

BACKGROUND

As a result of several court decisions beginning in 2015, persons or businesses that contract with a public agency *may* be subject to the state’s Conflict of Interest (COI) law, Government Code 1090 (GOV 1090), if they perform services that amount to transacting on the agency’s behalf. Neither case law nor statute, prior to AB 334, had subsequently made clear what services and practices were permitted and which were not.

In October 2020, the Fair Political Practices Commission (FPPC) provided guidance [see <https://www.fppc.ca.gov/learn/section-1090.html>] to agencies and their independent contractors regarding allowable practices that the FPPC would deem to comply with GOV 1090 and not constitute a COI on the part of either party to a contract. However, prior to AB 334, complying with the FPPC’s guidance yielded no safe harbor protection for the agency nor independent contractor; this could only be achieved by requesting from the FPPC an advice/opinion letter specific to the individual project and/or contract in question [see <https://www.fppc.ca.gov/advice.html>].

WHAT AB 334 CHANGES

AB 334, supported overwhelmingly by those in public works [see <https://bit.ly/3Za1qLs>], codifies the FPPC’s guidance and grants safe harbor protections against criminal, civil, and administrative enforcement to those who abide by it.

AB 334 returns control to public agencies to once again determine for themselves their own contracting decisions without fear of running afoul of unclear and conflicting state COI law and case law. Public agencies still retain the right to set their own contract requirements, local COI policies, and/or disallow contracts for any reason they desire.

STATUS

The Governor signed AB 334 into law on September 30, 2023, which will go into effect on January 1, 2024.

WHAT YOU CAN DO TODAY

Agencies and independent contractors should carefully review the provisions of AB 334 [see https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB334]. Subsections (a) and (b), which codify the FPPC’s guidance, must be closely followed in order to benefit from the safe harbor provisions found in subsections (c) and (d). In order to ensure the *full* safe harbor protection of AB 334 on and after January 1, agencies should immediately incorporate the following language found in subsection (c) into their initial contracts:

“Contractor/consultant’s duties and services under this agreement shall not include preparing or assisting the public entity with any portion of 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. The public entity entering this agreement shall at all times retain responsibility for public contracting, including with respect to any subsequent phase of this project. Contractor/consultant’s participation in the planning, discussions, or drawing of project plans or specifications shall be limited to conceptual, preliminary, or initial plans or specifications. Contractor/consultant shall cooperate with the public entity to ensure that all bidders for a subsequent contract on any subsequent phase of this project have access to the same information, including all conceptual, preliminary, or initial plans or specifications prepared by contractor pursuant to this agreement.”

Contracts that *do not* include the above language, even contracts signed at any point in the past, still benefit from the slightly diminished protections found in subsection (d).

In the minority of contracts for which the parameters established by subsections (a) and (b) of AB 334 do not apply or cannot be met, a COI still is not automatically or necessarily present. In order to know with certainty, the FPPC advice/opinion letter request process is still available and – since AB 334 significantly reduces the number of such requests the FPPC will receive – will fall subject to fewer processing delays on the part of the FPPC than in the past.

FOR MORE INFORMATION

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