GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

CONFIDENTIAL

September 9, 2016

Ronaldo T. Nicholson, P.E.
PARSONS
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Dear Mr. Nicholson:

This letter responds to your request for a determination as to whether, for purposes of the District's postemployment restrictions, you participated personally and substantially in the South Capitol Street Project (Contract DCKA-2013-Q-0040), while employed with the District's Department of Transportation, and are thus barred from appearing or communicating with District agencies with respect to that project. For the reasons that follow, I find that the South Capitol Street Project was a particular matter involving specific parties prior to your departure, that your participation was personal and substantial, and that you are subject to the post-employment restrictions that prohibit you from acting as a representative, or appearing or communicating with District agencies with the intent to influence District employees.[1]

In your request, through your counsel, you state that:

> Parsons and a teaming partner, [redacted], are contemplating preparing and submitting a proposal for the Douglas Bridge replacement and ultimately all of the South Capitol Street improvements (the "Project"). It is expected that Nick would, following the second anniversary of his departure from DDOT (April 26, 2016), actively participate in the preparation and presentation of the Parsons/[redacted] submittal for that Project.

[1] Whether an individual's participation was personal and substantial is typically a question resolved by the agency where the former employee worked, as the agency is best able to gauge the extent of the former employee's work in a matter and the importance of that work to the matter. Federal OGE Informal Advisory Letter 96 x 7 (March 27, 1996). However, in this instance, it is the agency that referred the question to this office.

> As Chief Engineer for DDOT, the DDOT Project Manager and Deputy Chief Engineer (Nick's direct reports) and the consultant who authored the documents would seek guidance from Nick and approval of their recommendations to ensure that the path forward was consistent with the Directors'/Mayor's vision, budget allocations and the like. His review was high level and limited to ensuring that the structure and intent of the procurement document(s) were consistent with industry practice and DC procurement laws. The production development and day-to-day decision making were done by his subordinates.

Although former District employees are subject to three classes of post-employment restrictions, a one-year cooling off period, a two-year prohibition and a permanent prohibition, only the permanent prohibition is implicated because you left the District government more than two years ago. This restriction is what is commonly referred to as the "permanent ban." The permanent ban prohibits a former District government employee from "switching sides," i.e., appearing before any District agency for the life of a particular matter involving specific parties, in which the former employee participated personally and substantially.

DPM § 1811.3 provides that:

> A former government employee shall be permanently prohibited from knowingly acting as an attorney, agent, or representative in any formal or informal appearance before an agency as to a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government employee.

Similarly, DPM § 1811.4 states that "[a] former government employee shall be permanently prohibited from making any oral or written communication to an agency with the intent to influence that agency on behalf of another as to a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government employee."

These two provisions, therefore, operate as a permanent ban (for the duration of the specific contract or other matter), on a former employee undertaking representational activities, i.e., appearances and communications, regarding any particular matters involving specific parties on which the employee participated personally and substantially (i.e., did substantive work) while in the government's employ.

According to OCP's online posting, on June 13, 2013, in Contract DCKA-2013-Q-0040, DDOT solicited Statements of Qualifications (SOQs) from entities (Prospective Contractors) interested in providing design-build services for the South Capitol Street Corridor, Segments 1 & 2. At that time, it became a particular matter. On January 31, 2014, the District notified a short list of contractor teams of their eligibility to respond to the solicitation. At that time it became a particular matter involving specific parties. Your employment with the District government ended on April 26, 2014. That meant the agency had identified specific parties involving a particular matter -- Contract DCKA-2013-Q-0040, prior to the date of your departure.[2]

[2] See, e.g., 5 CFR 2641.201(4):

Based on those facts, and an interview with you held on May 16, 2016, the only remaining question is whether your participation in Contract DCKA-2013-Q-0040, during your tenure with DDOT was personal and substantial. If so, you are barred from communicating or appearing before any District agency with respect to that particular matter (contract). Notwithstanding the permanent prohibition, you would not be prohibited from working behind the scenes on the matter.

The DPM requires District employees to comply with federal post-employment statutes and the post-employment guidance found in the Code of Federal Regulations. See, DPM § 1811.1 ("District employees shall comply with the provisions of 18 U.S.C. § 207 and implementing regulations set forth at 5 C.F.R. Part 2641, Subparts A and B."). 5 C.F.R. § 2641.201 contains the federal guidance on matters that are subject to the permanent ban, and explains the meaning of the terms used in the DPM.

To participate personally and substantially in a matter means that you directly participated in the matter as a government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other direct participation in a matter. Additionally, the participation must have been of significance to the matter (or form a basis for a reasonable appearance of such significance), which may be based on the amount and importance of the employee's effort. 5 CFR § 2641.201(i).

Under 5 CFR § §2641.201 (i)(2)(ii), an employee has participated personally if they participated in a particular matter "[t]hrough direct and active supervision of the participation of any person he supervises, including a subordinate." Under 5 CFR § §2641.201(i)(3), to participate "substantially" means that the employee's involvement is of significance to the matter. If an employee "participates in the substantive merits of a matter, his participation may be substantial even though his role in the matter, or the aspect of the matter in which he is participating, may be minor in relation to the matter as a whole."

As part of this determination, we reviewed a large number of your DDOT emails and found at least 9 that document the nature of your participation in the South Capitol Street Project. These include the following:

Preliminary or informal stages in a matter. When a particular matter involving specific parties begins depends on the facts. A particular matter may involve specific parties prior to any formal action or filings by the agency or other parties. Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage, and preliminary or informal action is covered by the prohibition, provided that specific parties to the matter actually have been identified. With matters such as grants, contracts, and other agreements, ordinarily specific parties are first identified when initial proposals or indications of interest, such as responses to requests for proposals (RFP) or earlier expressions of interest, are received by the Government; in unusual circumstances, however, such as a sole source procurement or when there are sufficient indicia that the Government has explicitly identified a specific party in an otherwise ordinary prospective grant, contract, or agreement, specific parties may be identified even prior to the receipt of a proposal or expression of interest.

- An email from you to 4 DDOT employees and 4 contractors, dated 6/27/2013, recommending edits to potential questions and answers for a pre-proposal conference.
- An email from [redacted] of CH2M.com, the project consultant, dated 6/21/2013, to you in response to a request for the status of Phase 1 and the acquisition schedule for "South Cap."
- An email from you to your subordinate, [redacted] and others, dated 6/12/2013, directing that DDOT maintain the schedule for the Statement of Qualifications.
- An email dated 6/12/2013, from you responding to the DDOT Director's questions regarding a PLA for the South Capitol Street Project.
- An email from you to [redacted] and others, dated 6/11/2013, directing that certain changes be made to the SOQ/RFQ for the South Capitol Street Project.
- An email from you dated 6/6/2013, to [redacted] and others on DBE recommendations for the "SCS" signal design work.
- An email from you to [redacted] and [redacted] dated 5/17/2013, attaching the schedule for the Utility Accommodations Manual for the South Capitol Street Project.
- An email from you dated May 14, 2016, to [redacted] and [redacted] of CH2M Hill, directing [redacted] to print nondisclosure forms for your signature for the South Capitol Street procurement.
- An email from [redacted] of CH2M Hill, the project consultant, dated 6/28/2013, requesting your signature and approval of DDOT's Construction Impact Assessment Report for DDOT Structures.

Additionally, at the Pre-proposal Conference held at the Matthews Memorial Baptist Church on June 27, 2013, you are listed as a presenter. There is a photo of you at the podium, and in the background is a screen entitled "RFQ Questions." This is the last page of the presentation that according to the attendance log was attended by 156 interested persons.[3] This gives the appearance that you are representing the District government on this contract, such that if you were to make a presentation on behalf of a private entity on the same particular matter would be switching sides in a manner prohibited by the post-employment rules. Moreover, the Contracting Officer's Technical Representative on the South Capitol St Corridor RFQ dated June 13, 2013 is listed as [redacted] a program manager who you are directing or consulting with on a number of the emails above.[4] [redacted] also appears to report to you so that his participation is imputed to you under 5 CFR § 2641.201(2)(ii).

One example from the CFR reflects that an employee who is frequently consulted as to filings and strategy participates personally and substantially in the matter.[5] The email communications set forth above amply demonstrate that you participated in the development and strategy to implement the SOQ for the South Capitol Street Project.

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[3] See, http://bit.ly/2cbuqeR (Last visited September 9, 2016).
[4] See, http://bit.ly/2c5gWFx (Last visited September 9, 2016).
[5] See 5 C.F.R. § 2637.201, Example 2, stating that one way to measure a government attorney's participation. "A Government lawyer is not in charge of, nor has official responsibility for a particular case, but is frequently consulted as to filings, discovery, and strategy. Such an individual has personally and substantially participated in the matter.".

Two other examples from the CFR reflect that a **very low threshold** is required for a finding of personal and substantial participation.[6]

For those reasons, I conclude that your participation was personal and substantial, and that you are precluded from appearing or communicating with District agencies with respect to the South Capitol Street Project (Contract DCKA-2013-Q-0040).[7]

This advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.19), which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

You also are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that your identity will not be disclosed unless you consent to such disclosure in writing. We encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

Pursuant to section 219 (c)(1) of the Ethics Act (D.C. Official § 1–1162.19 (c)(1)), you may appeal this determination to the Ethics Board. If you wish to do so, please send a written appeal to: Board of Ethics and Government Accountability, Attn: John Grimaldi, Esq., 441 4th Street, N.W., Suite 830 South, Washington, D.C. 20001, or email to bega@dc.gov.

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

#1531-001 DS/BF

cc: John C. L. Guyer
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[6] See, Examples 2 and 3 to 5 C.F.R. § 2637.201 (i). Example 2: An Internal Revenue Service (IRS) attorney is neither in charge of nor does she have official responsibility for litigation involving a particular delinquent taxpayer. At the request of a co-worker who is assigned responsibility for the litigation, the lawyer provides advice concerning strategy during the discovery stage of the litigation. The IRS attorney participated personally in the litigation.
Example 3 to paragraph (i): The IRS attorney in the previous example had no further involvement in the litigation. She participated substantially in the litigation notwithstanding that the post-discovery stages of the litigation lasted for ten years after the day she offered her advice.

[7] As noted previously, you are not prohibited from participating behind-the-scenes with respect to the contract. See BEGA Advisory Opinion #1318-001, dated April 15, 2015, published at62 DCR 8152 (describing examples of permissible behind-the-scenes activity).