



AIA
California Council

Assembly Bill 626: Continuity of Services

Inappropriate Application to Consultants is Limiting Public Access to the Most Qualified Professional Engineering, Surveying and Architectural Services

Quick Summary

Public agencies are experiencing an alarming contracting issue when seeking to partner with private engineering and architectural firms on infrastructure projects: Consultants (licensed engineers, land surveyors, architects, planners, geologists) are increasingly inappropriately subjected to the terms of California Government Code Section 1090 by the Fair Political Practices Commission (FPPC) and precluded from participating in subsequent phases of work if they had any involvement in an earlier phase. The consequences are that projects may not be developed with the most qualified professionals thus depriving the public of the most excellent and safest infrastructure possible, as well as potentially increasing project cost.

Background

Public officials must act transparently, fairly, and in the complete best interest of the public. Ethics regulations not only apply to literal violations, but also seek to prevent even the appearance of impropriety. California statute prohibits elected officers, public officials, and public employees from being “financially interested in any contract made by them in their official capacity” (Government Code § 1090). Unfortunately, private sector engineering and architectural professionals have been drawn into this regulatory net. The legal concern is that a consultant could influence preliminary phases of a public works project to create a competitive advantage in being awarded follow-on work or an opportunity to inflate the magnitude of subsequent work to the consultant’s financial gain.

Courts have determined that consultants serving in advisory positions who have the potential to “exert considerable influence” over the contracting decisions of a public agency could be considered public officials for purposes of Section 1090. Considerable influence loosely means that the consultant is acting in a capacity that demands a level of public trust and has a level of involvement in decisions that are more than ministerial and go beyond mere technical input. This would preclude the “trusted advisor” role that many engineers and architects currently serve for public clients.

Problem

The inflexible application of Government Code Section 1090 to these professionals poses a threat to the consultant-client working relationship and limits access to the most qualified services provided by design professionals. Procurement laws for design professional services (Government Code § 4525 et seq.) dictate that any project affecting infrastructure in California must be designed, overseen, and inspected by the most qualified and competent professionals available. Precluding specific professionals from working on successive phases of a project can force consultants to choose to withhold proposals for early phases of work, resulting in chances that the best solutions or design for a project will be unavailable during the critical early phases of project development. Design professionals are bound by their license to high ethical standards. Public interest is not served when the pool of qualified consultants who may propose during any stage is limited by overly broad application of regulation intended to protect against corrupt public officials.

Existing Law

AB 1090 (2013) gave the FPPC authority to give their opinion on issues and transactions related to Government Code 1090. Existing law also makes local government attorneys (in house or outside counsel) liable as “aiders and abettors” in those violations.

As a safeguard, local government attorneys are relying heavily on FPPC opinions for Government Code 1090 issues on public works projects.

While Public Contract Code § 10365.5 specifically states that design professional firms selected through Government Code § 4525 et seq. can be awarded a follow-on contract, the delegation of authority and inflexible application of Government Code § 1090 has caused Public Contract Code § 10365.5 to be ignored.

AB 626 (2019)

Assemblywoman Quirk-Silva introduced Assembly Bill 626 (currently a spot bill) while ACEC California and AIACC/Design collaborate with local public agencies (through statewide associations representing cities and counties) to formulate possible solutions.

For More Information

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