

April 22, 2014

Robert P. Oglesby
Executive Director
CA Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Re: Your Request for Advice
Our File No. A-14-059

Dear Mr. Oglesby:

This letter responds to your request for advice regarding the conflict of interest provisions under both Government Code Section 1090 *et seq*¹ and the Political Reform Act² (the “Act”). Because the Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. Additionally, we do not offer third party advice. (Regulation 18239.) The advice below is based on your facts as stated and the formal advice does not offer immunity to any third party. The Commission’s jurisdiction does not extend to other laws that may apply, such as the Public Contract Code.

Please note that after forwarding your request to the Attorney General’s Office and the Sacramento District Attorney’s Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

QUESTION

Based on the facts below, does either the Act or Section 1090 prevent your agency, the California Energy Commission, from contracting with Dr. Tim Brown, a former UC Irvine employee?

¹ All further statutory references are to the Government Code, unless otherwise indicated.

² The Political Reform Act is contained in Government Code Sections 81000 through 91014.

CONCLUSION

No. Based on the facts and for the reasons detailed below, neither the Act nor Section 1090 prohibits a potential contract between Dr. Brown and the California Energy Commission.

FACTS

You are the Executive Director of the California Energy Commission (“Energy Commission”) and you write in conjunction with your General Counsel’s office. The Energy Commission has been investigating a method of providing alternative fuels throughout California for some time. To that end, the Energy Commission contracted with UC Irvine, which had already developed a model that had been applied on a local level, to participate in the Energy Commission’s education on applying that or a similar model statewide. After years of research and collaboration with various entities including air quality districts, the Energy Commission released a solicitation seeking bids from contractors who could implement a program based on those models. To increase participation from interested parties, the Energy Commission revised the solicitation and re-issued it in draft form for public comment in the autumn of 2013. After revisions based on these comments, the Energy Commission released the final solicitation for its “Hydrogen Refueling Infrastructure” program. The Energy Commission has received applications in response to the solicitation and will choose successful parties from among those applicants. The winning bidders will then contract with the Energy Commission to provide services.

In response to the final solicitation, the Energy Commission received an application from FirstElement Fuel, Inc. (“FirstElement”). FirstElement Fuel is owned and operated by Dr. Tim Brown, a former employee of UC Irvine. You have not provided information regarding whether Dr. Brown was a designated employee under the Act. As a UC Irvine employee and pursuant to the contract between UC Irvine and the California Energy Commission described in the following two paragraphs, Dr. Brown educated the California Energy Commission regarding his research that had previously focused on the availability of fuel cell technology in the South Coast air basin. The Energy Commission was interested in aspects of the processes that his team was developing to determine whether that technology could be applied statewide and to other alternative fuels. On October 16th, 2013, after he had left his employment with UC Irvine, Dr. Brown was among the interested parties to respond to a request for comments on the draft solicitation.

Dr. Brown did not work for the Energy Commission, nor does he currently. Prior to starting his own company, he was an employee at UC Irvine, which was under contract with the Energy Commission to provide the Energy Commission with training related to UC Irvine’s Spatially and Temporally Resolved Energy and Environmental Tool (“STREET”) Enhancement Project. Dr. Brown was not ‘loaned out’ to the Energy Commission as an employee, nor did he fill the roll of an Energy Commission employee. Rather, he performed his job duties per his employment relationship with UC Irvine, which included, for a time, working on a contract that

UC Irvine had entered into with the Energy Commission. Under that contract, he trained Energy Commission staff regarding how to use and implement the models.

Dr. Brown trained the Energy Commission staff on how to use the models that UC Irvine developed in the STREET tool. While Dr. Brown was part of a team of researchers and other engineers that developed a “six minute drive-time metric” to determine optimal locations for fueling stations and trained the Energy Commission staff, he did not have a part in negotiating or executing the contract between UC Irvine and the Energy Commission. Also, you stated that once the meetings to discuss the draft solicitations for the contract bids on the Hydrogen Refueling Infrastructure program began in May of 2013, Dr. Brown was not involved in the meetings or developing the solicitation. His last day with UC Irvine was October 1, 2013.

Dr. Brown did not personally exert any influence over the Energy Commission’s decision to utilize the STREET maps for its Hydrogen Solicitations. The maps themselves were based on criteria established by the Energy Commission and during public workshops on the solicitation, and they were generated using input from publicly available data sets. Dr. Brown did not have access to the Energy Commissioners or decision-makers, and staff directed Dr. Brown’s work.

Dr. Brown is now an applicant with the Energy Commission’s Hydrogen Refueling Infrastructure program. The program could use the models that UC Irvine developed to implement statewide hydrogen refueling stations, or the applicants could present other methods of achieving the results. The STREET tool could assist the Energy Commission and successful applicants in determining where the stations will be located. The successful applicants will develop processes and work out logistics for actually locating the stations, often in conjunction with current gasoline stations. You have specifically asked whether Section 1090 or the Act prohibits the Energy Commission from contracting with Dr. Brown’s company, FirstElement, if he were among the successful applicants.

ANALYSIS

Conflict of Interest - Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the

prohibition of section 1090 also extends to the entire body. (89 Ops.Cal.Atty.Gen. at 50.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

Typically, we employ a six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090. Because you are asking whether the Energy Commission may contract with Dr. Brown (or FirstElement), who is a *former* government employee, Section 1090 presumptively does not apply. Given the specific facts you have described, we must look a little deeper to determine whether Dr. Brown, who was a government employee during the development of the solicitation (and what will be a contract between the Energy Commission and other parties), participated in that development.

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) While Dr. Brown does not technically fall under Section 1090’s threshold inquiry, the California Supreme Court has cautioned that an analysis of Section 1090 cannot turn on a strict interpretation while foregoing the purpose and spirit of the law.

In *Stigall v. City of Taft* (1962) 58 Cal.2d 565, the California Supreme Court considered whether the following scenario violated section 1090: A city council member owned shares in a plumbing company and was also head of the city’s building committee. The city solicited bids for plumbing work, with the council member’s company submitting the low bid. Within minutes, the city council member resigned from the city council and, after accepting his resignation, the city council voted to award the contract to his company. The court concluded such a scenario could in fact violate Section 1090, even though the council member technically had removed himself from the city council before a final, formal contract was approved. If there were no Section 1090 violation in such a case, “[a] council member could participate in all negotiations giving a contract its substance and meaning, be instrumental in establishing specifications and schedules most advantageous to his or his firm’s particular mode of operation, participate in the selection of his or his firm’s offer, resign just prior to formal acceptance of that offer and execute the contract as the other party thereto.” (*Id.* at p. 570.) The court found that such a result would run contrary to the purpose behind Section 1090, which is to “prohibit a situation wherein a man purports to deal at arm’s length with himself and any construction which condones such activity is to be avoided.” (*Id.* at p. 571.)

The court clarified that a contract might well be “made” on the acceptance of an offer, but the “negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense.” (*Stigall, supra*, 58 Cal. 2d at p. 569.) Therefore, where a

party has had no interest or involvement in the contract³ during his or her tenure as a public employee and was not an official when the contract was executed, the official is not *ex post facto* interested in the contract by virtue of coincidental timing and area-expertise.

In the present case, Dr. Brown was an employee of UC Irvine while operating under a contract with the Energy Commission. The research and education that the Energy Commission gained during that contract might have informed the solicitation at issue, but we cannot say that the contracts are the same or even that one necessarily led into the other. Additionally, Dr. Brown was not at all involved in the “negotiations, discussions, reasoning, planning and give and take which goes beforehand” regarding the solicitation. He was not in any meeting to discuss particulars and it was only *after* he left his position at UC Irvine that he provided substantive comments on the draft solicitation. His employment was with UC Irvine and his job duties included working on a contract between UC Irvine and the Energy Commission.

Given these specific factors, Dr. Brown was not a public officer or employee for purposes of Section 1090 while the Hydrogen Refueling Infrastructure contract was discussed and negotiated, nor are the two contracts discussed herein considered the “same” contract. Section 1090 therefore does not prevent the Energy Commission from contracting with Dr. Brown if he is chosen as an applicant in response to the solicitation.

Revolving Door – the Act

Public officials who leave state service are subject to two types of post-governmental restrictions under the Act, colloquially known as the “revolving door” prohibition and the permanent ban on “switching sides.” The first restriction is the “permanent ban” prohibiting a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state. (See Sections 87401-87402; Regulation 18741.1).

Sections 87401 and 87402 prohibit former state administrative officials, who participated in a judicial, quasi-judicial or other proceeding while employed by a state administrative agency, from being paid to represent or assist in representing another person regarding that same proceeding. A “state administrative official” is “every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.” (Section 87400(b).) Dr. Brown was a state administrative official by virtue of his position with UC Irvine.

³ We distinguish the non-involvement here from an employee who merely recuses or otherwise abstains from decision-making, which, absent a remote interest exception, does not protect a body against a Section 1090 violation. Dr. Brown’s duties under the UC Irvine contract with the Energy Commission did not extend to discussions regarding solicitations for bids on future contracts.

The key question here is whether Dr. Brown participated in a proceeding and whether that same proceeding is at issue here. An official is considered to have “participated” in a contract or proceeding if the official was personally and substantially involved in the contract or proceeding. (Section 87400(d).) The permanent ban does not apply to “new” proceedings in which the former employee did not participate. (Section 87401; *Pratt* Advice Letter, No. A-95-386.) Dr. Brown provided training and other resources to the Energy Commission under a contract between UC Irvine and the Energy Commission. That contract was for specific services and deliverables.

We have consistently advised that the permanent ban does not apply to a new proceeding even in cases where the new proceeding is related to, or grows out of, a prior proceeding in which the official had participated. A new proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings. (*Rist* Advice Letter, No. A-04-187; see also *Donovan* Advice Letter, No. I-03-119.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104.)

The proceeding at issue is a potential contract between the Energy Commission and FirstElement to implement the research performed under a previous contract between UC Irvine and the Energy Commission. The contract will be between different parties (UC Irvine will not be a party) and will have new consideration and terms. These two contracts cannot be considered the same “proceeding” under the Act. The permanent ban does not apply here.

The second restriction is the “one-year ban” prohibiting a state employee from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action. (Section 87406, Regulation 18746.1). While in effect, the one-year ban applies only when a former employee or official, who files or is required to file a Statement of Economic Interests (FPPC Form 700) with his or her agency, is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person.⁴ (Regulation 18746.1(b)(3) and (4).) Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented, (2) before a state agency “which budget, personnel, and other operations” are subject to the control of a state agency the public official worked for or represented, or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

Based on your facts, although Dr. Brown would be subject to the one-year ban as to his former agency, he was not an employee of the Energy Commission. He worked for UC Irvine and carried out the requirements of a contract for the university. UC Irvine is not under the

⁴ We assume, for purposes of this analysis, that Dr. Brown held a position that was designated, or should have been designated under UC Irvine’s conflict of interest code.

control of the Energy Commission. Consequently, the one-year ban does not prevent contacts between the Energy Commission and Dr. Brown.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl