



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

December 3, 2007

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Dean L. Macris
Director of Planning
City and County of San Francisco
1650 Mission Street, Suite 400
San Francisco, CA 94103

Dear Mr. Macris:

You have requested informal advice regarding whether the Planning Department's possible use of a digital model of a private architectural firm, Skidmore, Owens & Merrill, LLP ("SOM"), to run visual simulations of the overall planning process involving the Transbay Terminal would present a conflict of interest under the City and County of San Francisco's ("the City") conflict of interest laws.

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. *See* S.F. Charter § C3.699-12. Written formal opinions are available to individuals who request advice about their responsibilities under local laws. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice. *See id.* Informal advice does not provide similar protection. *See id.* Because you have requested informal advice, this letter does not provide you or any other person immunity under Charter section C3.699-12.

Background

You state that the City, along with the Transbay Joint Powers Authority, has undertaken a plan to redevelop the Transbay Terminal District into a major transportation hub. Because a signature tower will be constructed that will rise above all other existing downtown buildings, the Planning Department ("Department") will rezone the surrounding area to allow additional high-density development that would exceed current height restrictions. The Department has begun analyzing long-term planning options for the Transbay and downtown areas as well. You explain that this "complex planning effort will require evaluation of numerous planning elements under alternative development scenarios, including, for example, traffic and transit, shadows and visual impacts."

You add that SOM has developed "a unique and proprietary planning tool that allows a user to quickly create highly-detailed three-dimensional renderings of hypothetical planning scenarios" in the City. Based on SOM's prior work for the City, the Department has determined that SOM's digital model is "unique in its codification, detail and functionality." Thus, the Department wishes to enter into a contract with SOM whereby

the City would pay SOM fair market value to rent SOM's software, equipment, and technical support so that City planners could use the modeling process for City purposes. The City's modeling efforts would result in printed work product (hard copies) and/or PDF files of potential visual perspectives for subsequent consideration and evaluation at the Department.

You explain that "SOM has been and will continue to be involved in the unfolding Transbay plan." For example, SOM currently has two clients vying for approval of projects proposed in the plan area, and SOM submitted an entry in the design competition for the Transbay tower (and ultimately scored in second place). You add that SOM occasionally bids for City contracts to provide planning and architectural services, and that it uses the digital model to provide services to its clients. The digital model can be used for client presentations to public agencies such as the Department.

You also state that the City has on at least one occasion entered into a sole-source contract with SOM to perform detailed modeling of visual impacts in a particular area such as the Market and Octavia neighborhood. However, prior agreements called for SOM staff to do the modeling whereas under the proposed contract, City employees will be primarily responsible for the modeling by using software rented from SOM.

You add that if the Department were to enter into such a contract, it would do so in accordance with applicable City contracting requirements. The Department's analyses using the model would be subject to scrutiny and quality control by expert planning staff. However, because of the technical complexity of the model, SOM employees will be required to be in the room to provide computer technical expertise that is necessary to navigate the model when the Department's planners are viewing the model. But SOM will not have access to the City's analysis or work product; nor would SOM personnel participate in the planning analysis.

You explain that the viability of any project will depend in part on the Department's rezoning decisions which, in turn, will be informed by the Department's use of the digital model. The model simulations conducted by Planning staff would inform visual impacts analysis, which is one of the many considerations the Department weighs in making development and rezoning recommendations for the City. The Planning Commission and the Board of Supervisors would have full and independent discretion to decide what zoning controls best serve the City based on public comment and the Department's broad, policy-based recommendations. Neither SOM nor its clients would have special insight or influence over the City's decision-making process.

You also state that to your knowledge, no public official has any financial interest in SOM or its model.

You asked, based on the above facts, whether the City's use of SOM's digital model presents an actual conflict of interest for the City, the firm, or the firm's clients under the laws enforced by the Ethics Commission.

Discussion

Section 3.206(a)

In determining whether a conflict of interest exists, we begin by looking at section 3.206 of the San Francisco Campaign and Governmental Conduct Code. Section 3.206(a), which incorporates the California Political Reform Act (“PRA”), provides that no officer or employee may make, participate in making, or seek to influence a decision of the City in which the officer or employee has a financial interest within the meaning of the PRA. You state that to your knowledge, no public official has any financial interest in SOM or its model. If this is the case, section 3.206(a) is not implicated in the decision to enter into a contract with SOM to “rent” its digital model in order to enable the Department to perform its analyses for rezoning and planning in the Transbay and downtown areas. However, if it turns out that an officer or employee has a financial interest in SOM, that officer or employee may not make, participate in making, or seek to influence any government decision regarding SOM.

Section 3.206(b)

We next turn to section 3.206(b) of the Campaign and Governmental Conduct Code, which incorporates California Government Code section 1090, et seq. (“section 1090”). This section prohibits any officer or employee of the City from making a contract in which he or she has a financial interest. If, as you state, no officer or employee has a financial interest in SOM or the SOM digital model, section 3.206(b) would not be implicated in the decision to enter into a contract with SOM for use of its digital model. However, if it turns out that an officer or employee has a financial interest in SOM, the officer or employee, with limited exceptions, may not be involved in making a contract with SOM.

Section 1090 also prohibits City consultants (or other contractors) from participating in the making of a contract on behalf of the City if the consultants (or other contractors) have any financial interest in the contract. *See generally California Housing Finance Agency v. Hanover/California Management and Accounting Center, Inc.*, 148 Cal. App. 4th 682, 690-94 (2007). The facts you have presented suggest that SOM is renting a product to the City and that City employees may use the product in the course of making decisions regarding future contracts. Your request for advice does not indicate that SOM will participate in making a contract on behalf of the City. Based on these facts, it does not appear that section 3.206(b) would be implicated by the City's use of SOM's digital model. But if the facts change and SOM participates in making a contract for the City, SOM may not have a financial interest in that contract.

Section 3.214

Under section 3.214 of the Campaign and Governmental Conduct Code, a City officer or employee must disclose on the public record any personal, professional or business relationship with any individual who is the subject of or has an ownership or financial interest in the subject of the governmental decision being made by the officer or employee if, as a result of the relationship, the ability of the officer or employee to act for the benefit of the public could reasonably be questioned. Thus, if you as director are the final decision-maker on any projects involving SOM, and if you have a personal, professional or business relationship with SOM, you must disclose it on the public

record. Alternatively, if it is the Planning Commission that makes the final decision for the Department on matters related to SOM, the Commissioners must disclose any personal, professional or business relationship that they may have with SOM. The public record could be the minutes of a public meeting at which the governmental decision is being made, or if the governmental decision is not being made in a public meeting, a memorandum—which will be public record—kept on file at the offices of the Department.

Section 3.228

One law that may be implicated in the prospective contract with SOM is section 3.228 of the Campaign and Governmental Conduct Code, which prohibits any current or former officer or employee from willfully or knowingly disclosing any confidential or privileged information unless authorized by law to do so, or from using any confidential or privileged information to advance the financial or other private interest of himself or herself or others. Confidential or privileged information is information that at the time of use or disclosure was not subject to disclosure under the Sunshine Ordinance or California Public Records Act. To assure that the Department's employees comply with this requirement, you should take steps to ensure that SOM will not have access to information that gives it or its clients an advantage in responding to Requests for Proposals or Requests for Qualifications regarding proposals in the Transbay or downtown areas.

You also asked whether the prospective contract presents an actual conflict of interest for SOM or its clients. Because conflict of interest laws govern the activities of City officers and employees, the answer is generally no. However, because Charter Section C3.699-12 provides that a person may seek a written opinion “with respect to *that* person's duties” under provisions of the Charter or any ordinance relating to campaign finance, conflicts of interest, lobbying or governmental ethics, it would not be appropriate to provide advice to you regarding SOM's duties. *See* S.F. Charter § C3.699-12 (emphasis added).

I hope you find this information helpful. If you have additional questions, please do not hesitate to let me know.

Sincerely,

John St. Croix
Executive Director

By: Mabel Ng
Deputy Executive Director