

Advisory Opinion No. 93-7

A public servant has requested an opinion from the Conflicts of Interest Board (the "Board"), on behalf of an appointed member of a City commission (the "Commission"). Specifically, the public servant has asked whether, consistent with Chapter 68 of the City Charter, a firm in which the member is a principal may bid on a City project, and whether the member may participate in the project, as a practicing professional, if his firm is selected as the winning bidder.

Background

The member (the "Member") is a practicing professional, and is a principal in a firm which specializes in public projects. The firm has received a Request for Proposals ("RFP") from a City agency (the "Agency"), separate and distinct from the Commission, which is administering a project requiring services that the Member's firm can provide.

The Commission has jurisdiction over a portion of the project site, because of a prior determination made

by the Commission.

The Commission may assert jurisdiction over a further portion of the project site, and has held deliberations and conducted a public hearing on the matter. However, as of the date of this Advisory Opinion, no final action had been taken.

Where the Commission asserts jurisdiction, it will have a right to review certain aspects of the project based on whether or not any proposed work will impact on the reasons for its jurisdiction.

The Member has agreed that if his firm is selected to work on the project, pursuant to the RFP, he will recuse himself from any involvement in any matter coming before the Commission dealing with the project.

In addition, the Board has received a letter from the Chair of the Commission, in which the Chair approves of the Member's participation in the project, pursuant to Charter Section 2604(e).

For the following reasons, it is the opinion of the Board that the Member's firm may bid on the City project and that the Member may participate in the project if his firm is selected as the winning bidder, provided that he recuses himself from any matter coming before the Commission on the project, if his firm is so

selected.

### Prohibited Interests

As an appointed member of the Commission, the Member is a "public servant" for purposes of the conflicts of interest provisions of Chapter 68. He is not, however, a "regular employee" of the City. See Charter Sections 2601(19) and 2601(20).

Except as provided in Charter Sections 2604(a)(3) and 2604(e), a public servant is prohibited from holding an interest in any firm which he knows is engaged in business dealings with his agency. See Charter Section 2601(a)(1)(a). An "interest", in turn, consists of either an ownership interest in, or a position with, a firm. See Charter Section 2601(12).<sup>1</sup> "Business dealings" are defined as "any transaction

---

<sup>1</sup> An ownership interest in a firm is an interest held by a public servant, his or her spouse or unemancipated child, which exceeds five percent of the firm or an investment of \$25,000, and any lesser interest when managerial control is exercised, but does not include any interests in any pension plan, deferred compensation plan or mutual fund. See Charter Section 2601(16).

A position with a firm means a position such as an officer, director, trustee, employee or any management position, or an attorney, agent, broker or consultant to the firm. See Charter Section 2601(18).

with the [C]ity involving the sale, purchase, rental, disposition or exchange of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing, but shall not include any transaction involving a public servant's residence or any ministerial matter." Charter Section 2601(8).

Under Charter Section 2604(a)(3), if a public servant holds an ownership interest in a firm which, subsequent to his or her acquisition of the interest, engages in business dealings which would cause the interest to be prohibited by Charter Section 2604(a)(1)(a), the individual must either divest such interest or disclose it to the Board, which then issues an order as to whether or not such interest, if maintained, would be in conflict with the public servant's official duties. In making this determination, Charter Section 2604(a)(4) requires the Board to take into account the nature of the public servant's official duties, the manner in which the interest may be affected by any action of the City, and the appearance of conflict to the public.<sup>2</sup>

---

<sup>2</sup> A public servant may also, in appropriate circumstances, invoke the provisions of Charter Section 2604(e). As noted above, this Section is an exception to the general rule prohibiting a public servant from holding an interest in a firm which is engaged in business dealings with his or her agency. Pursuant to

City Project

If the Member's firm is selected as the winning bidder pursuant to the RFP, it is likely that the firm's work on the project will require it to engage in business dealings with the Commission. Accordingly, it is necessary for the Board to determine whether, under Charter Sections 2604(a)(3) and (a)(4), the Member's interest in the firm and his participation in the project would be in conflict with his official duties as a member of the Commission.

It is the Board's determination that, given the nature of the project and the extent of the Agency's involvement, no conflict of interest would be created by the Member's firm bidding on the project, or by the Member's participation in the project, provided that he recuses himself from any involvement in any matter dealing with the project which comes before the Commission, if his firm is selected as the winning bidder.

---

Charter Section 2604(e), a public servant may hold a position with a firm which is otherwise prohibited under Chapter 68, if the Board determines, after receiving the written approval of the head of the agency or agencies involved, that such position involves no conflict with the purposes and interests of the City. Charter Section 2604(e) is intended to operate as a waiver provision, allowing the Board to grant relief in otherwise inequitable situations.

The project itself is being administered by the Agency, which will closely supervise the work of any professionals selected pursuant to the RFP and engaged to provide services in connection with the project. The selected professionals will be asked to perform services in accordance with parameters and limitations established by the Agency before the work actually commences. In sum, the selected professionals will be interpreting an image of the project as determined by the Agency and under its direct control.

Moreover, to insure that Commission deliberations and decision-making are not tainted by any question of divided loyalty, we will require that the Member recuse himself from any involvement in any matter relating to the project coming before the Commission, if his firm is selected as the winning bidder. Recusal, in this context, means that the Member may not vote on, or otherwise involve himself in, any such matter as a member of the Commission, directly or indirectly. This includes, but is not limited to, participating in Commission discussions, attending meetings on behalf of the Commission, and receiving copies of relevant documents, with respect to such matters. See Conflicts of Interest Board Advisory Opinion No. 92-5.

The statute which establishes the Commission requires that its membership include representatives of various professions, including the profession in which

the Member practices. The Board has been advised that there are relatively few individuals within the City who practice in this profession, and virtually all are engaged in some form of business dealings with the City. It is our view that close supervision of the project by the Agency, coupled with the Member's recusal on matters involving the project, provide adequate protection of the City's interests in this case, while allowing the Member to remain on the Commission and preserve the diversity of backgrounds and views which its enabling statute calls for.

Sheldon Oliensis  
Chair

Benjamin Gim

Beryl R. Jones

Robert J. McGuire

Shirley Adelson Siegel

Dated: February 11, 1993