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REPORT TO THE CITY MANAGER

SAN DIEGO PROCESSING CORPORATION, CITY MANAGER REPORT 04-090

This report is divided into two parts. The first part responds to the Mayor's memorandum dated January 16, 2004, to the Honorable Members of the City Council, City Manager Michael Uberuaga, City Auditor Ed Ryan and San Diego Data Processing Corporation Board of Directors concerning San Diego Data Processing Corporation [SDDPC]. The Mayor's memorandum directed the City Manager to "evaluate whether or not to abolish DPC (Data Processing Board) and merge its responsibilities with the City's Information Technology Department." The City Attorney has been asked to respond to question 3.d., "[w]hat are the existing legal obligations and rights of both the City and DPC?" The second part discusses whether the City may enter into contracts with its wholly owned nonprofit public benefit corporations on whose board some City officials sit as full voting or ex-officio members?

A. Mayor's Memorandum, Question 3.d.

The 1999 Amended and Restated Operating Agreement [Agreement] Between the City of San Diego and San Diego Data Processing Corporation for Information Technology Services set forth the rights of the parties. The City of San Diego is the sole member of SDDPC and has the right to terminate this Agreement at any time after having provided 120 days' prior written notice. The City agrees to assume any noncancelable leases of SDDPC or other obligations contained in the Approved Budget for the fiscal year during which the termination occurred.

On February 24, 1986, in response to a deficiency identified by the San Diego County Tax Assessor, Article IV of SDDPC's Articles of Incorporation was revised to read as follows:

The property of this Corporation is irrevocably dedicated to charitable purposes and no part of net income or assets of this organization shall inure to the benefit of any private person. Upon the dissolution or winding up of the Corporation its assets remaining after payment or provision for payment of all debts and liabilities of this Corporation shall be distributed to the City of San Diego, to be used solely for charitable purposes, or if the City of San Diego does not accept the assets or is not then in existence, to a nonprofit fund, foundation, or corporation which is organized and operating exclusively for charitable purposes and which has

established its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

The supporting Manager's Report (Report No. 86-71, dated February 19, 1986) states, "[L]egal counsel to the State Board of Equalization has indicated the City is a properly designated recipient of the Corporation's assets upon dissolution if charitable organizations are residual designees." Thus, the City would be a proper party to receive any remaining assets after SDDPC's dissolution.

Notwithstanding the City's sole right to dissolve SDDPC, the City agrees to purchase and SDDPC agrees to provide information technology, computer services, system development, project management, programming, error recovery, system and data backup, telecommunications services and related administrative services (collectively "IT Services") needed to support the operational and planning requirements of the City. This is a non-exclusive contract and the City is not required to obtain all of its IT Services from SDDPC.

Subject to specified limitations, SDDPC has a right to contract with third parties for goods and services and to provide services to third parties. Depending upon the nature of the third party procurement or the provided service, SDDPC may be required to first seek City Manager approvals before entering into a third party contract.

SDDPC is required to submit a proposed annual budget to the City Manager for City Council approval.

In addition to the Agreement, SDDPC is subject to its Articles of Incorporation and By-Laws. As recently as January 28, 2002, the Council of The City of San Diego acting on behalf of the sole member amended and restated the By-Laws of SDDPC. This change to the By-Laws reduced the number and method in which directors of SDDPC are appointed and confirmed.

Currently there are three pending lawsuits:

- a. *Bhatia v. SDDPC* (employment discrimination). Outside defense counsel: Paul, Hasting, Janofsky & Walker LLP. No trial date has been set.
- b. *Pacific Bell Telephone dba SBC v. SDDPC* (contract award challenge). Outside defense counsel: Morrison & Foerster, LLP. No trial date has been set.
- c. *Michael Anderson, et. al. v. SDDPC, Inc. and Roger Talamentez, et al.* (fourteen former employees alleging employment and age discrimination following SDDPC's recent layoffs). Outside defense counsel: Paul, Hasting, Janofsky & Walker LLP. No trial date has been set.

B. City Contracting With SDDPC on Whose Board Some City Officials Sit As Full Voting Members

In a Memorandum of Law [MOL] to Michael T. Uberuaga dated February 1, 2000¹, then Deputy City Attorney Cristie C. McGuire analyzed the conflict of interest statutes² related to the City's ability to enter into contracts with the City's Redevelopment Agency and other government agencies. In that MOL, Ms. McGuire stated that the special legislation governing conflict of interest in nonprofit public benefit corporations' matters control over the more general statutes contained in Government Code sections 1090 and 1098. Thus, it would not be a conflict of interest for a City employee to serve as a full voting or ex-officio member of a City owned nonprofit public benefit corporation.

Respectfully submitted,

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¹ http://clerkdoc.sannet.gov/RightSite/getcontent/local.pdf?DMW_OBJECTID=090014518007c955

² California Government Code sections 1090-1098