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DENVER BOARD OF ETHICS
DIGEST OF SELECTED OPINIONS
July 1– December 31, 2009

PLEASE NOTE: This is a selected set of summarized opinions given by the Denver Board of Ethics between July 1 and December 31, 2009 in response to fact-specific requests for advisory opinions or complaints. **They should not be used as conclusive guidance for situations where the facts may differ**.

Case 09 – 34 (no jurisdiction)

An employee of the Department of Human Services filed a complaint concerning his supervisor, alleging that she had harassed him over trivial issues in retaliation for his complaining about what he considered unethical conduct. The Board dismissed this complaint because harassment and retaliation are personnel issues that are not covered by the Code of Ethics.

Case 09 – 35 (use of public office for private gain)

An employee of the Department of Human Services filed a complaint concerning a supervisor (although not his direct supervisor) who had borrowed $967 to pay some of her personal bills and had failed to repay any of the debt to him after seven months had elapsed.

After a public hearing, the Boarddetermined that the person's borrowing of a substantial amount of money from an employee at a subordinate level and, in particular, the failure to repay the amount over a lengthy period of time, despite a request from the employee, violated Section 2-67 of the Code of Ethics:

Sec. 2-67. Use of public office for private gain.

No officer, official or employee shall use his or her public office or position or disclose or use confidential information in order to obtain private gain for himself or herself…

The Board recommended that the appointing authority determine appropriate discipline and a corrective plan.

Cases 09–37, 09–38, 09–39, 09–46, 09–51, 09-53, 09–60 and 09-61 (no jurisdiction)

Citizens filed complaints against various police officers or deputy sheriffs or Animal Control officers, alleging excessive force and/or other unprofessional misconduct. The Board dismissed all of these cases because the Denver Code of Ethics does not govern such issues and recommended that the complaining parties direct their complaints to the appropriate appointing authorities or to the Internal Affairs Bureaus for the Police Department or Sheriff Department or the Office of the Independent Monitor.

Case 09-40 (outside employment)

A technician in the Police Department who has been a Police Department firearms and tactical instructor requested an advisory opinion regarding his proposal to engage in outside/secondary employment to teach private firearms classes. He agreed that he would conduct the classes and all class-related work in his off-duty time and that he would not wear his police uniform in class or in soliciting business for the classes and that he would not use any logo or other information identifying him as a member of the Denver Police Department.

The Board decided that, so long as he obtains his appointing authority's permission, pursuant to Section 2-63 of the Code of Ethics and so long as he does not use any city time or resources or reference his DPD job, he will not violate the Code of Ethics by engaging in this outside employment. The Board has also determined that, so long as he complies with these conditions, this proposed outside job will not violate Section 2-61 of the Code of Ethics or Section 1.2.8 of the City Charter related to conflicts of interest.

Case 09-41 (conflicts of interest)

The Director of Risk Management requested an advisory opinion. This case arose when the Board of Ethics received a communication from a member of the Sheriff Department who was involved in selecting and purchasing furniture and equipment for the Sheriff Department for the new Justice Center. The Sheriff Department requested a review by Risk Management of chairs for possible purchase to ensure that the chairs meet the ergonomic needs of the city. A Risk Management employee brought a private ergonomic

consultant that works with Risk Management to review some of the chairs. The consultant advised the Sheriff's representative that he did not think the chairs under consideration fit the city's ergonomic needs. The Sheriff's representative asked if the consultant could recommend a chair. The consultant did recommend a chair and brought a sample. When the Sheriff's representative asked who to work with to purchase the chairs, the consultant said that he was the representative for the distributor of the chair that he recommended. That chair was not selected for purchase.

Risk Management uses the consultant's services in two areas:

- As a consultant, when injuries to City employees occur and the potential cause may be ergonomic, physicians request an ergonomic review from the consultant, who makes recommendations which may include a variety of products, which are purchased by the agency. The consultant does not provide products in this situation.

- When a Risk Management staff person performs a preventive ergonomic evaluation and recommends specific products to the city agency, one of which products happens to be provided through the consultant. She recommends this product, a keyboard holder, because in her professional opinion it is the best available. The consultant does not participate in these ergonomic evaluations.

The Risk Management staff person indicated that the consultant "did not have his consulting hat on" when he looked at the chairs that the Sheriff Department was considering and that he was helping her only as a professional courtesy to her.

The Board of Ethics does not have jurisdiction to regulate city consultants or vendors. However, in this case, Risk Management and the Sheriff's representative appropriately recognized that there might be a conflict of interest or an appearance of a conflict by the consultant and requested an advisory opinion to help minimize such problems in the future. The Board of Ethics recommended that:

- Risk Management might consider negotiating a written agreement or contract with the consultant, so that the parties can more clearly understand the relationship between the city and the consultant;
- Risk Management should not allow this consultant or any other consultant to play two roles in the same transaction by, on one hand, consulting about the suitability of any furniture or equipment and, on the other hand, recommending a product on which it would earn a commission or other compensation, which would be a conflict of interest.

Case 09 – 42 (conflict of interest)

.An elevator inspector in the Community Planning and Development Department (CPD) requested an advisory opinion. In 2007 the Colorado legislature decided that the state government would take jurisdiction over the regulation and inspection of elevators, escalators, moving-sidewalks and other "conveyances" in both publicly-owned and privately-owned facilities. As a result, the City and County of Denver discontinued its city-operated conveyance inspection program effective December 31, 2009.

As of January 1, 2010, the inspector was to be transferred to an electrical inspector position within CPD. The inspector learned that the Purchasing Division, which issues many requests for proposals (RFPs) or bid requests on behalf of many city departments, issued an RFP for "conveyance inspection services" for city-owned conveyances.

The inspector and his wife formed a private inspection company and submitted a response to the RFP. They planned to employ two sub-contractor inspectors. The inspector would only do this outside work in his off-duty time.

Any outside employment by a city employee must be approved in writing by his or her appointing authority, pursuant to Section 2-63 of the Code of Ethics. One of the major considerations by the appointing authority would presumably be whether the inspector can adequately perform the city's 40-hour-per-week work as well as the outside job.

Assuming that the appointing authority will approve, the next question is whether there is an impermissible conflict of interest or incompatibility with the inspector's city job that would violate Section 2-61 of the Code of Ethics or Section 1.2.8 of the City Charter.

The Board of Ethics noted that House Bill 1151 of 2007, which regulates conveyance inspectors and inspections, provides the following definition:

> **Colorado Revised Statutes 9-5.5-103 (20**) "Third-party conveyance inspector" means a disinterested conveyance inspector who is retained to inspect a conveyance **but is not employed by or affiliated with the owner of the conveyance** …(emphasis added).

Therefore, the Board of Ethics determined that the inspector's or his company's work as a third-party conveyance inspector for city-owned elevators would appear to violate the statutory definition of that term. As a result, the Board found that such an outside job would be incompatible with his city duties, which would be in violation of section 1.2.8 of the City Charter and also Section 2-61(g) of the Code of Ethics.

Case 09-43 (outside employment)

A police officer requested an advisory opinion. He proposed to sell new and used firearms from his home in a suburban town. He indicated that he has a federal firearms

dealer license and also a local home occupation license. He also said that there are no zoning regulations in the town that would prevent him from selling firearms from home.

Section 2-63 of the Denver Code of Ethics requires that a city employee must obtain written approval for any outside employment or outside business activity. The Board advised the officer that "if you obtain such approval, the Board of Ethics does not find any conflict of interest or incompatibility between your city job and your proposed outside business activity. However, please understand that the Board of Ethics is not in any position to investigate or opine as to whether this proposal complies with federal, state or city legislation or regulations pertaining to firearms sales."

The Board advised the officer that, so long as he obtains written permission, renewed annually, from his appointing authority, he is not prohibited from engaging in this outside business activity. However, the Board recommended that, in order to avoid any appearance of impropriety, he should:

- Not identify himself in any way as a police officer in advertising or conducting his outside business;
- Not use any city resources, such as city time, city computers or copiers, in the outside business;
- Ensure that the business will comply with all federal, state and local legislation and regulations regarding firearms sales;
- Take great care to minimize risk of theft or accidental discharge or other dangers that may be related to the sale of firearms or the storage or transportation of firearms.

Case 09 – 44 (outside employment, conflict of interest)

A planner in the Office of Economic Development (OED) requested an advisory opinion. As part of her city job, she prepares environmental and/or historical reviews for projects in Denver in which funds have been awarded by the federal Department of Housing and Urban Development. She wished to set up an outside business in which she would use her expertise to consult with and provide similar reviews for non-Denver jurisdictions or developers on weekends or evenings.

She indicated that her role in Denver is and for any other entity would be only as a researcher, not a decision-maker and that she would research projects, if requested by a government entity or a private developer, only after federal funds have been tentatively awarded. In other words, her clients would not be competing with the City and County of Denver for the same funds.

The Board of Ethics determined that the first issue is that Section 2-63 of the Denver Code of Ethics requires than any city employee wishing to engage in outside business activity must first obtain written approval from her or his appointing authority and renew that approval on an annual basis. The second issue is whether any conflict of interest or incompatibility exists between her city job and her possible outside business. In light of the fact that Denver would not be in competition for the same funds as the outside clients,

the Board concluded that there is not a conflict of interest or incompatibility that would violate Section 2-61 of the Code of Ethics or Section 1.2.8 of the City Charter. The Board also recommended that the employee not use any city resources in her outside business activity.

09 – 45 (outside employment, conflict of interest)

An employee in the Office of Economic Development (OED) requested an advisory opinion. She said that "I am front-line staff in the Business Assistance Center, where I communicate the regulatory requirements for starting and running a business…" The employee indicated that she recently applied for a position and has been accepted as the "small business examiner" for a local private website. She said that the website "hosts articles about hundreds of topics in any given city" and that:

> As the Small Business Examiner, I would like to write brief articles about common subjects that come up in my capacity in the OED Business Assistance Center. For example, how to market your business online, why artists should write business plans for their projects, how to find the right trade and networking organizations for your business, et cetera…the subjects I plan to write about are outside of the scope of what OED addresses.

The Board of Ethics reminded the employee that Section 2-63 of the Denver Code of Ethics requires that any city employee wishing to engage in paid outside business activity must first obtain written approval from her or his appointing authority. The Board then reviewed Section 2-61 of the Code and concluded that, if the employee limits herself to topics of general interest to businesses or prospective businesses, there would not be any conflict or incompatibility between her city job and her outside business activity.

The Board also reviewed Section 1.2.12 of the Denver City Charter, which provides:

> No official or employee shall solicit or receive any pay, commission, money or anything of value or derive any benefit, profit or advantage, directly or indirectly, for the performance of official duties except lawful compensation or salary as such officer or employee.

The Board advised the employee that, if she were to publish and be paid for items that she or someone else at OED had already written to assist businesses as part of city work, that would probably violate the above charter provision. However, if she used her own time to prepare the items, it would not.

The Board of Ethics determined that the employee's proposed business activity will not violate the Code of Ethics or the charter, so long as:

- She obtains written permission from her appointing authority, which must be renewed annually, if she is to receive any payment;
- Her website writings do not negatively impact a business that OED is trying to assist;

- She writes the material that she publish on your own time if you are to receive any payment;
- She will not publish on the website any material prepared for OED purposes.

In addition, in order to avoid the appearance of impropriety, the Board recommended that she should not use any city resources, such as computers, paper, etc., in the outside business activity.

Case 09 – 48 (subsequent employment)

The Director of one division in the Office of Economic Development (OED) requested an advisory opinion. She had been offered a job as Vice President and General Manager of a Denver company to commence in the near future (before six months had expired).

The City and County of Denver had entered into three contracts, beginning in 2007, to pay approximately $3 million to the company, initiated by OED. The Director, however, had no role whatsoever in negotiating, approving, recommending or administering any of those contracts. Those contracts were negotiated and approved and administered by and any potential renewals or new contracts with the company will be negotiated and approved and administered by other executives in OED. The contracts with the company in question "reside" in an entirely separate division from her division of OED.

Subsequent employment for city employees or officers is governed by Section 2-64(a) of the Code of Ethics:

> **Sec. 2-64. Subsequent employment.**
>
> (a) During six (6) months following termination of office or employment, no former officer, official, or employee shall obtain employment outside of the city government in which he or she will **take direct advantage, unavailable to others, of matters with which he or she took direct official action during his or her service with the city.** (emphasis added)

The definition of "direct official action" is as follows:

> **Section 2-52 (b)** *Direct official action* means any action which involves:
>
> (1) Negotiating, approving, disapproving, administering, enforcing, or recommending for or against a contract, purchase order, lease, concession, franchise, grant, or other similar instrument in which the city is a party. With regard to "recommending," direct official action occurs only if the person making the recommendation is in the formal line of decision making.
>
> (2) Enforcing laws or regulations or issuing, enforcing, or regulating

permits;

(3) Selecting or recommending vendors, concessionaires, or other types of entities to do business with the city…

The Board of Ethics determined that, because the Director did not have any direct official action involvement with the company in question, she would not violate Section 2-64(a) of the Code of Ethics if she begins to work for the company without waiting for six months after the end of her employment with OED.

Case 09 – 49 (conflict of interest)

The Mayor appoints and the City Council confirms the members of the board of the Denver Housing Authority (DHA), which is responsible for development, management and the maintenance of low-rent housing projects for families of low and moderate income. The Mayor wished to appoint a candidate to the DHA board who is a senior vice president of a major investment banking company in Denver. That company has been periodically hired in the past by the City and County of Denver, for various investment banking projects, including bond projects; however, the company has never been hired by DHA, which is a separate entity from the City and County of Denver, and has no current intention of doing any work for DHA.

Even though DHA is not an agency or department of the City and the Code of Ethics does not apply to its employees or officials, the Board of Ethics has adopted a goal to offer to independent agencies, such as DHA, assistance in training and/or dealing with requests for advisory opinions and complaints in order to foster ethical consistency between the city and the several independent agencies.

Conflicts of interest for city personnel are regulated by Section 2-61 of the Code of Ethics:

Sec. 2-61. Conflict of interest while employed.

(a) Except when advised by the city attorney that the rule of necessity applies, an officer, official, or employee shall not take direct official action on a matter before the city if he or she or a member of the immediate family, a business associate or an employer other than the city of the officer, official or employee has any substantial employment, contractual, or financial interest in that matter. A substantial interest shall be deemed to exist if:

(1) He or she or a member of the immediate family, a business associate **or an employer other than the city** is the other party in the matter…(emphasis added)

(f) Officers, employees or officials who are prohibited from taking direct official action due to a substantial conflict of interest shall disclose such interest

to his or her colleagues on a board or commission or to his or her supervisor or appointing authority, shall not act or vote thereon, shall refrain from attempting to influence the decisions of others in acting or voting on the matter and shall work with his or her supervisor or appointing authority to ensure that the matter is assigned to someone without conflicting interests.

(g) No officer, employee or official may have any other employment or position which is incompatible with his or her duties or that adversely affect the interests of the city.

The Board of Ethics advised the candidate and the Mayor's Office that DHA board members are not subject to the Denver Code of Ethics. However, if DHA board members were subject to the Denver Code of Ethics and the candidate were appointed and confirmed as a DHA board member, he would be able to serve, but he would be required to abstain from taking any direct official action regarding the investment banking company which is his employer, if the company were to seek or obtain any type of contract with DHA and he should follow the other requirements of 2-61(f) of the Denver Code of Ethics. The definition of "direct official action" in Section 2-52(b) of the Denver Code of Ethics includes "negotiating, approving, disapproving or administering or recommending for or against a contract…"

Case 09 – 50 (conflict of interest)

A Mayoral appointee who is the Executive Director of a city agency announced her candidacy for a seat in the Colorado legislature. She requested an advisory opinion to determine if the Denver Code of Ethics will allow her, if elected, to serve in the legislature. She wants to continue to serve as a city employee, if elected. The legislature is generally in session each year from the beginning of January through the first week in May. Some legislators serve on committees that meet periodically through the rest of the year. Occasionally, the Governor calls a special session, in which case the legislature would be in session for some additional weeks.

The Board of Ethics determined that a City and County of Denver employee or officer could serve in the legislature, so long as he or she complied with Section 1.2.8 of the Denver Charter, which says:

> No (city) employee or appointed Charter officer shall hold other employment or hold any **public office** that is **incompatible** with his or her duties. Every employee and appointed officer shall notify his or her appointing authority in writing before accepting any other employment or **public office**…(emphasis added)

In addition, the Board of Ethics determined that a city employee would need to:

- comply with section 2-63 of the Code of Ethics, which requires any employee to obtain written permission from his or her appointing authority before beginning any paid outside employment (a seat in the state legislature is a paid position) and

- comply with Section 2-61 of the Code of Ethics relating to conflicts of interest.

Any city employee or officer and the appointing authority would need to analyze whether 1) it is possible to do justice to both jobs time-wise; 2) there is a significant conflict of interest between the two jobs and 3) is it possible to work out the issues of vacation time, leave without pay, etc. under city personnel and payroll rules.

In this case, the Board of Ethics indicated to the Executive Director that it was concerned whether the agency could be adequately managed in the absence of its Executive Director for four months or more out of every year. In addition, even though the Denver Code of Ethics would not regulate her voting as a state legislator, the Board is concerned about possible conflicts of interest that might arise on certain legislative issues between her position as a high-level City employee and her responsibility as a state legislator to represent her constituents.

For these reasons, the Board advised that it would be incompatible for her to serve both in the state legislature and also as Executive Director of the agency at the same time and that such service would violate both section 1.2.8 of the Charter and Section 2-61(g) of the Code of Ethics.

In addition, the Board reminded her that she should not use any city time or resources on behalf of her election campaign and also that, if she serves in the legislature and wishes to continue to serve as a city employee in any capacity, she must comply with city payroll and personnel rules regarding her pay and employee status.

Case 09 – 54 (outside employment)

An Assistant Director in the Public Works Department was promoted to that position in 2007. She indicated that she has had an outside consulting business since 2001 and had approval for the outside employment from her previous supervisors and that the outside work she plans to do in the upcoming year is no different from the outside work that she did before. The employee advised the Board that:

> The work typically involves small general civil engineering designs for developers, contractors or other consultants. The majority of this work is on private property and usually single family residences. I do this work on my own time at home and do not use City resources. I do not work on projects within the City and County of Denver.

Her current (new) supervisor denied her recent request for annual re-approval of her outside employment until she would obtain approval from the Board of Ethics. This was probably due to her promotion in 2007 to a supervisory position.

According to Section 2-63 of the Code of Ethics, no city employee may engage in outside employment or outside business activity without first obtaining written approval on an annual basis from the employee's appointing authority.

Section 2-61 of the Code of Ethics governs conflicts of interest. Section 2-61(a)(2) says that a city officer, employee or official may not take direct official action – which includes enforcing laws or regulations, issuing, enforcing or regulating permits …selecting or recommending vendors or other types of entities to do business with the city... – if he, she…or an employer other than the city… is the other party in the matter. Thus, the Board of Ethics decided that the employee would be prohibited from taking direct official action on a city project where any of her outside employers was involved.

The Board also recommended, in order to avoid the appearance of impropriety, that she not accept any outside work relating to property inside the city of Denver and that she not use any city resources or time in her outside jobs.

Cases 09 – 55 through 09 -59 (travel expenses, other issues)

A citizen from another state filed complaints concerning four members of the Auditor's Office and the Purchasing Director. The citizen has requested various jurisdictions around the country to investigate what he describes as "kickbacks" and "fraud" by a major company (his former employer) in its contract dealings with many state and city governments. The City and County of Denver has a contract for discounted products with that company.

After hearing about some of these allegations concerning the company, the Purchasing Director appropriately requested the Auditor's Office to review Denver's dealings with the company in question and, in response to that request, the Auditor's Office issued a Special Advisory Report (SAR) or review of the city's procurement program with the company. The SAR indicated that it was a "limited review" and a "non-audit service." It concluded that "it appears that the City is being charged correctly for items ordered from the company through this program."

The SAR also indicated:

> The City participates in a purchasing cooperative with U. S. Communities. "The U. S. Communities Government Purchasing Alliance …is a nationwide purchasing cooperative designed to be a procurement resource for local and state government agencies,… school districts (K-12), higher education and nonprofits. As a registered participant of the program,…(agencies) can access a broad line of competitively solicited contracts which provide quality products, services and solutions." .

The citizen complained that the SAR is a "cover-up of fraud by staff of the City and County of Denver in conspiratorial concert with" the company and U. S. Communities …which is injurious to the taxpayers of Colorado…by stifling free market competition…"

The citizen also indicated, correctly, that the Denver Purchasing Director is an advisory board member of U. S. Communities (along with representatives of several other cities and other government jurisdictions) and alleged that his relationship with U. S. Communities is "unhealthy and close." The Purchasing Director has been a member of the advisory board (not the governing board) of U. S. Communities for a few years. The advisory board has a teleconference approximately once per quarter in which the Purchasing Director participates and he attends a U.S. Communities advisory board meeting in California once per year and is reimbursed by U. S. Communities for air-fare, lodging, meals and some entertainment. He has received no other gifts or compensation from U.S. Communities (except for a few promotional gifts such as shirts, bags or wind-breakers) and none whatsoever from the company in question.

The Board of Ethics concluded that the complaining citizen did not present any facts that would support his conclusions of kickbacks, fraud, corruption, incompetent auditing or any other unethical conduct by any Denver city personnel.

In addition, the Board concluded that nothing in the Denver Code of Ethics regulates how city auditors should perform their audits (the SAR was not an audit), reviews or other professional work.

The Board of Ethics also concluded that the reimbursement of the Purchasing Director for travel and lodging and entertainment expenses by U. S. Communities once a year does not violate the gift section of the Code of Ethics (Section 2-60(a)), which provides:

> Except when acceptance is permitted by paragraph (b) below, it shall be a violation of this code of ethics for any officers, officials, or employees, any member of their immediate families to solicit or to accept any of the following items if (1) the officer, official, or employee is in a position to take direct official action with regard to the donor; and (2) the city has an existing, ongoing, or pending contract, business, or regulatory relationship with the donor…

The reasons for this conclusion are:

1. The Purchasing Director is not in a position to take direct official action regarding U. S. Communities (the donor of the travel reimbursement and minor gifts) and, therefore, would not violate 2-60(a);
2. As Purchasing Director, he is in a position to take direct official action regarding the company in question, but he has received no gifts whatsoever from the company;
3. The acceptance of reasonable travel expenses paid by a non-profit organization (U.S. Communities) would be an allowable exception under Section 2-60(b)(7), which specifically allows: "Reasonable expenses paid by non-profit organizations or other governments for attendance at a convention, fact finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the city."

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The Board of Ethics dismissed all of these complaints pursuant to Sections 2-56(6)(a) and (b) of the Code of Ethics, because the Board has no jurisdiction over this type of issue and because the alleged violation, if true, would not constitute a violation of the Code of Ethics. Absent any evidence of unethical conduct by Denver city personnel, the Denver Board of Ethics is not the proper entity nor does it have the expertise or capacity to sift through the financial accusations that the complaining citizen made against the company and U.S. Communities. The Board forwarded a copy of the citizen's complaints and associated documents to the City and County of Denver's outside auditor for their independent review.

Case 09 – 62 (gifts).

A citizen who is a Ph.D. candidate at a local university filed a request for an advisory opinion. He is working on a research project to study an ongoing process being conducted by the Parks and Recreation Department to generate policy recommendations on a proposed new park policy. He observed several meetings of the committee and wishes to conduct one-hour interviews of some of the citizen-members and some city employees about the process. He proposed to offer as an "incentive" to those who agree to be interviewed a chance at a $50 gift certificate. He indicated that incentives such as this are customary in many research projects. He and his faculty advisors wished to know if this would violate the Denver Code of Ethics. He believes that the participation rate in the interviews would be better with the offer of such an incentive. He would pay for the gift certificates from his own funds.

Section 2-60(a) of the Code of Ethics provides:

> **Sec. 2-60. Gifts to officers, officials, and employees.**
>
> (a) Except when acceptance is permitted by paragraph (b) below, it shall be a violation of this code of ethics for any officers, officials, or employees, any member of their immediate families to solicit or to accept any of the following items if (1) the officer, official, or employee is in a position to take direct official action with regard to the donor; and (2) the city has an existing, ongoing, or pending contract, business, or regulatory relationship with the donor.

The Board of Ethics determined that Section 2-60(a) of the Code of Ethics does not prohibit city employees or citizen committee members from accepting this type of incentive. Neither the city employees dealing with the policy issue nor the citizen members of the committee are in a position to take direct official action regarding the requestor of the advisory opinion, who is an independent researcher and is not doing or trying to do any business with the City and County of Denver.