

Advisory Opinion
Case No. 03049.A, Post-employment

To: [John]
Date: October 20, 2003

You formerly worked as a civil engineer in the City's Department of [A] ([the Department]). On September 5, 2003, you resigned from City service. On September 8, you began employment with [Company Alpha] ([Alpha]). In a letter dated September 15, 2003, you requested an advisory opinion from the Board of Ethics on whether, under the post-employment provisions of the Governmental Ethics Ordinance, you would be prohibited from assisting your new employer on the "South [] Street at [] Street Viaduct Rehabilitation Project" ([the Project]), were the City to select [Alpha] as construction manager on that project.

After careful consideration of the facts you presented and the relevant law, the Board has determined that neither the permanent nor the one-year prohibitions set forth in Section 2-156-100(b) of the Ethics Ordinance prohibits you from assisting [Alpha] Infrastructure Services, Ltd. in providing construction management services to the City on the "South [] Street at [] Street Viaduct Rehabilitation Project."

FACTS: You are an Illinois-licensed, civil engineer. You received a bachelor of science degree in civil engineering in [], and a master of science degree in civil engineering in [], both from the University of Illinois. From [] until your resignation in September [], you worked as a civil engineer in [the Department]'s Bureau of [1]. During the course of your City service, you worked exclusively as a "resident engineer"¹ on the Bureau's In-House Construction Team. In that position, you supervised the Bureau's labor force on a variety of construction projects. Depending upon the particular project involved, that labor force included any or all of the following City tradespeople: iron workers, laborers, machinists, sheet metal workers, pipe fitters, carpenters, hoisting engineers, electricians, plumbers and truck drivers. You were responsible for ensuring that construction proceeded on schedule, with approved materials and according to plan. This included reviewing design plans; coordinating the construction schedule; ordering and tracking the timely delivery of necessary materials²; scheduling and assigning tasks to the various Bureau tradespeople; supervising the actual construction work; and responding to design or construction issues that arose.

¹A "resident engineer," you explained, is one who works in the field or on-site.

²You stated that, depending on the construction project, you ordered materials from the Bureau's own Maintenance Facility, as well as from outside vendors who appeared on an "approved vendor list" established by others in the Bureau.

Primary City Duties and Responsibilities. During your [] tenure with [the Department], you had primary responsibility for 6 major construction projects, on which you worked, one after the other. Depending upon the particular project, you were assigned to the project, and supervised, by any of the following Bureau staff: the Chief Design Engineer for In-House Construction, the Chief Bridge Engineer or the General Superintendent of Field Operations. A description of each project follows below.

1. *[The Department] Bureau of [1] Maintenance Facility.* The first major project on which you worked following your hire in [] was the [the Department] Bureau of [1] Maintenance Facility, located at [] Street and [] Avenue. You served as project manager for the design-build of this 1600 sq. ft. facility. The project [] lasted approximately one year. During that period, the project was your primary City responsibility. Your duties included surveying the site, working with other City engineers and architects to conceptualize and design the facility, acquiring permits, creating and reviewing shop drawings, estimating and ordering materials, and scheduling and supervising day-to-day construction by in-house City forces.

2. [] *Street Bascule Bridge Rehabilitation Project.* The next major project on which you worked was the [] Street Bascule³ Bridge Rehabilitation Project. You served as resident engineer on the project and supervised day-to-day construction by in-house City forces pursuant to construction plans developed by an outside engineering consulting firm.⁴ The project entailed shoring up the counterweight box, removing and replacing the bridge deck, installing new “approaches”⁵, replacing the bridgehouse, refurbishing the mechanical and electrical systems, as well as repairing the “truss work.”⁶ The project lasted almost a year, during which time it was your primary City responsibility.

3. *South [] Street Bascule Bridge Rehabilitation Project.* Next, you worked on the South [] Street Bascule Bridge Rehabilitation Project. You served as resident engineer on this project and supervised day-to-day construction by in-house City forces pursuant to construction plans developed by an outside engineering consulting firm.⁷ The project entailed the removal and replacement of the bridge deck, truss repairs, new approaches and a new center lock mechanism. The project lasted approximately one year, during which time it was your primary City responsibility.

³ “Bascule,” you explained, refers to a movable, as opposed to a fixed, bridge.

⁴You stated that you had no involvement in the selection of the consultant or in the development of the construction plans.

⁵An “approach,” you explained, is the 30 feet from grade or different structure to the bridge itself.

⁶“Truss work,” you explained, is the framework on the sides of a movable bridge that supports the deck.

⁷You stated that you had no involvement in the selection of the consultant or in the development of the construction plans.

4. [] *Harbor Pedestrian Bridge Project*. The next major project on which you worked was the [] Harbor Pedestrian Bridge Project. You served as resident engineer on this project and supervised day-to-day construction by in-house City forces pursuant to construction plans developed by other City engineers and architects. This project entailed the complete installation of a steel girder bridge structure including new foundations, retaining walls, “wing walls,” and a reinforced concrete deck. The project lasted approximately nine months, during which time it was your primary City responsibility.

5. [] *Avenue Bascule Bridge Rehabilitation Project*. Next, you worked on the [] Avenue Bascule Bridge Rehabilitation Project. You served as resident engineer on this project and supervised day-to-day construction by in-house City forces pursuant to construction plans developed by an outside engineering consulting firm.⁸ The project entailed the replacement of the entire bridge deck system and portions of the trusses and approaches. It further entailed refurbishing the bridge’s electrical system and replacement of its center lock mechanism. The project lasted approximately 15 months, during which time it was your primary City responsibility.

6. [] *Street Bascule Bridge Sidewalk Replacement Project*. The final major project on which you worked as a City employee was the [] Street Bascule Bridge Sidewalk Replacement Project. You served as resident engineer on this project and supervised day-to-day construction by in-house City forces pursuant to construction plans developed by other City engineers and architects. This project entailed replacing the existing steel sidewalk deck with a new fiberglass deck system, and required re-balancing the sidewalk by adjusting the bridge’s counterweights. You worked on the project for approximately two months. When you left City service in September 2003, the project was approximately 50% complete.

Other City Projects. In addition to the 6 projects described above, for which you had primary responsibility, you assisted other Bureau field engineers on 2 other major construction projects during the course of your City service. In each instance, you served as a resource to the assigned engineer on an as-needed basis, e.g. taking measurements, resolving design issues, etc. The first project involved the replacement of the expansion joints in the City viaduct located at [] and [] Avenues. The construction plans for this project were developed by City architects and engineers, and the project lasted approximately 6 months. The second project involved the construction of a new entrance ramp onto the City’s Skyway at [] Street. The construction plans for this project were developed by an outside engineering consulting firm. This project was scheduled to last approximately one year and was approximately 80% complete at the time you resigned from City service.

Secondary Responsibilities as A City Employee. In addition to your primary City duties described above, you had various secondary responsibilities. These ranged from supervising assorted smaller

⁸You stated that you had no involvement in the selection of the consultant or in the development of the construction plans.

construction projects that lasted anywhere from several days to several weeks⁹; to conducting emergency inspections of viaducts damaged in vehicle crashes; to instructing public utilities workmen where to support fiber optic cable lines on City bridges without compromising those structures.

[Alpha] Infrastructure Services Ltd. and the South [] Street at [] Street Viaduct Rehabilitation Project. On September 8, 2003, you began employment with [Alpha] as a resident engineer. [Alpha], you stated, has responded to a Request for Proposals (RFP) from [the Department]/Bureau of [1] to provide construction management services to the City on a scheduled rehabilitation project known as the “South [] Street at [] Street Viaduct Rehabilitation Project” ([the Project]). You have asked whether you would be prohibited from assisting your new employer as a resident engineer on the project, were the City to select [Alpha] as construction manager.

As you understand it, the project entails removing and replacing, in stages, 2 viaducts on [] Street, as well as the sidewalks underneath the viaducts and the roadway from [] Street to [] Street. The project would last approximately one year. The actual construction would not be performed by [Alpha]; instead, as construction manager, [Alpha] would oversee the work of an outside City contractor. As a [Alpha] resident engineer, you would work on-site. You would be responsible for ensuring that the outside contractor performs the viaduct rehabilitation work on schedule, with approved materials, and according to plan¹⁰; answering design questions that the contractor might raise; resolving, in consultation with the City, design problems that might be encountered during construction; and implementing any necessary design changes to the project.

You stated that, during your City tenure, you had no involvement with [Alpha] or with any aspect of the [Project], including the Project RFP to which [Alpha] has responded.¹¹ You also stated that, to the best of your recollection, you had no involvement during your City tenure, either directly or through the City tradespeople you supervised, with any construction or maintenance of the viaducts, roadway or sidewalks located at South [] and [] Streets.

LAW: The relevant provision of the Governmental Ethics Ordinance is subsection 2-156-100(b) of the section entitled “Post-Employment Restrictions.” It states:

No former official or employee shall, for a period of one year after the termination of the official's or employee's term of office or employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the official or

⁹These smaller projects included re-balancing bascule bridges, cleaning bridge pits, refurbishing sections of walkway railing, and replacing single blocks of viaduct sidewalk or entire sidewalk systems.

¹⁰You stated that you do not know whether the plans for the [the Project] were prepared by City engineers/architects and/or an outside consultant.

¹¹Furthermore, you stated that, during your City tenure, you had no involvement with any City RFQ or RFP.

employee participated personally and substantially in the subject matter of the transaction during his term of office or employment; provided, that if the official or employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.

Under this provision, then, a former employee is subject to two, distinct restrictions on employment after leaving City service. First, *for one year* after leaving City employment, a former employee is prohibited from assisting or representing any person, other than the City, in any business transaction involving the City or any of its agencies, if he or she participated personally and substantially in the subject matter of that transaction during City employment. Second, a former City employee is *permanently* prohibited from assisting or representing any person, other than the City, on a contract if, as a City employee, he or she exercised “contract management authority” with respect to that contract.

Section 2-156-010(g) of the Ordinance defines the term “contract management authority” as follows:

"Contract management authority" means personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance.

Permanent Prohibition. We first address the permanent prohibition contained in the second clause of subsection 2-156-100(b). You have stated that, during your City tenure, you had no involvement, with [the Project] RFP for construction management services to which your new employer has responded. Based on your representation, the Board concludes that you did not exercise “contract management authority” over that RFP and, therefore, are not subject to the permanent prohibition as it relates to any ensuing contract based on that RFP.

One-Year Prohibition. Next, we address the one-year prohibition contained in the first clause of subsection 2-156-100(b). Under that provision, a former employee is prohibited for one year after leaving City employment, from assisting or representing any person, other than the City, in any business transaction involving the City or any of its agencies, if he or she participated personally and substantially in the subject matter of that transaction during City employment. Clearly, the provision of construction management services by [Alpha] to [the Department]’s Bureau of [1] on the scheduled “South [] Street at [] Street Viaduct Rehabilitation Project” would constitute a business transaction involving the City. For purposes of analysis under the one-year prohibition, therefore, the issue is whether you can be said to have been “personally and substantially involved” in the “subject matter” of that transaction as a City employee. The Board first addresses the issue of subject matter.

Historically, the Board has analyzed subject matter in one of two ways, depending on the facts of the particular case. In some cases, the Board has analyzed subject matter as the application of a City program to particular sites. For example, in Case No. 98020.A, the Board held that a former employee who coordinated the supervision of field construction for City development projects was

prohibited for one year from assisting or representing any person, other than the City, on a business transaction involving the application of a particular City construction program to any site on which he had worked with that program as a City employee. (*See also*, Case Nos. 96001.A, 96015.A, 96024.A).

By contrast, in Case No. 93038.A, the Director of a City program asked the Board for general guidance on the restrictions imposed by the Ethics Ordinance on the work he could undertake upon leaving City employ. Noting that the Director of the City program established the program's policies, coordinated each stage of the program and was substantially involved in all areas of the program, the Board determined that the Ethics Ordinance prohibited the Director for one year after leaving City employment from assisting or representing any person, other than the City, in any matter involving that program.

In your case, you worked exclusively as a resident engineer on the Bureau's In-House Construction Team. Over the course of your [] City tenure, you were assigned by higher-level Bureau engineers to 6 major construction projects. In each instance, the assigned project, at the time, constituted your primary City responsibility. In each instance, the project lasted, on average, approximately 9 months. In each instance, you were responsible for the successful completion of the project according to construction plans developed by other engineers and architects. In each instance, you worked on-site, supervising the day-to-day construction by City tradespeople. Based on the foregoing factors, the Board concludes that, in analyzing how the Ordinance's one-year prohibition applies to you, a project or site-specific analysis is appropriate.

In this case, the Board finds the relevant subject matter to be "the refurbishing of the City viaducts, sidewalks and roadway at [] and []Streets." You have stated that, during your City tenure, you had no involvement with the [the Project] RFP to which [Alpha] has responded, nor with any other aspect of the project itself. You have also stated that, to the best of your recollection, you had no involvement during your City tenure, either directly or through the City tradespeople you supervised, with any construction or maintenance of the viaducts, roadway or sidewalks located at that location. Based on your representations, the Board concludes that, during your City tenure, you participated neither personally nor substantially in the refurbishing of those structures and, therefore, are not subject to the one-year prohibition as it relates to [the Project].

DETERMINATIONS: After careful consideration of the facts you presented and the relevant law, the Board has determined that neither the permanent nor the one-year prohibitions set forth in Section 2-156-100(b) of the Ethics Ordinance prohibits you from assisting [Alpha] Infrastructure Services, Ltd. in providing construction management services to the City on the "South []Street at [] Street Viaduct Rehabilitation Project."

Our determinations do not necessarily dispose of all the issues relevant to your situation, but are based solely on the application of the City Governmental Ethics Ordinance to the facts stated in this opinion. If the facts presented are incomplete or incorrect, please notify the Board immediately, as any change in the facts may alter our opinion. Other laws or rules may also apply to your situation.

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We note that any City department may adopt restrictions that are more stringent than those imposed by the Governmental Ethics Ordinance.

CONFIDENTIAL INFORMATION: We also bring to your attention Section 2-156-070 of the Governmental Ethics Ordinance, "Use or Disclosure of Confidential Information." This section prohibits you, as a former City employee, from using or revealing confidential information you acquired through your City employment. Confidential information, for purposes of this section, means any information that may not be obtained under the Illinois Freedom of Information Act, as amended.

RELIANCE: This opinion may be relied upon by: 1) any person involved in the specific transaction or activity with respect to which this opinion is rendered; and 2) any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity with respect to which this opinion is rendered.

Darryl L. DePriest

Chair

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