



CITY OF PHILADELPHIA

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**Philadelphia Board of Ethics
Nonpublic Advice of Counsel GC-2010-516**

October 4, 2010

Re: Addendum to Nonpublic Advice of Counsel GC-2010-515

The City employee who was the subject of Nonpublic Advice of Counsel GC-2010-515 requested a nonpublic advisory advising on how the post-employment rules apply to additional facts that the employee provided.

In his request for an additional advisory, he advised as follows:

He described his technical work for his City department. He advised that the department decided to let a contract to provide additional deliverables. The requestor advised that he had been involved in developing the specifications for the contract and contacted a number of potential bidders.

The contract went out for bid as a competitive requirements contract using small purchase order through the Procurement Department. The bid winner subcontracted certain technical work to Firm X. The requestor advised that Firm X created and issued formal functional

requirements documents at the Department's request. All of the formal documents created by Firm X have a Copyright of Firm X statement.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this Advice is predicated on the facts that we have been provided. We do not conduct an independent inquiry into the facts. Although previous opinions of this office that interpret statutes are guidance to how this office will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that the requestor may be concerned about, he was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

This request for additional advice impacts chiefly on two provisions discussed in Nonpublic Advice of Counsel GC-2010-515, both in the Philadelphia Code.

Permanent Limitation On Assistance With Particular Matters—City Code

As noted in Nonpublic Advice of Counsel GC-2010-515, Section 20-603(1) of the City Ethics Code states:

No person who has served for compensation as a member of Council, City officer or employee shall assist, at any time subsequent to his City service or employment, another person, with or without compensation, in any transaction involving the City in which he at any time participated during his City service or employment.

It appeared that the requestor wished to have further explanation of the following portion of the prior Advice:

Thus, if during the requestor's service with his City department, he took official action on any particular transaction concerning which a future employer should contact the City at any time henceforth, he may not assist that future employer in the matter relating to that transaction. On the other hand, we interpret "matter" to mean only the particular issue or

issues on which decisions were made by the City with the requestor's involvement, not every issue related to that project that may arise after he separates from City service.

For example, if once the requestor has separated from the City and is employed by the entity, a question should arise that would present an opportunity to assist the entity with further understanding of the work that he did previously as a City employee, he may not provide that assistance to the entity. However, if a contract were to be awarded to the entity, Section 20-603(1) would not prohibit his doing any work at all under that contract, so long as his work did not involve assistance with his previous work for the City.

Similar advice appears in nearly every prior post-employment advisory issued by the Board. In Nonpublic Advice of Counsel GC-2010-514, we advised a City employee who planned to seek employment with a nonprofit with a contract with the City, where the employee had worked on the RFP related to that contract. In the discussion of Code Section 20-613, we advised as follows:

Thus, if during the requestor's City service, she took official action on any particular transaction concerning which a future employer should contact the City at any time henceforth, she may not assist that future employer in the matter relating to that transaction. On the other hand, we interpret "matter" to mean only the particular issue or issues on which decisions were made by the City with the requestor's involvement, not every issue related to that project that may arise after she separates from City service.

For example, the requestor advised that she had worked on an RFP for the City, related to the nonprofit's contract with the City. If the nonprofit were to hire her, and once she was employed by the nonprofit, a question should arise that would present an opportunity to assist the new employer with further understanding of the work that the requestor did previously as a City employee in developing the RFP and related tasks, she may not provide that assistance to the new employer. However, if a contract were to be awarded to the nonprofit, Section 20-603(1) would not prohibit her doing any work at all under that contract, so long as her work did not involve assistance with her previous work for her City department.

Nonpublic Advice of Counsel GC-2010-514, page 11. *See also* Nonpublic Advice of Counsel GC-2010-513, page 11; Nonpublic Advice of Counsel GC-2009-513, page 9; Nonpublic Advice of Counsel GC-2008-509, pages 5-6; Advice of Counsel GC-2008-513 (Lienert), page 7; and Advice of Counsel GC-2008-520 (Phillis), page 6. This language is nearly identical to the advice provided in Nonpublic Advice of Counsel GC-2010-515, also quoted above.

As the quotation from Nonpublic Advice of Counsel GC-2010-514 immediately above demonstrates, the purpose of the additional explanation is to assure the requestor that, just because she worked on developing the RFP for a City contract with a vendor, Section 20-603 does not prohibit her from being later employed by that vendor and doing substantive work under that City contract, so long as she is not assisting the vendor with specific issues relating to the work she did developing the RFP (and in most cases, once a contract is awarded, there are no more issues regarding the RFP). For example, a City social worker might advise the City on suggested criteria for a social services provider contract, and later be hired by the vendor to provide those social services to clients. Section 20-603 does not prohibit doing substantive work that is unrelated to the work the person did for the City related to that contract, as that would not be to “assist . . . another person . . . in any transaction involving the City in which he at any time participated during his City service.”

In contrast, under the facts that have been provided to us, the requestor did substantive work developing the business analysis and functional requirements for the work product that was further developed and now apparently owned by Firm X. The development of that product is the transaction. I note that Code Section 20-601(4) defines “transactions involving the City” as follows:

Transactions Involving the City. Any proceeding, application, submission, request for a ruling, or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation including ordinances and resolutions or other particular matter which the member of City Council, City officer or employee in question believes, or has reason to believe (a) is or will be the subject of City action; or (b) is one to which the City is or will be a party; or (c) is one in which the City has a direct proprietary interest. This shall not include routine applications or requests for routine information or other matters which are of a ministerial nature and do not require the exercise of discretion on the part of any member of City Council, City officer or employee.

This is a very broad definition. Clearly, a matter involving the development of a product on which the City owns the copyright (as the requester stated in his initial request letter) is one in which the City has a direct propriety interest. Accordingly, the requestor participated in that transaction, and Code Section 20-603 prohibits him from ever assisting anyone, including Firm X, in that transaction. However, the transaction is only “involving the City” if the City is still involved. Thus, Section 20-603 would not prohibit the requestor from assisting Firm X or another entity from developing a product to market to other municipalities or other entities, so long as the City of Philadelphia had no interest in the transaction.

Two Year Limitation On Financial Interests—City Code

In Nonpublic Advice of Counsel GC-2010-515 the requestor was advised that Section 20-607(c) of the Code prohibits a City employee for two years after leaving City employ from acquiring a financial interest in official decisions he made while in City employ. We advised: “Thus, if you had, for example, been officially involved in awarding, renewing, amending, or administering a City contract with the outside entity, you could not for two years be employed by and receive any compensation from that entity, if such compensation was derived from revenue received under that [City department] action affecting the contract.” However, the requestor advised in his initial request letter that he “would insure that [his] financial interest in the entity would be independent of the entity’s agreement with the City of Philadelphia.” If those supplied facts are still true regarding any compensation he would receive from Firm X upon being employed by that entity, there should be no issue under Code Section 20-607(c).

Other Law Not Addressed

This Advice of Counsel addresses only the provisions of the Public Integrity Laws that are within the jurisdiction of the Philadelphia Board of Ethics, as defined in Section 4-1100 of the Home Rule Charter. Specifically not addressed is any law pertaining to copyrights, patents, royalties, or other intellectual property issues.

Summary

In summary, based on the facts that the requestor provided to us, he was advised as to the following conclusions:

(1) Nothing in this Advice supersedes any advice provided in Nonpublic Advice of Counsel GC-2010-515, and this Advice incorporates the advice provided therein.

(2) Under the City Code, the requestor may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a particular issue or issues on which decisions were made by his City department with his involvement. The particular issue includes development of the product referred to in the initial request, but the Code provision would only prohibit assistance with a matter if the City continues to have an interest in the matter.

(3) Under the City Code, the requestor may not for two years after he leaves the employ of the City acquire a financial interest in any official decision he made while in City employ. Thus, if the requestor is employed by Firm X, he may not be paid out of revenues realized from Firm X's contract with the City.

The requestor was advised that, if he has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Please also note the option of requesting advice of the State Ethics Commission or the City Solicitor (as to the State Act only), as discussed in Nonpublic Advice of Counsel GC-2010-515. Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but are required to make public this revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

Evan Meyer
General Counsel

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director