

Advisory Opinion No. 93-22

A public servant has requested an opinion from the Conflicts of Interest Board (the "Board"), concerning certain activities proposed to be undertaken by a member of a City commission (the "Commission"). Specifically, the public servant asks whether, consistent with Chapter 68 of the City Charter, the member (the "Member") may participate in a bid to another City agency (the "Agency"), with respect to work on a City project being supervised by that agency.

Background

The Board has been advised that the Member is a lay member of the Commission, appointed to fill one of the seats on the Commission reserved for members of the public. The Board has also been advised that the Member is a principal in a private professional firm (the "Firm"), which provides consulting services.

The Agency has issued a Request for Proposals ("RFP"), asking qualified firms to submit proposals for certain work on a project being supervised by the Agency.

The public servant requesting this opinion has represented to the Board that a private business

concern, interested in responding to the RFP, has asked the Member to enter into a joint venture with that concern, by providing the consulting services of the Firm in connection with the project. Although the Commission has had no prior involvement with the project, it will eventually come before the Commission for review and approval.

The public servant requesting this opinion asks whether the Member may enter into the proposed joint venture arrangement, and participate in a bid in response to the RFP. The public servant represents that if the Member is allowed to participate, she will recuse herself from any Commission business pertaining to any aspect of the project, directly or indirectly. The public servant has also provided the Board with a letter from the head of the Commission, approving the Member's proposed participation in the bid and determining that it would not be in conflict with the purposes and interests of the City.

For the following reasons, it is the opinion of the Board that it would be a violation of Chapter 68 if the Member were to enter into the joint venture arrangement and participate in a bid in response to the RFP.

Prohibited Interests in Firms

Members of the Commission are "public servants", and are therefore subject to the conflicts of interest provisions of Chapter 68 of the City Charter. ¹

However, because their primary employment is not with The City of New York, they are not considered "regular employees" for purposes of those provisions. ²

As a general rule, a public servant who is not a regular employee of the City is prohibited from holding an interest in a firm engaged in business dealings with his or her agency. See Charter Section 2604(a)(1)(a).

An "interest", in turn, is defined as either an ownership interest in, or a position with, a firm. See Charter Sections 2601(12), (16) and (18).

This prohibition, among other things, is intended to prevent public servants from capitalizing on their

¹ "Public servants" are defined as

all officials, officers and employees of the city, including members of community boards and members of advisory committees, except unpaid members of advisory committees shall not be public servants.

Charter Section 2601(19).

² A "regular employee" of the City means

all elected officials and public servants whose primary employment, as determined by rule of the [Conflicts of Interest Board, is with the city, but shall not include members of advisory committees or community boards.

Charter Section 2601(20).

official positions to secure City business, and to safeguard the integrity of government decision-making by insuring that official actions are not influenced by considerations of private gain.³ At the same time, however, the Charter Revision Commission recognized that the prohibition could, in certain circumstances, hamper government in its efforts to attract and retain qualified public servants.

The Charter therefore authorizes the Board, in certain circumstances, to grant exceptions or waivers to the general prohibition set out in Charter Section 2604(a)(1)(a). Under Charter Section 2604(e), the Board may issue a waiver permitting a public servant to hold an otherwise prohibited position, if the head of the agency involved submits his or her written approval, and if the Board thereafter determines that the holding of such position would not be in conflict

³ Charter Section 2604(a)(1)(a), together with Charter Section 2604(a)(1)(b) (applicable only to "regular" employees) replace a former prohibition against owning a "substantial" interest in a firm doing business with the City or the holding of an interest in a firm whose business dealings with the City constitute a "substantial" part of its business activity. See Volume II, Report of the New York City Charter Revision Commission, December 1986 - November 1988, at p. 169. By substituting a more precise standard, the Charter Revision Commission sought to provide public servants with clear guidance concerning the lawfulness of their activities. Id.

with the purposes and interests of the City. Under Charter Sections 2604(a)(3) and (a)(4), the Board is authorized to issue an order permitting a public servant to maintain an ownership interest in a firm which, subsequent to the public servant's acquisition of the interest, engages in business dealings that would otherwise cause it to be prohibited. The Board's order must be premised on a determination that maintaining the interest would not be in conflict with the proper discharge of the public servant's duties. ⁴

In making this determination, the Board is directed to consider the nature of the public servant's official duties, the manner in which his or her interest may be affected by any action of the City, and the appearance of conflict to the public. In cases where the public servant holds a seat on a City board or commission, the Board will also consider the

⁴ Charter Sections 2604(a)(3) and (a)(4) authorize the Board to issue similar orders in three other discrete situations, based on such a determination. These other situations are as follows: (i) where an individual, prior to becoming a public servant, holds an ownership interest which would become prohibited once he or she enters public service; (ii) where a public servant holds an ownership interest and did not know of business dealings that would cause the ownership interest to be prohibited, but subsequently gained knowledge of such business dealings; and (iii) where a public servant acquires a prohibited ownership interest by operation of law.

statutory qualifications for service on the board or commission, and for the seat in question.

The Member's Interest

The Member is a principal in the Firm, and she therefore holds both an ownership interest in, and a position with, the Firm. Since the project in question will eventually come before the Commission for review and approval, if the Firm bids on the project and is selected as part of the winning team, the Member's ownership interest and position would become prohibited under Charter Section 2604(a)(1)(a), because the Firm would be engaged in business dealings with her agency.⁵

The Member has offered to recuse herself from any involvement in Commission business pertaining to any aspect of the project, directly or indirectly. The issue before us is whether, in light of such recusal, the facts and circumstances of the instant case justify the issuance of a waiver under Charter Section 2604(e) and an order under Charter Sections 2604(a)(3) and (a)(4), allowing the Member to participate in the

⁵ "Business dealings" with a City agency include any "license, permit, grant or benefit" sought from or granted by such agency, and would therefore include any approvals sought from the Commission with respect to the project. See Charter Section 2601(8).

bidding and retain her interests in the Firm.

Although we have in the past, where warranted, accepted recusal as a basis for allowing a member of a City commission to retain an interest in a private firm and perform or compete for City business, the facts and circumstances of the instant case are materially different and do not warrant such a conclusion.

In Advisory Opinion No. 93-19, we noted that because of the complex and technical nature of matters considered by many City boards and commissions, their enabling statutes frequently provide that certain members must be drawn from various scientific and professional disciplines. Individuals working in these disciplines possess knowledge and experience that is critical for the fulfillment of the missions assigned to such boards and commissions. At the same time, however, it is difficult to find qualified candidates who are willing to serve in the public interest, but who do not have business dealings with the City in some other capacity. For this reason, although Chapter 68 mandates a strong policy against the appearance of conflict of interest (as evidenced by the prohibition in Charter Section 2604(a)(1)(a)), this must be carefully balanced against the equally important public policy of insuring that City boards and commissions are

able to attract and retain their required complement of experts. In appropriate cases, the Board has therefore accepted recusal as an adequate means of avoiding conflicts of interest, and has invoked the waiver provisions of Charter Section 2604(e) and the order provisions of Charter Sections 2604(a)(3) and (a)(4) to allow a board or commission member to retain an affiliation with a firm interested in business dealings with his or her agency. See, e.g., Advisory Opinion No. 93-17.⁶

In the instant case, the Member is a lay member of the Commission, holding one of the seats reserved for members of the general public. Although the Member has a background in a certain area, there is no requirement that the holder of her seat be a member of any stated profession, or possess any special expertise; indeed, the Charter requires that her seat be reserved for an individual who is not associated

⁶ In Advisory Opinion No. 93-17, the Board allowed a member of a City commission to retain his ownership in and position with a firm that was bidding on a City project. The member in question was a professional and held a seat on the commission reserved for a member of that profession. The Board noted that there were relatively few individuals in the City who practiced in that profession and that virtually all were engaged in some form of business dealings with the City.

with several specific professions. The balance between competing policy considerations must therefore shift in favor of the prohibitory provisions of Chapter 68, since it is far easier to find qualified candidates who are willing to fill that seat, and who do not have interests in firms doing business with the agency. Charter Section 2604(a)(1)(a), in turn, enunciates a strong public policy against the appearance of impropriety, by prohibiting City employees from holding interests in such firms. We therefore conclude that, even with the offer of recusal, it would not be proper for the Member, while remaining a member of the Commission, to enter into the joint venture arrangement, and participate in the bidding for the design of the project.

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