CITY OF PHILADELPHIA

BOARD OF ETHICS
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GC-2008-515

Philadelphia Board of Ethics
Nonpublic Advice of Counsel

May 15, 2008

Re: Request for Advice Regarding Potential Conflict

We received a request from a member ("the requestor" or "the member") of a certain board/commission of the City for nonpublic advice[1] on whether a violation of the Ethics Code would occur if that board/commission were to award a consulting contract to a certain independent contractor ("the contractor"). This contractor has in the past done business with a company in which a member of this board/commission is a principal. We were advised that the consultant undertakes assignments pursuant to separate consultant contracts, and that the consultant is not an employee of the requestor's company.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, my advice is predicated on the facts that I have been provided. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. I wish to point out that, although previous opinions of this office that interpret statutes are guidance to how this office will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within

[1] Section 20-606(1)(d)(iii) of The Philadelphia Code provides as follows, relating to advisory opinions issued by the Board of Ethics:

> The Board shall make public its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of any City officer or employee or other involved party in accordance with regulations promulgated by the Board.

the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that you may be concerned about, we encourage contacting the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

We advised the requestor that "[i]n your position as a member of the board/commission, you are a City officer. See Board of Ethics Opinion Nos. 2007-004 and 2007-006. There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment, and conflicts of interest are avoided. In that regard, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth's Ethics Act specify certain conduct which is prohibited for a City officer or employee."

Home Rule Charter

Section 10-102 of the Charter prohibits certain compensated City officers and employees from benefiting from, or having a direct or indirect interest in, certain City contracts, even if they had no official connection with the contract. The full text of the provision is as follows:

> City Officers and Employees Not to Engage in Certain Activities. As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

The threshold question to be addressed is whether this provision applies to a member of the board/commission. As you may know, in Opinion No. 2007-006 the Ethics Board addressed the question of the application of Charter §10-107 to certain City boards and commissions. However, Section 10-107 is worded differently from

Section 10-102. The first sentence of Section 10-102 is explicit about which City officers are subject to that provision. The issue, then, is whether the requestor can be considered to fall under any of the categories of "City Officers and Employees" outlined in §10-102. We advised that the requestor is none of the enumerated officers, nor a department head, nor a City employee. The issue is whether the requestor is "any other governmental officer or employee whose salary is paid out of the City Treasury." More specifically, the question is whether the requestor's compensation as a member of the board/commission is a "salary" for purposes of §10-102. Code Section 20-304 provides compensation for members of various City boards and commissions. Based on the language of the particular subsection for the board/commission at issue, we concluded that members of the board/commission involved are subject to Charter Section 10-102.

As to the substance, prior rulings have held that where a City employee, as an individual, enters into a personal services contract with the City, that clearly violates Section 10-102. When the employee works for a firm that has a contract with the City, the provision is violated when the employee works <u>on that contract</u> for the outside contractor. Where the outside contractor has many contracts, and the employee happens to work for the outside contractor but not in any way related to the City contract, the provision is not violated, unless the City employee has a financial interest in the contract, such as where the employee's compensation includes a share of profits or revenue generated by the contract or where the employee otherwise benefits from the contract. This can include being a subcontractor to a City contractor.

However, on the facts that we were provided, there would be no financial connection between the board/commission member and a City contract, if the board/commission were to contract with the proposed consultant. The fact that the firm with which the member is connected may from time to time have other small contracts with the consultant would not create even an indirect interest for the member in any City contract the consultant may have, if the firm is not a direct supplier or subcontractor to the consultant under that City contract. Accordingly, there is no issue under Charter Section 10-102.

<u>Philadelphia Code</u>

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City officer from engaging in outside employment that involved representing another person,

directly or indirectly, as that person's agent or attorney in any transaction involving the City. However, subsection (2) of this Section provides that subsection (1) applies in a less restrictive way to part-time officials (which would apply to the requestor as a member of a board/commission of the City, which by its nature is a part-time position). Subsection (2) provides that such board members are "subject to the foregoing paragraph only in relation to a particular matter (a) in which he has at any time participated through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (b) which is pending in the department, agency, authority, board or commission of the City in which he is serving." Therefore, Code §20-602(1), as modified by 20-602(2), restricts the requestor personally from representing the consultant in any matter involving the City while the member are serving on the board/commission. We mentioned this only to be complete, as the requestor had not indicated that he/she had in the past, or intended in the future, to represent the consultant in any way.

Additionally, the Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or from being a member of a business or other entity that has a financial interest in their official decisions. As to the personal interest, Code Section 20-607(a) provides:

> (a) Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity . . .

As to the interest through another entity, Code Section 20-607(b) provides:

> (b) In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he

> or she shall comply with the provisions of Section 20-608(a) (b) (c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment.

Thus, for either a personal financial interest that the requestor may have or an interest that the requestor's company may have in board/commission action, the rule is the same: The requestor must disclose the conflict and be disqualified. In such matters, the requestor must publicly disclose the financial interest and announce intention to be disqualified from all official consideration of the matter, as provided in Code §20-608.[2] Participation that should be avoided would include not only final decisions, but also any preliminary discussion, review, or action. In this matter, the facts presented did not present any financial interest in either the requestor personally or the firm in an action by the board/commission to award a contract to the consultant. Nevertheless, we advised that if the requestor wished to avoid even an appearance of any personal bias due to prior business relationships with the consultant, he/she may wish to disqualify him/herself from the board/commission's decision on this matter, as outlined in footnote 2.

Note, also, that Section 20-609 of the Code provides that no City officer or employee "shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper

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[2] Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: We advised the requestor: you should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. Your public position (member of the board/commission) and description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (business relationship with the consultant) that presents the conflict;
4. A statement of how your public duties may intersect with your private interest or that of your employer (if not obvious from 2 & 3 above); and
5. Your intention to disqualify yourself from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the Chair, Executive Director, or Secretary of the board in which you would be acting, the board/commission; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees.

legal authorization, for the purpose of advancing the financial interest of himself or others." Obviously, if the requestor were to make available to the consultant any confidential City information he/she learns in service on the board/commission, that would violate this provision.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to the requestor.[3] Section 1103(a) provides:

> (a) Conflict of interest. No public official or public employee shall engage in conduct that constitutes a conflict of interest.

What is a "conflict of interest" may be determined by reference to the definitions section of the Act for a definition of that term and terms included within that definition, as follows:

> Section 1102. Definitions.
>
> The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:
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> . . .
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> "Authority of office or employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.
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> "Business." Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

[3] The Act applies only if the requestor is a "public official," as defined in the Act. The definition clearly includes members appointed to City boards and commissions, except those that are merely advisory. We have concluded that the board/commission is not merely advisory. See Opinion No. 2007-006.

> "Business with which he is associated." Any business in which the person or a member of the person's immediate family is a director, officer, owner, employee or has a financial interest.
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> . . .
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> "Conflict" or "conflict of interest." Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.
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> . . .
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> "Financial interest." Any financial interest in a legal entity engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.

65 Pa.C.S. §1102.

These principles require the same disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, as described in footnote 2 above. See also 65 Pa.C.S.A. §1103(j).

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note that the Act provides that: "A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act]." 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Since the Board of Ethics is not "the solicitor" of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. Any such request, to receive

the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

Conclusion

Based on the facts that we were provided, and provided that the requestor complies with the requirements of this opinion, we advised that there is no provision in State or local ethics law that would prohibit the board/commission from awarding a consultant contract to the proposed consultant., and no prohibition against the requestor's participating in the consideration of the contract award by the board/commission. Nevertheless, we advised that "you may wish to voluntarily disqualify yourself from official participation in the matter, in order to avoid any potential appearance issues."

Sincerely yours,

Evan Meyer
General Counsel

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director