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Bulletin: AB-334 & Conflicts of Interest in Public Contracting and Procurement for Design			
Effective Date:	January 15, 2024		
From:	Planning and Design		
Item No.	Information		

I. Overview:

On September 30, 2023, the Governor signed AB 334 (Rubio) into law, creating California Government Code (GOV) §1097.6, which applies when independent contractors have a prohibited conflict of interest in contracts with the California State University (CSU). The statute becomes effective January 1, 2024.

This new law provides clarity in two areas:

First, when the CSU enters into a contract with an independent contractor to perform services on one phase of a project and then seeks to enter into a subsequent "follow-on" contract with that independent contractor for a later phase of the same project, the independent contractor is not an "officer" of the CSU if the independent contractor's duties and services related to the initial contract do not include "engaging in or advising on public contracting on behalf of the public entity". For this purpose, "engaging in or advising on public contracting" means preparing or assisting the CSU with any portion of the CSU's preparation of a Request for Proposals (RFP), Request for Qualifications (RFQ), or any other solicitation regarding a subsequent or additional contract with the CSU.

Second, even if an independent contractor is an "officer" of the CSU, then it is not a conflict of interest for the CSU to enter into a subsequent "follow-on" 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".

For this purpose, 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.

As a reminder, GOV §1090 *et seq.* prohibits public agency "officers or employees" from having a personal financial interest in any contract they make in their official capacity. GOV §1097.6 now clarifies when independent contractors would not be considered "officers" of the CSU for purposes of GOV §1090 and when independent contractors whose work product is used in subsequent phases of a project would not be barred from subsequent follow-on contracts for the same project.

In addition to providing clarity to these issues, GOV §1097.6 establishes 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 not be 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 the initial contract's terms.

Furthermore, CSU believes that listed exemption to prohibition of consulting services to bid on a contract for services, goods, or supplies that is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract per Public Contract Code §10830 (c) is again allowed following passage of AB 334.

II. Response:

CSU Capital Planning, Design and Construction (CPDC) – both at The Office of the Chancellor and on campuses – regularly retains professional services firms (i.e., architects and engineers) as independent service providers to perform master plan services, initial planning, feasibility studies, and scoping work for future capital projects – collectively known as pre-design work. These services occur prior to the design and construction of projects. When the same firm that performed the pre-design work is awarded the contract for project design or part of a design-build team, the subsequent agreement for professional design services could be considered an impermissible “Follow-on Contract” if the firm has too much influence over the subsequent contract.

Therefore, following the clarity provided in GOV §1097.6, it is the policy of the CSU to exercise good practices in proceeding with follow-on service agreements (contracts) by complying with the following conditions for professional design consulting services including, but not limited to, those design consulting services listed below.

1. An initial service provider, consultant, or contractor is retained to advise the campus via an initial contract, the focus of which is to advise the campus or develop documents about future projects, developments, or buildings. CSU shall ensure that such person or entity either (1) does not prepare or assist the CSU with the CSU's preparation of an RFP, RFQ, or any other solicitation regarding a subsequent contract for the same project or (2) if such person or entity does so, then if the CSU wants to engage such entity for a subsequent contract on the same project, the CSU must ensure that such person or entity's participation in the planning, discussions, or drawing of plans or specifications during an initial stage of a project 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 as the initial service provider.
2. The following Professional Design consultant service providers are generally allowed to participate in follow-on contracts if the above requirements in #1 are met:
 - a. **Campus Consulting Architect** – A campus designated Consulting Architect appointed annually per CSU Policy "Professional Services for Campus Development" may be contractually involved in projects in which he/she has provided advisory services prior to the issuance of the subsequent service contract.
 - b. **Campus Consulting Engineer or Landscape Architect** – A campus designated Consulting Engineer or Consulting Landscape Architect appointed annually per the CSU Policy "Professional Services for Campus Development" may be contractually involved in projects in which he/she has provided advisory services prior to the issuance of the subsequent service or construction contract.
 - c. **Master Planning Service Provider** – Work on individual projects identified by master plan service providers shall be reviewed for conflicts of interest. Depending on the level of development, the master planning service provider may pursue individual projects identified in the master planning documents. Seek Office of General Counsel review prior to execution of subsequent related contracts to determine possible conflicts of interest. Special attention shall be paid to Design-Build, Collaborative Design-Build contracts, and parties that act on behalf of the CSU with significant influence over the decisions of the CSU to award subsequent contracts and acting as Officers of the CSU.
 - d. **Project Feasibility Service Provider** – A project specific feasibility study service provider may be contractually involved in projects in which he/she has provided services prior to the issuance of the subsequent service or construction contract.
 - e. **Land Survey, Facilities Condition Assessment and Geotechnical Services** – A specialized service provider that produces topographical land surveys, documentation, and assessments of existing physical conditions or geotechnical soils reports may be contractually involved in projects in which he/she has provided such services prior to the issuance of the subsequent service contracts for feasibility studies, design, or construction.

3. Suggested Service Agreement Language for the Initial Contract:

Below is language that should be included as part of the service agreements when the CSU does not wish to prohibit design professionals from participating in future phases of the projects. The below language must be identical or substantially similar to what is in initial contracts with independent contractors in order for it to be a factor in considering whether a person may be subject to criminal, civil, or administrative enforcement for a violation of GOV §1090 *et seq.*

- a. *“Contractor/consultant’s duties and services under this agreement shall not include preparing or assisting the Trustees with any portion of the Trustees’ preparation of a Request for Proposals, Request for Qualifications, or any other solicitation regarding a subsequent or additional contract with the Trustees. The Trustees entering into 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 Trustees 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.”*

4. Note that the current standard Rider A General Provisions does not currently include the above language in Item 3(a). This language can be added as a Supplemental Agreement Provisions (included as Exhibit “E”) to any of the Professional Service Agreements. It is anticipated that revised standard Rider A General Provisions are forthcoming and will be made available in the first quarter of 2024.

III. Notes:

If questions arise in regards to whether an independent contractor offering professional design services is or is not an “officer” of the CSU or has a disqualifying conflict of interest in a follow-on contract, consultation with the Office of General Counsel is required.

For additional assistance, contact the CPDC Director of Architecture.

Attachment: Exhibit “E” – Supplemental Agreement Provisions

Weblinks: None

Applicability: Procurement, Planning and Design, Construction Services, Capital Outlay, Public Works. All new design services or projects, or as part of Design-Build/Collaborative Design services advertised after the publish date of this bulletin as well as all projects currently under executed agreements and contracts.

- End of Bulletin -

Exhibit ‘E’ – Supplemental Agreement Provisions
[Project Name]
[Name of University/Campus]

The following terms are supplemental to Rider A, Agreement General Provisions.

1.0 Limitation of Duties and Services

The parties acknowledge and agree that Service Provider’s duties and services under this Agreement shall not include engaging or advising on public contracting on behalf of the CSU. Specifically, Service Provider will not prepare or assist the Trustees with any portion of the Trustees’s preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the Trustees for [INSERT PROJECT]. The Trustees shall at all times retain responsibility for making all of CSU’s public contracting decisions, including with respect to any subsequent phase of this project.

In addition, Service Provider’s participation in the planning, discussions, or drawing of project plans or specifications for [INSERT PROJECT] shall be limited to conceptual, preliminary, or initial plans or specifications. Service Provider shall cooperate with the Trustees 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.

End of Exhibit ‘E’