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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PROVISION OF DEFENSE FOR FORMER EMPLOYEE TRACY L. MEANS

INTRODUCTION

In a complaint dated December 13, 2005, the City of San Diego sued Tracy L. Means, the former Deputy Director of the Airports Division of the City's Real Estate Assets Department. The lawsuit includes causes of action against Ms. Means to rescind illegally awarded public contracts, to recover money had and received, and for violations of the Unfair Competition Act and the False Claims Act. (*See*, San Diego Superior Court Case No. GIC 858344 attached as Attachment 1.)

In a January 10, 2006, letter to Mayor Jerry Sanders and Council President Scott Peters, Paula Rosenstein of Rosenstein, Wilson & Dean advised that her office has been retained to represent Ms. Means and requested that the City provide a defense for Ms. Means in the lawsuit pursuant to California Government Code sections 825 and 995.¹ (A copy of Ms. Rosenstein's letter is attached as Attachment 2.) This report discusses the City's obligations to provide a defense and the exceptions thereto.

DISCUSSION

I. Background.

On or about November 5, 2005, the City completed a fact finding related to several allegations concerning Tracy Means, Deputy Director, Airports Division of the Real Estate Assets Department of the City of San Diego. The fact finding concluded, among other things, that Ms. Means violated San Diego Administrative Regulations and San Diego Municipal Code requirements in authorizing certain consulting contracts. On December 13, 2005, the City filed a complaint against Tracy Means, Michael Hodges, Roberta Thompson, and Airport Business

¹ Although the letter requests a response within 20 days, Ms. Rosenstein has stipulated with the City Attorney's Office to an extension of time to have this issue heard by the City Council, agreeing that it may be heard on February 27 or 28, 2006.

Solutions, Inc. In general, the complaint alleges that between September 2000 and continuing through June 2005, Ms. Means awarded fourteen written purchase order contracts for consulting services to Airport Business Solutions, Inc., for the study of the feasibility and marketability of developing the City's two municipal airports, Montgomery Field and Brown Field. The lawsuit claims that the defendants conspired to divide up the contemplated work into smaller purchase orders so that no competitive selection or bidding would be required, and that the contracts were illegal, improperly awarded and therefore must be rescinded. The City seeks restitution of \$218,526.84 illegally provided by the City contracts. The lawsuit also seeks civil penalties for each act of unfair competition or unfair or unlawful business practices and statutory treble damages.

On January 10, 2006, Ms. Means requested that the City provide a defense to this action under California Government Code sections 825 and 995.²

II. The Duty to Provide a Defense Pursuant to California Government Code Section 995.

California Government Code section 995 requires that the City provide a defense to any civil action or proceeding brought against a former employee in his or her official or individual capacity on account of an act or omission in the scope of employment by the City. California Government Code section 995 provides, in relevant part:

Except as otherwise provided in Section 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity. . .

Ms. Means is a former employee that has requested that the City provide a defense in the lawsuit that is related to her employment at the City. Ms. Means would be entitled to a defense by the City unless an exception under California Government section 995.2 or 995.4 is found to be applicable in this circumstance.

California Government Code section 995.2(a) provides that a public entity may refuse to provide for the defense in an action brought against an employee or former employee if the public entity determines that: (1) the act or omission was not within the scope of employment; (2) the employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice; or (3) the defense of the action by the public entity would create a conflict of interest between the public entity and the employee or former employee. Upon an employee's

² California Government Code section 825 is not discussed in this report because that section addresses the payment of the judgment by the public entity on behalf of an employee or former employee and is not relevant to the public entity's obligation to provide a defense.

request for a defense, the public entity must within 20 days, inform the employee or former employee whether it will or will not provide a defense, and the reason for the refusal to provide a defense. Cal. Gov't Code § 995.2(b).

California Government Code section 995.4 provides that a public entity may, but is not required to, provide for the defense of: (a) an action brought by the public entity to remove, suspend, or otherwise penalize its own employee or former employee; or (b) an action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity.

In either case, the City Council has the discretion to make a determination regarding the existence, or lack thereof, of these factors. If the City Council determines that these factors were present, then this exception to California Government Code section 995 allows the City Council to refrain from providing a defense to a former employee.

The complaint alleges Ms. Means awarded fourteen contracts in violation of the public policy behind the competitive bidding processes. Such policy is intended to “protect the taxpayers from fraud, corruption, and carelessness on the part of public officials, and the waste and dissipation of public funds.” (See, paragraph 41 of the Complaint). The complaint also describes allegations of unlawful business practices, false claims, and conspiracy to defraud the City. Accordingly, the City may refuse to provide a defense to Ms. Means under the exception in California Government Code section 995.2(a)(2) if it believes that she acted or failed to act because of actual fraud, corruption, or actual malice.

The City also may refuse to provide a defense under California Government Code section 995.2(a)(3) if doing so would create a conflict of interest between the public entity and the former employee. Because the City is a plaintiff in the action against a former employee, an inherent conflict of interest exists.³ As stated in *Stewart v. City of Pismo Beach*, 35 Cal. App. 4th 1600, 1606 (1995), “it is unreasonable to require a public entity to finance litigation directed against it.” When there is an actual conflict between a public entity and its employees “the public entity need not provide any defense whatsoever.” *City of Huntington Beach v. Petersen Law Firm*, 95 Cal. App. 4th 562, 567 (2002).

Similarly, California Government Code section 995.4 permits a public agency to refuse to provide a defense in an action or proceeding brought by the public entity against its own former employee as an individual and not in his official capacity. “This obviously constitutes a conflict of interest of such magnitude that the entity should not be compelled to litigate, in effect, against

³ In *City of Redondo Beach v. Alice DeLong*, 123 Cal. App. 3d 1035 (1981), the court found that the City had no duty under California Government Code section 995.2 or 995.4 to provide DeLong, the City Treasurer, with an attorney or to pay her legal fees in the City's action for a writ of mandamus to compel DeLong to perform her duties. *Id.* at 1043.

itself.” California Government Tort Liability Practice § 4.25 (4th ed. 2004). Accordingly, the City has the discretion to refuse to provide a defense to Ms. Means under these circumstances.

CONCLUSION

In general, the City must provide a defense to its employees for actions occurring within the scope of their employment. However, California Government Code sections 995.2 and 995.4 both provide exceptions to the general rule. If the City Council determines that Ms. Means acted because of actual fraud or corruption, and/or that there is a conflict of interest between the City and Ms. Means, then the City is not required to provide a defense.

Respectfully submitted,

MICHAEL J. AGUIRRE
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