
**SENATE COMMITTEE ON
ELECTIONS AND CONSTITUTIONAL AMENDMENTS**
Senator Steven Glazer, Chair
2023 - 2024 Regular

Bill No: AB 334 **Hearing Date:** 6/6/23
Author: Blanca Rubio
Version: 5/30/23
Urgency: No **Fiscal:** Yes
Consultant: Karen French

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, if certain conditions are met.

ANALYSIS

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.
- 2) Provides that an officer shall not be deemed to be interested in a contract for the purposes of Government Code Section 1090 (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.
- 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.
- 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.
- 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. 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.

- 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.

This bill:

- 1) Provides that a public entity that has entered 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 existing law pertaining to prohibitions and restrictions on public officers, if the independent contractor did not have responsibilities for public contracting on behalf of the public entity under the initial contract.
- 2) Provides that an independent contractor does not "have responsibilities for public contracting" if both of the following exist: (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 that, if an independent contractor is an officer under 1) above, then it is not a violation of this article 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 participate in the making of the subsequent contract through its performance of the initial contract.
- 4) Provides that an independent contractor does not "participate in the making of the subsequent contract" if both of the following exist: (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.
- 5) Provides that a person who acts in good faith reliance on this section shall not be subject to criminal, civil, or administrative enforcement under this article provided both the following conditions are met:
 - a) Specified language, or substantially similar, is included in the initial contract between the public entity and the independent contractor, which clarifies contractor/consultant and the public entity's duties, responsibilities and limitations, including cooperation to ensure that all bidders for a subsequent contract on any subsequent phase(s) of this project have access to all conceptual, preliminary, and/or initial plans or specifications prepared by contractor pursuant to this agreement.
 - b) The independent contractor is not in breach of the contractual obligations set forth in a).

- c) In the event the language set forth in a) is not included in the initial contract between the public entity and the independent contractor, compliance with a) and b) may nevertheless be relied on as a complete defense in any criminal, civil, or administrative proceeding.

BACKGROUND

Conflict of Interest. 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. 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, 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, as such advisement can set the parameters for future contracts.

Since 2017, the FPPC has issued more than 40 advice letters regarding whether a contractor or consultant that preformed preliminary work on a project is eligible for subsequent project contracts. In a significant majority of those letters, the FPPC concluded there was not a conflict of interest, suggesting Section 1090 does not impose a de facto ban on contractors being awarded multiple contracts for different portions of the same project. Rather, the FPPC's analysis is very fact specific, making it difficult for a contractor to determine whether a conflict of interest exists. The absence of such certainty can limit the pool of bidders willing to work on early phases of projects.

COMMENTS

- 1) 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) Suggested Amendment. This bill creates a new section in the Elections Code related to conflict of interest. The current language in the bill has been developed by the author and sponsor in consultation with the FPPC and is intended to reflect the FPPC's guidance and court decisions on the subject. The current bill includes safe harbor language which is a legal provision to reduce or eliminate legal or regulatory liability in certain situations as long as certain conditions are met. Committee staff recommends that the bill be amended with language vetted by the FPPC staff. Specifically, amend the current language to provide: 1) greater detail and clarification to provisions relating to defining duties and services in an agreement that determine whether or not an independent contractor is an "officer" and 2) clarifying and conforming language in the safe harbor provision.
- 3) Argument in Support. In a letter supporting AB 334, the American Council of Engineering Companies of California states, in part, the following:

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.

- 4) Double Referral. If approved by this committee, AB 334 will be referred to the Committee on Rules.

RELATED/PRIOR 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, but was not taken up for a vote on the Assembly Floor and died on the Assembly inactive file.

SB 952 (Torres), Chapter 483, Statutes of 2014, prohibited an individual from aiding or abetting a public officer or person in violating the law prohibiting financial conflicts of interest, and extended the penalties under existing law to apply to the individual who willfully aids or abets, as specified.

PRIOR ACTION

Assembly Floor:	66 - 0
Assembly Appropriations Committee:	16 - 0
Assembly Elections Committee:	7 - 0

POSITIONS

Sponsor: American Council of Engineering Companies, California

Support: American Institute of Architects, California
 American Public Works Association
 Associated General Contractors of California
 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 Special Districts Association
California State Association of Counties
City of Belmont
City of Mountain View
City of Redwood City
City of San Marcos
Coachella Valley Water District
County of Del Norte
Elsinore Valley Municipal Water District
Irvine Ranch Water District
Lake Shastina Community Services District
League of California Cities
McKinleyville Community Services District
Municipal Utilities Association
Orange County Sanitation District
Structural Engineers Association of California
Water Replenishment of Southern California
One Individual

Oppose: None received

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