



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 22, 2015

David Roose
Chief of Utility Operations
8082 Daisy Hill Drive
Sacramento, California 95829

Re: Your Request for Advice
Our File No. A-15-167

Dear Mr. Roose:

This letter responds to your request for advice regarding the “revolving door” provisions of the Political Reform Act (the “Act”)¹ and Section 1090.² Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act and Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the Sacramento County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

FACTS

You are currently Chief of Utility Operations within the Division of Operations and Maintenance of the California Department of Water Resources (DWR). You have held your current position for the last eight years. In this position you do the following:

- Manage, direct, and oversee the State Water Project Operations Control Office, which is responsible for coordinating the water and power operations of the State Water Project.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² While you did not explicitly ask for advice under Section 1090, your facts implicate the prohibitions in Section 1090 therefore we include the pertinent analyze of Section 1090.

- Program management, most recently related to fire systems modernization of State Water Project facilities, the result of the fire at Thermalito Powerplant in 2012. You led both the fire forensic investigation of the Thermalito fire and also the subsequent consulting team tasked with determining fire systems improvements to modernize all State Water Project facilities.

You are retiring from State service on December 4, 2015 after nearly 28 years of DWR service. Your plans are to secure employment with a consulting firm and potentially provide, through the consulting firm, services to DWR in the areas of engineering design, operations and maintenance, and general program/project management. Specifically, you seek to perform work on assessing facilities (asset management) of the State Water Project, and in addition, potentially perform work on fire systems modernization for these facilities. You are the only DWR employee with critical fire-systems-modernization project management skills, developed as a result of your responsibilities related to the Thermalito fire.

Your questions concern the following contracts (or potential contracts):³

- A current maintenance-related contract with consultant firm HDR for maintenance activities that include maintenance as well as fire systems modernization work. This contract will extend past your retirement date.
- A current maintenance-related contract with Pacific Power Engineers (PPE) for engineering and project management work.
- A new contract (currently being negotiated) to secure asset management consulting.

You have not participated in the decisions leading to the forming of any of these contracts, nor have you worked directly with any of the DWR managers supervising these contracts. These three contracts are in support of SWP maintenance activities. For the past eight years you have been assigned to operations, not maintenance. Your previous 20 years with DWR involved maintenance-related job classifications/assignments. For the first year of employment after your departure from DWR, you will be focusing your consulting services on maintenance-related activities, not on operations-related services.

On October 2, 2015, you provided the following additional information:

Nichols-Melburg & Rossetto (NMR) Contract.

- In November, 2012, a devastating fire broke out at Thermalito Pumping – Generating Plant in Oroville California. In the aftermath of this incident you were assigned to lead a team and evaluate fire modernization issues of all plants supporting the State Water Project.

³ You stated that the contracts discussed in this letter are Architecture and Engineering (A&E) contracts. You stated that in an A&E contract, even after it is executed and in force, no work is performed until DWR authorizes work by a specific task order. In issuing an A&E task order, DWR not only authorizes the work to be done but the contractor personnel who will perform the work.

- To assist your team, the consultant firm HDR was hired as a subcontractor to an existing contract with consultant firm NMR.
- You were a member of the panel that interviewed subcontractors and assisted in selecting HDR to work under the NM&R contract. You helped prepare the September 5, 2013 task order (Task Order 7) issued to HDR which assigned it specific fire modernization-related tasks to perform.

HDR Contract:

- On July 1, 2014, DWR entered into a contract directly with HDR to perform work on 23 specified engineering issues. A number of task orders have been issued under this contract including Task Order 3, which issued on March 16, 2015. Task Order 3 requires HDR to provide preliminary engineering, preparation of specifications and drawings, procurement support, design engineering, and project management for restoration and modernization of Thermalito.
- Because Thermalito was damaged by fire, the restoration work includes consideration of fire protection. Two of the sixteen subtasks in the task order relate to “Fire Protection and Life Safety.”
- Because you were not involved in the preparation of Task Order 3, you do not know whether any of the work that you were involved in when you worked with HDR under the September 5, 2013 task order (Task Order 7) was used in the development of Task Order 3. No final report for Thermalito was prepared of the work you were involved with during fire modernization assessments (Task Order 7).

You do not believe you participated in any decision related to the making of the HDR contract dated July 1, 2014. You did not participate in the making of Task Order 3 that issued on March 16, 2015.

QUESTIONS AND CONCLUSIONS

I(a): May HDR select you to be the new program/project manager within one year after your DWR retirement? May the HDR contract manager request that you become the project manager and ask the DWR contract manager to approve the change via correspondence to the contractor?

I(b): May you provide services as an employee of HDR under this existing contract as (a) a program/project manager for fire systems modernization or (b) a general (no fire systems modernization) program/project manager in a new task order that DWR issues within the year after you retire? The contractor would include your name in its proposed task order, and DWR would include your name in the task order that issues.

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. City of 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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Pursuant to Section 1090, leaving state employment may not avoid a Section 1090 violation when the person has been involved in the contract process. In *City Council v. McKinley* (1978) 80 Cal. App.3d 204, 212, the court stated:

“If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and affecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit or the intent of the law which precludes an officer from involving himself in the making of a contract.”

Similarly, the Attorney General’s Office has opined that county employees could not propose an agreement for consulting services, then resign, and provide the the proposed services (66 Ops.Cal.Atty.Gen. 156 (1983)) and a council member could not participate in the establishment of a loan program and then leave office and apply for a loan (81 Ops.Cal.Atty.Gen. 317 (1998).)

1. Did your duties as a former employee of the Department of Water Resources, constitute “participating in the making” of HDR’s current contract thereby prohibiting you from benefiting from the contract?

Section 1090 reaches beyond the officials who actually execute the contract and courts have broadly interpreted “participation in the making of a contract” when applying the section:

“The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.” (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

Thus, “participation in the making of a contract” is defined broadly and includes any act involving the planning, preliminary discussions, negotiations, compromises, reasoning, drawing of

plans and specifications and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft, supra*, at p. 569.)

In this case, you led the fire forensic investigation of the Thermalito fire and a subsequent consulting team tasked with determining fire systems improvements to modernize all State Water Project facilities. You were also a member of the panel that interviewed subcontractors under the NMR contract, assisted in selecting HDR as a subcontractor under the contract, and helped prepare the September 5, 2013 task order (Task Order 7) issued to HDR, which assigned it specific fire modernization-related tasks to perform. Moreover, the 2014 contract with HDR does contain restoration work resulting from the fire and fire safety related improvements.

While it is clear that you participated in making the contract with NMR in 2013 for purposes of Section 1090, it is less clear whether you participated in making the 2014 contract with HDR. However, we apply the broad language quoted from *People v. Sobel, supra*. Based on the fact that (1) you led the fire forensic investigation and consulting team tasked with identifying needed fire system improvements, (2) the limited time interval between the 2013 and 2014 contracts, and (3) the similarity in the parties and subject matter of the contracts, we conclude for purposes of Section 1090, you previously participated in the making of both contracts and may not subsequently benefit from either contract. Section 1090 prohibits you from working for HDR on any aspect of the contract.⁴

Question 2(a): May you provide services as an employee of PPE, working under the existing contract and task order? May you act as PPE's program/project manager within one year after your DWR retirement?

Question 2(b): May you provide consulting services as a program/project manager in a new task order that issues within the first year after your DWR retirement? PPE would submit your name for inclusion within the DWR—issued task order.

Question 3(a): May you provide asset management consulting services as an employee of this firm under the existing contract in a (a) existing task order ('my name submitted within one year after your DWR retirement) or (b) new task order that issues within one year after your DWR retirement? The consulting firm would submit your name for inclusion within the DWR-issued new task order.

Question 3(b): May you provide asset management consulting services as an employee of this firm under this new contract and new task order during the one year following your retirement? The consulting firm would submit your name for inclusion within the DWR-issued task order.

Revolving Door Law, Generally

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, the one-year ban and the permanent ban. In addition, Section

⁴ In light of our conclusion under Section 1090, it is unnecessary to consider the application of the Act's revolving door provisions to this question.

87407 and 87100 prohibits officials from making, participating in making, or using their position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. These provisions are commonly referred to as the “revolving door” prohibitions.

As an initial matter, you should be mindful of Section 87407 and 87100 since you will be continuing to work at DWR. Section 87407 is designed to ensure that the official does not use his or her position to make any decisions that unduly benefit a prospective private sector employer. Section 87407 states:

“No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.”

A public official is “negotiating” employment “when he or she interviews or discusses an offer of employment with an employer or his or her agent.” (Regulation 18747(c)(1).) A public official has an “arrangement” concerning prospective employment when he or she accepts an offer of employment. (Regulation 18747(c)(2).)

Once you have negotiated prospective employment or have made an arrangement regarding prospective employment, you are prohibited under Section 87407 from making, participating in making, or using your official position to influence any governmental decisions directly relating to the prospective employer. A governmental decision directly relates to a prospective employer, for instance, if the prospective employer is a named party in, or the subject of, a governmental decision before the official or the official’s agency because the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the prospective employer or involves any decision affecting the prospective employer’s real property. (Regulation 18747.)

One-Year Ban: The “one-year ban” prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency’s conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).) The ban applies for twelve months from the date the employee permanently leaves state office or employment. While in effect, the one-year ban applies only when a former employee or official 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. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to certain matters involving specific parties such as “judicial or quasi-judicial” proceedings, the one-year ban applies to “any appearance

or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Regulation 18746.1(b)(5).) An appearance or communication is for the “purpose of influencing” if it is made for the “principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Ibid.*)

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).)

Permanent Ban: The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in certain proceeding involving the State of California and other specific parties, or assisting in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication – or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication – made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).)

Additionally, an official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .” (Section 87400(d).)

One-Year Ban: As noted above, Regulation 18746.1(c) provides that “[s]ervices performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement are excluded from the prohibitions of Section 87406 and this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” Thus, under your facts the conduct in question would be permissible under the one-year ban if the contract was executed prior to you leaving your state position.

However, if the contract is awarded after your leave, you *would not* be able to appear before or communicate with DWR on behalf of any person as an agent, attorney, or representative of that person for one year after your departure.

The Permanent Ban: The Permanent Ban is not at issue in these questions if you did not participate in the contract decision. However, we caution that we base this conclusion on your statement that you have not been involved in the contract decision. Note that previous participation in making a contract may include prior involvement in a specific project encompassed by the contract. To the extent that you may have participated in a project encompassed by a contract, both the permanent ban and Section 1090 may be implicated. If this is the case, you may wish to seek additional assistance describing your involvement in the project.⁵

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: John W. Wallace
Assistant General Counsel,
Legal Division

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⁵ Likewise, Section 1090 is not at issue in these questions if you did not participate in the contract decision.