

City Position, Use of  
Family Relationships  
Recusal

Charter Sections: 2601(5)  
2604(b)(2), (3) and (4)

Advisory Opinion No. 98-1

The Conflicts of Interest Board (the "Board") has received a request from a City agency (the "Agency") and a public servant recently appointed by the Agency for an opinion from the Board as to whether, consistent with the conflicts of interest provisions contained in Chapter 68 of the City Charter, the public servant may, as part of her official duties as the head of a division (the "Division") of the Agency, work on matters involving the Firm (the "Firm") which employs her spouse. In addition, the Board has been asked whether the public servant's spouse may work on matters for the Firm involving the Division.

For the reasons discussed below, it is the Board's opinion that the public servant may not work on any matters involving the Firm. Further, as discussed below, the public servant may not work on certain aspects of the development of a Request for Proposals

("RFP") in response to which the Firm might submit a bid. In addition, the public servant's spouse may not work on any contracts awarded to the Firm by the Agency which involve work with the Division.

#### Background

The Agency has hired the public servant because of her expertise in the type of work performed by the Division. As head of the Division, the public servant is involved, inter alia, in determining whether certain structures require extensive repairs. The public servant then reviews and evaluates all draft RFPs for repairs on those structures. This review encompasses the technical aspects of the RFP, as well as the selection criteria developed to select a winning bid for a particular RFP.

The Agency has advised the Board that a determination of whether a structure needs repairs and the contents of the technical portions of an RFP cannot, under the particular facts of this case, be designed to favor a potential bidder, as most of the technical specifications are required by State law, with some aspects dictated by City needs. However, the Agency has indicated that the other portions of RFPs,

including the selection criteria for rating bids, can be designed to favor a particular bidder.

The Agency has further advised the Board that after bids are received, a panel of Agency employees, including employees from the Division, reviews the responses and selects a winning bid. The public servant herself usually is not involved in this selection process.

The public servant and members of her staff supervise the work performed under a contract awarded pursuant to an RFP. The public servant reports to her superiors on this work, and she makes suggestions for modifications or additions to the work being performed under the contract.

Recently, the public servant's spouse accepted a position with the Firm. The public servant's spouse does not have an ownership interest in the Firm.

In the past, the Firm has responded to RFPs issued by the Agency involving work for the Division; and the Firm is expected to do so in the future. The Firm could be selected to contract with the Agency for work with the Division by either of two methods. First, the Agency often selects contractors via a "limited procurement" process, whereby the Agency requests that

a limited number of bidders, selected by the Agency on a rotating basis from a list, respond to a particular RFP. The Division is not involved in the selection of contractors for the list for the limited procurement process. Second, where federal or state funds are involved, the Agency uses an open bidding process, in which the number of bidders is not limited.

The Board has been asked:

1) Whether the public servant may participate in decisions which lead to the determination that a specific structure needs repairs?

2) Whether the public servant may be involved in any aspect of the development of RFPs on which the Firm might bid and/or be awarded a contract?

3) Whether the public servant may supervise work on a contract awarded to the Firm?

4) Whether any contract awarded to the Firm by the Agency which involves work with the Division should specify that the public servant's spouse may not perform any work on the contract?

#### Discussion

Charter Section 2604(b)(3) provides that no public servant shall use or attempt to use his or her position

as a public servant to obtain any financial gain or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant. For the purposes of Chapter 68, a public servant's spouse is deemed to be "associated" with the public servant. See Charter Section 2601(5).

Charter Section 2604(b)(4) provides that no public servant shall disclose any confidential information concerning the City, or use any such information to advance any direct or indirect financial or other private interest of the public servant or of any other person or firm associated with the public servant.

Advisory Opinion No. 94-20

In Advisory Opinion No. 94-20, in a situation similar to that in the instant case, a public servant worked for a City agency, assuring compliance with certain regulations. The public servant's spouse worked with a firm which did business with that agency and had many projects as a consultant with the public servant's unit. The spouse worked on these projects, but did not have an ownership interest in the firm.

The public servant worked with private consultants

which she selected from lists of five to seven consultants approved by the agency. Her spouse's firm was one of the consultants who was pre-selected to appear on some of the lists. The public servant was not involved in the process by which the consultants on the lists were selected. She did, however, select a consultant from the list to work on a particular project. The public servant had advised the Board that if her husband's firm was on a list of consultants from which she was to select, she would select another consultant from the list. However, that agency informed the Board that the public servant could not recuse herself from all matters concerning her spouse's firm and continue to perform her official duties.

Therefore, in Advisory Opinion No. 94-20, the Board decided that the public servant could not continue in her position at the agency, because she would be in a position to obtain a direct or indirect private advantage for her spouse, in violation of Charter Section 2604(b)(3).

In the instant case, the Agency has informed the Board that the determinations of which structures need repairs and the technical aspects of an RFP cannot be

designed to favor a particular bidder, noting that most of the technical specifications are determined by State law. Therefore, the public servant can work on both of these determinations, inasmuch as she would not be in a position to benefit her husband or the Firm. The public servant may also work on all aspects, including non-technical portions, of those RFPs for which the bidders are selected by the agency via a "limited procurement" process, if the Firm is not one of the contractors selected to bid on that RFP.

As discussed above, the Agency has informed the Board that the non-technical portions of RFPs, including the selection criteria for rating bids, can be designed to favor particular bidders. If the public servant were to work on the non-technical portions of RFPs on which the Firm might bid, she would be in a position to obtain a direct or indirect benefit for her spouse and the Firm. See Charter Sections 2604(b)(3) and (4) and Advisory Opinion No. 94-20. Therefore, the public servant must recuse herself in writing from participation in all matters relating to the non-technical portions of RFPs on which the Firm might submit a bid.

The Board understands such recusal to mean that

the public servant will not work on non-technical aspects of RFPs on which the Firm might submit bids, not participate, directly or indirectly, in any meetings or discussions concerning such matters, and not receive copies of documents relating to such matters. See Advisory Opinion No. 92-5. For the same reasons, the public servant must recuse herself from participating in matters relating to the selection of a winning bid on an RFP on which the Firm has submitted a bid. Further, she may not participate in matters relating to any aspect of a contract awarded by the Agency to the Firm.

If the public servant's spouse were to work on any of the Firm's contracts which involve work with the Division, he would have direct or indirect contact with the Division's employees, all of whom are the public servant's subordinates. There is a risk that these subordinates would give preferential treatment to the public servant's spouse because of the public servant's City position. Therefore, any contract awarded by the Agency to the Firm which involves work with the Division should specify that the public servant's spouse may not perform any work on any aspect of the contract. See Charter Section 2604(b)(3).



Conclusion

It is the opinion of the Board, for the reasons stated above, that the public servant may participate in decisions which lead to the determination that a specific structure needs repairs. The public servant may also be involved in the development of the technical aspects of RFPs for structural repairs. However, the public servant must recuse herself from participation in all matters relating to non-technical portions of RFPs on which the Firm might bid and from all matters relating to the selection of a winning bid in response to an RFP on which the Firm has submitted a bid. Also, the public servant must recuse herself from all matters relating to any aspect of contracts awarded to the Firm by the Agency. Further, any contract awarded to the Firm which involves work with the Division should specify that the public servant's spouse may not perform any work on any aspect of the contract.

The Board's decision in this matter is conditioned on the correctness and completeness of the facts supplied to us. If such facts are in any respect incorrect or incomplete, the advice given in this

COIB Advisory Opinion No. 98-1  
February 2, 1998  
Page 10

opinion may not apply.

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