

**CITY OF BIRMINGHAM
ETHICS BOARD
ADVISORY OPINION 2015-07**

Introduction

The Ethics Board was requested by Birmingham City Commissioner Gordon Rinschler to provide an Advisory Opinion¹. At the October 12, 2015 Birmingham City Commission meeting, Commissioner Rinschler made the statement that “the Board of Ethics should review the process used to select Mr. Aaron Cohen to make sure that everything is done properly.” Mr. Rinschler was referring to whether or not the process used in the selection of the architect for a public project was in violation of Section 2-323 of the City Ethics Ordinance.

Issue

Whether the process used in the selection of the architect for the renovation of the Adult Services area at the Baldwin Public Library was in violation of Section 2-323 of the Ethics Ordinance?

Conclusion

No, the selection process was appropriately adhered to and thus no violation.

Factual Summary

The agenda item of the Birmingham City Commission meeting at issue on October 12, 2015 related to the Baldwin Public Library development of construction drawings. This specifically pertained to a renovation to the Adult Services Department of the library, concentrating on the main floor of the Birkertz addition. Library Director Douglas Koschik appeared before the Ethics Board and explained that a Request for Proposal (“RFP”) was issued in February, 2015 and five bids were received. Further, at a public meeting the Library Board selected the architectural firm of Luckenbach Ziegelman Gardner (“LZG”), and it was awarded the contract for the construction drawings. It submitted its proposal dated March 27, 2015. The goals were to get more light into the space, create a more open and collaborative space, increase way finding and circulation and to satisfy the library’s programming requirements. John Gardner of LZG explained that Mr. Aaron Cohen of Aaron Cohen Associates is a world famous library planning consultant in New York City, and that a library patron brought him to their attention. LZG interviewed Mr. Cohen and asked him to work with them on this project. Commissioner Rinschler suggested that the Ethics Board review the process related to the use of Mr. Cohen. The Commissioner expressed his support of the design, but lacked comfort with the process. The Commission unanimously approved the reference herein to the Ethics Board.

¹ Section 2-325(b)(1)(2). The procedure for an Advisory Opinion is set forth in Chapter 2 of the Board of Ethics Procedural Rules. This is not an Ethics complaint, but more a matter of education.

Some history of what occurred prior to this referral and request for Advisory Opinion is relevant. An election was held in Birmingham on May 6, 2014 to approve or reject a proposed \$21.5 million bond issue to expand and renovate the Baldwin Public Library. In preparation for this election, the City Commission and the Library Board jointly issued an RFP for architectural services to develop a concept plan and cost estimate. The Board used the City's RFP template.² Numerous prominent firms responded to the RFP, however Mr. Cohen's firm did not respond. There was some question as to whether or not Mr. Cohen and/or his firm was included as a subcontractor in any of the other firms' responses.

Subsequent to completion of the concept design and cost estimate, but prior to the Commission approval of the 2014 ballot language, Birmingham citizen Mr. David Bloom attended a Commission meeting and requested that the City hire Mr. Cohen. The request was rejected and the Commission ultimately approved the proposed language and set an election date. Thereafter, Mr. Bloom and others formed and registered an organization called "Birmingham Citizens for Responsible Spending" to oppose the bond proposal in their campaign literature. Mr. Cohen was featured therein as a leading library architect and was quoted as saying that the \$21.5 million dollar plan to demolish and rebuild most of the Baldwin Library was "unnecessary, a waste of taxpayer money, and has some serious usability limitations."

The bond proposal was eventually defeated and then the Library Board developed a new proposal, with significant participation by Mr. Bloom. Every Library Board meeting was publicly noticed and the minutes published. Architectural services were contracted to LZG who partnered with Mr. Cohen. Therefore, Commissioner Rinschler had concern as Mr. Bloom recommended Mr. Cohen to LZG, and that LZG might have been encouraged to hire Mr. Cohen as a quid pro quo for his participation with Birmingham Citizens for Responsible Spending in defeating the ballot proposal of May 6, 2014. Part of the concern was whether or not this process created the appearance of giving or accepting preferential treatment, including the use of city property or information, to or from any organization or person, in conflict with Section 2.323(2).³

Various members of the Library Board attended the subject Ethics Board hearing and expressed support for LZG, in part because of the firm's experience in Birmingham. Apparently, Mr. Cohen did not criticize any aspect of the project after LZG was awarded the contract. Mr. Ziegelman explained to the Ethics Board that it is very common to bring in an expert of Mr. Cohen's qualifications on this type of project, but his firm had not previously worked with Mr. Cohen. He further stated that Mr. Cohen was only giving advice to LZG and has had no decision making authority.

² It generally appears that the Library Board has the discretion for the oversight of the interior of the library building, and the City has the discretion for the exterior as it is a City-owned building. However, City funds paid for this architectural portion of the project.

³ It is the intention of section 2-324 that city officials and employees avoid any action, whether or not specifically prohibited by section 2-324, which might result in, or create the appearance of: (2) Giving or accepting preferential treatment, including the use of city property or information, to or from any organization or person.

The involvement of LZG and Mr. Cohen was not clandestine. The Library Board's Building Committee met on October 13, 2014, and conducted a conference call with Mr. Cohen, as shown by the Building Committee report. From a review thereof, it is quite evident that the Committee, and thus many members of the entire Library Board, became quite familiar with Mr. Cohen's beliefs and suggestions at that time. Mr. Bloom also attended that meeting. The Library Board Minutes of April 20, 2015 reference LZG bringing in Mr. Cohen as a consultant. In addition, "Aaron Cohen Associates" was identified as a Library Building Consultant, by and through Alex Cohen, as part of the LZG project team in its RFP submission of Architect's Description and Qualifications. This team description is significant as part and parcel of the RFP. It required the firm's qualifications. More particularly, on page 21 of the RFP there are various Selection Criteria, which included the experience and qualifications of proposed team members that will be assigned to the project. Also on page 22 thereof are RFP Submission Requirements, again requiring the architect description and qualifications, along with proposed project team members being identified, including resume and examples of prior projects. LZG complied therewith. The RFP from LZG was submitted well in advance of the bond election, especially as proposals had to be submitted no later than March 30, 2015. As evidenced by the minutes of the Library Board dated April 20, 2015, the board members considered the Selection Criteria listed in the RFP. It is also notable that LZG had the lowest price quote of the finalists.

There appears to be from the Library Board meeting minutes of May 6, 2015 a substantial familiarity with Mr. Cohen, his site visit and agenda. The Ethics Board also received and examined the review of Aaron Cohen's visit of May 22nd 2015. The Library Board Building Committee also reviewed on June 16, 2015 the preliminary lay outs of Mr. Cohen. Further minutes evidence that Mr. Cohen had a subsequent visit(s) and, into the fall of 2015, showed the continuing involvement of Mr. Cohen in this project.

Analysis

The City's Ethics Ordinance (Code), which "sets minimum standards for ethical conduct," recognizes that for a government to operate properly, each city official, employee, or advisor must earn and honor the public trust by integrity and conduct. In doing so one must avoid conflicts, and be independent, impartial and responsible to the people. Section 2-320. City officials must safeguard public confidence by maintaining non-partisanship in all official acts, and avoid conduct which may undermine respect for city officials and the city as an institution. Section 2-321. Pursuant to the Ethics Ordinance, Section 2-322, a "City Official" means a person elected, appointed or otherwise serving in any capacity with the city in a position established by the City Charter or by city ordinance which involves the exercise of a public power, trust or duty. "The term includes consultants, and Section 2-322 states that 'Consultant' means a person who gives professional advice or services regarding matters in the field of his or her special knowledge or training." Clearly, LZG is serving as a city official with respect to the subject contract. Moreover, its principal, Robert L. Ziegelman, is a member of the

Birmingham Board of Housing Appeals and Corridor Improvement Authority, and thus individually and otherwise a city official.⁴

The requested review of the ordinance by Commissioner Rinschler primarily related to Section 2-323, which pertains to the intention of the Code of ethics. More specifically, the focal section (subsection 2) focuses upon the prohibition against any city official engaging in any action which might result in, or create the appearance of, giving or accepting preferential treatment, including the use of city property or information, to or from an organization or person. The stated intent thereof is to avoid a conflict of interest. Section 2-324(a) pertains to conflict of interest.⁵

A conflict of interest is a situation in which a person or organization is involved in multiple interests, financial interests, or otherwise, one of which could possibly corrupt the motivation of the individual or organization. The presence of a conflict of interest is independent of the occurrence of impropriety. Various of the subparts of Section 2-324(a) have application to Section 2-323(2), as they pertain to property, funds, benefits, things of value, personal interest and/or preferential treatment. See Subsections of 2-324(a), including (a)(3), (4), (7), and (8). Subsection (8) provides in principal part that no official shall use or attempt to use his or her official position to secure any special consideration, privilege, advantage, contract or preferential treatment for himself, herself, or others, beyond that which is available to every other citizen. Commissioner Rinschler's concern and action herein evidence his diligence in exercising his fiduciary duty to safeguard the citizens of Birmingham and the integrity of city government.

The Commissioner's request further brings into play the Code's requirement of the responsibility to fully disclose the full nature and extent of an official's direct or indirect financial or personal interest in a matter before him or her. The Ethics Board finds that there was appropriate procedural full disclosure by the awarded architect(s), LZG, as shown by its response to the RFP. Therefore, this matter demonstrates universal recognition and compliance with the Code by all concerned, and this exercise will further strengthen its educational component.



James D. Robb



John J. Schrot, Jr.



Sophie Fierro-Share

⁴ He filed his Affidavit and Disclosure Statement pursuant to the Ethics Ordinance herein on November 18, 2015. See Section 2-326.

⁵ The ethics ordinance, Section 2-324(a)(10), defines when a conflict of interest exists as follows: Determination of conflict of interest. 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.