

**CITY OF BIRMINGHAM**  
**ETHICS BOARD ADVISORY OPINION**

**2003 – 01**

**NOVEMBER 11, 2003**

Walker Parking Consultants ("Walker"), an engineering firm that serves as a consultant to the City of Birmingham, has requested an advisory opinion as to whether it would be in a conflict of interest were it to enter into a temporary business relationship with a construction contractor, for the purpose of performing a "design/build" construction project for a client other than the City of Birmingham, when the construction contractor also performs work for the City for which Walker has oversight responsibility.

**ISSUES**

The request for advisory opinion presents two related but distinct issues.

(1) Is Walker in a conflict of interest under the Ethics Ordinance if it enters into a temporary design/build business relationship with a construction contractor, on a project being conducted for a client other than the City, when at the same time Walker has oversight responsibility over that same contractor on a project for the City?

(2) Is Walker in a conflict of interest under the Ethics Ordinance if a construction contractor, with whom Walker already has a temporary design/build business relationship on a project being conducted for a client other than the City, wins a bid for construction work for the City over which Walker will have oversight responsibility?

**OPINION**

(1) Walker would be in a conflict of interest within the meaning of the Ethics Ordinance were it to enter into a temporary design/build business relationship with a construction contractor at the same time it has oversight responsibility over that contractor on a City project.

(2) Walker would not be in a conflict of interest within the meaning of the Ethics Ordinance if a construction contractor, with whom Walker already has a temporary design/build business relationship, won the bid for a City project over which Walker would have oversight responsibility, assuming that the contractor notified the City during the course of the bidding that it had the relationship with Walker.

### ANALYSIS

Walker is an engineering firm with expertise in parking facilities. The City has engaged Walker to serve as its consultant on parking maintenance and repair projects as they may occur. Walker requested an advisory opinion from the Board of Ethics through a letter submitted by its vice president, Michael E. Johnson, who later appeared in person at a meeting of the Board. The Board commends Mr. Johnson on the quality of his presentation of the facts and issues. Based upon record, the Board notes first that Walker is presently not in a conflict of interest and is not acting in a way that is contrary to the Ethics Ordinance. Rather, Walker's concerns are prospective.

The City owns a number of parking facilities, each of which requires occasional maintenance and repair. Each maintenance and repair project is undertaken by a contractor engaged by the City on a short-term, case-by-case basis under the general direction of the City's assistant director of public works, Paul O'Meara. The contractor for each job is selected through the City's competitive bidding process, by which the lowest bidder typically receives the contract.

In its capacity as consultant, Walker advises the City regarding the performance and technical contract obligations of the construction contractors hired by the City to work on the projects. In short, Walker's role is to make sure that the City gets from its contractors what it pays for. Walker does not select the contractors, but it sometimes advises the City about whether a contractor's price may be fair and reasonable. The City pays Walker on an hourly basis in accordance with a mutually agreed fee schedule.

Because the City expends approximately \$500,000 annually to maintain and repair its parking facilities, Walker's advice is valuable in helping to ensure that the City's contractors perform their work in proper and timely fashion. For its services, Walker earns fees in the range of \$25,000 to \$50,000 a year from the City. Walker is a substantial company with many clients. The fees it earns from the City constitute only a small portion of its annual revenue.

Any construction project involves a number of professional fields, including architecture, engineering and construction. In the construction industry, there

appears to be a trend where clients now select construction contractors not just to build the project, but also to design and engineer it. To meet the requirements of clients in that situation, construction contractors commonly associate with firms from other disciplines in temporary business relationships established for purposes of the particular project. These joint projects are sometimes referred to as "design/build" projects.

Walker presently is not involved in any design/build projects involving contractors who work for the City of Birmingham. Because the design/build model is becoming more commonplace and further because there is only a limited number of contractors who work on parking projects generally, Walker foresees the day when it will be invited to participate on a design/build project for a client other than the City. Under that scenario, Walker contemplates that it would be employed by, and thus would receive income from, the contractor on a temporary basis until the project is completed. Walker is concerned that a conflict of interest might arise if it entered into such an arrangement with a contractor that currently is performing, or that later might be contracted to perform, work for the City over which Walker has oversight responsibility.

Three portions of the Ethics Ordinance apply. Section 2-324(A)(VI) provides, in pertinent part:

No official or employee of the City of Birmingham shall engage in or accept employment or render services for any private or public interest when that employment or service is incompatible or in conflict with the discharge of his or her official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of his or her official duties.

Ethics Ordinance, § 2-324(A)(VI). Section 2-324(A)(VII) then provides:

No official or employee of the City of Birmingham shall participate in, as an agent or representative of the City, in the negotiation or execution of contracts, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision, relating to any business entity in which he or she has, directly or indirectly, a financial or personal interest.

Id. § 2-324(A)(VI). Furthermore, section 2-324(A)(IX) provides, in part:

A conflict of interest exists if:

- (A) The City official or employee has any financial or personal interest, beyond ownership of his or her place of residence, in the outcome of a matter currently before that City official or employee, or is associated as owner, member, partner,

officer, employee, broker or stockholder in an enterprise that will be affected by the outcome of such matter, and such interest is or may be adverse to the public interest in the proper performance of said official's or employee's governmental duties, or;

- (B) The City official or employee has reason to believe or expect that he or she will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his or her official activity.

*Id.* § 2-324(A)(IX).

Walker is a "City official or employee" within the meaning of the Ethics Ordinance. *Id.* § 2-322(I). Accordingly, Walker is subject to the ordinance.

#### **Discussion and Holding on Issue (1).**

At the heart of Walker's contract with the City is its duty to ensure that the parking facility contractor hired by the City is performing its obligations under its contract; in short, that it is doing what it was hired to do. To perform that duty may require Walker to act in ways contrary to the interests of the contractor it is overseeing, including potentially identifying the contractor's defaults under its contract, recommending that the City cancel its agreement with the contractor, and even assisting the City in taking legal action against the contractor. If Walker were party to a design/build relationship with that contractor, Walker would be in a conflict because that relationship, even though temporary, might tend to impair its independence of judgment or action in the performance of its official duties. *Id.* § 2-324(A)(VI). Moreover, by entering into a design/build relationship with a contractor over whom it presently has oversight responsibility for the City, Walker would be participating in the execution of a contract relating to a business entity in which it has, directly or indirectly, a financial interest. *Id.* § 2-324(A)(VII). Finally, Walker would, or at least might, also have a financial interest in, or be associated as partner in, an enterprise that will be affected by the outcome of a matter currently before the City. *Id.* § 2-324(A)(VI).

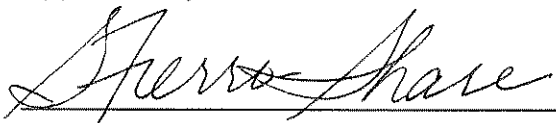
Accordingly, the Board finds that Walker may not, in a manner consistent with the requirements of the Ethics Ordinance, enter into a design/build relationship with a contractor on another project over whom it has oversight responsibility for a City project at the time it enters the relationship. Once the contractor concludes the work for the City over which Walker has oversight responsibility, Walker would be free to enter into a design/build relationship with that contractor on other projects not involving the City.

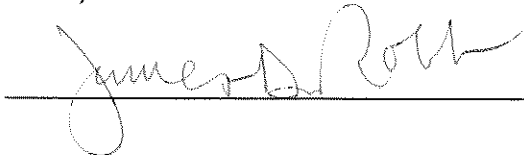
## Discussion and Holding on Issue (2).

Walker's request for advisory opinion also contemplates that a contractor, with whom it already has established a design/build relationship for a client other than the City, subsequently wins the bid to perform work for the City over which Walker will have oversight responsibility. Typically, a number of contractors bid on City jobs. The bids are closed. Walker does not know who is bidding or at what price. Walker is concerned that the City's entry into a contract with a contractor with whom Walker already has a relationship would place Walker in a conflict situation. Although the three above-cited provisions of the Ethics Ordinance would ordinarily control and serve to place Walker in a conflict of interest inadvertently, the Board finds that Walker's conflict would be waived by the City by reason of acceptance of the bid so long as the bidder informed the City of its relationship with Walker. Mr. Paul O'Meara of the City's Department of Public Works advised the Board that on future bids for maintenance or repair of parking facilities, the bidders will be required to disclose any relationship they have with Walker. With that caveat, the Board finds that Walker would not be acting outside the requirements of the Ethics Ordinance and would not be barred from its continued engagement with the City.

It is intended that this Opinion serve Walker, the City and other consultants of the City as an effective means of considering whether their actions are consistent with the Ethics Ordinance. The Board's determination is not necessarily dispositive of all issues relevant to this situation, but is based solely on the application of the Ethics Ordinance to the facts stated in this Opinion. If the facts stated are incorrect or incomplete, please notify the Board immediately, as any change may alter its determination. Other laws or rules also may apply to this situation.

Approved by the Ethics Board this 11th day of November, 2003.

  
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