



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: July 23, 2014

To: Members, Ethics Commission

From: John St. Croix, Executive Director
By: Jesse Mainardi, Deputy Executive Director

Re: Waiver Request by Commissioner Leo Chow

Introduction

Mr. Leo Chow, a commissioner on the San Francisco Arts Commission, has submitted a request for two waivers with respect to San Francisco Campaign and Governmental Conduct Code section 3.222 ("Section 3.222"), which bars members of boards and commissions from entering into contracts and subcontracts with the City for more than \$10,000. (*See* attached written request.)

Specifically, Commissioner Chow requests a waiver in connection with an existing subcontract between his firm, Skidmore, Owings & Merrill LLP ("SOM"), and the San Francisco Tourism Improvement District Management Corporation ("SFTIDMC") to work on the City's renovation and expansion of the Moscone Center. Commissioner Chow also requests a waiver allowing SOM to participate in a future bids to work on renovation work at the San Francisco Airport ("SFO").

This memorandum sets forth the applicable facts and law with respect to this waive request, and presents staff's analysis to guide the Commission's decision-making in this matter.¹

Factual Background

1. The Arts Commission.

The Arts Commission consists of 15 members appointed by the Mayor for four-year terms. Two of the members are required to be architects; nine members must be other practicing arts professionals and four members must be lay members.

¹ Mr. Chow will attend the Ethics Commission's July 28, 2014 meeting.

The mission of the Arts Commission, among other things, is to encourage artistic awareness, participation and expression, to promote education in the arts, to assist independent local groups with the development of their own programs, and to act as a liaison with state and federal agencies to ensure increased funding for the arts.

The Commission approves the designs for all public structures, any private structure that extends over or upon any public property and any yards, courts, set-backs or usable open spaces which are an integral part of any such structures. The Commission also promotes neighborhood arts programs and approves the design and location of all works of art before they are acquired, transferred or sold by the City, or are placed upon or removed from City property, or are altered in any way. (See City Charter § 5.103.)

2. Commissioner Chow and SOM.

Commissioner Chow is one of two architects representing their profession or trade on the Arts Commission, and sits on the Commission's Civic Design Review ("CDR") Committee and Executive Committee. He is also a partner at SOM, an architectural and engineering firm operating internationally but which has worked on many large-scale projects in San Francisco. Commissioner Chow evidently exercises management and control over that firm.

SOM is currently a subcontractor on a City contract for the renovation and expansion of the Moscone Center. More specifically, SOM was chosen to provide architectural design services to the SFTIDMC, the primary City contractor on the project, through a competitive bidding process. Commissioner Chow has not been, and is not currently, involved in this project in any manner.

Additionally, Commissioner Chow understands that SFO will begin the process of renovating additional terminals in the near future. SOM is beginning to explore possible partnership opportunities with other firms to work on that renovation project, which will be competitively bid by SFO. Although SFO has not released a request for proposals, SOM and its potential partners "are seeking certainty about [SOM's] ability to participate soon."

Commissioner Chow seeks a waiver for the Moscone Center and SFO projects. In this regard, Commissioner Chow has stated that he has not participated, and will not participate, in any way in either project for SOM. He adds that, with respect to each project, if the waiver is granted, he will recuse himself from reviewing and voting on matters regarding these projects before the CDR Committee, the Executive Committee, and the full Arts Commission.

Commissioner Chow has also stated that he will resign from the Arts Commission if his waiver request with respect to Moscone Center project is not granted.

Commissioner Chow contends that the ban under section 3.222 deprives not only his firm of business, but also the City of the expertise and valuable design services that his firm can contribute.

In this regard, the Commission’s President, JD Beltran, and its Director of Cultural Affairs, Tom DeCaigny have indicated that Commissioner Chow “serves a critical, unique and invaluable role on the Arts Commission . . . [and that his skills] would be extremely difficult to replace.”² (*See* attached 7/18/14 letter.) Moreover, they indicate that Commissioner Chow has avoided both actual and apparent conflicts of interest on the Arts Commission.

Applicable Law & Guidance

1. Section 3.222.³

Section 3.222(b) provides that “[d]uring his or her term of office, no officer shall enter, submit a bid for, negotiate for, or otherwise attempt to enter, any contract or subcontract with the City and County . . . where the amount of the contract or the subcontract exceeds \$10,000.” A member of the Arts Commission is an “officer” for purposes of this ban. (Section 3.203(a).)

Section 3.222 was enacted based on findings that City “contracts should be, and should appear to be, awarded on a fair and impartial basis” and that Section 3.222’s prohibition would “eliminate both actual and perceived favoritism or preferential treatment [in awarding City contracts] without creating unnecessary barriers to public service.” (Section 3.200(d).)

The prohibition in Section 3.222(b) extends to any business over which a City officer exercises management and control. (Subdivision (c)(2).) The prohibitions does not apply to “a contract or subcontract with a nonprofit organization.” (Subdivision (c)(1).) In this regard, the “term ‘subcontract’ means a contract to perform any work that a primary contractor has an agreement with the City and County . . . to perform.” (Subdivision (a)(4).)

2. Waiver standards.

Section 3.222(d) provides that the Commission “may waive the prohibitions in this section for any officer who, by law, must be appointed to represent any profession, trade, business, union or association.”

The Ethics Commission has not adopted regulations implementing section 3.222 or its waiver provision. However, the Ethics Commission has adopted a regulation setting forth those factors it may consider in connection with a request for a waiver from the prohibition on compensated advocacy by City officers. (See SFEC Regulation 3.224-2(b).) Although not binding, those factors are instructive for the present purposes, and include:

- a. the ability of the City to recruit qualified individuals to fill the position in question if the waiver is not granted;

² In particular, they point to Commissioner Chow’s “extraordinary technical and design expertise,” as well as his attention to both details and to “big picture” governance and financial issues. They also state that Commissioner Chow is collegial, creative, and “a worthy advocate for those who live in, work in and enjoy the City of San Francisco.”

³ A copy of the full text of Section 3.222 is attached.

b. the ability of the member to engage in his or her particular vocation if the waiver is not granted; and

c. any other factors the Commission deems relevant.

3. Prior waiver requests.

The Ethics Commission has received only one prior request for a waiver from the prohibition in Section 3.222, and it decided to deny that request. In June 2013, Cass Calder Smith also made his waiver request as one of two architects on the Arts Commission. Commissioner Smith wanted his 15-person company to bid on possible contracts with certain City agencies. Commissioner Smith agreed to recuse himself from reviewing and voting on projects put forth to the CDR Committee (on which he sat) and the full Arts Commission. He also agreed to have the projects managed by senior architects of his firm rather than himself.

However, during the hearing on the matter, Commissioner Smith stated that if the Ethics Commission denied the waiver, he would continue serving on the Arts Commission and that his company would simply not bid on City contracts. The Ethics Commission denied the waiver request, with Commissioner Hayon noting that Commissioner Smith, as an architect sitting on the CDR committee, may already have had a competitive advantage over other firms.

Analysis

The prohibition in Section 3.222 applies to Commissioner Chow and, because Commissioner Chow evidently exercises management and control over SOM, to SOM as well. Thus, Section 3.222 prohibits SOM from entering into or bidding on any City contract or subcontract worth more than \$10,000 so long as Commissioner Chow is still on the Arts Commission, unless a waiver is granted.

Commissioner Chow is eligible to request a waiver because he is one of two architects who represent his profession or trade on the Arts Commission. The waiver procedure contemplates either that certain City contracts will not result in any actual and perceived favoritism or preferential treatment, or that other considerations outweigh such actual and perceived favoritism or preferential treatment.

With one important exception (explained below), both waiver requests implicate the same issues and call for essentially the same analysis.⁴ Thus, both waiver requests may be analyzed according to the factors set forth in Regulation 3.224-2(b):

⁴ Commissioner Chow indicates that he was initially unaware that SOM's agreement with SFTIDMC is subject to the prohibition in Section 3.222(b), suggesting that that agreement is an exempt "subcontract with a nonprofit organization" under Section 3.222(c)(2). However, although this language could arguably apply in this instance, staff believes the language is more likely intended to categorically exempt nonprofits from the ban, and not entities that subcontract with nonprofits, as is the case here.

1. City's ability to recruit qualified individuals.

No evidence has been presented that the Arts Commission will be unable to recruit qualified architects in the future to be commission members, although Commissioner Beltran and Mr. DeCaigny are clear that they consider Commissioner Chow's expertise and abilities "extremely difficult to replace." Commissioner Chow's expertise and abilities are addressed in section 3 below.

2. Commissioner Chow's ability to engage in his vocation.

It does not appear that Commissioner Chow's or SOM's ability to obtain business will be significantly impeded if either waiver is not granted. Commissioner Chow and SOM each appear to be well-regarded and to have the ability to attract clients outside of San Francisco.

3. Other factors.

In addition to the factors mentioned above, the Ethics Commission might consider two other issues.

First, the Ethics Commission might consider the implications for the Arts Commission of Commissioner Chow's resignation if he does not receive a waiver with respect to SOM's subcontract on the Moscone Center project. More specifically, Commissioner Beltran and Mr. DeCaigny make clear that Commissioner Chow's expertise and abilities are highly valued by the Arts Commission, stating that he "serves critical, unique and invaluable role" there.

Second, the City uses competitive bidding procedures to select vendors and requires that all City vendors comply with City ordinances and other requirements prior to entering into a contract with the City. Moreover, if a waiver is granted, Commissioner Chow will not work on either of the projects, and will recuse himself from considering those projects when they come before the Arts Commission. Nonetheless, the purpose of the prohibition is to avoid not only actual but also perceived favoritism and preferential treatment.

Conclusion

Commissioner Chow's resignation may represent significant loss for the Arts Commission. Moreover, it appears reasonable to believe that Commissioner Chow will avoid any actual conflicts of interest with respect to the projects at issue (e.g., not participating in consideration of the proposed SFO renovation, etc.).

However, a waiver does not appear justified by consideration of the City's ability to recruit qualified architects for the Arts Commission, Commissioner Chow's ability to engage in his vocation, or the Ethics Commission's past decisions.

Nevertheless, the Ethics Commission may decide to grant a waiver if it concludes that the critical, unique and invaluable role Commissioner Chow evidently serves on the Arts

Commission outweighs any actual or perceived favoritism and preferential treatment with respect to the contracts at issue.

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SAN FRANCISCO
ETHICS COMMISSION

June 16, 2014

John St. Croix
Executive Director, San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102-6053

BY _____

Dear Director St. Croix;

I am a commissioner on the San Francisco Arts Commission, appointed in 2009 to fill one of two seats on the commission designated for architects. As a part of my duties, I sit on the Arts Commission's Civic Design Review and Executive Committees. I am writing to request two waivers from the Prohibition of Officers from Contracting with the City and County (sec. 3.222 of the San Francisco Campaign and Governmental Code). Because I occupy a seat on the Arts Commission that must be appointed to represent a profession or trade, I believe I am eligible for such a waiver under section 3.222(d).

I am one of five partners at the San Francisco architectural and engineering firm Skidmore, Owings & Merrill, LLP (SOM), and on occasion when there are projects that match our expertise, we are interested in pursuing architectural and engineering design services work either directly or through subcontract with the City and County. Although we are an international practice, we have focused much of our efforts here in our home town since we opened our office here in 1946, completing commissions such as the San Francisco International Terminal at SFO, the Treasure Island Master Plan, 101 2nd Street and the Bank of America Building. Much of our design work is for large-scale, complex endeavors that call for the type of highly specialized expertise that our firm possesses.

1. Waiver for Moscone expansion project

SOM is currently engaged in a subcontract for architectural design services for the renovation and expansion of Moscone Center. As a subcontractor, SOM is not contracting directly with the City, but with the San Francisco Tourism Improvement District Management Corporation (SFTIDMC), a California non-profit corporation. This contract was awarded through a response to a competitive Request for Qualifications process. SFTIDMC's contract for the Moscone Center renovation and expansion is with the City and County of San Francisco. I am not personally working on the Moscone Center project in any way. At the firm, the direction, contracting, management, and design of this project is being carried out by my partners and other staff members

SOM just recently executed its subcontract with SFTIDMC, on April 9, 2014. Unfortunately, I also only recently became aware that this subcontract may require a waiver. I had previously understood that the exception provided in section 3.222(c)(1) for "contract[s] or subcontract[s] with a nonprofit organization" would apply, because SFTIDMC is a nonprofit organization. However, I have been advised that this exception only applies if SOM itself is a nonprofit, rather than subcontracting with a nonprofit.

Now that I have learned that the nonprofit exception does not apply to my circumstances, I am seeking a waiver from the Ethics Commission so that SOM may continue working on the Moscone Center expansion with SFTIDMC. Should the Ethics Commission not grant this waiver, I will need to resign from the Arts Commission. While I have enjoyed my service on the Arts Commission, and believe that I have made substantial contributions to the commission's work, it is essential that SOM honor our subcontract with SFTIDMC.

If I do receive a waiver from the Ethics Commission, I would not – in my Arts Commission role – participate in any discussion or review of the Moscone Center expansion. Likewise, at SOM, I will not be personally involved in the Moscone Center project in any way. Other partners and staff at SOM would continue to provide these services without my assistance or involvement.

2. Waiver for SFO Terminal 1 renovation

In the near future, we understand that the San Francisco Airport will start the process of renovating additional terminals at SFO. SOM is beginning to explore possible partnership opportunities with other architectural, design, and engineering firms to bid on the renovation project. The renovation project will be competitively bid by the Airport. The Airport has not yet released its request for proposals regarding the project, but SOM and our potential partners are seeking certainty about my firm's ability to participate soon.

If I receive this waiver, similar to the Moscone Center expansion, I will not be involved in any discussion or review of this Airport project as an Arts Commissioner. At SOM, I will not participate in preparing any bids for the project. If SOM is selected, I will not personally work on the project - other partners and staff at SOM will handle these services, without my assistance or involvement.

I am deeply appreciative of the opportunity to serve the people of San Francisco through my knowledge as an architect and would look forward to continue to do with dedication and purpose.

Thank you for yours and the Ethics Commission's consideration of my request and I am happy to provide any additional information you may need.

Sincerely,



Leo Chow, AIA
Partner

Cc: T. DeCaigny
N. Wheaton

FILED

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SAN FRANCISCO
ETHICS COMMISSION

BY _____

San Francisco
Arts Commission

July 18, 2014

Edwin M. Lee
MayorMr. John St. Croix
Executive Director
Ethics Commission
25 Van Ness Ave., Ste. 220
San Francisco, CA 94102Tom DeCaigny
Director of
Cultural AffairsPrograms:
Civic Art Collection
Civic Design Review
Community Arts & Education
Cultural Equity Grants
Public Art
SFAC Galleries
Street Artist LicensingRe: Arts Commissioner Leo Chow
Proposed waiver request25 Van Ness Avenue, Ste. 345
San Francisco, CA 94102
tel 415-252-2590
fax 415-252-2595
sfartscommission.org
facebook.com/sfartscommission
twitter.com/SFAC

Dear Mr. St. Croix:

We are writing in support of Commissioner Leo Chow, who serves a critical, unique and invaluable role on the Arts Commission. His constellation of strengths and qualifications would be extremely difficult to replace.

The Charter calls for two architects to sit on the Arts Commission, and Commissioner Chow admirably fills one of those two seats, serving on the Civic Design Review Committee. An award-winning, Harvard-trained architect and urban planner with experience in both private and public projects, Commissioner Chow brings extraordinary technical and design expertise to his work for the City. He works collegially and creatively with the City's staff architects and project managers, demonstrating a commitment to finding a way to achieve the best possible structure for the City, while remaining sensitive to the departments' budgetary and scheduling constraints. Commissioner Chow's thorough familiarity with the relevant building and planning codes and standards, his understanding of materials and of the collaborative process of design and construction, and his sensitivity to the impact of a structure on the people who encounter it make him a worthy advocate for those who live in, work in and enjoy the City of San Francisco.

Commissioner Chow also serves ably on the Executive Committee, bringing an astute attention to both the details and the "big picture" of governance and financial oversight for the Commission. Indeed, he was chosen to serve on the search committee when the Commission hired its current Director of Cultural Affairs in late 2011.

Finally, Commissioner Chow has scrupulously guarded against both actual conflicts of interest and the perception of conflicts, and we have great faith in his ability to

City and County of
San Francisco

Mr. John St. Croix

July 18, 2014

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continue to fairly, honorably and ethically represent the interests of the City as an Arts Commissioner.

In short, Commissioner Chow brings a unique and invaluable blend of qualifications, experience and expertise—in architecture, city planning, fiscal oversight and governance—that would be extremely difficult to find in another individual willing to volunteer service to the City on the Arts Commission. We appreciate your consideration of his request for a waiver, and are available to answer any questions you may have.

Very truly yours,



Tom DeCaigny
Director of Cultural Affairs



JD Beltran
Arts Commission President

TED/spr

Encl

cc: Nicole Wheaton, Office of the Mayor

Print

San Francisco Campaign and Governmental Conduct Code

SEC. 3.222. PROHIBITING OFFICERS FROM CONTRACTING WITH THE CITY AND COUNTY.

(a) **Definitions.** For purposes of this Section, the following definitions shall apply:

(1) **Business.** The term "business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, or other legal entity or undertaking organized for economic gain.

(2) **City and County.** The term "City and County" includes any commission, board, department, agency, committee, or other organizational unit of the City and County of San Francisco.

(3) **Contract.** The term "contract" means any agreement other than a grant or an agreement for employment in exchange for salary and benefits.

(4) **Subcontract.** The term "subcontract" means a contract to perform any work that a primary contractor has an agreement with the City and County, the San Francisco Redevelopment Agency, the San Francisco Housing Authority, the San Francisco Unified School District, or the San Francisco Community College District to perform.

(b) **Prohibition.** During his or her term of office, no officer shall enter, submit a bid for, negotiate for, or otherwise attempt to enter, any contract or subcontract with the City and County, the San Francisco Redevelopment Agency, the San Francisco Housing Authority, the San Francisco Unified School District, or the San Francisco Community College District, where the amount of the contract or the subcontract exceeds \$10,000.

(c) **Exceptions.** This Section shall not apply to the following contracts or subcontracts:

(1) A contract or subcontract with a nonprofit organization;

(2) A contract or subcontract with a business with which an officer is affiliated unless the officer exercises management and control over the business. A member exercises management and control if he or she is:

(A) An officer or director of a corporation;

(B) A majority shareholder of a closely held corporation;

(C) A shareholder with more than five percent beneficial interest in a publicly traded corporation;

(D) A general partner or limited partner with more than 20 percent beneficial interest in the partnership; or

(E) A general partner regardless of percentage of beneficial interest and who occupies a position of, or exercises management or control of the business;

(3) A contract or subcontract entered into before a member of a board or commission commenced his or her service;

(4) An agreement to provide property, goods or services to the City and County at substantially below fair market value; or

(5) A settlement agreement resolving a claim or other legal dispute.

(d) **Waiver.** The Ethics Commission may waive the prohibitions in this section for any officer who, by law, must be appointed to represent any profession, trade, business, union or association.

(e) **Limitation.** Failure of an officer to comply with this Section shall not be grounds for invalidating any contract with the City and County.

(Added by Proposition E, 11/4/2003; Ord. 244-09, File No. 091013, App. 12/3/2009)

RESOLUTION

Section 3.222 of the San Francisco Campaign and Governmental Conduct Code prohibits a City officer during his or her term of office from entering, submitting a bid for, negotiating for, or otherwise attempting to enter, any contract or subcontract with the City and County San Francisco, where the amount of the contract or the subcontract exceeds \$10,000; and

Commissioner Leo Chow of the Arts Commission has requested a waiver in connection with an existing subcontract between his firm, Skidmore, Owings & Merrill LLP (“SOM”), and the San Francisco Tourism Improvement District Management Corporation (“SFTIDMC”) to work on the City’s renovation and expansion of the Moscone Center; and

Commissioner Chow also requests a waiver allowing SOM to participate in a future bids to work on renovation work at the San Francisco Airport (“SFO”); and

Commissioner Chow has stated that he has not participated, and will not participate, in any way in either project for SOM; and

With respect to each project Commissioner Chow will recuse himself from reviewing and voting on matters put forth to the Civic Design Review Committee, the Executive Committee, and the full Arts Commission.

THEREFORE, the San Francisco Ethics Commission resolves to grant Commissioner Chow’s waiver requests with respect to:

- the existing subcontract between SOM and SFTIDMC to work on the City’s renovation and expansion of the Moscone Center; and
- future bids to work on renovation work at the San Francisco Airport.

Such waiver is contingent upon Commissioner Chow not participating in any way in either project for SOM or any other firm or organization, and upon Commissioner Chow recusing himself from reviewing and voting on matters regarding the above projects before the CDR Committee, the Executive Committee, and the full Arts Commission.

I certify that this resolution was adopted by the San Francisco Ethics Commission on July 28, 2014.

John St. Croix, Executive Director
San Francisco Ethics Commission

St.Croix, John

From: Wheaton, Nicole (MYR)
Sent: Sunday, July 27, 2014 6:59 PM
To: St.Croix, John
Subject: Commissioner Leo Chow Waiver Request

Good afternoon John,

Please forward for the Ethics Commission Review:

Commissioners,

I would like to communicate the Mayor's enthusiastic support of a waiver to allow Commissioner Leo Chow to continue to serve on the Arts Commission. Commissioner Chow's knowledge and expertise is indispensable, has proven extremely valuable on the City's Civic Design Review Committee, and Arts Commission, and I believe the community of San Francisco has benefitted greatly from his service.

We also know that Commissioner Chow has gone to great lengths to avoid the appearance of conflict and submitted his request for waivers as soon as he discovered his conflict. His adherence to the highest standard of conduct reflects his character and leads me to concur with Director DeCaigny and Commissioner Beltran that we may all be confident in Commissioner Chow's ability to fairly, honorable, and ethically represent the interests of the people of the City and County.

The Mayor's Office also agrees with Director DeCaigny and Commissioner Beltran that Commission Chow is an extremely qualified architect, and his expertise and understanding of the work of the Commission, the City and County arts communities, and the City's development of public space is invaluable. Moreover, I would argue that Commissioner Chow's knowledge of public and private projects in the City and County is an asset that benefits the City greatly, and so long as he continues to wall himself off through those measures outlined in the staff memo and Commissioner Chow's letter, the City and County should be allowed to continue to benefit from his service.

Commissioner Chow has made it quite clear that he would resign if he does not receive this waiver, and it would be the City's loss if that were to occur. It would also be very difficult to replace Commissioner Chow with an individual of equal or greater value without running into a similar conflict. A disapproval of this waiver would set a harmful precedent for the recruitment and retention of the most qualified architects for this appointment. Those architects, who have earned high ranking positions in their respective firms, notably firms who understand the environment of San Francisco, who have the time to serve, and who are willing to remove themselves from the review of projects and action on matters related to those projects, should not be disallowed from serving the City and County.

Thank you for your consideration of Commissioner Chow's waiver and the impact that not granting a waiver would have on the City and future appointments to this seat.

Best,
Nicole

Nicole A. Wheaton
Director of Appointments
Commission & Board Liaison
Office of Mayor Edwin M. Lee
(415) 554-7940