

CONFIDENTIAL

ADVISORY OPINION

March 20, 2012

Department of Housing & Economic Development [DHED]
Department of Law

Case No. 12007-2.A, Interest in City Business

. On February 6, 2012, [DHED] forwarded us a copy of a letter dated January 30 from a "Concerned Citizen." The letter was addressed to the City's Inspector General (IG), and was also sent to DHED's Commissioner. It is attached as Exhibit 1. It alleges, among other things, that: the "[C] Chamber of Commerce" has contracted (actually subcontracted) directly with [L], a Chicago [employee] , for ¹; and ii) that these associated subcontracts are prohibited by the contracts this chamber of commerce has with SSA #99. On February 6, [DHED] requested an advisory opinion from the Board of Ethics addressing whether these subcontracts with [L] , and [L] himself, were or are in violation of the City's Governmental Ethics Ordinance (the Ordinance), and may be prohibited by the SSA/service provider contracts. [DHED] forwarded copies of relevant contracts and other documents. On February 6 and 8, Board staff sent [DHED] a preliminary analysis of issues arising under the Ordinance, and recommended that [DHED] seek the advice of the Department of Law as to issues raised by relevant contractual language. She did, and the Law Department then also joined in the request for an advisory opinion from our office. Board staff then requested that [DHED] obtain answers to a number of factual questions, and [DHED] kindly and efficiently did that.

1. DHED explained, and documentation DHED provided to us confirms, that the [C] Chamber of Commerce is under contract with Special Service Area (SSA) #99 to be its "service provider." SSA #99 itself, like all SSAs in Chicago (there are about 45 City-wide) is established by ordinances enacted by City Council, pursuant to the authority granted to the City by Article VII, Sections 6(l) and 7(6) of the Illinois Constitution, and by the Special Service Area Tax Law, 35 ILCS 200/27-5 *et seq.*, and by the Illinois Property Tax Code, 35 ILCS 200/1-1 *et seq.* As the Board has recognized, the SSAs are thus, for purposes of the Governmental Ethics Ordinance, City Commissions, and their Commissioners, who are appointed by the Mayor and confirmed by City Council, thus City appointed officials. See Case No. 93013.A; Board minutes of 1/13/93 meeting. SSAs are authorized by their enabling ordinances to spend City funds they are appropriated for designated neighborhood improvement and other projects: SSAs do not have their own full-time staff (the Commissioners are volunteers, and DHED staff provides assistance to all SSAs in the City). Thus they contract with service providers—typically local chambers of commerce—to secure and hire appropriate persons and firms and to enter into (sub)contracts necessary to accomplish these projects, and expend their appropriated City funds for these purposes. SSA Commissioners approve these subcontracts.

On March 15, the [Law Department] forwarded to us an anonymous letter, dated February 3, addressed to the City's Corporation Counsel (it forwarded the letter to the IG as well). We received that letter on March 19. The Law Department has asked for our opinion as to whether the allegations contained in this February 3 letter involve possible violations of the Ordinance. The letter shows a "cc" to Andy Shaw of the Better Governmental Association and John Kass of the Chicago Tribune. It is attached as Exhibit 2, and contains a number of allegations. Those pertaining to [L] are that he:

"is contracted by [sic] the [C] Center Chamber of Commerce to perform work for the Chamber. This is a clear violation of the Municipal Code ... with respect to the Economic Disclosure Statements have to be filed by the contractor and Chamber of Commerce that administrates [sic] the bidding and awarding of the contracts. 6.03 Conflict of Interest of the Municipal Code of Chicago states that employees of the City ... and or relatives are prohibited from gaining any financial benefit from contractual services."

As [R] has sought and received an opinion from the Law Department addressing whether the subcontracts with [L] , or [L] himself, have violated the terms of the contracts between the SSAs and the chamber of commerce, we will not address those issues. And, as [DHED] has informed the IG that this Board opinion has been requested, and sent the IG our preliminary analysis of the case, and as the Board is making specific recommendations to the IG for further investigation and audit, we are requesting that DHED and the Department of Law forward a copy of this opinion to the IG.² Please also be advised that, pursuant to Board Rule 3-8, we are sending our opinion not only to DHED and the Law Department, as requestors, but also to [L] (the opinion subject), and to [L's Department Head] who, together with law, can consider and act on our recommendations. Under our Rules and Regulations, however, we have no authority to send our opinion to the Inspector General, who is neither the requestor nor the subject of the opinion, though we make several recommendations to his office.

At its meeting this afternoon, the Board carefully considered all the facts presented in light of prior relevant Board investigations and opinions in which we have interpreted and applied the pertinent Ordinance provisions. As fully explained in this opinion, the Board has determined that [L] violated § 2-156-110 of the Ordinance ("Interest in City Business"), and that several City subcontracts were entered into between SSA #99's service provider and [L] , and then performed in violation of the Ordinance. The Board has also made a number of recommendations near the end of this opinion.

FACTS: Board staff reviewed several contracts, proposals, ordinances, and questionnaires that DHED staff sent and had prepared for us. These include contracts between SSA #99 and the [C]

2. On March 19, our Executive Director had a phone conversation with the IG's office, and explained that we were going to render this opinion today--without mentioning the names of the employees involved. He also explained that we are unable to send the IG a full, unredacted copy of our opinion, due to the wording of our law and Rules & Regulations, though we are sending it to the requestors and subjects of the opinion, as well as the subjects' department heads.

Chamber of Commerce for 2011 and 2012, and the accompanying ordinances enacted by City Council authorizing them. From these documents, we have gleaned and here cite the facts relevant to the issues we are addressing under the Ordinance.

I. [L] . Initially, we note that [L] is currently employed by the [City] , and began his City employment on [date] 2009.³

II. SSA #99 and the [C] Chamber of Commerce.
By City Council ordinances passed on [date] 2010 and [date] 2011, contracts between the [C] Chamber of Commerce and SSA #99 were approved for years 2011 and 2012.

A. 2010 Ordinance. In the 2010 ordinance, SSA #99's budget was approved for \$XXX,XXX (for fiscal 2011). Contained within the budget is the proposed contract between SSA #99 and its selected service provider, the [C] Chamber of Commerce, and a list of parties the SSA was expecting to retain in 2011, along with the payments that the SSA was estimating would be made to these parties in 2011. The 2010 ordinance (for 2011) lists, among others, "[L] , [phone #] Estimate: \$[> \$10k] Provides services for and neighborhood "

B. 2011 Ordinance. In the 2011 ordinance, SSA #99's budget was approved for \$[200K+] for fiscal 2012). Contained within the budget is the proposed contract between SSA #99 and its selected service provider, the [C] Chamber of Commerce, and a list of parties that the SSA was expecting to retain in 2012. The 2011 ordinance (for 2012) lists, among others, "[L] Anticipated, [address] Chicago, IL 606 United States, Subcontractor- non MWDBE, \$8,500, Estimated."

C. Quotes from [L] . DHED also provided us with two documents bearing the heading "Quotes" from "[L] ," dated XXXX10 and XXXX/11. The first is for "[C] Routine , Duration: Approx. [date]-[date] " for locations listed as . It describes various services, at a cost of \$350 per month. The second "quote" from [L] is also for " Routine Maintenance, Duration: Approx. [date-date] ," for the same locations, services and price term as the first proposal.

D. Commission Meeting Minutes. DHED also provided us with SSA #99 Commission meeting minutes from [date] 2010 and [date] , 2011. The 2010 set shows, under the heading "2010 Maintenance Contract," that:

3. Because he was not yet in City service in 2007, [L] did not complete the 2007 mandatory all employee training program, in which restrictions on contracting with the City were covered. Nor has he attended a face-to-face ethics training session, at which restrictions on contracting with the City are covered. This topic is again covered in the 2012 mandatory all employees training program.

"[D] the Executive Director of the [C] Chamber of Commerce] presented a bid by [L] to maintain at . Noting that [L] has provided excellent service in the past and he did not increase his rates for 2010 from 2009, [D] recommended the commission approve to renew [sic] [L's] contract. Commissioner [Q] motioned to approve the contract for [L] for \$2,450 ... The motion carried unanimously."

The 2011 minutes set shows, under the heading " Maintenance Agreement," that [D] "reported the proposed from [L] for service to the [C] and the neighborhood . Commissioner [B] motioned to approve the proposal for \$3,470 as presented ... The motion carried unanimously."

F. Vendor Questionnaire. At Board staff's request, and in order for us to render this opinion, DHED presented the [C] Chamber of Commerce with a questionnaire, on 2012. Board staff provided the questions. On sent us the answers [L] for . The answers show that the Chamber subcontracted directly with [L] for services to be performed in 2010 and 2011, and that [L] was paid--with SSA funds--\$7,070 for services performed in 2010 and \$3,470 for services performed in 2011. And, it states that the [C] is not currently under contract with [L], but that an RFP (request for proposals) "will likely go out in March 2012 and we expect [L] to submit a bid."

III. Statements of Financial Interests. [L] has not been required to file a statement because, in every year since 2009, his salary rate has been lower than the rate we set, pursuant to Ordinance.

LAW AND ANALYSIS:

I. Interest in City Business. The relevant provision of the Ordinance is § 2-156-110, "Interest in City Business." It 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, or is authorized by ordinance.

"Financial interest," defined in §2-156-010(l), means, in relevant part, "(i) any interest as a result of which the owner currently receives or is entitled to receive in the future more than \$2,500.00 per year; [or] (ii) any interest with a cost or present value of \$5,000.00 or more." As the Board has interpreted these provisions, if a company or firm is owned completely or partly by a City employee, the value of the employee's ownership interest in the firm's City contract or business is calculated as the gross amount of the company or firm's contract, work or business with the City, multiplied by the employee's percentage of ownership interest in the company or firm. Case Nos.

04049.A, 97019.A; 90077.A. If the City employee's interest (which effectively is an ownership interest) in the City contract (or in City work or business) *yields to the employee, or entitles the employee to receive*, income of more than \$2,500 per year, then the employee has a prohibited financial interest in City business [emphasis added]. The applicable subdefinition in this case is (i), which, the Board recognized in Case Nos. 04049.A and 97010.A, governs situations where a City employee or official receives or is entitled to receive money as a result of an ownership interest. If the amount of money an employee or official receives or is entitled to receive from his or her ownership interest in a City contract or in City business is more than \$2,500 per year, the employee has a prohibited financial interest in City business (note that appointed officials are subject to a slightly different standard, which is not germane to this case) in violation of the Ordinance. Case No. 04049.A. Similarly, where a City employee wishes to become a *direct* contractor with the City (for example, through a personal services contract), the Board treats 100% of the price of the contract as the employee's ownership interest in the City contract, work or business. Thus, if that arrangement or contract yields or entitled the employee to more than \$2,500 in a year, the employee has a prohibited financial interest. Case Nos. 89110.A; 90073.Q.

However, here, [L] is not and has not been a City contractor, but, rather, a City subcontractor. The [C] Chamber of Commerce, using City funds appropriated to SSA #99, with which it contracted, was authorized to enter into these subcontracts by the SSA and City Council. The names of the proposed subcontractors were disclosed to and then voted on and approved by City Council in public meetings—and were approved by SSA Commissioners. The question, then, is whether [L] had an "interest in his own name" in payments he received directly or was entitled to receive. If yes, then, under the holdings of Case Nos. 04049.A and 90077.A, he would have a prohibited financial interest in City contracts for 2010 and 2011.

In Case Nos. 97019.A and 04049.A, the Board addressed when a City employee would have a prohibited financial interest in a City contract if a firm owned in part or wholly by the employee were to become a *subcontractor* on a City contract. In those cases, the firms were also City-certified MWBEs, and, as such, the firms' names were required to be listed on the prime contractors' bid proposals, so the City could exercise discretion and evaluate the proposed subcontractors. Considering that fact, the Board determined that, where the participation of particular subcontractors is a component in the City consideration of the (prime) contract award, then such consideration gives those subcontractors an "ownership" interest in the City contract, and of course in their own City subcontract(s). And, we said, where a subcontractor is listed on the prime contractor's bid proposal (whether as an MBE/WBE or, as here, otherwise), the participation of that subcontractor becomes subject to the City's approval, and thus the subcontractor has an "ownership" interest in City business, even though it typically is not paid by the City directly. Here, the subcontracts were actually awarded by the chambers of commerce, but were also voted on and approved by the SSAs and the full City Council. In other words, under Board case law, [L] could have had prohibited financial interests in City contracts, work or business through these subcontracts if he received or was entitled to receive \$2,500 or more per year through these subcontracts. Case Nos. 90077.A; 04049.A. It remains then, simply to "do the math."

"The Math." [L] has had what amounts to at least two direct, independent, personal service-type contracts with the [C] Chamber of Commerce, through which the Chamber paid him \$7,070 in City funds delegated to SSA #99 by City Council for services performed in 2010 and \$3,470 in City funds for services performed in 2011. Both exceed \$2,500 per year. These contracts were approved by the City Council and by SSA #99. We thus conclude that [L] violated § 2-156-110 by becoming contractually entitled to, and then receiving, more than \$2,500 in City funds in both 2010 and 2011 from SSA #99 through [C], which was acting on behalf of and expending funds appropriated by the City Council to the SSA.⁴

II. **Remaining Allegations.** The January 30 complaint also alleges that [L's] subcontracts are prohibited by [C] Chamber of Commerce's contracts with SSA #99. As stated above, the Board is not addressing this issue, and it is our understanding that the Law Department has provided an official interpretation of the relevant contract language to both DHED and the IG. Further, the February 3 letter to [the Law Dept.] alleges that [L] "is contracted by" the [C] Chamber of Commerce. Nothing in the Ordinance would prohibit the Chamber from contracting with [L], or any person or entity, if no City provided or City-administered funds were used. We do not know whether there were such "business-to-business" private contracts, and, as explained below, are recommending that the IG consult with the Law Department and DHED to determine whether further investigation into that possibility is warranted. The February 3 letter also has allegations that appear to fall outside our purview (see footnote 2, above).

DETERMINATIONS: For the foregoing reasons, the Board determines that [L] violated § 2-156-110 by becoming contractually entitled to, and then receiving, more than \$2,500 in City funds in both 2010 and 2011 from SSA #99 through [C] Chamber of Commerce, which was acting on behalf of and expending funds appropriated by the City Council to the SSA.

The Board's determination does not necessarily dispose of all the issues relevant to this situation, but is based solely on the application of the City Governmental Ethics Ordinance to the facts stated in this opinion. If the facts presented are incomplete or incorrect, please notify the Board immediately, as any change in the facts may alter the Board's opinion. Other laws or rules may also apply. The Board notes that any City department may adopt restrictions that are more stringent than those imposed by the Governmental Ethics Ordinance.

RECOMMENDATIONS: Given: 1) the complexity of this case; 2) the possibility that there may be other similar violations of the Ordinance involving SSAs, their service providers, and subcontracts entered into by those service providers; 3) the fact that the Board has determined that

4. We note here that statements made by an SSA #99 Commissioner, reflected in the minutes of a public meeting, seem to refer to other (prior) years in which [L] contracted directly with SSA #99 through its service provider. However, as [L] became a City employee [in] 2009, at most there would be a [] period when any violation might have occurred: that is, between 2009 and 2010.

there were violations in this situation, brought to light by an anonymous complaint; and 4) pursuant to the Board's powers and duties under §§ 2-156-380(e) and (n), the Board of Ethics recommends:

[L's] Department:

Pursuant to §2-156-410(a), the Board recommends that the Department:

- 1) consider imposing appropriate employment sanctions as to [L] , and report its action back to the Board's Executive Director; and
- 2) advise [L] that, if he is interested in pursuing SSA or other City contracts or subcontracts on behalf of either himself or a business in which he has an ownership interest, he must consider terminating his City employment; and
- 3) require [L] to attend face-to-face ethics training.

Why is the Board not recommending specific discipline in this case? In most cases in which it determines that an employee has violated the Ordinance, the Board does not make specific recommendations for discipline. Rather, it leaves that decision to the employee's department head, who is in a better position to know the employee's overall record. In those cases where the Board has recommended specific discipline, the employee(s) or official(s) have either committed repeat violations, or have sought and disregarded Board advice.

Departments Housing and Economic Development and Law: The Board recommends that the Departments of Housing and Economic Development and Law:

- 4) implement steps to ensure that: i) SSA Commissioners and the persons (or their representatives) they retain as service providers properly screen potential subcontractors that would be paid with City funds to ascertain whether these subcontractors are owned in part or whole by City employees or officials--this could be done by written questionnaire, similar to (but less extensive than) Economic Disclosure Statements filed by potential City contractors; and ii) documents filed with the City by potential contractors and subcontractors including disclosure statements and contract bids, require disclosure of the names, departments and ownership percentages of any owners of bidders who are City employees or officials, and are thoroughly reviewed, specifically with respect to identifying those owners of potential contractors and subcontractors who are City employees or officials; and
- 5) work with the Board of Ethics to develop a training program for SSA Commissioners and personnel affiliated with their service providers; and
- 7) advise SSA #99 that, as long [L] remains as a City employee, he and any entity in which he has an ownership interest are severely restricted (if not outright prohibited) from having any contracts with the service providers;

8) discuss whether, under § 2-156-440, the City should bring a lawsuit for an accounting of any pecuniary benefit received by [L] , and to recover them; and

9) that consideration be given to amending two sections of the standard SSA-Service Provider agreement, as follows (see *italicized, underlined* text for recommendations):

6.01 E. "That it [the SSA provider, agrees that], all Subcontractors and their respective officers, directors, agents, partners, and employees shall cooperate with the Inspector General *or Board of Ethics* in any investigation or hearing undertaken pursuant to Chapters 2-56 or 2-156 of the Municipal Code of Chicago; that it understands and will abide by all provisions of Chapters 2-56 and 2-156 of the Municipal Code of Chicago and all subcontracts shall inform Subcontractors of such provisions and require understanding and compliance therewith."

And,

6.03 Conflict of Interest. "Pursuant to Chapter 2-156 of the Municipal Code of Chicago, and 65 ILCS 5/3.1-55-10, no member of the government body of the City or other unit of government, nor other officer, employee, SSAC member or agent of the City or other unit of government who exercises any functions or responsibilities in connection with the Services to which this Agreement or related subcontract pertain, and no relative of any SSAC member shall have any personal economic or financial interest, directly or indirectly, in this Agreement or any such subcontract except to the extent that such benefits are provided equally to all residents and/or business owners in the area. Furthermore, no SSAC member, relative of any SSAC member, City official, agent, or employee shall be a Subcontractor or have any financial interest in any Subcontractor, or an employee or shareholder of the Contractor or receive anything of value from the Contractor."

Inspector General: The Board has pointed out various gaps in the factual record relevant to potential Ordinance violations, and we recommend that the Inspector General discuss with the Departments of Law, DHED and [L's Dept.] whether it should commence or continue with an investigation that would ascertain facts necessary to close those gaps. Specifically:

10. Did [L] have other, similar subcontracts with either SSA #99 or other SSAs between [L's start date and January 1, 2010, during the time he was, in effect, a sole proprietor? If so, for how much, and with whom, when, and whether paid with SSA funds?

11. Given the holdings and rationale articulated in this opinion, are there other SSA subcontracts that are in violation of the Governmental Ethics Ordinance because they yield City employees prohibited financial interests, either in their own name or in the name of a business entity in which they have an ownership interest? We recommend that the IG conduct an audit of SSA subcontracts, and consult with the Board, DHED and Law as to its findings and recommendations.

We note here that the Board of Ethics believes that it is inappropriate for it to recommend specific disciplinary measures regarding [L] to his department head. And, moreover, we believe

Case No. 12007.A-2
March 20, 2012
Page 9

it inappropriate to recommend to the IG whether to continue with or suspend any investigation into this matter that it may have commenced, or to recommend to the Law Department that it pursue legal action seeking recovery of pecuniary benefits received by [L] from these subcontracts. However, if the Law Department does decide to pursue such action, it would seem appropriate for the IG to continue its investigation and coordinate its findings with the Law Department so that the full recovery could be pursued.

RELIANCE: This opinion may 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