

ADVISORY OPINION

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SUMMARY OF CHANGES: Updated format only.

Post-State Employment

QUESTION

May a former state employee, who was as a “project leader” with the Washington Department of Fish and Wildlife (“WDFW”) assist a new employer to complete the project under a new contract?

ANSWER

Yes, because the former state employee will be assisting his new employer in a contract that was developed and negotiated after the former state employee had left state employment.

ANALYSIS

Under federal law the Bonneville Power Administration (“BPA”) is required to make payments to the state to mitigate damage caused by dams on the Columbia River. As part of this process BPA enters into contracts with the WDFW to assess damage caused by the dams. Under the contract, WDFW performs the assessment and provides certain deliverables, such as a final report, and BPA pays according to the terms of the contract.

When the former state employee (“Former Project Leader”) worked for WDFW he was a project leader for various federally funded projects in the Columbia Basin. One of these projects was to evaluate the juvenile fall Chinook salmon run in the Hanford Reach of the Columbia River, the Hanford Juvenile Fall Chinook Stranding Evaluation. As team leader, the Former Project Leader was responsible for developing the work plan and budget, supervising the field work, analyzing the data, writing interim and annual reports, and overseeing the work of subcontractors.

Earlier this year the Former Project Leader was recruited and hired by Golder Associates Incorporated (“Golder”). He was recruited largely through his former association with another former WDFW employee who once supervised the Former Project Leader. Golder hired the Former Project Leader due to his extensive experience in the Columbia Basin in hydroelectric

mitigation studies, fisheries research, and general federal contract management. The Former Project Leader was not recruited and hired by Golder specifically to continue work on the Hanford Juvenile Fall Chinook Stranding Evaluation. At Golder, the Former Project Leader is responsible for Environmental Science Program development in the Columbia Basin.

Before Former Project Leader left state employment he was the only permanent staff assigned to the project and held specialized knowledge associated with the project. The question is whether Golder can enter into a contract with WDFW to have the Former Project Leader complete the work. Under the proposed contract, the Former Project Leader would perform specific tasks such as completing the final report. However, he would not have all the responsibilities of his former state job as project leader. WDFW asked Golder to make the Former Project Leader available for this contract because of his specific knowledge of the technical data analysis and overall project management.

The Ethics in Public Service Act prohibits, for the period of one year, former state employees from accepting employment with contractors in which, in the two years prior to leaving the state, they negotiated or administered contracts with that employer and will help that employer fulfill some provisions the contracts that they administered. RCW 42.52.080(1), provides that:

No former state officer or state employee may, within a period of one year from the date of termination of state employment, accept employment or receive compensation from an employer if:

(a) The officer or employee, during the two years immediately preceding termination of state employment, was engaged in the negotiation or administration on behalf of the state or agency of one or more contracts with that employer and was in a position to make discretionary decisions affecting the outcome of such negotiation or the nature of such administration; (emphasis added)

(b) Such a contract or contracts have a total value of more than ten thousand dollars; and

(c) The duties of the employment with the employer or the activities for which the compensation would be received include fulfilling or implementing, in whole or in part, the provisions of such a contract or contracts or include the supervision or control of actions taken to fulfill or implement, in whole or in part, the provisions of such a contract or contracts. This subsection shall not be construed to prohibit a state officer or state employee from accepting employment with a state employee organization.

In this case, the Former Project Leader was involved in the administration of the contract between WDFW and BPA. Therefore, under RCW 42.52.080(1), the Former Project Leader could not go to work for BPA to supervise and control the implementation of the contract between BPA and WDFW. The question before the Board, however, is whether the Former Project Leader may perform work under a different contract between WDFW and Golder.

While the Former Project Leader's duties under the new contract will involve work necessary to fulfill the old contract between BPA and WDFW, the Former Project Leader did not supervise or administer this second contract as a state employee. Therefore, RCW 42.52.080(1) does not prohibit his employment with Golder to complete the project.

The Ethics in Public Service Act also prohibits, for the period of two years, former state employees from having a beneficial interest in a contract or grant which was funded by a state action in which they participated. RCW 42.52.080(2) provides that:

No person who has served as a state officer or state employee may, within a period of two years following the termination of state employment, have a direct or indirect beneficial interest in a contract or grant that was expressly authorized or funded by specific legislative or executive action in which the former state officer or state employee participated.

In EEB Advisory Opinion 00-07, the Board advised that because a former state employee had not participated in an agency decision to use federal grant money to fund a specific contract, the former state employee may contract with a federal agency to fulfill the federally funded contract's provisions without violating RCW 42.52.080(2). The Board found that:

RCW 42.52.080(2) is intended to prevent former state officers or state employees from improperly acquiring a beneficial interest in a state contract or grant as a direct result of having participated in the decision to authorize or fund the contract or grant. In this case, the state employee did not participate in decisions relating to application of the federal grant, nor in the decision to use these grant monies to fund a contract for writing papers on treatment outcomes to be submitted to peer-reviewed journals. Therefore, the Board concludes that the employee would not violate RCW 42.52.080(2) if he left state employment and contracted with DASA for this purpose.

Similarly, the Former Project Leader did not participate in WDFW's decision to authorize or fund the contract between WDFW and Golder. Therefore, his work for Golder would not violate RCW 42.52.080(2).

The Ethics in Public Service Act further prohibits a former state employee from assisting another in any transaction involving the state in which the former employee participated. RCW 42.52.080(5), provides that:

No former state officer or state employee may at any time subsequent to his or her state employment assist another person, whether or not for compensation, in any transaction involving the state in which the former state officer or state employee at any time participated during state employment. This subsection shall not be construed to prohibit any employee or officer of a state employee organization from rendering assistance to state officers or state employees in the course of employee organization business.

The definition of the term “transaction involving the state” in RCW 42.52.010(21) includes a contract. As noted above, the Board considers the contract between WDFW and Golder a separate transaction from the contract between WDFW and BPA and the Former Project Leader did not participate in the Golder contract while a state employee. Therefore, RCW 42.52.080(5) does not prohibit the Former Project Leader from assisting Golder in a contract with WDFW to complete the final project report.

In this advisory opinion the Board has narrowly interpreted this provision of the Act and held that this project itself is not a “transaction involving the state.” Nevertheless, the Board believes that under a different set of facts they could find that a project, which may involve multiple contracts, could be considered a single "transaction involving the state." The Board cautions former state employees not to broadly rely on this opinion when they are asked to assist their current employers in contracts with their former state agency.