

Advisory Opinion No. 92-21

The Conflicts of Interest Board has received two requests, one from the Department of Health (DOH) and one from the Human Resources Administration (HRA), both seeking to determine the propriety of their soliciting or accepting gifts from the private sector to support agency programs and initiatives. As we explain below, it is our conclusion that such a determination depends on the circumstances of each case. We have determined that it would not be a conflict of interest under Chapter 68 of the City Charter for either agency to accept gifts from the private sector in these instances.

Background

The first request is from DOH, which would like to ask condom manufacturers, distributors and repackagers to donate condoms to its AIDS prevention programs. The agency has business dealings with two suppliers of condoms and has previously received bids from or had business dealings with several manufacturers.

The second request involves the HRA Emergency Food Assistance Program, which provides supplemental food to

soup kitchens and food pantries operated by not-for-profit entities for needy local residents and the homeless. HRA would like to solicit funds and/or food from private individuals and corporations to further support this program, which has previously received unsold produce from the Hunt's Point Market at no cost.

#### Discussion

In general, it is the opinion of the Board that the City is well served by contributions from the public which aid the City's efforts to meet the needs of its citizens. Philanthropy which takes the form of donations to the City should be encouraged. This is especially true now when the City is under severe financial constraints. The receipt of contributions by the City, is not, however, free from ethical problems.

Problems can arise when the contributions are made, or appear to be made, so that the donor may receive an undeserved public benefit. For example, someone seeking a contract with the City may make a "donation" to a City agency for the purpose of inducing that agency to award it a contract on highly profitable terms. In our view, however, the risk of impropriety or the risk of the appearance of impropriety is not so great that all contributions either from persons who have no association with the City or from persons who

do have such association need be prohibited. In many circumstances, the City may accept or even solicit gifts to support its programs.

This favorable view of contributions to the City was shared by our predecessor, the Board of Ethics, which in a series of decisions permitted the City to accept gifts which would support its programs.\*

Opinion No. 100 of the Board of Ethics, issued by this Board's predecessor in response to a request from then Mayor John Lindsay, held that gifts to the City should be encouraged for the public good and not prohibited and that those who do business with City are not excluded from making such gifts, especially where no personal benefit, profit or favor is directly or indirectly received by a City employee. In Opinion No. 328, the Board held that it was ethically proper for the City to accept a \$20,000 grant to provide a music program for under-privileged children from an independent foundation that had been funded by an oil company involved in business dealings with the City; and in Board of Ethics Opinion No. 466, the Board held that the Mayor and Deputy Mayor could solicit gifts for

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\*This decision hereby supersedes the decisions discussed in the text.

WNYC from those doing business with the City.

This issue was also addressed by the Board of Ethics in its Opinion No. 279, which held that members of the Landmarks Preservation Commission, who are also trustees of the Landmarks Fund of the Cultural Council Foundation, "[s]hould not solicit or accept contributions from private interests, individual or corporate, if they have matters pending before the Commission or if it is reasonably expected that they may have matters before the Commission or it is reasonable to infer that the contributor is or may be interested in a determination of the Commission."

In Opinion No. 100, the Board of Ethics advised the creation of a not-for-profit corporation to receive private donations to finance the entertainment of guests of the City and other official and semi-official functions. It also recommended that gifts be referred to the Corporation Counsel for review and to the Mayor for decision as to accepting or rejecting any gift. The Board of Ethics felt that the Mayor was in the best position to order an investigation if he deemed the area a sensitive one by reason of the existing relationship between the donor and the City and to make an informed decision as to whether the gift in question should be accepted or declined.

The decision whether the City may accept gifts rests on the public policy underlying Chapter 68 "[t]o promote public confidence in government, to protect the integrity of government decision-making and to enhance government efficiency."

Certain factors need to be considered in order to determine whether the gift may either be improper or have the appearance of impropriety. In evaluating requests, the factors to be considered include among other things, whether the donor has business dealings with the City; whether the donor has an interest in a matter awaiting determination by the agency; whether the donor is a sole supplier; whether the donor's contracts with the agency have been disclosed; and the extent to which the public servants accepting the gift on behalf of an agency are the same public servants who make decisions on the agency's contracts.

It is our belief that in the case of donors seeking contracts with the City, the integrity of the contracting process must remain intact and any appearance of partiality in selecting contractors must be avoided. It is imperative that the solicitation is not linked by the agency, explicitly or implicitly, to securing or not securing a contract with the agency, and that the donor through such gifts does not attempt

to influence the agency's selection of a vendor. Thus, in appropriate cases the agencies should inform potential vendors in their solicitation that any gifts will not affect the bidding process or serve as a quid pro quo in securing contracts with these agencies.

Finally, we recommend that City agencies consider the creation of non-profit organizations which could solicit and receive donations with fewer ethical problems. We also agree with our predecessor agency, the Board of Ethics, that proposals to receive gifts should be referred to the Corporation Counsel and the Mayor for review and approval.

#### Conclusion

It is our conclusion that DOH and HRA may solicit and accept gifts to support the described programs. We note that in DOH's case, the agency has received condoms from one donor, which is not a sole supplier and does not have any business dealings with the City, including any contract with DOH. Moreover, such contracts are disclosed to the public servants accepting the gifts on behalf of the agency and these public servants do not make the ultimate decision on who are awarded the contracts, which are awarded pursuant to competitive sealed bidding. In addition,

DOH's solicitation and thank you letters explicitly state that condom gifts will have no influence on future City condom purchases. This warning is especially important in the solicitation proposed by DOH because it will be sent only to potential vendors.

In HRA's case, its solicitation would take the form of mass mailing a general letter of appeal which would not target any specific entities, especially those which have business dealings with the City. The Board recommends that HRA similarly set up a "donation" staff separate from those agency officials who make decisions on agency contracts which might involve donors. In addition, HRA's general letter of appeal should also include language expressly stating that such donations will not affect any future business dealings between HRA and the donor.

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Dated: July 27, 1992

