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AB-334 Public contracts: conflicts of interest. (2023-2024)

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Assembly Bill No. 334

CHAPTER 263

An act to add Section 1097.6 to the Government Code, relating to contracts.

[Approved by Governor September 30, 2023. Filed with Secretary of State September 30, 2023.]

LEGISLATIVE COUNSEL'S DIGEST

AB 334, Blanca Rubio. Public contracts: conflicts of interest.

Existing law 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. Existing law authorizes the Fair Political Practices Commission to commence an administrative or civil action against persons who violate this prohibition, as prescribed, and includes provisions for the collection of penalties after the time for judicial review of a commission order or decision has lapsed, or if all means of judicial review of the order or decision have been exhausted. Existing law identifies certain remote interests in contracts that are not subject to this prohibition and other situations in which an official is not deemed to be financially interested in a contract. Existing law makes a willful violation of this prohibition a crime.

This bill would establish that an independent contractor, who meets specified requirements, is not an officer for purposes of being subject to the prohibition on being financially interested in a contract. The bill would authorize a public agency to enter into a contract with an independent contractor who is an officer for a later phase of the same project if the independent contractor did not engage in or advise on, as specified, the making of the subsequent contract.

This bill would establish that a person who acts in good faith reliance on these provisions is not in violation of the above-described conflict-of-interest prohibitions and would prohibit them from being subject to criminal, civil, or administrative enforcement under those prohibitions if the initial contract includes specified language and the independent contractor is not in breach of those terms. The bill would provide that it is a complete defense in any criminal, civil, or administrative proceeding if the person acts in good faith reliance on these provisions, and meets specified conditions, but fails to include the specified language in the initial contract.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1097.6 is added to the Government Code, to read:

1097.6. (a) (1) For a public entity that has entered into 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 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.

(b) (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.

(2) For purposes of this section, 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 that participation is limited to conceptual, preliminary, or initial plans or specifications and all bidders or proposers for the subsequent contract have access to the same information, including all conceptual, preliminary, or initial plans or specifications.

(c) A person who acts in good faith reliance on this section is not in violation of this article and shall not be subject to criminal, civil, or administrative enforcement under this article if both of the following conditions are met:

(1) A statement identical or substantially similar to the following is included in the initial contract between the public entity and the independent contractor:

"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."

(2) The independent contractor is not in breach of the contractual obligations set forth in paragraph (1).

(d) If a person acts in good faith reliance on this section but fails to include the language set forth in paragraph (1) of subdivision (c) in the initial contract between the public entity and the independent contractor, it is a complete defense to a violation of this article in any criminal, civil, or administrative proceeding if either of the following apply:

(1) The independent contractor is not an officer pursuant to subdivision (a).

(2) If the independent contractor is an officer pursuant to subdivision (a), the independent contractor did not engage in or advise on the making of the subsequent contract as provided in subdivision (b).