



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 12, 2018

Scott McGowen, P.E.
Manager, Transportation Services and
Water Quality Programs
Michael Baker International
2729 Prospect Park Dr., Suite 220
Rancho Cordova, CA 95670

Re: Your Request for Advice
Our File No. A-18-094

Dear Mr. McGowen:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act ("Act").¹ Please note that we are only providing advice under the post-governmental employment provisions of the Act. We therefore offer no opinion on the application, if any, of other post-governmental employment laws that may apply, such as Public Contract Code Section 10411.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71); any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Do the Act's post-governmental employment provisions prohibit you from participating on a consulting contract that facilitates a program that you formerly supervised as a Caltrans Chief Environmental Engineer?

CONCLUSION

No. Based on the facts provided, the Act's permanent ban does not prohibit you from participating in the performance of the contract because the contract is a new proceeding in which you have not previously participated.

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.

FACTS AS PROVIDED BY REQUESTOR

You previously worked for the California Department of Transportation as a Chief Environmental Engineer and supervised the implementation of the Department's Stormwater Program in the Department's Division of Environmental Analysis. The program is governed by a permit issued by the California State Water Resources Control Board.

Under the program, Caltrans issued a request for proposals ("RFP") for a consulting services contract. Caltrans ultimately awarded the contract to your current employer, Michael Baker International. You supervised the performance of this contract in overseeing the implementation of the program. On January 26, 2017, you retired from state employment.

The consulting services contract is scheduled to expire in June 2018. In anticipation of the four-year contract cycle concluding, Caltrans engaged in another competitive bidding process for a contract for consulting services to replace the expiring contract. The successor contract will also be governed by the State Water Resources Control Board issued permit.

In response to the Caltrans RFP, your employer proposed to provide similar consulting services to those under the original consulting services contract. You did not participate in any way in the RFP bid for the successor contract. Caltrans awarded the successor consulting services contract to your employer for a second time.

You inquire whether your participation in offering consultation to Caltrans under the contract is permitted under the Act's post-governmental employment provisions.

ANALYSIS

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. (Sections 87406 and 87400-87405.) Because it has been over one year since you left state service, the one-year ban is no longer applicable to you.

Permanent Ban:

The "permanent ban" prohibits a former state employee from "switching sides" and participating, for compensation, in a 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, 87402.) The permanent ban applies when an official has permanently left or takes a leave of absence from any 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).) Thus, the permanent ban covers proceedings that affect the rights or claims of specific parties. (*Lowry* Advice Letter, No. I-08-053.) It does not apply to those that involve the making of rules or policies of general applicability. (*Beale* Advice Letter, No. A-00-146.)

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).) A former state official who held a management position in a state administrative agency is deemed to have participated in a contract or proceeding if: 1) the contract or proceeding was pending before the agency during his or her tenure, and the contract or proceeding was under the official’s supervisory authority, including any decisions made by the official directly or by someone under his or her supervision. (Regulation 18741.1(a)(4).)

The permanent ban applies throughout the duration of a proceeding in which the official participated. It does not, however, prohibit the official representing a business entity in any new proceeding even though the business entity may have been a party to a previous proceeding in which the official participated.

New Proceedings:

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. (Sections 87401, 87402.) A “new” proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual or legal issues from those considered in previous proceedings. (*Rist* Advice Letter, No. A-04-187.) New contracts with the employee's former agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) 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.)

Your employer’s new consulting services contract was based on new consideration, was subject to a new RFP bidding process, and contains new terms. It is a new proceeding for purposes of the Act. Therefore, the permanent ban does not prohibit you from being involved in the performance of the new contract. (*Blonien* Advice Letter, No. A-89-463.)

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

Sincerely,

Brian G. Lau
Acting General Counsel



By: Ryan P. O'Connor
Counsel, Legal Division

RPOC:jgl