



City Attorney/City Prosecutor's Office

# Today Everything's Not a Conflict of Interest: New AB 334 Clarifies Rules for Independent Contractors in Phased Construction Projects

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# Motivational Poster of the Day

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# AB 334 (Blanca Rubio)

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- Assembly Bill No. 334 (approved September 30, 2023; effective January 1, 2024)
  - > Lead Author Blanca Rubio (48<sup>th</sup> Assembly District – covering West Covina, Glendora, Monrovia, Baldwin Park)
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# What Is AB 334?

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- Existing law prohibits state, county, and city officers and employees from being financially interested in any contract made by them. (Gov't Code, § 1090.)
- AB 334 establishes that an independent contractor who meets specific requirements is not an "officer" for the purposes of this prohibition and protects the contractor against criminal, civil and administrative penalties in certain circumstances. (Adding Gov't Code, § 1097.6.)



# Why Did We Get AB 334?

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- Section 1090 is construed broadly.
  - > “Making” a contract includes:
    - Final approval
    - Preliminary discussion
    - Planning
    - Negotiation
    - Solicitation of bids
  - > Applies to virtually all state and local officers and employees *and also consultants and independent contractors advising or doing public contracting for government.*



# Why Did We Get AB 334?

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- **The Problem:** An entity hired by a governmental body to advise on a project can have a Section 1090 conflict that prohibits the entity from being awarded contracts for subsequent phases of the same project. Assembly Floor Analysis (August 18, 2023)
- **Existing Solution:** FPPC can provide advice and employs a two-step test when advising whether 1090 applies to a particular contractors.
- **New Solution:** AB 334 attempts to codify FPPC Guidance and provide safe harbor.



# Why Did We Get AB 334?

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- **Existing Solution:** FPPC Advice Letter and Two Step Analysis
  - > Step 1: Determine whether the independent contractor had responsibilities for public contracting on behalf of the public entity under the initial contract.
  - > Step 2: Determine whether the independent contractor participated in making the subsequent contract for through its performance of the initial contract.



# FPPC Advice

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- Example FPPC Letters (First Step):
  - > Webber Advice Letter, No. A-15-127
  - > Burns Advice Letter, No. A-14-060
- Example FPPC Letters (Second Step):
  - > Nakamura Advice Letter, No. A-20-033
  - > Shulz Advice Letter, No. A-19-054





# Photo Break

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# AB 334: Is Your IC an Officer?

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- First, Government Code Section 1097.6(a) asks whether an independent contractor is an officer.
  - > (a) (1) . . . the independent contractor is not an “officer” under this article if the independent contractor’s duties and services related to the initial contract did not include engaging in or advising on public contracting on behalf of the public entity.
  - > (2) For purposes of this section, “engaging in or advising on public contracting” means 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.



# AB 334: If Yes, Then What?

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- Second, Government 1097.6, subd. (b) asks whether the contractor engaged in or advised on the making of the second contract.
  - > (1) If an independent contractor is an officer under subdivision (a), 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 engage in or advise on the making of the subsequent contract during its performance of the initial contract.



# AB 334: If Yes, Then What?

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- Second, Government 1097.6(b) asks whether the contractor engaged in or advised on the making of the second contract.
  - > (2) . . . an independent contractor does not “engage in or advise on the making of the subsequent contract” by participating in the planning, discussions, or drawing of plans or specifications during an initial stage of a project if . . . limited to conceptual, preliminary, or initial plans or specifications and all bidders or proposers for the subsequent contract have access to the same information . . . .



# How to Use AB 334

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- Gov't Code, § 1097.6(c) A person who acts in good faith reliance on this section . . . shall not be subject to criminal, civil, or administrative enforcement . . . if both of the following conditions are met:
  - > Initial contract includes term set forth in 1097.6(c)(1)
  - > Contractor abides by the term.



# Use Term (Or Follow Statute)

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- 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. (Gov't Code, § 1097.6(c)(1).)

PASADENA



# 1090 Violations

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- Administrative penalty by FPPC. (Gov't Code, § 1097.)
- Civil penalty. (Gov't Code, §§ 1097, 1097.3)
- Criminal penalty. (Gov't Code, § 1097.)
- **Contract is void. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1073.)**



# Resources

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- A Quick Guide to Section 1090, FPPC (July 2023)
- FPPC Advice Letters
- Government Code Sections 1090, *et seq.*