



Memorandum

TO: City Council
FROM: Mayor Ron Gonzales
SUBJECT: Recusal from San José Airport Terminal Area Improvement Program RFP Selection
DATE: May 23, 2006

Approved

Date

5/23/06

To avoid any real or perceived conflict of interest, I will not participate in the City Council's consideration and decision regarding the staff's recommendation of the proposal from Bechtel Infrastructure Group for the design/build contract for the Terminal Area Improvement Program at San José Mineta International Airport.

I take this step because my wife was employed part-time by Transmetrics, one of the 44 sub-consultant firms listed on the anticipated Bechtel team, during the period that the proposals were prepared and were evaluated by the Administration. Three weeks ago when the City Manager informed the Mayor and Council that Bechtel was among the RFP finalists for the airport project [Attachment A], I informed the City Attorney at that time that I might have a potential conflict and asked him for his legal advice.

Based the City Attorney's legal research and opinion that he gave to me on May 17 [Attachment B, for which I am waiving attorney/client privilege], the potential conflict can be avoided only by the withdrawal of Bechtel from consideration by the City Council; or by the termination of my wife's employment with Transmetrics; or by the withdrawal by Transmetrics as a Bechtel sub-consultant on this proposal. Upon learning that her employment would disqualify Transmetrics and Bechtel, she resigned from her part-time position last week. Concerned that this issue could negatively affect Bechtel, Transmetrics also withdrew from Bechtel's airport project team last week, and I am recusing myself from all participation in this matter.

Neither any of my staff in the Mayor's Office nor I were involved in any way at any stage during the RFP process for the Airport Terminal Area Improvement Project, including any communications or meetings. My wife's employment with Transmetrics did not involve her in any of the firm's business decisions or relationships with Bechtel, nor did she have any communications with the City or City Council related to this issue. The City Attorney's finding of potential conflict is based on his reading of court decisions on other cases and consultation with the Office of the Attorney General, rather than on any impropriety in the facts of this specific matter.

My wife and I have decided that even though we have had no involvement or communication associated with the current Bechtel proposal, and despite the real personal cost of her resignation, we have taken these steps to ensure that the City Council, City staff, and the public can have full confidence in the integrity of the City's contracting process.

cc: City Manager, City Attorney, City Clerk
Attachments

Megrath, Rita

From: Megrath, Rita
Sent: Wednesday, May 03, 2006 4:01 PM
To: Allen, Katy; Shikada, Ed; Sherry, Bill; Maas, Dave; Freitas, Harry
Cc: Santana, Deanna; Belanger, Janice; Soto, Eileen; Hatfield, Toni (Airport)
Subject: Proposer Ranking for the Airport Design-Build Project

From: White, Les
Sent: Wednesday, May 03, 2006 3:59 PM
To: Gonzales, Ron; Campos, Nora; Chavez, Cindy; Chirco, Judy; Cortese, Dave; LeZotte, Linda; Nguyen, Madison; Pyle, Nancy; Reed, Chuck; Williams, Forrest; Yeager, Ken
Cc: Perez, Rosie; Megrath, Rita; Alexander, Linda; Cota, Adrianna; Espinoza, Margie; Fuller, Judy; Good, Cheri; Hadnot, Rhonda; Mannina, Diane; Nguyen, Yen Chi; Tsukamoto, Kathy; West, Tina
Subject: Proposer Ranking for the Airport Design-Build Project

This email is an update on the selection process for the Design Build contractor for the Airport's Terminal Area Improvement Project. Interviews have been completed and the four proposing firms have been ranked as follows:

1. Bechtel
2. Hensel Phelps
3. Turner-Devcon
4. Austin Commercial

The evaluation panel (Phaedra Ellis-Lamkins, South Bay Labor Council; Marvin Bamberg, Chamber of Commerce; Steve Swanson Swanson, Airline Representative; Dave Soike, Deputy Director SeaTac Int'l Airport; Katy Allen, Director of Public Works; Bill Sherry, Director of Aviation; Jim Helmer, Director of Transportation; and Dave Maas, Deputy Director of Aviation) unanimously selected Bechtel as the top ranked contractor.

A staff report will be completed next week that will include a complete analysis of the selection process and the recommendation. This report is planned to be agendaized for the May 23, 2006 council meeting. Upon completion of the staff report next week, a five-day protest period will be commence.

Consistent with the RFP process, each proposer has an opportunity to meet with staff to discuss their evaluation. In the event that a protest is received, a supplemental report will be provided. The communication restriction for the proposer's, as outlined in my March 9, 2006 memo to you, will remain in effect per the Design-Build Ordinance until the staff report is approved by the City Manager.



Memorandum

TO: MAYOR RON GONZALES

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Conflict of Interest – Airport
Design Build Project

DATE: May 17, 2006

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Background

This memorandum addresses a potential conflict of interest issue concerning the Airport Design-Build Project that has recently come to our attention. Bechtel has submitted a proposal with respect to the Airport Project. Your spouse is employed with Transmetrics, a company that is listed by Bechtel as a subconsultant that it plans or anticipates using on the Project. Bechtel does not currently have a contract with Transmetrics for the Design-Build Project. Bechtel has indicated that it has an existing contractual relationship with Transmetrics on two projects for VTA. The City is not a party to those contracts.

Conflict of Interest – Government Code Section 1090

Government Code Section 1090 provides that an elected official shall not be financially interested in any contract entered into by the City. It should be noted that the courts and the California Attorney General construe “financial interest” as used in the statute, very broadly. The courts have also demonstrated a willingness to look behind the structure of a transaction, at all of the facts and circumstances that could lead to a finding of a conflict of interest.

The financial interest of a spouse is attributed to the other spouse for purposes of Section 1090. (85 Ops. Cal. Atty. Gen. 34). The prohibited financial interest arises from the fact that your spouse is employed by Transmetrics and Transmetrics existing business relationship with Bechtel. The Attorney General has concluded that where either the officer or employee’s spouse is either employed by a subcontractor or has an ownership interest in the subcontractor, the officer or employee has a prohibited financial interest in the contract between the public entity and the contractor. (85 Ops. Cal Atty. Gen. 176).

Courts have found a prohibited financial interest even though the officer or employee would not directly benefit from the terms of the contract; it was ruled significant that the contract would contribute to the financial health of the contracting party with which the

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officer or employee (spouse) was associated. (85 Ops. Cal. Atty. Gen. 34 citing Fraser-Yamor Agency, Inc. v. County of Del Norte (1977) 68 Cal.app.3d 201). Thus, it is also significant in this case, that Transmetrics has contracts and an existing business relationship with Bechtel outside of the proposed City contract.

Even if Bechtel did not ultimately use Transmetrics as a subcontractor in the City contract, this would not eliminate the Section 1090 conflict issue as a court could still find that you have a prohibited financial interest if your spouse continues employment with Transmetrics. We have generally discussed this situation with the Attorney General's Office and they have indicated that in such a case, an official could still potentially benefit from an outside contract since the contract with the City could still contribute to the financial health of the contracting party, here in this case, Bechtel.

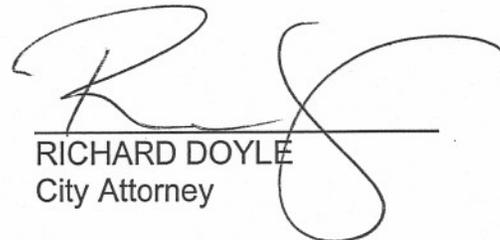
You would not have a prohibited interest in the contract under Section 1090 if your spouse terminates her employment with Transmetrics prior to Council action. (See, 86 Ops. Cal. Atty. Gen. 187). In which case, the City may enter into a contract with Bechtel.

Conflict of Interest – Political Reform Act

The Political Reform Act (Gov. Code Sections 87100 *et seq.*) provides that no public official shall make, participate in making, or in any way attempt to use his or her official position to influence a decision when the official knows that he or she has a financial interest in the decision.

Since Transmetrics is a source of income to you, you would have a disqualifying financial interest in a City decision if the decision would have a material financial effect on Transmetrics. Therefore, disqualification from participating in any City decision having a material financial effect on Transmetrics will be required for a period of 12 months from the time Transmetrics was a source of income to you.

If your spouse terminates her employment with Transmetrics, you will still need to disqualify yourself from participating in City decisions for a period of one year from the date her employment ended if the decision has a material financial effect on Transmetrics.



RICHARD DOYLE
City Attorney