The Board of Ethics adopted this following Memorandum as its Advisory Opinion in the matter. The Board's opinion is based on the facts set out in the Memorandum.

As with all Board opinions, the Board's opinion in this case is confidential in accordance with the provisions of the City's Campaign Financing and Governmental Ethics Ordinances–this means that the Board and its staff will not discuss this opinion or its underlying request for it unless it has the requestor's express waiver of this confidentiality.

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

MEMORANDUM

To: Board of Ethics

From: _____
Richard J. Superfine, Legal Counsel

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Steven I. Berlin, Executive Director

Date: September 8, 2010

Re: Case No. 10046.CNS/"Gifts" and Negotiated Contractual Provisions

Recently, Board Staff has been asked several related questions by City employees: whether, and if so how, the Governmental Ethics Ordinance's gift restrictions would or should apply to the acceptance by City employees or officials of items or services negotiated by the City (and, presumably, approved by the Department of Procurement Services and/or Corporation Counsel), and memorialized in contractual provisions? For example: 1) the City buys software, and the vendor contractually agrees to provide pc's to the City "at no extra cost"; or 2) a likely more frequent scenario: a vendor contractually agrees to pay for travel for one or a few City employees to attend periodic product training seminars or facility inspections. The Board has not addressed these questions formally. In the past, Staff has advised City employees that the Ordinance does not prohibit these contractual provisions or the acceptance of items or services by City employees or officials pursuant to them. However, Staff believes it is in the City's interest that the Board revisit the issue more thoroughly and clarify its advice more formally.

The relevant Ordinance section is §2-156-040, entitled "Offering, Receiving and Soliciting Gifts and Favors." It states in pertinent part:

> **(b) No person shall give or offer to give to any official, employee or City contractor ... and none of them shall accept, anything of value, including, but not limited to, a gift, favor or promise of future employment, based upon any mutual understanding, either explicit or implicit, that the votes, officials actions, decisions or judgments of any official, employee or City contractor, concerning the business of the City would be influenced thereby ...**
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> **(c) No person who has an economic interest in a specific City business, service or regulatory transaction shall give...to any City official or employee whose decision or action may substantially affect such transaction... (ii) an item or service other than a gift with a value of less than $50.00...**
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> **(d) Except as prohibited in subsections (a) and (b), nothing in this Section 2-156-040 shall prohibit any person from giving or receiving... (iv) reasonable hosting ... furnished in connection with public events, appearances or ceremonies related to official City business, if furnished by the sponsor of such public event.**

> **(f) Nothing in this Section 2-156-040 shall prohibit any official or employee...from accepting a gift on the City's behalf; provided, however, the person accepting the gift shall promptly reports receipt of the gift to the Board of Ethics and to the Comptroller, who shall add it to the inventory of City property.**

For years, the Board has interpreted these sections by in effect using a "business purpose" analysis regarding trips or training programs and associated travel expenses offered by a City vendor or would-be vendor. The Board has concluded, for example, that the Ordinance allows City employees' attendance at software user group meetings, training classes, or tours of manufacturers' facilities–if the Board receives affirmation from the department head or a department's senior management that attendance by the relevant City employees (and only those employees) is important for the department to operate more effectively. See, e.g. Case Nos. 91075.Q; 96020.Q; 97014.Q; 98039.Q; 98044.Q; 01007.Q; 03053.Q. Under these cases, these "business purpose" travel expenses are not considered "gifts," for purposes of the Ordinance; however, any items or services offered *beyond* reasonable and necessary business travel expenses *are* considered gifts (like entertainment or other things of a personal nature), and their acceptance thus must be analyzed under the Ordinance's gift restrictions.[1] Similarly, the Board has recognized that City employees, or a City department, may treat certain items or services as gifts accepted on behalf of the City, such as pc's or software, for example, provided those items or services are not purely personal, but are useable by the City or displayed for the benefit of the public, and are reported to the Board and the Comptroller as gifts to the City. They then become part of the City's inventory. See Case Nos. 88005.A (television set); 88092.A (computer equipment); 91062.Q (radio); 91064.Q (reasonable travel expenses to conference where offeror was not the sponsor).

But we address here situations in which the City negotiates a contract provision under which the contractor agrees to provide travel expenses to City employees for stated purposes (educational, training or inspections, typically), or to provide personal computers or other items at no additional charge to the City. Is such a contract provision "automatically" taken out of the ambit of the Ordinance's gift restrictions? Put another way, could acceptance by a City employee or official of a contractually negotiated benefit constitute a prohibited gift, item or service under the Ordinance's gift restrictions? Consistent with cases not involving contractual provisions (see above) Board staff believes that it could, if: i) the value offered and accepted exceeds what is necessary under a "business purpose" analysis, or that value is personal in nature; *and* ii) the City is not already paying for it through the contract price.[2] That is, we believe that, in instances

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1. We note that the issue of whether such personal items or services can be negotiated into a City contract in the first place is not, primarily, a question that arises under the Governmental Ethics Ordinance, but is addressed by other City policies and Ordinances, as well as by State law. We do not intend to imply that the Ordinance either permits or prohibits this–rather, that, were such a case to arise, the Board would address the Ordinance's application at that time.

2. We note that if the contractor specifically includes the cost of business travel as part of its contract bid, then the City pays for it. This *would* take the matter out of the ambit of § 2-156-040 of the Ordinance (cf. footnote 1, above; that situation would likely raise issues under other laws and policies, but we are not addressing that here). This Memorandum, however, is intended to address those situations in which the cost is *not* so specified in advance, and thus where the *contractor* appears to be paying the expenses, not the City. See also Ohio Ethics Commission Advisory Opinion No. 87-007 (August 14, 1987). There, the question was whether State employees could accept travel expenses from parties doing business with the State where such expenses were paid pursuant to contract. The Ohio Ethics Commission answered "yes," essentially under the theory that, where the State included the requirements in its contract bid specifications, potential vendors would include such expenses in the contract price. It stated:

> It is apparent that parties, in submitting a bid to the [State], will include the cost of the trips in their proposals, and that such expenses are a cost included in the final contract price. Therefore, the travel expenses are a cost for which the [State] pays consideration. Ultimately, it is the [State] which bears the cost of the trips.

where the City is not clearly paying for the negotiated contractual item or service, *the Board should not simply presume a valid "business purpose."* Such a presumption could allow the possibility of uncontrolled contracting, or vitiate the Ordinance's gift restrictions–or foster the perception that this is what is happening. Hence, we recommend that the Board interpret § 2-156-040 in line with past cases, such that, even in negotiated contract situations, there must be a valid "business purpose" for anything of value offered and paid by a City contractor that appears in its City contract, and that this value accepted must be limited to the business purpose itself.

Staff has extensively researched how other jurisdictions treat the issue, but found little relevant authority. However, the Defense Contract Management Agency (DCMA) of the U.S. Department of Defense (DOD) has addressed the issue in its guidelines entitled "Ethics Issues in Government-Contractor Teambuilding." General Rule, p. 11, No. 7, in that document states that the following is not a gift: "Anything which is paid for by the Government or secured by Government contract." The first clause is not at issue here. As to the second clause ("secured by Government contract"), a DOD attorney explained that DCMA does in fact review contracts to determine whether an item or service appearing in a contract provision meets the "business purpose" requirement. If it does, then it is permitted. The indicia DCMA uses to determine if there is a business purpose include: (i) is the gifting recited in the contract; (ii) is it tied to the contract's purpose; (iii) is it necessary to a/the provision with which it is associated; (iv) will it aid in contract performance; and (v) was it carefully negotiated? The DOD attorney did not recall an instance where the business purpose test was not met.[3]

This analysis is compelling to Staff. Staff thus recommends that the Board determine that an item or service to be provided by a contractor does not automatically become permissible or taken out of the ambit of the Ordinance's gift restrictions simply because it has been negotiated and appears in the contract. The first question when these matters

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This opinion is consistent with the first clause in DCMA Guideline General Rule p. 11 No. 7, mentioned below.

3. Further, the attorney confirmed that the Government may accept gifts to itself. Guideline Rule p. 21, Example 6 p. 24; Guideline General Rule p. 40, Example 4 p. 41.

arise is whether the City is in fact paying for the item or service. Unless it is clear in the given situation[4] that the City is paying for the recited item or service, then the item or service is being paid for by the contractor (or would-be contractor). It may be a gift, and, under the Ordinance, may be prohibited. To determine that, Staff believes that the next question is whether the recited item or service has a "business purpose" (see the DOD criteria, above, which Staff recommends the Board adopt with respect to contractual provisions). If it *does*, and it is reasonable in value and limited to that business purpose, then it is *not* a gift, and is not prohibited under Ordinance §2-156-040(c), nor by -040(b) if there is no evidence of a mutual understanding between the offeror and recipient regarding City decisions or actions. (Cf. Case No. 88134.A, where the Board concluded that reasonable hosting expenses, including travel expenses, are not "gifts," but are still subject to the conditions set forth in §§ 2-156-040(a) and (b), namely that they are not anonymous and not offered or accepted based on a mutual understanding concerning the recipient's City judgments or actions.) However, if the item or service *does not* have a "business purpose," then it *must* be analyzed under the Ordinance's gift restrictions and Board case law to determine if it's prohibited thereunder, or if it may still be accepted by the City employee (or City department) it will benefit. If the appropriate conditions are present (for example, the item can be displayed publicly, for the enjoyment or use of the public, despite its not having a "business purpose"), then acceptance of the item or service may be treated as a gift to the City and accepted on behalf of the City under §2-156-040 (f) and reported to the Board and Comptroller as such.

In the two instances mentioned at the beginning of this Memo, then, the pc's provided "at no extra cost" would not be gifts, as they have a clear business purpose. Similarly, as to the contractor-provided travel, the Board's analysis over the years does not change: provided they have a valid business purpose, and are limited to what is necessary to fulfill that business purpose, then these benefits are not gifts, and their acceptance is not prohibited by the Ordinance.

4. This could be demonstrated, for example, if the price of the item or service is explicitly itemized as part of the City's price. It will depend on the contract bid documents, the contract's terms themselves, and the statements and understanding of the City's and contractor's negotiators.