

SALT LAKE CITY CORPORATION

LAW DEPARTMENT

EDWIN P. RUTAN, II
CITY ATTORNEY

RALPH BECKER
MAYOR

December 23, 2009

Michael J. Bodell Sr.
President/CEO
Bodell Construction Company
Salt Lake City Airport Board
586 Fine Drive
Salt Lake City, UT 84115

Re: Ethics Opinion - Bidding on Salt Lake City Contracts not Connected to Airport

Dear Mr. Bodell:

You have requested an advisory opinion pursuant to SLCC § 2.44.210A as to the applicability of the City's conflict of interest ordinance or other applicable law to you as a member of the Salt Lake City Airport Board in connection with potential bids by a business in which you have a financial interest on (1) the Gallivan Center project that is now being advertised by Salt Lake City in connection with an RDA project; and (2) the future Public Safety Building project (together, the "Salt Lake City Projects").

FACTS

I understand the following to be the relevant facts:

1. You currently are a member and Chair of the Salt Lake City Airport Board (the "Board"). As a member of the Board, you are a "volunteer public servant" for purposes of the City's conflict of interest ordinance.
2. You also are President and CEO of Bodell Construction Company ("Bodell Construction").
3. Bodell Construction is interested in bidding on the Salt Lake City Projects, which have no connection to the Airport.
4. *City Code* § 2.14.120 lists the powers and duties of the Board, which are limited to certain matters that concern the Airport.
5. It is my understanding you orally agreed at the Administration's request at the time of your appointment to the Board not to bid on Airport construction projects as long as you were a

member of the Board. However, it also is my understanding that such an agreement did not extend to bids for Salt Lake City projects that are not connected to the Airport.

DISCUSSION AND ANALYSIS

This matter implicates several sections of the *Salt Lake City Code*. The following is a short description of those sections and an analysis of how they apply to the current situation.

A. **Applicability to Airport Board Members**

Salt Lake City Code § 2.14.060 provides that Board members are subject to and bound by applicable City and State laws pertaining to ethics. Any violation of the provisions of such laws is grounds for removal from the Board.

B. **Conflict with Financial, Professional, or Personal Interests**

Salt Lake City Code § 2.44.030 provides that whenever the performance of your official duty requires governmental action on any matter involving your financial, professional, or personal interests, and it is reasonably foreseeable that the decision will have an individualized material effect on that interest (distinguishable from its effect on the public generally), you must disclose that matter to the Mayor and the Board and disqualify yourself from deliberating and voting on the matter.

The conflict of interest ordinance defines “financial interest” to include having a 10 percent or greater ownership interest in a business entity, or the status of being a partner or employee of a business entity. Because you have a more than 10 percent ownership interest in Bodell Construction, you have a financial interest in it. Thus, it is necessary to analyze the effect of § 2.44.030 on you and Bodell Construction.

In this case it appears you have a financial interest in any contract awarded to Bodell Construction in connection with the Salt Lake City Projects. That interest clearly would have an individualized material effect on your interests, distinguishable from any effect on the public generally (i.e., only you and a relatively few other people stand to benefit financially). However, the performance of your official duty as a member of the Airport Board does not extend to any governmental action that would involve the Salt Lake City Projects. Therefore, it does not appear that *City Code* § 2.44.030 would disqualify you or Bodell Construction from bidding on the Salt Lake City Projects.

C. **Use of Confidential Information**

Salt Lake City Code § 2.44.040(A) prohibits you from (1) disclosing confidential information acquired by reason of your official position or in the course of your official duties or (2) using such information in order to: (a) substantially further the personal, financial, or professional interests of yourself or someone else; or (b) secure special privileges or exemptions for yourself or someone else.

Therefore, if, as a Board member, you have learned about the Salt Lake City Projects before other potential bidders, or have other confidential information about City operations, *and* if you were to use that inside information to craft Bodell Construction’s bid in an advantageous

way, you would violate this section. (Nothing indicates you have done any such thing; this is included only as a cautionary note.)

D. Corrupt Use of Official Position.

Salt Lake City Code § 2.44.040(B) prohibits you from “corruptly” using your official position to either: (1) further the personal, financial, or professional interests of yourself or someone else; or (2) secure special privileges, treatment, or exemptions for yourself or someone else.

City Code § 2.44.040(B) is violated only when action is done “corruptly.” “Corruptly” is defined as “done with wrongful intent and for the purpose of obtaining or receiving any personal, financial, or professional benefit resulting from some act or omission of the public servant . . . which is inconsistent with the proper performance of his or her public duties.”¹

In this case, no information suggests undue influence or corruption. You have voluntarily disclosed the facts of this situation. Further, no evidence suggests that you have any wrongful intent in these matters, or that you intend to act in a way inconsistent with the proper performance of your public duties.

E. Conflicts in Public Contracts and Procurement

Salt Lake City Code § 2.44.130(A)(1) prohibits you from participating directly or indirectly in making, recommending, preparing, or performing a discretionary function with respect to any contract with the City, including without limitation a procurement contract, when you have actual knowledge that: (1) you or one of your relatives have a financial interest pertaining to such contract; (2) you or one of your relatives have a financial interest in a business entity that has a financial interest pertaining to such contract; or (3) any other person or business entity with whom you or one of your relatives is negotiating or has an arrangement concerning prospective employment is involved in such contract.

As an Airport Board member, you will not participate directly or indirectly in making, recommending, preparing, or performing a discretionary function with respect to a contract with the City in connection with the Salt Lake City Projects. This provision of the Salt Lake City Code thus will not limit the participation of you or Bodell Construction in the bid process on the Salt Lake City Projects.

F. Outside Employment

Salt Lake City Code § 244.060(A) provides that no volunteer public servant (or employee) shall engage in outside employment which is “inconsistent, incompatible or in conflict with, or inimical to, his or her duties.” Section 2.44.060(A) further provides that this prohibition “includes, but is not limited to” outside employment involving (1) use for private gain or advantage of the volunteer public servant’s City working time or City facilities, equipment or supplies or (2) receipt of compensation from anyone other than the City for the performance of an act that would be part of the volunteer public servant’s duties.² Neither subsection (3) nor (4) is applicable here.³

¹ *Salt Lake City Code* § 2.44.020(F).

² “Outside employment” includes any activity or enterprise for compensation and thus would appear to encompass your activity with Bodell Construction. See *Salt Lake City Code* § 2.44.020P.

It does not appear that your interest in Bodell Construction as a potential bidder on the Salt Lake City Projects is “inconsistent, incompatible or in conflict with or inimical to” your duties as a Board member.

G. Volunteer Public Servant Disclosure Requirements

Salt Lake City Code § 2.44.130(B)(1) provides that if you obtain any benefit from any City contract with a business entity in which you have a financial interest, you must report such benefit to the Mayor and the Airport department head within 30 days after you have actual or constructive knowledge of the benefit received or to be received.

General Advice for Board Members in Connection with Contracting or Procurement

The present issue does not encompass matters that involve the Airport, and thus does not appear to present a direct conflict with your duties as a member of the Airport Board. The following advice is thus for informational purposes regarding the responsibilities of Board Members in a broader contracting or procurement context.

Because the Board may have a policy role in “granting rights, privileges, or concessions at the Airport, and in making determinations as to the public need for additional concessionaries or services at the Airport” (see *City Code* § 2.14.120(E)(3) and (6)), Board members must be very careful in following the recusal requirement in connection with those contracting or procurement processes. For example, it would be inappropriate for a Board member to lobby or exert pressure on members of the RFP committee to select a particular contractor or to lobby for inclusion of particular terms in the RFP if that Board member, or a relative of that Board member, stood to gain financially from the contract.

Board members also may want to consider whether it creates an “appearance of impropriety” for a Board Member or a business in which a Board Member has an interest to have a concessionaire agreement with the Airport while a member of the Board. Bear in mind that the purposes of the conflict of interest ordinance include to “prevent improper influence” and to “avoid the appearance of impropriety.” The ordinance also seeks to “increase public confidence by assuring that official actions are taken objectively and properly.” See *City Code* § 2.44.010. The Airport’s conflict of interest policy for employees would prohibit an employee from bidding in these circumstances.

Even if a Board member has disclosed the relationship and recused himself or herself from participating in the matter on behalf of the City, a Board member still should not personally advocate to the Airport on that matter on behalf of his or her financial interest.

Finally, *City Code* §2.44.050 requires that every volunteer public servant who is also an officer, director, agent, employer, or employee of any business entity, or the owner of a substantial interest in any business entity, including, without limitation, any business entity subject to city regulation disclose any such position or employment and the nature and value of such position or employment. Such disclosures must be made within thirty (30) days after being appointed or elected or otherwise commencing their employment or public service, and again

³ Subsections 2.44.060(A)(3) and (A)(4) do not apply to volunteer public servants.

during January of each year if such volunteer public servant's position in the business entity has changed or if the value of such volunteer public servant's interest in the entity has materially increased since the last disclosure. Such disclosure shall be made in a sworn written statement in a form prescribed by the city and shall be filed with the mayor. Unless otherwise provided by the law, the statements are public records and shall be made available for inspection by members of the city council and the public upon request.


III.

CONCLUSION

Based on the facts presented and subject to the conditions set forth below, it is my opinion that applicable City ordinances will not preclude you or Bodell Construction from participating in the procurement and contracting processes in connection with the Salt Lake City Projects. However, you should consider and comply with the following conditions in connection with such participation:

1. If, as a Board member, you have learned about the Salt Lake City Projects before other potential bidders, or have other confidential information about City operations, *and* if you were to use that inside information to craft Bodell Construction's bid in an advantageous way, you would be prohibited from participating.
2. If, as a Board Member, you obtain any benefit from any City contract with a business entity in which you have a financial interest, you must report such benefit to the Mayor and the Airport department head within 30 days after you have actual or constructive knowledge of the benefit received or to be received.

Sincerely,

A handwritten signature in black ink, appearing to be 'J.P. Riley', written over the word 'Sincerely,'.

cc: Mayor Becker
City Council
City Recorder
Maureen Riley
Marco Kunz