

ADVISORY OPINION
CASE NO. 03043.A
Post Employment

To: [John]
Director of Transportation Engineering
[Company Alpha]

Date: January 14, 2004

You are the [Senior Engineer] in the traffic signals section of the [Department 1]. On June 2, 2003, you left City service and accepted a position as Director of Transportation Engineering for [Company Alpha] ([Alpha]). In an email dated August 20, 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. You specifically asked the Board to address how the permanent prohibition in Sec. 2-156-100 of the Ordinance (Post Employment) would affect your ability to work on the final design phase (Phase 2) of the City of Chicago [Project] [(Project)]. After reviewing your request, and conducting preliminary research, on September 4, 2003, Board staff informed you that the Board could not render a meaningful opinion until further information concerning Phase 2 of the [Project] became available. On November 3, 2003, in a phone conversation with Board staff, you requested that the Board address how the one-year prohibition imposed by Sec. 2-156-100 of the Ordinance applies to any work you may do relating to the preliminary design phase (Phase 1) and Phase 2 of the [Project]. You also provided further information concerning the status of the [Project], and again asked the Board to address the permanent prohibition.

After careful consideration of the information you submitted and the relevant law, the Board has concluded that the Ordinance prohibits you, for one year from the date you left City service, from assisting or representing [Alpha], or any other person other than the City, on any business transaction involving Phase 1 and Phase 2 of the [Project]. Because additional restrictions arising from the permanent prohibition may apply, we advise you to contact us for guidance when the Request for Proposals (RFP) for Phase 2 of the [Project] is issued. We set forth below the relevant facts, our analysis of those facts under the City's Governmental Ethics Ordinance, and our determinations.

FACTS:

I. City Employment

You entered City service in 1973 as a civil engineer with the [Bureau of A], which at that time was part of the Department of [Y]. The [Bureau of A] plans, designs, and operates the City's street traffic system. This includes studies for the improvement of street traffic and signals, traffic planning for major developments, traffic management of on-street construction, and the promotion of traffic safety. The Bureau also manages and maintains the City's system of street traffic control and parking signs, traffic calming programs, street paint markings, and guardrails. During your City employment, you have served in the various grades of civil and traffic engineer¹, as Chief Planning Analyst in the Traffic Signals Section of [Department 1],² as Project Manager in the Signals Section, and, from 1995-2003, as Engineer of Traffic Planning in the Signals Section. For the purposes of this opinion, only your most recent position is discussed in detail.

Engineer of Traffic Planning: 1995-2003. As [Senior Engineer] in the signal's section of [Department 1], your primary responsibility was to oversee the annual traffic signal improvement program. You explained that [Department 1] annually reviews the existing traffic signal system throughout the City to determine what improvements need to be made. Once this review is complete, the list is prioritized, and the Department seeks City, state, and federal funding to make the improvements. When funding is acquired, the Signals Section works with other [Department 1] bureaus and City agencies to design and implement the improvements. You stated that you supervised every step of this process, directing the [Department 1] employees who conducted the review and prioritized the improvements, identifying funding sources and supervising the preparation of funding requests, and overseeing the design and construction of the improvements once funding was acquired. For the most part, you said, the remainder of your time, with a major exception discussed below, was spent dealing with the day-to-day operations of the signal system, particularly with questions and complaints from Aldermen regarding traffic signal problems in their wards.

Chicago [Project]. In 1997 [W] embarked on the preparation of a strategic traffic planning study for the City as a whole, which was completed in or around late 1999. Among the initiatives recommended by Parsons in its strategic planning study was the design and construction of a traffic management center, which would integrate the operations of various City agencies currently involved in traffic control into a single function, and enhance the safety and

¹The Civil and Traffic Engineer title in [Department 1] (and its predecessor Departments) is classified by grade, with Civil Engineer II being the lowest rank (generally filled by recent graduates) and Civil Engineer V the highest.

²[Department 1] was established in 1991.

efficiency of Chicago's surface transportation system through the deployment of intelligent transportation systems (ITS) technology.

In the autumn of 1999, as part of the development of its ITS Program, and in anticipation of the completion of the Parsons studies, the [Bureau of A] participated with the Bureau of Highways and the Department of Procurement Services in an RFQ process through which consultants could seek to be "pre-certified" to provide certain specialized services to [Department 1].³ In or around December 1999, [Michael], the Assistant Chief Engineer for the [Bureau of A], authored a 10-page Scope of Services for Phase 1 of this initiative—the preliminary design study.⁴ The Bureau then issued Requests for Proposals, based on the scope of services, to all consultants—9 or 10 total—who had been pre-certified in ITS services pursuant to the 1999 RFQ.

To your recollection, 5 firms responded to the RFP. You and [Michael] reviewed and scored the responses. Together you recommended to the [Department 1] Commissioner and the Chief Procurement Officer that the contract be awarded to [Company Beta], since renamed [Company Beta] [(Beta)]. You also helped negotiate a proposed contract with [Beta]. Following a customary audit of labor rates, overhead, minority contractor participation, etc., the contract, which had a value of approximately \$1.6 million, was awarded to [Beta] in January 2001.⁵

[Michael] served as project manager from February 2001 until April 2001, at which time you assumed the post. In this capacity, you oversaw the Phase 1 development of the [Project]. You were responsible for ensuring that issues relating to the actual use of the facility by [Department 1] staff—for example, desk space, computer access, etc.—were communicated to [Beta]. You stated that

³The RFQ, entitled "*Pre-qualification for Highway Engineering and Traffic Engineering and Construction Inspection Services*," contained 8 categories. Five of the categories corresponded to Bureau of Highway programs. The balance—Category 5, Traffic Signals; Category 6, Traffic Studies; and Category 7, Intelligent Transportation Systems—corresponded to [Bureau of A] programs. You sat on the committee that reviewed the responses to the RFQ. You and [Michael] represented the [Bureau of A] on the committee. The Bureau of Highways and the Department of Procurement were also represented on the committee. The Department of Procurement representative(s) did not participate in the vote on whether to certify the various respondents as "qualified." You and [Michael] voted only on responses in the three categories relating to the [Bureau of A], and Bureau of Highways personnel voted only on responses in the other five categories. A "second-round" RFQ issued in the spring of 2001, seeking new participants, as well as affording participants who had previously failed to qualify an opportunity to demonstrate that they had since acquired the necessary expertise and/or experience. To the best of your recollection, the scope of services of the 3 [Bureau of A] categories remained unchanged. You again participated in the review of responses and voted only on Traffic categories.

⁴You explained that the project envisions 3 phases: Phase 1 is a 0-30% preliminary design study; Phase 2 is a 30-100% final design plan; and Phase 3 is actual construction of the [Project].

⁵You noted that the Bureau's Phase 1 contract with [Beta] was for a "fixed scope of work, at a fixed price," as opposed to a term agreement to which additional task orders, at an additional cost, might be added at a later date.

as [Beta]'s preliminary design study evolved, you were "copied" on their working drafts, and commented and made recommendations to [Beta] concerning these drafts. In or around August 2002, [Beta] issued a final summary report of their design study, approximately 100 pages in length, with several appendices. In a previous Board opinion relating to this project, a former City employee identified Section 8 of the report, entitled "Final [Project] Facility Requirements and Conceptual Design Plan," as the document which "gives the best idea of the scope of services for design Phase II work." (See Case No. 02031.A.) You were contacted by the Board to provide background information for that opinion, and you stated that Section 8 does not constitute a final design scope of services for Phase II. Instead, you said, "Section 8 presents the results of the Phase I preliminary design effort, including size and layout of rooms in the [Project]...and establishes design parameters that the Phase II consultant would be expected to meet or exceed." (Id. at Page 5.)

Upon completion of the final summary report, you assisted [Beta] with what you referred to as a "road show," from December 2002 through January 2003. You explained that this was the process by which the details of the plan were presented to the stakeholders via a multimedia presentation by [Beta]. You explained that the term "stakeholders" refers to other City departments with an interest in the [Project] _____, the Illinois Department of Transportation, the Federal Department of Transportation, and _____ the private entity responsible for radio traffic reports. You stated that approximately 10 of these presentations were made, and that you personally made about half of them.

Following these presentations, [Beta], with your assistance and under your supervision, began to prepare a work plan for Phase 2, as required under its contract with the City.⁶ The draft work plan provided an overview of a number of tasks that would be completed in Phase 2 of the project and beyond. The "Program Management" task was generic, and involves coordination, scheduling, and reporting; the "Systems Design" task included the preparation of the final specifications for the control room of the [Project]; and the "Architectural Services" included the design of interior finishes, including wall ceiling and floor treatments, as well as lighting, fire protection, mechanical systems, etc. The work plan also included very brief references to tasks that would be undertaken during the implementation and operations phases, including development of software, system testing and operations. This was put in to acknowledge that this work would follow, but the task write ups were not fully developed. Your role in the preparation of the work plan consisted of reviewing drafts prepared by [Beta], assisting [Beta] in its interactions with City agencies, and organizing and supervising meetings between [Beta] and stakeholders relating to the work plan for Phase 2.

The Phase 2 work plan was scheduled for completion in mid-2003. You explained that, generally, the next step in the process, following completion of the work plan, would be for the project manager

⁶As generally used by [Department 1], the term "work plan" refers to a preliminary document that outlines the general requirement for a specific project or phase of a project. After a work plan is drafted, a scope of services is prepared, using the work plan as a general outline. The scope of services is used to prepare an RFP, which is then used to select a contractor.

and staff to draft a scope of services, based on the work plan, for the RFP for the next phase of the project. However, you explained that before the work plan was completed, and before the preparation of the scope of services was underway, the City embarked on a plan to incorporate the physical location and the functions of the [Project] within the Office of Emergency Communications 911 center. Because of issues regarding how the [Project] project would proceed in light of the larger "Emergency Operations Center" project, which would dramatically affect the scope, design, and work tasks needed to implement the [Project], the work plan could not be finalized while you were at [Department 1].⁷ In a recent interview with Board staff for the purposes of this opinion, you again stated that the Phase 2 scope of services for the [Project] has not, to the best of your knowledge, been completed, and further stated that you believed that the scope of services, and ensuing RFP, would be significantly different than that contemplated by the work plan prepared by [Beta] under your supervision. In your most recent conversation with Board staff (October 27), you noted that the RFP for Phase 2 of the [Project] had not been issued, and that you did not anticipate it being issued until early to mid-2004. During that conversation, you also gave the Board permission to talk to your replacement as project manager of the [Project], [William]. [William] stated that while he was sure that the work plan would be used in the drafting of the scope of services, and subsequent RFP, he did not know to what extent; he noted that the changes in the scope of the project had rendered some elements of the work plan irrelevant, and stated that the scope of services and RFP would most likely be significantly different from what was contemplated during your City tenure. [William] also stated that, at this point, it is impossible to tell how much of the work plan will be reflected in the RFP.

II, Post-City Employment.

You are currently employed as Director of Transportation Engineering with [Alpha]. In that position, you are responsible for management of the civil design division, which prepares plans, specifications and estimates for a variety of roadway improvements. You act as principal in charge for several projects, and project manager for several others.

You explained to Board staff that [Alpha] is not, itself, planning to respond to the Phase 2 RFP for the [Project]. However, you said, it is extremely likely that one of the companies that will respond to the RFP will hire [Alpha] as a consultant, both to help them draft their RFP response and to provide engineering consulting services if they are awarded the contract. Although your potential role on the [Project] project has not been defined, it is most likely, you said, that you would assist in plan review, project coordination, and management of in-house design activities, including civil and architectural design.

⁷In Case No. 02031.A, you explained that "...the ultimate scope for the [Project] design consultant cannot be finalized until the scope of work for the [City's Emergency Operations Center (EOC) Project] has been developed, and until the division of responsibilities between the EOC and [Project] projects has been agreed to." You also stated in that opinion that you were uncertain when the [Project] Phase II scope of services will be completed, given that "...the EOC Project does not have a schedule yet."

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 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.

This section of the Ordinance imposes both a one-year and a permanent prohibition on former City employees' post-employment activities. The one-year prohibition begins on the date City employment ends, not on the date an employee stops participating in specific projects or transactions. (See Case No. 94011.A, p. 7.) We address the one-year prohibition first.

I. One-Year Prohibition. Under the first clause of Sec. 2-156-100 (b), you are prohibited, for one year after you leave City employment, from assisting [Alpha], or any other person, in any business transaction involving the City if you participated personally and substantially in the subject matter of the transaction while employed by the City. In order to apply this prohibition to your case, we must first ascertain the “business transaction involving the City” in which you will assist [Alpha], then the “subject matter” of that transaction, and finally, whether you “participated personally and substantially” in that subject matter while employed by the City.

As noted above, you anticipate that [Alpha] will be asked to assist a company in its response to the City's RFP for Phase 2 of the [Project] and, if that company is successful, [Alpha] will likely be retained by that company to provide engineering consulting services. Clearly, both the response to the RFP, and the resulting contract for Phase 2 of the [Project], are business transactions involving the City. The subject matter of these transactions is equally clear— Phase 2 of the [Project].

You stated that, as Project Manager for the [Project] you oversaw the day-to-day work on Phase 1 of the [Project], as well as overseeing the preparatory work for Phase 2. With respect to Phase 1, your duties included reviewing responses to the Phase 1 RFP, recommending that [Beta] be selected as the contractor, and participating in the negotiation of the contract between the City and [Beta]. You also attended regular meetings with [Beta] and other stakeholders, reviewed drafts of the design plans prepared by [Beta], and assisted [Beta] in its presentation of the details of the plan to the stakeholders via a multimedia presentation. With respect to Phase 2, you supervised [Beta] in preparing a work plan for this phase, reviewed drafts of this plan, assisted [Beta] in its interactions with City agencies, and organized and supervised meetings between [Beta] and stakeholders relating to the work plan. The Board concludes that these activities constitute personal and substantial participation in Phase 1 and Phase 2 of the [Project]. Therefore, we determine that you are prohibited, for one year from the date you left City service, from assisting or representing [Alpha],

or any other person other than the City, on any business transaction involving Phase 1 and Phase 2 of the [Project].

II. Permanent Prohibition. Under the second clause of Sec. 2-156-100 (b), you are, as a former City employee, permanently prohibited from assisting or representing any person other than the City on a City contract, if you exercised contract management over that contract while employed by the City. Section 2-156-010(g) of the Ordinance defines the term “contract management authority” 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.

The issue before the Board, therefore, is whether you, while a City employee, exercised “contract management authority” over any City contracts with respect to the [Project]. If so, you are permanently prohibited from assisting or representing [Alpha] (or any other person) with respect to those contracts. As any RFP or contract you would be asked to assist [Alpha] (or any other person) with would be for Phase 2, we only address this phase of the [Project] under this Ordinance provision.⁸

While no contract for Phase 2 of the [Project] has been awarded to date, the law makes clear that “contract management authority” includes preparing specifications, evaluating bids or proposals, and negotiating terms. In the absence of an RFP, however, the Board cannot make a determination as to whether you exercised contract management authority over any contract or transaction relating to Phase 2 of the [Project]. We therefore recommend that you contact us for further guidance at the time the RFP is issued.

Confidential Information. We also bring to your attention Ordinance Section 2-156-070, entitled “Use or Disclosure of Confidential Information,” which 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 pursuant to the Illinois Freedom of Information Act, as amended.

DETERMINATION: Based on the facts presented, the Board determines that the post-employment provisions of the Governmental Ethics Ordinance prohibit you, for one year from the date you left City service, from assisting or representing [Alpha], or any other person other than the City, on any business transaction involving Phase 1 and Phase 2 of the [Project]. The Board cannot make a determination as to what effect, if any, the permanent prohibition will have on your post-City

⁸Please note that we do not address Phase 3 of the [Project] in this opinion. If you, at some point in the future, have occasion to assist or represent a person other than the City with Phase 3 of this project, you may wish to contact the Board for advice on whether the permanent prohibition applies.

employment, as no RFP or contract relating to Phase 2 exists for us to review. We recommend that you contact us for further guidance at the time the RFP is issued.

Our determination is not necessarily dispositive of all issues relevant to this situation, but is 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 determination. 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 Ethics 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