



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
428 J Street • Suite 620 • Sacramento, CA 95814-2329  
(916) 322-5660 • Fax (916) 322-0886

April 20, 2016

David Roose  
8082 Daisy Hill Drive  
Sacramento, CA 95829

Re: Your Request for Advice  
Our File No. A-16-048

Dear Mr. Roose:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the "Act") and Government Code Section 1090.<sup>1</sup>

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).)

### QUESTION

As a contractor for a private company, may you work as a project manager on a project for the Department of Water Resources when you retired from the agency less than a year ago?

### CONCLUSION

Yes. You may work on a project with the Department of Water Resources because the contract was in place before you left the agency and you did not participate in the making of the contract while you were employed at the Department of Water Resources.

### FACTS

You retired from the Department of Water Resources (DWR) on December 30, 2015. On January 4, 2016 you secured employment with Black & Veatch, a Sacramento based consulting firm. At this time you have not provided consulting services to DWR. A DWR Architectural and Engineering Asset Management contract was signed with consulting firm NEXANT that was

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<sup>1</sup> 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.

executed on September 1, 2015. This contract was executed before your retirement date from DWR. You did not participate in any way with securing the NEXANT contract. The NEXANT contract was entered into by DWR and NEXANT to provide consulting services to DWR for Cyber Infrastructure Protection (CIP) related requirements/projects.

Another contract for the CIP V5 Project was initiated on December 7, 2015 between DWR and NEXANT. The purpose of this project was to develop and implement Cyber Infrastructure Protection requirements to ensure that the operation of the State Water Project does not adversely affect the Bulk Electronic System. During the initiation phase of the CIP V5 project in your previous role as an operations manager with DWR, you were part of the Executive Steering Committee and attended the first CIP V5 Project kickoff meeting. The focus of this meeting was the vision, project organization, timeline/deliverables, and budget/risk projections for what was developed at the time. The primary role of the Executive Steering Committee was to ensure that the CIP V5 Project has support and to inform appropriate managers of how the CIP V5 Project may affect their respective staff and office.

During the first initial kickoff meeting of the Executive Steering Committee, it was determined that only internal DWR staff would be needed for the CIP V5 project and no contractors or subcontractors would be hired. At the time you attended the kickoff meeting no resources for the CIP V5 project were identified and no requirements for the project were initiated, approved or developed. The Executive Steering Committee did not participate in identification of resources, initiate, approve, or develop the requirements of the CIP V5 Project. The CIP Senior Manager, (the Division Chief) is responsible for the approval and implementation of CIP requirements. The only involvement you had while working at DWR with the CIP V5 project was attending one Executive Steering Committee meeting where information stated above was discussed by other employees at DWR. At this meeting you did not provide input or speak at all. You sat and listened and then left.

In February 2016, NEXANT and DWR requested consulting services from your employer Black & Veatch for a Project Manager for the CIP V5 Project Operations Team because the needs for the CIP V5 project changed and you have been identified to fill this role. The need for consultants for the project was identified only after you had already retired. The role would require the Project Manager to support the Chief Dispatcher and field division operations superintendents to coordinate and integrate four CIP teams (Physical Security, Cyber Security/Technical, Change Management & Administrative, and Risk Assessment & Compliance) with the Operations Team. As you are currently employed by Black and Veatch, you would be a subcontractor to NEXANT if you were to become the Project Manager for the CIP V5 project.

## ANALYSIS

### 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 NEXANT’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 have informed us that you served a very limited role as part of the Executive Steering Committee and only attended the first CIP V5 Project kickoff meeting. The focus of this meeting was the vision, project organization, timeline/deliverables, and budget/risk projections for what was developed at the time. The primary role of the Executive Steering

Committee was to ensure that the CIP V5 Project has support and to inform appropriate managers of how the CIP V5 Project may affect their respective staff and office.

During the first initial kickoff meeting of the Executive Steering Committee, it was determined that only internal DWR staff would be needed for the CIP V5 project and no contractors or subcontractors would be hired. At the time you attended the kickoff meeting no resources for the CIP V5 project were identified and no requirements for the project were initiated, approved or developed. The Executive Steering Committee did not participate in identification of resources, initiate, approve, or develop the requirements of the CIP V5 Project. The CIP Senior Manager, (the Division Chief) is responsible for the approval and implementation of CIP requirements. You stated that at this initial meeting you made no comments and it was more of an informational meeting where leadership informed you of what the project would entail.

To the extent that your only involvement in the CIP V5 Project was your attendance at the initial meeting at which you made no comments, we conclude for purposes of Section 1090, you did not previously participate in the making of the NEXANT contract because you did not engage in any action involving the planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids. Because you were not involved in any of these actions you did not participate in the contract.

#### *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. 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).)

***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.

***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 and your only involvement in the CIP V5 Project was your attendance at the initial meeting at which you made no comments . 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.<sup>2</sup>

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

Sincerely,

Hyla P. Wagner  
General Counsel



By: Sukhi K. Brar  
Senior Counsel, Legal Division

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<sup>2</sup> Likewise, Section 1090 is not at issue in these questions if you did not participate in the contract decision.