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Report of Investigation

FILE NO: 19-0001-I

DATE: June, 27, 2019

SUBJECT: AV-1 (Aviation Associate Director)

STATUS: Closed

INVESTIGATOR: Peter Pacheco

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ACCOUNTABILITY IN GOVERNMENT OVERSIGHT COMMITTEE CHAIR

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Executive Summary

The Office of Inspector General (OIG) for the City of Albuquerque (City), NM, conducted an investigation based on information received from a complaint regarding an employee with the Aviation Department (AD). According to the complaint, an AD Associate Director (AV-1) submitted a contract proposal for the job he was currently overseeing as an AD employee. AV-1 was retiring from the City and if approved, would be performing the same job duties as a contractor while being on early retirement from the City.

AV-1's proposal for \$52,000 was included in the tenth Authorization Request Form for Additional Services (Change Order) by the Architectural contractor (Contractor) overseeing the Terminal Improvement Project (TIP).

The AD knew of AV-1's proposal and the potential legal problems. According to the assistant city attorney assigned to AD, AV-1 was open about submitting the proposal and recognized the potential problems of the proposal. The AD's assigned assistant city attorney requested an independent legal opinion from the City's Legal Department. The City's Legal Department's opinion was that it would be problematic to approve the proposal.

The Tenth Change Order was signed by AV-1 and AD's deputy director. Six signature approvals were needed. Although the Tenth Change Order did not completely make it through the approval process, the OIG believes the actions taken during the process do create potential violations of City Ordinances.

Based on the following facts established during the investigation, the OIG finds there is evidence to substantiate that AV-1 was in violation of City Ordinances § 5-5-22 ETHICAL CONDUCT, § 3-3-5 CONFLICT OF INTEREST and Personal Rules and Regulations Section 311.7 Conflict of Interest.

- AV-1 was involved in the initial procurement as one of the five members of the Selection Advisory Committee who chose the Contractor for the TIP project.
- AV-1 was the Project Manager for the TIP project.
- AV-1 submitted his proposal for \$52,000 to the Contractor while he was the Project Manager for the TIP project.
- AV-1 signed off on the Tenth Change Order essentially approving himself to be an outside contractor while on early retirement. (Tenth Change Order did not get all the required signatures)
- AV-1 made the decision as stated in the Contractor's proposal that it would be in the best interest of the City to provide management services through the conclusion of the TIP project, but this was a self-serving and self-interested conclusion not independently arrived at.
- AV-1 had a personal financial interest when submitting the proposal.

The AD was aware of the issues and conflicts. The AD should not have allowed the process to move as far along as it did. AD's assigned assistant city attorney stated that it is now clear it was a bad idea and if it were to be attempted again the attorney's response to approve it would be "absolutely not".

AV-1 did not get the outside contract and is on early retirement status. The OIG's opinion is that the AD did take the correct action by not approving the proposal, but the proposal should have been denied from the beginning because it would clearly be in violations of the Ethical Conduct, Conflict of Interest Ordinances and Personal Rules and Regulations Section 311.7 Conflict of Interest.

Introduction:

The mission of the Office of Inspector General (OIG) is to promote a culture of integrity, accountability, and transparency throughout the City of Albuquerque in order to safeguard and preserve the public trust. The OIG received a complaint alleging potential conflicts of interest between a City employee and a contractor working on a project at the Albuquerque International Sunport. Specifically, the complainant stated that an Associate Director for AD submitted a contract proposal for the job he was currently overseeing as a City employee. The employee was retiring from the City and would be performing the same job duties as a contractor while being on early retirement from the City.

Background:

According to the allegation, the Associate Director of Aviation (AV-1), who was the City's project manager for the Terminal Improvement Project (TIP), submitted a proposal to the TIP Contractor in the amount of \$52,000 at \$50 per hour to provide contracting services upon his retirement from the City. AV-1 would basically be doing the same job as a contractor that he was doing as a City employee. AV-1's proposal was submitted by the contractor, along with other documents, in the Tenth Authorization Request Form For Additional Services (Change Order) dated November 27, 2018. The potential was there for AV-1 to get paid \$50 an hour as an outside contractor while getting paid a City salary while on early retirement.

Scope and Methodology:

The scope of this investigation focused on the allegations asserted by the complainant. The methodology consisted of reviewing relevant documents and interviewing City personnel who could provide information regarding the allegation.

The following activities were conducted as part of the investigative process:

- Interviews of Aviation personnel
- Review of pertinent documents
- Review of relevant City ordinances, rules and regulations and administrative instructions relevant to the allegations in the complaint
- Communication with pertinent City departments

Review of Relevant Ordinances, Personnel Rules and Regulations, Administrative Instructions:

After reviewing pertinent documents, the OIG concluded that the following could be potential violations by AV-1.

§ 5-5-22 ETHICAL CONDUCT.

In the procurement of goods, services and construction for the city, all City employees shall comply with the rules of ethical conduct set out in § 3-3-1 et seq., Conflict of Interest. In addition, the following ethical provisions shall also apply to all city procurements:

(A) *Employee conflict of interest.* It shall be unlawful for any city employee to participate directly or indirectly in a procurement when the employee knows that:

(1) The employee or any member of the employee's immediate family has a financial interest pertaining to the procurement; or

(2) Any other person, business, or organization with whom the employee or any member of an employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

(K) *Penalties.* To the extent that violation of the ethical standards of conduct set forth in this section constitute violations of a city ordinance or state statute, they shall be punishable as provided therein. The civil penalties set forth in this section and available for the violation of provisions of this article shall be in addition to such criminal penalties.

(’74 Code, § 5-7-22) (Ord. 6-1991; Am. Ord. 30-1998; Am. Ord. 24-2000; Am. Ord. 34-2006) Penalty, see § 1-1-99

§ 1-1-99 GENERAL PENALTY.

Any person who violates any provision of this code for which another penalty is not specifically provided shall, upon conviction, be subject to a fine not exceeding \$500 or by imprisonment not exceeding 90 days or both unless a different specific penalty is provided. Each separate violation shall constitute a separate offense and, upon conviction, each day of violation shall constitute a separate offense.

- **AV-1’s involvement in the TIP project began from its initial phase when AV-1 was part of the five member Selection Advisory Committee that chose Contractor for the project.**
- **AV-1’s involvement continued as the City’s Project Manager for the TIP project.**
- **AV-1 submitted his proposal to Contractor for \$52,000 while he was the City’s Project Manager for the TIP project.**
- **AV-1 worked on the Tenth Change Order as a City employee and as a potential outside contractor.**
- **AV-1 had a financial interest while working on the Tenth Change Order procurement process.**
- **AV-1 stated that he made the decision in the following statement provided by contractor in the Tenth Change Order, “In order to maintain management continuity which is in the best interest of the City, a decision was made to allow AV-1, to provide management services through conclusion of the TIP project.”**

§ 3-3-5 CONFLICT OF INTEREST.

(A) An employee shall disqualify himself or herself from participating in any official act directly affecting a business in which he or she has a financial interest. No employee shall acquire a financial interest at a time when he or she believes or has reason to believe that it will be directly affected by his or her official act.

(B) Every employee who has a financial interest which he or she believes or has reason to believe may be affected by an official act taken within the scope of his or her employment shall disclose the precise nature and value of such interest. The disclosures shall be made in writing to the City Clerk at the time the conflict occurs and during the month of January every year thereafter. Additionally, it shall be the duty of an employee to inform his or her department head of such a financial interest at the time he or she acquires it. The information on the disclosures, except for the valuations attributed to the reported interests, shall be made available by the City Clerk for inspection to any citizen of this State; provided, however, the valuation shall be confidential. The filing of disclosures pursuant to this section is a condition of entering upon and continuing in city employment.

- **AV-1's official act of signing the Tenth Change Order was directly affecting his financial interest by approving himself as a contractor for \$52,000.**
- **AV-1 should have disqualified himself as one of the approvers of the Tenth Change Order. (Although the Tenth Change Order did not get all the required signatures, AV-1 did sign it authorizing the additional services. By AV-1 signing the Tenth Change Order, he was approving himself to be a contractor upon entering early retirement.)**
- **By AV-1 being the City's Project Manager, it may have provided an advantage to the TIP Contractor in accepting AV-1's proposal to continue with the project upon being on early retirement.**

NOTE: AV-1 notified Aviation's assigned legal counsel about his plans to possibly outside contract with AD upon entering early retirement. Upon this notification, AD's assigned assistant city attorney requested an opinion from the City's Legal Department on whether or not it was feasible.

Personal Rules and Regulations Section 311.7 Conflict of Interest:

No employee shall violate any provision of the City Conflict of Interest Ordinance (3-3-5, R.O., 1994) or Code of Conduct promulgated pursuant to that Ordinance, including, but not limited to the following:

- A. Employees shall disqualify themselves from participating in any official act directly affecting a business in which they have a financial interest. Employees shall not acquire a financial interest at a time when they believe or have reason to believe that it will be directly affected by their official act.
- E. A former employee shall not within (1) year after the date of termination from employment represent any person or business in connection with a matter in which the former employee has performed an official act, unless the Chief Administration Officer consents to such representation. No person or business with which the former employee is associated may knowingly undertake or continue a private representation in such a matter unless:

Nothing in this section in and of itself prohibits a former employee from entering into a contract to represent the City in any matter, however, all such contracts must

be approved by the Chief Administrative Officer. If approval is not provided then the employee cannot proceed.

Violation of any of the provisions of the Conflict of Interest Ordinance by an employee is grounds for disciplinary action, up to and including termination. Violation on any of the provisions of the Conflict of Interest Ordinance by a former employee is a misdemeanor, and, upon conviction the former employee may be sentenced to imprisonment for not more that (90) days or fined not more than \$500.00 of both such imprisonment and fine.”

- **AV-1 should have disqualified himself as an approver.**
- **By AV-1 being the City’s Project Manager, it may have directly affected the contractor accepting AV-1’s proposal to continue with the project upon entering in early retirement.**

After reviewing pertinent documents, the OIG considered the following for potential violations by AV-1.

§ 3-3-10 OUTSIDE EMPLOYMENT.

No employee shall engage in outside employment without prior approval of the Chief Administrative Officer, or a designee of the Chief Administrative Officer. No employee shall continue outside employment if such employment has a negative impact on his or her job performance. A determination that such employment has a negative impact on an employee's job performance is not the subject of a grievance as defined in § 3-1-24 of this chapter. No employee who is receiving Worker's Compensation benefits shall engage in outside employment. ('74 Code, § 2-3-10) (Ord. 31-1985)

- **AV-1 informed Aviation’s legal counsel about wanting to continue with the TIP project as an outside contractor upon entering early retirement.**
- **Aviation’s legal counsel decided that an outside review by the City’s Legal Department was needed for an opinion on whether or not AV-1 could attempt to get approval.**
- **The City’s Legal Department did come back with an opinion that AV-1 should not be approved for outside employment.**

ADMINISTRATIVE INSTRUCTION: 7-27 RETIREMENT PROCESS

Conflict of Interest Early Retirement/Retirement:

Individuals in early retirement and within one (1) year of their official retirement date cannot represent any person or business in connection with matters in which the employee has performed in an official act, unless the Director of Human Resources concurs and the Chief Administrative Officer consents in writing to such representation. Any requests to enter into a contract to represent the City in any matter may be approved with the concurrence of the Director of Human Resources and the approval of the Chief Administrative Officer.

- **AV-1 was attempting to get approval prior to going into early retirement, but had not yet obtained approval.**

INTERVIEWS

Aviation legal (AV-2) Interview:

On November 28, 2018, AD assistant city attorney (AV-2) was interviewed and provided the following information.

AV-2 stated that AV-1 was very open on what he was doing. The assumption was that the Human Resources Director and the Chief Administrative Officer were going to approve the proposal¹. AV-2 stated that AV-1 came to him in early November, 2018 to see if the proposal was allowable. AV-2 told AV-1 that it would be better to get an opinion from downtown City legal and that it made sense to get an independent opinion. According to AV-2, AV-1 did not see it as a conflict, but knew certain approvals were needed. There was no attempt to cover up.

AV-2 was asked if he knew that AV-1 had submitted the Tenth Change Order for approval which contained AV-1's proposal for the approval process. AV-2 stated that he did not know that.

On January 31, 2019 AV-2 was interviewed a second time by phone and provided the following information:

Again AV-2 stated that AV-1 recognized that he would have to have his proposal in the Tenth Change Order cleared by legal. Asking for an independent opinion from downtown City legal was the best option according to AV-2.

AV-2 stated that when AV-1 brought it to his attention there was not much time to get an approval. The process was to try to get approval with recognition that legally it was problematic. There was a discussion about Chief Schultz (Taser Investigation). AV-2 stated that there were arguments as to whether or not this was a different situation.

When asked about the Tenth Change Order, AV-2 stated that before the director signs it, he had to initial it. There was an attempt to get the initial approvals before it got to his desk. AV-2 stated during that process he was aware of what everyone wanted to do. There was a question of whether it could be done. When it got to that stage, AV-2 had seen the document and still had the original document.

With the Tenth Change Order documents circulating, AV-2 stated that he took steps to ensure that it would not go downtown until resolved. The AD human resources person was notified according to AV-2.

¹ ADMINISTRATIVE INSTRUCTION: 7-27 RETIREMENT PROCESS
Conflict of Interest Early Retirement/Retirement:

Individuals in early retirement and within one (1) year of their official retirement date cannot represent any person or business in connection with matters in which the employee has performed in an official act, unless the Director of Human Resources concurs and the Chief Administrative Officer consents in writing to such representation. Any requests to enter into a contract to represent the City in any matter may be approved with the concurrence of the Director of Human Resources and the approval of the Chief Administrative Officer.

AV-2 stated that when you attempt to do something quickly, there is an opportunity to create a problem. They were doing everything that needed to be done for the approval, with the question pending of whether it could be approved. The approval process needed to be followed, but it was trying to be done quickly. AV-2 stated that things can always be rescinded, but to protect the City we try to make sure the process works.

AV-2 stated that downtown City legal came back with their analysis and that it would be a bad idea to approve AV-1's proposal.

AV-2 was asked by the OIG if AV-2 saw anything ethically wrong with this situation. AV-2 stated that AV-2 would have to agree with downtown City legal's analysis and that there would be an ethical problem in approving AV-1's proposal. AV-2 stated that it was "weird" that the City's internal rules would allow this to occur, but it could violate other policies to include state statutes.

AV-2 stated that if AV-2 had a do over, AV-2 would say "absolutely no". It was not a clear cut situation, but when put all together, there was a general consensus that it was a bad idea. AV-1's thinking was that it would be beneficial to complete the project rather than abandon it. AV-1 recognized that there was an issue and so AV-1 came to legal prior to everything happening.

AV-1 Interview:

The OIG called AV-1 wanting to set up an interview at the OIG office. AV-1 was informed that the OIG had some questions on the Tenth Change Order and his proposal for \$52,000. AV-1 stated that AV-1 was all done and that what was being complained about was no longer in the Tenth Change Order any longer.

An interview time was set and was cancelled by AV-1 due to AV-1's work load. The OIG conducted an interview over the phone.

The OIG read a portion of the Contractors Tenth Change Order proposal to AV-1 which read, "In order to maintain management continuity which is in the best interest of the City, a decision was made to allow AV-1, to provide management services through conclusion of the TIP project." The OIG asked AV-1 who made the decision to allow him to continue management services once he retired as a contractor for the Architect. AV-1 stated that he had made the decision.

OIG asked if AV-1 ever submitted his proposal in writing to the City Clerk's office. AV-1 stated no, the TIP project had been very difficult with a number of challenges. AV-1 thought it was best for the AD, the City and everyone involved if there was a way that AV-1 could stay involved and focused on this one project to get it finished.

AV-1 stated that everything was sent through AV-2 and it was vetted and determined that it could not happen. AV-1 stated that it was unfortunate for the project but those are the rules.

The OIG asked AV-1 if he understood the ethical conduct and conflicts of interest that might have occurred if awarded the contract. AV-1 stated yes, that was the issue and everything goes

through AV-2. AV-1 stated he was willing to stay if there was an exception that could have been made to finish this particular project, but obviously it was determined that it would not be appropriate. When asked why not hold off on retirement until the project was complete? AV-1 stated that last year he had set things in motion to retire. AV-1 had figured that the project would have been completed, but that a number of issues had extended the project.

HR Director Communication:

The OIG spoke to the HR Director to go over the complaint. The Director stated that the Director had been made aware of the complaint by the City Legal Department. The Director stated that the request would never have been approved if it had made it to the Director's desk.

Purchasing Assistant City Attorney Communication:

The assistant city attorney for the Purchasing Division was asked if a change order would refer to a procurement as stated in §5-5-2 Ethical Conduct. The Purchasing assigned city attorney stated that if the change order arises from an initial purchase, it is a procurement and all ethics and procurement rules apply.

Department of Municipal Development (DMD) Communication:

The OIG reviewed EC-18-219, which was the Mayor's recommendation for the Architectural Consultant for the TIP project. The Architectural Consultant would be the company in charge of the TIP project. AV-1 was one of five persons listed as present for the Selection Advisory Committee meeting held on May 16, 2018.

The OIG sent a request to DMD to verify if AV-1 was one of the five members on the Selection Advisory Committee for the TIP project who awarded the Architectural Consultant contract.

DMD verified that AV-1 was one of the five members on the Selection Advisory Committee for the TIP contract.

Conclusion:

The actions of AV-1 potentially committed violations of ordinances §5-5-22 Ethical Conduct, §3-3-35 Conflict of interest and Personal Rules and Regulations Section 311.7 Conflict of Interest.

AV-1 submitted a formal proposal for the same services AV-1 was doing as a City employee and AV-1 used AV-1's authority by signing the Tenth Change Order approving AV-1's own proposal to work as an outside contractor while on early retirement. AV-1's proposal to provide services should have been denied when AD became aware of AV-1's intentions. The mere perception of AV-1's involvement with the TIP project from its conception should have been a "Red Flag" to stop the process. Aviation's assigned assistant city attorney acknowledged that the proper response would be to say "absolutely no" if this were to occur again.

The City should look at evaluating their current policies on educating both City employees and City contractors and vendors on the ethical constraints to which the City adheres. In addition, policies concerning outside employment, especially for those on so-called early retirement,

continue to raise questions and potential problems like the ones created in this situation. At a minimum, AD should take this as a learning experience on what not to do if any of the same situations arise in the future. Lastly, the City should seriously consider instituting a system whereby City officials and employees can request advisory ethical opinions. Bernalillo County has such a system. For example, see Bernalillo County Code of Conduct Advisory Opinion 2012-002: Employment Restrictions After leaving County Service (Oct. 10, 2014) <https://www.bernco.gov/compliance-office/advisory-opinions.aspx>. Such a system may help in creating an ethical culture with City government and could facilitate ethical training and compliance.

The OIG is forwarding this report to the City's Legal Department to determine if the City should pursue any legal action. The City's Legal Department was made aware of the issues when they were asked to give an opinion by the AD's assigned assistant city attorney.