

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

**Michael J. Aguirre**  
CITY ATTORNEY

**MEMORANDUM OF LAW**

**DATE:** October 1, 2008

**TO:** Scott Kessler, Deputy Director, City Planning and Community Investment  
Luis Ojeda, Program Manager, City Planning and Community Investment

**FROM:** City Attorney

**SUBJECT:** College Heights Maintenance Assessment District February 2008 Request for Proposals, Response Thereto and Conflict of Interest

**INTRODUCTION**

In February 2008, the College Area Business District published a Request for Proposals [RFP] on behalf of the College Heights Maintenance Assessment District [MAD] for the administration of Public Right of Way Beautification and for consulting services to modify the MAD. City had no knowledge of this RFP until August 2008, and was not provided an opportunity to review or approve the RFP.

Our office is in receipt of the February 2008 RFP and Little Italy Association's Response to the RFP. The scope of services, set forth at page two, is extremely brief, essentially leaving to respondents the task of defining what will be delivered. It states, in full:

"The chosen Contractor shall be responsible for amending the City Council Ordinance for the District to include new developments within the geographical boundaries of the District, including condominiums. The Contractor will also be responsible for administering public right of way enhancements including beautification and holiday décor."<sup>1</sup>

See College Area Business District Request for Proposals attached hereto as Exhibit A.

According to the College Area Business District, Little Italy Association [LIA] is the only entity that responded to the RFP. Little Italy Association's Response to RFP is attached

---

<sup>1</sup> Note that there is no "City Council Ordinance" to be amended for a modified Maintenance Assessment District and any required resolutions would be amended by City staff and the City Attorney's office, not a consultant.

hereto as Exhibit B. LIA proposes that Marco LiMandri, as “President” and “Project Manager” re-write the College Heights MAD by modifying the boundaries and assessment methodology, including investigating and forming the modified MAD. LIA also proposes that Marco LiMandri and various personnel maintain and beautify the public rights of way in the College Heights MAD. On page 15 of the 16 page proposal, a condition of the contract is listed as “New City America, Inc. working as the Staff Administrative Contractor for the Little Italy Association...will bear all payroll and personnel related costs”. Although it is unclear what exactly this means, Marco LiMandri owns and is the registered agent with the California Secretary of State for New City America, Inc. Thus, the same person would, in effect, be both the contractor and the contract administrator.

Furthermore, Marco LiMandri, via his company New City America, Inc., was the consultant hired by the City in 2003-2004 to work on the process of forming the College Heights MAD at its inception. This consulting work involved determining the boundaries and assessment methodology, determining the desired maintenance services and the costs of potential programs, gathering information from and providing information to the community regarding the assessment district, and conducting the balloting procedure required to form a district.

An unrelated entity, CAM Services, currently holds contracts to provide maintenance services to the College Heights MAD. It is unclear from the scope of services in the RFP whether the College Heights MAD intends to replace its current service provider, or if it intends to supplement services with a new contract with LIA.

You have asked our office to evaluate the validity of the RFP and the only response thereto, given that one entity has bid on consulting for both the re-formation of the MAD, and providing maintenance and beautification services for the MAD, given that Mr. LiMandri was the consultant who was hired in the process of forming the College Heights MAD in 2003-2004.

### **QUESTIONS PRESENTED**

1. Can a person or entity whom the City hires as a consultant in the process of forming a Maintenance Assessment District [MAD] be hired to perform maintenance services in that District?
2. Is the February 2008 Request for Proposals [RFP] issued by the College Area Business District valid?

### **SHORT ANSWERS**

1. No. A conflict of interest under Government Code section 1090 exists when a person hired by the City as a consultant in the process of forming a MAD is also hired to manage or provide maintenance services to the MAD.

2. No. The February 2008 RFP is fatally flawed. It presents an inherent conflict of interest by requesting the same entity to assist in re-writing the MAD, and also to provide maintenance services to the re-formed MAD.

## **LEGAL ANALYSIS**

### **I. Statutory Scheme for Maintenance Assessment Districts**

The formation of a MAD is governed by California Streets and Highways Code sections 22500 through 22679 (the Landscape and Lighting Act of 1972), California Constitution article XIII D [Article 13D] (also known as Proposition 218), California Government Code sections 53750 through 53754, and San Diego Municipal Code [SDMC] sections 65.0201 through 65.0234. The purpose of a MAD is to provide to a specified area improvements that are special benefits such as landscaping, lighting, installation of park and recreation improvements, as well as other improvements. The SDMC sets forth the procedures to hire consultants to form the districts as well as administer the district upon formation.

SDMC section 65.0212 provides for the property owners to elect for a private non-profit entity to administer the contracts for goods and services, such as the College Heights MAD. In this case, the City enters into a contract with the private nonprofit entity to administer the district. These contracts provide for the City to oversee and audit the private nonprofit entity's administration of the district in light of the City's ultimate responsibility to administer the assessment monies collected for the benefit of the districts.

### **II. Government Code section 1090 applies to MAD Consultants**

California Government Code section 1090 [Section 1090] states in part,

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. . . .

In other words, Section 1090 precludes a public officer or employee from participating in the making of a contract in which he or she is financially interested. Although the term "financial interest" is not specifically defined in the statute, an examination of case law and statutory exceptions to the basic prohibition indicates that the term is to be liberally construed. *Thomson v. Call*, 38 Cal. 3d 633, 645 (1985). An official is considered to be participating in the making of a contract for purposes of Section 1090 when he or she is involved in any preliminary discussions, negotiations, compromises, planning, and solicitation of bids for government contracts. *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222 (1968). Any contract that is entered into in violation of Section 1090 is void and unenforceable. Cal. Gov't Code § 1092. Additionally, an official who violates Section 1090 may be subject to criminal (Cal. Gov't Code § 1097), civil, and administrative penalties.

The primary intent behind Section 1090 is to ensure that public officials are guided solely by the public interest, rather than by personal interests, when dealing with contracts in their official capacity. *Campagna v. City of Sanger*, 42 Cal. App. 4th 533 (1994). A situation involving a MAD formation consultant hired by the City who also performs maintenance service for the MADs, even if contracted through a nonprofit corporation, could potentially involve that consultant acting in his or her own interests, rather than in the best interests of the City or the district. The formation consultant would have quite an advantage over any other management consultant since the formation consultant would have been so heavily involved with the property owners and City staff in the formation, defining the services to be provided, gaining the advantage of knowledge of the district, familiarity with the property owners and an overall understanding of several aspects of the district. This is the exact situation that Section 1090 was created to avoid.

A. The Consultant is a Public Officer Under Section 1090

Virtually all board members, officers, and consultants are public officials within the meaning of Section 1090. The Attorney General's Office has specifically opined that consultants hired by a public agency are covered by Section 1090. 46 Ops. Cal. Att'y Gen. 74, 79 (1965). In that decision, the Attorney General wrote:

It seems clear that the Legislature in later amending section 1090 to include "employees" intended to apply the policy of the conflicts of interest law . . . to independent contractors who perform a public function and to require of those who serve the public temporarily the same fealty expected from permanent officers and employees. *Id.*

Therefore, MAD formation consultants who have been hired to temporarily perform a public function are covered by Section 1090. The response to the RFP lists Marco LiMandri as the project manager and President who would be providing consulting services to modify the boundaries and the assessment methodology of the MAD and also providing maintenance or "beautification" services for the public rights of way. Thus, Marco LiMandri is considered a public official under Section 1090 for those purposes.

B. The Consultants' MAD Formation Services Involve "Participation in the Making of a Contract" Under Section 1090

Once it is determined that an individual is a public official for purposes of Section 1090, the next step is to determine if the official made a contract, or participated in the making of a contract, in his or her official capacity. California courts and Attorney General opinions have broadly defined what constitutes "participating in the making of a contract" for purposes of Section 1090. In one case, the court held:

The decisional law . . . has not interpreted section 1090 in a hypertechnical manner, but holds that an official . . . may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, *influence execution directly or indirectly to promote his personal interests*.

*People v. Sobel*, 40 Cal. App. 3d 1045, 1052 (1974) (emphasis added). In *Sobel*, the court defined the making of a contract to include any preliminary discussions, negotiation, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. *Id.* at 1052.

Here, with respect to the re-formation of the College Heights MAD for the City, the consultant's services will involve "planning" and "preliminary discussions" related to the maintenance services that will be provided to the re-written or modified district. Mr. LiMandri's participation in the re-formation process for the College Heights MAD includes participation in the planning of the district including formulation of the scope of services for the service contract. The consultant meets with the property owners, City staff, and the assessment engineer to identify the services and service priorities that will be provided for the re-formed district. In promoting the formation of the district, the consultant has an opportunity to influence the service contract, directly and indirectly. A MAD formation consultant cannot help form the MAD or re-form the MAD and then bid to provide maintenance services for such MAD. This is a violation of section 1090. Additionally, Mr. LiMandri and his corporation New City America, Inc. was the consultant hired by the City in the original formation of the College Heights MAD. This precludes Mr. LiMandri from bidding on any service contract for the MAD, whether or not the MAD is re-written. The City Attorney published this opinion in a Memorandum of Law, ML-2006-1 dated January 3, 2006.

### III. Validity of RFP

The RFP requests a proposal for consulting on the re-write or re-formation of the district as well as for the provision of maintenance services. The RFP is inherently fatally flawed because it invites a violation of Section 1090 – that is, it requests an entity to participate in the planning and development of services for a MAD, and in the same proposal requests the same entity to provide the services. According to the Executive Director of the College Area Business District, a maintenance services contract was already awarded to LIA. Such contract is void and cannot be enforced. The City is not permitted to allow assessment monies to pay for that contract.

In addition to the facial flaws in the RFP, College Area Business District has circumvented the City process. While it is perfectly permissible for a group to initiate modification of a MAD, this must be done in conjunction with City staff. See Council Policy 100-21 on MAD Formation. City Staff has the ultimate responsibility for administration of the MAD, even in cases like the College Area MAD which is managed by a non-profit corporation.

Further, the RFP is utterly vague as to scope – how does it wish to modify the district? What maintenance services is it seeking? Is beautification for installation of one-time improvements or is it a continuing service contract for all maintenance services in the district? Because the answers to these questions are unclear, it begs the question of how much influence LIA or Mr. LiMandri had in making the contract.

Because the RFP is vague, was never approved by the City, and is inherently flawed, College Area Business District should re-issue an entirely new RFP if it still wishes to hire a consultant. For the reasons set forth herein, the RFP cannot seek both modification of the district and the provision of maintenance or “beautification” services. The district should work with City staff to ensure they are following the correct procedures for letting contracts.

### **CONCLUSION**

Our office has consistently advised that a conflict of interest under Government Code section 1090 exists when a person hired by the City as a consultant in the process of forming a MAD is also hired to manage the MAD. This advice spans more than just the current administration of the City Attorney’s office.

The College Heights MAD RFP requesting both consultation for the College Heights MAD re-formation and requesting maintenance services for the district is fatally flawed. Any entity responding to both parts of the RFP puts itself in a conflict situation. Thus, the College Area Business District is not legally permitted to let this contract for re-formation of the MAD and for the provision of maintenance services to any entity. In order to comply with the law, the contracts must be awarded separately. In addition, any entity who is awarded the contract for re-formation of the MAD is precluded from bidding on and performing any maintenance services in that district.

Moreover, any contract for the provision of maintenance services to the College Heights MAD may not be awarded to any entity run or owned by Marco LiMandri, including LIA, New City America, Inc., and Marco LiMandri as an individual. On its face, this is a violation of section 1090 since Mr. LiMandri was the consultant hired in the process of forming the College Heights MAD in 2003-2004.

Scott Kessler  
Luis Ojeda

-7-

October 1, 2008

Because a contract with LIA or Mr. LiMandri such as the one described in the RFP and response thereto would be a violation of Section 1090, such a contract would be void ab initio and unenforceable. Cal. Gov't Code § 1092. Assessment monies from the College Heights MAD, or any public funds for that matter, cannot be used for such a contract.

MICHAEL J. AGUIRRE, City Attorney

By

Kimberly K. Kaelin  
Deputy City Attorney

KKK:nda  
ML-2008-19  
Attachments

cc: Mayor and City Councilmembers  
Michael Aguirre, City Attorney  
Beth Murray, Assistant Deputy COO, Land Use & Economic Development  
Brock Ladewig, Chief Deputy City Attorney  
Michael Calabrese, Chief Deputy City Attorney