

May 24, 2018

District Attorney Jeff Rosen
Santa Clara County
West Wing, 70 W Hedding St,
San Jose, CA 95110

Dear District Attorney Rosen:

Please accept this letter as criminal complaint against Alum Rock School District (Alum Rock), each member of the Alum Rock School District Board as individuals, Del Terra Real Estate Services, Inc. (Del Terra), Del Terra contract employees working at Alum Rock, and Louie Moran. This complaint details numerous criminal violations of Government Code Section 1090, Education Code Section 7054, and the Political Reform Act (the Act).

Background

Alum Rock serves around 11,000 students in East San Jose, in Santa Clara County. It is a K-8 school district. Like many school districts throughout the state, Alum Rock relies on local ballot measures to finance district facility needs. Alum Rock passed two such measures, Measure J in November 2012 and Measure I in 2016.

In 2013 and 2014, Del Terra was selected by Alum Rock to perform program and construction management services for Measure J construction projects. Del Terra was selected and awarded a contract after a "Letter of Intent" was issued by Alum Rock. The contract was approved by the Alum Rock Board on May, 9, 2013. Included in that "Letter of Intent" was a prohibition on conflicts of interest, including a statement that "Any firm that submits a Statement of Interest and is selected to support the District under this Letter of Interest for Program Manager will be ineligible to submit a proposal for construction manager services, lease-leaseback services or general contract bid for the subsequent phases of work." Further, this Program Services agreement required Del Terra to oversee the District's construction manager, and to be paid a 10% of construction costs bonus to keep construction costs down.

On May 8, 2014, despite the original contract prohibition against the program services manager serving as the construction services manager, the Alum Rock Board approved a second agreement with Del Terra, the Construction Management Services Agreement. (see Exhibit F, Alum Rock Board signed approval document) This agreement was not done via an RFQ or any other competitive process. The Construction Management agreement requires Del Terra to manage all Construction of the project, including the ability to control costs of construction. There is much overlap in the duties of Del Terra in terms of the managing of construction when

both contracts are considered together. (see Exhibit A, Rehon & Roberts Legal Memorandum to Alum Rock Board) The Program Management Contract included provisions that required Del Terra to develop and participate in bids for services under the contract. (see Fiscal Crisis and Management Audit, Exhibit B, pages 90 and 111)

Del Terra donated \$30,000 in support of Measure I in June, 2016. Del Terra also provided campaign contributions to several Alum Rock Board Members for their respective board elections. Although not covered within 1090 or the Act's conflict of interest provisions, this does raise issues under Education Code Section 7054 (a), which prohibits school district or community college district funds, services, supplies, or equipment from being used to advocate or influence the outcome of an election if the pre-election services contracted with a person or entity for services may be characterized as campaign activities. Further, the Attorney General's office issued an opinion in January 2016 (AG opinion No. 13-304). This opinion related to campaign contributions in a local bond campaign. In general, it prohibits school districts from entering into agreements with municipal underwriting firms that provide school districts with pre-election services in return for guaranteeing the firm an exclusive contract to provide post-election services.

In November 2016, Alum Rock entered into further agreements with Del Terra that were not subject to RFQ or bid. A second round of program and construction management agreements for Measure J funds was entered into, along with program and construction management agreements for Measure I. (see Exhibit C, Minutes from November 10, 2016 Alum Rock Board Meeting) The Program Management Contract included provisions that required Del Terra to develop and participate in bids for services under the contract. (see Exhibit A, Page 10)

From 2013 through the present, Del Terra has provided both program and construction management services to Alum Rock. As required by the program management contract, it is without doubt that Del Terra participated in the awarding of no-bid contracts to itself for construction management services for Measures J and I in 2016.

In June 2017, due to complaints about fraud and mismanagement by Del Terra, an audit of the work done by Del Terra for Alum Rock was conducted by the Fiscal Crisis and Management Assistance Team (FCMAT) at the behest of the Santa Clara County Office of Education. (see Exhibit B, FCMAT Audit Report). This audit detailed the fraud, mismanagement and conflicts of interest by Del Terra in their work for Alum Rock. Del Terra refused to cooperate with the FCMAT audit. They refused to provide any documents or witness interviews, even though required to do so by the program and construction management services agreement. (see Exhibit B, FCMAT Audit page 2) The Audit also found that a Del Terra employee (named in the Audit only as the Director of Facilities, but here identified as Louie Moran) has gone to work for Alum Rock, and participated in decisions regarding Del Terra, but has not even filed the required Statements of Economic Interests (SEI). (see Exhibit B, page 58)

Following the FCMAT audit, Alum Rock, at its October 27, 2017 meeting, approved the “re-negotiation’ of the construction management and program management agreements with Del Terra. This was done against the advice of counsel, who identified 1090 and other conflict issues, and recommended these issues be resolved, if possible, before re-negotiation of the Del Terra agreement. (see attached Exhibit D, minutes of the Alum Rock October 27, 2017 meeting)

Statutes Violated

1. Government Code Section 1090 (Alum Rock School District) 5 Counts
2. Government Code Section 1090 (b) (Alum Rock School Board Members and Del Terra) 5 Counts per Board Member
3. Government Code Section 87100 (Del Terra Contractors, Louie Moran (former Del Terra and current Alum Rock employee)) 5 Counts for Del Terra contractors and 5 counts for Louie Moran (former Del Terra and current Alum Rock employee).
4. Government Code Section 83116.5 (Alum Rock School Board Members) 5 Counts per Alum Rock School Board Member
5. Government Code Section 87300 (former Del Terra and current Alum Rock employee) One Count for Louie Moran (former Del Terra and current Alum Rock employee).
6. Elections Code Section 7054 (a) (Alum Rock School District)

Specific Violations of Law

Conflicts of Interest in Contracts – Government Code Section 1090

Government Code section 1090 prohibits public officials from being financially interested in contracts made by them in their official capacities. It states, in pertinent part, that “[m]embers 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.” (Cal. Gov. Code § 1090 (emphasis added).)

The purpose of section 1090 is to prevent self-dealing of public officials, essentially being on two sides of a contract. Section 1090 follows a theme that runs throughout conflict of interest rules, namely, that public officials cannot serve two masters when making official decisions. Contracts made in violation of section 1090 are void. (*See* Cal. Gov. Code § 1092; *Thompson v. Call* (1985) 38 Cal.3d 633.)

In reviewing a potential section 1090 issue, the Attorney General has set forth the following analytic framework:

1. Is the individual with the potential conflict of interest covered by section 1090?
2. Does the decision at issue involve a contract and is that contract ultimately executed?
3. Is the individual making or participating in making the contract?
4. Does the official have a financial interest in the contract?

5. Does a non-interest exception apply?

Alum Rock violated section 1090 under the following analysis:

Is the individual with the potential conflict of interest covered by section 1090?

The language of section 1090 is quite broad and applies to virtually all public officials and employees in the state. The section also applies to corporate consultants hired by local governments or districts (see *Davis v. Fresno Unified School District* 237 Cal. App.4th 261). Del Terra was a corporate consultant hired by Alum Rock to provide management services, including the development of public contract bids.

As noted in the Rehon & Roberts memo in Exhibit A, Del Terra “had a hand in designing and developing plans and specifications by which District projects are built.” Del Terra’s responsibilities included oversight and coordination of the District’s consultants, including architects, engineers and construction managers, the coordination of design consultant activities and delivery schedules, working closely with and supporting architects is all related designing and programming tasks, reviewing design documents for constructability, scheduling, phasing, clarity, consistency and coordination, and performing analyses of the design documents and preparing reports with recommendations to the District to maintain established budgets. In *Davis*, the Court was persuaded by the fact that the contractor had “had a hand in designing and developing plans and specifications by which the project” was being constructed in finding the contractor was a public official. (*Davis* at 295)

Thus, Del Terra, and its consultants, were covered under the prohibitions of Section 1090.

Does the decision at issue involve a contract and is that contract ultimately executed?

Section 1090 requires that a contract be “made” in order for there to be a violation. A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See *City of Imperial Beach v. Bailey* (1980)103 Cal.App.3d 191 Where an existing contract requires periodic renegotiation of payment terms, the modification of such terms constitutes the making of a contract. (81 Ops.Cal.Atty.Gen. 134 (1998).)

Alum Rock entered into six different contracts with Del Terra. The Measure J Project Management Agreement in 2013, the Measure J Construction Management Agreement in 2014, the second Measure J Project Management Agreement in 2016, the second Measure J Construction Management Agreement in 2016, the Measure I Program Management Agreement in 2016 and the 2016 Measure I Construction Management Agreements.

Is the individual making or participating in making the contract?

The standard for making or participating in a contract is broad and covers direct or indirect involvement. This includes planning, preliminary discussions, compromises, drawing of plans and specification and solicitation of bids. Del Terra was contractually obligated to participate in the development of the subsequent RFQs after the initial 2013 Measure J agreement.

As detailed in Exhibit A, Del Terra, at a minimum, publicly spoke in favor of the Measure I Program Management and Construction Management Agreements. Although there was no RFQ or any other public solicitation put out for the 2016 Measure I or Measure J contracts, the fact that it was a “no-bid” award to Del Terra leads to the conclusion that Del Terra participated in the awarding of the contract. In fact, the Alum Rock staff recommended that an RFQ process be used for adoption of these contracts, but the recommendation was rejected by the Board.

There is publicly available evidence of Del Terra’s participation in these contracts. Further investigation will no doubt reveal Del Terra consultant’s participation in the development and issuance of the five contracts listed in this complaint as violating section 1090.

Does the official have a financial interest in the contract?

Courts have been clear that the financial interest component of Section 1090 is to be broadly construed. (*Lexin*, 47 Cal. 4th at 1075 (citing *People v. Honig* (1966) 48 Cal.App.4th 289, 315) In addition, the public official need not directly benefit from the contract for a violation to be found. The objective of Section 1090 is to avoid “divided loyalties” and require a public official to serve only one interest, that of the governmental entity. (*Stigall v. Taft*, (1962) 58 Cal. 2d 565, 570.)

Del Terra had significant overlap in terms of the two contracts in terms of scope of services and costs. There were financial incentives built into these contracts where Del Terra received more money if it let the costs of construction rise. Del Terra’s financial interest is direct and clear.

Does a non-interest exception apply?

The Government Code contains multiple exceptions to section 1090, known as “non-interests.” These are areas in which the Legislature has sought to curb the broad impact of section 1090 in instances where, despite the existence of a financial interest, an official’s judgment would not likely be impaired. None of these apply to Del Terra’s situation.

Conclusion

Alum Rock and the Del Terra contract employees working at Alum Rock are in violation of section 1090 with regard to five contracts it entered into:

May 2014 – Measure J Construction Management Agreement
November 2016 – Measure J Second Program Management Agreement
November 2016 – Measure J Second Construction Management Agreement
November 2016 – Measure I Program Management Agreement
November 2016 – Measure I Construction Management Agreement

Del Terra knowingly aided and abetted the five above-listed 1090 violations in violation of 1090 (b).

Financial Conflicts of Interest – Government Code Section 87100

Under the Political Reform Act (PRA), “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” (Cal. Gov. Code § 87100.) The FPPC analyzes PRA conflicts by determining: 1) if a person is a public official; 2) whether they participated in, influenced or made governmental decisions; 3) what economic interests did the public official have; and (4) whether the governmental decision had a reasonably foreseeable and material impact on those interests. Violations of the Political Reform Act are misdemeanors.

Unlike Section 1090, 87100 financial conflicts of interest can exist whether or not the contract was ultimately agreed upon and signed. This is because the statute applies to even participating in or attempting to influence the making a governmental decision. As a result, participation in any contracts that were finalized or that have not yet been finalized will result in a conflict of interest violation if the relevant materiality and foreseeability standard is met. Moreover, the PRA is not limited to contracts. Any governmental decision can be the basis for a conflict violation.

Del Terra Consultants were Public Officials

Consultants who make, participate or influence governmental decisions are considered public employees and subject to the conflict of interest provisions of the Political Reform Act under FPPC Regulation 18700.3. Here, Del Terra’s consultants were required under each of the Program and Construction Management contracts to make governmental decisions and serve in a capacity where they acted as staff members for the Alum Rock School District. They were responsible for oversight of all the consultants related to the projects undertaken as a result of Measure I and Measure J. They were also responsible for assisting with the development of RFQs for subsequent services under these Measures. As a result, they clearly meet the standard

of Regulation 18700.3 and were public officials subject to the financial conflict of interest prohibitions.

Del Terra Consultants Made, Participated In, or Influenced Decisions

As noted above in the 1090 complaint, Del Terra publicly spoke in favor of two of the agreements, those for the Measure I Program and Construction Management contracts. Given the Measure J contracts in 2014 and in 2016 were “no bid,” Del Terra undoubtedly had involvement in those contracts as well.

Del Terra Had a Material Financial Interest in the Decisions

Since the contractors were employees of Del Terra, Del Terra was a source of income to them pursuant to FPPC Regulation 18700.1. The contracts in which these employees made, participated or had influence had a material financial effect on Del Terra. (see FPPC Regulation 18702.3) Del Terra was the named party in the contracts in question. Further, the Program Management contracts provided Del Terra with payment for services and with a financial incentive to make more money based on their own actions under the Construction Management contracts. The Del Terra contractors had a clear, reasonably foreseeable material interest in these contracts.

The Material Financial Interest Was Reasonably Foreseeable

The FPPC standard for foreseeability is quite liberal in its application, stating that the financial effect is foreseeable if it can be “recognized as a realistic possibility and more than hypothetical or theoretical.” Here, given the direct financial benefits of the contracts, this element is easily met as well.

Conclusion

The Del Terra consultants were each in violation of section 87100 with regard to five contracts the Alum Rock and Del Terra entered into:

- May 2014 – Measure J Construction Management Agreement
- November 2016 – Measure J Second Program Management Agreement
- November 2016 – Measure J Second Construction Management Agreement
- November 2016 – Measure I Program Management Agreement
- November 2016 – Measure I Construction Management Agreement

The Alum Rock Board Members each knowingly caused and aided and abetted the five above-listed 87100 violations.

Louie Moran, in his capacity as the Alum Rock Director of Facilities, also violated 87100 for the four November, 2016 contracts if he received income from Del Terra within one year of making, influencing or participating in these decisions. Also, please see Exhibit E, which is an article from the San Jose Mercury news. The article details Louie Moran attempting to secure a “side deal” for a contract with Alum Rock. The side deal would have the effect of increasing income to Del Terra. Mr. Moran may have received additional income from this “side deal,” that could result in a conflict of interest as well.

Failure to File Statements of Economic Interest

Anyone who is a public official and whose position is contained within their agency’s conflict of interest code is required to file a Statement of Economic Interest (SEI). The SEI must within 30 days of taking office, annually for each year they are a public official, and within 30 days of leaving office. (see Government Code section 87300). Failure to file an SEI is a misdemeanor.

Louie Moran was hired by Alum Rock as its Director of Facilities in 2015. (see Exhibit B, page 58) However, he has failed to file his SEIs through at least 2016. Given his previous employer, who still has business before the District, and the allegations of his participation in facility “side deals,” Mr. Moran must be required to disclose his economic interests but has failed to do so.

Violations of Elections Code 7054 (a)

As noted previously, Del Terra donated \$30,000 in support of Measure I in June, 2016. Del Terra also provided campaign contributions to several Alum Rock Board Members for their respective board elections. Further, several architectural firms gave a total of \$55,000 in support of the Measure I ballot measure in 2016. All of these architectural firms had been awarded contracts by Del Terra as part of their administration of Measure J programs. All these firms were also subsequently awarded contracts from Measure I funds by Del Terra as part of their administration of Measure I funds. (see Exhibit B, page 3)

Education Code Section 7054 (a), prohibits school district or community college district funds, services, supplies, or equipment from being used to advocate or influence the outcome of an election. This is true if the pre-election services contracted with a person or entity for services may be characterized as campaign activities. Violations of Education Code Section 7054 can be either a misdemeanor or a felony.

The Attorney General’s office issued an opinion regarding this issue in January 2016. (AG opinion No. 13-304). This opinion related to Section 7054 as it relates to the promise of contracts to a firm pre-election if they support a bond measure campaign. Specifically, it found that “a school or community college district violates prohibitions against using public funds to advocate passage of a bond measure if the district enters into an agreement with a municipal

finance firm under which the district obtains pre-election services (of any sort) in return for guaranteeing the firm an exclusive contract to provide bond sale services if the election is successful, under circumstances where (a) the district enters into the agreement for the purpose (sole or partial) of inducing the firm to support the contemplated bond-election campaign or (b) the firm's fee for the bond-sale services is inflated to account for the firm's campaign contributions and the district fails to take reasonable steps to ensure the fee was not inflated.”

Given the facts presented here, this issue requires investigation by the appropriate enforcement entity. Del Tera was awarded no-bid contracts after their support for Measure I. These contracts were awarded against the recommendations of staff. Once this was discovered by audit, the Board directed re-negotiation against the advice of their attorneys. The District hired a former Del Terra employee as their Director of Facilities. It allowed this employee to make “side deals” on awards that benefitted Del Terra financially. It rewarded every architectural firm with project work after Measure I passed. All this certainly warrants investigation of whether Section 7054 was violated.

We respectfully request you investigate these violations of law.

Sincerely,

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