CITY OF PHILADELPHIA

BOARD OF ETHICS
PACKARD BUILDING
1441 Sansom Street
2nd Floor
Philadelphia, PA 19102-3026
(215) 686 – 9450
FAX 686 – 9453

Evan Meyer
General Counsel

Philadelphia Board of Ethics
Nonpublic Advice of Counsel

August 4, 2008

Re: Request for Advice Regarding Potential Conflict

We received a request from a member ("the requestor" or "the member") of a board/commission of the City for nonpublic advice[1] concerning the restrictions the ethics laws would place on the requestor's activities as an employee of a business firm that has a contract with the City.

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 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

[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.

general principles, and there are particular fact situations that the requestor may be concerned about, the requestor was encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

In his/her position as a member of the board/commission, the requestor is 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 that 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. In this sense, Section 10-102 is a broad prophylactic rule, rather than a typical conflict of interest provision. 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 at issue. In Opinion No. 2007-006, the Ethics Board addressed the question of the application of Charter Section 10-107 (political activity) to certain City boards and commissions. However, the provision at hand, Section 10-102 (interest in contracts), is worded differently from Section 10-107. The first sentence of Section 10-102, as quoted above, 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 Section 10-102.

Clearly, a board/commission member 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 at issue is a "salary" for purposes of Section 10-102. Compensation of board/commission members is provided in Code Section 20-304. To my knowledge, the specific question of the application of Section 10-102 to the board/commission at issue has never been addressed by any Ethics Board or by the Solicitor's Office. However, prior rulings by the Solicitor's Office to related boards provide some guidance.[2] In 1992 the City Solicitor ruled that members of the Human Relations Commission (compensation: $100 per meeting, annual maximum of $10,000) were subject to Section 10-102. Opinion No. 92-27, *1992-1993 City Solicitor's Opinions* at 108. Also, in 1989 the City Solicitor ruled that members of the L & I Review Board (compensation: $85 per meeting, annual maximum of $6,375) were subject to Section 10-102. Opinion No. 89-13, *1988-1989 City Solicitor's Opinions* at 101. Unlike the political activity restriction, interpretation of Section 10-102 is based particularly on a consideration of what "salary" means, therefore it is appropriate to apply a solely monetary analysis.[3] Accordingly, by analogy to Solicitor Opinions 92-27 and 89-13, I conclude that members of the board/commission at issue 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.

We were advised that the company that employs the requestor does have at least one contract with the City, the proceeds of which are realized by the company. We were advised that, although the requestor's salary at the company is not connected to any particular contract, the requestor does participate in an employee stock purchase and other investment interests, which are determined in part on the company's performance. Thus, we determined that the requestor clearly has a financial interest in the company's present contract with the City, as well as in potential future contracts.

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[2] We applied a similar analysis in the Confidential Advice of Counsel issued on April 2, 2008 and in the Nonpublic Advice of Counsel issued May 8, 2008. However, since those Advices were redacted to conceal the identities of the board/commissions involved, the exact analysis in those Advices may not be cited in support of this matter.

[3] I interpret "salary" to mean statutory salary, not net income after expenses.

The requestor asserted facts to the effect that these various financial interests represent a small percentage of both the company's total revenue and the requestor's own income. Nevertheless, there is no "*de minimis*" exception explicitly stated in Charter Section 10-102, and a search of more than 40 opinions--previously issued by the City Solicitor's Office, the previous advisory Board of Ethics, and this Board--reveals little direct discussion of whether a financial interest might be so insubstantial as to present no issue under Section 10-102. Many opinions merely repeat the language paraphrased two paragraphs before. *See, e.g.,* Advice of Counsel of January 10, 2008 (Yurkow), pages 2-3. It could be argued that the phrase, "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," is not limited to large shares of profits or significant benefits from the contract. Whether a certain level of "financial interest" or "benefit" could be considered to be so small as to be *de minimis* and thus presenting no issue under §10-102 has never been explicitly addressed in any published opinion. However, a few prior opinions do offer some light on the question.

In 1980, a Law Department advisory summarized the history of Charter Section 10-102. After quoting from the provision, Deputy City Solicitor Frank Thomas, Jr. wrote:

> This provision was adopted in order to preclude a City employee "from soliciting in a private capacity or personally profiting or being interested, directly or indirectly, in contracts with the City." (See annotation to Charter Section 10-100). Indeed, the language of Section 10-102 is traceable to state statutes which mandated forfeiture of position by the employee who acquired an interest in a contract with the municipality which employed him (Act of June 25, 1919 P.L. 581, Art. XX, § 3), and deemed such action to be a misdemeanor (Act of June 24, 1939, P.L. 872, § 682, repealed and replaced by Act of December 6, 1972, P.L. 1482, § 5302). The applicable principle has been enunciated by the Pennsylvania Supreme Court as follows:
>
> > *"It is a well and wisely established principle of public policy in Pennsylvania that a public official may not use his official power to further his own interests.* This principle originated in the common law and has become embodied in the Constitution of Pennsylvania and has been declared to be the policy of the State in many Acts of Assembly . . . The reason for this must be obvious—a man cannot serve two masters at the same time, and *the public interest must not be jeopardized by the acts of a public official who has a direct pecuniary or personal or private interest which is or may be in conflict with the*

> *public interest." Genkinger v. New Castle,* 368 Pa. 547 (1951). (emphasis in original).

Memorandum of Legal Advice No. 3880, *1980 City Solicitor's Opinions* at 155. In 1992 the Law Department suggested that other ways in which a public official or employee might have an applicable prohibited benefit under Section 10-102 could include being "a shareholder or a compensated officer or director" in a business that has a contract with the City. *See* Opinion No. 92-14, *1992-1993 City Solicitor's Opinions* at 63-64. In 1996, the Solicitor advised a City official who had authored a book that, if copies of the book were purchased by the City, the official's receipt of royalties would constitute a "direct or indirect interest" under Section 10-102. Opinion No. 96-12, *1994-1996 City Solicitor's Opinions* at 222-223. In 1999, two opinions held that a City officer or employee has an indirect interest in a City contract, even if no contract funds flow to that officer or employee, if he or she is an officer or director in the company that has the City contract. *See* Opinion No. 99-26, *1997-1999 City Solicitor's Opinions* at 386-387; Opinion No. 99-34, *1997-1999 City Solicitor's Opinions* at 421.

In contrast to the above-cited Opinions, several advisories have indicated that not every degree or type of interest or benefit is prohibited under Section 10-102. In 2000 the City Solicitor advised as follows:

> Where a large company has many contracts, of which its contract with the City is one, and a City employee holds an investment that gives him a financial interest in the company, but well less than 1% of the company's equity, I conclude that the impact of the City's contract on that company, and particularly on the employee's investment, is so small as to be de minimis. Thus, such an employee cannot be said to have "a direct or indirect interest" in the City contract.

Opinion No. 00-03 (accessed from palawlibrary.com). In 2004, in my previous position as a Senior Attorney in the Law Department, I issued an opinion to the Capital Program Office, regarding Janice Woodcock, a recently-hired Project Director in that office. I had been advised that Ms. Woodcock's firm, Woodcock Design, had a contract with the City. However, I was also advised that Woodcock Design was essentially being dissolved, and that it would reassign all project-related activities and the balance of the contract amount to their subconsultant firm. The opinion is to date unpublished, so I attach it for reference. The opinion concludes:

> As the owner of Woodcock Design, Janice Woodcock may not be receiving "compensation" under the City's contract with her firm, but she clearly has a financial interest in future payments to her firm under her contract. However, this is not a case where a City contract is awarded to a City

> employee, who then has an interest in the entire proceeds of the contract as a City employee. Rather, this contract was awarded well before Janice Woodcock became a City employee, is substantially under way, and the City hired Ms. Woodcock with the express understanding that it was utilizing her architectural expertise. It would be a draconian measure indeed to force the City either to fire Ms. Woodcock and forgo her expertise or to cancel this on-going contract, which was completely permissible when executed, in order to enforce the strict language of the Charter provision.

p. 4 of the opinion.

In 2007, also as a Senior Attorney in the Law Department, but by then assigned Counsel to the newly-created independent Board of Ethics, I issued an advisory on behalf of the Board to Christopher Zearfoss, an employee of the City Planning Commission. This opinion is also unpublished, so I attach it as well. Mr. Zearfoss advised that he owned 12 shares of stock in CBS, Inc., a firm that had submitted a proposal in response to a City RFP. In analyzing Charter Section 10-102, I concluded:

> In this matter, where the only arguable financial interest is the slight chance that the award of a contract to CBS might conceivably result in a very small increase in the stock price and thus the value of your 12 shares, I conclude that such a connection is too remote to qualify as "benefiting from" or "being interested directly or indirectly" in the City contract.

p. 5 of the advisory.

Finally, on January 29, 2008, I issued an Advice of Counsel[4] as General Counsel to this Board to Richard R. Harris, an attorney for a local law firm, who advised that he was being considered for appointment to the Board of Trustees of the Philadelphia Prisons. Mr. Harris' firm represented Aramark, which provides food service and building maintenance service to the prisons and advised that his firm may represent Aramark in prison litigation within the next few months. In analyzing the application of Charter Section 10-102, I concluded that, although I did not reach the question of whether the provision applied to the Prison Board:

> Nevertheless, even if your firm were to litigate a matter on behalf of Aramark that involved a City contract, I conclude that any financial interest

[4] The Advice of Counsel may be found on the web site of the Board of Ethics, at www.phila.gov/ethicsboard. Select "Advisory Opinions, Publications and Reports" and then look for the January 29 Advice under 2008 Advices of Counsel.

> that you would have in the matter would be too remote to be considered even an indirect interest in the contract. Accordingly, there is no issue under the Charter.

p. 2 of the Advice of Counsel.

In consideration of the more specific nature of the exceptions in the latter group of opinions, as well as their generally more recent vintage, I conclude that there may be circumstances under which a *de minimis* standard may be applied in determining whether a particular financial interest qualifies as a "direct or indirect interest in a City contract" under Charter Section 10-102. Based on the facts that the requestor provided, I concluded that any financial interest the requestor may have in his company's contracts with the City (those currently in place or contemplated under the facts we were provided) is too insubstantial to constitute a "direct or indirect interest" in any of those contracts. Accordingly, Charter Section 10-102 does not prohibit the requestor's service on the board/commission at issue under these circumstances.

Philadelphia Code

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/commission 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 Section 20-602(1), as modified by 20-602(2), restricts the requestor personally from representing his/her company in any matter involving the City while serving on the board/commission at issue, in two ways:

1. In matters in which the requestor acted on the board/commission at issue as a Board member, the requestor may not represent his/her company; and

2. In matters currently before the board/commission at issue, the requestor must disclose the conflict and arrange to be disqualified from acting on the board/commission, as provided in Code Section 20-608.[5]

However, this does not address a separate restriction on any other employee of the company, as imposed by a separate provision, Section 20-602(5). Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to any outside firm of which the City officer is a member, so that anyone in that firm would be prohibited from the same representation. Unlike Section 20-602(1), however, Section 20-602(5) allows for the City official to avoid the prohibition by making the public disclosure and disqualification provided in Section 20-608. Thus, an officer or employee of the company could represent the firm in a transaction involving the City, provided that the requestor made the requisite disclosure and disqualification. *See* footnote 5.

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:

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[5] Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required. 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 (employee of the company) 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 <u>precedes</u> 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/commission in which you would be acting; (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.

> (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 or an interest that the company may have in City action, the rule is the same: the requestor must disclose the conflict and arrange to be disqualified. That is, in any matter before that City agency, the requestor must publicly disclose the financial interest and announce his/her intention to be disqualified from all official consideration of the matter. *See* footnote 5. Participation that should be avoided would include not only final decisions, but also any preliminary discussion, review, or action.

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 legal authorization, for the purpose of advancing the financial interest of himself or others." Obviously, if the requestor were to make available to his/her company any confidential City information learned during 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.[6] Section 1103(a) provides: "No public official or public employee shall engage in conduct that

[6] The Act applies only to "public employees" and "public officials," as defined in the Act. A board/commission member is generally not a "public employee." The definition of "public official" clearly includes members appointed to City boards and commissions, except those that are merely advisory. We have concluded that the board/commission at issue is not merely advisory. *See* Opinion No. 2007-006.

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

> Section 1102. Definitions.
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> 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:
>
> . . .
>
> "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.
>
> "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.
>
> "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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> . . .
>
> "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.
>
> . . .
>
> "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.

I conclude that for the requestor to take official action that has an economic impact on his/her company would be a conflict under the State Act in the same way it would be under the City Code. In such a case, Section 1103(a) would restrict the requestor's activities as a public official relative to the use of authority of office to obtain a private pecuniary benefit for his/her company, and would require disclosure and disqualification, as set out in City Code Section 20-608(c), prior to any City action being taken, as described in footnote 5 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 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.)

Financial Disclosure

As a City officer, the requestor would also be required to disclose his/her compensation as an employee of the company as income in the financial disclosure forms required to be filed each May 1.

Conclusion

Based on the facts the requestor provided, and provided that the requestor complies with the requirements of this opinion, including public disclosure of any conflicts as provided in Code Section 20-608(1) and disqualification in matters in which a member of the requestor's company is representing the firm in a matter involving the City and in matters in which official City action would affect the financial interests of the company, I advised the requestor that he/she is not prohibited by State or local law from serving as an appointed member of the board/commission at issue, in light of the fact that he/she is an employee and officer of a company with contracts with the City.

I informed the requestor that if he/she had any additional facts to provide, I would be happy to consider whether they change any of the conclusions in this opinion. Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original Advice of Counsel public, but we are issuing this revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

Evan Meyer
General Counsel

Attachments (advisory opinions to C. Zearfoss and M. Buchman)
cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director

City of Philadelphia

LAW DEPARTMENT
One Parkway
1515 Arch Street
17th Floor
Philadelphia, PA 19102

MEMORANDUM

TO: Christopher Zearfoss, Senior Transportation Project Manager
Office of Strategic Planning, City Planning Commission

FROM: Evan Meyer, Senior Attorney

DATE: May 23, 2007

SUBJECT: Conflict of Interest

You have asked to be advised on procedures that you must take to ensure compliance with the ethics laws and other policies, a s Senior Transportation Project Manager in light of the fact that you own stock in CBS, Inc., a firm that has submitted a proposal in response to a City RFP. In particular, you wish to know whether you could permissibly review responses to the RFP for the City[1].

You advise that your principal duties consist of: advising the Secretary for Strategic Planning and other Administration officials regarding public transportation issues. You analyze and submit reports and recommendations on SEPTA operating and capital budgets, scheduled service, routings, and fares - particularly in the context of the City's $60 million of annual operating subsidies for SEPTA service, and roughly $5 million of annual capital matching funds for SEPTA improvement projects. You monitor the various lease agreements between the City and the Delaware River Port Authority (DRPA) for operation and maintenance of City-owned transit facilities. You participate in various public transportation planning, alternatives analysis, and feasibility studies that are sponsored by the City, SEPTA, DRPA, DVRPC and other transportation agencies. You

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[1] The actual wording of your request was to ask for "approval of [your] participation in reviewing three contractor proposals submitted in response to the City's RFP." Please be advised that the Board of Ethics and the Law Department do not "approve" (or disapprove) employee action in potential conflict matters; what we can do is provide an advisory opinion, advising as to what actions you may permissibly take under the ethics laws and any restrictions imposed by such laws.

assist the City's Law Department regarding tort claim cases brought against the City that involve accidents on the public transit system. Since 1979, you advise that you have managed the City's Transit Passenger Advertising Shelter program. You advise that the pending Street Furniture Advertising RFP would subsume transit shelters into a larger initiative that would encompass ad-bearing benches, newsstands, information kiosks, pay toilets, etc. The City would receive as ground rent a portion of the advertising revenues thus generated by the contractor.

You advise that one of the respondents to the RFP is CBS, the radio/television/media entertainment conglomerate originally known as Columbia Broadcasting System, which also includes an outdoor advertising subsidiary. You advise that you own 12 shares of stock in CBS, which is a publicly-traded corporation.

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. I wish to point out that, although previous opinions of this office and the Board of Ethics 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 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. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that you may be concerned about, you are encouraged to contact me for specific advice on the application of the ethics laws to those particular facts.

The issue is whether you must take any actions to avoid a conflict of interest. The State Ethics Act, the City Ethics Code, and the Charter all contain provisions that address conflicts of interest.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to you. 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:

. . .

"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.

"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.

"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.

. . .

"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.

. . .

"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.

Although you have not provided the value to CBS of this contract, if awarded, I conclude that it would have a very small effect on the finances of that conglomerate. Especially, any economic impact on your 12 shares of stock (which must be a very small portion of the total equity of the corporation), would clearly be de minimis, and would thus not meet the definition of "conflict of interest" above. Similarly,

the impact on CBS itself would not represent a conflict through a "business with which you are associated," because that would require a "financial interest," in the company, which is defined as being at least 5% of the equity of the business, and 12 shares certainly does not approach that percentage of all CBS equity.

Accordingly, you are advised that there is no issue under the State Ethics Act.

Philadelphia Code

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 . . .

Unlike the State Ethics Act, the above provision does not define "financially interested" as being above any minimum percentage of the equity in a business, and does not include a "de minimis" exception. Nevertheless, on consideration of all of the facts of this particular matter, including the nature of the contract, the size of the CBS company, and the amount of stock that you hold, I conclude that you would not be "financially interested" in any decision made by you in reviewing responses to the "Street Furniture" RFP.

As to the interest through another entity, Code Section 20-607(b) would require disclosure and disqualification from a decision affecting the financial interests of a firm if it could be said that you are a "member" of that firm. Although "member" is undefined in the Code, it clearly does not include merely holding an extremely small percentage of a firm's stock.

Accordingly, you are advised that there is no issue under the City Ethics Code.

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.

We have said in the past that where a City employee, as an individual, enters into a personal services contract with the City, that clearly violates this provision. 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. In this matter, where the only arguable financial interest is the slight chance that the award of a contract to CBS might conceivably result in a very small increase in the stock price and thus the value of your 12 shares, I conclude that such a connection is too remote to qualify as "benefiting from" or "being interested directly or indirectly" in the City contract.

Accordingly, you are advised that there is no issue under the Home Rule Charter.

Conclusion

I conclude, and you are advised, that, based on the facts that you have presented, no issues under the ethics laws would arise if you were to take official City action in reviewing responses to the City's Street Furniture Advertising RFP, notwithstanding that one of the proposers is CBS, a publicly-traded corporation of which you own twelve shares of stock.

cc: Board of Ethics

City of Philadelphia
Law Department

MEMORANDUM

TO: Mariette J. Buchman, Deputy Director
Capital Program Office

FROM: Evan Meyer, Senior Attorney

DATE: July 6, 2004

SUBJECT: **Conflict / Janice Woodcock**

You have requested advice as to whether the ethics laws in any way restrict the activities of Janice Woodcock as a Project Director at the Capital Program Office working on Fairmount Park projects, in light of the continuing responsibilities of her firm, Woodcock Design. You advise that, effective February 9, 2004, Janice Woodcock was appointed as an exempt employee in the Capital Program Office.[1]

You advise that Woodcock Design was awarded a contract effective September 30, 2001 with the Capital Program Office for construction administration for renovations of the Bluebell and Boelson Cottages in Fairmount Park.

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. 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 the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as

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[1] You requested this opinion in January, as is appropriate. I regret that I was unable to complete the opinion any earlier.

to his or her specific situation. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that you may be concerned about, you are encouraged to contact me for specific advice on the application of the ethics laws to those particular facts.

There is no general requirement that City officers or employees refrain from all private or self-employment while on the City's payroll, provided that outside work is not performed on the City's time or using City materials, personnel, or equipment. However, 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.

We have said in the past that where a City employee, as an individual, enters into a personal services contract with the City, that clearly violates this provision. 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.

However, we have also said that where the City official or employee is in a compensated position of high authority (such as an officer or director) at the outside entity that has a City contract, that official or employee has at least an indirect interest in the City contract, even if no contract funds directly flow to that individual. See Opinions No. 92-2, 1992-1993 City Solicitor's Opinions, at 14; No. 92-14, 1992-1993 City Solicitor's Opinions, at 64; No. 92-27, 1992-1993 City Solicitor's Opinions, at 108. Thus, the Charter would prohibit such an interest. This prohibition may not be avoided by disclosure and disqualification (or "recusal"), as with some other ethics provisions.

In this particular matter, whether Janice Woodcock has such an interest is a difficult, and unique, question. You advise that Woodcock Design is essentially being dissolved, and that it will reassign all project-related activities and the balance of the contract amount to their subconsultant firm. You advise that the plan for the business is that it will fulfill existing contractual obligations, delegate responsibilities as appropriate, utilize employees to handle day to day issues, and subsidize fixed expenses until they expire over time.

Moreover, this is not a situation where the interests of the City are separate from those of the contractor. It is clearly in the interests of the City that the Capital Program Office avail itself of Ms. Woodcock's expertise, while work continues on the Bluebell and Boelson Cottages project. The application of Section 10-102 to such a situation is discussed in two opinions of the City's Board of Ethics, Opinion Nos. 82-12 and 83-01.[2] In Opinion No. 83-01, the Ethics Board considered the question of whether the Managing Director, the Director of OHCD, and a Deputy Director of Finance may properly sit in their public capacities on the board of directors of a private non-profit housing rehabilitation corporation, PRP, Inc. The Ethics Board noted that the City officials served as directors of PRP, Inc. solely as "representatives of the City" and received no compensation from PRP, Inc. The Ethics Board discussed Charter Section 10-102 and Section 20-607 of the Philadelphia Code and observed:

> At the very least, statutes of this nature are clearly intended to prohibit government officials from using their public positions to further their private interests, whatever their nature.

After quoting the well-known dictum, "No man can serve two masters," which is often cited by the courts in issues of conflict of interest, the Ethics Board opined:

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[2] These opinions may be found in the bound volume of 1982 City Solicitor's Opinions at pages 355-364.

> In the instant situation where public officials are sitting on the Board of Directors of PRP, Inc. solely as an extension of their official duties, it would seem clear that they are properly serving but one master--the City of Philadelphia.

The Board concluded as follows:

> In summary, this Board finds that the City officials whose conduct is in question here sit on the Board of Directors of PRP, Inc., in furtherance of a policy decision that the City's interests in housing rehabilitation can be furthered by such an arrangement. In this context, participation in the corporate affairs of PRP, Inc. is an incident of the official duties of these public servants and in no way involves their private interests, financial or otherwise. . . . .
>
> We believe that public officials must be afforded wide latitude to achieve in the manner that they deem appropriate the public purposes for which they were elected or appointed, so long as they maintain their singular loyalty to the public interest. Where, as here, officials neither profit from nor in any way devote their allegiance to the private business in whose affairs they participate to help achieve these public purposes, there can be no conflict of interest.

Opinion No. 82-12 is similar. These two opinions thus describe an exception to the application of Charter Section 10-102. However, it is noteworthy that in both Opinions the Board of Ethics concluded that the outside employment in an entity with a City contract would be permissible <u>only if the City official received no additional compensation for his service with the outside entity.</u> As the owner of Woodcock Design, Janice Woodcock may not be receiving "compensation" under the City's contract with her firm, but she clearly has a financial interest in future payments to her firm under her contract. However, this is not a case where a City contract is awarded to a City employee, who then has an interest in the entire proceeds of the contract as a City employee. Rather, this contract was awarded well before Janice Woodcock became a City employee, is substantially under way, and the City hired Ms. Woodcock with the express understanding that it was utilizing her architectural expertise. It would be a draconian measure indeed to force the City either to fire Ms. Woodcock and forgo her expertise or to cancel this on-going contract, which was completely permissible when executed, in order to enforce the strict language of the Charter provision.

I conclude that the Charter does not prohibit the City and Woodcock Design from completing their obligations under the contract.

Philadelphia Code - representation

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 in any transaction involving the City. Thus, Ms. Woodcock may not represent an outside firm (including Woodcock Design) in any transaction involving the City.[3] This is another provision that may not be avoided by disclosure and disqualification.

Section 20-602(5) applies a similar restriction to any outside firm of which the officer is a member, so that anyone in that firm would be prohibited from the same representation. Unlike §20-602(1), however, §20-602(5) does not apply if the City official makes the public disclosure and disqualification provided in §20-608. Thus, Ms. Woodcock could not represent Woodcock Design in a transaction involving the City, but another member of that firm could do such representation, provided that Ms. Woodcock made the requisite disclosure and disqualification.

Philadelphia Code – conflict of interest

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

[3] The Code defines "transaction involving the City" as follows: "Any proceeding, application, submission, request for a ruling, or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation including ordinances and resolutions or other particular matter which the member of City Council, City officer or employee in question believes, or has reason to believe (a) is or will be the subject of City action; or (b) is one to which the City is or will be a party; or (c) is one in which the City has a direct proprietary interest. This shall not include routine applications or requests for routine information or other matters which are of a ministerial nature and do not require the exercise of discretion on the part of any member of City Council, City officer or employee." Code §20-601(4).

> 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 or an interest that the outside firm, Woodcock Design, may have in City action, the rule is the same: Ms. Woodcock must disclose the conflict and disqualify herself. In such matters, she must publicly disclose the financial interest and announce her intention to disqualify herself from all official consideration of the matter[4]. Participation that she should avoid would include not only participating in final decisions, but also any preliminary discussion, review, or action.

The Code does not have an explicit exception for action that "affects to the same degree a class or subclass of the general public" as does the State Ethics Act (see below). However, we have previously advised members of City Council that where a personal financial interest in a Council bill is not "direct, immediate, and particular, as distinct from the interests that might be shared by a larger group," disqualification under Code Section 20-607 is not required. Specifically, Councilmembers who held liquor licenses were not prohibited from voting on a proposed liquor tax ordinance. Opinion Nos. 88-12 and 89-5, 1988-1989 City Solicitor's Opinions, 43 and 85. Thus, Ms. Woodcock may participate in general decisions by the Capital Program Office,

[4] Section 20-608(1) of the Philadelphia Code spells out the precise procedure for the disclosure required, which differs for legislation and for other City action. See Code Section 20-608(1)(a) and (c).

such as determine the Office's overall goals or proposed budget, even though such decisions may affect Woodcock Design along with all other contractors, because the connection would not be direct, immediate and particular.

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 legal authorization, for the purpose of advancing the financial interest of himself or others."

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., would apply to Ms. Woodcock, as a public official. 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:
>
> . . .
>
> "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.
>
> "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.
>
> "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.
>
> . . .
>
> "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.
>
> . . .
>
> "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.

I conclude that for Ms. Woodcock to take official action that has an economic impact on Woodcock Design but that does not directly affect her compensation (since this is a difficult determination) by Woodcock Design does not constitute "use of the authority of his office for the private pecuniary benefit of <u>himself</u>." Thus, the issue is whether such official action constitutes "use of the authority of his office for the private pecuniary benefit of <u>a business with which he is associated</u>." (Of course, in this case the female pronoun would be more appropriate, but I am quoting from the statute.) Woodcock Design is clearly a "business with which [Ms. Woodcock] is associated." Thus, Ms. Woodcock would be required to publicly disclose the potential conflict and disqualify herself from taking any official City action with respect to that entity, as set out in City Code Section 20-608(1), prior to any City action being taken. In addition, Section 1103(j) of the Act specifically addresses "voting conflicts" such as where a bill is before City Council. This provision states:

> (j) Voting conflict.--Where voting conflicts are not otherwise addressed by the Constitution of Pennsylvania or by any law, rule, regulation, order or ordinance, the following procedure shall be employed. Any public official or public employee who in the discharge of his official duties would be required to vote on a matter that would result in a conflict of interest shall abstain from voting and, prior to the vote being taken, publicly announce and disclose the nature of his interest as a public record in a written memorandum filed with the person responsible for recording the minutes of the meeting at which the vote is taken, provided that whenever a governing body would be unable to take any action on a matter before it because the number of members of the body required to abstain from voting under the provisions of this section makes the majority or other legally required vote of approval unattainable, then such members shall be permitted to vote if disclosures are made as otherwise provided herein. In the case of a three-member governing body of a political subdivision, where one member has abstained from voting as a result of a conflict of interest and the remaining two members of the governing body have cast opposing votes, the member who has abstained shall be permitted to vote to break the tie vote if disclosure is made as otherwise provided herein.

65 Pa.C.S.A. §1103(j). This requirement may be met by following the same procedure as noted above for conflicts under the City Code. See footnote 4 above. In short, there is no absolute prohibition against outside employment with a firm that has a transaction before the Capital Program Office, so long as Ms. Woodcock comply with the requirements for disclosure and disqualification. In other words, Ms. Woodcock may not take official action that would enhance the financial interests of Woodcock Design, such as by recommending or acting on a proposal to renew the contract with Woodcock Design or to increase its fees or add to its scope of work.

Finally, I note that the State Ethics Commission has final administrative jurisdiction over interpretation of the State Ethics Act. Thus, you may wish to request the advice of the Commission to obtain a definitive ruling on any particular fact situation.

Conclusion

Based on the facts you have provided, and provided that Ms. Woodcock complies with the requirements of this opinion, including that she publicly disclose any conflicts as provided in Code §20-608(1) and disqualify herself from official City

action that would affect her personal financial interests and those of any outside firm, I advise you that the ethics laws do not prohibit Ms. Woodcock from retaining an ownership interest in Woodcock Design and being employed by the Capital Program Office, while Woodcock Design completes its previously-awarded contract with the Capital Program Office.

EM/em