

**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

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

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, it 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

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.

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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.

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By

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KH:mpc

cc: Patti Boekamp, Engineering & Capital Projects Department