

STATE OF NEW YORK
COMMISSION ON PUBLIC INTEGRITY

Opinion No. 11-02

The lifetime bar prohibits a former State employee from receiving compensation for services in relation to his participation in an RFP and any resulting contract to evaluate a system over which he had high-level project and technical management responsibilities while employed by the State.

INTRODUCTION

The New York State Commission on Public Integrity (“Commission”) issues this advisory opinion in response to a request by [], a retired [] Engineer of the New York City Transit Authority (“NYCTA”), inquiring whether Public Officers Law 73(8)(a)(ii), generally referred to as the “lifetime bar,” prohibits him from participating in a Request for Proposals (“RFP”) and any resulting contract evaluating the installation of a [] system on the NYCTA’s [] Line, with respect to which [the former State employee] provided high-level project and technical management when he worked for NYCTA.

Pursuant to Executive Law §95(15), the Commission hereby renders its opinion that the lifetime bar prohibits [the former State employee’s] participation for compensation in the RFP and any resulting contract related to the [] Line [] installation because, were [the former State employee] to so participate, he would be rendering services and receiving compensation in relation to a transaction with respect to which he was directly concerned, in which he personally participated and which was under his active consideration while in State service.

BACKGROUND

Until [date], when he retired, [the former State employee] was employed by the NYCTA as a [] Engineer. [The former State employee's] duties included providing high level technical direction and project management related to the planning, design and construction of a [] system on the [] Line. Three managers who were working on the [] project reported directly to [the former State employee]. They were: the Construction Manager, who managed the day-to-day activities of the project; a Design Manager, who coordinated all the design activities for the project; and a Senior Director who managed all the technical aspects of the project, including the approval of documents and drawings. Additionally, [the former State employee] resolved technical and project management issues and conducted regular project status meetings with both NYCTA staff and contractors. [The former State employee] provided regular project status reports to higher-level management of the NYCTA, as well as to the Metropolitan Transportation Authority ("MTA"). He also oversaw and approved the implementation of a safety certification process to ensure the safety of the [] installation on the [] Line.

The project, which was awarded in [], had been substantially completed at the time of [the former State employee's] retirement from NYCTA in []. Since NYCTA did not have sufficiently equipped [] trains to support service demands, the [] installation operates utilizing a mixed fleet of cars. Once the existing cars have all been modified to utilize [], the original project objectives will be met.

[The former State employee] is a licensed Professional Engineer. Since his retirement, he has been working as an independent consultant to the rail industry. He is a principal in an engineering firm that plans to submit a proposal in response to a Federal Transit Administration ("FTA") request for proposals ("RFP") for the evaluation of [] for heavy and light rail transit

systems. There are only three [] systems in existence in the United States-- []. All three are to be evaluated as part of the project that is the subject of the RFP. The immediate objective of the anticipated FTA project is to “monitor, document, evaluate, assess and support the processes, evaluations, best practices and decisions of a heavy rail system, such as a metro or a subway for successful implementation of [] meeting the requirements of the Institute of Electrical and Electronics Engineers (“IEEE”) Standard [], Performance and Functional Requirements.” One of the systems to be evaluated as part of this project is the NYCTA’s [] Line [] installation.¹

The RFP Tasks

The RFP states that the selected organization should conduct the following tasks regarding the three [] installations, including the [] Line:

- Describe the operations and maintenance, service levels and safety issues of the baseline signaling control system before the [] was installed.
- For the [] system, identify the function requirements of the subsystems and how they are being implemented at the component level. Describe the function requirements and compare and contrast with IEEE Standard [].
- Identify and describe the performance requirements of the [] system. Describe how the performance requirements compare and contrast with IEEE Standard [].
- Identify and describe the enabling technologies used in the [] system and how they have been implemented.
- Document the system safety program plan and requirements for the [] system or the rail transit agency.

¹ The IEEE standards, which are only a part of the evaluation, were not used on the [] installation, since they did not exist until 2003.

- Document the [] system risk assessment process and how it satisfies the system safety requirements.

RFP Eligibility Requirements

The RFP eligibility requirements include six criteria including, in pertinent part, the following two:

- The qualifications of Key Personnel, which includes knowledge of and prior experience with train control technology and;
- The past performance of such personnel on activities relevant to the proposed work.

[The former State employee] states that, if awarded the FTA contract, his analysis would be based upon information obtained from:

- Documents provided to him by the NYCTA;
- Generic technical information and information in the public domain;
- Interviews with NYCTA employees; and
- Documents and information provided by the equipment supplier.

[The former State employee] has asked whether, under the circumstances set forth above, the lifetime bar set forth in Public Officers Law §73(8)(a)(ii) prohibits his participation in the RFP and any resulting contract. [the former State employee] has also asked whether the lifetime bar would similarly prohibit his consulting firm from participating in the RFP and any resulting contract.

APPLICABLE LAW

Public Officers Law §73(8)(a)(ii) provides, as follows:

No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.

DISCUSSION

The lifetime bar set forth in subsection 73(8)(a)(ii) prohibits a former State employee from providing services before a State agency, and from providing compensated services, in relation to any case, proceeding, application or transaction with respect to which he or she played a substantial role while in State service.² The Commission must determine whether [the former State employee's] involvement in the RFP and any resulting contract is prohibited by the lifetime bar. More specifically, the Commission must determine whether the RFP and any resulting contract are or would be "*in relation to*" a transaction with which [the former State employee] was directly concerned, in which he personally participated or which was under his active consideration while at NYCTA.³

The lifetime bar does not apply only before State agencies. It has been applied to prohibit services before the Legislature (*see*, Advisory Opinion No. 92-20); Congress and federal executive branch agencies (*see*, Advisory Opinion No. 93-13), or anywhere [*see*, Advisory Opinion Nos. 93-11, 94-18, 95-07, 95-15, 95-16, 95-19, and 95-32; Matter of McCulloch v New

² Since [the former State employee] retired in [], the two-year bar set forth in Public Officers Law §73(8)(a)(i) is not at issue.

³ The NYCTA's [] Line [] project is not a "case, proceeding [or] application." Public Officers Law §73(8)(a)(ii). Thus, in order to determine the proper application of the lifetime bar to [the former State employee's] circumstances, we need only consider [the former State employee's] participation as a "transaction." *Id.* On the other hand, the circumstances clearly show [the former State employee's] personal participation, direct concern, or active consideration in the NYCTA's [] Line [] project. *See* Advisory Opinion No. 91-18.

York State Ethics Commission, 285 A.D.2d 236 (Third Dept. 2001). The purpose of the lifetime bar is “to preclude the possibility that a former State employee may leverage his or her knowledge, experience and contacts gained in State service to his or her advantage or that of a client, thereby securing unwarranted privileges, consideration or action.” Advisory Opinions No. 90-11, 91-02 and 91-06. The determination of whether the lifetime bar applies is one that must be made on a case-by-case basis (*see*, Advisory Opinion No. 90-22).

With respect to the term “transaction” as it is used in the lifetime bar statute, in Advisory Opinion No. 10-05, the Commission recently said: “In this context, [a] ‘transaction’ should . . . be seen as a . . . discrete event, in which particular parties come together to conduct a particular piece of business.” Thus, the Commission determined that a “transaction” must meet the following four criteria: “a [1] particular event with [2] defined parties, [3] subject matter and [4] time horizon.”

The [] installation on the [] Line meets all four of these criteria. It was a particular event with defined parties, which included NYCTA, contractors and the suppliers and manufacturers of the equipment. The subject matter was also defined – that of a [] installation on the [] Line. The installation of the project also had a time horizon in that contractors were retained by NYCTA to complete project scopes within certain specified time frames. Thus, the Commission determines that the [] installation on the [] Line is a transaction for purposes of applying the lifetime bar.

The next question is whether the services [the former State employee] would render with respect to the RFP and the resultant contract would be “in relation to” the transaction— NYCTA’s [] installation on the [] Line—with respect to which [the former State employee] was directly concerned, in which he personally participated or which was under his active

consideration while in State service. The tasks set forth in the RFP include a complete analysis and evaluation of [] technology and safety, including that of the [] Line. [The former State employee's] duties while in State service included providing high level technical and project management direction related to the planning, design and construction of NYCTA's [] Line [] installation. The principal project managers all reported directly to him and he reported to high-level NYCTA management. He resolved technical and project management issues as well as conducted regular project status meetings with staff and contractors. He oversaw and approved the implementation of a safety certification process.

Under these circumstances, the RFP and any resulting contract are or would be "*in relation to*" a transaction with which [the former State employee] was directly concerned, in which he personally participated and which was under his active consideration while in State service. Consequently, the lifetime bar prohibits [the former State employee] from participating in the RFP and any resulting contract related to the [] Line [] project for compensation.

[The former State employee's] circumstances are similar to those that were at issue in Advisory Opinion 91-18. There, the Commission considered application of the lifetime bar to a former employee who asked whether he could participate in an RFP for which he would prepare the scope of services, act as project engineer and participate in the review and design of fire protection systems. Noting that specific information concerning the RFP requirements were not supplied, the Commission determined that the requesting individual was prohibited from participating in the design and inspection of fire suppression systems which he had designed and inspected for his former agency. The former employee was also precluded from the design, review, inspection, and analysis of fire and safety systems in facilities or mobile units on which he had previously worked. The Commission further determined that the former employee could

not work on any modification or extension of existing projects, training, designs, reviews and inspections or other transaction on which he worked while in State service.

The Commission stated:

[I]n each of these instances, the requesting individual was directly involved in the actual design, implementation, inspection, review or analysis of the projects. His knowledge regarding the projects is not cursory but, rather, is specific and significant. Such knowledge would, necessarily, place him in a position of great advantage with regard to preparing bid proposals ... It is this knowledge and resulting advantage which was gained solely because of his previous employment with (the former State agency) which he may not sell for profit

Similarly, [the former State employee] was intimately involved in the NYCTA's [] Line [] installation. He provided high level technical and project management. His knowledge of the project is not cursory, but is specific and significant. The RFP requirements give preference to applicants with prior knowledge and experience with []. Based on the RFP tasks and requirements for bidding, the special knowledge gained by [the former State employee] while in State service put him at a distinct advantage in the bidding process because of his personal and active involvement in the NYCTA's [] Line [] installation.

Similarly, in Advisory Opinion No. 91-12, the Commission considered whether the lifetime bar prohibited a former employee from bidding or participating on a particular building renovation project. The former employee maintained that, although he had been substantially involved with the project while a State employee, the project had changed significantly and other design consultants had been paid millions of dollars to redesign the project after he left State service. The Commission found the building renovation project to be a "transaction" within the meaning of the lifetime bar statute and determined that the former State employee was prohibited

by the lifetime bar from rendering services in relation to the renovation project because the subject property and the basic concept of the project had not materially changed, stating:

The fact that the exact design of the project has changed does not change the essential nature of the transaction.... The State agencies, the subject property and the basic concept of reconstruction have not changed to a degree necessary to render this project a different transaction in order to avoid application of the lifetime bar.

Here, the [] installation remains unchanged since [the former State employee's] separation from NYCTA. The State agency, the subject property and the project remain the same as when [the former State employee] managed the project. Thus, the RFP and any resulting contract would be "in relation to" a transaction on which [the former State employee] worked while in State service.

Finally, [the former State employee] has also asked whether the lifetime bar would similarly prohibit his engineering consulting firm from participating in the RFP and any resulting contract. [The former State employee's] firm may participate in the RFP and any resulting contract. [The former State employee] may not participate, for compensation, in either the RFP or any contract as it pertains to the [] Line. [The former State employee] may perform such services, so long as he is not compensated for any work related to the [] Line. [The former State employee] would be permitted to complete the tasks applicable to the [] and [] Line, for compensation, since he did not work on those projects while in State service.

CONCLUSION

The RFP and any resulting contract, with respect to the [] Line, would be "in relation to" a transaction with which [the former State employee] was directly concerned, in which he personally participated and which was under his active consideration while at NYCTA. Thus,

[the former State employee] is prohibited by the lifetime bar set forth in Public Officers Law §73(8)(a)(ii) from participating in the RFP and any resulting contract, for compensation, related to the [] Line. As set forth above, [the former State employee] would be permitted to complete the tasks applicable to those projects on which he did not work while in State service, specifically the [] and [] Lines. [The former State employee] may perform services with regard to the [] Line without compensation.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for the opinion or related supporting documentation.

All concur:

Mitra Hormozi
Chair

Hon. Richard J. Bartlett
John M. Brickman
Vernon Broderick
Richard D. Emery
Hon. Howard A. Levine
John T. Mitchell
Mark G. Peters,
Members

Dated: February 15, 2011