



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 17, 2023

Ghassan ALQaser, Ph.D.
10328 Beckley Way
Elk Grove, CA 95757

Re: Your Request for Advice
Our File No. A-23-061

Dear Mr. ALQaser:

This letter responds to your request for advice regarding post-government employment provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the post-government employment provisions of the Act and under Section 1090. We therefore offer no opinion on the application, if any, of other post government employment laws, such as Public Contract Code section 10411, or other general conflict of interest prohibitions such as common law conflict of interest.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and 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. Lastly, the Commission does not provide advice with respect to past conduct. (Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

We are required to forward your request regarding Section 1090 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).)

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 18104 through 18998 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.

QUESTIONS

1. Under Section 1090 may you, as a former Department of Water Resources (“DWR”) manager of the State Water Project’s Power and Risk Office, act as a subcontractor under DWR’s consulting contract with Stantec on a future Task Order through your consultant business, Hydro Plus Power, LLC?
2. What is your date of permanent separation for purposes of the one year ban?
3. Does either the Act’s one-year ban or permanent ban prohibit you from consulting work under the Stantec contract?

CONCLUSIONS

1. As a former state employee, you are subject to Section 1090. However, you are not prohibited from working as a consultant on the implementation of the Stantec contract so long as your subordinate, the Power Plant Branch Manager, or other DWR officials had the full authority to initiate and conduct the contracting process and to review and select the contractor, and you were not involved in any discussions or decisions regarding the RFP in your capacity as a DWR manager including any preliminary discussions, negotiations, review, or approval of the RFP or selected contractor.
2. December 31, 2022, is your date of permanent separation.
3. You are subject to the one-year ban and may not appear before DWR for compensation as detailed below for one year from the date of your permanent separation on December 31, 2022, and continuing until December 31, 2023. Accordingly, you may not appear before or communicate with DWR or any DWR official for the purpose of influencing the issuance, amendment, or revocation of any contract between DWR and Stantec. Moreover, this restriction would apply to subsequent agreements between DWR and Stantec, and you are prohibited for one-year from appearing before or communications with DWR for the purpose of influencing the issuance of a Task Order even if the Task Order will be issued under Stantec’s existing contract. However, you are not prohibited under the one-year ban from making appearances or communications before DWR as a part of services performed to administer, implement, or fulfill the requirements of the Stantec contract, so long as those services do not involve the issuance, amendment awarding or revocation of the contract during the one-year ban period. (Regulation 18746.1(c).)

You are subject to the permanent ban in regard to any proceeding, as detailed below, in which you participated during your DWR employment. You are not prohibited by the permanent ban from acting as a subcontractor to Stantec under the terms of the existing contract, as the performance of future Task Orders under the Stantec contract is a separate proceeding in which you did not participate during your employment.

FACTS AS PRESENTED BY REQUESTER

You have a Ph.D. in Civil Engineering and have been working in the water and power industry for over 40 years. Until June 30th, 2022, you were employed as a CEA [Career Executive Assignment], managing the State Water Project's ("SWP") Power and Risk Office ("PARO").

After 23 years of service at the Department of Water Resources ("DWR"), you retired on December 31, 2022. On July 1st, 2022, you vacated your position and moved into a "blanket position" to be able to use accrued vacation time. Others were assigned to be acting managers of PARO from July 1st, 2022, forward.

To ensure continuity in meeting SWP's obligations, especially efforts that were under your leadership and oversight before July 1st, 2022, DWR management requested if you would make yourself available for 8 hours a week, on average, to provide advice, answer questions, and attend meetings. You did so and helped other managers to keep things moving, especially with efforts meant to meet the state's Clean Energy mandates under Senate Bill 49 and Senate Bill 1020, and the Governor's initiatives for Electric Grid reliability improvements. In response to our request, you clarified that these activities continued to December 30, 2022, and involved your attendance at a limited number of meetings and your providing advice on technical topics for which you were the subject matter expert. The acting managers for PARO had the responsibility for the daily oversight of maintaining the PARO business and for making needed decisions.

SWP has a complex integrated water and power infrastructure and operations setup. Climate change impacts and the Clean Energy mandates require the SWP to develop and implement long-term strategic plans allowing the SWP to adapt and meet its obligations, in terms of compliance and water supply reliability. Under your oversight, SWP's PARO performed the flexible resources planning and developed the SWP Energy Roadmap amongst other project planning efforts and procurements of renewable energy.

You state that SWP management asked if you could be retained as a consultant, to provide the expertise and support for the SWP in advancing the planning efforts at PARO. You established a consulting company under the name Hydro Plus Power, LLC on Jan 1st, 2023. One potential project you would like to work on in this capacity involves a recently executed "A&E Contract" [architectural or engineering contract] at PARO with Stantec, a consulting firm. Stantec provides consulting services to PARO and other SWP divisions in the area of integrated water and power and has been doing so under contracts for over 20 years (though under different names).

PARO had an expiring 5-year A&E consulting contract with Stantec in 2022 for services such as power planning, data analysis and reporting, and infrastructure. This contract was managed by the SWP's Division of Engineering Architectural and Engineering contract's management group ("A&E program"). After an extension of the contract, A&E determined that a new contract needed to be issued. In February or March of 2022, the A&E program in coordination with PARO issued a Request for Proposal ("RFP") for a new 5-year term A&E contract, to replace the expiring contract.

In response to our request for additional information on the RFP process, you explained that you were not involved in the discussion regarding issuing a new RFP as this was an expected and necessary development given the expiration of the existing contract, and because the PARO Power Plant Branch Manager was in charge of the process. The Power Planning Branch Manager was leading the effort to work with the A&E program to solicit, interview, select, and retain the consulting service provider and served as the Contract manager. The Power Plant Branch Manager had the responsibility to request a new contract and provide the scope of work for the RFP to the A&E program. You were acting in the role of her direct supervisor at this time, due to a temporary re-assignment of the Principal Engineer. You did not review the scope of work for the RFP or provide any input on this process. You understood that the scope of work was identical to the general services scope of work under Stantec's expiring contract and the contract prior to this (under an earlier company name of "MWH"), each on a 5-year term.

You further state that this type of contract typically has a general scope of work, and later, after execution, the contractor is provided with specific Task Orders to perform. You state that the RFP did not need to reflect changes in services, as the tasks to be provided are perpetual state-mandated tasks for PARO and any specific needs or updates would be addressed by future Task Orders. (For example, when the target dates for reaching clean energy goals were modified by the Legislature, this did not require a contract amendment under the previous contract but was addressed in shorter windows for performance in the Task Orders.) In your previous role as the Power Planning Manager, you were involved in drafting Task Orders under an earlier contract with Stantec from 2014 to 2017. For the current Stantec contract, you were not involved in drafting specific Task Orders, as this is done after the execution of the contract which occurred after your retirement.

Stantec was the only applicant to the RFP. Stantec was interviewed in June 2022, and the contract was executed in January 2023. In your role as PARO Manager, you attended the interview as a "silent observer", and this was your only involvement in the process for retaining Stantec's services. Program managers at PARO were responsible for being on the interview panel and for the coordination with the A&E program, throughout the process. You noted that your primary role in observing the interview process was to observe the two PARO managers, including the Power Planning Branch manager, who were under your temporary direct supervision. The two managers were relatively new to the interviewing process, and you sat in to ensure that they conducted the interview properly. Due to Stantec's past history of providing services under previous contracts, you did not attend to review Stantec's bid, as you were familiar with this business and their work. Additionally, you state you did not discuss or authorize any action in the contract formation, and you were not performing the Office Manager's duties after July 1st, 2022. Because the A&E program staff were responsible for administering the contracting process with Stantec, neither you nor any PARO managers had any contact with Stantec relevant to the subject of the new contract.

The contract with Stantec was executed in January 2023. You clarified in a phone conversation on April 4, 2023, that as a subject matter expert and due to your past strategic planning work, you are interested in working on Task Orders that may be created under the Stantec contract. Currently, you are aware of only one Task Order for specific work that has been issued by your

former agency to date. You are not seeking to work on this Task Order, but request advice as to whether it is permissible for you to work on future Task Orders under the Stantec contract.

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.) 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.)

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.) Participation in the “making of a contract” is defined broadly and includes “the planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids” (*Stigall v. City of Taft, supra*, at pp. 569-571; see also *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.) Similarly, “financial interest” is liberally interpreted, and courts look to whether the officer 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.)

Application to Former Public Officers who Participated in Making the Contract

Leaving state employment or state office prior to the execution of the contract 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 concluded that county employees could not propose an agreement for consulting services, then resign, and provide 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).)

Importantly, Section 1090 reaches beyond the officials who execute the contract, and courts have broadly interpreted “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.)

We have previously advised it was permissible under Section 1090 for a former public officer who left state service to work on the implementation of a contract where the facts indicate that the officer did not have influence over the contract as to promote their personal interests with respect to the contract implementation. (See *Lester* Advice Letter, No. A-18-060 [former California Coastal Commissioner was not prohibited under Section 1090 from working on the implementation contract for a program where, although he worked on the settlement agreement and permit proceedings which stated the program as a condition and its purpose, neither proceeding included specifications for the program, and its implementation was ten years after the permit proceedings; and *Abdulrahman-Wells* Advice Letter No. A-17-055 [Section 1090 did not prohibit a former state Department of Technology employee from working on a networking services contract where he was not involved in forming the specifications or requirements of the Invitation for Bids, and only provided a general assent to the proposal during his employment.])

Stantec Contract

Your participation while employed as a DWR’s State Water Project Power and Risk Office (SWP PARO) manager involved your direct supervision of the PARO Power Planning Branch Manager in charge of the RFP process, your attendance to observe the two PARO managers conducting the Stantec interview and your general supervision of the PARO during the time the RFP was in process. You were not involved on a more detailed level in determining the need for the RFP or in forming the scope, specifications or requirements of the RFP. The RFP was for ongoing work that PARO had Stantec perform under two previous contracts. Because the work, such as preparing mandated reports, was a continuing necessity, you did not discuss the need for the RFP to replace the expiring contract or its scope with the Power Planning Branch Manager in charge of the process. You attended the interview with Stantec as a “silent observer”; however, you did so to observe the two managers under your temporary supervision, who were relatively new to conducting interviews, rather than to evaluate Stantec, a business that had provided services on the two previous five-year contracts with PARO and the sole bidder on the RFP.

Additionally, the work you seek to perform in the future would be on a specific Task Orders, in the event that such Task Orders are issued by PARO to Stantec under its general contract.

The Task Orders you would be qualified to work on have not been formed, and you were not involved in drafting any Task Orders under the current Stantec contract during your employment.

Due to your lack of involvement in RFP process, scope or specifications, or the future Task Order on which you would seek to act as a consultant, it does not appear from these facts that you had an influence on the RFP or the formation of the Stantec contract such that it would promote your personal interests with respect to working on the implementation of the contract. Based on the facts provided, Section 1090 does not prohibit you from providing consulting work on a future Task Order under the contract so long as your subordinate, the Power Plant Branch Manager, or other DWR officials had the full authority to initiate and conduct the contracting process and to review and select the contractor, and you were not involved in any discussions or decisions regarding the RFP in your capacity as a DWR manager including any preliminary discussions, negotiations, review, or approval of the RFP or selected contractor.

The Act

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.

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 the official’s 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 for a period of one year after leaving office or employment. (Section 87406; Regulation 18746.1.)

This ban is applicable to an employee who holds a designated position at a state agency, or one that should be designated in the agency’s conflict-of-interest code.² (Regulation 18746.1(a)(4).) While in effect, the one-year ban applies only when the former employee is being compensated for their appearances or communications before the employee’s former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

An “appearance or communication” includes, but is not limited to, conversing directly or by telephone, corresponding by writing or email, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).) An appearance or communication is considered to be for

² Positions that require designation in an agency’s conflict of interest code include are those that involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. (Section 87302(a).)

the “purpose of influencing” legislative or administrative action “if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (*Ibid.*)

Appearances and communications are prohibited under the one-year ban if they are made: (1) before a state agency that the public official worked for or represented; (2) before a state agency whose “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)(C).)

The ban applies for twelve months from the date the employee “permanently leaves” state employment. (Regulation 18746.1(b)(1).) Regulation 18746.4(a) defines the date an official has permanently left employment as:

(1) The date on which an official permanently leaves office or employment or takes a leave of absence is the date on which the official is no longer authorized to perform the duties of the office or employment, and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits

Application to Your Post-Employment Appearances & Communications before DWR

The one year ban is applicable to you as a former DWR, SWP PARO manager. Your date of permanent separation is December 31, 2022, for purposes of the ban due to your continued performance of employment duties for DWR in a “blanket position” up until December 30, 2022. Therefore, you are subject to the one-year ban until December 31, 2023.

During this time period you may not make a formal or informal appearance before DWR for compensation for the purpose of influencing any administrative or legislative actions or any discretionary acts involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property during that time period. The one-year ban will also prohibit you from making appearances and communications before any state agency whose “budget, personnel, and other operations are subject to the control” of DWR. For the purposes of the facts provided, we caution that the one-year ban would apply to subsequent agreements between DWR and Stantec, including but not limited to future Task Orders even if issued under Stantec’s existing contract. Accordingly, you are prohibited for one-year from appearing before or communications with DWR or any DWR official for the purpose of influencing the issuance of any subsequent Task Order.

Exceptions

However, you will not be prohibited from making appearances or communications before DWR that are made as part of “services performed to administer, implement, or fulfill the

requirements of an existing permit, license, grant, contract, or sale agreement... provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings” for the twelve-month period commencing once you have permanently left state service. (Regulation 18746.1(c).) Note that the above exception is only applicable to the extent that the permanent ban does not prohibit your participation in the proceeding, as discussed below. (*Id.*)

Furthermore, you will not be prohibited from performing work as an independent contractor or as a subcontractor that does not require you to appear before or communicate with DWR, so long as you are not otherwise prohibited under the permanent ban. We have advised that a former agency official may, without violating the one-year ban, draft proposals on a client’s behalf to be submitted to the agency so long as the former employee is not identified in connection with the client’s efforts to influence an administrative action. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use their expertise to advise clients on the procedural requirements, plans, or policies of the official’s former agency so long as the employee is not identified with the employer’s efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

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 and 87402; Regulation 18741.1.)

The permanent ban applies to every “state administrative official,” which is defined as “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).) 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. (Sections 87401 and 87402; Regulation 18741.1.) “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).)

Participation in a Proceeding

An official “participated” in a proceeding if the official 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).) Relevant to your role as a manager, Regulation 18741.1(a)(4) further defines that a supervisor is “deemed to have participated” in any proceeding that was pending before the official’s agency and that was under the supervisor’s supervisory authority. For purposes of this regulation, a proceeding is under a supervisor’s “supervisory authority” if any of the following applies to the supervisor:

- (A) The supervisor’s duties include the primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted. However, this provision does not apply to a supervisor who is only responsible for the general oversight of the administrative actions or functions of a program in which the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency.
- (B) The supervisor directly supervises the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken.
- (C) The supervisor reviews, discusses, or authorizes any action in the proceeding.
- (D) The supervisor has contact with any of the participants in the proceeding regarding the subject of the proceeding.

The permanent ban is applicable to you as a former SWP PARO manager. It will apply to prohibit your participation in any judicial, quasi-judicial, or other proceeding in which you participated during your employment.

New Proceedings: Implementation of an Existing Contract

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 contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. 1-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.) The “performance” or “implementation” proceeding is narrowly construed and limited to the execution of the existing terms of an existing contract. (*Lujan* Advice Letter, No. A-14-009.)

Stantec Contract

At issue is whether you may provide subcontractor consulting services to Stantec on its executed contract with DWR under the permanent ban or under the one year ban.

The performance of the executed contract is a separate proceeding from the RFP proceeding for the formation of the contract for purposes of the permanent ban. You left state service prior to the execution of the current contract, and therefore did not participate during your DWR employment in Stantec's performance of the contract. Nor have you participated in the drafting of any Task Orders under the contract. As a result, the permanent ban does not prohibit you from acting as a subcontractor to Stantec on a future Task Order in the performance of the existing terms of the contract.

Nonetheless, you are subject to the one-year ban and may not appear before DWR for compensation for one year from the date of your permanent separation on December 31, 2022, and continuing until December 31, 2023. Accordingly, you may not appear before or communicate with DWR or any DWR official for the purpose of influencing the issuance, amendment, or revocation of any contract between DWR and Stantec. Moreover, this restriction would apply to subsequent agreements between DWR and Stantec, and you are prohibited for one year from appearing before or communications with DWR for the purpose of influencing the issuance of a Task Order even if the Task Order will be issued under Stantec's existing contract. However, you are not prohibited under the one- year ban from making appearances or communications before DWR as a part of services performed to administer, implement, or fulfill the requirements of the Stantec contract, so long as those services do not involve the issuance, amendment awarding or revocation of the contract during the one-year ban period. (Regulation 18746.1(c).)

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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