

CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION # 07-0001

TO: Barbara Gomez, Director
Department of Community Development

FROM: Jorge L. Fernandez, City Attorney *KAM*

DATE: March 9, 2007

RE: Conflict of Interest

You have requested a legal opinion on substantially the following issue:

WHETHER THERE IS A PROHIBITED CONFLICT OF INTEREST POSED BY A BUSINESS ENTITY DOING BUSINESS WITH AND RECEIVING FEDERAL FUNDS FROM A CITY DEPARTMENT, IF THE EXECUTIVE DIRECTOR OF THE BUSINESS ENTITY IS THE FORMER SPOUSE OF THE DEPARTMENT DIRECTOR AND THE CITY DEPARTMENT COMMENCED FUNDING THE BUSINESS ENTITY BEFORE THE FORMER SPOUSE ASSUMED THE POSITION OF EXECUTIVE DIRECTOR.

The answer to the question is in the negative.

FACTS

According to the facts that have been presented to us, the former spouse ("Former Spouse") of a City Department Director ("Director") currently occupies the position of executive director of a non-profit organization ("Organization"). The Organization is funded by and doing business with the City Department. The former spouse and Director have been divorced for 30 years. The Director and the Former Spouse have had no business relationship or any other type of relationship for the past 30 years except for having a son together. The son is currently thirty years old. The assignment of duties to the Former Spouse in his role as executive director of the Organization is to carry out the policies of the Organization and its Board of Directors. The Organization is funded with Housing Opportunities for People with Aids ("HOPWA") funds and Community Development Block Grant ("CDBG") funds. The Director is not directly involved in selecting the Organization for funding purposes. The City issues advertised Request for Proposals. The City staff reviews and rates the responses, and the City Commission makes the final funding determination. The Organization also receives City of Miami general funds through the Mayor's Poverty Initiative Campaign, also on a cost basis, for the provision of services.

DISCUSSION

In order to determine whether there is a prohibited conflict of interest, it is necessary to analyze the provisions of the City Charter and Code (“City Charter” or “City Code”) Miami-Dade County’s Conflict of Interest and Code of Ethics Ordinance (“County Code”), and Florida Statutes.

City Code

Chapter 2, Article V of the City Code states:

No person [officer, official, employee or member of any board, commission or agency of the City] shall enter into any contract or transact any business with the city or any person or agency acting for the city, or shall appear in representation of any third party before any board, commission or agency of which such person is a member....Any such contract or agreement entered into or appearance made in violation of this section shall render the transaction voidable.

Section 2-612(a), City of Miami Code (2001).

The City’s Code, in Section 2-612(b), extends this prohibition to an employee’s “spouse, son, daughter, parent, brother or sister.”

The Director has a prohibited conflict of interest if the City or her agency [department] transacts business with an entity in which she or her immediate family has an ownership interest. The City’s Code, Section 2-612(b) does not however extend to a former spouse. Therefore, under the City’s Code, the Director does not have a prohibited conflict of interest.

Miami-Dade County Code

Pursuant to Section 2-11.1(c) and (d), Miami-Dade County Code (2001), no person shall enter into any contract or transact any business through a firm, corporation, partnership or business entity in which she or any member of her immediate family has a controlling financial interest, direct or indirect, with the City or any person or agency acting for the City, and any such contract, agreement or business engagement entered in violation of this Subsection shall render the transaction voidable.

The County's Code, in Section 2-11.1(b)(9), defines "immediate family" to mean the spouse, parents and children of the person involved.

Based on the facts presented, neither the Director nor her immediate family has a controlling interest, direct or indirect, in the business entity. The County's Code, Section 2-11.1 does not extend to a former spouse. Therefore, the Director does not have a prohibited conflict of interest in this matter.

State Laws

Section 112.311, Florida Statutes states:

no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the Legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his or her duties in the public interest.

Section 112.313(4), Florida Statutes states:

(3) DOING BUSINESS WITH ONE'S AGENCY.—No...public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest.

Florida State Statute, Section 112.313(4) does not extend to a former spouse. As a result, the Director does not have a prohibited conflict of interest because these provisions of the Florida Statutes do not apply to a former spouse of a public official or employee of a state agency or of a county, city or other political subdivision of the state.

Federal Conflict of Interest Provision

Pursuant to the provisions of 24 C.F.R. §574.625 (2002), pertaining to HOPWA program funding, no person who is an employee, agent, consultant, officer, or elected official or appointed official of a Subrecipient receiving grant funds or project sponsor and who exercises or has exercised any functions or responsibilities with respect to assisted activities, or who is in a position to participate in a decision making process or gain inside information with regard to such activities may obtain a financial interest or benefit from the activity, or have an interest in any contract, subcontract, or agreement with respect thereto, or the proceeds thereunder, either for himself or herself or for those with whom he or she has *family or business ties*. 24 C.F.R.

§574 does not define the term “family or business ties”. However, the City of Miami HOPWA Program Policies and Procedures Manual’s definition of “family” does not extend to a former spouse.

Also, pursuant to the provisions of 24 C.F.R. §570.611 (2002) no persons . . . who exercise or have exercised any functions or responsibilities with respect to CDBG activities assisted under this part, or who are in a position to participate in a decision-making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from a CDBG-assisted activity, or have a financial interest in any contract, subcontract, or agreement with respect to the proceeds of the CDGB-assisted activity, either for themselves or those with whom they have a business or *immediate family ties*, during their tenure or for one year thereafter. 24 C.F.R. §570.3 defines *family* to include all persons living in the same household who are related by birth, marriage or adoption. The Director and the Former Spouse do not live under the same household and are not currently related by birth, marriage or adoption.

As a result, the Director does not have a prohibited conflict of interest because these provisions of the federal regulation do not apply to a former spouse.

When it has been determined that there is a conflict, pursuant to the provisions of 24 C.F.R. §574.625, the City may request that the Department of Housing and Urban Development (“HUD”) grant an exception for these conflicts of interest. As stated in 24 C.F.R. §574.625(b)(1), these may be granted from HUD on a case-by-case basis. However, in the current case, the Director is not in violation of either 24 C.F.R. §574.625 or 24 C.F.R. §570.611.

CONCLUSION

The Director has not violated the City, county, state or federal government’s provisions regarding conflicts of interest as a result of his/her former spouse serving as the Executive Director of an agency transacting business with the City.