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

---

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")

---

[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.

---

[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 Phase II contract, then, can be viewed as merely an extension of that award, it might be seen as

---

[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.

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 City Charter section 99, and separately procuring the environmental portion. However, there is a

---

[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.

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 happened." *People v. Gnass*, 101 Cal. App. 4th 1271, 1287 (2002). Thus, in this case, it is not

---

[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.

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.[09] 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[00] 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.[01] Cal. Gov't Code section 87103.

---

[09] 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.

[00] 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.

[01] 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, 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.

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 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