract through its performance of the initial contract.
- 2) Provides, for the purposes of this bill, that an independent contractor does not “have responsibilities for public contracting” if both of the following are true:
 - a) The public entity at all times retains responsibility for public contracting, including with respect to any subsequent phase of a project; and,
 - b) The independent contractor’s duties under the initial contract do not include preparing or assisting the public entity with 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) Provides, for the purposes of this bill, that an independent contractor does not “participate in the making of the subsequent contract” if both of the following are true:
 - a) The independent contractor’s participation in the planning, discussions, or drawing of plans or specifications during an initial stage of a project are limited to conceptual, preliminary, or initial plans or specifications; and,
 - b) All bidders or proposers for the subsequent contract have access to the same information, including all conceptual, preliminary, or initial plans or specifications.

EXISTING LAW:

- 1) Prohibits members of the Legislature and 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. Prohibits 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. Prohibits an individual from aiding or abetting a violation of these provisions. (Government Code §1090)
- 2) Provides that an officer shall not be deemed to be interested in a contract for the purposes of Section 1090 if the officer has only a remote interest, as defined, in the contract. Enumerates various financial interests that are considered a “remote interest,” for these purposes. (Government Code §§1091, 1091.4)
- 3) Enumerates various financial interests for which an officer or employee is deemed not to be interested in a contract for the purposes of Section 1090. (Government Code §1091.5)
- 4) Provides that a contract made in violation of Section 1090 may be voided by any party to the contract, except for the officer who had an interest in the contract in violation of Section 1090, as specified. (Government Code §1092)
- 5) Provides that a person who willfully violates Section 1090, or who willfully aids or abets a violation of Section 1090, 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 the state. (Government Code §1097) Gives the Fair Political Practices Commission (FPPC) the authority to commence an administrative or civil enforcement action for a violation of Section 1090 and related laws, as specified. (Government Code §1097.1)
- 6) Permits the FPPC to issue an opinion or advice with respect to a person’s duties under Section 1090 and related laws, as specified. (Government Code §1097.1)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

AB 334 will clarify Government Code §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) **Government Code Section 1090:** Section 1090 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. In addition, a public body or board is prohibited from making a contract in which any member of the body or board has a financial interest, even if that member does not participate in the making of the contract. Contracts that are made in violation of Section 1090

can be voided by any party to the contract except the officer interested in the contract, as specified. The prohibitions against public officers being financially interested in contracts that are contained in Section 1090 date back to the second session of the California Legislature (Chapter 136, Statutes of 1851). A public official can be subject to felony penalties for a violation of Section 1090 even if the official did not intend to secure any personal benefit, did not intend to violate Section 1090, and did not know that their conduct was unlawful.

Unlike conflicts of interest under the Political Reform Act, it is generally not sufficient for public officials who have financial interests in contracting decisions under Section 1090 to recuse themselves from participating in those decisions in order to avoid the conflicts. Instead, under Section 1090, the board or body of which the official is a member continues to be prohibited from making a contract in which one of its members is financially interested *even if* that member does not participate in the decision. This policy reflects a concern that remaining board members' knowledge of their fellow member's interest could lead the board to favor an award that would benefit the recused member.

State law recognizes two categories of exceptions to Section 1090: "remote interests" and "non-interests." State law lists 15 types of financial interests that the Legislature has chosen to exclude from the scope of Section 1090, commonly referred to as "non-interests." Examples of "non-interests" include: an ownership interest of less than 3% of a for-profit corporation, as specified; interest in a spouse's employment, if the spouse has held the same job for at least one year before the official took office; or that of a public official being reimbursed for their actual expenses related to the performance of official government duties.

By contrast, where a government official has a "remote interest," the official must take three steps before the body on which the official sits may vote on that contract. First, the official must disclose the interest to the governmental body. Second, the interest must be noted in the governmental body's official records. Finally, the official with the "remote interest" must abstain from participating in making the contract. State law lists 18 situations that qualify as "remote interests," including that of an engineer, geologist, architect, or planner employed by an engineering, architectural, or planning consulting firm. While the willful failure of an officer to disclose a remote interest in a contract subjects that officer to the penalties outlined above, the contract itself is not subject to cancellation due to the violation unless the contracting party had knowledge of the fact of the remote interest of the officer at the time the contract was executed.

When considering whether a public official is involved in the making of a contract for the purposes of Section 1090, legal opinions generally have broadly construed the "making" of a contract to include governmental actions that go beyond the award of the contract. For example, courts have found that for the purposes of Section 1090, the "making" of a contract includes preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Association for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222.) In an informal opinion from 1993, the California Attorney General concluded that a *former* member of a city planning commission would violate Section 1090 if he entered into a contract with the city to be a consultant with respect to the city's general plan revision, because when the person was still

on the planning commission, it had adopted a policy to use consultants rather than employees for the plan revision. (Cal. Atty. Gen., Indexed Letter, No. IL 92-1212 (Jan. 26, 1993).)

Furthermore, courts have interpreted Section 1090 to apply to the actions of consultants to and independent contractors of public agencies in situations where the consultant or contractor serves as a trusted advisor to the governmental body and where the consultant or contractor carries out public contracting duties on the government's behalf. (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533. *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114. *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261. *People v. Superior Court (Sahlolbei)* (2017) 3 Cal. 5th 230.) In those situations, the courts have concluded that the contractors' considerable influence over the decision making of the governmental body meant that the contractors were serving as public employees, and were therefore subject to Section 1090's prohibition on public employees being financially interested in any contract made by them in their official capacity.

- 3) **Infrastructure Projects and Section 1090:** In light of the information outlined above about the broad construction of Section 1090, an entity that is hired by a governmental body to advise the body on a project can have a Section 1090 conflict that prohibits the entity from being awarded contracts for subsequent phases of the same project. In the case of infrastructure projects, for instance, a contractor that provides preconstruction services can be considered to have been involved in the making of the subsequent contract for construction services because the preconstruction work can set the parameters for subsequent work. In such a circumstance, the contractor that provided preconstruction services could be barred by Section 1090 from being awarded a contract for the construction of that project.

In 2017, for example, the FPPC issued an advice letter concluding that an architectural firm that was awarded a contract to perform a jail needs assessment for a county was prohibited by Section 1090 from being awarded a subsequent contract to prepare plans and specifications for a new jail facility, and for related architectural services through construction of the new facility (*Simon Advice Letter*, No. A-17-148). In reaching that conclusion, the FPPC noted that the architectural firm "was integrally involved in the preliminary discussions, negotiations, reasoning, planning, and specifications that will result in the contract for the architectural design of a new jail," and thus the firm "has the potential to exert considerable influence over the County's decisions concerning the new...jail."

The fact that a contractor provided preconstruction services to a governmental body, however, does not necessarily mean that the contractor has a conflict under Section 1090 when it comes to subsequent contracts on the same project. Rather, courts and the FPPC have concluded that a contractor for a public agency is not considered a public employee for the purposes of Section 1090 if the contractor does not exert considerable influence over the decision making of the agency.

Since the FPPC was given the authority to issue legal advice regarding Section 1090 and related laws through the passage of AB 1090 (Fong), Chapter 650, Statutes of 2013, the FPPC has issued almost 500 advice letters relating to Section 1090. Since the start of 2017, the FPPC has issued more than 40 letters in situations where governmental bodies sought advice about whether a contractor or consultant who performed preliminary work on a

project would be eligible to be awarded a contract for subsequent work on the same project. In a significant majority of those letters, the FPPC concluded that Section 1090 did *not* prohibit a contractor or consultant who performed preliminary work from being awarded a subsequent contract for additional work on the same project. That fact seems to suggest that Section 1090 does *not* impose a de facto ban on contractors being awarded multiple contracts for different portions of the same project. On the other hand, the FPPC's analysis of whether Section 1090 applies to a contracting situation is very fact specific, so it could be difficult for a contractor or consultant to determine whether their participation in early phases of a project would jeopardize their ability to be awarded contracts for subsequent phases of the same project. The absence of such certainty could limit the pool of bidders for work on early phases of projects. Additionally, the time and uncertainty associated with needing to get an advice letter from the FPPC before awarding certain contracts for public projects could lengthen the time necessary to complete those projects and could further reduce the pool of willing bidders for public contracts.

In light of the foregoing information, there may be policy benefits associated with having clearer rules describing the circumstances under which a consultant or contractor's participation in an early phase of a project will prevent that consultant or contractor from being awarded contracts for subsequent aspects of the same project.

- 4) **FPPC Guide to Section 1090:** In October 2020, the FPPC issued two documents that summarize Section 1090 and the advice the FPPC has given in interpreting that law. Both documents discuss the situations in which Section 1090 may apply to independent contractors, especially as it relates to questions about whether a public entity that has entered into a contract with an independent contractor to perform one phase of a project may enter into a second contract with the same contractor for a subsequent phase of the project. In those documents, the FPPC describes a two-step test it generally employs in determining whether it is permissible for a public entity to enter into a second contract with a contractor in that situation, as follows:

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. If the answer is "no," the independent contractor is not subject to Section 1090 and the public entity may enter the subsequent contract with them for the same project. However, if any part of their contractual duties or responsibilities under the first contract involved public contracting, then the independent contractor is subject to Section 1090, and the analysis proceeds to the second step.

Under the second step, the analysis focuses on whether the independent contractor participated in making the subsequent contract for purposes of Section 1090, as discussed below, through its performance of the initial contract. If the answer is "no," the public entity may enter the subsequent contract with them for the same project. However, if the independent contractor is found to have participated in the making of the contract for purposes of Section 1090, the public entity may not enter into the subsequent contract.

The language of subdivision (a) of Section 1097.6 of the Government Code, as proposed to be added to state law by this bill, closely tracks the language of the FPPC's guidance documents, and appears to accurately reflect that guidance. The provisions of subdivision (b) of that section, however, go beyond the scope of the summary provided in the FPPC guidance documents, and seek to describe situations under which an independent contractor would be deemed not to have "had responsibilities for public contracting" or not to have "participated in the making of the subsequent contract" for the purposes of the two-step test described above. The sponsors and supporters of this bill believe that the language of proposed subdivision (b) is consistent with FPPC guidance and case law, while the California District Attorneys Association, as indicated below, does not. (County district attorneys have responsibility for criminal enforcement of Section 1090.) The FPPC has not communicated a position on this bill, nor has it publicly communicated whether it believes the provisions of this bill are consistent with its guidance and case law.

- 5) **Arguments in Support:** The sponsor of this bill, the American Council of Engineering Companies, California, writes in support:

Public agencies are experiencing an alarming contracting issue when seeking to partner with independent contractors on their projects.

For example, when agencies seek to contract with engineers, land surveyors, architects, and geologists on public works infrastructure projects, these design professionals are increasingly – and inappropriately – being subjected to the terms of Government Code Section 1090 as a result of unclarity in the law and case law. In consequence, well-qualified professionals are being precluded from participating in subsequent phases of work if they had any involvement in an earlier phase.

Engineers and architects conceive, design, and oversee much of the state's infrastructure projects, including roads, buildings, airports, tunnels, dams, bridges, rail, and water systems. The public is at great risk if qualified consultants and contractors are prohibited from working on certain phases of our projects.

Public agencies should be free to choose through a competitive process who the most qualified professional is to partner with them and deliver projects to their constituents.

- 6) **Arguments in Opposition:** The California District Attorneys Association, which has an "oppose unless amended" position on this bill, writes:

While we would agree that subdivision (a) of the proposed Government Code §1097.6 appears to be consistent with that guidance, we believe that the entirety of subdivision (b) is not, and would prevent District Attorneys and the Attorney General from prosecuting and investigating conflicts of interest involving state, county, and local governments, and officials in their potential conflict-of-interest dealings. For this reason, we oppose the measure unless amended to remove subdivision (b).

- 7) **Previous Legislation:** AB 626 (Quirk-Silva) of 2019 would have provided that specified design professionals who provide certain preliminary services on a public project shall not be deemed financially interested in a contract to provide services on a subsequent portion of that project, pursuant to Section 1090, if the work product for the preliminary services is publicly available. AB 626 was approved by the Assembly Elections & Redistricting Committee (the predecessor to this committee) on a 7-0 vote, but was never taken up for a vote on the Assembly Floor and died on the Assembly inactive file.

REGISTERED SUPPORT / OPPOSITION:**Support**

American Council of Engineering Companies of California (Sponsor)
American Institute of Architects California
Associated General Contractors of California
Associated General Contractors - San Diego Chapter
Association of California Cities - Orange County
California State Association of Counties
City of Mountain View
City of San Marcos
Coachella Valley Water District
County of Del Norte
Lake Shastina Community Services District
League of California Cities
McKinleyville Community Services District

Opposition

California District Attorneys Association (unless amended)

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