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CITY AND COUNTY OF SAN FRANCISCO

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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: June 25, 2013
To: Members, Ethics Commission
From: John St. Croix, Executive Director
By: Mabel Ng, Deputy Executive Director
Re: Request for Waiver from Contracting Ban

Cass Calder Smith, a commissioner on the San Francisco Arts Commission who chairs the Civic Design Review Committee, has submitted a request for a waiver from San Francisco Campaign and Governmental Conduct Code section 3.222, which bars members of boards and commissions from entering into contracts with the City for more than \$10,000. Mr. Smith will attend the Commission's July 22, 2013 meeting.

Background

Section 3.222 states:

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.

Section 3.222 was formerly section 3.200 of the Campaign and Governmental Conduct Code, which took effect on January 15, 1997 and which contained the following findings:¹

- (a) FINDINGS.
 - (1) City and County contracts should be, and should appear to be, awarded on a fair and impartial basis.
 - (2) The practice of members of Boards and Commissions of the City and County contracting with the City and County creates the potential for, and the appearance of, favoritism or preferential treatment by the City and County.
 - (3) Prohibiting members of Boards and Commissions of the City and County from contracting with the City and County will eliminate both actual and perceived favoritism or preferential treatment without creating unnecessary barriers to public service.

There are no regulations implementing section 3.222.

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 This language now appears in section 3.200(d), the Findings and Purpose section of the Governmental Ethics Ordinance.

The mission of the Arts Commission, among other things, is to encourage artistic awareness, participation and expression, education in the arts, and assist independent local groups with the development of their own programs, as well as provide 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 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* Charter § 5.103.

Discussion

Mr. Smith is one of two architects who represent his profession or trade on the Commission; as such, he is eligible to request a waiver from the ban in section 3.222.

Mr. Smith is a principal of his firm, CCS Architecture, which has about 15 staff. He is interested in having his company bid on possible contracts with agencies such as the Department of Public Works, the Public Utilities Commission, and the Department of Recreation and Parks that so that the departments may utilize the services of his company. If his firm were selected for use by any department, the firm would be required to enter into a contract with the City, and Mr. Smith would be in violation of section 3.222 if the contract exceeds \$10,000, unless a waiver is granted. The Commission has never received a request for a waiver from section 3.222; thus, this is a case of first impression.

Mr. Smith states that the ban under section 3.222 deprives not only his company of business, but also the City of the expertise and valuable design services that his firm can contribute. He adds that if the waiver is granted, he will recuse himself from reviewing and voting on projects put forth to the Civic Design Review Committee and the full Arts Commission. He would also have the projects managed by senior architects of his firm rather than himself.

In general, 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. Section 3.222 was designed to address not only actual bias but also instances of perceived favoritism or preferential treatment. Mr. Smith's membership on the Arts Commission and his exercise of management and control over his private firm does not necessarily translate into perceived favorite or preferential treatment. Nonetheless, Mr. Smith is an officer of the City who must avoid not only actual but also perceived conflicts of interests.

For these reasons, staff is unable to make a recommendation in this matter.

June 13, 2013

John St. Croix

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

Dear John St. Croix,

I am a commissioner on the San Francisco Arts Commission, and as one of the two architects on the commission, I chair the Civic Design Review Committee. I was appointed to the commission during the Newsom administration and am just about to be sworn in for another four years by Mayor Lee.

My firm *CCS Architecture* is interested in providing services for city and county projects that we may be deemed qualified. This would be a selection process through the normal process that private architectural firms are chosen to design buildings for the city and county. This would be on a consultant basis as well as an RFQ/RFP process for various city agencies seeking architectural services. To avoid any potential conflict of interest, I am requesting that the Ethics Commission review the prohibition for a commissioner to enter into a contract with any city or county agency. My request is that this prohibition be waived for the following reasons:

As a sitting commissioner (especially on the Civic Design Review Committee), I provide the city with a wealth of experience that brings significant value to the built environment, yet at the same time, my firm is deprived of offering design services which I feel is a hardship not shared by my peers. CCS Architecture is a small firm of about 15 people with diverse skills – most of who live in San Francisco.

This prohibition not only deprives my San Francisco firm of business, but I believe also deprives the city of the expertise and valuable design services for certain projects that my firm can contribute that may be missing.

If this waiver is granted, I will recuse myself from reviewing and voting on projects put forth to the Civic Design Review Committee and the Full Arts Commission. I would also have these projects managed by other senior architects in my firm rather than myself.

My understating of this is that this waiver can be granted if the Arts Commission Charter is required to have architects on the commission, which it does. Per section 3.100 this requirement is described (see attached.)

Please contact me to discuss or if you would like any additional information.

Thanks

Cass

Cass Calder Smith, AIA.

Subject: (none)

Date: Sunday, May 19, 2013 7:44:44 PM Pacific Daylight Time

From: Cass Smith <cass@ccs-architecture.com>

“The Arts Commission shall consist of fifteen members appointed by the Mayor, pursuant to Section [3.100](#), for four-year terms. Eleven members shall be practicing arts professionals including two architects, a landscape architect, and representatives of the performing, visual, literary and media arts; and four members shall be lay members.”

[http://www.amlegal.com/nxt/gateway.dll/California/charter_sf/articlevexecutivebranch-artsandculture?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$anc=JD_5.103](http://www.amlegal.com/nxt/gateway.dll/California/charter_sf/articlevexecutivebranch-artsandculture?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_5.103)