



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Gerald A. Silva

SUBJECT: STATUS REPORT ON THE
SELECTION OF AN INDEPENDENT
INVESTIGATOR TO REVIEW THE
ISSUES ASSOCIATED WITH THE NORCAL
CONTRACT AND CONTRACT AMENDMENT

DATE: September 12, 2005

BACKGROUND

On June 28, 2005, the City Council directed the City Auditor to 1) select and retain a qualified independent investigator to review issues associated with the Norcal garbage contract and contract amendment, 2) complete a thorough conflict analysis to ensure independence and impartiality and 3) to negotiate and execute a contract with the independent investigator in an amount not to exceed \$100,000.

RECOMMENDATION

- 1) Accept the City Auditor's status report on the selection of an independent investigator to review the issues regarding the Norcal garbage contract and contract amendment.
- 2) Accept JAMS status report on Investigation Regarding Issues Associated with the Norcal Contract and Contract Agreement.

STRATEGIC PROCEDURE FOR SELECTING AN INDEPENDENT INVESTIGATOR

The City Auditor has completed the following:

1. Set up a meeting with the Business Manager of the San Jose Judicial Arbitrations Mediations (JAMS) Office in order to discuss possible candidates to make up an Expert Panel of Neutral Evaluators (EPNE).

2. The JAMS Business Manager provided the City Auditor with a list of nine retired judges of which three were chosen. The City Auditor has selected the members of the EPNE to include Judge Peter Stone, Judge Joseph Biafore and Judge Harry Low. The City Auditor has also designated Judge Peter Stone as the lead member of the EPNE.
3. The three retired judges completed and signed the City of San Jose's conflict of interest form. The City Auditor has completed the conflict of interest analysis on the EPNE and has found the members to be free of bias.
4. The City Auditor with assistance from the City Attorney's Office negotiated a contract agreement and contract amendment between the City Auditor and the JAMS Business Manager and the EPNE. The City Auditor has executed and will administer the contract and make any necessary payments to the JAMS. The contract and contract amendment between the City Auditor, on behalf of the City of San Jose and JAMS, INC., were fully executed on August 3, 2005 and August 29, 2005 respectively. (See attachments A and B).
5. The scope of services stated in the contract amendment¹ between the City of San Jose and JAMS, INC., provides that JAMS shall perform the following services:
 - 1) Provide the services of three retired judges who will make up an Expert Panel of Neutral Evaluators (EPNE) responsible for 1) selecting an independent investigator to review issues associated with the Norcal garbage agreement and amendment as discussed in the Santa Clara County Civil Grand Jury Report, 2) overseeing the investigator and the investigation process, 3) designating the lead member of the EPNE and the independent investigator to return with a full report, which will include recommended next steps, to the full City Council by the date stated in Exhibit C unless otherwise extended, 4) designating the lead member of the EPNE and the independent investigator to report back on the status of the investigation to the full City Council in the event that the investigation is not complete by the date stated in Exhibit C.
 - 2) Direct the Independent Investigator to include in the scope, the review of the material and findings of the Grand Jury to determine if the Mayor, Mayor's staff, or other CITY officials, officers or employees violated the City Charter, Municipal Code, CITY policies related to ethics of independent judgment, or other law, with the final scope to be determined by the Independent Investigator with oversight from the EPNE.
 - 3) Require the Independent Investigator to complete the City of San Jose Conflict of Interest Form for JAMS review.
 - 4) Advise prospective candidates for the Independent Investigator that the Independent Investigator will be required to comply with the City of San Jose contract requirements including indemnity and insurance requirements.

¹ SECTION 2, TERM OF AGREEMENT; EXHIBIT B, SCOPE OF SERVICES; and EXHIBIT C, SCHEDULE OF PERFORMANCE were amended. See attachment B.

- 5) Review independent investigator invoices for services rendered for accuracy and compliance with the scope of services the EPNE developed.
- 6) Forward independent investigator invoices to the City of San Jose, in care of the City Auditor for payment. The City Auditor will require compliance with the not to exceed amount of One Hundred Thousand Dollars (\$100,000) for services for the independent investigator and incidental JAMS administrative costs as stated in Exhibit D.

STATUS

JAMS EPNE selected Chris Scott Graham of Dechert LLP to review the issues regarding the Norcal Contract agreement and the contract amendment on September 1, 2005. According to JAMS press release the panel reviewed several RFPs and the selection process involved eliminating firms with internal conflicts of interest as well as those firms unable to meet the budget and deadline parameters of the assignment.

The City Auditor has completed the conflict of interest analysis on Dechert LLP and has found the Lead Attorney Chris Scott Graham and Dechert LLP staff members (expected to provide assistance to Mr. Graham) to be free of bias. The City Auditor has also completed the contract agreement which Dechert LLP is currently reviewing.

COORDINATION

The City Auditor coordinated the negotiation of the contract between the City of San Jose and Dechert LLP, with the City Attorney, the Chief Deputy City Attorney, the Risk Management Department and the City Clerk's Office.



GERALD A. SILVA
CITY AUDITOR



MEMORANDUM

DATE: September 12, 2005

TO: San Jose City Council

FROM: Honorable Peter Stone (Ret.)
Honorable Joseph Biafore (Ret.)
Honorable Harry Low (Ret.)

CC: Chris Graham, Esq. & Gerald Silva

RE: Status Report on Investigation Regarding Issues Associated with the Norcal Contract and Contract Amendment

BACKGROUND RE: SCOPE OF INVESTIGATION

As directed by the City of San Jose in the draft Agreement for Investigator Services¹, at this time the scope of the investigation consists of a review of the material and findings of the Grand Jury to determine if the Mayor, Mayor's staff, or other City officials, officers or employees violated the City Charter, Municipal Code, City Policies related to ethics of independent judgment, or other laws, with the final scope of the investigation to be determined by the Investigator in consultation with the Panel.

CURRENT STATUS OF INVESTIGATION

Consistent with the foregoing, the initial scope of the investigation is focusing on the materials considered by the Grand Jury, as opposed to an independent factual investigation. We are in the process of compiling all of the information and materials considered by the Grand Jury, along with associated relevant materials such as the Mayor's September 1, 2005 response to the Grand Jury's Report on the Norcal contract (the "Mayor's Response"). To date we have compiled several thousand pages of documents, and are in the process of seeking copies of materials not yet provided (which we understand could constitute several additional thousands of pages of relevant documentation). We have started the process of sorting the documentation and correlating the information contained therein to the findings of the Grand Jury.

¹ While the terms of the Agreement have not been finalized, the open issues do not involve the "Scope of Services," as identified in Exhibit B to the draft Agreement.

PLAN OF ACTION TO ACCOMPLISH INITIAL SCOPE OF INVESTIGATION

There are two aspects to the scope of investigation as currently specified.

First, since the focus of our efforts during this investigation as currently constituted relates to a contained (if significant) body of information, we plan to accomplish our described task by comparing the factual analysis contained in the Grand Jury Report with the source materials. We will then determine whether any further factual investigation is appropriate in light of that analysis (as well as in consideration of the Mayor's Response).

Second, if no further factual analysis appears appropriate, we will address whether there is credible evidence sufficient to support the conclusion that the Mayor, Mayor's staff, or other City officials, officers or employees violated the City Charter, Municipal Code, City Policies related to ethics of independent judgment, or other laws.

On the assumption that we are able to timely obtain all of the relevant materials considered by the Grand Jury, we anticipate being able to complete the scope of the investigation (as described above) within sixty to ninety days.

Notwithstanding the above plan of action, the investigation will go were the facts lead us, no matter how difficult it may be.

POTENTIAL RECOMMENDED FURTHER INVESTIGATION

As noted above, upon completion of the scope of this investigation as currently constituted, if no further investigation is necessary, the assignment will be concluded at that point. If, upon completion of the review of the material findings of the Grand Jury, it appears that a further scope of investigation is necessary or appropriate (primarily related to further fact gathering, witness interviews, etc.), at that time we will provide to the Panel an identification of the additional types of investigation suggested. Upon consultation with the Panel we will be prepared to make such other and further recommendations to the City Council along with an estimate of the additional resources that appear necessary to complete the further scope of the investigation.

While we have not yet determined whether any additional investigation will be necessary or appropriate, in addition to the potential need to obtain additional documents, such additional investigation could include further witness interviews. We note that, to ensure the preparation of an accurate record and consistent with the recommendations of the Grand Jury to have witnesses testify under oath and penalty of perjury, such witness interviews will likely be conducted and transcribed by a certified court reporter. Should such further investigation be recommended, at that time we will also provide an additional anticipated timeline.

Respectfully submitted.