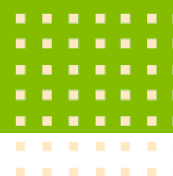




Client Alert

New Statute Provides Clarity on Conflicts of Interest in Contracting For Multi-Phase Projects



Key Takeaways

- The California State Legislature added Government Code Section 1097.6 to AB 334 (2023), bringing long-overdue clarity to uncertain law around the use of contractors in multi-phase projects.
 - Contractors may now perform pre-contracting consulting and services for the same contract under certain conditions.
 - Public agencies should immediately update their consulting agreements to align with the new law.
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Code Confusion

Government Code Section 1090 generally prohibits a public agency's "officers or employees" from being financially interested in contracts they help the agency create. When interpreting the law, courts have held that contractors could be considered an "officer" of the agency, and therefore subject to Section 1090, if they:

- (a) initially entered into a contract to assist with developing a scope of work, and then,
- (b) were contracted in a second phase to carry out that scope of work.

However, these court decisions ran contrary to some long-standing contracting practices by public agencies, leading to significant uncertainty and confusion.



Code Interpretations

For context, it is worth mentioning some of the contract types that were questioned because of these decisions.

- Public agencies questioned whether an architect's participation in facilities master planning, needs assessments, or other planning activities precluded the architect from performing work on the projects arising from those services.
- Other agencies sought clarity regarding whether the same contractor could perform a constructability review and perform the related construction work, as is historically common in lease-leaseback arrangements.
- And, still, other agencies questioned whether the same entity could contract to perform a feasibility study for a project and then serve as that project's construction manager.

Code Clarity

Thanks to the new Government Section Code 1097.6 introduced in AB 334 (2023), agencies now have clarity around contractor involvement.

1. An independent contractor who contracts to perform one phase of a project, and then makes a subsequent contract for a later phase of the same project, is not an "officer" subject to Section 1090 if the contractor's services in the first contract did not include assisting with the preparation of the solicitation (bid, RFP, RFQ, etc.) for the subsequent contract.
2. Even if the contractor assisted with the solicitation for the subsequent contract, there is no violation if the contractor did not "engage in or advise on the making of the subsequent contract..." The law further clarifies that a contractor may participate 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 for the subsequent contract have access to the same information (plans, specifications, etc.).
3. Persons acting in good faith are exempted from criminal or civil penalties if the contract contains (and the contractor complies with) certain language consistent with items 1 and 2 above.

With the clarification that Government Section Code 1097.6 provides, we recommend public agencies work with legal counsel to ensure the appropriate language is used in consultant agreements for multi-phase projects.

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