

SUPPLEMENT TO LETTER OF APPEAL, DOCUMENTATION AND SUPPORTING ALLEGATIONS OF UNLAWFUL BIAS

Pacific Gateway Concessions, LLC seeks appeal of the denial of their protest, and submits this Supplement to their Letter of Appeal.

A. Additional Documentation

The following documents and other evidence have been requested by PGC on more than one occasion since receiving the protest rejection letter from Mr. Rossman, dated April 28, 2008. PGC requests that this City Council obtain and produce this documentary evidence since it is in the City's possession, custody, and control. We further submit that said documentation and other evidence be fully incorporated herein by reference and made part of this record of appeal. PGC has used reasonable diligence in attempting to obtain this information from the City of San Jose, Airport Commission, Evaluation Committee, and from the Finance Department-Purchasing Division but has been unable to obtain this information prior to the June 3, 2008 hearing on this matter. Indeed, on Thursday May 29, 2008, PGC made a specific written request to City Attorney Richard Doyle to continue the June 3, 2008, to ensure that all documents relevant to this matter would be before the Council and reviewed by the parties.

These documents and related evidence are as follows:

1. Any and all transcripts or minutes relating to any meetings of the evaluation committee and its members, including any notes or calculations relating to their review of all submissions reviewed for consideration on the subject RFP.
2. Any and all transcripts or minutes relating to any meetings of the Airport Commission and its members, including any notes, or calculations relating to their review of all submissions reviewed for consideration of the subject RFP.
3. Any and all competitor bids/proposal in response to the subject RFP.
4. All documents from Mr. Rossman regarding his investigation of PGC's protest
5. All evaluation committee member backup/detail to the scores of all of the competitors bids
6. Any and all notes, correspondence, emails, faxes of the evaluation committee and its members, relating to all submissions reviewed for consideration of the subject RFP.
7. Any and all notes, correspondence, emails, faxes, of the Airport Commission, the Evaluation Committee and its members, relating to the subject RFP.

8. All minutes/transcripts of meetings between PGC personnel and evaluation committee members, commission members, the Airport Director, and the April 28, 2008, meeting with Rossman.

B. Relevant Law and Policy for City Council Consideration

PGC submits that the following represent the applicable law that the City Council must consider when evaluating PGC's appeal, and the facts therein as iterated in PGC's Protest letter, Letter of appeal, and this supplement.

1. RFP Section 1.12.5- Disqualification:

"Factors such as, but not limited to, the following may disqualify a Proposer without further consideration"

" a) any attempt to exert undue influence with members of the Evaluation Panel and/or City staff,..."

2. San Jose City Council Policy Number 0-35: Procurement and Contract Process Integrity and Conflict of Interest Approved on 2/6/07

The Purpose of this policy is:

- 1) to ensure integrity in the procurement and contract processes;
- 2) to educate City employees, consultants, uncompensated outside parties, and any person involved in the decision to award a contract about potential Conflicts of Interests;
- 3) to establish guidelines for procedural screening of Conflicts of Interests.

It is the Policy of the City of San Jose to provide a fair opportunity to participants in competitive processes for the award of City contracts by promulgating integrity and removal of Conflicts of Interests through the inclusion of the following components in all competitive solicitations....

I. Communication Protocol

This section describes the characteristics of appropriate communication between respondents and the City during various phases of a solicitation.

A. Prior to Issuance of Solicitations

Prior to the issuance of solicitations, contact between prospective respondents and City staff, elected officials, or consultants is permissible.

B. After Issuance of Solicitations and prior to Submission deadline for Solicitations:

After issuance of solicitations, all contact between prospective respondents and the City must be directed to the Procurement Contact designated in the solicitation. City Staff, elected officials, and consultants will refer all inquiries to the Procurement Contact.

All requests for clarification, objections to the structure, content, or distribution of a solicitation, or other inquiries must be made in writing and the City shall answer to these clarifications, objections, and inquiries in writing via addenda to the solicitation.

C. After Submission Deadline of Solicitations and prior to issuance of Notice of Intended Award:

After the submission deadline of solicitations, all contact regarding the procurement between respondents and the City and participants in the evaluation process, who are not City employees, must be directed to the Procurement Contact designated in the solicitation. City staff, elected officials, and consultants will refer all inquiries to the Procurement Contact.

D. After Issuance of a Notice of Intended Award:

The City will issue a Notice of Intended Award to all respondents including the basis for selection and instructions for filing a protest. All respondents shall follow the procedures for protest as indicated in the solicitation document. During the protest period, City staff, elected officials, and consultants will refer all inquiries to the Protest Hearing Officer identified in the solicitation document.

II. Respondent's Code of Conduct

By submitting a response to a City solicitation, respondents agree to adhere to this Policy and are individually and solely responsible for ensuring compliance with this policy on behalf of the respondent's employees, agents, consultant, lobbyists, or other parties or individuals engaged for purposes of developing or supporting a response.

In addition to adhering to the various section of the policy, respondents may not:

- influence any City staff member or evaluation team member throughout the solicitation process, including the development of specifications; and ...

Any evidence that indicates that a Respondent has failed to adhere with any section of this policy may result in the respondent's disqualification from the procurement as well as possible debarment.

III. Confidentiality during Evaluation Process

City staff, consultants, and outside evaluators, who are participants in the evaluation process are required to sign a confidentiality Agreement, which binds the participants not to share any information about responses received and the evaluation process until the City issues a Notice of Intended Award.

IV. Conflict of Interest

Per the General Rule with Respect to Conflicts of Interest, as outlined in the City Policy 2.01, "Code of Ethics", City elected officials, appointed officials, their staffs, and City employees are expected to avoid any conflicts of interest. Further, employees should avoid the appearance of conflicts of interest in order to ensure that City decisions are made in an independent and impartial manner.

In general, Council Appointees shall take measures to ensure that the City avoid any conflict of interests in procurement processes of City contracts. Specifically, these measures include that...

2. persons who may not be regularly involved in City procurements to review this Policy and other ethical standards and to elicit such information from them to enable the City to determine if the person's participation would create a conflict of interest. Such persons shall include, but are not limited to:

b. paid and unpaid evaluators

3. the person managing the procurement shall discuss any potential conflict of interest identified with City Attorney's Office and document the resulting determination, and take appropriate action including, but not limited to, removal of an employee, consultant, or outside uncompensated party from the procurement activity or cancellation of a solicitation.

V. Prior to the solicitation release up to award of contract, any allegations of Conflict of Interest by a City employee, consultant, or other participant in the pre-solicitation and solicitation process shall be reported to the Procurement Contact. The Procurement Contact shall investigate the alleged conflict of interest in consultation with the City Attorney's Office and document the resulting determination.

The City Council should thus review all of the allegations in PGC's protest letter, and Letter of Appeal with these promulgations as context.

3. Government Code Section 1090: Prohibitions Applicable to Specified Officers

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.

4. **People v. Honig (1996), 48 Cal. App. 4th 289, interpreting Government Code Section 1090:**

The above case is instructive on what constitutes conflict of interest and financial interest, which applies to the allegations of bias made by PGC herein:

The conflict-of-interest statutes are based upon "[t]he truism that a person cannot serve two masters simultaneously" (*Thomson v. Call* (1985) 38 Cal.3d 633, 637 [214 Cal.Rptr. 139]), which is regarded as a "self-evident truth, as trite and impregnable as the law of gravitation" (*Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 601 [229 P. 1020]). The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office. (*Thomson v. Call*, *supra*, 38 Cal.3d at p. 648; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569 [25 Cal.Rptr. 441].) Yet it is recognized " 'that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.' " (*Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 570, quoting *United States v. Mississippi Valley Generating Co.* (1961) 364 U.S. 520, 549-550 [5 L.Ed.2d 268, 288, 81 S.Ct. 294].) Consequently, our conflict-of-interest statutes are concerned with what might have happened rather than merely what actually happened. (*Ibid.*) They are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer's undivided and uncompromised allegiance. (*Thomson v. Call*, *supra*, 38 Cal.3d at p. 648.) Their objective "is to remove or limit the *possibility* of any personal influence, either directly or indirectly, which might bear on an official's decision" (*Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569, italics in original; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 865 [136 Cal.Rptr. 429]; *People v. Watson* (1971) 15 Cal.App.3d 28, 39 [92 Cal.Rptr. 860].)

In view of the purposes of our conflict-of-interest statutes, it is well established that their scope is not limited to instances of actual fraud, dishonesty, unfairness or loss to the governmental entity, and criminal responsibility is assessed without regard to whether the contract in question is fair or oppressive. (*People v. Darby* (1952) 114 Cal.App.2d 412, 426-427 [250 P.2d 743].) Thus, it has been repeatedly held that such matters are irrelevant under section 1090. (*Thomson v. Call*, *supra*, 38 Cal.3d at pp. 648-649; *People v. Vallerga*, *supra*, 67 Cal.App.3d at p. 865; *People v. Watson*, *supra*, 15 Cal.App.3d at p. 39.). In enacting the conflict-of-interest provisions, the Legislature was not concerned with the technical terms and rules applicable to the making of contracts, but instead sought to establish rules governing the conduct of governmental officials. (*Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569.) Accordingly, those provisions cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose. (*Id.* at pp. 569, 571; *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237 [69 Cal.Rptr. 251].) Thus, in *Stigall v. City of Taft*, *supra*, where a member of the city council participated in preliminary matters leading to the adoption of a contract but resigned before the formal award of the contract, the court refused to construe the word "made" in a narrow and technical sense and instead held that

it encompassed the planning, preliminary discussion, compromises, drawing of plans and specifications and solicitation of bids that led up to the formal making of the contract. (58 Cal.2d at p. 571; see also *Thomson v. Call*, *supra*, 38 Cal.3d at pp. 644-645 [successive contracts were considered part of a single multiparty agreement for purposes of section 1090].)

In a similar vein, the term "financially interested" in section 1090 cannot be interpreted in a restricted and technical manner. The law does not require that a public officer acquire a transferable interest in the forbidden contract before he may be amenable to the inhibition of the statute, nor does it require that the officer share directly in the profits to be realized from a contract in order to have a prohibited interest in it. (*People v. Vallerga*, *supra*, 67 Cal.App.3d at p. 865; *People v. Darby*, *supra*, 114 Cal.App.2d at p. 425.) Rather, "[t]he instant statutes are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [state]." (*Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569.) **The fact that the officer's interest "might be small or indirect is immaterial so long as it is such as deprives the [state] of his overriding fidelity to it and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good."** (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208 [300 P.2d 119].) And, "[w]e must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts. [Citation.] However devious and winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection made, a conflict of interest is established." (*People v. Watson*, *supra*, 15 Cal.App.3d at p. 37.)

In addition to the judicial authorities interpreting section 1090, a significant indication of legislative intent with respect to the scope of section 1090 can be derived by reference to sections 1091 and 1091.5. Section 1090, it has been said, is an embodiment of the common law with respect to conflicts of interest. (*Stockton P. & S. Co. v. Wheeler*, *supra*, 68 Cal.App. at p. 597.) The courts construed that provision broadly to include any interest, "other than perhaps a remote or minimal interest," which might influence official duty. (*Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569.) In sections 1091 and 1091.5, the Legislature has provided for remote and minimal interests which will not be deemed to be interests within the prohibitive scope of section 1090. **Section 1091 applies to an officer who is a member of a body or board that authorizes, approves or ratifies a contract. Such an officer will not be deemed to be interested in a contract if his or her interest is one of the remote interests set forth in the section, the officer makes full disclosure of the interest, the officer abstains from voting, the officer does not influence or attempt to influence any other member, and the body or board authorizes, approves or ratifies the contract in good faith by a vote of its membership sufficient for that purpose without counting the vote of the officer with the remote interest.** Section 1091 is not arguably applicable here since, among other things, defendant did not disclose his interest in the contracts at issue and personally made the decision to create the contracts. ^[2]

The Honig Court then proceeded to discuss applicable jury instructions:

I. Jury Instructions

A. The Measure of Financial Interest

In instructing the jury the court defined the charged offenses in accordance with sections 1090 and 1097 as follows: "Any state Officer who, acting in his official capacity, who willfully makes or causes to be made a contract in which he has a financial interest is guilty of a violation of Government Code sections 1090 and 1097. [¶] In order to prove such a crime, each of the following elements must be proved: [¶] (1) that the person is a state officer; [¶] (2) that the person acted in his official capacity; [¶] (3) that the person knowingly; and [¶] (4) willfully made or caused to be made a contract in which he had a financial interest." The court further instructed on the definitions of knowingly and willfully in accordance with the standard CALJIC instructions and gave a special instruction defining a contract. ^[12] **The court also instructed the jury that the prosecution did not have to prove fraud, dishonesty or loss, or that the contracts were unfair, unjust or inequitable, and that it was not a defense that there was no actual fraud, dishonesty or loss or that the contract was just, fair and equitable.**

With respect to prohibited financial interests the court instructed: "**The phrase 'financially interested' as used in Government Code section 1090 means any financial interest which might interfere with a state officer's unqualified devotion to his public duty. The interest may be direct or indirect.**

We reject defendant's suggested interpretation of section 1090. This section has long been interpreted as prohibiting an official from having any financial interest in a contract, whether direct or indirect. (See *Stigall v. City of Taft, supra*, 58 Cal.2d at p. 569.) Although the Legislature amended the statute in 1963 to clarify that it was concerned with financial interests, ^[13] the Legislature has never seen fit to qualify the proscribed financial interests with modifiers such as "material," "substantial," "significant," or "direct," "certain," "probable," and the like. (See *People v. Watson, supra*, 15 Cal.App.3d at p. 34, fn. 1.)

For over a hundred years our courts have consistently held that our conflict-of-interest statute, now embodied in section 1090, is intended to enforce the government's right to the absolute, undivided, uncompromised allegiance of public officials by proscribing any personal interest. (See *Thomson v. Call, supra*, 38 Cal.3d at p. 648; *Stigall v. City of Taft, supra*, 58 Cal.2d at p. 569.) To this preventative end, section 1090 establishes a broad, objective proscription which is violated when an official places himself in an "ambivalent position" or an "ambiguous situation," by having any financial interest in an official contract, and which does not depend upon the actuality of a personal influence on his decisions.

- a. **It is PGC's position that Evaluation Committee member Phaedra Ellis-Lamkins conduct is in violation of Government Code Section 1090.**

Ellis is a noncompensated outside party who is an appointed committee member involved in the evaluation process and decision to award the Airport contract. Accordingly, her conduct is subject to the rules prohibiting financial and conflicts of interests. Ellis-Lamkins is the highest ranking paid staff member at the South Bay AFL-CIO Labor Council, which obtains its funding from the affiliated labor unions and its 110,000 members in Santa Clara and San Benito Counties through union dues. In this connection, her salary is paid by union members, and the consequent increase in the number of union members must intrinsically bear some relation to her compensation. Ellis' predisposition regarding Host/Marriot as iterated to PGC member Javier Vega is by itself sufficient evidence that Ms. Ellis violated her public duty, irrespective of any union connection. Moreover, when one genuinely looks at the benefits she personally derives as an employee of the union, and the benefits derived by the union itself, her employer, being a beneficiary, it is unassailable that the increase in union dues through Host/Marriot employees would enhance the security for Ellis-Lamkins salary at the Labor Council, facilitates its payment, and strengthens the unions relationship with a substantial company such as Host/Marriot. Accordingly and unequivocally it is thus a prohibited financial interest under Government Section 1090.

1) Related Airport Activities of South Bay Labor Council and its Executive Director Phaedra Ellis-Lamkins:

The South Bay AFL-CIO Labor Council views the Norman Y. Mineta International Airport as a keystone in its growth and stability. If the airport were a single employer it would rank as the third largest employer in San Jose with 6,000 employees, ranking only behind Cisco and IBM. Building a Better Airport is a campaign of Working Partnerships USA and it has an intended purpose of obtaining prevailing wages for all employees at Mineta International Airport. On its face this is a worthy goal for the working men and women of this City. The Executive Director of Working Partnerships USA is Phaedra Ellis-Lamkins. Working Partnerships USA and South Bay AFL-CIO are located at the same address at 2102 Almaden Road, Suite 107, San Jose, CA 95125. This connection indicates a substantial vested and financial interest in all decisions affecting employees at the airport. Working Partnerships USA is a declared Ally of the South Bay AFL-CIO Labor Council and Team San Jose. Moreover, Ellis Lamkins is a founder of Team San Jose (per her biography). Airport Evaluation Committee member Daniel Fenton is Chairman of Team San Jose, Inc. Phaedra Ellis-Lamkins is Vice Chair of Team San Jose, Inc. As raised in its Appeal, Clifton Clark is General Manager of San Jose Marriott. This web of connections between Ellis, the union, the Airport and Host/Marriot ostensibly led Ellis Lamkins to disregard her duty to the public to be completely fair and impartial and without any financial benefit (direct or indirect). Her conduct requires that at a minimum, this council void the contract with Host/Marriott.

5. PGC is entitled to integrity and fairness in the entire Procurement Process and a fair hearing under the due process requirements of the California and Federal Constitution:

a. Procedural due process requires that the hearing be conducted before a reasonably impartial, noninvolved reviewer... Therefore, in order to prevail on a claim of bias violating fair hearing requirements, it must be established that there is "an unacceptable probability of actual bias on the part of those who have actual decision making power over their claims. A party seeking to show bias or prejudice on the part of an administrative decision maker is required to prove the same "with concrete facts: "bias and prejudice are never implied and must be established by clear averments." *Gai vs. City of Selma (1998) 68 Cal. App. 4th 213, 219; Nasha vs. City of Los Angeles (2004) 125 Cal. App. 4th 470.*

1) Ellis-Lamkins has an indirect financial interest and/or an undisclosed remote financial interest in attempting have all airport employees be HMS Host employees, including those new employees which will be added by the current contract. Ellis-Lamkins has stated in writing as part of her work as Executive Director of Partnerships USA that if the Mineta International Airport were a single employer it would be the 3rd largest employer in San Jose with 6,000 employees, behind Cisco and IBM. She is leading the effort behind the South Bay AFL-CIO Labor Council and Partnerships USA in its Campaign to Build a Better Airport and bring a living wage to the airport. It is clear that expanding the base of union workers is the primary goal of Ms. Ellis-Lamkins as the Executive Director of the South Bay AFL-CIO Labor Council and that expanding the base will provide more union dues which enhances the security of her receiving her compensation, and enhances the strength of her employer. This is unequivocally a financial interest that is prohibited of Government Code Section 1090 and *People v. Honig*. This is also direct evidence that she had a conflict of interest and financial bias when she participated in evaluation committee on the subject RFP. Her overt statement to Javier Vega stating her position regarding Host/Marriot represents an absolute violation of her duty to the public (see 2) below). Accordingly, at a minimum, City Council should void the contract award, and refer this matter back to the Airport Commission for reevaluation and that Ms. Ellis-Lamkins recuse herself from the evaluation process.

a) Pursuant to RFP Rule 1.12.5, HMS Host should be disqualified for unduly influencing a committee member, Phaedra Ellis-Lamkins;

2) On Friday June 8, 2007, Mr. Javier Vega was at the office of Ellis-Lamkins at the South Bay AFL-CIO Labor Council located at 1017 Almaden Road, Suite 108, San Jose, California in an effort to continue to build PGC's relationship with the union and introduce itself as a proposer on the Airport Concessions RFP. This was a permissible communication under City Council Policy 0-35. At this brief meeting Mr. Vega introduced himself as a principal of Pacific Gateway Concessions. Ms. Ellis-Lamkins stated that she "did not know who we were but that she already had a relationship with HMS Host and that is who she would be supporting". This statement by Ellis-Lamkins is direct evidence that she had already decided to support HMS Host prior to the RFP being issued. This is a clear violation of city policy, city regulations, PGC's rights to a fair hearing, and equally compelling a violation of her duty to public as discussed in *People v. Honig*.

a) As she had already decided to "support HMS Host" her participation in the

evaluation process denied PGC fairness in the procurement process. PGC asserts that her participation in the process tainted the evaluation process, prejudiced PGC and negatively influenced the ultimate score received by PGC. PGC asserts that Ellis-Lamkins participation in the evaluation process likely influenced the vote and score calculations of fellow Team San Jose, Inc. founder and fellow-committee member Daniel Fenton and others. We assert that the scores of evaluation committee were artificially lowered by the participation of Ellis-Lamkins in the evaluation process.

b) PGC requests that the City Council, prior to voting on this the airport commission recommendation of HMS Host for the Concession Contract, compel inquires to Daniel Fenton if as co-founder of Team San Jose, Inc or in any other capacity or at any other time, if he had any discussions with Ellis-Lamkins in any of the prohibited time frames set forth in City Council Policy 0-35 and as set forth in the RFP.

3) In a letter dated November 17, 2006, evaluation committee member Amy Shaw stated: "Please accept this correspondence as a letter of recommendation for Airport Management Services LLC dba Hudson Group". Although not a member of the evaluation committee at the time the letter was written, Shaw was a member of the evaluation committee at the time the letter of recommendation was made part of the record as part of the evaluation process. This is further grounds for this council to find that PGC did not receive a fair hearing. This letter of recommendation is direct evidence that Ms. Shaw also had already decided to support another competitor prior to the RFP being issued. This is a clear violation of city policy, regulations and also of PGC's rights to a fair hearing. Although the City's Protest Hearing Officer, Walter C. Rossman concluded that this was a general reference letter, his conclusion is without merit. The letter clearly states to the committee to "Please accept this correspondence as a letter of recommendation...." for the Hudson Group.

a) As she already decided to "recommend the Hudson Group" Shaw's participation in the evaluation process denied PGC a fair process. PGC asserts that her participation in the process tainted the evaluation process, prejudiced PGC and negatively influenced the ultimate score received by PGC. PGC asserts that Ms. Shaw's participation in the evaluation process did or could have influence the vote and score calculations of fellow evaluation committee members. We assert that the scores of evaluation committee were artificially lowered by the participation of Ms. Shaw in the evaluation process.

4) Unlawful Augmentation of PGC's Submitted Proposal: The proposal by PGC in response to the City's RFP consisted of 300 pages, including exhibits. Its proposal was improperly augmented by the City's Protest Hearing Officer Walter C. Rossman when he attached PGC's 3 page protest letter to the RFP, against the wishes of PGC that its objections not be disclosed to the evaluation committee because of concern of negative bias. PGC had an absolute right to have its proposal, as submitted, to be forwarded to the evaluation committee with its objection that said objection letter would create negative bias on the evaluation committee. This is further supported by the fact that as hearing officer Mr. Rossman concluded in its December 18, 2007, letter to PGC that "...your letter will not result in the City amending the RFP document." Despite this statement by Mr. Rossman, the RFP was improperly amended

when PGC's protest was added as Attachment #1 to Addendum #3 of the RFP. PGC asserts that its objections being shared with the evaluation committee served no purpose, effectively augmented its Submitted Proposal and indicate the predisposed bias towards its proposal.

a) There is no authority in the protest procedure set forth in RFP Section 1.12.8: Objections to This RFP. This section states:

"Any objections as to the structure, content or distribution of this RFP must be submitted in writing to the City's Protest Hearing Officer prior to the submission deadline for Questions and Answers. Objections must be as specific as possible and identify the RFP section number and title, as well as a description and rationale for the objection."

b) It is good public policy to get the input of prospective proposers prior to distribution of the final RFP. **Inclusion of objections which are rejected by Protest Officer serves no purpose and will discourage input of proposers which are in the public interest.**

5) PGC was Entitled to a Fair Protest Hearing: The 9-person evaluation committee of the Airport Commission was appointed in conjunction with the support of the City's Protest Officer Walter C. Rossman. This includes the appointment of Ellis-Lamkins, Daniel Fenton and Amy Shaw to the evaluation committee. Rossman failed to be unbiased decision maker in the assessment and investigation of the conduct of his appointees, Ellis-Lamkins and Shaw, and perhaps others.

6) Finally, Airport Commission Director Sherry stated to Proposer Areas USA that "DeLaVe (a related entity of PGC) and Javier Vega" were undesirable partners. This is an unlawful communication in violation of City Council Policy. This statement reflects a clear bias of a decision maker in the process that has denied PGC a fair hearing.

CONCLUSION

The San Jose City Council is the gatekeeper of the public trust, and has an absolute duty to the public. It is an obligation, not an option, that the City Council take all reasonable steps possible to ensure that the Procurement process has integrity, is fair and is free of conflicts of interest. It is precisely this process that came under scrutiny in the 2004-2005 Santa Clara County Civil Grand Jury Report regarding the City of San Jose's Procurement Policies, Procedures, and Practices. Based on the above stated City, State and Federal policy, rules and regulations, it is unassailable that PGC was in fact denied a fair and unbiased process and hearing on the merits of its proposal, as well as on its protest of the decision of the evaluation committee to award the Airport Concessions Contract to HMS Host. Accordingly, PGC urges that the City Council proceed as follows:

1. Reject the recommendations of the Airport Commission to award the Airport Concessions contract to HMS Host;
2. Disqualify HMS Host for unduly influencing the decision of evaluation committee

member Ellis-Lamkins pursuant to the disqualification authority set forth in the RFP;

3. Refer this matter back to the Airport Commission for reevaluation with the recusal of Ellis-Lamkins, Amy Shaw, Daniel Fenton, and any other evaluation members that have a conflict of interest.

4. Refer this matter to the Santa Clara County District Attorneys office for determination of whether Ms. Ellis-Lamkins, or any other committee members conduct violated Government Code Section 1090/1097;

5. Refer this matter to the Office of the City Attorney for re-consideration of the recommendations of the 2004-2005 Civil Grand Jury which expressed serious concern and recommendations relating to the integrity of the process in the procurement process;

6. Incorporate by reference as though fully made part of this record all those documents referenced in section one of this document relating to the documents, transcripts and other evidence PGC has tried to obtain from the City but which has yet to be produced;

7. In lieu of our request in #6 above, delay its decision on PGC's appeal until the requested documents in section 1 are produced and made part of this record.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Lawrence P. Ramirez', is written over the typed name and extends across the width of the page.

Lawrence P. Ramirez
Attorney at Law

cc:Pacific Gateway Concessions, LLC