

CONFIDENTIAL

ADVISORY OPINION

CASE NO. 03030.A

Post Employment

To: [Employee]

Date: September 10, 2003

You are a former employee of the City of Chicago, and a licensed civil engineer. From August 1976 to June 15, 2003, you were employed by the City of Chicago [Department 1]¹ as a civil engineer. In July 2003, you accepted a part-time position with [Another Company] ([Company]), a [different] firm that provides [services] to [third parties]. In a letter dated June 23, 2003, you asked the Board of Ethics for an advisory opinion on what restrictions, if any, the Governmental Ethics Ordinance places on you with respect to your post-City employment in general, and 16 [Department 1] construction contracts in particular.

After careful consideration of the information you submitted and the relevant law, the Board has concluded that you are not subject to the permanent prohibition in Section 2-156-100(b) of the City's Governmental Ethics Ordinance with respect to the 16 [Department 1] construction contracts described herein. However, under Section 2-156-100(b), you are prohibited, for a period of one year from the date you left City employment, from assisting or representing any person, other than the City, in the "closeout" of any [Department 1] construction contract under the default resolution process.

FACTS:

A. City Employment

You entered City service in August 1976 as an [Title 1] in the [sub] unit of the [Unit], which at that time was part of the City's [Department A]. You said that your responsibilities as [Title 1] were to prepare change orders and payment vouchers for construction projects, audit "quantity estimates"²

¹The Chicago [Department 1] was established in [year]. Prior to that time, most functions of that department were carried out by [Department A] and [Department 2].

²You described "quantity estimates" as estimates of items completed or provided by a contractor, such as sidewalks, trees, water valves, catch basins, inlets, landscaping, resurfacing work, and asphalt work.

CONFIDENTIAL

Case No. 03030.A

September 10, 2003

Page 2

measured by City field engineers, and ensure that documentation submitted by the field engineers was properly completed. Between August 1976 and 1987, you were successively promoted to [Title 2], [Title 3], [Title 4], and then [Title 5], all in the [sub] unit of the [Department A]. You stated that, with respect to these positions, your work functions remained the same; however, as you were promoted, you were assigned to successively more complicated contracts. For approximately the next 16 years, from 1987 until your retirement on June 15, 2003, you worked as the [Title 6] (a [Type Z] position). During this period, the [Department A] was restructured, and, in its place, [Department 1] was established. Your former bureau, following the restructuring, became [Department 1]'s [Bureau 1].

1. Function of [sub] Unit

Within [Department 1]'s [Bureau 1], there are four units: 1) [sub]; 2) Accounting; 3) Personnel; and 4) Programming. You said that each unit has its own supervisor. As [Title 6], you supervised only the [sub] unit. You stated that the main function of the [sub] unit is to provide administrative support to [Department 1]'s six other bureaus – [Bureau 2], [Bureau 3], [Bureau 4], [Bureau 5], [Bureau 6], and [Bureau 7]—by ensuring that measurements reported by [Department 1] engineers on construction projects reconcile with payments made to contractors.

2. [Department 1] Construction Projects Generally

With respect to [Department 1] construction projects generally, you said the projects are “owned” by the other six bureaus of the Department, i.e., these “owner bureaus” are “responsible” for issuing the Requests for Qualifications (“RFQs”), reviewing the responses to RFQs, hiring consultants, developing construction plans, working with [Department 3] to issue Requests for Proposals (“RFPs”), reviewing RFPs, choosing the contractor, negotiating the contract with the contractor, signing the contracts, setting up the funds for the project, and supervising and managing the construction project. You stated that, during your City tenure as [Title 6], you had no involvement in drafting any RFQ or RFP, reviewing any responses to these requests, selecting any contractor, or supervising the performance of any contractor.

3. Responsibilities as [Title 6]

As [Title 6], you supervised a staff of 15 employees who reviewed monthly “reports of work completed” submitted by field engineers from the “owner bureaus.” Specified in these reports were “quantity estimates,” which your unit audited. This audit entailed reviewing a list of completed items, calculating the total amount owed to the contractor for that month, and verifying whether there were sufficient funds in the account from which payment was to be made. In addition to reviewing the reports, your unit also entered the “quantity estimates” information in a [Department 1] database,

CONFIDENTIAL

Case No. 03030.A

September 10, 2003

Page 3

which tracked the items to be provided under the contracts, the work completed by the contractors, and the amounts paid to the contractors.

After reviewing the reports and verifying that the amount to be paid was calculated correctly, and that there were sufficient funds in the account to make a payment, your unit generated a payment voucher. The voucher was then forwarded to the deputy commissioner of the "owner bureau" and the project engineer for their approval and signature. After the deputy commissioner and project engineer approved the voucher, it was then sent back to your unit for signature. You said that, before you signed the voucher, your staff was required to obtain "partial waivers" from the contractor with respect to the previous month's payment. "Partial waivers," you explained, are, for all intents and purposes, receipts showing that the contractor has paid, whether in part or in whole, its subcontractors and suppliers. Your unit also sent a copy of the voucher to the contractor to confirm that the items completed and amount paid for the month were correct. Once the "owner bureau" and the contractor agreed on the specified quantities and amounts for that month, and the "partial waivers" had been received by your unit, you would sign the voucher and forward it to the [Official 1]. The [Official 1] would then issue a check in the amount specified on the voucher and mail the check to the contractor.

You stated that, in the event that the contractor, upon reviewing a copy of the voucher, disagreed with the quantities specified in the voucher, you referred him to the "owner bureau" chief, who supervised the project as a whole, to resolve the discrepancy. The "owner bureau" chief would then contact the project and field engineers who had submitted the report to you. They would discuss the matter with the contractor and come to a resolution. Upon coming to a resolution, the field engineer would advise you whether the reported quantities were correct or incorrect. If incorrect, the field engineer was required to correct the work report before any new voucher was generated. You said that you had no authority to change any quantities on the work report once it was submitted to your unit. Any discrepancy was resolved within the "owner bureau", or between the "owner bureau" and the contractor, and any changes to the work report could be made only by the engineers of the respective "owner bureaus."

Another issue that you dealt with involved insufficient funds to make a payment. You said that sometimes your unit would receive a work report in which the quantity of a particular item exceeded the original estimate. Because additional monies were required to pay for the additional quantities, you would have to contact the project manager to get direction and authorization as to which fund source you could use to pay for the additional items. You stated that you, yourself, had no authority to draw from alternate fund sources.

Further, you said that, on occasion, a project manager would ask you to sit in on a meeting with a contractor while they negotiated contract item prices. You said that the project manager, not you, negotiated the price. You said that your function at these meetings was to provide information

CONFIDENTIAL

Case No. 03030.A

September 10, 2003

Page 4

regarding the “average prices” for the contract items under normal conditions, based on prior contracts entered into by the “owner bureaus.” You did not provide your opinion with respect to what the prices should be for a particular project. You merely provided historical data with respect to what the “owner bureaus” previously paid for the items at issue. You said that during your City tenure as [Title 6], you were asked to attend such meetings only when your staff engineers were not available to attend such meetings, which occurred approximately once a year.

4. Closeout of [Department 1] Contracts

During the construction phase of a [Department 1] project, partial payments were made to the contractor on a monthly basis. When the construction work was finished, the “owner bureau” determined the “final value” of the contract, which entailed going to the construction site and calculating and totaling the actual items provided by the contractor. A final work report was subsequently submitted to your unit. Upon receiving the final work report, your job was to “close out” the contract. In “closing out” the contract, you calculated the actual contract price from the final work report. You then calculated the final amount owed to the contractor based on the actual contract price minus the total payments previously made to the contractor. You then generated a “final voucher” indicating the final payment amount. The “final voucher” was forwarded to the “owner bureau” for the deputy commissioner and project engineer’s signatures, and was subsequently returned to you for forwarding to the [Official 1].

Prior to forwarding the “final voucher” to the [Official 1], you verified that the necessary “closeout” documents had been submitted to your unit by the contractor. You said that the standard “closeout” documents are: 1) a list of all subcontractors and suppliers; 2) all partial waivers; 3) all final waivers; 4) releases from any persons who may have damage claims against the contractor; 5) a “punchlist”³ memo indicating that all tasks on the “punchlist” have been completed to the satisfaction of the “owner bureau”; and 6) a signed and notarized statement by the contractor attesting that, among other things, the contractor accepts the “final value” of the contract, and the contractor paid the prevailing wage rate to its workers. Once you received all the necessary “closeout” documents, you forwarded the “final voucher” to the [Official 1], who then issued a final check to the contractor. You said that once the contract was “closed out,” you were responsible for storing and maintaining the construction records for the project.

5. Default by Contractor Generally

³You stated that a “punchlist” is a list created by the “owner bureau” after said bureau makes the final inspection of the work done by the contractor. The list indicates those items that were not done to the satisfaction of the “owner bureau” and, therefore, must be remedied by the contractor.

CONFIDENTIAL

Case No. 03030.A

September 10, 2003

Page 5

You said that, on occasion, a contractor defaulted on a contract during the construction phase of a project. You explained that, for that reason, prior to awarding construction contracts, the City requires contractors to have contract surety bonds. These bonds are agreements under which the surety company assures the City that, should the contractor default and subsequently be terminated from a contract, the surety company will be responsible for completing the project, e.g., hiring a new contractor to complete performance of that contract. You said that [Department 1] had no group or committee specifically responsible for handling defaulted contracts; [Department 1] addressed defaulted contracts on an as-needed basis.

You stated that, during your tenure as a City employee, you did not directly work with any surety companies. After a contractor was declared to be in default by the City⁴, the project usually became inactive until the “owner bureau” and [Department 3] came to an agreement with the surety company on how the project would be completed. In addition, any legal issues concerning the original contractor’s default were handled by the City’s [Department B]. You said that your unit was not involved in any issues regarding the actual completion of the project. Your involvement in these defaulted contracts was the same as with non-defaulted contracts, and your unit followed the same procedures with respect to reconciling and processing work reports and payment vouchers. The only difference in procedure was that monthly payments, as well as the final payment, were made to the surety company, not the new contractor. Also, the same procedures, as described in Section A.4 herein, were followed in the “closeout” of the contract.

B. Post Employment with [Company].

In July 2003, you accepted a part-time position with [Company]. You said that [Company] is a small consulting firm in [City, State] that provides [services] to [third parties]. [Company] is hired by the [third parties] to assist in selecting a completion contractor; resolve payment bond claims by subcontractors; and collect, organize and submit “closeout” documents. You said that [Company], itself, has no contracts with the City; its contracts are with [third parties]. Although [Company] has been hired to assist in the “closeout” of contracts that involve non-City agencies, such as suburban municipalities, the [State Department 1], [Organization 1], and [Organization 2], the majority of the current contracts involve [Department 1].

You stated that [Company] has been hired by two surety companies, [Surety 1] and [Surety 2], to assist in the default resolution of 16 [Department 1] contracts. [Company] would like you to review the current status of these 16 [Department 1] projects, and assist in their “closeout.” You said that these 16 contracts involved only two contractors: [Contractor 1] and [Contractor 2] You explained that, in obtaining the current status of these projects, you would most likely have to contact persons

⁴You said that the City’s [Department 3] is the department that issues the default notices to the contractor and the surety company.

CONFIDENTIAL

Case No. 03030.A

September 10, 2003

Page 6

at [Department 1] to determine which specific “closeout” documents have not yet been submitted. You would then contact the contractor, any subcontractors and suppliers, and any other necessary persons to obtain the required documents. You would then compile, organize, and package the “closeout” documents and submit them to the surety company, and/or the appropriate City department.

You said that during your tenure as the [Title 6] for [Department 1], you processed the work reports and payment vouchers for these 16 contracts. At that time, the original contractors had not yet defaulted on the contracts. Also, prior to the City initiating default proceedings on the original contractors, approximately 3 years ago, you participated in several meetings with [Office A], the commissioner of [Department 1], and the chief of [Bureau 1] to discuss these 16 projects. You said your function at these meetings was to provide the status of the projects—the original contract price, the total amount of work done by the original contractor, the total amount paid to the original contractor, outstanding balances remaining on the contract. You provided this information in a written report. You said that providing this information was the extent of your involvement at these meetings; you did not make any oral presentation at these meetings.

While you were still in City service, the City declared the contractors on these 16 contracts to be in default of the contracts. You said that, after the contractors defaulted on the contracts, the projects became inactive. Work on these projects resumed after the “owner bureaus” and [Department 3] came to an agreement with the surety companies on how the projects would be completed. You stated that you had no involvement in discussions with the surety companies regarding the completion of these projects. Instead, your involvement in these 16 defaulted contracts was limited to reconciling and processing work reports and payment vouchers with respect to the new contractors.

You said that the construction work on some of the 16 [Department 1] contracts has been completed, and all that is required to “close out” these contracts is to compile and submit the “closeout” documents to the City. With respect to the remaining contracts, you said that additional construction work may be needed. Once the construction work is finished, you would assist in getting the “closeout” documents.

APPLICABLE LAW AND ANALYSIS: The provision of the Governmental Ethics Ordinance that is relevant to your request is Section 2-156-100(b), entitled “Post-Employment Restrictions,” which provides:

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 employee participated personally and

CONFIDENTIAL

Case No. 03030.A

September 10, 2003

Page 7

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 Section 2-156-100(b), a former City employee is subject to two employment restrictions after leaving City service: a permanent prohibition and a one-year prohibition. Both of these prohibitions are discussed in further detail below.

A. Permanent Prohibition

Under Section 2-156-100(b), you, as a former City employee, are permanently prohibited from assisting or representing any person, other than the City, in any contract over which you, as a City employee, exercised “contract management authority.” 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.

The contracts at issue in this case are the 16 [Department 1] construction contracts on which [Company] has requested your assistance. During your tenure as [Title 6], you reconciled and processed the work reports and payment vouchers for these 16 contracts prior to the default of the contractors. In carrying out your duties, however, you had no authority to change specified quantities, or to change amounts in any [Department 1] fund sources for these projects. In addition to reconciling and processing work reports and payment vouchers, prior to the City declaring the contractors to be in default of the 16 construction contracts, you attended several meetings with [Office A], the Commissioner of [Department 1], and the chief of [Bureau 1], during which you reported on the status of the projects. Providing this information was the extent of your involvement in these meetings. After the contractors defaulted on the 16 contracts, these 16 projects became inactive. Work on these projects resumed after the “owner bureaus,” [Department 3] came to an agreement with the surety companies on how the projects would be completed. You had no involvement in discussions with the surety companies regarding the completion of these projects. Once the construction work resumed, your involvement in these 16 defaulted contracts was limited to reconciling and processing work reports and payment vouchers.

The Board notes that, during your tenure as [Title 6], you had no involvement in drafting any RFQ or RFP, reviewing any responses to such requests, selecting any contractor, or supervising the

CONFIDENTIAL

Case No. 03030.A
September 10, 2003
Page 8

performance of any contractor. On occasion, you attended a meeting in which a project manager would negotiate contract item prices with a contractor. You, however, did not participate in the price negotiations; you merely provided historical data with respect to what the [Department 1] “owner bureaus” previously paid for the items at issue.

As you have described your involvement, the Board finds that you did not have personal involvement in, or direct supervisory responsibility for, the formulation or execution of the 16 [Department 1] construction contracts at issue. Accordingly, the Board concludes that you did not have “contract management authority” over these 16 [Department 1] construction contracts, and determines that you are not subject to the permanent prohibition with respect to these 16 contracts.

B. One-Year Prohibition

Under Section 2-156-100(b), you, as a former City employee, are prohibited for one year after leaving City service from assisting or representing any person, other than the City, in a business transaction involving the City if, during your City employment, you participated personally and substantially in the subject matter of the transaction. “Assisting” and “representing” a person in a business transaction involving the City has been found to include helping a person to seek a City contract, as well as perform a City contract. (*See* Case Nos. 92035.A; 89119.A) Further, the term “representation” has been found to include a broad range of activities in which one person acts as a spokesperson for another person or seeks to communicate and promote interests of one party to another. (*See* Case No. 93038.A) Also, the one-year period begins on the date your City employment ended, not on the date you stopped performing particular tasks. (*See* Case No. 97025.A)

As you have described them, your primary responsibilities at [Company] would be to gather and prepare documents for the “closeout” of construction contracts, including the 16 [Department 1] contracts described above. In essence, you would be facilitating the “closeout” of such construction contracts. In order to determine what restrictions are placed on your post-City employment by § 2-156-100(b) of the Ordinance, we must analyze 2 separate issues. First, we address whether [Company] is participating in a business transaction involving the City. Second, we address the “subject matter” of that transaction, and whether you participated personally and substantially in that subject matter while employed by the City.

1. Business Transaction Involving the City

As noted above, [Company], itself, has no contracts with the City. However, it has been retained by two surety companies, [Surety 1] and [Surety 2], to assist them in fulfilling their obligations to the City on 16 [Department 1] construction contracts on which the contractors defaulted. The default resolution of these [Department 1] construction contracts clearly constitutes a business transaction involving the City.

CONFIDENTIAL

Case No. 03030.A
September 10, 2003
Page 9

2. Subject Matter

We next address the issue of the “subject matter” of the business transaction. Traditionally, the Board has defined subject matter in one of two ways, depending on the facts of the case, and the nature of the employee’s duties. In some instances, the Board has found that the subject matter is “site” or “program” specific, that is, it may be defined as a City project at a particular site, or a particular City program, on which an employee worked during City service. (*See* Case No. 93038.A) In other cases, the Board has concluded that, regardless of the site or program on which an employee worked, the subject matter is “duty” or “responsibility” specific, that is, it may be defined in terms of the City duties or responsibilities that the employee carried out. (*See* Case No. 02021.A, in which an employee’s City duties included proposing, reviewing, and commenting on bond financing documents, from the initial stages of the financing process, until the sale and closing of the bonds; the Board concluded that the subject matter in which the employee participated personally and substantially was the structuring, issuance, and administration of the debt of the City of Chicago through the issuance of bonds.)

In the instant case, the Board believes that a “duty” or “responsibility” specific analysis is appropriate. As noted above, one of the main aspects of the default resolution services that [Company] provides to surety companies, and the aspect in which you expect to participate, is assistance with the “closeout” of [Department 1] contracts. According to you, the “closeout” of [Department 1] contracts generally follows a standard pattern: following a final calculation by field engineers of the quantities of assorted items provided by the contractor, the final amount owed to the contractor is calculated based on the actual contract price minus total payments previously made to the contractor; the contractor submits the necessary “closeout” documents to the [sub] unit of [Department 1]’s [Bureau 1]; the “final voucher” is prepared and forwarded to the [Official 1] for payment to the contractor; and the [sub] unit then stores the project records. Based on the foregoing, the Board concludes that, for purposes of the one-year prohibition in Section 2-156-100(b) of the Ordinance, the appropriate “subject matter” in this case is “the closeout of [Department 1] construction contracts.”

During your tenure as head of the [sub] unit, you supervised a staff of 15 employees. In addition to its duties with respect to ongoing contracts, this unit is responsible for ensuring that [Department 1] contracts are “closed out” in accordance with the procedures described above. As supervisor, you were directly involved in, or had authority over, every aspect of the “closeout” process, from the calculation of the final amount owed to the contractor, to verifying that the necessary “closeout” documents had been submitted to your unit by the contractor, to the preparation of the “final voucher.” Based on these facts, the Board concludes that you participated personally and substantially in the subject matter of the “closeout” of [Department 1] construction contracts while employed by the City. Therefore, you are prohibited, for a period of one year from the date you left City employment, from assisting or representing any person, other than the City, in the “closeout” of any [Department 1] construction contract under the default resolution process.

CONFIDENTIAL

Case No. 03030.A
September 10, 2003
Page 10

Section 2-156-070. Finally, we remind you of Section 2-156-070 of the Ordinance, entitled “Use or Disclosure of Confidential Information,” which provides:

No current or former official or employee shall use or disclose other than in the performance of his official duties and responsibilities, or as may be required by law, confidential information gained in the course of or by reason of his position or employment. For purposes of this section, “confidential information” means any information that may not be obtained pursuant to the Illinois Freedom of Information Act, as amended.

Under this section, current and former City officials and employees are prohibited from using or disclosing any confidential information gained in the course of their City service.

DETERMINATIONS: Based on the facts presented, the Board determines as follows:

1. You did not have “contract management authority” over the 16 [Department 1] construction contracts described herein, and, therefore, are not subject to the permanent prohibition in Section 2-156-100(b) with respect to those contracts.
2. Under Section 2-156-100(b), you are prohibited, for a period of one year from the date you left City employment, from assisting or representing any person, other than the City, in the “closeout” of any [Department 1] construction contract under the default resolution process.

Our determinations are not necessarily dispositive of all issues relevant to this situation, but are based solely on the application of the City’s Governmental Ethics Ordinance to the facts stated in this opinion. If the facts stated are incorrect or incomplete, please notify the Board immediately, as any change may alter our determinations. Other laws or rules also may apply to this situation. Be advised that City departments have the authority to adopt and enforce rules of conduct that may be more restrictive than the limitations imposed by the Ordinance.

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 indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

Darryl L. DePriest
Chair