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Court Affirms School District Consultants Are Subject To Conflict Prohibitions

Vol. 2015,No. 8 | June 05, 2015

Davis v. Fresno Unified School District, et al. **(2015) ___ Cal.Rptr.3d ___ [2015 WL 3454720]**

A recent appellate decision ruling on the validity of a lease-leaseback transaction also held that private consultants under contract with school districts are subject to the same prohibitions on conflicts of interest as school district employees and officials. (*Davis v. Fresno Unified School District, et al.* (2015) ___ Cal.Rptr.3d ___ [2015 WL 3454720].) This holding clarifies and reaffirms that consultants working with schools may not influence decisions involving contracts in which they have a financial interest.

Background

Davis involved an agreement between the Fresno Unified School District (District) and a contractor utilizing the lease-leaseback construction delivery method for the construction of improvements at one of the District's middle schools. A taxpayer alleged that the contractor should be treated as a District "employee" for purposes of the prohibition on conflicts of interest, that the contractor participated in making the lease-leaseback contracts as a consultant for the District, and that the contractor had a financial interest in the ultimate contract. Thus, he argued the contract violated the prohibition. The District contended that the prohibition was not applicable to the contractor.

Decision

The Court of Appeal found that the prohibition applied, and thus the taxpayer could allege that the contractor had acted in violation of the prohibition. It explained that the prohibition, found in Government Code section 1090, barred public officials and employees from being financially interested in contracts they form in their official capacities. While it acknowledged that a recent decision found consultants could not be held criminally liable for violating section 1090, it agreed with two prior decisions which had applied the prohibition to consultants hired by public entities in the civil context.

It also noted this case raised a question of first impression as to whether the prohibition applied to a corporate consultant retained by a public entity; prior cases had only addressed individuals

retained as consultants. The Court of Appeal could not identify any grounds to limit the prohibition to individual consultants and concluded that corporate consultants, like the contractor involved in*Davis,* would also be held to the same prohibition on conflicts of interest. While the court of appeal held that plaintiff stated a cause of action that the prohibition could apply, it did not decide whether the prohibition was violated in this case, explaining that the taxpayer would need to prove that the contractor in fact violated the prohibition.

Impact

Davis adds and expands the long line of cases broadly interpreting the application of the prohibition on public officials or employees making contracts in which they are financially interested. It reaffirms that, at least in the civil context, individual consultants hired by public entities may be subject to this prohibition and expands the prohibition's reach to include corporate consultants. This holding stresses the need to consider potential conflicts of interest whenever working with consultants on school district contracts. For lease-leaseback developers entering into a preliminary services agreement during the design phase, the District should ensure that the developer cannot influence its own ability to enter into the site and facility leases. Selecting the developer through a competitive selection process can assist in avoiding claims of conflict of interest.

For more information on the impact of the decision on lease-leaseback transactions, please see our prior bulletin.

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