Madeleine

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: October 12, 2007

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: Proposed Contract for Design and Environmental Work on the Regents Road Bridge

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INTRODUCTION

The City Attorney's Office has twice previously opined that a proposed contract between the City and Project Design Consultants [PDC] for the final design of a bridge on Regents Road may not be lawfully entered into because it would violate sections 1090 and 87100 of the California Government Code. See City Attorney's Memoranda of April 4, 2007 and July 24, 2007 (attached). This conclusion arose from the fact that PDC was retained in 2003 to perform an evaluation of several alternatives for improving traffic flow in University City, including the Regents Road Bridge [Phase I], and was at that time also promised a subsequent contract, without any intervening competitive procurement process, to design any alternative that the City might choose to build as a result of the earlier study [Phase II]. As a result of this arrangement, PDC had an inherent incentive, when performing Phase I, to present analyses to the City that would result in the most lucrative Phase II contract.

On July 22, 2007, outside counsel for the City issued a memorandum questioning the conclusions in this office's April 4, 2007 memorandum; this office's July 24, 2007 memo responded to outside counsel's memo. On September 4, 2007, the City Council first considered an ordinance approving this contract despite the City Attorney's continued concerns. At that hearing, Michael Cowett, a partner at the law firm of Best, Best & Krieger [BBK], representing PDC, offered brief verbal comments contending that no violation of section 1090 would affect the proposed Phase II contract. Mr. Cowett did not offer an opinion on the section 87100 violation. Second reading of the ordinance was scheduled for October 9, 2007. At that hearing, BBK, this time represented by Attorney Sophie Akins, reiterated its contentions on PDC's behalf. Also on October 9, 2007, the City Attorney's office presented both a verbal explanation of its continuing concerns, and a description of the relevance of certain documents showing that PDC's Phase I work was actually affected by its financial interest in Phase II, some of which documents had been recently discovered. Prior to the conclusion of the City Attorney's

presentation, the Council President requested continuance of the item for one week, and requested that the City Attorney's updated analysis be reduced to writing. This memorandum and its attachments fulfill that request.

QUESTIONS PRESENTED

1. How has the emergence of new information since September 4, 2007 affected the City Attorney's prior opinion that the proposed design contract is unlawful?

2. How has the analysis presented by PDC's attorney at the September 4, 2007 and October 9, 2007 Council hearings affected the City Attorney's prior opinion that the proposed design contract is unlawful?

SHORT ANSWERS

1. The California Court of Appeals, Fourth District (San Diego) released its decision in *Lexin v. Superior Court*, 154 Cal. App. 4th 1425, on September 7, 2007. In addition to reiterating and clarifying controlling law as discussed in our earlier memoranda, *Lexin* cast additional light on the relevance of e-mail communications that establish that PDC knew that its work on the Phase I contract would affect its financial interest in the Phase II contract, including some such communications that were discovered after September 4, 2007. These communications strongly suggest that PDC altered its analysis for the purpose of casting a favored alternative in the best light, thus increasing the likelihood that that alternative would form the Phase II scope of work. Moreover, a recently discovered communication from PDC explicitly states that this outcome was PDC's objective throughout its Phase I engagement.

2. PDC's attorneys suggested at the September 4, 2007 and October 9, 2007 Council hearings that section 1090 does not apply to PDC in this context. This contention is based on the view that PDC is not an "employee" of the City because it did not exercise "considerable influence" over the Council. These contentions are at odds with the overwhelming weight of the case law under section 1090, as well as the facts at hand. First, the law is crystal clear that section 1090 applies not only to employees but also to independent contractors of a public agency when they participate in the making of a contract. Second, the law clearly establishes that, in considering a section 1090 question, we must examine PDC's role through the "whole" of the transaction, including its "continuing course of conduct" over the entire Phase I period. There is no question that PDC contributed significantly to the process when viewed as a whole.

ANALYSIS

We have continued to monitor developments in case law, and to examine the documentary evidence related to the conflict of interest questions regarding this contract, in the time following the first reading of the ordinance that would approve the PDC Phase II contract.

In addition, we have examined BBK's analysis as presented at both prior hearings on this issue. We continue to be firmly of the opinion that the proposed PDC Phase II contract would complete a violation of section 1090 (which prohibits public officials, including consultants, from participating in the making of any contract in which they have a financial interest), and of section 87100 (which prohibits public officials from participating in the making of any governmental decision in which they have a financial interest). The release of the *Lexin* ruling, additional evidence, and a review of the BBK analysis all have reinforced this conclusion.

I. *Lexin v. Superior Court*, 154 Cal. App. 4th 1425 (4th Dist., September 7, 2007)

On September 7, 2007, the California Court of Appeals for the Fourth District, which includes San Diego, released its lengthy opinion in *Lexin v. Superior Court*, 154 Cal. App. 4th 1425, finding that certain members of the San Diego City Employees Retirement System board could be prosecuted for violations of section 1090. *Lexin* reiterated much of the long-established case law cited in our earlier memoranda. *Lexin* affirmed that 1) section 1090 does not require actual bias affecting the performance of a public official's duties, because a public official who has a conflict of interest "should not be trusted, even if he attempts impartiality." *Lexin*, 154 Cal. App. 4th at 1452; 2) the prohibited financial interests under section 1090 "extend to expectations of economic benefit" which "may be direct or indirect and include[ ] the contingent possibility" of financial gain. *Id.* at 1453; 3) participating in the making of a contract includes not only finally drafting, approving, and executing a contract but also "planning, preliminary discussion, compromises, drawing of plans and specifications and solicitation of bids that led up to the formal making of a contract." *Id.* at 1454; 4) that section 1090 applies not only to actual decision makers but also to those in positions where they "could exercise influence" over the making of a contract. *Id*; and 5) that section 1090 is "concerned with any interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolutely loyalty and undivided allegiance" to the public body. *Id.* at 1455.

In addition, *Lexin* clarified two additional principles. First, *Lexin* holds that, in examining a potential section 1090 violation, one must look not only to the conduct that led directly or indirectly to the making of the contract, but also to the "continuing course of conduct" of the government official in question during the entire time that decisions were considered and made that ultimately resulted in the contract. *Id.* at 1455. PDC's action at every portion of Phase I are thus relevant to the section 1090 inquiry, since those actions were means by which PCD "could exercise influence" over the scope of the Phase II contract.

Second, *Lexin* affirmed prior holdings that, to violate section 1090, an official need not know that his actions are illegal, but only that he has a financial interest in the contract the making of which he may influence. *Id.* at 1465. In legal parlance, a requirement of knowledge that is necessary to support a finding is commonly called a "scienter" requirement. Having knowledge of a potential interest in a contract, the official may not "participate in the process that leads to the making of the contract." *Id.* at 1466. Thus, evidence of PDC's knowledge during Phase I of its Phase II interests during takes on added importance in light of *Lexin*.

II. The Relevance of E-mail Communications, Under *Lexin* and Pre-existing Case Law

The "continuing course of conduct" principle and the clarification of the section 1090 *scienter* requirement have taken on added importance in light of certain communications that took place among PDC, its subconsultants, and City staff during Phase I. Some of these documents have been discovered since the September 4, 2007 hearing, while others were discovered previously but have taken on new importance in light of *Lexin*. These communications are discussed below in chronological order, and are attached hereto in the same order.

First, PDC's Bruce McIntyre, on October 15, 2004, informed a number of PDC employees, subconsultants, and City staff that he had "changed the orientation on the comparison graphics from change in delay to change in LOS."[1] See Page 1 of Appendix. The reason for this change was to resolve "Gordon's[2] concern over why the Grade Separation appeared as good as the Community Plan[3] alt." The "Grade Separation" was a traffic improvement option that did not include the Regents Road Bridge; the "Community Plan" would have included both the Bridge and the widening of Genesee Avenue. Thus, the stated reason for discarding one method of measuring traffic flow improvements in favor of another was that the first method did not cast a preferred alternative in a sufficiently favorable light.

Following up on this message on October 20, 2004, Mr. Lutes opined that "The Community Plan is clearly the best" alternative among those studied. Appendix, Page 2. Responding later that evening, subconsultant Lewis Michaelson questioned this conclusion, explaining that he would not be willing to support Mr. Lutes' conclusion in an anticipated meeting with Council President Peters: "I nominate Gordon to go to the meeting with Scott. I would have a hard time using the word 'clearly' in front of 'best.'" Appendix, Page 3 (bottom). Mr. Michaelson then listed numerous factors that, in his view, favored merely widening Genesee Avenue without building the Regents Road Bridge, which factors "Gordon wasn't using" in favoring the Community Plan. Mr. Michaelson also strongly implied that he was uncomfortable with the switch from measuring change in delay to measuring change in LOS, suggesting that the "underwhelming" results of the change in delay study will eventually come out and will undermine PDC's attempts to advocate for the Community Plan.

Agreeing with Mr. Michaelson the next day, subconsultant Sara Katz observed that, although the PDC team had expected their analyses to favor the Community Plan, she did not

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[1] "LOS" stands for "level of service." Change in delay represents the amount by which travel times between given points would change as a result of a given upgrade to transportation infrastructure; level of service is a qualitative description of operating conditions that occur on a given segment of roadway under various traffic volume loads. Thus, "change in delay" and "change in level of service" are alternative methods of measuring traffic improvements.

[2] "Gordon" is Gordon Lutes, a principal of PDC.

[3] The "Community Plan" would have involved both widening Genesee Avenue and building the Regents Road Bridge.

agree with Mr. Lutes that that conclusion was supportable in the end, because "the cumulative factors just did not tell the story we all thought they would." Appendix, Page 3 (top). In Ms. Katz's view, only traffic data (which Mr. McIntyre had altered, per Mr. Lutes' desires, to favor the Community Plan) supported Mr. Lutes' view, and not strongly, while weighing other factors made his conclusion unsupportable other than by "intuition."

These communications are relevant to the section 1090 analysis not because they cast doubt on the correctness of the ultimate choice of an alternative. Rather, they inform the inquiry as to whether the "continuing course of conduct" by PDC involved an ability to alter its conduct in a way that would significantly influence the City's decision on what, if anything, to build. They show that PDC had the ability to manipulate methods of estimating and presenting projected effects of various alternatives, by choosing how to measure effects, and by choosing which factors to allow to influence its conclusions. And they show that PDC did manipulate this data, at least to some degree, to affect which alternatives would look best.

An observation from pages 7-8 of our April 4, 2007 memo bears repeating here: A finding of actual bias affecting a consultant's work is not a necessary element of a section 1090 violation. However, as we observed at that time, *People v. Sobel*, 40 Cal. App. 3d 1046 (1974) establishes that a stronger section 1090 case exists where if PDC "had the opportunity to, and did influence" the making of the contract. The e-mails discussed to this point show both that the opportunity existed and that it was taken.

A later e-mail informs the inquiry in a different way. On February 3, 2006, E&CP Project Manager Kris Shackelford and Department Director Patti Boekamp discussed who should attend a meeting of the San Diego Highway Development Association at which the ongoing Phase I study was expected to be discussed. Ms. Shackleford's response to Ms. Boekamp's inquiry is enlightening. In pertinent part, she said:

> Gordon [Lutes] asked if it would be O.K. for him to do it. I told him that it would be too risky. We are too close and I can't afford for things to go south at this point...I didn't think it would be a good idea for Gordon to be involved, even on his own time. If a "Project" is selected, PDC will get a large contract and the fact that the name "Highway Development Association" is already tainted the scene [sic], I can't see how we can win this one as far as the public perception is concerned. Appendix, Page 4.

This message is significant because it shows not only that E&CP Staff was aware of PDC's conflict of interest during the Phase I work, but more important, that that awareness was communicated to Mr. Lutes. Thus, while it seems obvious that PDC must have been aware of its financial interest in the making of the Phase II contract and the effects of its Phase I work on that contract, this e-mail provides concrete evidence that City Staff discussed that interest, and its potential effect on public perception. with PDC. Thus, the *Lexin* requirement that PDC was

aware of their financial interest in the Phase II contract, and that that interest would be affected by their Phase I work, is supported by concrete evidence.

Finally, all of these considerations come to bear one last time in a single e-mail from Mr. Lutes to PDC's employees and subconsultants on August 1, 2006. This was the day that the City Council approved a resolution selecting the Regents Road Bridge as the alternative to be implemented. After that Council action, Mr. Lutes wrote the following message to several of PDC's staff and subconsultants:

> Congratulations Team! For those who may have missed it....the City Council voted to Certify the EIR ***and select the Regents Road Bridge alternative.***
>
> Key participants in the 45 minute staff presentation were Andy, Keith and Bruce! A key player behind the scenes – especially this last 2 weeks was Theresa as she worked with Bruce to craft the findings and overriding considerations[4] as well as defend the EIR from ***those opposing the Bridge*** including the City Attorney.
>
> ***There will be lots more work before any project is built***, but we need to celebrate the victories when they come. ***Thanks for your 3+ years of work*** on this important project.....
>
> Edited, and with emphasis supplied, from Appendix, Page 5

The legal significance of this message is that it conveys PDC's overarching goal over the course of "3+ years of work." The victory that was won was not merely certification of the EIR, but also selection of the Bridge alternative. The victory that was achieved through that "3+ years of work" was a victory over "those opposing the Bridge." And finally, PDC was well aware, even in that moment of "victory," that they had "lots more work" to do, since they fully expected to move immediately forward with a contract to design the bridge.

There can be no doubt from this message that PDC viewed its Phase I mission, which it pursued over more than three years, not as presenting an unbiased evaluation of alternatives that would serve the public interest, but as achieving approval of the Regents Road Bridge Alternative so that it could move onto the next phase, for which it would be paid nearly $5 million.

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[4] "Theresa" refers to Theresa McAteer, a private attorney who drafted the referenced documents, which are necessary to support approval of a project that, like the Regents Road Bridge, would have significant and unmitigatable environmental impacts. It is telling that these documents were only created with respect to the Bridge, and not for any other alternative studied, despite the fact that it was claimed that the EIR did not recommend any project over the others and that the City Council had not, when they were drafted, expressed a preference for any alternative. By choosing to draft these documents for only one alternative, PDC and its team again sought to increase the likelihood that that alternative would be selected.

III. Best, Best & Krieger's Contention that PDC has not Violated Section 1090

Finally, as noted above, BBK presented its contention that the proposed contract would be lawful at both the September 4 and October 9, 2007 hearings. The substance of those contentions was most completely stated by Ms. Akins on October 9, 2007:

> ...As a threshold matter, PDC is not an employee subject to section 1090. PDC is an independent contractor of the City and does not exert considerable influence over the City Council. However, even if PDC were constructively deemed to be a City employee subject to section 1090, we have concluded that no conflict of interest precludes the City from awarding the agreement for Phase II services to PDC today.

The contention that PDC was not subject to section 1090 because it was "not an employee" is not only without support in the case law construing that statute, but in fact directly contradicts decades of consistent rulings. Applying section 1090 to find that an outside attorney retained by a city was subject to section 1090, the California Court of Appeals held in 1956 that "A person merely in an advisory position to a city is affected by the conflict of interest rule." *Schaefer v. Berinstein*, 140 Cal. App. 2d 278, 291 (1956). The question was not whether the outside attorney was in position to generally "exert considerable influence over the City Council" and thus become a *de facto* employee, as BBK seemed to assume, but whether he was "in a position to advise the city council as to what action should be taken relative to the property involved [which the attorney sought to buy]." *Id.*

Relying heavily on *Schaefer*, the California Attorney General in 1965 applied section 1090 to a temporary financial consultant, finding that the distinctions between employees and independent contractors that control in other contexts do not limit the application of section 1090, which is to be broadly construed. 46 Cal. Ops. Atty. Gen. 74, 78-79 (1965). The 1965 Attorney General's Opinion has been cited approvingly on this question as recently as March of 2007 in *California Housing Finance Agency v. Hanover/California Management and Accounting Center*, 148 Cal. App. 4th 682, 692 (2007). Under *Hanover/California*, "the officer or employee language of Section 1090 must be interpreted broadly. The fact that someone is designated an independent contractor is not determinative; the statute applies to independent contractors who perform a public function."[5] *Id.* at 690. There can be absolutely no doubt that section 1090

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[5] Ms. Akins' October 9, 2007 comments also imply that it is a necessary element of a section 1090 violation that the consultant exert "considerable influence' over the public agency. This contention is without support in the case law. The phrase "considerable influence" has only appeared twice in cases under section 1090, once in *Hanover/California* and once in *People v. Gnass*, 101 Cal. App. 4th 1271, 1298 (2002). In neither case is there any suggestion that the court was describing a mandatory requirement; in both cases the court was summarizing the actual facts of the case. But in any event, there is little doubt that, even if this were a mandatory requirement, PDC

applies to consultants of public agencies, at least within the realm where they actually provide advice.[6] And there is no doubt that in PDC's case, the prohibited Phase II financial interest was directly related to the subject matter of the advice it was hired to give in Phase I.

CONCLUSION

New case law, new evidence, and new outside analysis have all come to light since the proposed ordinance approving the Phase II PDC contract was introduced on September 4, 2007. All of these new considerations lend additional support to our original conclusion that the proposed contract would violate section 1090, as well as section 87100. A contract that arises from a violation of section 1090 is void. *Thompson v. Call*, 38 Cal. 3d 633, 646 (1985).

Given these considerations, the Office of the City Attorney remains convinced that any contract awarding PDC the task of designing the Regents Road Bridge would be unlawful, and would be void *ab initio*. We stand ready to assist the Mayor and Council in moving forward on this issue in a manner that complies with the law.

MICHAEL J. AGUIRRE, City Attorney

By _____
Michael P. Calabrese
Chief Deputy City Attorney

MPC:

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and its team did exert considerable influence over the process that led the Council to select the Regents Road Bridge, and used that influence to increase the likelihood of achieving a favored end.

[6] As noted at the outset of this memorandum, BBK did not question the City Attorney's April 4, 2007 conclusion that the proposed Phase II contract would violate Gov't Code section 87100 as well as section 1090. As our April 4, 2007 memorandum noted, unlike under section 1090, there is no need to rely on case law to establish that section 87100 applies to independent contractors, as the statutory definition of a "public official" explicitly includes consultants in that context. Cal. Gov't Code section 82048.

City Attorney's Memorandum Regarding
Regents Road Bridge Design Contract

October 12, 2007

Appendix

From: "Bruce McIntyre" <BruceM@ProjectDesign.com>
To: "'Kris Shackelford (E-mail)'" <kshackelford@sandiego.gov>, "Gordon Lutes" <GordonL@projectdesign.com>, "'Andy Schlaefli (E-mail)'" <usai@urbansystems.net>, "'Ann French Gonsalves (E-mail)'" <agonsalves@sandiego.gov>, "'Martha Blake (E-mail)'" <mblake@SanDiego.gov "'Mike Mezey (E-mail)'" <MMezey@SanDiego.gov>, "'Sarah Katz (E-mail)'" <skatz@katzandassociates.com>
Date: Fri, Oct 15, 2004 2:08 PM
Subject: RE: Traffic Congestion Comparison

By the way, you will notice that we have done the exercise for the segments as well as intersections.

-----Original Message-----
From: Bruce McIntyre
Sent: Friday, October 15, 2004 2:03 PM
To: Kris Shackelford (E-mail); Gordon Lutes; Andy Schlaefli (E-mail); Ann French Gonsalves (E-mail); Martha Blake (E-mail); Mike Mezey (E-mail); Sarah Katz (E-mail)
Subject: Traffic Congestion Comparison

As we discussed, I have changed the orientation on the comparison graphics from change in delay to change in LOS. Please pardon the handwriting but I wanted to get these out as soon as possible. This resolves Gordon's concern over why the Grade Separation appeared as good as the Community Plan alt. It was because we were focusing on delay rather than LOS.

A full red dot means the LOS diminishes by two or more levels, a half red circle indicates a decline of one level. Yellow indicates no change. Full green indicates LOS improvement by 2 or more levels while a half green indicates an improvement of one level. An exclamation point indicates that the LOS would go from Acceptable to Unacceptable. A star indicates that the LOS would go from Unacceptable to Acceptable. So green circles and stars are good. Also, as you will see, this matrix correlates with the colored tables which were included in the EIR.

My thought would be to convert the consumer reports graphics to this information. I'm not sure if I want to include the matrix because it may set a precedent for doing a similar comparison for other issues which would be tough.

Please let me know your thoughts.

Bruce McIntyre

ProjectDesign Consultants

701 B Street, Suite 800

San Diego, CA 92101

A-1

From: Gordon Lutes [mailto:GordonL@projectdesign.com]
Sent: Wed 10/20/2004 10:23 PM
To: Lewis Michaelson; Bruce McIntyre; Kris Shackelford (E-mail); Gordon Lutes; Andy Schlaefli (E-mail); Mike Mazey (E-mail); Ann French Gonsalves (E-mail); Martha Blake (E-mail); Sara M. Katz; Theresa McAteer (E-mail)
Subject: RE: Revised Traffic Comparison Tables

Here is my take on the traffic tables:

-The Community Plan is clearly the best. It is the best in tables 6,7 and 8. It ties with Genesee widening for the best in table 5.

- Genesee Widening comes in second. As you would expect widening is a close second when considering segments LOS, but drops when considering intersection LOS. Widening in table 6 has the same benefit as the Bridge, Grade Separation and Combination Grade Separation/Bridge. Widening in Table 8 is behind the combination Grade Separation/Bridge and Grade Separation and has the same impact as the bridge..

-The combination of Grade Separation/Bridge is in third place.

- The bridge comes in a close fourth having the same impact as the Grade Seperation/Bridge combination on tables 5,6 & 7, but falls below in table 8.

- The grade separation does poorly as you would expect when looking at the segment LOS in tables 5 and 7. Grade separation does well when looking at intersection LOS. Weighing the tables equally, I would put grade separation 5th, but if we only considered intersection LOS Grade Separation would be third..

In summary, I think the traffic tables make the case for the community plan, but make it difficult to pick a second best alternative.

-----Original Message-----
From: Lewis Michaelson [mailto:LMichaelson@KatzandAssociates.com]
Sent: Wednesday, October 20, 2004 8:21 PM
To: Bruce McIntyre; Kris Shackelford (E-mail); Gordon Lutes; Andy Schlaefli (E-mail); Mike Mazey (E-mail); Ann French Gonsalves (E-mail); Martha Blake (E-mail); Sara M. Katz; Theresa McAteer (E-mail)
Subject: RE: Revised Traffic Comparison Tables

Here's what I would make of these tables if I was trying to cast a fairly unbiased eye on which alternatives made things better or worse for traffic congestion irrespective of other factors. People with biases will no doubt selectively focus on certain aspects that support their position.

From: "Sara M. Katz" <SKatz@KatzandAssociates.com>
To: "Lewis Michaelson" <LMichaelson@KatzandAssociates.com>, "Gordon L <GordonL@projectdesign.com>, "Bruce McIntyre" <BruceM@ProjectDesign.com>, "Kris Sh mail)" <kshackelford@sandiego.gov>, "Andy Schlaefli (E-mail)" <uasi@urbansystems.net>, (E-mail)" <MMezey@sandiego.gov>
Date: Thu, Oct 21, 2004 9:33 AM
Subject: RE: Revised Traffic Comparison Tables

I too have reviewed the docs and am hard pressed to make a compelling, attractive and passionate argument for the community plan. Given the history and emotion of the issue, "clearly" needs to be clear to all - and an easy sell. THIS IS NOT an easy sell. The cumulative factors just do not tell the story we all thought it would. And, I would not want to be the person that has to defend the "intuition" justification before the community and the media. We have to look at all the factors, not just the traffic data. And even with the traffic data, the reason to "drive" the community plan as the recommendation is not that strong of an argument.

Remember, we have a very informed group of stakeholders and we have worked tirelessly to try and find the most compelling reasons and how best to show those. The "time savings" is not that impressive, no matter how you slice and dice the data. If we are using the data to tell the story, it is not a very good story. If the model is weak, then so be it. But, we have all been waiting to see the "facts" and now that they are here.....

-----Original Message-----
From: Lewis Michaelson
Sent: Wednesday, October 20, 2004 11:00 PM
To: Gordon Lutes; Bruce McIntyre; Kris Shac[illegible]); Andy Schlaefli (E-mail); Mike Mezey (E-mail); Sara M. Katz
Subject: RE: Revised Traffic Comparison Tables

I nominate Gordon to go to the meeting with Scott. I would have a hard time using the word "clearly" in front of "best." To me, the community plan is slightly better than widening in most cases from a traffic congestion relief standpoint. However, when one factors in cost, construction aggravation, and unmitigable significant environmental impacts (I know I didn't state those factors in my first email and Gordon wasn't using them either), will the small congestion relief advantage of the community plan overcome the downside tradeoffs that will probably be assigned to it for the other criteria the committee identified as important to evaluate in making the decision? I realize now I was taking those other factors into account when I said that widening "looks attractive."

It seems to me the only criteria for which widening probably will not fair better than the community plan will be for spreading the pain and safety (because the bridge would provide an alternative route).

Also, keep in mind that right now we are only comparing the "greens and reds." Will the data be available for people to do their own analysis, in which total trip time savings would be revealed, which as I recall, were underwhelming?

Is Kris' meeting tomorrow supposed to be the one in which she tells Scott what staff recommends?

From: Patti Beekamp
To: Kris Shackelford
Date: 2/3/06 1:23PM
Subject: Re: Fwd: SDHDA January 2006 Newsletter

Maybe I can ask them to stick to the general concept of the gaps and not focus on the environmental document for this specific situation

>>> Kris Shackelford 02/03/06 8:40 AM >>>
No, it won't be me this time. Gordon asked if it would be O.K. for him to do it. I told him that it would be too risky. We are too close to the end and I can't afford for things to go south at this point. Gordon can easily be sucked into the debate because we have tons of information now. Yesterday I talked to Greg Gastelum who's putting this together and gave him some ideas of how he can stage this debate. I explained to him why I didn't think it would be a good idea for Gordon to be involved, even on his own time. If a "Project" is selected, POC will get a large contract and the fact that the name "Highway Development Association" is already tainted the scene, I can't see how we can win this one as far as the public perception is concerned.

Kris

>>> Patti Beekamp 02/02/2006 4:21 PM >>>
Who are the lucky presenters on the UC North/South Connectors "Gap" presentation... you? Hey, Frank mentioned that he is going to be going to some of these meetings in his new job and wondered if he'd maybe see you there that day

Patti

A-4

Urban Systems

003702

From:	Gordon Lutes [gordonl@projectdesign.com]
Sent:	Thursday, August 03, 2006 2:39 PM
To:	usai@urbansystems.net; Sara M. Katz; LMichaelson@KatzandAssociates.com; JShira@KatzandAssociates.com; jtognoli@tylin.com; KMerkel@MerkelInc.com; tcmcatee@pacbell.net
Cc:	brucem@projectdesign.com; Gordon Lutes
Subject:	RE: Celebration and Debrief of Council Votes 6-2 to certify EIR and select Regents Road Bridge
Importance:	High

We would like to celebrate this milestone and have a "debriefing" at PDC at 3 PM on Monday, August 7. We will meet in our large 8th Floor Conference Room. We apologize for the short notice, but hope you can join us. We wanted to celebrate while the milestone was still fresh and before Bruce goes on vacation. Please RSVP. I hope to see you all on Monday!

-----Original Message-----
From: Gordon Lutes [mailto:gordonl@projectdesign.com]
Sent: Tuesday, August 01, 2006 9:33 PM
To: usai@urbansystems.net; Sara M. Katz; LMichaelson@KatzandAssociates.com; JShira@KatzandAssociates.com; jtognoli@tylin.com; KMerkel@MerkelInc.com; tcmcatee@pacbell.net
Cc: brucem@projectdesign.com
Subject: Council Votes 6-2 to certify EIR and select Regents Road Bridge

Congratulations Team! For those who may have missed it, after 6 hours, including over 3 hours of public testimony evenly divided between those that supported the Bridge and those that were against the Bridge, the City Council voted to Certify the EIR and select the Regents Road Bridge alternative.

Key participants in the 45 minute staff presentation were Andy, Keith and Bruce! A key player behind the scenes - especially this last 2 weeks was Theresa as she worked with Bruce to craft the findings and overriding considerations as well as defend the EIR from those opposing the Bridge including the City Attorney.

There will be lots more work before any project is built, but we need to celebrate the victories when they come. Thanks for your 3+ years of work on this important project. We have set a new standard for community involvement to date and we can look forward to continued community involvement in this project as we move forward.

Gordon

A-5

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: April 4, 2007

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: Proposed Contract for Design and Environmental Work on the Regents Road Bridge

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INTRODUCTION

The City's Engineering and Capital Projects Department [E&CP] has proposed a contract under which Project Design Consultants [PDC] would perform final design work and prepare California Environmental Quality Act [CEQA] documentation for the proposed Regents Road Bridge in University City. The proposed contract requires City Council approval. In 2003, PDC was awarded a contract to study alternatives for relieving traffic congestion in the area and performing CEQA analysis of these alternatives [Phase I]. No pre-determined preference among alternatives was stated at the outset of that earlier study. As a result of that study, the Mayor and Council decided to pursue construction of the Regents Road Bridge. This will require project-specific design and environmental work [Phase II]. No further competitive selection process was followed to choose a consultant to perform this later design and environmental work. Rather, E&CP has proposed PDC as the contractor on the basis of its having performed the earlier study that led to the selection of the Regents Road Bridge alternative.

Several questions have arisen regarding the legality of the proposed Phase II contract, including whether the proper procurement processes have been followed, whether the proposed form of Council approval is adequate, and whether the proposed contract would result in a violation of certain conflict of interest provisions of the California Government Code and San Diego Municipal Code.

QUESTIONS PRESENTED

1. Is the work being assigned to PDC in the proposed Phase II contract within the scope of work that was defined in the 2002/2003 procurement process, such that the Phase II contract may be justified on the basis of the 2002/2003 procurement process?

2. Is PDC precluded from being awarded the contract to design and perform CEQA analysis for the proposed Regents Road Bridge because of its involvement in the selection of that bridge as the preferred choice from among alternatives?

SHORT ANSWERS

1. No. Because the currently contemplated project-level Environmental Impact Report [EIR] was not part of the original procurement, a new procurement process is needed for that EIR.

2. Yes. Because PDC played a central role in the process by which the Regents Road Bridge was selected as the preferred alternative, it may not now be awarded a resulting contract to design that bridge and perform related environmental work.

BACKGROUND

In 2002, the City, through E&CP, issued a request for qualifications [RFQ] for Architecture-Engineering consultants to perform specified work related to the "University City North/South Transportation Corridor." The general purpose of the project was to study alternatives for improving traffic flow between the northern and southern portions of the University City community. The "General Description and Scope of Services" divided the requested work into two phases, as follows:

> Phase I includes the preparation of ***all CEQA documentation for the proposed project.*** The environmental document and associated technical studies must equally evaluate the following combinations or work associated with the proposed North/South Transportation Corridor Project: Regents Road Bridge only, Genesee Avenue widening only, both Regents Road Bridge and Genesee Avenue widening, and no project alternative. The Phase I scope also includes the ***preliminary design of the proposed work to the level required to support the proposed environmental document.*** Phase II includes final design plans, specifications and engineers estimate (PS&E package). (Emphasis added.)

The deadline for submittals in response to this RFQ was July 15, 2002. Originally, fees were estimated at $500,000 for Phase I and would "not exceed $1,500,000" for Phase II.

Under normal circumstances, the City selects a consultant with reference to a specific project. It is not uncommon for such consulting services to be "segmented" into different phases, as was the case here. The segments are commonly awarded to the same firm but performed in a logical sequence. While preliminary engineering and environmental analysis are

often combined even for complex projects like the building of a bridge, final detailed design is commonly deferred to a later segment, since it cannot proceed until final environmental clearance has been received. *See* Caltrans Local Assistance Procedures Manual, p. 10-6 (May 1, 2006). Thus, there would be nothing fundamentally problematic about the selection of a consultant to perform both preliminary engineering work and an environmental assessment of a specific, identified project and then, in a later segment, perform final design work for that project.

However, this project has not fit that pattern. Rather, the first phase of the work did not call for preliminary engineering work and environmental assessment of a specific project, but instead called for a study of several alternative projects, with none initially identified as the preferred alternative. And because there was no preferred project at the outset, no project-level EIR was called for at the time. City staff has stated that it was their intent, and would have been understood by all potential consultants, that a project-level EIR would be needed after a preferred alternative was selected, but this was not specified in the RFQ. Rather, according to City staff, it was contemplated that this need, though anticipated from the outset, would be addressed later, when the necessary selection of a preferred alternative had been made. Whether a new consultant selection process would be needed at this later stage was apparently not considered at the time. However, although City staff reports that it was always anticipated project-level CEQA analysis would be needed, and this project-level CEQA analysis therefore presumably could have been included in the Phase II scope of work as crafted in 2002, it was not included.

After submittals from nine different firms, the City chose PDC to do the work described above. A contract with PDC (the "Phase I Contract")[1] was approved by City Council Resolution R-297850 on April 21, 2003. It was then executed by the City and PDC, and approved by the City Attorney's office on April 24, 2003. Among other things, the Phase I Contract called for (during "Funding Phase II" thereof) the preparation of a "First Screencheck", "Second Screencheck," "Third Screencheck," "Draft," and "Final" EIR. This EIR would cover the "four primary alternatives equally," and also address "any other alternatives identified" during "Funding Phase I" of the Phase I Contract.

Significantly, both the RFQ and the Phase I Contract explicitly contemplated that the preparation of "all CEQA environmental documentation" would be performed in Phase I. For this reason, the level of "preliminary design of the proposed work" for the various alternatives was, according to the RFQ, to have been sufficiently detailed "to support the proposed environmental document." The initial portion of the Phase I Contract (i.e., "Funding Phase I")

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[1] Although the Phase I Contract covered two "Funding Phases," called Phase I and Phase II, these funding phases should not be confused with the Phase I and Phase II called for in the RFQ. The Phase I Contract, in its Scope of Work, corresponded to the RFQ's description of Phase I. However, the total funding for the Phase I Contract, originally estimated in the RFQ at $500,000, had by the time of the Phase I Contract's execution, less than a year later, more than tripled to $1,563,250.

was largely devoted to such preliminary design, and thus included the plotting of utilities, mapping, geotechnical studies, two "Advance Planning Studies" for the Regents Road Bridge Alternative, planning level construction cost estimates, and a Constraints Report for up to six alternatives. Nothing in either the RFQ or the resulting Phase I Contract suggested that any CEQA work was to be done in Phase II; to the contrary, the explicit language of these documents says that "all CEQA environmental documentation" was to be completed in Phase I. Phase II was, from the outset of the project, to have been for the "final design plans, specifications and engineers estimate."

City staff has stated that it always intended that further environmental work would be done once a preferred alternative was identified. And indeed, it would have been reasonable to have expected that, once a specific project was selected, a project-level CEQA document would be needed. Nonetheless, no such work was identified in any of the procurement documentation at the time.

PDC, in cooperation with both its subconsultants and City staff, presented its Phase I EIR to the City Council on August 1, 2006. As a result of that presentation, in combination with a recommendation by the Mayor, the Council both certified the EIR[2] and selected, from the alternatives studied, the Regents Road Bridge alternative. *See* San Diego Resolution No. R-301787.[3]

Following that hearing, City staff entered into negotiations with PDC for a new proposed contract (the "Phase II Contract"), which was finalized for presentation to the Council in approximately December of 2006. It included not only final design of the alternative selected by the Council – the Regents Road Bridge - but also preparation of a new EIR. Of the $5.78 million Phase II Contract total (up from the original 2002 estimate of $1,500,000), there is included $1,157,163.85 in "CEQA and Permit Processing" costs. Approval of this contract awaits Council action.

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[2] That certification was a matter of some controversy around the time of the August 1, 2006 Council hearing and thereafter, as there arose questions as to whether the EIR was a "project EIR," which "examines the environmental impacts of a specific development project" or a "program EIR," which "may be prepared on a series of actions that can be characterized as one large project and are related" in various ways. *Sierra Club v. County of Sonoma*, 6 Cal. App. 4th 1307, 1315-16 (1992). ***This memo does not address the question of which of these types of EIRs was required or performed as a result of the Phase I Contract, which is the subject of ongoing litigation***. The significant fact, for the purposes of the questions addressed here, is that City staff stated at the August 1, 2006 hearing that, despite the fact that the RFQ and Phase I Contract had not been explicit in identifying the need for a CEQA aspect to Phase II (and in fact contained language that seemed to exclude the possibility), further environmental work was, in fact, needed to move forward with the Regents Road Bridge alternative.

[3] The Council's August 1, 2006 action has been altered to some degree by its March 27, 2006 action, which clarified that the selection of the Regent's Road Bridge as the preferred alternative would be contingent upon completion and certification of a project-level EIR.

The Phase II Contract as proposed calls for CEQA work by PDC itself, as well as by four subconsultants. However, PDC has recently sold its environmental planning group to Helix Environmental Planning, Inc., which was never previously involved in any phase of the project, in any capacity, either as a consultant or as a subconsultant. PDC remains in business and intends to perform the non-environmental aspects of the Phase II Contract. However, as PDC no longer employs environmental planning personnel, it now proposes to subcontract this work to Helix.

ANALYSIS

I. The Environmental Work Called for in the Phase II Contract was not Subject to any Competitive Procurement Process, and the Proposed Contract, as it Relates to that Environmental Work, Would Violate Council Policy 300-07 and Administrative Regulation 25.60.

As a general rule, the selection of consultants is not subject to the same competitive procurement requirements as most City procurement. While most purchases of goods and services must be conducted pursuant to competitive processes spelled out in San Diego Municipal Code [SDMC] section 22.3212, consultant contracts are excluded from these requirements. *See* SDMC section 22.3003 (defining "contract for services" to exclude consultant services).

However, the selection of consultants, though generally exempt from the Municipal Code's competitive procurement provisions,[4] is subject to both Council Policy [CP] 300-07 and Administrative Regulation [A.R.] 25.60 (specific to architecture and engineering consultants). Under CP 300-07, such consultants must be selected on the basis of a published RFQ.[5] *See* CP 300-07, § A.2; A.R. 25.60, § 8.1.3 (requiring publishing for the selection of a consultant to perform "any specific contract for an expenditure in excess of $250,000.") At least three consultants must be considered, and the "highest qualified person" must be selected, with the basis for that selection spelled out in detail where Council approval is, as here, required. *See* CP 300-07, §§ A.3 and B.1. A fair price is then negotiated with the selected consultant. Price is not normally a selection criterion, coming into play only if, in the City's judgment, a fair price cannot be negotiated.

As noted, the Phase I Contract was awarded pursuant to a published RFQ, whose propriety, at least as to the Phase I work, is not within the scope of this memo. If the proposed

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[4] The Municipal Code does specify that consultant selection must be approved by the City Council where the contract in question, or any combination of contracts for the same consultant in a given fiscal year, exceeds, $250,000. SDMC § 22.3223.

[5] This requirement is subject to certain minimum dollar thresholds that are far exceeded here.

Phase II contract, then, can be viewed as merely an extension of that award, it might be seen as being in compliance with CP 300-07 and A.R. 25.60.

However, this is not the case. The RFQ and the Phase I Contract very explicitly stated that "all CEQA environmental documentation" would be performed during Phase I.[6] Because the environmental work that was awarded as part of Phase I was completed, and no environmental work was called out as part of Phase II, a separate award process is required at least for the environmental aspect of Phase II. And, because the proposed cost of the work (per the Phase II Contract) would exceed $250,000, it would need to be awarded pursuant to published notice and approved by City Council. *See* CP 300-07; A.R. 25.60; SDMC section 22.3223.[7] While a project-level EIR might have been called for in Phase II, under normal "segmenting" of consultant work, this was not done. These services must be procured anew.

Because the environmental portion of the Phase II work cannot be considered part of the Phase II scope of work and awarded to PDC on that basis in any event, this memo need not reach the question of whether Helix, having acquired PDC's environmental planning group, could stand in PDC's place at the outset of the Phase II Contract.

II. The Proposed Phase II Contract Would Result in Violations of Sections 1090 and 87100 of the California Government Code.

If the procurement issues discussed above were the only problems with the proposed contract approval, they might be cured by redrafting the Phase II Contract to exclude the environmental work, crafting an ordinance to approve the bridge design portion consistent with

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[6] As noted above, it has been suggested by City staff that, despite this unambiguous language, it would have been understood that further environmental work would likely be needed after Phase I was completed. Even if those reviewing the RFQ would have understood that more environmental work was likely to follow, however, the fact remains that the RFQ itself did not include environmental work in Phase II. It was unambiguous and cannot be amended by implication nearly four years after the fact.

[7] To the extent that the Phase II Contract can be justified as being within the scope of the 2002/2003 procurement process (i.e. for the bridge design work), another problem arises. The Phase II contract calls for services to be completed more than five years after the original April 24, 2003 Phase I contract date. Thus, if the Phase II contract were to be viewed as a continuation of the Phase I contract – which is the only conceivable justification for allowing it to go forward without a competitive selection process, it would violate City Charter section 99, which requires that City contracts involving obligations lasting more than five years be approved by an ordinance passed with six votes or more. No such ordinance has been presented; the document currently pending before the Council is a resolution.

This problem could be resolved by the drafting and docketing of such an ordinance, if it were the only problem. But as discussed below, the Phase II contract – in its entirety – also represents an unlawful conflict of interest, and this problem is not curable.

City Charter section 99, and separately procuring the environmental portion. However, there is a larger, more intractable problem. Any award of Phase II work to PDC would create a violation of two provisions of the California Government Code. Specifically, Government Code sections 1090 and 87100 both prohibit the proposed contract with PDC, or indeed any contract that would award to PDC the project-specific follow-on work that will flow from the City's selection of the Regents Road Bridge Alternative as the preferred alternative from among those studied in Phase I.[8]

A. Government Code §1090

Section 1090 of the Government Code is a codification of a pre-existing common law prohibition against self-dealing by government officials. *See Berka v. Woodward*, 125 Cal. 119, 122 (1899). Under §1090:

> 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.

This provision is construed broadly to effectuate the purpose of protecting the public against possible corruption in public officials. *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 237 (1968). Thus, it applies to "making" of contracts in a broad sense that includes "preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids." *Id.* Section 1090 has been held to apply not only to those who actually have the power to make contracts, but also to those who contribute to the process "merely in an advisory capacity." *Schaefer v. Berinstein*, 140 Cal. App. 2d 278, 291 (1956). Moreover, it has specifically been held to apply to consultants, when they advise government officials on matters of public policy. 46 Op. Cal. Att'y Gen. 74 (1965).

More important, a violation of section 1090 arises not from a public official's actual attempt to profit from the contract in question, but from the possibility that he might do so. The public has a right to demand "absolute, undivided allegiance" from such a person, and this expectation is violated "as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty." *People v. Honig*, 48 Cal. App. 4th 289, 325 (1996). Actual bias or improper dealing is not required for a violation of section 1090. Where the person in question "had the opportunity to, and did influence the execution [of a contract] directly or indirectly to promote his personal interests," section 1090 is violated. *People v. Sobel*, 40 Cal. App. 3d 1046, 1052 (1974). An inquiry into motives is not part of the analysis. The courts recognize that "an impairment of judgment can occur in even the most well-meaning men," and section 1090 is "concerned what might have happened rather than merely what actually

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[8] In addition, sections 1090 and 87100 are, in substance, codified in the Municipal Code at sections 27.3560 and 27.3561, respectively. Thus, the analysis below regarding potential violations of state law yields the same conclusions under municipal law.

happened." *People v. Gnass*, 101 Cal. App. 4th 1271, 1287 (2002). Thus, in this case, it is not relevant to inquire whether PDC actually performed its Phase I work in a manner that would have tended to lead to a more lucrative Phase II contract.[9] The question is whether it was in a position where it could have done so.

Obviously, whether a violation of section 1090 will result from a contract's execution is fact-specific. However, there seems little doubt that such a violation would likely be found in this case. PDC undeniably was a central participant in the preparation of the EIR, and of the verbal and video presentations of August 1, 2006, which led to the Council's decision to order the staff to move forward with the design of the Regents Road Bridge. The Phase I contract called for an even-handed evaluation of several alternatives. This placed PDC in a position where it had the power to control the framing of the recommendations to the Council, and where it thus could, for example, slant the Phase I analysis toward the alternative that would generate the largest Phase II contract, since it knew that the City intended to have PDC do the Phase II work. There can be little doubt that this situation represented one of "possible temptation for the average man." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

A contract made in violation of section 1090 is not merely voidable, but void. *Thompson v. Call*, 38 Cal. 3d 633, 646 (1985). Thus, any purported Council approval of the proposed Phase II Contract (or any Phase II contract with PDC) would, in effect, be a nullity, as the contract cannot be valid in any event.

B. Government Code §§ 87100 and 87100.1

Finally, the Political Reform Act, at section 81700 is directly applicable here and also prohibits this contract. It provides:

> No public official[10] at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

Section 87100 applies to individuals, and thus affects those PDC principals and employees who directly participated in the decision in question.[11] Cal. Gov't Code section

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[9] Indeed, it should be acknowledged here that this memo is not intended to suggest that PDC in any way altered its performance in order to maximize benefits to itself.

[10] That section 87100 applies to consultants is even more clear than with section 1090, as the statute itself unambiguously so provides. *See* Cal. Gov't Code section 82048.

[11] Although a consultant's participation in a decision may be cleansed by "independent substantive review" of that decision, this exception to section 87100's prohibition is inapplicable here, because it requires that the agency making the decision not rely on the consultant's work unless that data has been independently verified by the decision-making body. *In re Nelson*,

87103. A disqualifying effect is any effect on the consultant's economic interests that is distinguishable from the effect of the decision on the general public.

Again, there can be no doubt, based on the facts discussed above, that PDC "participated" in the making of the Council's August 1, 2006 decision to select the Regents Road Bridge from among the available alternatives. And PDC certainly knew it had a financial interest, clearly distinguishable from that of the general public, in which alternative was selected. This selection would, according to the original RFQ, define PDC's Phase II scope of work.

The only factor that might take this situation out of the operation of section 87100 is section 81700.1, which was added in 1991 specifically to limit the operation of section 87100 where engineers are concerned. It provides that there is no prohibited financial interest where a consultant engineer renders services "independently of the control and direction of the public agency" and "does not exercise public agency decision making authority." Cal. Gov't Code section 87100.1(a).

There are no cases construing section 87100.1. The few Fair Political Practices Commission decisions that mention it shed no real light on whether it would be applied in a situation where the consulting engineer not only rendered services, but did so with the clear expectation that those services would inform a selection among alternative projects that would directly affect the consultant's bottom line because of an expected follow-on contract.

It seems unlikely that the Legislature intended to declare by simple fiat that an engineering consultant "does not have a financial interest" where, as here, it is clear that such an interest exists. Because section 87100 codifies a long-standing common law rule, section 87100.1, which limits section 87100's application, must be strictly construed. *In re Jeffrey M*, 141 Cal. App. 4th 1017, 1027, n. 5 (2006). There is nothing in the legislative history that suggests that section 87100.1 was intended to exempt a situation where the value of a follow-on contract with the engineer would flow directly from the decision in question. Rather, it was enacted to alleviate a situation where public agencies were "being forced to delay action or impose moratoria on requests for certain types of discretionary approvals because they ha[d] insufficient staff to evaluate such requests." CA Legis. 887 (1991). Such concerns do not appear implicated here. It is surpassingly unlikely that section 87100.1 was intended to generally permit consulting engineers to participate in decisions where they would have the chance to steer lucrative contracts toward themselves.

Moreover, even if section 81700.1 casts doubt on the applicability of section 81700, section 1090 is still applicable, because it has been specifically found that the former did not affect the application of the latter. *See City of Vernon v. Central Basin Water Dist.*, 69 Cal. App. 4th 508 (1999) (The Political Reform Act did not by implication repeal section 1090, and both

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FPPC Inf. Adv. Ltr. I-91-437, *7 (Oct. 29, 1991). The City Council did not independently check the data presented to it by PDC.

must be complied with). Thus, approval of the proposed Phase II contract would result in a violation of at least one, and more likely two provisions of the Government Code.

CONCLUSION

The proposed Phase II contract with PDC would be inconsistent with state and municipal law in numerous respects. First, the procurement process from 2002/2003 cannot support the environmental work now proposed in the Phase II Contract, because that work, even if it was contemplated at the time, was not called for in the original scope of work. A new procurement process under CP 300-07 and A.R. 25.60 would be necessary for the environmental work. Second, to the extent that the non-environmental work is within the scope of the original procurement, it would extend the contract beyond five years, and thus require approval by an ordinance supported by a six-vote Council majority, under City Charter section 99. Such an ordinance has not been presented.

But, more important, such a contract with PDC cannot be approved in any event, because it would result in a statutorily prohibited conflict of interest. PDC had a direct interest, when performing its Phase I work, in influencing the City to select a project alternative that would produce the most lucrative Phase II Contract for PDC. This would violate sections 1090 and 87100 of the Government Code, and corresponding provisions of the San Diego Municipal Code, and thus render the contract void.

MICHAEL J. AGUIRRE, City Attorney

By _____
Michael P. Calabrese
Chief Deputy City Attorney

MPC:sc

cc: Patti Boekamp, Engineering & Capital Projects Department

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: July 24, 2007

TO: Honorable Mayor and City Council Members

FROM: City Attorney

SUBJECT: Proposed Contract for Design and Environmental Work on the Regents Road Bridge

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INTRODUCTION

This office has received a copy of a memorandum to you, dated July 13, 2007, from Kevin Sullivan, Esq. Mr. Sullivan serves as outside counsel to the City, under the direction of this office, in the matters of *Friends of Rose Canyon v. City of San Diego*, SDSC No. 871984 and *Las Palmas Condominium Owners' Association et al. v. City of San Diego*, SDSC No. GIC 872000. Mr. Sullivan's memo addresses procurement and conflict of interest questions related to a proposed contract between the City and Project Design Consultants, Inc. [PDC] for the design and environmental analysis of a proposed bridge extending Regents Road over Rose Canyon in the University City Community.[1]

As you may recall, this Office opined on these same issues in the attached April 4, 2007 memo to you from Chief Deputy City Attorney Michael Calabrese, which concluded that:

1. the proposed contract, to the extent that it called for an environmental analysis, was outside the scope of the procurement procedures that had been used to hire PDC in 2003, and thus required a new consultant procurement process under CP 300-07 and A.R. 25.60;

2. the proposed contract would, because it would have extended the City's

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[1] Mr. Sullivan's memo was presented as a confidential attorney-client communication. We note that it was attached to a form CM-1472 that was routed to at least nine different city offices on July 20 and 23, 2007. This wide distribution may have effectively eliminated any privilege. However, because the Council has not explicitly waived the privilege as of the date of this memo, we will refrain from revealing the contents of Mr. Sullivan's memo in this memo, in order to preserve any privilege that may remain.

contractual relationship beyond five years from the previous date of hire on this project, require adoption by an ordinance receiving six votes on the Council, per the requirements of section 99 of the City Charter; and

3. the proposed contract could not be awarded to PDC in any event, because it would result in violations of Sections 1090 and 87100 of the California Government Code, which respectively prohibit government officials, including consultants, from:

   a. participating in the making of contracts in which they have a financial interest; and

   b. participating in the making of government decisions in which they have a financial interest

   These latter conclusions are based, in essence, upon the fact that PDC was employed to perform a preliminary analysis of various alternatives for traffic flow improvements in University City, and that this analysis was presented to the Council to influence its deliberations as to which alternative should be designed and built – with PDC fully expecting to receive the resulting design contract. Thus, PDC had both participated in the shaping of its own resultant contract and influenced the governmental decision to design and build the Regents Road Bridge, from which decision it stood to profit substantially through the expected follow-on contract.

Mr. Sullivan's memo discusses these conclusions. Initially, then, I should note that it is the function of the City Attorney, pursuant to section 40 of the City Charter, to serve as the City's "chief legal advisor." To the extent that outside counsel is employed to meet the City's legal needs, the City's relationship with such counsel is under the direction of the City Attorney. Neither the Council nor City Staff, including the Mayor's staff, should purport to direct the work of outside counsel except in cooperation and consultation with the City Attorney's Office. Nor should outside counsel be employed for the purpose of seeking a different opinion when the opinion of the City Attorney's Office is not to the Staff's or the Council's liking.

Nonetheless, in order to ensure that the Council has the benefit of complete legal analysis, we will here supplement our earlier memorandum on these questions.

QUESTION PRESENTED

Has the City Attorney's opinion regarding the lawfulness of a proposed contract between the City and PDC changed in light of Mr. Sullivan's memo?

SHORT ANSWER

No. Mr. Sullivan's memo did not address key facts that formed the basis of the City Attorney's April 4, 2007 memo. Because of this, after careful consideration of the analysis that Mr. Sullivan has offered, we have concluded that our original analysis remains valid, and that the proposed contract with PDC cannot be entered because it would result in violations of both section 1090 and section 87100.

ANALYSIS

We have reviewed Mr. Sullivan's analysis, and found it most helpful in performing our mandatory duty to ensure that all City contracts are in compliance with all applicable laws, including Sections 1090 and 87100. We note here that, while the City Attorney may consider the input of outside counsel on such questions, and we have done so here, the Charter places the responsibility for ensuring the legality of contracts with this Office; it cannot be delegated to outside counsel. After considering Mr. Sullivan's reasoning and conclusions with respect to Sections 1090 and 87100, we reiterate our original conclusion that the proposed contract, even if altered to omit environmental work, would violate these statutes.

I. No Intervening Review of the Consultants' Work by City Staff Occurred with Respect to the Consultants' Presentations at the August 1, 2006 Council Meeting.

Our April 4, 2007 memo mentioned in a footnote that it is legally possible that, in the case of a possible violation of section 87100, a violation might be eliminated if City Staff were to engage in "significant intervening substantive review" after the consultant gave its input to the governmental decision in question. However, we noted that such subsequent review had not occurred in this case – i.e., that City Staff had not performed an intervening review of the consultants' work such that any violation would be eliminated.

It should be noted here that, in addition to preparing the Environmental Impact Report [EIR] that the City Council certified on August 1, 2006, PDC and two of its subconsultants also interacted directly and extensively with the Council itself at the August 1, 2006 Council meeting, preparing and narrating a multi-media presentation that advocated the selection of the Regents

Road Bridge alternative.[2] It was primarily this presentation with which our April 4, 2007 analysis was concerned. Whatever "significant intervening substantive review" may have occurred as to the EIR itself, the selection of the Regents Road Bridge was an independent action. It was this action – not the certification of the EIR – in which the consultants' had a financial interest, specifically, their expected follow-on contract, the scope of which would be determined by the Council's choice among alternatives. Thus, is was the selection of the preferred alternative – not the certification of the EIR – that gave rise to violations of sections 87100 and 1090.

We have extensively reviewed the video archive of the August 1, 2006 City Council meeting. Although City Staff was present and also participated in this discussion, that participation cannot be construed as "significant intervening substantive review" of PDC's presentation, since the consultants were speaking directly to the Council at the very meeting at which the decision in question was made. Other factors, including presentations by the Mayor and City Staff, undoubtedly also influenced the Council's action. But there can be no question that the purpose of PDC's participation in the meeting was to influence the Council's decision to select the Regents Road Bridge alternative, and in turn to shape the content of the contract that PDC fully expected to receive as a result of that Council decision.

II. There is No Doctrine of Intervening Review Under Section 1090.

We should also note here that, whatever may be the outcome of a thorough consideration of the question of "significant intervening substantive review" under section 87100, this inquiry has no application to the question of whether a proposed contract with PDC would violate section 1090. The concept of significant intervening substantive review arises from regulations promulgated under section 87100, specifically 2 Cal Code Regs section 18702.2(b). There is no corresponding regulation under section 1090. Further, the California Court of Appeals has held that the regulations implementing section 87100 may not be applied to questions under section 1090. *People v. Anguay*, 2002 WL 31124730, *7 (unpublished opinion citing *People v. Honig*, 48 Cal. App. 4th 289, 325-29, and fn. 15 (1996)). Thus, even if it were possible to find that PDC's contribution to the making of the "governmental decision" to build the Regents Road Bridge had been cleansed of any possible violation of section 87100 by significant intervening substantive review, it is not possible to draw this same conclusion under section 1090. The doctrine simply does not exist in that context.

CONCLUSION

The doctrine of "significant intervening substantive review" cannot be invoked to eliminate the potential violations of sections 1090 and 87100 identified in our April 4, 2007

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[2] The EIR itself explicitly expressed no preference among the alternatives considered. However, a review of video archive of the consultants' presentations to Council makes clear that, at least with respect to their participation in that meeting, they advocated for the Regents Road Bridge alternative.

memo. Under section 87100, the doctrine does not change the result because PDC and two of its subconsultants participated personally and substantially not only in the preparation of the EIR, but also in the hearing at which the Council made the decision to select the Regents Road Bridge as the preferred alternative. Their presentations at this hearing were not subject to significant intervening substantive review, since they were made, verbally and through the use of visual aids, directly to the Councilmembers who were, at that hearing, considering the very governmental decision in question. Moreover, the doctrine has no application in the context of a possible section 1090 violation.

Given these facts, while we have found Mr. Sullivan's thoughtful analysis enlightening, we remain convinced that any contract awarding PDC the task of designing the Regents Road Bridge would be unlawful. We will not approve such a contract as to form and legality, as Section 40 of the City Charter would require in order for any such contract to be valid.

MICHAEL J. AGUIRRE, City Attorney

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KH:mpc

cc: Patti Boekamp, Engineering & Capital Projects Department