

May 2, 2007

CONFIDENTIAL

Advisory Opinion
Mr. Smith
Case No. 06073.A

By letter dated _____, 2006 you, a former City employee in the Chicago Department of AA (“AA”), asked the Board of Ethics how the Post-Employment Restrictions of the City’s Governmental Ethics Ordinance (“Ordinance”) would restrict your ability to work with XYZ, Inc. (“XYZ”), an engineering and construction company that is a City contractor with AA.

After considering the facts and law, the Board has determined **THAT you are prohibited for one year, that is, until _____, 2007, from assisting or representing XYZ in its work with the City that involves provision for the design and construction of City roadways and, in addition, you are permanently prohibited from assisting or representing any person, other than the City, on any City contract where you acted as a project manager or assistant or acting project manager, i.e., on the 7 projects specifically discussed in this opinion** (defined below).

This advisory opinion contains the facts presented to the Board, as well as the Board’s analysis and its determinations.

FACTS: Background.

You are an Illinois licensed and certified civil engineer, having received a B.S. in xxxxxxxx from the xxxxxxxx in May 19__ . Prior to joining the City, you worked as a design engineer for xxxxxxxx and xxxxxxxx and as a civil engineer for xxxx. You began your City service in April 20__ with the Chicago Department of AA (“AA”) as a field engineer. You became a design project manager at AA in September 20__ as an assistant to the project manager and, upon his leaving AA, became acting project manager, in which assignment you remained until you left City service as a Civil Engineer __ on _____, 20__.

Proposed Work with XYZ, Inc.

XYZ, Inc. (“XYZ”), with which you desire employment, is an engineering/construction firm that is a City contractor. You explained that some of XYZ’s contracts are with your former department, AA. These contracts include roadway work, upon some of which contracts XYZ desires you to assist. Your title at XYZ would be Senior Construction Inspector. Notwithstanding your title, you would also perform design work. As an inspector, you would observe and direct the construction contractor(s) working on an XYZ project. The construction contractors would be private companies retained by the City that perform the actual construction work. Your job would be to ensure that these construction contractors conform to the project’s plans and specifications. You would have no staff and you would report to the XYZ’s resident engineer for the project. You would advise the engineer of inconsistencies between the contractor performance and the specification requirements from AA. For example, if there must be compaction before the street surface is put down, you

would ensure that occurs. On certain projects, you would have the authority to “write up” the contractor and “shut down” the project. You would submit daily reports to the resident engineer that include, among other things, the quantities of materials used in construction work. Specifically, XYZ would expect you to supervise roadway work involving the placement of pavement, sidewalks, curbs, gutters, earthwork, sewer pipe, drainage structures and traffic signals. Your design responsibilities would involve roadway geometrics, including designing curves, radius returns, horizontal and vertical location of roads, and the associated requirements, such as sewer pipes. You would submit design work to one of the managers at XYZ.

XYZ desires you, as its inspector, to work on a XYZ initiative known as the M Program (“M Program”). The M Program involves repair to a Ward’s infrastructure, using monies funded from the Ward requesting work. The work is performed by AA personnel using City equipment. XYZ is one of ____ City construction managers for the M Program. The ____ year XYZ contract with the City began ___ years ago and XYZ has already been awarded the first of [certain] yearly extensions. You would oversee City work crews in the production and placement of asphalt, pavement and concrete related to the grinding and surfacing of streets, including the replacement of curbs, gutters and sidewalks. You would observe and direct the City workers performing street work in a Ward under the M Program. For example, as you would be working on street and sidewalk concrete work, you would ensure the concrete “delivery tickets” and the concrete placement are consistent with each other and AA specifications, conform to quality control, and that the amount of concrete is correct. You accomplish the latter by estimating the cubic yards required (compared to the delivery tickets) for one city block that is 16 feet wide and 5 inches deep. As an inspector for XYZ, XYZ would also like you to work on certain toll plazas in connection with XYZ’s contract with the Illinois Department of Transportation (“IDOT”).

As its designer, XYZ would also like you to work on several contracts between it and the City through AA. First, you would perform street re-design work in Phase 2 of a contract that began three years ago, scheduled to end _____ 20 __, and involving C Blvd. between L and Q. On this job, primarily you would design ramps under the Federal American with Disabilities Act (“ADA”) pursuant to City specifications. In addition, and related to the ADA design work, you would perform “production work,” namely, design specifications and plans for areas of roadway, driveways, radius design and curbs. Second, you would perform street re-design on the “RJS” contract, which began in 20__ and will end ____ years from now. The [abbreviations] designate four _____ public housing projects to be razed, namely, A, B, L and D in the R - R area of the City. You would work on Phase 2 of a ____ Phase project, including design of a new street grid system so that a developer may build on the vacant sites. You would design ADA ramps and production work similar to that for the C Blvd. project. Third, you would perform design work on a viaduct clearance project, begun ____ years ago and to end _____ 20 __, which includes four viaducts in the area of 7th and H that requires, among other things, removing one viaduct, lowering street level(s) and raising the bridge(s). On this project your design responsibility would focus upon the ADA ramp(s). As a designer for

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XYZ, XYZ also would assign you to an Illinois tollway roadway project on Route 88 between Route 290 and Route 83, and, additionally, a Canadian National Railroad project to be performed in Memphis.

XYZ may also ask you to work on the roadway and sewer components of an assignment for the City's Department of Y, which, additionally, may include (i) design of a "green" roof at the G water station; (ii) an ADA ramp at the G plant; and (iii) placing a new roof over the G station's administration building. In general, respecting the tasks involving construction management, you stated that your City work and proposed XYZ work would be similar.

Prior Work with the City.

When you first entered City service, as a field engineer, you worked on the viaduct clearance improvements at ____ N. ____ Avenue, and worked on the roadway reconstruction in the 80th Ward. The latter is described below; in the former you helped manage construction personnel for lowering _____ Avenue's roadway beneath a railroad viaduct, including a new 72-inch sewer main, live sewer connections to the new sewer main, roadway pavement and traffic signals. You stated that this work is similar to work XYZ would ask you to perform at the 7th & H project described above.

The majority of your City service involved work on seven AA projects ("7 projects"). As an acting Project Manager on each of these projects, you stated that your duties required "cradle-to-grave" management of the 7 projects; however, none of the 7 projects were complete when you left AA. Your duties included design engineering; the construction bid process; construction supervision; and "project closeout." By way of example, one of the 7 projects was the [Main] Street Capital Improvement (from _____ to _____) ("Main Street"). You were involved in miscellaneous infrastructure repair work, typically required when structural elements have been in place for approximately 10 years.

As an AA design engineer, you said that you aided the private-sector engineers (retained by AA) in their Main Street infrastructure design (the scope and specifications for which were initially completed under AA or Chicago's Department of E ("E") supervision), respecting sidewalks, accessibility ramps, curbs, gutters, handrails, granite planters, planter railings, general "clean up" and touch up paint work; you helped rewrite the design plans on Main Street when the private engineers failed to comply with a City requirement, such as the initial scope or AA guidelines for a sidewalk slope: you ensured the roadway design had "constructability," which you likened to feasibility. You also compared all private engineers' plans with all utility company plans and, if you found, for example, that the excavation depth was incorrect (and tools might strike a ComEd power line) you would change the plans. You reviewed the private engineers' submissions and, when you felt that all City requirements were met, processed those plans through sister agencies, *e.g.*, Chicago Transit Authority, or other departments, *e.g.*, _____ with Department of T, for its comment; provided your expert and sister agency input to the private engineers to develop final designs; and, finally, ensured that the final plans met AA guidelines. Then you would send the plans to the proper funding

agency, *e.g.*, the Federal Highway Authority, IDOT or E which could modify and, ultimately, approve plans. You would “redline” the plans, drawings and, where necessary, the contract specifications, and keep working with the private engineers until the final plan was ready to submit for bid. In sum, you compared (for purposes of comment and change) the private engineers’ work with your survey of the project; the initial scope of the project they had received; and plans and estimates generated within AA and pursuant to AA guidelines.

In connection with construction bidding, once you ensured there were complete design plans and specifications, with funding agency approval, you sent the plans to AA’s K Section to process through the City’s Department of R (“R”) for that department to follow its internal competitive bid processes. In connection with one of your 7 projects, “C Blvd.,” you actually oversaw the publication of proper advertisements, which results in three weeks of advertising for bids “on the street.” You did not obtain the responsive bids, but occasionally you reviewed the bids (on a limited basis: looking for discrepancies, *e.g.*, was a low bid error or legitimate), making your comments on the preferred contractors to R. You did not monitor R’s award of the work on the project.

In your construction supervision, after the contract award, your duties were dependent on whether AA was in its pre-January 20__ or post-January 20__ organization. If before _____ 20__, you held and chaired pre-construction meetings with the contractor, AA and utility representatives to, among other things, set project start and end dates, work hours and scheduling. You also held weekly construction meetings during which the resident engineers reported on project progress and you reported upon any design issues reported from on site that you had to address. If you found, for example, that a utility existed in the proposed roadway construction area, you would supervise a change (including budgetary) in the designs used by the contractor, using, also, the private engineer’s advice. You performed this type of supervision on the “[Minor] Street” project. After January 20__, if you identified a problem, you advised AA’s Construction Management section. However, after the solution was given to you from the Construction Management section (for you to communicate to the resident engineer and private engineer), if more contract specification changes were engendered because of the solved problem, you would, with the private engineer, make those further changes, such as a change in the quantity of concrete needed for a portion of the project. Then, you would communicate those “further changes” to the resident engineer for further analysis, and to incorporate your change in the main construction contract. In either case, you were typically not on the site with the resident engineer; once an on-site problem was given to you, your job was to be a “problem solver.”

Last, there would be a final inspection of the project, which was similar to a pre-construction meeting, except that the Department of Y, Bureau of _____ (T) and any other necessary agencies were present for a walk-through of the site and the generation of a punch list, which was given to the contractor. Accordingly, once there was a final acceptance by AA, the project would be closed out. During this procedure you would address any budget problems, *e.g.*, a shortfall of funding for materials. This procedure was a function of reviewing records and making correct estimates of

materials. Once you, or others with whom you worked, reconciled monies, final payment was made and you ensured all bills were paid. Finally, you closed the entire AA project file. However, after AA's January 20__ reorganization, you, as project manager, did not perform most of these functions, but, instead, the AA K Section performed most of this "close out" processing.

Your work on the other six projects was similar to your work on Main Street; some projects included different roadway elements, your attendance at neighborhood meetings, obtaining easements, or preparation for submission to bid (which meant obtaining all comments, revisions and approvals from the funding source, e.g., the Federal Highway Authority, IDOT or E, and affected utility companies). These projects were: C Blvd. Improvements (M to L, Phases I-III) ("C Blvd."); DR Street Improvements (_____ Avenue to _____ St., Phase III); Minor Street Improvements (MD Street to LD Street) ("Minor Street"); RH Street Repair Work (District, _____ to _____) ("RH Street"); West 7th Street (RP to MP) ("7th Street"); and 2nd Street (TP to SP) ("2nd Street").

However, you had some special responsibilities on some of these projects. For example, respecting RH Street, your job was to repair the stars that were "coming out of" the logos in the City's District; this repair work of the decorative medallions and in resetting granite was not accomplished through competitive bidding, but, instead, through an emergency contract with pre-negotiated prices so that your repair work could be quickly accomplished. On C Blvd., you were the City's acting design manager and reviewed all of XYZ's Phase I preliminary designs; its detailed contract plans and specifications; and prepared the project for advertisement. In order to perform the latter, you ensured all City agency, AA and funding agency comments had been made and incorporated in the plans and specifications. In addition, you were the contact between AA and XYZ on C Blvd. for design review while you were an assistant project manager and, also, when you became an acting project manager, which totaled a period of at least two years. If you (or a department) had comments about a particular XYZ design on C Blvd., you would ensure that XYZ knew about them and ensured that, if a change to the design were made, that it was carried out during construction. On Minor Street, you acted "fully" as a construction manager - as described above *prior* to the AA reorganization - in that you identified problems during construction and, with the private engineer, solved the problem, and ensured its being implemented instead of advising AA's Construction Management section of the problem.

On all 7 projects, you did not supervise the engineers on site; that supervision was the responsibility of a different division in AA. However, you offered your technical knowledge, and, if you felt a design change was needed, after speaking with your consultant (from the private engineers) or resident engineer, you would institute the design change (which needed resident engineer "sign off").

In addition to your project manager responsibilities on the 7 projects, your supervisors asked you to aid the Wards. Although you are not sure which Wards, you did help quite a few, including the Ward(s) encompassing the Main Street project, and the 80th Ward. As a AA field engineer, you worked with construction personnel to reconstruct 2 miles of streets in the 80th Ward only, including

excavation, sub-grade preparation, catch basin and manhole removal and replacement, mainline and house drain pipe installation, PCC pavement and base course, binder and surface courses, sidewalks and gutters. All your other Ward aid was, also, in connection with roadway work. You were asked to go on a site in a Ward, estimate scopes of work regarding possible future requests for repair work from that Ward or any other department, as well as estimating time and materials, ancillary work involved and, after your fact-finding was complete, to give your opinion of the final scope of possible future Ward work. You performed no design work during these fact-finding assignments. However, you were occasionally “borrowed” (by XYZ management) to do design review of some site plans for the M Program (you do not remember for which Wards), looking for issues in quantity calculations, *e.g.*, verifying correct material quantities in outside consultant-prepared site plans, such as the amount of concrete to be used.

Occasionally, with a AA deputy commissioner, you attended community meetings (particularly in connection with the C Blvd. project) to answer either design or construction questions. In addition, you were responsible for filing summaries and complete “accountability” reports with the ****’s Office, the Office of GTC, and AA. You also responded to many “311” complaints, citizen inquiries or questions from the ****’s Office. Upon becoming an acting project manager you became involved in budget matters and construction management.

LAW AND ANALYSIS: Section 2-156-100(b) of the Ordinance, “Post-Employment Restrictions,” states in relevant part:

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

This section of the Ordinance imposes both a one-year and a permanent prohibition on former City employees’ post-employment activities. The one-year prohibition begins on the date City employment ends, not on the date an employee stops participating in specific projects or transactions.

The Ordinance defines “contract management authority” as:

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. §2-156-010(g)

We will analyze each of these provisions in turn with respect to your proposed employment with XYZ.

The One-Year Prohibition. Under the one-year prohibition, you are prohibited for one year from the date you leave your City job from assisting or representing XYZ or any other person in any business transaction involving the City if you participated personally and substantially in the subject matter of that transaction while you worked for the City. To “assist” or “represent” a person in business transactions involving the City encompasses helping a person to seek a contract as well as helping a person perform a contract. *See* Case No. 92035.A.

XYZ has asked you to work on four business transactions it has with the City’s Department of AA. (In addition, XYZ may ask you to work on a business transaction with the City involving the City’s Department of Y.) Generally, XYZ would expect you to: (i) supervise roadway work involving the placement of pavement, sidewalks, curbs, gutters, earthwork, sewer pipe, drainage structures and traffic signals; and (ii) design roadway geometrics, including designing curves, radius returns, horizontal/vertical road location and associated roadway requirements. On the four specific projects XYZ would expect that: (a) on the M Program you would oversee City work crews in the production and placement of asphalt, pavement and concrete work; and ensure concrete delivery tickets conform to AA specifications; (b) on the C Blvd. project (which you worked on with XYZ during your City tenure) you would perform re-design work in Phase 2 of the contract relating to the area of C Avenue between L and M, specifically, designing ADA ramps pursuant to City specifications, and performing “production work,” including design specifications and plans for areas of roadway, driveways, radius designs and curbs; (c), on the RJS contract you would work on Phase 2 of the design of a new street grid, and perform ADA and production work similar to that on the C Blvd. project; and (d) on the 7th and H project you would perform design work on a viaduct clearance project, requiring raising or lowering streets/bridge, and, again, ADA ramp and production work. The subject matter of XYZ’s business transactions with the City, under the facts presented to the Board, is the City’s ongoing requirement to provide for the design and construction of City roadways. *See* Case No. 98043.A (Board explained subject matter of former employee’s work under contract between his new employer and CDOT, and compared it to subject matter of his City work for CDOT).

From the facts presented here, it is clear that you participated personally and substantially in the subject matter of XYZ’s transactions with the City, through AA, while you were an AA employee. While at AA, among other things, you were an acting project manager on 7 City roadway projects, and performed viaduct, ward roadway and ward scope “opinion” work. Briefly, as acting project manager, you were responsible for four phases of the roadway work that included “redlining” plans, drawings and (where necessary) specifications, as well as supervising construction of, among other things, miscellaneous infrastructure repair that included sidewalks, curbs and gutters. Aside from the 7 projects, at 7500 S. Western Avenue, you helped manage construction personnel in the lowering of the roadway beneath the railroad viaduct (similar to the work in one of the 7 projects). Further,

in the 80th Ward, you worked with construction personnel to reconstruct two miles of streets that included, among other things, excavation, binder and surface courses, and curbs and gutters. Finally, on a ward-by-ward bases, you gave your opinion of the final scope of possible future roadway work to be performed in any given ward. Under the Ordinance, therefore, you are prohibited for one year after you left City employment, that is, until April 28, 2007, from assisting or representing XYZ in its work with the City that involves provision for the design and construction of City roadways.

Note that this one-year prohibition applies both to providing services to XYZ or to managing, advising or supervising XYZ's outside consultants, or seeking any contracts with any of the City's agencies, respecting working on transactions with the City that involve provision for the design and construction of City roadways. In addition, the prohibition applies to you, personally, and not to your employer, XYZ.

The Permanent Prohibition. The Ordinance permanently prohibits former City employees from assisting or representing persons or entities in connection with City contracts if the former employee exercised contract management authority with respect to that contract while employed by the City. For purposes of the Ordinance, "contract management authority" encompasses both preparation of specifications and supervision of performance. *See* Case Nos. 98043.A (former CDOT employee's pre-contract act of recommending a scope of work demonstrated his contract management authority); 04005.A (former arterial road CDOT employee's project management assignment that included responsibility for various phases of construction demonstrated contract management authority); 04011.A (former arterial road CDOT employee's varied duties as project manager for 10 projects at different stages of completion demonstrated contract management authority). As described above in connection with the 7 projects, you said you participated in either or both the modification and submission of roadway designs and/or the supervision of performance of contractors on City roadway and related work, as well as "closing out" the project or assignment.

As to the 7 projects as acting project manager you were responsible for the following four project phases: (i) design engineering; (ii) bid process; (iii) construction supervision; and (iv) "project closeout." You stated that, although in some projects you had different duties, your activities on the 7 projects were similar. Summarizing those phases, first, you were involved with roadway design. Although personnel at E or others at AA initially formulated the roadway specifications for the 7 projects, your job was to aid the City's privately retained engineers in rewriting design plans if the engineers failed in their plans to comply with AA requirements, even involving "redlining" of drawings and, where necessary, contract specifications. Next, before you sent the plans to AA's K Section to begin the bidding process, you ensured that the funding agencies had approved complete design plans and specifications. For the C Blvd. project, you actually oversaw the advertisement publication process and performed limited bid response review. In the subsequent phase, the AA reorganization caused your contract supervision role to vary by project. On the Minor Street project you chaired pre-construction meetings, helping to set construction scheduling, held weekly engineers' meetings, and supervised any necessary design changes arising out of meetings and

construction reports. In the final project phase, you ensured a final project inspection, presented the contractors a punch list, addressed any budget concerns and ensured all bills were paid. At that point you were in a position to close a project's file (though none of the 7 projects were complete when you left City service).

Based on these facts, the Board concludes that, in relation to the 7 projects, your activities constituted personal involvement in, or direct supervisory responsibility for, the finalization of designs incorporated in AA roadway contracts, *cf.* Case No. 04011.A (fact of former arterial road CDOT employee's involvement in design of City's arterial, residential and industrial streets based upon, among other things, assisting resident engineer in "resolution of unforeseen design...issues," *Id.* p. 2, is virtually identical to Mr. Smith's "redlining" privately-retained engineers' plans and drawings) and/or the supervision of the work necessary in completing those contracts. Therefore, the Board determines that you exercised contract management authority over City contracts where you acted as the acting project manager and, accordingly, are permanently prohibited from assisting or representing any person, other than the City, on any City contract where you acted as a project manager or assistant project manager, *i.e.*, on the 7 projects.

DETERMINATIONS: In summary, after careful consideration of the facts you presented and the relevant law, the Board has determined that:

- 1) under Section 2-156-100(b) of the Governmental Ethics Ordinance, **you are prohibited for one year, that is, until _____, 20__**, from assisting or representing XYZ in its work with the City that involves provision for the design and construction of City roadways. This one-year prohibition applies both to providing services to XYZ or to managing, advising or supervising XYZ's outside consultants, or seeking any contracts (on behalf of XYZ or its consultants) with any of the City's agencies, respecting working on transactions with the City that involve provision for the design and construction of City roadways. However, you are not prohibited in any manner from performing work for XYZ in connection with the G station for the Department of Y as presented in this opinion; and
- 2) **you are permanently prohibited from assisting or representing any person, other than the City, on any City contract where you acted as a project manager or assistant or acting project manager, *i.e.*, on the 7 projects** (defined above).

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 the Board immediately, as any change in the facts may alter our opinion. Other law or rules may also apply to your situation. We note that any City department may adopt restrictions that are more stringent than those imposed by the Governmental Ethics Ordinance.

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CONFIDENTIAL INFORMATION: We also bring to your attention Section 2-156-070 of the Governmental Ethics Ordinance, "Use or Disclosure of Confidential Information." this section prohibits you, as a former employee, from using or revealing confidential information you acquired through your City employment. Confidential information, for purposes of this section, means any information that may not be obtained under the Illinois Freedom of Information Act, as amended.

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.

Darryl L. DePriest
Chair