

Advisory Opinion
Case No. 04028.A, Post-employment

To: [Employee]
Date: July 22, 2004

You formerly worked as a [Position] in the City's [Department 1] ([Department 1]). You retired from City service on [Date]. On June 21, 2004, you requested an advisory opinion from the Board of Ethics on how the Governmental Ethics Ordinance would affect your post-City employment activities. Specifically, you have asked whether you may assist [Consultant], a consultant to the City's [Department 2], in providing construction observation services on City street and parkway restoration work scheduled to be performed by a [Department 2] contractor, [Construction Company].

After careful consideration of the information presented and the relevant law, the Board has determined that the post-employment provisions contained in Section 2-156-100 of the Ordinance impose significant restrictions (set forth in detail below) on your post-City employment activities.

FACTS: City Employment. You began City employment in 1982 as a [Title 1] in what was formerly the City's [Department A]. In or around January [year], the [Department A] was reorganized as [Department 1]. Following that reorganization, you were assigned to [Department 1]'s [Bureau 1], where you worked as a [Position] until 1997. From 1997 until you retired from City service, you worked as a [Position] in [Department 1]'s [Bureau 2]. At the time of your retirement, you held the position of [Title 2].

You stated that the duties of the engineering staff of [Department 1]'s [Bureau 1] are essentially the same as those of the engineering staff of [Department 1]'s [Bureau 2]: providing engineering (and certain management and administrative) services related to the design and construction of City arterial, residential and industrial streets (including new street construction, street resurfacing, installation and repair of curbs and gutters, installation of landscaped medians and viaduct improvements.)¹

[Bureau 1]. You stated that during your 5 years of service as a [Position] in [Department 1]'s

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You stated that the work of the two bureaus may be distinguished generally by their scope, the status of their work force and their source of funding: [Bureau 1] projects tend to be of a larger scale with more elaborate contract specifications and documents; [Bureau 1] design and construction projects typically are performed in whole or in part by outside consultants or contractors, as opposed to in-house City engineers and tradespeople; and [Bureau 1] projects typically have multiple funding sources, including City, State and Federal funds.

[Bureau 1], you served as resident engineer on approximately 10 Bureau construction projects. These projects were of various types, including construction of new industrial and residential streets, resurfacing of arterial streets, viaduct reconstruction and installation of median planters. As resident engineer, you had no involvement in the Bureau's selection of design consultants or construction contractors for these projects. Your duties consisted of on-site oversight of the contractors' construction activities to ensure compliance with contract specifications, as well as responding to unforeseen design issues that arose during construction. In addition, you were responsible for measuring and recording the contractors' completed work in a "quantities log" and preparing pay-estimates based on those recorded entities. You stated that all of the [Bureau 1] construction projects on which you served as resident engineer have been completed.

[Bureau 2]. You stated that during your 7 years of service as a [Position] in [Department 1]'s [Bureau 2], you were assigned to special projects. You estimated that you managed or assisted with at least 25 Bureau construction projects², most, if not all, of which involved some aspect of City streets. You gave the following examples of the variety of projects to which you were assigned and your duties with regard to each:

1. [Program 1]. You assisted in the execution of the City's [Program 1], under which each City alderman identifies desired infrastructure improvements (curbs, gutters, street resurfacing, etc..) to be made in her/his ward during the fiscal year, by evaluating the feasibility, and estimating the cost of, such improvements;
2. [Program 2]. On this streetscaping project, you oversaw excavation work, pavement patching and resurfacing, and installation of curbs by in-house City forces;
3. [Program 3]. On this project, you marked and "laid out"³ a Chicago police station parking lot; you also coordinated and oversaw City crews in the excavation of the existing lot and the construction of a new asphalt lot;
4. [Project 4]. On this new industrial street project, you did the plan design (which entailed, among other things, performing a topographical survey of the site and establishing the "line and grade," or alignment and elevation, of the roadway) and oversaw construction of the street by in-house City forces; and
5. [Program 5]. Under this program, you worked with City aldermen to select locations in their

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You noted that "it depends on how you count 'projects'; if you count each block we worked on as a separate project, it would in the hundreds."

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You noted that "when I was in [Bureau 2] I [typically] prepared the layout for the [construction] crews, [whereas] when I was in [Bureau 1], the contractor was responsible for his own layout."

wards for the installation of stamped asphalt⁴, and coordinated and oversaw such installation by in-house City forces.

You stated that although most of the [Bureau 2] construction projects to which you were assigned have been completed, several street construction projects for which you did the plan design have not yet proceeded to the construction phase.⁵

Post-City Employment. [The Consultant] ([Consultant]) is a joint venture between [Vendor 1] and [Vendor 2]. [Consultant] has a Depends Upon Requirements (DUR) contract with the City's [Department 2] to provide engineering consulting services, including construction design and planning services and construction observation services, to [Department 2]. [Department 2] has elected to utilize [Consultant]'s services, pursuant to a task order under that DUR contract, to provide construction observation services on City street and parkway restoration work scheduled to be performed by a [Department 2] contractor, [Construction Company] ([Company]).

You stated that, during the course of your City employment, you had no involvement in any aspect of the process by which [Consultant]'s DUR contract with [Department 2] was let, formulated or awarded. You also stated that you had no involvement in the decision by [Department 2] to utilize [Consultant]'s services, under that DUR contract, on [Company]'s street and parkway restoration work.

You have asked whether, you, as an employee of [Vendor 1], may assist [Consultant] in providing those services by serving as a resident engineer over [Company]'s restoration work in the City's [District] the area bounded by [North] on the north, [South] on the south, and the City's east and west limits.

As you described the project, [Company]'s construction crew will follow, by several weeks, crews from the [Division] of the City's [Department 2], who will be installing new sewer and water main lines throughout the City. [Company] will restore certain infrastructure that has been damaged, or that needs to be adjusted, as a result of that sewer or water main work. Essentially, [Company]'s restoration work will consist of the following: patching or resurfacing City streets (arterial, residential and industrial); replacing sections of City sidewalks, curbs and gutters; installing or restoring landscaped parkways; and making adjustments to water valve vaults, manhole covers and frames.

Your duties as resident engineer on [Company]'s restoration work would consist, essentially, of the

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Stamped asphalt is utilized, for example, in crosswalks.

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As to these unfinished projects, in particular, please see the NOTE section of this opinion at page 6.

following: participating in pre-construction meetings with the contractor to discuss how the work is going to be performed; performing pre-construction site visits to survey, measure, sketch and “mark out” the areas that need to be cut out and replaced by the contractor⁶; reviewing and approving the contractor’s proposed construction schedule; receiving, and forwarding to [Consultant] for review and approval, “materials submittals”; day-to-day oversight of the contractor’s work to ensure that construction is in accordance with contract specifications⁷ (previously prepared by [Consultant] and reviewed and approved by the City); resolving, through your [Consultant] project manager⁸, unforeseen design issues; coordinating the taking and testing of materials samples; serving as a communications liaison between the contractor and [Department 2], as well as other City departments, City officials and the public⁹; measuring, recording and submitting for payment, quantities of work performed by the contractor¹⁰; and compiling and maintaining the official, final project documents.

STATEMENT OF THE LAW: The section of the Governmental Ethics Ordinance at issue in this case is Section 2-156-100, entitled “Post-Employment Restrictions,” specifically part (b), which 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 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.

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For example, you would determine how many feet from the water main trench the pavement on the affected roadway must be removed for restoration purposes.

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For example, you would ensure that the existing pavement is removed to the proper depth, that the new pavement is installed to the proper height and that the proper type of pavement is used.

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The project manager is [Project Manager], an employee of [Sub], a subcontractor to [Consultant] on this project.

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For example, you would communicate, as necessary, with the City’s [Office], the alderman in whose ward the restoration work is being performed, and hospitals or businesses affected by resulting traffic interruptions.

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Examples of such quantities are linear feet of curb, square feet of sidewalk, tons of asphalt, linear feet of sawcutting, and square yards of sod or hydroseeding.

Section 2-156-010(g) defines “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.

APPLICATION OF THE LAW TO THE FACTS: Ordinance Section 2-156-100(b) prohibits a former City employee from assisting or representing any person, other than the City, in any business transaction involving the City for one year after leaving City service, if he or she “participated personally and substantially in the subject matter of the transaction” while a City employee. That section further provides that if the employee “exercised contract management authority” with respect to a contract, the prohibition shall be permanent as to that contract.

1. The One Year Prohibition: Personal and Substantial Participation. We first address the one-year prohibition and the issue of “business transaction.” [Consultant] has a DUR contract with [Department 2] to provide engineering consulting services to the Department. The Department has elected to utilize [Consultant]’s services, pursuant to a task order under that DUR contract, to provide construction observation services on City street and parkway restoration work to be performed by [Company]. The rendering of these services by [Consultant] to the Department clearly constitutes a “business transaction involving the City” within the meaning of Section 2-156-100(b) of the Ordinance.

You have asked whether, you, as an employee of [Vendor 1], may assist [Consultant] in providing those services by serving as a resident engineer over [Company]’s restoration work in the City’s [District], the area bounded by [North] on the north, [South] on the south, and the City’s east and west limits. The subject matter of [Consultant]’s business transaction is clear: the provision of engineering services related to the restoration of City streets and parkways. For purposes of analysis under the one year prohibition, therefore, the issue becomes whether you “participated personally and substantially” in the subject matter of that transaction as a City employee.

During your City service, you served as resident engineer on approximately 10 [Bureau 1] construction projects. These projects were of various types, including construction of new industrial and residential streets, resurfacing of arterial streets, viaduct reconstruction and installation of median planters. Your duties consisted of on-site oversight of the contractors’ construction activities to ensure compliance with contract specifications, as well as responding to unforeseen design issues that arose during construction. In addition, you were responsible for measuring and recording the contractors’ completed work in a “quantities log” and preparing pay-estimates based on those recorded entities. During your years of service, you also managed or assisted with at least 25 [Bureau 2] construction projects, most, if not all, of which involved some aspect of City arterial,

residential or industrial streets. Your duties included evaluating the feasibility, and estimating the cost of, street infrastructure improvements; doing the plan design for, and overseeing the construction by City forces of, a new industrial street; as well as overseeing excavation work, pavement patching and installation of curbs on a streetscaping project.

Based on the foregoing, the Board concludes that, as a City employee, you were personally and substantially involved in the engineering design and construction of City arterial, residential and industrial streets. The Board determines, therefore, that under Section 2-156-100(b) of the Governmental Ethics Ordinance, you are prohibited for one year from the date you left City service, that is, until May 31, 2005, from assisting or representing [Consultant], or any other person, on any business transaction involving the City related to the engineering design or construction of City arterial, residential or industrial streets, including new street construction, street rehabilitation and resurfacing, and the installation of curbs, gutters and landscaped medians. This prohibition also includes, but is not limited to, providing construction observation services on the City street and parkway restoration work scheduled to be performed by [Company].

2. The Permanent Prohibition: Contract Management Authority. As noted above, 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.*”

You stated that, during the course of your City employment, you had no involvement in any aspect of the process by which [Consultant]’s DUR contract with [Department 2] was let, formulated or awarded. You also stated that you no involvement in the decision by [Department 2] to utilize [Consultant]’s services, under that DUR contract, to provide construction observation services on [Company]’s street and parkway restoration work.

Based on your representations, the Board concludes that you did not exercise contract management authority, within the meaning of Ordinance Section 2-156-100(b), with respect to that contract. The Board determines, therefore, that after May 30, 2005, you are not prohibited under Section 2-156-100(b) of the Governmental Ethics Ordinance, from assisting [Consultant] in providing construction observation, or other engineering, services to the City’s [Department 2] under its DUR contract with the Department.

NOTE: The Board’s determination in this case addresses the application of the permanent prohibition contained in Ordinance Section 2-156-100(b) only to [The Consultant]’s DUR contract with the City’s [Department 2]. Should you, in the future, have a question regarding the application of the permanent prohibition to some other City contract with which you may have been involved as a City employee, you should contact the Board for specific guidance.

DETERMINATIONS: After careful consideration of the facts you presented and the relevant law,

the Board has determined that:

1. under Section 2-156-100(b) of the Governmental Ethics Ordinance, you are prohibited for one year from the date you left City service, that is, until May 31, 2005, from assisting or representing [Consultant], or any other person, on any business transaction involving the City related to the engineering design or construction of City arterial, residential or industrial streets, including new street construction, street rehabilitation and resurfacing, and the installation of curbs, gutters and landscaped medians. This prohibition also includes, but is not limited to, providing construction observation services on the City street and parkway restoration work scheduled to be performed by [Company]; and
2. after May 30, 2005, you are not prohibited under Section 2-156-100(b) of the Governmental Ethics Ordinance, from assisting [Consultant] in providing construction observation, or other engineering, services to the City's [Department 2] under its DUR contract with the Department because, during the term of your City employment, you did not exercise contract management authority with respect to that contract.

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. 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