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Room 303  
320 North Clark Street  
Chicago, Illinois 60610  
(312) 744-9660  
(312) 744-2793 (FAX)  
(312) 744-5996 (TTY)  
<http://www.ci.chi.il.us>

E M U S

ADVISORY OPINION  
Case No. 97019.A, Outside Employment

To: [REDACTED]  
Date: November 12, 1997

You asked the Board of Ethics to consider whether the Governmental Ethics Ordinance prohibits you from having your firm listed as a subcontractor on a general contractor's bid proposal to the City. While there is no contract currently at issue, you said you would like guidance from the Board so you may respond in a timely manner when business opportunities arise.

It is the Board's determination that, under the circumstances described in this opinion, the listing of your firm as a subcontractor on a prime contractor's bid proposal for a City contract worth at least \$10,000 would give you, as a City employee-owner of that company, an interest in City business within the intended meaning of the Ethics Ordinance, once the contract is awarded. Therefore, if the interest you would derive by virtue of your firm's agreement with the prime contractor in these circumstances amounts to more than \$2,500 per year, or has a present value of \$5,000 or more, this would give you a "financial interest" in City business that is prohibited by Section 2-156-110. We set forth below the facts pertaining to your inquiry, our analysis of those facts under the Ethics Ordinance, and our determination.

**FACTS:** You are a City employee ; you also are President and 100% owner of [REDACTED] Inc., a firm that provides services [REDACTED]. The company is certified under the City's Minority and Women's Business Enterprise ("MWBE") program. You said your company has not done business directly with the City before and is not currently participating as a subcontractor on any City contracts. There is also no City contract pending at this time that you are interested in pursuing for your company, either as a City contractor or subcontractor. However, you said you are interested in seeking business for your company in the future as a subcontractor on City contracts. Further, you said the kinds of contracts for which you would be interested in providing services [REDACTED]

[REDACTED] --would be worth

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well over \$10,000. Specifically, you asked the Board for an advisory opinion on whether the Ethics Ordinance prohibits you from having your firm listed as a subcontractor on bid proposals that general contractors submit to the City.

Because there is no specific contract at issue, Board staff spoke with representatives of various City departments to clarify how the City handles City-certified MWBE subcontractors on City contract bids, and to determine how much consideration the City gives to them in the contract bid process. According to Purchasing Department officials, in all City contracts for \$10,000 or more, the City requires that all MWBE subcontractors be listed on the potential prime contractor's bid proposal. That list contains, among other things, a description of the services the subcontractor will provide in connection with the City project, and the price of those services, as well as the percentage of the City contract the subcontractor is expected to perform.

In the normal contract award procedure, bid proposals are received by the Purchasing Department, forwarded for evaluation to the appropriate "user department" (the City department responsible for overseeing the work relevant to any given contract), and then returned to the Purchasing Department for final review. Staff learned that while the Purchasing Department's assessment is limited mostly to confirming MWBE certification issues,<sup>1</sup> evaluations performed by the contract administrators in the larger user departments are far more extensive.

In departments that have their own contract administrators (such as Housing, Transportation, and Planning and Development), staff learned that those administrators perform a careful review of the contract bid proposals, including the list of MWBE subcontractors, before the proposals are returned to the Purchasing Department. According to the contract administrators contacted by our staff, these officials have a great deal of discretion both in interpreting the specifications of the contracts and in evaluating the qualifications of the MWBE subcontractors. They look at any number of factors appropriate to a given contract in order to judge

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<sup>1</sup> Purchasing Department representatives said they normally review the MWBE subcontractor information only to confirm that: (1) the subcontractor is a certified MWBE; (2) it is certified in an area appropriate to the work it is expected to perform on the City contract; and (3) the amount of work the subcontractor will perform (both the percentage of the City project, and the amount of money it expects to receive for that work) is within the City's projected goals.

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whether the subcontractor is able to perform the job indicated on the bid proposal. This judgment may involve a review of the number of the subcontractor's staff, an evaluation of the subcontractor's past work performance, detailed considerations of the work hours and dollar amounts the subcontractor proposes to expend on each aspect of the contract, and the qualifications of each individual staff member to perform the specific tasks assigned to them. After their review, the contract administrators approve or disapprove the bid proposals before they are forwarded to the Purchasing Department. City officials stated that this evaluation of MWBE subcontractors by the user departments is a significant factor in the City's decision as to which prime contractor will be awarded the contract.

An additional relevant fact is that, according to Purchasing Department officials, the prime contractor is obligated, as a term of its City contract, not only to use the MWBE subcontractors listed on its proposal in the performance of the contract, but to employ those subcontractors to the extent indicated in the contract bid. If a prime contractor wants to change one of its MWBE subcontractors (either before or after the award of the contract), it must go through an approval process with the Purchasing Department to implement those changes. Further, once the City contract is awarded, if the prime contractor falls short of its obligations to employ or pay its MWBE subcontractors as specified, those subcontractors have a right to arbitration by a City representative. The Contract Monitoring Certification Division of the Purchasing Department is responsible for approving any changes and for enforcing the subcontracting end of the City contract by making sure the appropriate work is being performed by the MWBE subcontractors included in the contractor's bid.

**LAW AND ANALYSIS: INTEREST IN CITY BUSINESS.** The provision of the Governmental Ethics Ordinance most relevant here is Section 2-156-110, "Interest in City Business," which states in 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, or is authorized by ordinance. . . .

"Financial interest," for this prohibition, refers to "(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. . ." (§ 2-156-010(1)). If a company is owned in whole or in part by a

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City employee, the employee's interest is calculated as the amount of the company's contract, work or business with the City, or sale of any article, pro-rated by the employee's percentage ownership interest in the company (Case No. 90077.A).

In a previous Board case, No. 93033.A, you asked if your company could submit a bid to provide [redacted] services to the general contractor on the City's [redacted] project. Because that particular contract was so extensive both in size and duration, the City did not require the prime contractor to submit the names of its subcontractors at the time of the bid proposal, but only after the contract was awarded. Under those circumstances, the Board said you did not have an interest in City business under Section 2-156-110 of the Ordinance because: (1) your company would be paid by the general contractor and not the City; (2) your company would be hired by the general contractor, not the City; and (3) the City chose the general contractor "without considering the participation of your company or any other MBE or WBE" (p. 5). The Board also expressly stipulated that its opinion should not be understood to apply to all subcontracting arrangements on City-funded projects, in particular, to those situations in which general contractors identify subcontractors on bid documents to the City.

In the present case, the information available to the Board indicates that, as a City-certified MWBE company subcontracting on a City contract worth over \$10,000, your company's name must be listed on the prime contractor's bid proposal, because of City requirements for contracts of this size. One of the purposes served by listing MWBE subcontractors on City contract bid proposals is to include an evaluation of those subcontractors in the City's consideration of the contract award. While Purchasing Department officials only confirm issues related to the subcontractors' MWBE-certification and the amount of work they will perform, officials in the user departments informed us that, in contracts of this size, they give substantial consideration to the MWBE subcontractors included on the prime contractor's bid proposal, and have a great deal of discretion as to how they judge the qualifications of those subcontractors.

If the participation of particular subcontractors is a component in the City's consideration of the contract award, it is our opinion that such consideration gives those subcontractors an interest in the City contract and not only an interest in the business of the prime contractor with whom they subcontract. Accordingly, if your company, [redacted], were to be listed as an MWBE subcontractor on a prime contractor's bid proposal for a City contract worth over \$10,000, the facts of this case indicate that the participation of your company would be part of the City's

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consideration of the contract award. That consideration gives you, as owner of [REDACTED], an interest in the City business, once the contract is awarded.

Another factor in our decision has to do with the legal ramifications of naming an MWBE subcontractor on a bid proposal for a City contract. Under City regulations, an MWBE subcontractor listed on a bid proposal has certain rights under the contract. Once the City enters into the contract with the prime contractor, the MWBE subcontractor has enforceable rights, under the terms of the contract, to perform the work for, and to be paid by, the prime contractor exactly as specified on the bid proposal. If the prime contractor falls short of its obligations to employ and/or pay the MWBE subcontractor as specified, that subcontractor has a right to arbitration by a City representative. Thus, in the case of City contracts over \$10,000 (in which the City follows the procedures described in this opinion), an MWBE subcontractor listed on a bid proposal for a City contract has an interest in that contract once it is awarded.

Under these circumstances, it is the Board's opinion that, once the City contract is awarded, any MWBE subcontractor listed on the prime contractor's bid proposal has an interest in that contract, for the purposes of the Ordinance's Interest in City Business provision. Therefore, as the owner of an MWBE-certified company listed as a subcontractor on a bid proposal for a City contract, you would have an interest in the City contract, once that contract is awarded.

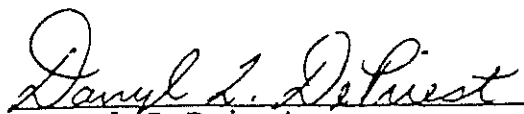
OTHER PROVISIONS PERTAINING TO OUTSIDE EMPLOYMENT. Please be advised that other provisions of the Ethics Ordinance also pertain to City employees engaging in non-City business or employment. Section 2-156-020, "Fiduciary Duty," obligates you to use your City position responsibly and in the best interest of the City. It requires that you exercise professional judgments free from outside influences or conflicting duties to another entity; it also prohibits you from using City time or resources for your non-City job or for any private benefit. Section 2-156-060, "City-owned Property," also 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 City position to influence, any governmental decision or action affecting your outside employer or any matter in which you have an economic interest distinguishable from that of the general public.

*E. A. Jones*

**BOARD DETERMINATION:** It is our determination that, under the circumstances indicated in this case, the listing of *your company* as an MWBE subcontractor on a prime contractor's bid proposal for a City contract worth at least \$10,000 would give you, as a City employee-owner of that company, an interest in City business within the meaning of Section 2-156-110 of the Ethics Ordinance, once the prime contractor's bid is accepted by the City. Therefore, if the interest you would derive by virtue of *your company's* agreement with the prime contractor in these circumstances amounts to more than \$2,500 per year, or has a present value of \$5,000 or more, this would give you a "financial interest" in a City contract or business that is prohibited by Section 2-156-110.

Our determination in this case is based upon the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. If the facts presented are incorrect or incomplete, please notify the Board immediately, as any change in the facts may alter our opinion. Other laws or rules also may apply to this situation, including Personnel Rule XX, Section 3, which requires City employees to submit a request to their supervisor to engage in outside employment; and Rule XVIII, Section 1, no. 43, governing conflicts of interest. We note that a City department may adopt and impose rules more strict than those contained in 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 that is indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

  
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Darryl DePriest  
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