

CONFIDENTIAL

Advisory Opinion

John Smith

Case No. 07043.A, Post-Employment

October 17, 2007

You were the Director of Real Estate of the City's Department of Aviation ("DOA"). You left City employment in ____ 20__. You desire to become an independent contractor for ABC ("ABC"), a national airport cargo facility and leasing development company. On August 16, 2007, you requested a written advisory opinion from the Board of Ethics addressing how the City's Governmental Ethics Ordinance would restrict your possible post-City retention by ABC. With your permission, we communicated with current and former City employees who would likely know facts relevant to your request. As discussed in this opinion, the Board has determined that the Ordinance's "permanent" post-employment provision does not prohibit you from assisting or representing any person, including ABC, its parent, subsidiaries or affiliates with respect to the New Lease (including, but not limited to, the RFQ, or any RFP, licensing, construction, subleasing, operations, development, leasing, or management) proposed under, or arising out of, the RFQ, or any other lease arising from the ROFR contained in the Termination.

FACTS: History of ABC and the City. On ____ 15, 19__, the City entered into a Cargo Building Site Lease (also known as #__-__-0_) with DEF Airlines, Inc. ("DEF") ("Original Lease") pursuant to which the City leased to DEF a cargo site and cargo facility at O'Hare Airport ("Demised Premises"). Such facilities (in this case, a 318,000 square foot building on a site in the southeast quadrant of O'Hare) are used by airlines to off-load, store, ship and freight cargo. The Original Lease's provisions delineated, among other things, a specific real estate area (including improvements) in which DEF could conduct its operations. On ____ 19, 19__, the Original Lease was amended by the First Amendment to Cargo Building Site Lease ("Amendment"). The Amendment, in essence, provided for the assignment by DEF to ABC of DEF's rights and obligations under the Original Lease, without releasing DEF, so that ABC could, in turn, sublease to other airlines – such as freight forwarders - portions of the Demised Premises for their operations. In 19__, after the City announced the World Gateway Project (a portion of which was to build a facility ["Facility"] that included part or all of the Demised Premises), ABC and the City, through DOA, unsuccessfully attempted to negotiate to relocate its operations to another site at O'Hare. The Original Lease, as amended, thus, remained in effect.

On ____ __, 20__, the City Council passed an ordinance providing for a Facility ("Facility Project") that would expand O'Hare's flight services presence; the Facility Project was eventually discontinued. In late 20__, DOA determined that the Demised Premises were required for that project and it was necessary that the City acquire the Demised Premises (then being leased by ABC from the City).

Moreover, DOA determined that it needed to acquire the Demised Premises no later than the end of 20__ to avoid the risk of cost increases resulting from the delay of the development of the Facility and to eliminate the need to relocate certain Carrier hardstand [tarmac away from an airline's gate] operations, or interfere with either airfield operations or passengers during the construction of the Facility (20__ – 20__). On _____ 6, 20__, the City Council passed an ordinance (“Negotiation Ordinance”) authorizing DOA to negotiate an agreement providing for the termination of the Original Lease and Amendment. ABC and the City negotiated and reached a settlement agreement (“Termination”) that resolved all outstanding disputes regarding rents and bond payments due from ABC, compensated ABC monetarily for the remaining lease term (_____ 11, 20__), terminated the Original Lease (but with continuing obligations, including the essence of the Termination: ABC and its subtenants’ proper exit from the Demised Premises no later than December 31, 20__ (see Termination Article I § F)), provided for ABC’ continuing proper business operations at no cost to the City until final vacation (with liquidated damages for late vacation) in return for the compensation, a City release, covenants not to sue, and the City’s assumption of bond payments. Last, it included a grant by the City of a right of first refusal (“ROFR”), which survived the parties’ final performances as required by the Termination, in favor of ABC to, again, have a lease (“New Lease”) at the airport as “there is currently no facility or property at the Airport which is available to offer ABC in substitution for the Demised Premises.” Termination Final Recital pages 1 – 2. On _____ 27, 20__ the City Council passed an ordinance approving the Termination (“Approval Ordinance”). Approval Ordinance § 2.

ABC vacated the Demised Premises; part of the facility is currently used for storage. In _____ 20__, DOA issued “New Contract Airport Request for Qualifications: Northeast Air Cargo Modernization” (“RFQ”). The goal of the RFQ is to allow DOA to enter into a long-term ground lease with a “highly qualified development team” to develop multiple air cargo facilities on the airport property identified in the RFQ. RFQ. § I. The RFQ refers twice to the ROFR and the document where the ROFR is located, namely, the Termination. In RFQ § I-2, a map designates the “general location of an air cargo facility proposed to be developed by ABC...and represents a portion of the Property that will likely be leased to ABC for air cargo development pursuant to a right of first refusal.” In RFQ § III-4, DOA first recites the history of the Original Lease, Amendment and Termination, stating that “this [the Original Agreement, as amended] was terminated pursuant to its terms and conditions. A critical term of this agreement [Termination] afforded the [sic] ABC a right of first refusal which would provide for the effective ‘in kind’ relocation of their [ABC’] facility. Consequently, the City plans to offer a ground lease to ABC on part of the Property...” It then outlines, on an aerial map, the boundaries of the site intended for ABC with a list of site characteristics. RFQ §§ I-2 and III-4. ABC, along

with approximately 20 others, is in the midst of responding to the RFQ. You stated ABC and the City are negotiating the Site Notice, which is the RFQ.

Your Background. In 19__, you graduated with a B.A. in _____, and in 19__ with an M.A. in _____ from University. You worked from 19__-19__ for School in _____; from 19__-19__ for _____ Corporation in Management; and from 19__-19__ for _____ Company in Management. You joined the City in January 19__ as Director of _____, Department of Aviation (“DOA”), and in 19__, you became Director of Real Estate for DOA. You left City service in _____ 20__. You then worked for the Public Sector from ____ 20__ - _____ 20__ as Manager. You now wish to be retained as an independent contractor by ABC.

Your City Job. As Director of Real Estate (for both Chicago airports) you said your general, daily activities included monitoring leases for airlines in domestic terminals and cargo buildings, and leases for areas designated for private planes. You (and others) explained that you ensured airlines followed their leases with the City, and that the City fulfilled its lease obligations. A typical airline obligation might be that it operated only within the leased area, and, accordingly, you watched what space the airline used. The City was obligated to operate, maintain and repair the airport facilities properly, and comply with Federal Aviation Administration rules. An obligation involving both parties might include a leaking airport facility roof. The parties communicated with you and you reviewed the lease to determine whose obligation it was to repair; your determination was followed through by DOA Facilities personnel to ensure the work was accomplished. You reviewed the architectural plans of those doing construction at the airport – ensuring work was to be within the applicable leased space - and you changed the airlines’ lease agreement’s exhibits (showing rented areas) to increase or decrease the leased areas’ square footage accordingly. You worked with the X Department, and helped amend the lease to show those lease changes. As an example of your work, you stated that an airline might like more space in the lower level of Terminal 2, as shown in the standard airline “Use Agreement” with the City, specifically, in the standard Use Agreement’s Exhibits J and K, showing such space. You were responsible for making changes to the space on the documents, and then you followed through with billing instructions (as the space had changed, so had the rent to the City from the airline). Similarly, you worked on airlines’ rent credits, *e.g.*, if an airline gave up some storage space then you decreased square footage and decreased billings, showing a credit. You then instructed the Y Department to generate a credit statement or an invoice as appropriate. You (and some others with whom Board staff spoke with your permission) said the airlines were frequently changing/moving space they used, so you were frequently amending agreements. In addition, you (and others) explained that much of your work involved property management, including working with DOA’s Airport Facilities personnel, as

disagreements between different tenants and others arose, *e.g.*, maintenance and repair or utilities.

Respecting new leases, you were involved with general aviation tenants (companies handling individuals' private planes), usually at Midway, as it had hangers located on its outskirts, and for the commercial tenants such as S or A. At Midway, you assisted in the negotiations for the building of new buildings by general aviation or commercial tenants and cargo facility developers. In general, DOA and the X Department used a form lease to start, and made changes to it. During negotiations, you would often attend with an member from the X Department with you, and, additionally, another DOA member with a higher title than yours. You would work on the physical location and would put exhibits together, showing locations and square footage. To complete this task, you worked with a City architect so the lease could reflect the City requirements for the tenant's construction. Also, you completed billing instructions to the City, as construction often engendered rent changes. Only once, with a consultant, did you "put together" a Request for Qualifications/Proposal ("RFQ/P"), which was for the sale of land at O'Hare; then you were involved in draft leases sent back and forth between the parties. You also were involved in necessary negotiations relating to the premises; however, the proposed transaction did not work out in accordance with the City's needs. Several times you reviewed Request for Proposal ("RFP") responses on a submissions team, scoring some of them. You drafted some summaries and memoranda for the Mayor's Office section for Intergovernmental Affairs for airline lease modifications. You said you were involved in ground transportation matters related to the real estate side of airport operations, *e.g.*, in connection with DEF buses, you worked with the X Department and Ground Transportation to negotiate (along with other members of DOA) the lease for and operations involving buses on the airport premises.

You also monitored licenses, leases and other agreements that involved various airlines at the two airports if the issue related to "bricks/mortar" and operations, *i.e.*, disputes between airlines respecting trucks tugging luggage, which issue, you said, always must be resolved by referring to the "J & K exhibits" of the Airlines Use Agreement with the City. In that case, you refereed the dispute by working with the various airlines' operations managers to determine who is using whose space and then to "fix the problem."

You (and others) stated that, in connection with the Original Lease and the Amendment, you performed the same types of monitoring/supervision/modification/notice to billing, *etc.* you explained in generally describing your City duties. In addition, as to the Amendment, you attended some initial negotiation sessions, providing background information to the City's negotiator. Upon execution of the Amendment, you completed the lease file and set up the billing.

In connection with the Termination, you stated that only initially were you at the negotiating table for the City as it negotiated with ABC. You provided certain spreadsheets, amounts of back rents (due from ABC), ABC subtenant mix and the subtenants' various leases to the City's negotiating team. You were present when the problems between the parties were identified but not when the solutions were constructed or agreed upon. You (and others) stated that the ROFR was part of the consideration for the Termination and provided an opportunity for ABC to obtain a relocation of the site it had leased (by assignment) from the City, but only if the City chose to develop a new cargo area, as described in the ROFR. You also stated (and others confirmed), that the RFQ was the Site Notice to ABC required in the ROFR. You stated that the RFQ was issued because the City did, ultimately, decide to have a new cargo area and ABC has the right to say, as you stated, "yes, we'd like to be part of that," and then the City would have to negotiate a lease for the new cargo area to the City, which, you (and others) said, ABC is likely to obtain. The Termination (which terminated – along with continuing ABC obligations – the Original Lease and Amendment) arose in order to solve the fact that ABC was in the footprint of the Facility Project. In addition, you stated that, but for the Termination, the ROFR would not be in the RFQ, and that the New Lease for the new cargo area is the "offset" for the old site ABC leased from the City. Further, you added, that the ROFR apparently appears in the RFQ so that other bidders can assess whether they want to respond to the RFQ.

Upon execution of the Termination - about which you explained that the main task in and purpose for that agreement was for ABC and its subtenants to vacate - you said that your main job, in connection with the Termination, was to manage that vacation. You said you monitored ABC (usually by telephone) with a list of subtenants (and dates certain for their vacation) in your hand. Occasionally, you were involved in a problem (similar to those you described) as you were concerned that ABC might work outside its leasehold. You also escorted City engineers through the building as they determined demolition (which did not occur) procedures. When the building was vacated, you performed the final walkthrough, arranging disposition of items left by subtenants (such as "tugs," the vehicles that pull luggage). As to the ROFR in the Termination, you (and others) explained that the ROFR was consideration for ABC' agreement to the Termination, and that the ROFR is constructed in "reverse"; others advised Board staff this structure was so that the City would give special consideration to ABC assuring that ABC would be likely to successfully negotiate the New Lease on a new location different from the old airport site ABC controlled under the Original Lease and Amendment.

Your ABC job. You (and others) told Board staff that ABC has no current contracts with the City. You further explained that, should ABC obtain the New Lease and you were to work for them, your job would include monitoring cargo facility construction; "troubleshooting," during construction, when, for instance, there would be an airport runway closure causing problems with construction of the facility, you would supervise

on/off airport traffic, and work with/for ABC' construction company and with DOA to resolve the problem (you might also work with the City if there were problems, or in connection with utilities, ABC or its subtenants' operations, "SNAFUs" over real estate boundaries, *etc.*); and once the facility is built, managing the day-to-day operations of the facility (cargo company sublessees would be accepting/freighting containers: an airline flies to the airport, unloads freight at a ABC facility, and, on the opposite side, trucks remove the freight for further delivery), basically a similar operation to that which ABC had under the Amendment. As with the City, you would monitor the space ABC' subtenants used in their operations were consistent with their sublease and ABC' lease with the City.

LAW AND ANALYSIS: Post Employment. Section 2-156-100(b), "Post-Employment Restrictions," of the Governmental Ethics Ordinance ("Ordinance") states, in relevant part:

No former...employee shall, for a period of one year after the termination of the employee's...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...employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.

One-Year Prohibition: Under the first clause of §2-156-100(b), you were, as a former City employee, prohibited for one year after leaving City service from assisting or representing any person (including ABC) in any business transaction involving the City if you participated personally and substantially in the subject matter of that transaction as a City employee. Because you left your City employment _____ 20__, the one-year prohibition is not at issue in this advisory opinion.

Permanent Prohibition: As noted, under the Ordinance, a former City employee is permanently prohibited from assisting or representing any person on a contract if he or she exercised "contract management authority" over that contract while employed by the City. "Contract management authority," defined in Section 2-156-010(g):

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 said that, in your position as Director of Real Estate for the City's Department of Aviation from _____ 19__ to _____ 20__, your duties included, among others, monitoring performance of airline leases, reviewing airport construction, modifying lease space, reviewing plans for construction of new buildings, occasionally scoring RFP responses, and negotiating leases for ground transportation at the airports and reviewing licenses involving "bricks/mortar" issues. The relevant question before the Board is whether you exercised contract management authority while in City service over the New Lease. If you did, then under § 2-156-100 of the Ordinance, you will be permanently prohibited from assisting or representing any person (including ABC, its parent, subsidiaries or affiliates) on the New Lease (which for purposes of this advisory opinion includes, but is not limited to, the RFQ/P, licensing, construction, subleasing, operations, development, leasing, or management) proposed under, or arising out of, the RFQ, or any other lease arising from the ROFR contained in the Termination. In analyzing this issue, we first address three sub-issues: (i) what is the ROFR in this matter before the Board; (ii) while with the City, what was your involvement, if any, as defined in the Ordinance, with the Original lease, as amended, the Termination or the ROFR; and (iii) what is the substance of the ROFR that is contained in the RFQ, pursuant to which process, only, the New Lease would arise.

The Right of First Refusal ("ROFR"). In the Termination, "Article II Consideration," § E, the agreement effectively recites that: (i) as consideration given by the City to help compromise any obligations between it and ABC set forth in the Termination's Recitals, and (ii) in acknowledgement that the City "currently [has] no facility or property at the Airport which is available to offer ABC in substitution for the Demised Premises" [ABC' leased site under the Amendment] (*see* Termination Recitals), the City granted ABC a right of first refusal that survived the parties' performance of the Termination. This right essentially made a one-time grant of a "right of first refusal" that ABC could exercise

"[o]nce the availability of the ["substitution"] Site, if any, is established by the City...[ABC being advised by] [t]he City's notice [that] will include the material terms and conditions of a proposed lease for the Site which are acceptable to the City...ABC will have 90 days from the date of the its receipt of the Site Notice to accept the terms outlined in the Site Notice...[i]f ABC fails to exercise its Right of First Refusal within 90 days after its receipt of the Site Notice, the City will have the right to offer the Site for lease to any other third party upon the same terms and conditions as those outlined in the Site Notice" (the "ROFR").

As you (and others) stated, the RFQ is the Site Notice to ABC.

The ROFR is an example of a variation of the classic definition of a right of first refusal. The ROFR's structure ensures that ABC may not exercise the ROFR until it obtains Site Notice. Therefore, it is in the City's discretion whether to send a Site Notice to ABC. However, because of the Site Notice procedure, the ROFR provides ABC – and no one else – an opportunity to “accept the terms outlined in the Site Notice” it has received. You have stated that, currently, the City and ABC are negotiating the New Lease. Accordingly, the ROFR's structure ensures that ABC has the first right to consummate an agreement with the City for airport space that substitutes for that which it gave up through the Termination; only if the negotiations fail to yield a New Lease between ABC and DOA may the City present the Site Notice to a third party. This process is a reversal, as you have stated, of the classic right of first refusal.

Your involvement with the Original lease, as amended, the Termination or the ROFR.

You (and others) stated that your general duties as Director of Real Estate described above included in their purview the Original Lease and the Amendment. You said that you supervised the performance of the airlines' leases, *e.g.*, you ensured lease obligations were met, and made determinations regarding operational disputes between airlines involving real estate. You (and others) explained your involvement in the Amendment was to communicate to the City's negotiator your input regarding background information necessary to the negotiation. As to the Termination, you provided data to the City's negotiator, including data about the subtenants. The Termination contained few terms except the continuing obligations between the parties, namely, the ROFR, Article II, § E, and the vacation by ABC and its tenants of the Demised Premises [defined in the Original lease], Article I, §§ D and E, by a date certain. The ROFR granted ABC an enhanced negotiation right for the New Lease. But the Termination contained none of the material terms of the New Lease, *i.e.*, precise site location, types of improvements to be constructed and operations methods, rental, payment obligations and legal sanctions, rights to sublease and obligations for subtenant default. You told Board staff that the main issue in the Termination was ABC and its subtenants' timely and orderly vacation of the Demised Premises. This you oversaw. You were in regular communication with ABC, knowing the subtenants and their schedule of departure, and you monitored this process under the Termination, ensuring that it occurred as agreed by the parties.

The ROFR contained in the RFQ. You (and others) stated that the RFQ effectuates the Termination's ROFR, as the RFQ contains the language that is the Site Notice required in the ROFR. In §§ I-2 and III-4, the RFQ (which you acknowledge was sent to ABC and others, and to which ABC has responded) specifically refers to the ROFR, the Original

Lease (noted as __ - ____ -0_), the Amendment, and the Termination. Most notably, the RFQ refers to the Original Lease and recites:

“On _____ 1, 20__ [Cf. Termination Article I §A] this agreement was terminated pursuant to its terms and conditions. A critical term of this agreement afforded the ABC a right of first refusal which would provide for the effective ‘in kind’ relocation of their facility.***Consequently, the City plans to offer a ground lease to ABC on part of the Property [designated in the RFQ]...”

The RFQ then recited certain site parameters. RFQ § III-4. The substance of the “effective ‘in kind’ relocation...City plans to offer” of a ground lease is set forth in the ROFR existing in Article II, § E of the Termination. You (and others) have acknowledged that the ROFR was part of the consideration for the Termination and it was intended to provide an opportunity for ABC to obtain a relocation of the site it leased from the City under the Assignment. Termination Article II, § E.

You also stated that the City and ABC are currently negotiating the New Lease pursuant to the RFQ’s incorporation of the ROFR. But the ROFR contains no terms to be included in the New Lease. It does provide the method by which the RFQ was issued to the public, and that the RFQ specifically include language referring to the ROFR. However, the RFQ contains few terms for the proposed New Lease. The RFQ specifies an area for ABC at the airport and recites some of the areas characteristics, namely, the size of the space.

In your City involvement with the Original Lease and Amendment, you (and others) stated that, among other things, you monitored and enforced airline leases. You also enforced the main provision which was the purpose of the Termination. Termination Article I § D. Notably, respecting the Termination, your primary responsibility was to ensure that ABC and its tenants vacated the Demised Premises. In your description of your work involving ABC’ vacation, the Termination is straightforward, as was the obligation upon ABC that you enforced. As to the Termination, the Board concludes you supervised the material substance of the Termination: the actual exit of ABC and its tenants from the Demised Premises pursuant to the terms of the Termination. Cf. Case No. 99022.A page 4 (employee’s involvement in complex, multi-faceted City contract was not supervision, as it involved a small portion of the contract and only required verifying a specific task completion). Accordingly, under Ordinance § 2-156-100(b), the Board concludes you did exercise contract management authority over the Original Lease, the Amendment and the Termination, which contained the ROFR.

However, the facts in your case do not warrant the conclusion that you also exercised contract management authority over the New Lease.¹ You supervised the Original Lease,

¹ Your case is distinguishable from Case No. 07019.A., in which the Board considered whether a Task Order, issued pursuant to a City’s Depends Upon Requirements (“DUR”) agreement, was a separate

Amendment and the Termination, which contained the ROFR. The Termination and ROFR evidence the parties' intent that, should the City have a substitute cargo facility site available at the airport for ABC, that the City first offer it to ABC. Without the ROFR, ABC would not have a right – one enhanced beyond any right third parties have in responding to the RFQ – to have the first chance to negotiate with the City for a designated area for a cargo facility at O'Hare Airport. However, ABC has only a right to negotiate. Unless negotiations are successful, there will be no New Lease in which you would be involved. Moreover, there are no facts indicating that, when the parties entered into the Termination agreement and the ROFR, the parties intended to do anything other than negotiate in good faith eventually to enter into a binding contractual relationship. Except for the ROFR *rights*, the Termination legally extinguished the Original Lease as amended and all rights and obligations between the parties. There has yet to exist a New Lease over which you could exercise contract management authority. Therefore, for purposes of Ordinance § 2-156-100, the Board concludes that the New Lease will be (if consummated) a distinct contract from the Original Lease, the Amendment or the Termination. Accordingly, the Board concludes that you have not exercised contract management authority over the New Lease.

Confidential Information: In addition, the Board cautions you that, as a former City employee, you remain subject to the strictures of Ordinance § 2-156-070, "Use or Disclosure of Confidential Information."

DETERMINATIONS: The Board has concluded, based on the facts presented, that you did not exercise contract management authority over the New Lease, which is the contract upon which ABC desires you to work. Based on that conclusion, the Board determines that the Ordinance's "permanent" post-employment provision does not prohibit you from assisting or representing any person, including ABC, its parent, subsidiaries or affiliates with respect to the New Lease (including, but not limited to, the RFQ, or any RFP, licensing, construction, subleasing, operations, development, leasing, or management) proposed under, or arising out of, the RFQ, or any other lease arising from the ROFR contained in the Termination. You have advised Board staff that you were involved in and/or likely exercised contract management authority over a number of other contracts during your City service. However, as you have not requested an advisory opinion with respect to any of those other contracts or projects, we caution you that this

contract from the DUR. The Board concluded that the Task Order was not a distinct contract from the DUR. The Board reasoned that the performance of a DUR contract requires that the City issue its requirements for goods or services to a City vendor who is a signatory to the DUR. As substantially all material terms have been previously agreed upon by the parties, there is little possibility for a meaningful negotiation request by the City's vendor: the Task Order is "part and parcel" of the DUR. *Id.* at page 4. In this case, to the contrary, ABC is negotiating all the material terms of the New Lease with the City. The New Lease does not issue from, nor is it "part and parcel" of, the Original Lease, Amendment, Termination or ROFR. *See Id.*

opinion is limited to your proposed work for ABC as described herein. If you are asked to assist or represent any person (including ABC) on any such other contract, the Board advises you consult us, as the Ordinance's permanent prohibition may apply.

Our determinations do not necessarily dispose of all the issues relevant to your 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 presented are incomplete or incorrect, please notify us immediately, as nay change may alter our opinion. Other rules or Xs may also apply to your situation. We also note that any City department may adopt restrictions that are more stringent than those imposed by the Governmental Ethics Ordinance.

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

Miguel A. Ruiz, Chair