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Advisory Opinion
Case No. 93033.A, Interest in City Business

City of Chicago
Richard M. Daley, Mayor

Date: [REDACTED]

Board of Ethics

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On [REDACTED], you requested an advisory opinion from the Board on whether the Governmental Ethics Ordinance would prohibit you from working in a subcontracting capacity on a City-funded project. You are a [REDACTED] in the [REDACTED] Department, as well as part-owner of a security agency. You stated that you wished to submit a bid with Co. A [REDACTED], a construction contractor, to provide security services on a City-funded project for which Co. A [REDACTED] is the general contractor. Co. A [REDACTED] advertised the security contract in local newspapers on [REDACTED]; bids were due approximately one week later, on [REDACTED]. You inquired whether the Ordinance prohibition against an employee having an interest in City business would affect your company's ability to work for Co. A [REDACTED] on this project.

On [REDACTED], after discussion with the Department of [REDACTED] about the project, the Board office advised you that you could submit a bid on the contract, but expressly reserved judgment on the ultimate issue of whether you could perform the work should Co. A [REDACTED] award the contract to your company. On [REDACTED], you submitted a bid with Co. A [REDACTED].

After reviewing the facts presented by you and Mr. [REDACTED] of the [REDACTED] Department, the Board concludes that the Ethics Ordinance does not prohibit your company from working as a subcontractor for Co. A [REDACTED] on the City project in question. The Board's analysis of the facts under the Ethics Ordinance is set forth below.

FACTS: You are a [REDACTED] in the [REDACTED] Department, assigned to [REDACTED]. You are also the 51% owner of Co. C [REDACTED], a security agency. Co. C [REDACTED] is certified as both a Minority Business Enterprise (MBE) and Women-owned Business Enterprise (WBE) by the City of Chicago.



The Department of Purchases, Contracts and Supplies awarded Co. A a contract to construct a facility. According to the Purchasing Department, the new facility will be the . The City hired a construction management firm, Co. B, to oversee the massive project. The project is being completed in phases and is approximately 15% complete at present. For the next years, Co. A will need "round-the-clock" security patrol of the facility housing the equipment.

The Purchasing Department typically requires City contractors to identify certified MBE and WBE subcontractors on bid documents as a means of ensuring compliance with the City's minority business participation goals. However, due to the scale of the project, the City did not require Co. A to identify subcontractors in its original bid. According to Mr. , overseeing MBE/WBE compliance on the project, compelling Co. A to identify MBE and WBE subcontractors prior to bidding on the project would have been an impossible burden for a contract its size and duration, and would have significantly delayed commencement of the project. Instead, the Purchasing Department relied upon Co. A and Co. B to select certified MBES and WBES after the general contract was awarded.

As the general contractor, Co. A is responsible for selecting qualified MBE and WBE subcontractors. Co. A is also responsible for paying the subcontractors it hires. While the City does not interfere with Co. A's freedom to select qualified MBES and WBES, the City requires Co. A to follow certain procedural requirements to ensure that Co. A meets the City's minority participation goal on the project. For example, as part of its target market program, the City requires Co. A to advertise subcontracting opportunities in newspapers with predominantly minority circulations, and to select subcontractors by means of fair and open bidding. The City further requires Co. A to use the City seal in its advertisements to attract minority- and women-owned businesses.

In addition to monitoring MBE and WBE participation, the City retains oversight of the MBE/WBE selection process to ensure that its budget and project completion goals are met. General contractors are legally bound to obtain the City's approval of all subcontractors selected to do work in excess of \$10,000. Mr. stated that the City considers two factors in

deciding whether to approve or disapprove subcontractors: (1) whether the project will be done on time, and (2) whether the proposal is within the budget originally proposed. Purchasing Department employees determine, based on their professional experience, whether the subcontractor's bid is reasonable by comparing the cost of the proposal to its scope. The City rejects subcontractors with excessive bids. According to Mr. [REDACTED], the City generally approves or disapproves subcontractors within a few days.

Additionally, should the City have prior knowledge of a firm's expertise in a particular area, the City may directly contact the firm about a business opportunity. However, the City will contact businesses only after an advertisement has been placed in the public realm and all parties have been encouraged to pick up specifications and submit proposals.

As a measure of good faith compliance with City requirements, Co. A [REDACTED] invited the City to attend bid openings on the [REDACTED] project, including the bid opening for the security contract. According to Mr. [REDACTED], the City, usually represented by Co. B [REDACTED], attends bid openings to monitor the proceedings, but has no input in [REDACTED] Co. A's method of selection. When the City, or its representative, does not have time to attend bid openings, it asks for receipts of bids submitted. The City was not present for the opening of the security bids.

According to Mr. [REDACTED], the City will not evaluate competence in deciding whether to approve or disapprove the security subcontractor. Mr. [REDACTED] stated that Co. A [REDACTED] is responsible for assessing the security agency's qualifications, upon which assessment the City will rely. According to Mr. [REDACTED], the City does not have time to review lengthy contracts and compare different proposals, and therefore does not scrutinize each subcontractor's qualifications. Mr. [REDACTED] stated that the City pays Co. A [REDACTED] to choose the most qualified company for the job. Moreover, Mr. [REDACTED] stated that the City does not certify businesses unless they are qualified, and therefore presumes certified MBEs and WBEs to be competent.

LAW AND ANALYSIS:

Section 2-156-110 of the Governmental Ethics Ordinance prohibits a City employee from having a financial interest in City business. Section 2-156-110 states in relevant part:

No elected official or employee shall have a financial interest in his own name or in the name of any other person in any contract, work or business of the City or in the sale of any article, whenever the expense, price or consideration of the contract, work, business or sale is paid with funds belonging to or administered by the City.

The term "financial interest" is defined in part as " ... (i) any interest as a result of which the owner currently receives or is entitled to receive in the future more than \$2,500 per year; (ii) any interest with a cost or present value of \$5,000 or more; or (iii) any interest representing more than 10% of a corporation, partnership, sole proprietorship, firm, enterprise, franchise, organization, holding company, joint stock company, receivership, trust, or any legal enterprise organized for profit...."

The contract with Co. A [REDACTED] will earn the winning bidder considerably more than \$2,500 per year. Therefore the issue before the Board is whether your proposed contract with [REDACTED] Co. A constitutes a financial interest in City business within the meaning of section 2-156-110.

Based on the facts presented and previous Board opinions, set forth below, the Board concludes that your company's proposed contract with Co. A [REDACTED] is not an interest in City business and is thus not prohibited by the Ordinance.

In Case No. 91072.A, the Board held that a City employee, on a temporary leave of absence from City service, could work full-time for a private educational institution on a City contract without violating the financial interest provision of the Ethics Ordinance. The Board reasoned that because the private institution, not the City, hired and paid the City employee, the City employee did not have a financial interest in City business, even though the employee had been hired solely to perform on the institution's contract with the City. The Board found that the employee's activity was, in effect, one step removed from a financial interest in City business, and that the Ethics Ordinance did not prohibit this intermediary relationship.

Likewise, following Case No. 91072.A, in a series of hypothetical questions raised in Case No. 92030.A, the Board held that the Ethics Ordinance would not prohibit a real estate company owned by a Chicago alderman from performing architectural inspecting services on City property for a company that managed the property on behalf of the City. The

Board advised that if the alderman's real estate company were paid out of the City contractor's general funds, not City funds or funds authorized by ordinance or administered by the City, there would be no financial interest in City business.

Applying the same principle in Case No. 91052.A, the Board found that a City employee did not have a financial interest in City business where the employee leased space to a corporation that intended to use the space to operate a business funded by a City-subsidized loan. The Board reasoned that the employee's contract was with that other corporation, not with the City.

The facts here show that the City of Chicago awarded Co. A [REDACTED] a contract to build a new [REDACTED] facility without considering the participation of Co. C [REDACTED] or any other MBE or WBE. Rather, Co. C [REDACTED] submitted its bid directly to Co. A [REDACTED] after the City selected Co. A [REDACTED] as general contractor on the [REDACTED] project. Co. A [REDACTED] is responsible both for awarding the security subcontract and paying the subcontractor. While Co. A [REDACTED] is required by law to submit the name of the security subcontractor it selects to the City for approval, the City's evaluation is essentially limited to ensuring that the subcontractor's bid is reasonable, that is, within the budget and schedule originally proposed.

Co. A [REDACTED] is paid with funds administered by the City and, by virtue of this arrangement, clearly has a financial interest in City business. Co. C [REDACTED], should it be awarded the security contract, would be paid directly by Co. A [REDACTED]. Thus, while Co. C [REDACTED] may have a financial interest in the business of Co. A [REDACTED], the Board concludes that this interest does not translate into a financial interest in City business.

CONCLUSION: The Board concludes that the Ordinance does not prohibit Co. C [REDACTED] from working on the proposed contract with Co. A [REDACTED] as the contract has been described.

Our determination in this case is based upon the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. The Board's decision here should not be understood to control all subcontracting arrangements between City contractors and entities owned by City employees or officials.

Please note that you should observe the following additional provisions of the Ordinance concerning outside employment. Section 2-156-020, "Fiduciary Duty," obliges you to use your

City position responsibly and in the best interest of the City. This provision requires you to exercise professional judgments free from outside influences or conflicting duties to another entity. It also prohibits you from using City time for your non-City job or for any private benefit.

Additionally, section 2-156-060, pertaining to "City-owned Property," prohibits you from using any City property or resources in your non-City employment or for any private benefit. Section 2-156-070, "Use or Disclosure of Confidential Information," prohibits you from using or revealing confidential information you may have acquired during the course of your City job.

Finally, sections 2-156-030, "Improper Influence," and 2-156-080, "Conflicts of Interest," prohibit you from participating in, or trying to use your position with the City to influence, any governmental decision or action affecting Co. A [REDACTED].

RELIANCE: This decision should not be understood to control those situations where general contractors identify subcontractors on bid documents. 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 the opinion is rendered.

Catherine M. Ryan
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Chair