



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 9, 2015

James M. McManus, P.E.
1610 Glade Place
Escondido, CA 92029

Re: Your Request for Advice
Our File No. A-15-178

Dear Mr. McManus:

This letter responds to your request for advice regarding the post governmental employment provisions of the Political Reform Act (the "Act").¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest, Section 1090 or the Public Contract Code.

QUESTION

What restrictions, if any, apply to you should you find and accept a consulting position now that you have been out of state service for more than one year?

CONCLUSION

The one-year ban does not apply to you, as explained below. The permanent ban would apply in specific circumstances, also described below. You will need to consider your particular situation should you start consulting with firms that contract with the State.

FACTS

You are former state employee whose official separation date was August 31, 2015. Your last physical day working for the state was June 30, 2014, however your leave balance did not run out until August 31, 2015. While employed with the State your title was Deputy District Director Construction in District 11 for Caltrans and the civil service class for this position was Supervising Transportation Engineer. While in this position you were the overall manager of the

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.

construction division which oversaw the public works construction contracts on the state highway system in San Diego and Imperial counties. You also managed A & E contracts for construction inspection and construction management contracts in both of those counties. You were a designated employee and were required to file a Statement of Economic Interests (Form 700).

The Caltrans Division of Procurement and Contracts has posted opportunities for new construction management and construction inspection A & E contracts in most districts around the State. These types of contracts were managed by subordinate management team members under you during your tenure as the Deputy District Director Construction. You have had no involvement in any aspect of the above described future contracts as they were not being contemplated during July 2014 or before because there were other A & E contracts already in place.

You have been approached by an engineering consulting firm for employment. This firm plans to compete for several of the future Caltrans A & E contracts and would like to hire you to represent the firm in administering these contracts with Caltrans. The firm would use your resume in the submittal documents to Caltrans in an effort to secure the contracts and you would potentially be interacting directly with Caltrans employees sometime as early as the next couple months. The firm has also asked if you are interested in representing the firm in A & E contracts with a transit construction agency called the San Diego Association of Governments as soon as September. The San Diego Association of Governments works closely with Caltrans under a memorandum of understanding including, occasionally, providing Caltrans with consultant resources utilizing the A & E contracts mentioned above to staff state highway construction projects. You would like to know if and how the Act's revolving door provisions apply to you.

ANALYSIS

Post-Governmental Employment Restrictions

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 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.

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).)

For purposes of the one-year ban, the date an official "permanently leaves state office or employment" is the date on which the official is no longer authorized to perform the duties of the position and stops performing the duties of the position. (Regulation 18746.4(b).) Because you stopped performing the duties of your position on June 30, 2014, this is the date you left your state position. Thus, the one-year ban does not apply to you as it has been 12 months since your date of separation.

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).)

While we have detailed the general provisions of the permanent ban for your review, you have not provided any information as to your participation in any proceeding that may affect your ability to engage in any of the conduct listed herein. To apply the permanent ban to your situation, you need to determine if any of the actions in which you may engage with any potential employer or contractor involve a proceeding in which you participated while working for Caltrans. (Regulation 18741.1(a)(4).) You have stated that none of the contracts that you may work on in the future are contracts that you worked on while employed with Caltrans and that the contracts had not yet been contemplated while employed with Caltrans. To the extent that you have not participated in the future contract in anyway, the permanent ban would not apply.

However, we must caution that if a future contract involves a particular project any previous involvement in the project as a Caltrans' official may be considered participation in the contract and may implicate the permanent ban. If you may have participated in a proceeding including any project involved in a future contract, please feel free to write for further assistance after providing the relevant facts.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Sukhi K. Brar
Senior Counsel, Legal Division

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