



# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

March 13, 2007

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Beverly J. Prior, AIA  
Beverly Prior Architects  
222 Sutter Street, 9<sup>th</sup> Floor  
San Francisco, CA 94108

Dear Ms. Prior:

Re: Request for Advice Concerning Modification of Contract

You requested advice regarding San Francisco Campaign and Governmental Conduct Code section 3.222, which prohibits members of appointed boards and commissions, other than advisory bodies, from contracting with the City and other agencies.

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. *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.<sup>1</sup> *See id.* Informal advice does not provide similar protection. *See id.*

Because you seek advice regarding specific actions that you may take in the future, the Commission is treating your question as a request for a formal opinion.

### Question

You asked the Ethics Commission to consider the following question:

Does section 3.222 of the Campaign and Governmental Conduct Code apply to modifications of contracts that have been made since your appointment as a commissioner to the Arts Commission?

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<sup>1</sup> The Ethics Commission does not act as a finder of fact. Advice is prepared based upon the facts presented by you in this letter. The advice in this letter may provide immunity, but only to the extent that the material facts related to a future enforcement are presented here.

## 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 on the Arts Commission.

## Background

You provided the Ethics Commission with the following information:

You have served as a commissioner on the Arts Commission since May 2005. Prior to your appointment, your company, Beverly Prior Architects, Inc., entered into two contracts to provide architectural services to the San Francisco Unified School District (“School District”) to modernize five schools to make them ADA compliant. One contract was to furnish school repair services at Balboa High School, Marina Middle School and SF Community Elementary School; the other to furnish similar services to Dr. Charles Drew Elementary School and Treasure Island Elementary School.

In the course of providing services under the contracts, it became clear to the parties that the scope of services needed to be changed. Under one contract, after you partially completed your obligations, the School District determined that it would not go forward to the construction phase because of uncertainty about the fate of the Treasure Island Elementary School. Thus, the District has concluded that no further work by you is necessary under the contract, and the District wishes to modify the contract so that it will not be required to pay you for work you will not be performing. This Modification of Contract, which the District has issued, will adjust your fee downward by \$145,820.74.

Under the second contract, after work had begun, it became apparent that review by the Landmarks Preservation Advisory Board was necessary. Based on feedback from the Landmarks Preservation Board, the District determined that changes to the scope of your work for Balboa High School were necessary; thus, the District issued a Modification of Contract under which your fees will increase by \$43,830.00. You informed staff that you provided the District an estimate of what it would cost to make changes based on an estimate of hours multiplied by your hourly fees.

## Discussion

A. *The General Prohibition Against Contracting with the City*

The Prohibition on Contracts with the City provides:

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 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.

S.F. Campaign and Governmental Conduct (“S.F. C&GC”) Code § 3.222(b).<sup>2</sup> “Contract” is defined 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.” *Id.*, § 3.222(a)(4). Section 3.222 was adopted to ensure that contracts are, and appear to be, awarded on a fair and impartial basis. *See id.*, § 3.200(d). By prohibiting Board and Commission members from contracting with the City, “both actual and perceived favoritism or preferential treatment without creating unnecessary barriers to public service” will be eliminated. *See id.*

Section 3.222 does not apply to a contract or subcontract with the City and County entered into before a member of a board or commission commenced his or her service. *Id.*, § 3.222(c)(3).

B. *Application of the Law*

The question presented by your inquiry is whether Section 3.222 prohibits modifications to contracts between you and the School District where the original contracts were entered into before you commenced your service on the Arts Commission.<sup>3</sup> In one instance, you and the School District modified a contract, which resulted in a loss of income to you; in the other instance, you and the School District modified a separate contract, which resulted in a gain of income to you.

Both modifications were of the type contemplated in the original contracts. Specifically, both agreements contain similar provisions, which state, among other things, that the School District

shall provide a separate Work Authorization for each school that has been approved by the Chief Facilities Officer. Each Work Authorization shall be agreed to by the Architect, and include a complete description of the Scope of the Project for that school which includes a Fixed Budget Limit of Building Construction Cost that is reasonable for the defined Scope of the Project.

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<sup>2</sup> Section 3.222 was formerly section 3.200, which was added by Ord. 374-96, app. 9/30/96, and subsequently became section 3.222 after adoption of the conflict of interest amendments by the voters in November 2003.

<sup>3</sup> Our advice is limited to the facts of this case and does not address the question of whether modifications to contracts are generally subject to section 3.222.

See Section 1.1 of the Agreement Between the San Francisco Unified School District and Beverly Prior Architects (“Agreement”). Another provision states, “In the event that redesign services are necessary, the District shall cooperate with the Architect in allowing design changes, including, if necessary, changes which reasonably affect the size and quality of the Project.” *Id.*, § 1.2.b.

The contracts further provide that “Additional services shall mean the services that the District, in writing, authorizes the Architect to perform which are in addition to the services included within Basic Services.” *Id.*, § 2.1. Under the contracts, a contract order or purchase order of the District must be properly executed by the Project Manager and Bond Manager and certified by the Chief Business Officer for the specific funding of the Agreement or any modification. *See id.*, § 2.4. The Architect may not perform any work unless it is authorized to do so by the issuance of a “Modification of Contract” duly executed and bearing the Chief Business Officer’s certification. *Id.*, § 12.

In the case of the modification that resulted in a financial loss to you, section 3.222 does not apply. The ordinance applies only where the contract “exceeds \$10,000.” Assuming, *arguendo*, that section 3.22 otherwise would apply to this modification, because the modification of this contract does not exceed \$10,000 in value, the ordinance does not prohibit it.

In the case of the modification of the contract that resulted in additional income to you, section 3.222 does not prohibit the modification because the modification was anticipated or foreseeable when the parties initially entered into the contract. When analyzing the application of a City ordinance to a specific situation, the Commission must not read a section of the ordinance in isolation. Instead, the Commission must read every ordinance with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. *See State Farm Mut. Auto. Ins. Co. v. Garamendi*, 32 Cal.4th 1029, 1043 (2004). Section 3.222(c)(3) exempts from the scope of the prohibition contracts entered into before a member of a board or commission commenced his or her service. In some circumstances, where an original contract contemplates change orders, such change orders are part and parcel of the original contract, and the exemption in section 3.222(c)(3) will apply if a City commissioner enters into the original contract before commencing his or her service.

Here, the original contract between you and the school district specifically contemplated that change orders would be necessary because of the nature of the work. For that reason, the original contract granted the School District the authority to issue modifications, so long as they are duly executed and certified by the School District’s Chief Business Officer. *See* Agreement, §§ 1.2b, 2.1, 2.4 and 12. During the course of your work under the contract, the School District concluded that modification was necessary based on recommendations made by the Landmarks Preservation Board; thus, the construction and architectural needs of the School District changed. Because the original contract contemplated such circumstances, the parties were merely executing certain provisions in the contract itself when it agreed to the modification. Accordingly, based on these unique facts where the modification, which was contemplated explicitly in the original contract, advanced the purpose of the original contract, and enabled the School District to proceed towards completion of its project with due diligence, section 3.222 is not applicable.

### Conclusion

For the reasons discussed above, the Commission finds that section 3.222(b) does not apply to prohibit you from continuing to serve as a commissioner on the Arts Commission while performing under the modified contracts identified above.

I hope you find this information helpful. Please let me know if you have additional questions.

Sincerely,

John St. Croix  
Executive Director

By: Mabel Ng  
Deputy Executive Director