

AB 334 (Rubio)
Public contracts: conflicts of interest
As Introduced January 30, 2023

Bill Summary

AB 334 provides clarity to public agencies when contracting with independent contractors on public projects that their normal, historical contracting practices will not violate state conflict of interest rules.

Existing Law

Under current statute and case law, independent contractors that provide successive phases of services for public projects *may* be subject to the terms of Government Code §1090, the state’s conflict of interest statute. Because of unclarity surrounding §1090 and its implementing case law, public agencies increasingly, since 2013, preclude highly qualified consultants from competing to work on subsequent phases of their public works projects out of fear that their actions *could* be perceived in the future to result in a conflict.

Background

Public officials must ensure that they conduct their operations transparently, fairly, and in the complete best interest of the public. Ethics regulations not only strike at literal violations, but also seek to prevent even the appearance of impropriety. For the better part of the past century, California has prohibited elected officers, public officials, and public employees from being “financially interested in any contract made by them in their official capacity” (§1090). Recently, courts have expanded the application of §1090 to include independent contractors when their actions rise to the level of “transacting on behalf of” a public agency (i.e. considered an “agent” of the agency).

There is additionally court precedent that consultants and independent contractors serving in advisory positions who have the potential to “exert considerable influence” over the contracting decisions of a public agency could be subject to §1090 (i.e. considered an “agent” of the agency).

Unfortunately, there is no clear standard in statute as to the actions that, if taken, would result in an independent contractor being considered an “agent”

and thus subject to §1090. Additionally, current law dictates that anyone who violates §1090, or causes someone else to violate §1090, can face administrative, civil, or criminal penalties.

As a result, public agencies are today reluctant to award subsequent work to any independent contractor for fear that doing so may result in a real or perceived conflict, if that independent contractor is later found to have acted, even unknowingly, as an “agent.”

Finally, in accord with procurement laws for design professional services (Government Code §4525 et seq.), any project affecting infrastructure in California must be designed, overseen, and inspected by the most qualified and competent professionals available. Precluding specific design professionals from successive phases of a project forces consultants to withhold proposals and services that may be in the public interest, forcing agencies to spend more money for less value as a new professional learns the background, develops an understanding of the issues, and revisits decisions already made on a project.

Solution

AB 334 will clarify Government Code §1090 according to previous court rulings 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.

Sponsor

American Council of Engineering Companies, California (ACEC California)

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