

Advisory Opinion
[John Smith]
Case No. 04009.A, Conflict of Interest
April 7, 2004

You are Commissioner of the [Department of D] (“D”). On February 20, 2004 you requested an opinion from the Board regarding allegations of “conflict of interest” made by the Executive Director of the “A”, a departmental contractor, against D and [Mary Doe] its Director. The allegations arise from funding decisions involving D’s Request for Proposals (RFP) process, and [“G”], Ms. [Doe’s] pre-City employer. As explained below, we have determined that: 1) as to decisions involving D’s RFP evaluation process and the funding of D contractors under it, neither Ms. Doe nor D itself are, as alleged, involved in a “conflict of interests” under the Ordinance, and the Ordinance does not require that she recuse herself (or that D remove her) from the RFP process, or from other City decisions affecting her pre-City employer; and 2) the Ordinance’s fiduciary duty provision does not prohibit Ms. Doe from making or participating in City decisions affecting her pre-City employer. Our analysis follows.

FACTS: Ms. Doe explained to Board staff that, in October 2003, D began the process of issuing a new RFP for funds and programs under the federal Act of 1998 for program year 2004 (which begins July 1, 2004). The RFP covers development services for , services through D’s centers. In drafting the RFP, both you and Ms. Doe said, the department was specifically concerned with avoiding duplicative administrative costs and increasing contractor accountability. Among the possibilities discussed by senior D staff to achieve these goals were including in the RFP a maximum compensation amount per funding recipient (or “contractor”), or requiring “primary” contractors (i.e., agencies that in turn distribute D funds to “subcontractors”) themselves to perform 50% of the work. Ultimately, the RFP D issued in January 2004 states as one of its terms that primary contractors may not serve as subcontractors in similar grant programs.

A is an “umbrella” organization: it is a D primary contractor that in turn funds 14 subcontractors (many of which are alternative programs) through grants it receives from D and the [federal government]. A’s staff have monitored and worked with these 14 subcontractors, and provided training and technical assistance to their employees. As Ms. Doe explained, though, D also currently funds five of these subcontractors directly as primary contractors, and will likely continue to fund four contractors in Program Year 2004. A’s concern, then, both you and Ms. Doe believe, is that its ability to receive D contract funding will be impaired because it will no longer be able to fund these five subcontractors through D contracts, nor to monitor their performance or assist them.

The process by which D adopted this RFP, and its terms and conditions, both you and Ms. Doe explained, was standard for the department: D’s Managing and First Deputy Commissioners, Deputy

Commissioners of Programs, Contracts, Fiscal Performance and Performance Management, and its Special Assistant to the Commissioner and Assistant Director of Programs met and agreed on the RFP's substance, then it was drafted by D's Programs Unit, which Ms. Doe heads. Once the personnel listed above agreed on the wording, they submitted it to you for formal approval, then to D's Advisory Board for approval (in fact, Ms. Doe said, this Board recommended several clarifications in the RFP's wording, which her unit made). Finally, the RFP was submitted to and approved by the Executive Members of the [Y] Board.

Ms. Doe is D's Director of Programs. She began her City service, in that position, on January 28, 2001. Prior to joining D, she was employed for 13 years (through June 2000) by G, first as its Director of Human Services and then as a Vice President. Since joining D, she said and you confirmed, she has had no direct connection with G or its personnel—i.e., she does not directly review its grant applications, and has no economic interest or monetary relationship with her pre-City employer. She did say, however, that, as Director of Programs, she supervises the unit that monitors the performance of all D contractors, including A and G. Her unit collects and analyzes data pertaining to contractor performance according to a rating system that you both have described as objective: it includes such factors as how many customers or clients each contractor (including A and G) serves, how many of these are in the population targeted for service by the contractor, and how the contract funds are being spent. As part of D's regular program review process, her unit makes recommendations as to continued funding levels based on the results of this data collection—these are then presented to her. She in turn reviews them, and if she concurs, presents them to her Deputy Commissioner and you, and then, upon your approval, to the Y Board. Aside from this program review, she has not reviewed any grant or contract proposals submitted by either G or A. Both you Ms. Doe said that you have instituted a policy whereby D employees do not review applications or RFP responses submitted by their pre-City employers; that policy, you confirmed, has been observed with respect to G and Ms. Doe since the time she joined D. In fact, you said, nearly half of your management staff was employed by non-profit agencies prior to joining D. In that way, D can help ensure that its decision-makers are familiar with agencies applying for and receiving contracts.

In early February 2004, D received several fax transmissions from [Sam Jones], A's Executive Director. In one (Exhibit A), Mr. Jones claimed, among other things, that the terms of the RFP (which applies to all contracts issued by D for programs beginning July 1, 2004) will "cut at least \$800,000 from the [A's] program ... [and] stop many of [A's] participating [agencies] from being part of this program next year." A separate fax transmission (Exhibit B) is entitled:

" D Has a Very Serious Problem of Staff Of Conflict Of Interest In Terms Of Selecting Programs. D Also Has Many Serious Operational Problems."

It alleges, in summary, that: 1) Ms. Doe, D's Director of Programs, worked at G until January 2001, and that since then, G has received D contracts amounting to \$3.8 million, although it had not had a City contract since 1997; 2) she actively participated in the non-competitive selection of G to be the lead agency for the D Program and is listed as a direct contact to a \$71,250 G contract for 2002; 3) since she began employment at D, G contracts have gone up from \$268,000 to \$3.8 million; and 4) "This presents a serious conflict of interest. Other city employees ... who have come from the private sector to the city routinely recuse and separate themselves from any contracting as well as any program or monitoring activity with the previous

agency or business they have worked with. This is clearly not the case with Ms. Doe and presents ... a serious situation of the appearance of a serious conflict of interest ...”¹

G, like all D contractors responding to the RFP (you and Ms. Doe anticipate about 95 for program year 2004), is subject to the same terms and conditions as A. Because of the number of subcontractors A has had, however, it would likely see a correspondingly larger share of its funding re-directed to [agencies] that were formerly its subcontractors.

LAW AND ANALYSIS:

1. Sections 2-156-030(a); -080(a). The City’s Governmental Ethics Ordinance (§§ 2-156-030 and -080, respectively entitled “Improper Influence” and “Conflicts of Interests; Appearance of Impropriety”), states:

No official or employee shall make, participate in making or in any way attempt to use his position to influence any City governmental decision or action in which he knows or has reason to know that he has any economic interest distinguishable from its effect on the public generally (§-030(a));

and:

No official or employee shall make or participate in the making of any governmental decision with respect to any matter in which he has any economic interest distinguishable from that of the general public. (§-080(a)).

Section 2-156-010(i) of the Ordinance defines an “economic interest” as “any interest valued or capable of valuation in monetary terms”

As the Board has interpreted them, these sections prohibit City employees or officials from making, participating in or in any way attempting to use their City positions to influence a City decision or action in a matter in which they have an economic interest (as defined) that is distinguishable from that of the public. Most typically, the Board has construed “economic interest” in the situations where City employees have current outside employment—that is, an employee has an economic interest in a person by virtue of being employed for compensation with the person, and may not influence, make or participate in City decisions that are related to or enhance his or her employment with that person. Thus, if the employee makes a governmental decision affecting that outside employer, a conflict of interests arises. Case nos. 94017.A, pp. 3-4; 91059.A, p. 3.

However, in this case, a City employee is involved in a governmental decision affecting a pre-City employer—a matter of first impression for the Board. Ms. Doe is no longer employed by G—she has no current economic interest in it (or, for that matter, in any other organization that has applied for or received contracts from D), and has not had such an interest in it since June 2000.

1. In fact, A’s funding from D contracts, according to documents Ms. Doe provided Board staff, was \$660,000 for program year 2000 (beginning July 1, 2000); it increased to \$990,000 in program year 2001 (the first year in which Ms. Doe was employed by D), over \$2.4 million for 2002, over \$2.3 million for 2003, and its proposed funding for program year 2004 (the first year in which the new RFP is in effect) totals over \$2.7 million, with approximately 70% of this allocation earmarked for A’s subcontractors (leaving \$720,000 for A’s costs, as compared to \$68,000 for 2000, when 90% of A’s contracts were earmarked for subcontractors). G’s funding from D contracts, according to documents Ms. Doe provided Board staff, was just under \$2 million dollars for 6 contracts awarded between January 1, 2000 and January 28, 2001, when she joined D. Since July 1, 2001 (the first contract award date after she joined D, G has had 9 separate contracts, for a total of just over \$2.7 million; of these, 3 are current, for a total of just under \$1.65 million.

Moreover, you said, nearly half of D's management staff has had some pre-City employment with non-profit agencies in the workforce development and job training field (many of which apply for and receive D contracts), and have no current economic interest in their pre-City employers. Therefore, we conclude, as she has no economic interest in any of the agencies or contractors involved in the RFP process, these sections of the Ordinance do not require that she recuse herself (or that D remove her) from that process, or from other City decisions affecting G, and further, that, as to decisions involving the RFP evaluation process, and the funding of D contractors under that process, neither she nor D itself are involved in a "conflict of interests" under the Ordinance.²

In coming to this conclusion, we note two previous Board cases that are analogous in important respects. In Case no. 91090.A, applying these sections, we determined that Commissioners who sit on a City Board may adjudicate a complaint filed by a fellow Commissioner and are not required to recuse themselves from the decision-making process, as long as they (like Ms. Doe and other D management personnel who make decisions affecting pre-City employers) have no economic interest in the outcome of their fellow Commissioner's complaint. Likewise, in Case no. 94017.A, we determined that a City employee did not have a conflict of interests under these sections of the Ordinance by recommending to a City Board that his residential tenant receive a City contract, absent some independent agreement or understanding between him and his tenant that his continued stream of rental income would be affected by the recommendation. In this case, by contrast, there is no economic relationship between Ms. Doe (or your other management staff) and the agency with which she was employed prior to joining the City that is analogous even to rental payments in 94017.A—that is, no current economic interest whatsoever.

2. Section 2-156-020. Section 2-156-020, entitled "Fiduciary Duty," states: "Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City." As the Board has interpreted it, this section requires City employees and officials to use their City positions responsibly and in the best interest of the public. Case nos. 03027.A; 91090.A. Addressing this section to the Commissioners who would adjudicate a complaint filed by a fellow Commissioner, the Board determined that their fiduciary duty:

"does not prohibit them from participating in good faith in proceedings concerning a fellow Commission member. Rather, it requires that [they] put the best interests of the City before any personal feelings they may have for the complainant ... Any commissioners who cannot exercise unbiased judgement [sic] and, therefore, would not properly perform their duties as City commissioners, should recuse themselves."

Case No. 91090.A, at 4. Applying that holding to this case (which does not involve administrative adjudications, but City contract decisions more generally), we believe that a City employee's fiduciary duty does not require that she recuse herself from decisions involving a prior employer, in which she has no current economic interest. Rather, it requires that she consider whether she can, in good faith, put the City's interests before any personal feelings she may have regarding any particular contractor or RFP respondent, including a pre-City employer. We find nothing in the facts presented that would cause us to conclude that Ms. Doe was unable to put aside any such feelings or unable to

2. In further support of our conclusion, we also note that D's policy is that its employees do not review applications or RFP responses submitted by their pre-City employers, and that that policy was observed with respect to A and G. Thus, the policy requires disclosure of past employment relationships to departmental superiors. Our research into the laws of other jurisdictions shows that apparently only one has addressed this issue: in Massachusetts, the appearance of a conflict of interest would be created if a public official acted in a matter involving a former employer unless the public official first disclosed the past relationship. See MGL c. 268A, s. 23(b)(3). Even that standard was met in this case.

exercise unbiased judgment in her decisions and properly perform her City duties (and we note the length of time—nearly 4 years—since her employment with G ended). Thus, we conclude that the Ordinance’s fiduciary duty provision does not prohibit Ms. Doe from making or participating in City decisions affecting her pre-City employer.

DETERMINATIONS: The Board determines that: 1) as to decisions involving D’s RFP evaluation process and the funding of contractors under it, neither Ms. Doe nor D itself are, as alleged, involved in a “conflict of interests” under the Ordinance, and the Ordinance does not require that she recuse herself (or that D remove her) from the RFP process, or from other City decisions affecting her pre-City employer, G ; and 2) the Ordinance’s fiduciary duty provision does not prohibit her from making or participating in City decisions affecting G .

Our determinations do not necessarily dispose of all the issues relevant to this situation, but are 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 our opinion. Other laws or rules may also apply. We note that any City department may adopt restrictions more stringent than those imposed by the 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 this opinion is rendered.

The Board sincerely appreciates your concern that your department’s actions abide by the standards embodied in the City’s Governmental Ethics Ordinance.

Darryl L. DePriest
Chair