CITY AND COUNTY OF SAN FRANCISCO

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April 10, 2007

John St. Croix
Executive Director
Ethics Commission
30 Van Ness Avenue, Suite 3900
San Francisco, CA 94102-6027
FAX: (415) 581-2317

Re: **Formal Opinion Letter to Beverly J. Prior dated March 13, 2007**
Re: Request for Advice Concerning Modification of Contract

Dear Mr. St. Croix:

In accordance with the process set forth in San Francisco Charter Section C3.699-12, the District Attorney's Office has reviewed your March 13, 2007 formal opinion letter to Beverly J. Prior concerning the applicability of section 3.222 of the Campaign and Government Conduct Code to modifications of contracts that have been made since her employment as a commissioner to the Arts Commission.

As discussed below, the District Attorney's Office concurs with that portion of the proposed opinion concerning the modification which resulted in no additional income to Ms. Prior, but *does not* concur with that portion of the proposed opinion concerning the modification which did result in additional income to Ms. Prior.

The question presented to the Ethics Commission was whether section 3.222 of the Campaign and Governmental Conduct Code applies to modifications of contracts that have been made since Beverly J. Prior's appointment as a commissioner to the Arts Commission.

Your proposed opinion provides the following "Summary of Advice:"

"Because the two contracts at issue were entered into before you were appointed to the Arts Commission, the exemption in section 3.222(c)(3) applies, which allows you to continue your work under the contracts as well as serve on the Arts Commission. Each of the contracts contains modification provisions, which you and the San Francisco Unified School District have exercised in two instances. In the first instance, because the change results in a loss of income to you, the prohibition of section 3.222 does not apply. In the second instance, because the change was anticipated in the original contract, the prohibition also does not apply. Accordingly, section 3.222 does not prohibit you from accepting the

modifications of the contracts and, at the same time, continuing your service to the Arts Commission."

The District Attorney's Office concurs with the opinion that the contract modification which resulted in a loss of income[1] does not violate Section 3.222 since the amount of the contract did not exceed $10,000. However, the District Attorney's Office *does not* concur with that portion of the opinion that deals with the contract modification which resulted in a gain of $43,830 to Ms. Prior for the following reasons.

1. Modification No (4) to Contract 00565 May Violate Section 3.222.

Pursuant to Campaign and Governmental Conduct Code Section 3.222(b), "No member of a Board or Commission of the City and County shall, during his or her term of office, contract or subcontract with the . . . San Francisco Unified School District . . . where the amount of the contract or subcontract exceeds $10,000."

There is no question that Ms. Prior is a member of a Board or Commission of the City and County, that she contracted with the San Francisco Unified School District prior to becoming a member of the Arts Commission, and that now she would like to enter into a modification of that contract which exceeds $10,000. The only question is whether the contract modification is deemed a new contract subject to the prohibition found in Section 3.222(b), or a pre-existing contract allowable under Section 3.222(c)(3).

Section 3.222(a)(4) defines the term "contract" as "any agreement to which the City and County is a party, other than a grant funded in whole or in part by the City and County or an agreement for employment with the City and County in exchange for salary and benefits." The Ordinance is silent on the issue of whether a contract modification of a pre-existing contract is a "contract" subject to the prohibition set forth in Section 3.222(b). However, contract modifications have long been found to be "contracts" for the purpose of State conflict of interest laws, including Government Code section 1090.[2] Accordingly, we do not agree with the Ethics Commission conclusion that contract modifications "anticipated in the original contract" fall within Section 3.222(c)(3)'s exception to the City's contracting prohibition.

We note that, even if there were an exception to Section 3.222(b) for modifications "anticipated in the original contract," there is insufficient evidence presented that the modification in this case was indeed anticipated. Under Paragraph 4.1.2 of the contract between the District and

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[1]Modification No (2) to Contract 00549.

[2] See, e.g., 77 Ops.Cal.Atty.Gen. 112 (1994) ("We have consistently determined that any modifications to a contract would also fall within the proscription of section 1090"); 68 Ops.Cal.Atty.Gen. 337 (1985) ("While the contract of employment of Fire Captain II may have been made before the Captain became a director of the community services district [section 1090] would prohibit the board of directors and him from making any modification of the employment contract while he held both position."); *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 (renewal of concessionaire contract constitutes "making of a contract" for purposes of section 1090); 81 Ops.Cal.Atty.Gen. 134 (1998) (renegotiation of rental agreement and water fee constitutes "making of a contract").

Ms. Prior at issue here, virtually any additional services requested and authorized by the District could be the basis for a contract modification, without limitation. Such provision provides no guidance whatsoever as to the types of modifications "anticipated" in the contract. We also note that, under the specific terms of Modification No (4) to Contract 00565, the parties agree that "the [requested] additional services are not included in the original scope of services with BPA."

Accordingly, we do not agree that the subject contract modification falls within the exception for pre-existing contracts found in Section 3.222(c)(3).

2. Modification No (4) to Contract 00565 May Violate Government Code Section 1090.

Section 1090 of the Government Code in pertinent part provides:

"Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. . . ."

For the reasons stated above, the contract modification at issue here is a "contract" for the purposes of the application of Government Code section 1090. However, whether or not the contract would violate Section 1090 depends on what role, if any, the Arts Commission has in the Unified School District projects at issue here.

In this regard, we note that San Francisco Charter Section 5.103 mandates the Arts Commission to "Approve the designs for all public structures, any private structure which 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; ...." And, from your proposed opinion letter, it appears that the District's decision to modify contract no. 00565 was "based on feedback from the Landmarks Preservation Board."

Section 1090 applies to persons in advisory positions to contracting agencies. (77 Ops.Cal.Atty.Gen. 112; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 212-213; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291-292.) Thus, whether or not the subject contract modification would violate Section 1090 depends not only on whether the Arts Commission is generally *required* to approve San Francisco Unified School District projects, but also on whether the Arts Commission plays any type of advisory role to the District which could influence the District's decisions on these projects.

Very truly yours,

KAMALA D. HARRIS
District Attorney

By _____
June D. Cravett
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