CONFLICT OF INTEREST; DOING BUSINESS WITH ONE'S AGENCY

WATER MANAGEMENT DISTRICT GOVERNING BOARD
MEMBER'S COMPANIES DOING BUSINESS WITH DISTRICT

To: Edward J. Pozzuoli, Esquire (Fort Lauderdale)

SUMMARY:

Advice is provided to a potential appointee to the governing board of a water management district concerning contracts between his companies and the district. CEOs 16-7, 11-2, 06-28, 02-14, 95-8, 90-39, and 81-28 are referenced.¹

QUESTION 1:

Do contracts between companies of a member of the governing board of a Water Management District and the District, entered into prior to the member's appointment to the governing board, create a prohibited conflict of interest for the member?

Question 1 is answered as set forth below.

¹ Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).
enterprises, some of which are doing business with the WMD under contracts or agreements already in existence. More particularly, you state that there is an active agreement (executed or entered into in 2015) between a corporation, of which the individual is the founder and the majority shareholder, and the WMD, for time and materials regarding a stormwater treatment area; that there is a second agreement, between a wholly-owned subsidiary of the corporation and the WMD, for debris-hauling services, executed or entered into in 2017, which has a term of five years (expires 2022), but which has yet to be activated (has yet to begin delivery of services); and that there is a third contract, for reservoir stormwater treatment, entered into in February 2019.²

Relevant prohibitions in the Code of Ethics for Public Officers and Employees (Part III, Chapter 112, Florida Statutes) provide:

DOING BUSINESS WITH ONE'S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political

² As to the February 2019 contract, you state that it was originally bid in August 2014, in a sealed competitive process; that a company that is not a company of the individual was the low bidder and was awarded the contract, but that the individual's corporation was the second lowest bidder, by less than one half of one percent; and that in December 2018 the individual's corporation was contacted by staff of the WMD and informed that the lowest bidder company had been removed from the project (which allegedly was behind schedule). The individual's corporation, as the original second lowest bidder, was already familiar with the project, and the WMD moved quickly to ensure that the project would progress as soon as possible in order for the WMD to have use of the stormwater treatment area, prior to full project completion. After several meetings and reviews, the WMD and the individual's corporation entered into the contract, which authorized a payment amount up to the amount that remained on the original contract with the original lowest bidder company. You relate that this contracting process between the WMD and the individual's corporation began well before any announcement of the individual's potential appointment to the governing board.
subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator. This subsection shall not affect or be construed to prohibit contracts entered into prior to:

(a) October 1, 1975.
(b) Qualification for elective office.
(c) Appointment to public office.
(d) Beginning public employment.
[Section 112.313(3), Florida Statutes.]

CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties. [Section 112.313(7)(a), Florida Statutes.]

We find that the contracts mentioned above do not create a prohibited conflict of interest under either Section 112.313(3) or Section 112.313(7)(a), Florida Statutes. As to Section 112.313(3), it expressly provides that its prohibitions do not apply to contracts entered into prior to appointment to public office, the contracts were entered into in 2015, 2017, and February 2019, and the individual has yet to be appointed to the WMD governing board. Concerning Section 112.313(7)(a), while it does not contain an express exemption or "grandfather clause," as does Section 112.313(3), the Commission on Ethics has applied Section 112.316, Florida Statutes, to exempt or "grandfather" such contracts from Section 112.313(7)(a), reasoning that there is no conflict regarding business entered into between one's private company and his public agency when he held no public position and thus had no public duties which he could have been tempted
to dishonor. See, among others, CEO 95-8 (school board member's corporations doing business with school district) and CEO 90-39 (water management district board applicant employed with laboratory receiving funds from the district).  

**QUESTION 2:**

Would contracts between the individual's companies and the WMD, entered into after he is appointed to the governing board, create a prohibited conflict under Section 112.313(3) or Section 112.313(7)(a)?

Question 2 is answered in the affirmative, unless an exemption (e.g., sealed competitive bidding) under Section 112.313(12), Florida Statutes, applies.

Continuing, you relate that after appointment to the governing board the individual's

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3 Renewals or extensions of a grandfathered contract, occurring after a public officer's appointment, will not be grandfathered, unless the renewal or extension is expressly provided for (with a term or time period of the extension certain) in the original contract, and unless the renewal or extension occasions no change in the contract. See CEO 02-14, among others.

4 Section 112.316, Florida Statutes, provides:

CONSTRUCTION.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

5 The exemption requires sealed, competitive bidding; invitations to negotiate (ITNs), requests for proposals (RFPs), or similar procurement mechanisms sometimes referred to as "bidding," do not satisfy the exemption. See, among others, CEO 81-28.
companies will not enter into additional contracts with the WMD, unless the contracts are awarded under sealed competitive bidding; and that the individual will not be involved, directly or indirectly, concerning the development of the scope of work of any such contract, that he will not be involved in any discussion or decision of the award of such a contract, and that the will file the appropriate disclosure form (CE Form 3A, Interest in Competitive Bid for Public Business) prior to or at the time of his company's submission of a bid.6

QUESTION 3:
Would the WMD's purchase or lease of a parcel of real property owned by an entity
in which the individual is a partner create a prohibited conflict under Section
112.313(3) or Section 112.313(7)(a), if the property is a "sole source?"

Question 3 is answered in the negative, provided that Section 112.313(12)(e), Florida

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6 The competitive bidding exemption, found in Section 112,313(12)(b), Florida Statutes, states:

. . . no person shall be held in violation of subsection (3) or subsection (7) if:
(b) The business is awarded under a system of sealed, competitive bidding to
the lowest or best bidder and:
1. The official or the official's spouse or child has in no way participated in
the determination of the bid specifications or the determination of the lowest or best
bidder;
2. The official or the official's spouse or child has in no way used or attempted
to use the official’s influence to persuade the agency or any personnel thereof to
enter such a contract other than by the mere submission of the bid; and
3. The official, prior to or at the time of the submission of the bid, has filed a
statement with the Commission on Ethics, if the official is a state officer or
employee, or with the supervisor of elections of the county in which the agency has
its principal office, if the official is an officer or employee of a political subdivision,
disclosing the official’s interest, or the interest of the official's spouse or child, and
the nature of the intended business.
Statutes, is complied with. Section 112.313(12)(e) provides:

\[\ldots\] no person shall be held in violation of subsection (3) or subsection (7) if:
(e) The business entity involved is the only source of supply within the political subdivision of the officer or employee and there is full disclosure by the officer or employee of his or her interest in the business entity to the governing body of the political subdivision prior to the purchase, rental, sale, leasing, or other business being transacted.

You state that as part of the restoration of Biscayne Bay, the WMD is studying and considering the purchase or lease of a parcel which is owned by an entity in which the individual is a minority partner. As part of its analysis, the WMD will determine the necessity of the purchase of the parcel and the parcel's specifics or uniqueness for the WMD's purpose (efforts toward restoration of the Bay).

Important to whether the property is a sole source will be objective determinations by WMD staff in this regard, coupled with the individual refraining from discussing the property's desirability for the project with WMD staff or any fellow governing board member and his refraining from voting and participating as a governing board member regarding project matters. See CEO 11-2 (water management district governing board member employee of landowner party to water project agreement with district), CEO 16-7 (water management district basin board member owner of company providing growth modeling to district), and CEO 06-28 (assistant principal selling real property to school district).

Your questions are answered accordingly.\(^8\)

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\(^7\) CE Form 4A/Part B (Disclosure of Business Transaction, Relationship or Interest/Disclosure of Interest in Sole Source of Supply) is the form to be used for the disclosure required by Section 112.313(12)(e).

\(^8\) In addition to the individual refraining from involvement as required to come within the exemptions of Section 112.313(12)(b) and Section 112.313(12)(e), he also must comply with
Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, the voting/participation conflicts law, regarding any votes/matters of the governing board which would inure to his special private gain or loss, to that of his companies, or to that of any other person or entity as listed in these statutes. CE Form 8B (Memorandum of Voting Conflict for County, Municipal, and other Local Public Officers) should be used in conjunction with these statutes.
Joy Cicero

From: Joy Cicero <jjc@trippscott.com>
Sent: Tuesday, March 05, 2019 5:25 PM
To: Doss, Virindhia; Anderson, Chris
Cc: Ed J. Pozzuoli
Subject: Bergeron
Attachments: 02-22-19 Bergeron Letter with Attachment A to Virindhia Doss, Florida Commission on Ethics (sent 03-05-19).pdf

To: Executive Director Doss
       General Counsel & Deputy Executive Director Anderson

Please see the attached letter, including Attachment “A” from Ed Pozzuoli.

Thank you.

TRIPP SCOTT 50
ATTORNEYS AT LAW

Joy Cicero

Executive Legal Assistant
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Best Place to Work | Florida Trend | South Florida Business Journal
February 22, 2019

Virlindia Doss, Executive Director
Florida Commission on Ethics
325 John Knox Road
Building E., Suite 200
Tallahassee, Florida 32303

Dear Ms. Doss,

I have the privilege of representing Ronald M. Bergeron, Sr., the C.E.O. of Bergeron Land Development, Inc. and Bergeron Emergency Services. Mr. Bergeron is anticipating an appointment to the South Florida Water Management District Board and as such is seeking an advisory opinion from the Florida Ethics Commission regarding any potential concerns.

Mr. Bergeron is the founder and majority shareholder of Bergeron Land Development, Inc. since 1965. Founded in 2006, Bergeron Emergency Services is a wholly owned subsidiary of Bergeron Land Development, Inc.

PRE-APPOINTMENT AGREEMENTS

There are two active agreements between Bergeron Land Development with the South Florida Water Management District (SFWMD). The first was executed on November 19, 2015 for a project titled Stormwater Treatment Area, Martin County, Florida. It is a time and materials contract.

Bergeron Emergency Services, Inc. executed a contract in August 2017 with the South Florida Water Management District for emergency debris hauling services. The contract term is for 5 years but to date has never been activated.

All of the above contracts predate any potential appointment of Ron Bergeron to the SFWMD Board. Section 112.313(3)(c) Fla. Stat., specifically provides an exception to the prohibition to “doing business with one’s agency” for pre-appointment contracts or business. Ethics opinion 14-16 is consistent with this principle. Moreover, in anticipation of an appointment to the SFWMD board, Mr. Bergeron has established internal company processes which would remove him from any contact with SFWMD staff, board members, professionals and contractors with regard to the above mentioned and potential future projects.
POTENTIAL POST-APPOINTMENT WORK

As for post-appointment activity or work, the Bergeron companies will not engage in a future contractual relationship with SFWMD unless it is pursuant to a sealed, competitive bidding process. In that instance Mr. Bergeron will not be involved directly or indirectly, with these projects concerning the development of the scope of work as well as any discussion or decision of the actual award. A disclosure of interest form will be filed prior to or at the time of submission of any such bid with the Commission on Ethics.

Also, as part of the restoration of Biscayne Bay, SFWMD is currently studying and considering the purchase or lease of a parcel which is owned by an entity which Mr. Bergeron is a minority partner. As part of the analysis, SFWMD will determine the necessity of its purchase and the specific uniqueness of the property. If the purchase is determined necessary for the restoration of Biscayne Bay then we believe that any such purchase would be exempt and consistent with the Ethic opinion 11-02. That opinion held that due to applicability of the “sole source” exemption of Section 112.313(12)e, Florida Statutes, a prohibited conflict of interest would not be created under either Section 112.313(3) or Section 112.313(7)(a), Florida Statutes, where a water management district would enter into a water project agreement with a landowner of which a member of the district’s governing board is an employee and corporate officer. Again, a timely disclosure of interest form will be filed should the SFWMD determine the necessity of purchase for the land.

Section 112.313(7)(a), Fla. Stat., provides that no public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee … that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties. Subsection 1 further provides when the agency referred to is that certain kind of special tax district created by general or special law and is limited specifically to constructing, maintaining, managing, and financing improvements in the land area over which the agency has jurisdiction, or when the agency has been organized pursuant to chapter 298, then employment with, or entering into a contractual relationship with, such business entity by a public officer or employee of such agency shall not be prohibited by this subsection or be deemed a conflict per se. Furthermore, a review of the SFWMD agendas over the past 14 months did not reveal any potential conflicts concerning the Bergeron contracts nor are any future conflicts anticipated. As such, Mr. Bergeron would be able to fully participate in the robust set of issues before the Board and fulfill his duties as a commissioner.

We thank you for your consideration of this matter and request that an advisory opinion be issued based upon the facts set forth above. Please let me know if you have any questions or need additional information.

Very truly yours,

Edward J. Pozzuoli, Esq.

EJP/je
### Attachment A

**Bergeron Contracts**

<table>
<thead>
<tr>
<th>Project Title</th>
<th>Contract Number</th>
<th>Effective Date</th>
</tr>
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<tbody>
<tr>
<td>Emergency Debris Hauling Services</td>
<td>4600003718</td>
<td>8/22/2017</td>
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<tr>
<td>C-44 Reservoir/STA Project, Stormwater Treatment Area, Martin County, Florida</td>
<td>4600003959</td>
<td>2/7/2019</td>
</tr>
<tr>
<td>Stormwater Treatment Area (STA) 1W Expansion#1, Palm Beach County, Florida</td>
<td>4600003343, 6000000730</td>
<td>12/3/2015</td>
</tr>
</tbody>
</table>
To: Executive Director Doss
    General Counsel & Deputy Director Anderson

Please see the attached letter from Ed Pozzuoli.

Thank you.

Joy Cicero

Executive Legal Assistant
phone 954-525-7500 | fax 954-761-8475 | direct 954-525-7500 x3710
110 SE Sixth Street, Suite 1500, Fort Lauderdale, FL 33301 | www.trippscott.com
March 15, 2019

Virlindia Doss, Executive Director
The Florida Commission on Ethics
P.O. Drawer 15709
Tallahassee, FL 32317-5709

Re: Advisory Ethics Opinion for Ronald Bergeron, Sr.

Dear Ms. Doss,

We previously submitted a request for an advisory ethics opinion for our client, Ronald Bergeron, regarding a potential appointment to the South Florida Water Management District Board. In an effort to be fully transparent, we offer the following information pertaining to the contract for the C-44 Reservoir/STA Project, Stormwater Treatment Area, Martin County, Florida (contract #4600003959) with an effective date of February 7, 2019.

First, we have previously stated this contract pre-dates any potential appointment of Ronald Bergeron to the South Florida Water Management District Board. Section 112.313(3)(c) Fla. Stat., specifically provides an exception to the prohibition to “doing business with one’s agency” for pre-appointment contracts or business.

Secondly, the C-44 contract was originally bid back on August 19, 2014 in a sealed competitive process. Blue Goose was the low bidder and was subsequently awarded the contract. Bergeron Land Development (BLD) was the second lowest bidder by less than ½ percent.

About four years later, in early December, 2018, BLD was contacted by SFWMD staff and was informed that Blue Goose had been removed from the subject project. The project was allegedly behind schedule and needed to be completed prior to the commencement of the USACE C44 Reservoir Project which is scheduled to be completed 2021. As the original second low bidder, BLD was already familiar with project, was near completion of a similar project in terms of scope and complexity (delivering it on time and within budget), and was in the same general geographic area using the same type of equipment on that project needed for the subject project. Lastly, schedule concerns the District moved quickly to insure that the subject project would be “Flow Capable” as soon as possible. Once “Flow Capable” the District would have beneficial use of the STA prior to its completion.
An initial meeting was set with the District on around December 6, 2018 for further discussions regarding the project. Thereafter, there was an on-site visit on 12/13/2018. Due to the holidays, the next meeting was not scheduled until 12/27/2018 and another site visit was immediately scheduled 1/3/2019. At the January 10, 2019 SFWMD Governing Board Meeting the C-44 contract was approved (Item #25 of the agenda). Following this meeting, contract negotiations continued on January 17, 2019. After several versions of contract reviews, a final draft was represented on February 5, 2019. The balance remaining on the original contract with Blue Goose Construction, LLC was $25,017,003.70 and this new contract authorized up to that same amount. BLD signed the agreement February 6, 2019 and the District signed on February 7, 2019. A Notice to Proceed was issued on February 11, 2019. The contracting process began well before any announcement of Mr. Bergeron’s potential appointment to be on the South Florida Water Management Board.

We thank you for your consideration of this matter. Please advise if additional information is required to reach an opinion.

Very truly yours,

Edward J. Pozzuoli, Esq.

EJP/jjc