

Ferguson, Boyd

From: Ferguson, Boyd
Sent: Wednesday, September 15, 2010 1:12 PM
To: [REDACTED]
Cc: Rutan, Ed; Naser, John
Subject: Conflict of interest inquiry - [REDACTED]

Categories: Confidential

[REDACTED]

This is a follow-up opinion letter to our previous oral advice to you regarding a conflict of interest inquiry.

Facts

In the Spring of 2009 you invented a [REDACTED] that connects to a ready-mix concrete truck to help facilitate the [REDACTED] on road projects. To some extent, you worked with a BYU professor, [REDACTED], on the invention. BYU was working to patent the [REDACTED], and a company expressed interest in manufacturing the [REDACTED].

You are a [REDACTED] for Salt Lake City for road projects. In the past you have recommended and made available the [REDACTED] to contractors, who have used it on Salt Lake City projects. In the pre-bid meetings you mentioned your invention to the contractors, but did not pressure them to use it or promise them any special treatment if they did. The contracts were awarded to the lowest bidder through a competitive bidding process. The [REDACTED] was used on several Salt Lake City roadway projects during 2009.

John Naser, the Salt Lake City Engineer (who was the Deputy City Engineer at the time of our previous oral discussions) said that the [REDACTED] will provide a better product to the City for its road projects. You and John Naser represented that Engineering will not include the [REDACTED] in the bid specifications for City projects.

You sometimes are involved in the procurement process for contractors on road projects. However, you (or your spouse or minor children) do not have a 10 percent or greater ownership interest in any business entity, and you do not hold a position such as an officer, director, trustee, partner, employee, or the like, or hold a position of management, in a business entity.

You do not have any interest in a business entity that manufactures or markets the [REDACTED].

Analysis

City Code § 2.44.030 requires you, as a City employee, to disclose conflicts of interest, and recuse yourself if you are asked to take action on a matter involving your financial, professional, or personal interests, if that action would have an "individualized material effect on such interest, distinguishable from its effect on the public generally."

If your City duties include recommending to contractors that certain equipment be used in City road projects, and if you were to recommend your own [REDACTED], you would be in the position of being tempted to recommend your [REDACTED] because you would make additional income if the contracted followed your recommendation. That is a conflict of interest under § 2.44.030. We don't see a problem with contractors using your [REDACTED] in City projects, which the City Engineer has said benefits the City, but you, personally, should not make recommendations to contractors about whether or not to use your [REDACTED] or competing similar products.

City Code § 2.44.040 provides that you may not corruptly use or attempt to use your official position with the City to: (a) further your personal, financial, or professional interest or the personal, financial or professional interest of others; or (b) secure special privileges, treatment, or exemptions for yourself or others.

The analysis under this section is very similar, in this case, to the analysis above regarding § 2.44.030, and our advice is similar. However, we note that we see no evidence that any of your actions were done "corruptly" in this case. You approached the City Attorney's Office in advance regarding the [REDACTED], and have been very open and cooperative about the situation.

City Code § 2.44.130A provides that you may not participate 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:

You or your relative has a financial interest pertaining to such contract;

You or your relative has a financial interest in a business entity that has a financial interest pertaining to such contract; or

Any other person or business entity with whom you or your relative is negotiating or has an arrangement concerning prospective employment is involved in such contract.

Based on the facts recited above, it appears that you do not have a financial interest in the contracts as "financial interest" is defined in § 2.44.020J. However, because the use of your [REDACTED] on a City project could provide income to you, you could have a financial interest in a road contract in the commonly understood sense. Therefore, you may not perform a discretionary function (such as making a recommendation or approval) with respect to any contract in which your [REDACTED] might be involved. We understand that the road contracts are awarded pursuant to sealed competitive bidding, and that your [REDACTED] is not mentioned in the bid specifications. Therefore, it seems unlikely that you would have any discretionary functions with respect to the initial procurement of the contractor. However, if the opportunity for such a discretionary function ever arises, you must not be involved in it. Also, as noted above, you should not thereafter personally recommend to any selected contractor that he or she use your [REDACTED].

For your information, Section § 2.44.130A(3)(b) provides that no public servant who serves on a City procurement committee may, during the two (2) years immediately following the date the related contract is awarded by the City, seek or accept employment or remuneration of any kind from a person or entity that submitted a bid or proposal that was evaluated by that committee.

Conclusion

For the foregoing reasons, we conclude that contractors may use your [REDACTED] in City projects, which the City Engineer has said benefits the City, but you, personally, should not make recommendations to contractors about whether or not to use your [REDACTED] or competing similar products.