

Advisory Opinion
Case No. 07019.A, Post-Employment

To: John Smith
Date: August 15, 2007

You formerly served as Commissioner of the City's Department of S ("DS"). Currently, you are an employee of Inc. ("Inc."). On April 18, 2007, you contacted the Board, seeking guidance under the post-employment provisions of the City's Governmental Ethics Ordinance. Specifically, you asked whether you may assist Inc. on the Task Order relating to DS Project *-*-*, if the Task Order is awarded to Inc.

Because more than a year has elapsed since you resigned from City service, the Ordinance's one-year post-employment prohibition is not at issue in this case. Instead, the issue is whether, during your City tenure, you exercised "contract management authority" over the Task Order, thus subjecting you to the Ordinance's permanent post-employment prohibition.

After carefully considering the facts presented and the relevant law, **the Board has determined** that you are permanently prohibited, under Section 2-156-100(b) of the Governmental Ethics Ordinance, from assisting or representing Inc., or any other person other than the City, on any contract over which you exercised "contract management authority" as a City employee, including, but not limited to, the Task Order relating to DS Project *-*-*, as well as any other Task Order/ Task Order Solicitation issued pursuant to the authority of Contract [*].

A recitation of the pertinent facts, the relevant law, and the Board's analysis, conclusions and determinations in this matter are set forth below.

Statement of the Facts. Through consultations with you and current DS staff, Board of Ethics staff developed the following pertinent facts:

- On/about October 30, 20__, the City's Department of S ("DS") entered into a professional services agreement, "Contract [*]," with Inc. to provide "architectural and engineering services and construction management services." As then-Commissioner of the Department of S, you signed Contract [*] on behalf of DS. The agreement was a Depends Upon Requirements ("DUR") agreement with a dollar value not to exceed \$***,000, and a term of January 1, 20__ through December 31, 20__.

- Attachment 1-B to Contract [*] described the task order process to be followed under the agreement:

"The Commissioner will identify a project for which Services are to be provided. The Consultant [in other words, Inc. and/or other pre-qualified vendors] will be notified of the project, including the general scope of the project and the project completion date by the Commissioner. Upon receipt of project notice [in other words, a "Solicitation"] issued by the Commissioner, Consultant will submit a Task order form which identifies the estimated budget for the project (based upon the number of

hours necessary to complete the project and subject to all of the compensation terms of this agreement, including the hourly and overhead rates¹), the schedule for performance of the project (which must meet the project completion date established by the Commissioner) and any other additional information required by the Commissioner.

Following Consultant's submission of the Task Order, the Commissioner and the Chief Procurement Officer will review the task order and may elect to approve it, reject it or use it as a basis for further negotiations with the Consultant regarding the scope of the project and the project completion date. If the City and the Consultant negotiate the scope of the project and the project completion date, the Consultant must submit a revised Task Order (based upon such negotiations) to the City for approval.

All Task Orders are subject to the approval of the Chief Procurement Officer and no Task Order will become binding upon the City until it is approved, in writing, by the Chief Procurement Officer. Absent approval of a Task Order by the CPO, the City will not be obligated to pay or have any liability...to the Consultant for any Services provided by the Consultant pursuant to a Task Order...."

- On/about January 31, 20__, you transferred from DS to the City's Department of V.
- On/about January 31, 20__, you resigned from City service.
- On/about October 7, 20__, the City extended Contract [*] for two years, effective January 1, 20__ through January 1, 20__. In correspondence to Inc. (dated July 20, 20__), the City's Department of Procurement Services noted that the City had elected to extend Contract [*] "*...in accordance with Section 4.3, 'Agreement Extension Option' of the Professional Services Agreement.*"²
- On/about March 19, 20__, you joined Inc. as a Senior Project Director.
- On/about ____ 10, 20__, DS sent to Inc. a "Task Order Solicitation" relating to DS Project *-*-*, the renovation of a 45,000 square foot building located at ____ West *** Avenue for the benefit of the City's Departments of C and H. The Solicitation recited a Response Date of ____ 11, 20__; a Work Start Date of ____ 31, 20__; and a Project Completion Date of December 1, 20__. According to Part F. of the Solicitation:

"This Task Order Solicitation is being made by the City of Chicago Department of S

1

Contract [*], Exhibit 2 sets forth a rate schedule, including payment methodology and negotiated mark-up cap.

2

Section 4.3 of Contract [*] provided: "*The Chief Procurement Officer may at any time before this agreement expires elect to extend this Agreement for up to two additional one-year periods under the same terms and conditions as this original Agreement....*"

pursuant to [Contract No. []] between the City and certain pre-qualified vendors and is subject to all terms and conditions thereof...All Vendors solicited are required to respond, those who choose not to make a proposal for this Task Order Solicitation must submit a letter...informing the City...why a response will not be submitted.”*

•On April 18, 20__, you contacted the Board, seeking guidance. In your discussions with Board staff, you urged the Board to find that you would not be prohibited from assisting Inc. on the Task Order because, you argued, “Contract [*]” was not a contract but, in essence, “merely an agreement to agree at a future date.”

•On/about ____ 11, 20__, Inc. responded to the Task Order Solicitation.

Statement of the Law. Section 2-156-100(b) of the City’s Governmental Ethics Ordinance, entitled “Post-Employment Restrictions,” provides, in relevant part:

No former...employee shall, for a period of one year after the termination of the...employee's term of...employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the...employee participated personally and substantially in the subject matter of the transaction during his term of...employment; provided, that if the...employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.

The term “contract management authority” is defined at Section 2-156-010(g) of the Ordinance as:

“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.”

Because more than a year has elapsed since you resigned from City service on/about January 31, 20__, the one-year prohibition contained in sub-section 2-156-100(b) is not at issue in this case. Instead, the issue is whether, during your City tenure, you exercised “contract management authority” over the Task Order relating to DS Project *-*-*, thus subjecting you to the permanent prohibition.

Board Analysis and Conclusions. i)“Contract [*].” The Board first addresses the question of whether “Contract [*]”— the professional services agreement entered into between DS and Inc. on/about October 30, 20__—constituted a “contract” within the meaning of the Ordinance’s post-employment provisions, or was, as you have argued, “merely an agreement to agree at a future date.” The Board finds that: 1) Contract [*]’s subject matter—the provision of architectural, engineering and construction management services—is both lawful and not contrary to public policy; 2) there is no indication that either party to the agreement—the City/Inc.—lacked legal capacity to contract; 3) Contract [*] sets forth terms of consideration, *i.e.*, a rate schedule including payment methodology/negotiated mark-up cap; and 4) Contract [*] provides for a method of performance, *i.e.*,

a task order solicitation process. For those reasons, the Board concludes that, for purposes of the Ordinance's post-employment provisions, Contract [*] constituted a contract between DS and Inc.

ii) “Contract Management Authority.” The Board next addresses the question of whether you exercised “contract management authority” over Contract [*]. As noted above, the term “contract management authority” is defined in the Ordinance as “personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract.” In this case, on/about October 30, 20__, you signed Contract [*] on behalf of the Department of S in your capacity as department head. For that reason, the Board finds that you had “personal involvement in the execution of [that] City contract” and concludes that you exercised “contract management authority” over Contract [*] within the meaning of Ordinance Section 2-156-100(b). *Cf.* Case No. 93032.A, page 5.

iii) Contract Modification. The Board next addresses the question of whether the contract modification of October 7, 20__—extending Contract [*] for two years, effective January 1, 20__ through January 1, 20__—yielded a distinct contract from Contract [*]. The Board concludes that, for purposes of the Ordinance's post-employment provisions, the contract modification of October 7, 20__ did not yield a distinct contract from Contract [*]. The Board's conclusion is based on two factors: 1) Section 4.3 of Contract [*] explicitly authorized the Chief Procurement Officer, at his election, to extend the agreement for up to two additional one-year periods under the same terms and conditions as the original agreement; and 2) in correspondence to Inc. (dated July 20, 20__), the City's Department of Procurement Services explicitly stated that the City had elected to extend Contract [*] “...in accordance with Section 4.3, ‘Agreement Extension Option’ of the Professional Services Agreement.”

iv) Project *-*-* Task Order. Finally, the Board addresses the question of whether, for purposes of the Ordinance's post-employment provisions, the Task Order relating to DS Project *-*-* constitutes a distinct contract from Contract [*]. The Board acknowledges that the completion date of the Task Order, as recited in the Solicitation (viz. December 1, 20__) extends beyond the term date of the underlying agreement (viz. January 1, 20__). Notwithstanding this fact, however, the Board concludes that, absent some showing that the Task Order Solicitation issued other than pursuant to the authority of Contract [*] and the task order processes described in Attachment 1-B³, or that the resulting Task Order differs in some substantive respect (e.g., scope of services, rate of compensation) from the material terms described in Contract [*], for purposes of the Ordinance's post-employment provisions, the Task Order is part and parcel of Contract [*].

In this case, there is no indication that the Task Order Solicitation issued to Inc. other than pursuant

Contract [*] contemplates, and Attachment 1-B to Contract [*] describes in considerable detail, the task order process to be followed by the parties to the Contract. In summary, according to Attachment 1-B, the Commissioner of S will identify a project; the Consultant will be notified of the general scope and completion date; upon receipt of project notice (i.e., a “Solicitation”), the Consultant must submit a response/proposal; the proposal must include a budget based upon the number of hours necessary to complete the project and subject to all of the compensation terms of the Agreement, including the hourly and overhead rates; the City will review the proposal; the City may elect to approve the proposal, reject it or use it as a basis for further negotiations regarding the scope of the project and the project completion date.

to the authority of Contract [*] and the task order processes described in Attachment 1-B. In addition, the scope of work to be performed under the Task Order—the renovation of a 45,000 square foot building to house operations/staff of two City departments—appears to fall squarely within the scope of services described in Contract [*], i.e., architectural and engineering and construction management services. Further, there is no indication that Inc. would be compensated for its performance of the Task Order at a rate other than the rate set forth in Contract [*]. Accordingly, the Board concludes that, for purposes of the Ordinance’s post-employment provisions, the Task Order relating to DS Project *-*- does not constitute a distinct contract from Contract [*].

Board Determinations. Accordingly, **the Board determines** that you are permanently prohibited, under Section 2-156-100(b) of the Governmental Ethics Ordinance, from assisting or representing Inc., or any other person other than the City, on any contract over which you exercised “contract management authority” as a City employee, including, but not limited to, the Task Order relating to DS Project *-*- , as well as any other Task Order/ Task Order Solicitation issued pursuant to the authority of Contract [*].

Other Contracts. At your request, the Board has addressed specifically—and only—Contract [*/the Task Order relating to DGS Project *-*- . We note, however, that, given your considerable responsibility during the course of your City service, you likely exercised management authority over *other* City contracts. Therefore, should you, in the future, have a question about how Section 2-156-100(b) applies to you in the context of other City contracts, we advise you to contact the Board for specific guidance.

Other Constraints. The Board also calls your attention to Section 2-156-100(a) of the Governmental Ethics Ordinance which provides:

No former...employee shall assist or represent any person other than the City in any judicial or administrative proceeding involving the City or any of its agencies, if the...employee was counsel of record or participated personally and substantially in the proceeding during his term of office or employment.

The facts presented do not implicate this provision; however, should you, in the future, have a question about how this provision applies to you in the context of any particular judicial or administrative proceeding involving the City, we advise you to contact the Board for specific guidance.

In addition, the Board calls your attention to 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 disclosing confidential information gained in the course of or by reason of your employment. Confidential information, for purposes of this section, is defined as any information that may not be obtained under the Illinois Freedom of Information Act, as amended.

Note: The Board’s determinations in this matter are based solely on the application of the City’s Governmental Ethics Ordinance to the facts recited in this opinion and may not dispose of all issues relevant to your situation; other laws or rules may also apply to your situation. If the facts recited

in this opinion are incorrect or incomplete, please notify the Board immediately as any change may alter our conclusions and determinations.

Reconsideration. If there are material facts or circumstances that were not available to the Board in its deliberations on this opinion, you may request that the Board reconsider its opinion. As provided in the Board's Rules and Regulations, a request for reconsideration must: (i) be in writing; (ii) explain the material facts and circumstances that are the basis for the request; and (iii) be received by the Board within fifteen days of the date of this opinion.

Reliance: This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

Michael F. Quirk
Chair Pro Tem