

**Written Response of the San Francisco  
International Airport**



San Francisco International Airport

P.O. Box 8097  
San Francisco, CA 94128  
Tel 650.821.5000  
Fax 650.821.5005  
www.flysfo.com

May 20, 2003

Mr. Harvey M. Rose  
Budget Analyst  
San Francisco Board of Supervisors  
1390 Market Street, Suite 1025  
San Francisco, CA 94102

AIRPORT  
COMMISSION  
CITY AND COUNTY  
OF SAN FRANCISCO

Dear Mr. Rose:

WILLIE L. BROWN, JR.  
MAYOR

Attached please find the San Francisco International Airport's response to the Management and Performance Audit of the Airfield Development Bureau. We were pleased to be given the opportunity to respond to the findings and recommendations that are contained in your audit report ("Audit Report"). We have taken the approach of responding to each section individually, rather than the Audit Report in its entirety. A summary of the Airport's response is set forth separately and precedes the more detailed response to each section of the Audit Report.

HENRY E. BERMAN  
PRESIDENT

LARRY MAZZOLA  
VICE PRESIDENT

MICHAEL S. STRUNSKY

Again, the Airport appreciates the opportunity to respond to the Audit Report and looks forward to the public presentation and discussion of the findings and recommendations.

LINDA S. CRAYTON

CARYL ITO

Very truly yours,

John L. Martin  
Airport Director

JOHN L. MARTIN  
AIRPORT DIRECTOR

Attachment (Summary of Response)

Enclosures

cc: The Honorable Members of the Airport Commission  
Gloria L. Young

## Summary of Airport's Response

---

- Section 1 – Policy Oversight and Appropriation Control

The Budget Analyst acknowledges, and the Airport concurs, that the rules, regulations and laws that have been set forth regarding the issuance of Airport Revenue Bonds and the authority of the Airport Commission to issue said bonds have been followed, and that all of the appropriate resolutions and ordinances are in place and duly executed by all responsible parties.

- Section 2 – Public Information and Community Input

The Budget Analyst appears to assess the adequacy of ADB's efforts based on limited information contained in the ADB files marked "communications" or "public information". Unfortunately, the detailed accounting of the largest public outreach effort is technical in nature and is therefore contained in the files of the Environmental Group, which are also available for review. Furthermore, a substantial number of meetings were conducted by the Lead Agencies (FAA and City Planning's OER), therefore, documentation and responses were not the Airport's responsibility. However, the budget analyst makes several observations and recommendations which would improve the process. The airport intends to pursue these further.

- Section 3 – Controlling Consultant Expense Reimbursements and Fees

The Budget Analyst acknowledges, and the Airport concurs, that there are no inherent weaknesses in the invoice review process. The Airport further believes that the evidence cited of improperly supported invoices are isolated instances and not endemic of the process. However, the Budget Analyst makes several observations and recommendations which would improve the process. The Airport intends to pursue these further.

- Section 4 – Managing Subcontractors

The Airport believes the Budget Analyst's conclusions reflect a misunderstanding of (1) the nature and purpose of subcontracting which is intended to hold the prime contractor responsible and liable for the performance of the subcontractors and allow for proper administration and management of the contracted services; (2) the duties of departments under the MBE/WBE Ordinance and federal regulations as they relate to prime contractors and their subcontractors; and (3) the system of internal controls utilized Airport-wide to ensure contractor compliance with the terms and conditions of Airport contracts; and (4) the privity of contract relationship between the contracting parties.

- Section 5 – Obtaining Services from Secured Subcontractors and Secured Personnel

The Airport concurs with the Budget Analyst that some of the subcontracting agreements may not be clearly related to the prime contract scope. The Airport Director has issued a directive to resolve this issue. However, for the two major contracts with subcontracting, the extent of the deviation is over-emphasized, in that they both contain provisions for public relations services related to the contract scope. Regarding procurement practices, the Airport believes that the City Attorney Opinion on seconding issued May 5, 2003, which in itself indicates there are internal ambiguities regarding this issue, nonetheless provides for exceptions to the procurement requirements that are not addressed in the Audit Report.

- Section 6 – Maintaining Mitigation Opportunities through the Wildlands, Inc. Option Agreement

The Budget Analyst acknowledges, and the Airport concurs, that the management of the agreement is orderly and comprehensive. The Audit Report recognizes the Airport employed a third party contractor to review the agreement who concluded the contract “met generally acceptable standards”, was “in conformance” and “well within range for large-scale restoration projects”. While the Audit Report suggests that the decision to enter into the agreement was somehow misguided, the Airport’s view is that the decision to enter into the agreement was a prudent business decision at the time.

- Section 7 – Integrating the Runway Reconfiguration Project into the Bureau of Design and Construction

The Airport agrees with the Budget Analyst’s presentation of the organizational structure and history of the Airfield Development Bureau. Further, the Airport agrees with the Budget Analyst’s conclusions regarding staff reductions. The reduced staffing levels will be proposed to the Board of Supervisors as part of the budget request for FY 03-04. The Airport has consolidated the Airfield Development Bureau, the Bureau of Planning and the Bureau of Design and Construction into a newly formed division called Airport Development. The proposed staffing has been reviewed with the Budget Analyst’s Office and will be finalized through the City budget review process.

---

**Airport Response**  
**to Budget Analyst Management Audit**  
**of the Airport's**  
**Airfield Development Bureau**

---

## Table of Contents

Summary of Airport's Response .....	Page 1
Section 1: Policy Oversight and Appropriation Control.....	Page 3
Section 2: Public Information and Community Input.....	Page 8
Section 3: Controlling Consultant Expense Reimbursements and Fees.....	Page 13
Section 4: Managing Subcontractors.....	Page 17
Section 5: Obtaining Services from Secured Subcontractors and Secured Personnel.....	Page 20
Section 6: Maintaining Mitigation Opportunities through the Wildlands, Inc. Option Agreement.....	Page 26
Section 7: Integrating the Runway Reconfiguration Project into the Bureau of Design and Construction.....	Page 33

### Attachments

- 1) MOU Between the Airport and HRC
- 2) City Attorney Opinion on Seconding
- 3) Director's Memorandum Regarding Subcontracting

## **Summary of Airport's Response**

---

- Section 1 – Policy Oversight and Appropriation Control

The Budget Analyst acknowledges, and the Airport concurs, that the rules, regulations and laws that have been set forth regarding the issuance of Airport Revenue Bonds and the authority of the Airport Commission to issue said bonds have been followed, and that all of the appropriate resolutions and ordinances are in place and duly executed by all responsible parties.

- Section 2 – Public Information and Community Input

The Budget Analyst appears to assess the adequacy of ADB's efforts based on limited information contained in the ADB files marked "communications" or "public information". Unfortunately, the detailed accounting of the largest public outreach effort is technical in nature and is therefore contained in the files of the Environmental Group, which are also available for review. Furthermore, a substantial number of meetings were conducted by the Lead Agencies (FAA and City Planning's OER), therefore, documentation and responses were not the Airport's responsibility. However, the budget analyst makes several observations and recommendations which would improve the process. The airport intends to pursue these further.

- Section 3 – Controlling Consultant Expense Reimbursements and Fees

The Budget Analyst acknowledges, and the Airport concurs, that there are no inherent weaknesses in the invoice review process. The Airport further believes that the evidence cited of improperly supported invoices are isolated instances and not endemic of the process. However, the Budget Analyst makes several observations and recommendations which would improve the process. The Airport intends to pursue these further.

- Section 4 – Managing Subcontractors

The Airport believes the Budget Analyst's conclusions reflect a misunderstanding of (1) the nature and purpose of subcontracting which is intended to hold the prime contractor responsible and liable for the performance of the subcontractors and allow for proper administration and management of the contracted services; (2) the duties of departments under the MBE/WBE Ordinance and federal regulations as they relate to prime contractors and their subcontractors; and (3) the system of internal controls utilized Airport-wide to ensure contractor compliance with the terms and conditions of Airport contracts; and (4) the privity of contract relationship between the contracting parties.

- Section 5 – Obtaining Services from Secured Subcontractors and Secured Personnel

The Airport concurs with the Budget Analyst that some of the subcontracting agreements may not be clearly related to the prime contract scope. The Airport Director has issued a directive to resolve this issue. However, for the two major contracts with subcontracting, the extent of the deviation is over-emphasized, in that they both contain provisions for public relations services related to the contract scope. Regarding procurement practices, the Airport believes that the City Attorney Opinion on seconding issued May 5, 2003, which in itself indicates there are internal ambiguities regarding this issue, nonetheless provides for exceptions to the procurement requirements that are not addressed in the Audit Report.

- Section 6 – Maintaining Mitigation Opportunities through the Wildlands, Inc. Option Agreement

The Budget Analyst acknowledges, and the Airport concurs, that the management of the agreement is orderly and comprehensive. The Audit Report recognizes the Airport employed a third party contractor to review the agreement who concluded the contract “met generally acceptable standards”, was “in conformance” and “well within range for large-scale restoration projects”. While the Audit Report suggests that the decision to enter into the agreement was somehow misguided, the Airport’s view is that the decision to enter into the agreement was a prudent business decision at the time.

- Section 7 – Integrating the Runway Reconfiguration Project into the Bureau of Design and Construction

The Airport agrees with the Budget Analyst’s presentation of the organizational structure and history of the Airfield Development Bureau. Further, the Airport agrees with the Budget Analyst’s conclusions regarding staff reductions. The reduced staffing levels will be proposed to the Board of Supervisors as part of the budget request for FY 03-04. The Airport has consolidated the Airfield Development Bureau, the Bureau of Planning and the Bureau of Design and Construction into a newly formed division called Airport Development. The proposed staffing has been reviewed with the Budget Analyst’s Office and will be finalized through the City budget review process.



## **Section 1: Policy Oversight and Appropriation Control**

---

### **Excerpts and General Comments**

On page 6 of Section 1, the Audit Report reads:

*According to the Controller, the ordinances approved in the early- and mid-1990's in the amount of approximately \$4 billion for design and construction of the Master Plan and other capital improvement projects provided the appropriation authority for expending commercial paper proceeds on the Runway Reconfiguration Program.*

On page 10 of the same Section, the Budget Analyst goes on to say the following:

*The Airport's position on the use of commercial paper to fund capital improvement projects is that the legislation enabling the issuance of commercial paper is so broad that any capital improvement project may be funded regardless of whether the Board of Supervisors has appropriated funds for a particular capital improvement project. However, the Budget Analyst has determined that 1) the Airport's interpretation is incorrect and that appropriation authority is required for all expenditures of City funds, including the proceeds of commercial paper issuances, and 2) the Airport had the required appropriation authority as a result of the appropriation ordinances approved in the early-and-mid-1990's for the Airport's Master Plan and other capital improvements.*

The Budget Analyst has also accurately described the process undertaken by the Airport Commission and the Board of Supervisors to issue Airport Revenue Bonds and has acknowledged that the process has been followed for each issuance to date. The Audit Report reads:

*The Board of Supervisors approved Resolution No. 34-92 in January of 1992, authorizing the first issuance of San Francisco International Airport Second Series Revenue Bonds (the 1991 Board Resolution) in the not-to-exceed principal amount \$225,000,000.*

The Audit Report also reads:

*Section 2.13 of the 1991 Bond Resolution, entitled 'Subordinate Obligations' permits the Airport Commission to issue bonds, commercial paper, certificates of participation, or other obligations with a pledge and security interest in the Airport 'Net Revenues' that are junior and subordinate to Issue 1 and the additional 28 issues of the 1991 Bond Resolution.*

*The Airport Commission, by its Resolution No. 97-146, dated March 20, 1997, (the 'Master Subordinate Revenue Bond Resolution') authorized the issuance of Airport Second Series Subordinate Revenue Bonds. On the same date by its Resolution No.*

*97-147, the Airport Commission supplemented the Master Subordinate Bond Resolution to authorize the issuance of up to \$400,000,000 aggregate principal amount outstanding at any one time of San Francisco International Airport Subordinate Commercial Paper Notes for the purpose of financing and refinancing the acquisition, construction and development of approved Airport capital improvements, as well as paying costs of issuance and other incidental costs. The Airport Commission also authorized the issuance of a Letter of Credit of up to \$435,506,850 aggregate principal amount outstanding at any one time as security for the Commercial Paper.*

*The Board of Supervisors approved the foregoing actions, effective June 27, 1997, by its Resolution No. 620-97. On February 19, 2002, the Board of Supervisors approved a second Letter of Credit with a term from April 12, 2002 through March 31, 2006, for up to \$400,000,000 aggregate principal amount outstanding for Commercial Paper to replace the previous Letter of Credit, which expired on April 12, 2002, by its Resolution No. 113-02. At that time the Board of Supervisors also approved the issuance of up to \$2,000,000,000 additional aggregate principal amount of San Francisco International Airport Second Series Revenue Refunding Bonds for the purpose of refinancing 1991 Resolution Bonds and Subordinate Bonds of the Airport Commission.*

We would like to also state that the Audit Report clearly references Section 4.115 of the City Charter, which reads:

*“...Subject to the approval, amendment or rejection of the Board of Supervisors of each issue, the Commission shall have exclusive authority to plan and issue revenue bonds for Airport related purposes...”*

With these citations noted in the Audit Report, the Budget Analyst has outlined the following issues and findings regarding ADB's and the Airport's actions pertaining to the issuance of revenue bonds, commercial paper, etc., and the Airport Commission's approval of the projects associated with the subject revenue bonds, commercial paper, etc.

### **Audit Findings**

**Expenditure of Airport Capital Funds on the Runway Reconfiguration Program** – The Audit Team has stated that while the Airport has expended \$75.5 million on the Runway Reconfiguration Program, only \$14.4 million, including \$5.0 million currently on reserve, has been specifically appropriated for the Program by the Board of Supervisors.

**Expenditure of Commercial Paper Proceeds to Fund Runway Reconfiguration Activities** – The Audit Team has concluded that the Airport has misinterpreted the authorizing legislation for the use of Commercial Paper for the Runway Reconfiguration Program, and that the Board of Supervisors must specifically appropriate all funds before they can be expended for any purpose.

The Audit Team has also concluded that in their professional opinion, the substantial completion of all projects related to the Near Term Master Plan, as well as current economic conditions in the Airport's operating environment warrant more prudent fiscal policy and oversight by the Board of Supervisors, and that any additional issuances should be limited until the Airport Commission submits a Capital Plan that is supported by sound revenue and cost estimates and such plan is presented to the Board of Supervisors.

### **Recommendations**

The Budget Analyst has made the following recommendations.

*The Board of Supervisors should:*

- Restrict appropriations of the Airport's Second Series Revenue Bond Resolution (the Master Bond Resolution) to refunding purposes only until the Airport Commission presents to the Board of Supervisors an approved Long-Term Capital Program.
- Continue to limit funding for the Runway Reconfiguration Program to annual appropriations in the Airport's annual operating budget until such time that the Airport presents an acceptable Long-Term Capital Program to the Board of Supervisors.
- Amend the 1991 Master Bond Resolution, Resolution 34-92, to require the Airport to obtain the approval of the Board of Supervisors for each and every bond issuance.

*The Airport Commission should:*

- Develop a Long-Term Capital Plan and submit that plan to the Board of Supervisors for review and approval.

### **AIRPORT RESPONSE**

The Budget Analyst acknowledges, and the Airport concurs, that the rules, regulations and laws that have been set forth regarding the issuance of Airport Revenue Bonds and the authority of the Airport Commission to issue said bonds have been followed, and that all of the appropriate resolutions and ordinances are in place and duly executed by all responsible parties.

It is important to note that the Budget Analyst has acknowledged that applicable rules, regulations and laws regarding the issuance of Airport Revenue Bonds and the exclusive authority of the Airport Commission to issue said bonds have been followed, and that all of the appropriate resolutions and ordinances are in place and duly executed by all responsible

parties. As such, there is no inherent shortcoming in the process and procedures employed by the Airport Commission in seeking the approval to issue Airport Revenue Bonds.

The Airport's detailed response to the Audit Report's findings and recommendations is as follows:

**Expenditure of Airport Capital Funds on the Runway Reconfiguration Program -** The Airport concurs with the Controller (Audit, p. 6) that "[t]he ordinances approved in the early and mid-1990's in the amount of approximately \$4 billion for the design and construction of the Master Plan and other capital improvement projects provided the appropriation authority for expending commercial paper proceeds on the Runway Reconfiguration Program."

**Expenditure of Commercial Paper Proceeds to Fund Runway Reconfiguration Activities** – The Controller and Airport agree that the Airport had the proper authority to sell commercial paper. The Airport notes that the Board of Supervisors approved Resolution No. 620-97, effective June 27, 1997, and Resolution No. 113-02, effective March 12, 2002, which approved the initial and subsequent Letters of Credit each with up to \$400,000,000 aggregate principal amount outstanding for Commercial Paper, and said resolution notes that:

*... on January 31, 2002, a public hearing was held pursuant to such notice before the Deputy Airport Director, Business and Finance, and an opportunity was provided for interested persons to present arguments for and against the issuance of such bonds and the nature and location of the projects to be financed or refinanced with the proceeds thereof...*

Again, we reiterate that the Budget Analyst has affirmed that the authority exists.

As noted above the Audit Report clearly reads as follows:

*According to the Controller, the ordinances approved in the early-and-mid-1990's in the amount of approximately \$4 billion for design and construction of the Master Plan and other capital improvement projects provided the appropriation authority for expending commercial paper proceeds on the Runway Reconfiguration Program.*

**Restrict appropriations of the Airport's Second Series Revenue Bond Resolution (the 1991 Master Bond Resolution) to refunding purposes only until the Airport Commission presents to the Board of Supervisors an approved Long-Term Capital Program** - In the past, the Airport has submitted its Five-Year Capital Plan to the City's Capital Improvement Advisory Committee (CIAC), which we believed then presented the entire Citywide Five-Year plan to the Board of Supervisors. Due to the challenging economic conditions since 2001, the Airport is revisiting the Five-Year Capital Plan and

submitting to the CIAC individual projects as required. The Airport is currently working on a new Five-Year Plan and will be submitting it to the CIAC for 2004.

**Continue to limit funding for the Runway Reconfiguration Program to annual appropriations in the Airport's annual Operating Budget until such time that the Airport presents an acceptable Long-Term Capital Program to the Board of Supervisors** - Starting in FY 02/03, the Airport submitted a funding request for the Runway Reconfiguration Program as part of the budgetary process with the Mayor's Office and the Board of Supervisors. The Airport has requested FY 03/04 funding as part of the budgetary process.

**Amend the 1991 Master Bond Resolution, Resolution No. 34-92, to require the Airport to obtain the approval of the Board of Supervisors for each and every bond issuance** - This will require City Attorney and qualified Bond Counsel's advice as to the effects on all Citywide enterprise funds that issue bonds. Currently, Charter Section 4.115 requires the Airport to obtain Board approval.

**Develop a Long-Term Capital Plan and submit that plan to the Board of Supervisors for review and approval** - See response in previous paragraph above.

## Section 2: Public Information and Community Input

---

The Airport agrees that community involvement is integral to the planning effort for major projects. Specific to the Runway Reconfiguration Project, the Airport instituted and maintained a rigorous public outreach effort; responded to public concern that the no-build alternative had not been adequately examined by commissioning four independent studies to do just that; refrained from assuming an advocacy role for any one-build or no-build option as no "Airport proposed project" has ever been identified; kept, where required by law, detailed records of meetings and public comment letters, and provided access to its documents in every case except where prohibited by law.

Throughout Section 2, there are repeated statements indicating the Airfield Development Bureau has not maintained a rigorous public outreach effort and failed to maintain public meeting records. The section implies that this failure was indicative of Airport bias and lack of interest in public comments. Section 2 admonishes the Airport for its insufficient knowledge of regulatory requirements for public participation and its failure to evaluate the effectiveness of the public meetings.

On Page 2 of Section 2, the Audit Report reads:

*The Airfield Development Bureau has provided no written documentation that community input was considered by Airport personnel in the development of the Runway Reconfiguration Project.*

We regret that there must be a basic misunderstanding that led the auditors to believe that records of all public meetings and communications and associated regulatory requirements would be contained in ADB files marked "communications" or "public information." The detailed accounting of the largest public outreach effort is technical in nature and is therefore contained in the files of the Environmental Group, which are also available for review. Environmental staff members have thorough knowledge of the regulatory requirements contained in that set of files.

Between July, 1999 and May, 2000, 15 public meetings were conducted throughout the Bay Area (four in San Francisco, two in San Mateo, two in Palo Alto, two in Oakland, two in Marin County, and one each in Millbrae, South San Francisco and San Bruno). Five of these were hosted by the Airport with assistance from Solem Associates. The balance of these were more formal CEQA/NEPA "Scoping Meetings" held in response to published Notices of Preparation (of an EIR), and Notices of Intent (to prepare an EIS). The comments from these meetings and hundreds of letters received are extensively documented in 10 volumes of published reports that have been in the public domain since 1999 and 2000, respectively. Minutes of these meetings were not prepared because verbatim transcriptions are provided.

A review of the 10 volumes that document the scoping process reveals that of the thousands of public comments received and documented, the topic of "alternatives" was mentioned most frequently and each mentioned alternative must receive consideration in the EIR/EIS.

Responding to all substantive comments is the duty of the Lead Agencies (the FAA and City Planning's OER) through the vehicle of the EIR/EIS process, in compliance with CEQA and NEPA.

Given that the majority of these meetings were conducted by the Lead Agencies, it was inconceivable to Airport staff that the effectiveness of these meetings should be evaluated by the Airport. The vast volume of response from the public is sufficient testimony to the success of this extensive and expansive effort.

Further, while the Audit Team contends that the Airport did not maintain minutes of less formal community-related meetings described further in this response, the Airport notes that it is not required by law to maintain minutes of those meetings. However, the Airport is in agreement with the Audit Team that to maintain and provide minutes of those open meetings would be in the best interest of good public policy and will draft a policy guideline to that effect for all large Airport projects.

On Page 1 in Section 2, the Audit Report reads:

*The Airport has not done an adequate job of meeting the stated communications goals...outlined as (a) publicly presenting a series of independent studies on alternatives that would not result in filling the Bay, (b) presenting information to the public, and (c) gathering information from the public.*

The following information demonstrates clearly that ADB's communications goals were met:

**Goal #1: Publicly present a series of independent studies on alternatives that would not result in Bay fill:**

The Airport held four regional forums in the Spring/Summer of 2001 – one each in San Francisco, Santa Clara County, San Mateo County and Alameda County – that focused specifically on the so-called “no-build” alternatives. As part of its commitment to thoroughly examine ways in which delays might be solved without new runway construction (per public request), the Airport commissioned four independent studies in 2001 to examine ways in which the Airport might solve its delays without new runway construction. The four studies, cited by the Audit Team, examined demand management, technology, construction of a fourth airport and construction of an under-Bay tunnel connecting Oakland and San Francisco Airport. The forums were attended by hundreds of interested citizens and by all senior ADB staff, consultants and planners.

**Goal #2: Present information to the public:**

- 1) More than 100 community presentations were made to Bay Area-wide organizations such as Kiwanis, Lions, Rotaries, schools, nature and conservancy organizations, groups of public officials, transportation

committees, labor councils, environmental groups, neighborhood organizations, media roundtables, etc. Many of these organizations were visited on several occasions, as more information became available. The presentations were made by several ADB staff members and, in some cases consultants, all of whom used a standard, straightforward Powerpoint presentation containing the latest information and details on the project. The presentations were factual in nature and contained no advocacy information. Staff members did not offer opinions on the Airport's position regarding an Airport proposed project, because there wasn't one. Copies of the standard presentations and a list of community organizations visited have been provided to the Audit Team.

- 2) The Airport provided up-to-date information on current alternatives being studied and the results of the independent studies on the no-build alternatives through the Airport's website ([www.flysfo.com](http://www.flysfo.com)), and through several periodic newsletters, mailings and printed brochures. All of these materials were distributed freely at Stakeholder and community meetings.

### **Goal #3: Gather information from the public:**

Among other efforts, and in addition to extensive public outreach, the Airport funded:

- 1) Multi-agency task force meetings scheduled monthly for which publicly available agendas and minutes have been filed; 15 agencies regularly participate.
- 2) An Environmental Liaison Office that meets periodically with its selected environmental consultant (funded by the Airport). This group of environmental interest public citizens has requested and received numerous presentations by the Airport and involved consultants on topics of special interest to it (*note*: the Airport is unaware of whether this group advertises these meetings to a broader audience or publishes agendas and minutes).
- 3) Presentations and discussions on many occasions to solicit timely input from the involved regulatory and approval agencies, including BCDC, RWQCB, EPA, Corps of Engineers, DFG, USFWS, NMFS and the State Lands Commission.
- 4) A special report released for review and comment in December 2001 to solicit input to the Airport's habitat mitigation planning process (Environmental Analysis of Tidal Marsh Restoration in San Francisco Bay by specialty consultant Jones & Stokes). All received comments are on file and are being considered in iterative planning efforts.



- 5) Approximately 17 "Stakeholders" meetings held at the Airfield Development Bureau over a period of 30 months. The meetings were noticed on the Airport's website, in printed literature and through personal, faxed invitations to hundreds of representatives in the areas of business, environment, community leaders, public officials, labor, media and any other interested parties. The meetings were open to all, and sign-up sheets were recorded.
- 6) Monthly Roundtable meetings at which Airport Director John L. Martin or a member of Airport Senior Staff gave up-to-date information on the Runway Reconfiguration Project. As the Audit Team was informed, minutes of those meetings are available at the Roundtable offices in Redwood City and are not kept on file by the Airport.

*Section 2 of the Audit Report repeatedly states that regulatory agencies require that each alternative included in EIR/EIS draft documents be given equal consideration by the Airport and the lead agencies until a preferred alternative is selected. The Report goes on to say the Airport's public information program did not follow this "requirement" (Section 2 at pp. 2, 3, 7, 11, and 14).*

As explained below, the Audit Report's assertion stated above is erroneous and, therefore, all findings and conclusions related to this mistaken impression of CEQA and NEPA guidelines and regulations are invalid.

First, the vast majority of EIR/EIS's contain a "proposed project/proposed action", respectively. This is a proposal by an "Applicant" (in this case, the Airport) that the applicant believes best responds to the project's objectives and purposes. The Airport can propose its project at any time during the EIR/EIS process. In fact, the Airport has rigorously explored many alternatives in an effort to define a proposed project before issuance of a Draft EIR/EIS.

Second, reference is repeatedly made to the words "preferred alternative." This is a regulatory phrase reserved to the Lead Agencies' choice of alternatives that they deem best suits all requirements of CEQA and NEPA. A "preferred alternative" may or may not be the same as an applicant's "proposed project." Even the Lead Agencies need not give "equal treatment to all alternatives until the preferred alternative is selected." The requirement is that the Lead Agencies must consider all alternatives identified during a scoping process or by other expertise or consultation. They then must provide the reasons underlying their decision to delete alternatives from detailed analysis in the body of the EIR/EIS and Administrative Record. Such a section is common in all environmental documents compliant with CEQA and NEPA. For those alternatives carried into full analysis, NEPA regulations require "equivalent" treatment of the reasonable range of alternatives. However, CEQA guidelines state that an EIR shall include sufficient information about each alternative to allow meaningful comparison with a "proposed project", which is a standard somewhat less rigorous than required for federal documents.

On Page 1 in Section 2, the Audit Report reads:

*The use of a Press code is an inappropriate standard for community participation in the planning and development process.*

The Airport agrees. At no time was a Press Code utilized as a standard for community participation. The Airport Press Code is and was used only for guidelines in working with the media.

*The Audit Team implies in Section 2 that the Airport did not respond to Sunshine Ordinance requests for environmental documents until ordered to do so by a Superior Court judge.*

The Audit Report consistently ignores that the Airport received repeated communications from the Federal Aviation Administration over a three-year period that certain environmental documents were not to be released to the public, even after the Sunshine Ordinance Task Force ruled otherwise. The Airport responded in writing more than once, requesting that the FAA reconsider its position and allow the Airport to release the documents. The Airport also testified under oath (in a deposition) that it believes the documents should have been made available to the public. When the court ruled in the favor of the plaintiff, the Airport immediately made the documents available.

Documentation includes:

- September 26, 2000, letter from FAA to ADB
- March 1, 2002, letter from FAA to ADB
- April 9, 2002, letter from ADB to FAA
- April 29, 2002, letter from ADB to FAA
- May 9, 2002, letter from FAA to ADB
- Press release, dated April 30, 2002

## **Section 3: Controlling Consultant Expense Reimbursements and Fees**

### **Excerpts and General Comments**

The Budget Analyst Audit Team has provided an accurate summary of the invoice review procedures that are in place and functioning:

*Contractors periodically submit invoices to the Airfield Development Bureau for payment of services provided and reimbursement of expenses incurred. The Project Manager assigned to monitor a particular contract reviews the invoice in detail and, if necessary, amends the amounts approved for payment because of disallowed items, mathematical errors, or for other reasons. A higher-level staff person also reviews the invoice and certifies that the invoice has been reviewed and is correct and that all of the required supporting documentation has been provided and that the terms of the contract have been met with regard to the invoice.*

The Audit Team also states that it reviewed a sample of contract files maintained by the Bureau and noted the following:

*Our review of those contract files revealed that the general practice of requiring both the Airfield Development Bureau Project Manager assigned to monitor a contract and a higher-level manager to sign-off (sic) on contractor invoices was performed.*

We would like to add that ADB invoices also receive a subsequent review by Airport Accounting before they are submitted for payment.

In this context, the Budget Analyst Audit Team has outlined the following findings and areas of concern regarding ADB's procedures in these areas, along with its recommendations.

### **Audit Findings**

**Support for Hours Invoiced** – The Audit Team stated that its review of the contract files revealed that claims for services were sometimes approved without supporting timesheets or other documentation of work performed and hours billed.

**Travel and Incidental Expenses** – The Audit Team also stated that some travel, meal, lodging, and incidental expenses were approved although, because of the seemingly extraordinary nature or amount of the particular expense, an explanatory note should have been included in the contract file. The Audit Team included a list of what it termed “the various questionable invoices and contract file items”.

The Audit Team also noted that the controls on travel, meals, lodging, and other expenses included in the Airport's "Travel and Training Guidelines" manual for controlling employee travel and training costs were not applied to consultants.

**Waivers to City Risk Management Policies** - Included in the list referenced above is an instance in which the Airport waived certain insurance requirements for two seconded subconsultants without the approval of the City's Risk Manager.

### **Recommendations**

The Budget Analyst Audit Team made the following recommendations:

*The Airport Director should:*

- Insure that any proposed changes or waivers to the City's risk management policies are approved by the City's Risk Manager prior to implementing such changes or waivers.
- Establish and implement policies for controlling the approval of contractor claims for travel, lodging, meals, and incidental expense reimbursement, and the documentation required for professional services payments.

*The Director of Airport Development should:*

- Emphasize to the Runway Reconfiguration Program Contract Managers the importance of thorough invoice reviews and obtaining appropriate documentation.
- Improve the control over the quality of invoice reviews by instituting consistent secondary reviews by higher-level managers and occasional thorough secondary reviews by highly experienced contracting staff.

### **AIRPORT RESPONSE**

The Airport agrees with the factual statement made by the Budget Analyst quoted above that the Airport follows its tacit processes for review and approval of invoices and travel expenses. As such, it is evident that there are no inherent weaknesses in the invoice review process employed by the Airfield Development Bureau staff.

The Budget Analyst states in the Audit Report:

*Contractors periodically submit invoices to the Airfield Development Bureau for payment of services provided and reimbursement of expenses incurred. The Project Manager assigned to monitor a particular contract reviews the invoice in detail and, if necessary, amends the amounts approved for payment because of disallowed items, mathematical errors, or for other reasons. A higher-level staff person also reviews the*

*invoice and certifies that the invoice has been reviewed and is correct and that all of the required supporting documentation has been provided and that the terms of the contract have been met with regard to the invoice.*

The Airport will continue its rigorous review and will reinforce the necessity to its managers to identify extraordinary invoices and travel expenditures as well as the need for documenting the approval of such extraordinary expenditures. Furthermore, the Budget Analyst made several observations and recommendations that would improve the process.

It is important to note that the list of “the various questionable invoices and contract file items” included by the Budget Analyst Audit Team represents isolated incidents of special cases. The list *does not* signify any particular weaknesses in the invoice review procedures that are described in generally favorable terms by the Audit Team.

With this in mind, the following are our detailed responses to the findings and recommendations:

**Support for Invoiced Hours** – The form of support required for invoiced hours varies by contract. In some cases, detailed timesheets may be required with each invoice, and in other cases, project reports are required that detail the hours billed for each individual, for each contract task. For tasks to be performed for amounts agreed-upon in advance, the contractor is not required to provide an accounting of costs. The invoice is approved based on the percentage of the task that is completed. However, any claimed reimbursable expenses outside of the fixed-price amount must be properly supported. The contracts and tasks issued by ADB were both of the fixed-price and reimbursable types. Therefore, the variations in completeness of supporting documentation is reasonable and to be expected.

It should be noted that, in all cases, ADB requires the type and level of support that is required by the applicable contract, and which the applicable manager believes is necessary in order for him/her to approve contractor invoices. It is also important to note that, in all cases, *the contractors and subcontractors are contractually bound to maintain detailed time records*, which are subject to audit under the audit clause included in all ADB and Airport contracts.

**Travel and Incidental Expenses** – We concur that it would be prudent to include an explanatory note in the contract file for unusual travel or meal expenses, and will do so with any future items of this type.

We also generally concur with the Audit Team’s recommendation for written procedures governing travel, lodging, meals, and incidental expense reimbursement. The Airport will explore options in this area.

**Waivers to City Risk Management Policies** – The Airport agrees that insurance requirements should not have been waived without first obtaining the approval of the City’s Risk Manager. As recommended by the Audit Team, we will ensure that any proposed

changes or waivers to insurance requirements are approved by the City's Risk Manager or designee, as is our usual practice.

**General Recommendations** - Regarding the Audit Team's general recommendation that the Director of Airport Development should emphasize to the Runway Reconfiguration Program Contract Managers the importance of thorough invoice reviews and obtaining appropriate documentation, we consider this a reasonable recommendation and we agree it should be implemented. This is consistent with the procedure followed by the Bureau of Design & Construction which recently merged with the Airfield Development Program. However, regarding the Audit Team's other general recommendation regarding instituting consistent secondary reviews of invoices, it is our opinion that the existing procedures, as described by the Audit Team, already accomplish the objectives desired by the Audit Team.

## **Section 4: Managing Subcontractors**

---

### **Excerpts and General Comments**

The Budget Analyst Audit Report states that the ADB has funded or continues to fund more than 100 subcontractors through its prime professional services contracts. The Audit Report notes that the participation of these subcontractors on ADB prime contracts is approximately 20%, or \$17.9 million.

The Audit Report acknowledges that to the extent ADB professional services contracts are City-funded, they are subject to the MBE/WBE subcontracting requirements of the City's MBE/WBE/LBE Utilization Ordinance, Administrative Code Chapter 12D.A. To the extent ADB professional services contracts are federally-funded, the Audit Report recognizes that federal DBE subcontracting requirements apply. We are pleased to note that the Audit Report highlights the significant subcontract dollars awarded to MBE/WBE/DBE's.

The Budget Analyst's primary concern in Section 4 appears to be that ADB does not sufficiently monitor subcontractors. If we are correct in our understanding of the issue, it appears that the Budget Analyst is of the opinion that ADB should exercise direct management and supervision of subcontractors, consistent with its management practices regarding prime contractors.

### **AIRPORT RESPONSE**

The Budget Analyst's comments reflect a misunderstanding of:

- 1) the nature and purpose of subcontracting in large, professional services contracts;
- 2) the duties of departments under the MBE/WBE Ordinance and federal regulations as they relate to prime contractors and their subcontractors;
- 3) the system of internal controls utilized Airport-wide to ensure contractor compliance with terms and conditions of Airport contracts; and
- 4) the privity of contract relationship between the contracting parties

First, in large professional services contracts, such as URS Greiner and ADEC, it is customary to have subcontractors performing services. Airport Commission contracts obligate the prime contractors to undertake the responsibility and liability for subcontractors performing services under the prime contract. This approach is legal. It is also prudent in that it assigns liability and responsibility to a party other than the City. Additionally, Airport contracts contain provisions that prohibit prime contractors from using subcontractors which the Airport has not approved.

Second, the Airport's Minority and Women Opportunity Office (AMWO) collects and analyzes information on both prime contractors and subcontractors for the following reasons:

- 1) To prepare annual reports to the Airport Commission on M/WBE performance on professional service contracts, construction contracts and concession leases. This report informs the Commission on the achievement made in awarding contracts to M/WBE contractors and consultants.
- 2) To provide data, in accordance with the Administrative Code Chapter 12D.A, for the DTS which is maintained by the City Controller's office. This data includes contractor name and address, contract number, dollar amount, contract notice to proceed date, contract closing date, ethnicity/gender of each contractor, payment history, etc.
- 3) To verify that the contract M/WBE and DBE goals are met and continue to be met throughout the contract.
- 4) To verify that actual payment amounts paid agree to the amounts awarded.

The AMWO maintains records dating back to 1982 on all Airport contracting activity, including ADB records since the inception of the program.

The Airport maintains an MOU agreement with the HRC to provide on-site compliance officers to monitor contractor compliance with Administrative Code Chapters 12D.A and 12B (copy attached). For federally funded projects, the Airport's DBE Liaison Officer through the AMWO, monitors contractor compliance with federal regulations, 49 CFR Parts 26 and 23 regarding DBE participation. Within this frame of responsibility, both HRC and AMWO staff are responsible for monitoring subcontractors and ensuring that prime contractors are meeting their contractually required M/WBE and DBE participation goals.

HRC and AMWO staff review on a continual basis the HRC and DBE forms reporting payments by prime contractors to their subcontractors. The forms are reviewed each time an invoice for payment is submitted to the project manager. In addition, each prime is required to provide at contract completion an exit form that reports cumulative payments made to each subcontractor. These forms are also submitted to the Controller's Office and information from the forms is entered on a regular basis into the DTS. When staff detects discrepancies in the payments or between the subcontractors listed and the contract award listing, a further investigation is performed. When a deficiency in the level of subcontracting committed to is detected staff informs the HRC who initiates an investigation into the reason for a reduced participation level. For substitutions of M/W/DBE's, the primes must obtain prior approval from either AMWO or HRC in order to verify the reasoning for the substitution and to inform the subcontractor of the request.

Subcontractors can be added through the modification process when a new scope of work is added and the listed subcontractors cannot perform the modified scope of work due to a subcontractor's lack of expertise or unavailability. When this occurs, the project manager and the prime have to complete the required forms to be reviewed and approved by the



HRC and the AMWO. The HRC reviews to evaluate whether the new work provides an opportunity for additional MBE/WBEs to work on the project or provides an additional opportunity for existing subcontractors. This information is also submitted to the Controller's Office and entered into the DTS.

The Airport's annual MOU with HRC places the compliance responsibility solely upon the HRC staff. Although not explicitly stated in the MOU, HRC staff assigned to the Airport concur with the Airport's position that monitoring of compliance resides with the HRC. Furthermore, three of the HRC positions assigned to the Airport are entitled "Contract Compliance Officer" further indicating compliance monitoring is an HRC responsibility. To this end, HRC staff assigned to the Airport have the responsibility to review and ensure compliance with City ordinances, with the HRC forms 6 and 7 and any forms required by the primes and subcontractors while working on Airport contracts. There is no need for ADB to establish a parallel process. In fact, the HRC's status as independent of the contracting department (i.e., the Airport) is exactly what is intended by the cited Administrative Code provisions.

HRC has the opportunity to audit certain subcontractors and they maintain their records accordingly. As stated earlier, both the HRC and AMWO staff closely monitor subcontractor payments and participation levels to safeguard against potential abuse on the contracts. Contractors also are aware that they can call HRC and AMWO to file a protest/complaint about their work level and payments. HRC and AMWO both work with the project manager assigned to the contract regarding any problems that may arise with the subcontractors to keep them aware of these issues.

Finally, each prime contractor is contractually obligated to perform in compliance with all contract conditions as a prerequisite for payment. The Airport's project manager has the responsibility to ensure that all payments made under the prime contract are for services actually performed in compliance with each of the terms and conditions of the contract.

## Section 5: Obtaining Services from Secuded Subcontractors and Secuded Personnel

---

### Excerpts and General Comments

The Budget Analyst's Audit Report states:

*The Airfield Development Bureau uses a professional services procurement method known as "Seconding" under which the Airfield Development Bureau authorizes a prime contractor either to (1) physically locate an employee of the prime contractor or an employee of a prime contractor's subcontractor at the Airport work site for the purpose of working under the direction of Airport personnel, or (2) enter into an agreement with a subcontractor to perform the work of an entire task. The subcontractor performing work under the seconding arrangement is responsible to the Airport, and not to the prime contractor, for performance of the work under a seconded sub-contractor agreement. The prime contractor acts only as a conduit for the Airfield Development Bureau to obtain the services provided by the seconded personnel or subcontractor.*

The Budget Analyst is relying on a provision contained in the RFQ for the DMC contract that states:

*Seconded subconsultants (individual subconsultant or seconded/assigned subconsulting firms): For the purpose of this Agreement, the term "seconded subconsultant" means that the Consultant will enter into a subconsultant agreement with a subconsultant specifically requested by City to perform the work of an entire task. The subconsultant performing work under a Seconding Arrangement, and not the Consultant, shall be responsible for the cost of correction or revision of any errors or deficiencies in their work. Consultants' fixed fee shall not exceed 3% of direct labor and overhead associated with services provided on a seconded basis.*

However, while the Airport did request several prime contractors to enter into subcontracting arrangements with certain specific subcontractors it did not relieve the prime contractor of the responsibility for the work.

The Budget Analyst also reports that:

*...the City Attorney has reported that seconding agreements are not prohibited.*

Seconding is not a procurement practice, rather it is a management practice used to:

- 1) Optimize the use of the skills of the personnel engaged in a project.
- 2) Minimize the number of personnel necessary to perform the project work.
- 3) Maintain continuity among project personnel.

- 4) Minimize the effects of the learning required to complete the project.

The practice provides the project manager the ability to assign project personnel best suited to perform specific tasks to perform those tasks from the total complement of personnel engaged in the project, whether they are employees of the City or the City's contractors engaged on the project. Seconded personnel, whether they are the employees of prime consultants or subconsultants, are generally speaking, directly supervised by the project personnel responsible for the task they have been seconded to perform. This could be a City employee or the employee of another consultant. When seconding personnel, the project manager is cognizant of the contractual relationships involved and amends the affected contracts to appropriately apportion risk and assign liability for the work being performed by the seconded personnel. The project manager does not relieve the affected contractors of any other contractual obligations such as their commitments to achieve established M/WBE goals or DBE goals.

The practice of seconding personnel is not restricted to contract personnel. Organizations frequently second personnel to other organizations for mutually beneficial purposes. Seconding occurs among City departments through work order or MOU arrangements quite often.

The Budget Analyst provides that the City Attorney reported:

*a seconding arrangement may make the City vulnerable to claims by third parties that the City is liable for the negligent actions of seconded personnel and to claims by such personnel that they are entitled to employee benefits from the City. The City may also be unable to hold the prime contractor accountable for cost overruns or other problems that arise because of the work done by the seconded personnel.*

Had the Airport requested that a prime consultant second a subconsultant, each seconding agreement would be required to include appropriate terms that specifically assign responsibility for the work and the liability for corrections of any deficiencies in the work. These terms are in addition to any other terms limiting the Airport's liabilities that are appropriate or required.

The City Attorney also reported that when the City, and not the prime contractor, selects the seconded personnel or subcontractors, seconding is lawful only if:

*...(i) the services rendered by seconded personnel are within the scope of work authorized under the prime contract and (ii) any work done complies with restrictions that derive from the source of funding for the contract, and only if the employees or subcontractors are procured under any applicable City procurement requirements.*

With respect to the foregoing the Budget Analyst states:

*that the Airfield Development Bureau has authorized a total of 50 seconding agreements under seven prime contractors, some of which were not related to the scope of work for which the prime contractor was contracted. Additionally, that ...all of the 50 seconding agreements were awarded at the request of the Airport without undergoing any competitive processes and that the agreements were not required to comply with applicable City and County regulations, including the City's MBE/WBE/LBE and Civil Service requirements.*

### **Audit Findings**

- **The Airfield Development Bureau has authorized a total of 50 Seconding Agreements totaling \$6.5 million** – Some of the seconding agreements that were authorized under seven prime contracts were not related to the scope of work for that prime contractor.
- **The Airport has inadequate controls over seconded agreements** – the seconded DSG consultant's contract was amended from the typed hourly amount of \$144.23 to a contract billing rate of \$275 per hour with the initials of three individuals.
- **There was no competitive process for the seconded subconsultants and the agreements were not required to comply with City and County Regulations** – seconded subconsultants were not required to comply with the City Civil Service, MBE/WBE/LBE laws and regulations.

### **Audit Recommendations**

Based on the findings noted above, the Budget Analyst made the following recommendations:

The Board of Supervisors should:

- Engage the City Attorney to propose legislation to address issues raised by the practice of seconding.
- Require the Airport Director to adopt specific rules and procedures in order to gain compliance with seconding requirements, as presented by the City Attorney.

The Airport Director should:

- Develop, adopt and enforce procedures to comply with the required seconding rules, as presented by the City Attorney.
- Cease entering into seconding agreements pending legislation addressing issues raised by the practice of seconding.
- Ensure that the City Risk Manager clears all required waivers or modifications.

## AIRPORT RESPONSE

The Airport concurs with the Budget Analyst that some of the subcontracting agreements may not be clearly related to the prime contract scope. The Airport Director has issued a directive to resolve this issue. However, for the two major contracts with subcontracting, the extent of the deviation is over-emphasized, in that they both contain provisions for public relations services related to the contract scope. Regarding procurement practices, the Airport believes that the City Attorney Opinion on seconding issued May 5, 2003, which in itself indicates there are internal ambiguities regarding this issue, nonetheless provides for exceptions to the procurement requirements which are not addressed in the Audit Report.

Upon review of the Budget Analyst's concerns, findings and recommendation, the Airport responds as follows:

**The Airfield Development Bureau has authorized a total of 50 Seconding Agreements totaling \$6.5 million** - After careful review of the cited examples we agree that some of the agreements may not be as clearly related to prime contract scope as they should have been. This was brought to the attention of program management by Airport staff. As a result the Airport Director issued a policy directive, dated March 21, 2001, that no subcontracts would be undertaken by a prime contractor without the express approval of the Airport Director (copy attached).

However, we disagree with the extent of deviation contained in the Budget Analyst's cited examples. In this regard both the URS and ADEC contracts contain specific provisions related to public relations in furtherance of the project and also contain a provision requiring them to provide additional services as required. As observed by the Budget Analyst, additional services assigned the prime consultants were made by task order describing the task to be performed and the preferred personnel or subconsultant to perform the task pursuant to existing contract provisions. The task orders did not relieve the prime consultant of any of its existing contractual obligations.

The Budget Analyst states that the selection of seconded subconsultants did not meet City procurement requirements and that all the seconded agreements were awarded without following a competitive process. However, we disagree with the extent of deviation cited by the Budget Analyst. The Budget Analyst only considers the application of one of the considerations identified by the City Attorney that is relevant when the Airport selects the seconded personnel. The City Attorney opinion clearly sets forth exceptions to the competitive process (see pages 4-5 of May 5, 2003 City Attorney Memorandum re. Seconding), including:

- 1) Whether an alternative to competitive solicitation applies, such as services available only from a sole source;
- 2) The amount of the contract award (Administrative Code §6.40; §21.1); and

3) Restrictions imposed by a funding source.

The Budget Analyst does not address the applicability of the exceptions to the competitive process, and therefore provides an incomplete discussion of seconded subcontracts that does not support its views.

**The Airport has inadequate controls over seconded agreements** - The Budget Analyst states:

*an example of the Airport's inadequate controls over these seconded agreements, Luster/GKO seconded DSG Consultant in the current not-to-exceed amount of \$530,000. Amendment No. 1 to Work Authorization No. 1 (Karen Skelton) of that seconding agreement had a typed billing rate of \$144.23 per hour that was crossed out and initialed by three parties to the contract to reflect a billing rate of \$275 per hour, or 90.7 percent over the crossed-out typed billing rate. DSG Consultant had originally been seconded to another prime contractor, Airfield Development Engineering Consultant (ADEC), in the amount of \$246,052, for a seven month period.*

The Budget Analyst is correct that Work Authorization No. 1 for the DGS subconsultant agreement initially indicated a billing rate of \$144.23 per hour for professional services. However, as indicated by the three approvals to the document revising the amount to \$275 per hour, the amount was unacceptable to DGS and was re-negotiated to the current rate. This revised rate is commensurate with the level expertise and experience required of this position. We agree that a formal record of negotiation would have provided better evidence of the process.

However, we disagree with the Budget Analyst's assertion that a correction made to a sub-consultant's billing rate, with the Airport's approval, is evidence of the "Airport's inadequate controls over these seconded agreements."

The Airport is also aware of the cautions recently provided by the City Attorney and will take appropriate actions regarding the utilization of subcontractors whether seconded or not.

**There was no competitive process for the seconded subconsultants and the agreements were not required to comply with City and County Regulations** – The Airport notes that, prior to receiving a copy of the City Attorney's May 5, 2003 Seconding Opinion, it was unaware of any specific legal requirements for the selection of seconded subconsultants. As far as selection by the City of subcontractors to become seconded, the City Attorney May 5, 2003 opinion states on Page 3, "No City ordinance specifically addresses the selection by City officials of subcontractors or employees of City prime contractors".

**Insurance Waivers** - Regarding the waiver of insurance requirements, we agree that the Airport should have obtained the requisite approval of the City's Risk Manager and will take appropriate action to prevent recurrence.

## Section 6: Maintaining Mitigation Opportunities through the Wildlands, Inc. Option Agreement

---

### Summary of Facts by Budget Analyst

The Budget Analyst accurately summarized how a potential runway reconfiguration would require mitigation and properly identifies a key reference document, the Habitat Goals Report, as a source for identifying candidate mitigation sites. The Budget Analyst's Audit Report reads:

*Federal regulatory agencies will determine the value of potential mitigation land relative to the value of the subtidal Bay land which would be filled to permit expansion of the Airport's runways. Using different types of land for mitigation credits will result in different values, therefore mitigation is not an acre-for-acre swap.*

The Budget Analyst has accurately described Skaggs Island and Haire Ranch, how the USFWS has a keen interest in seeing the island reunified and restored and how USFWS is interested in the Airport's assistance. The Audit Report reads:

*In a November 29, 2001 letter to the Airport Director, the U.S. Fish and Wildlife Service formally expressed its interest in having the Airport participate in restoring the former naval base site to tidal marsh. From the perspective of the U.S. Fish and Wildlife Service, combining habitat restoration efforts with the Airport would fund the initiative, avoid the need to build an expensive levee between the former naval base and Haire Ranch sites, and significantly lower the per acre habitat restoration cost. Simultaneously, the Airport might be able to earn mitigation credits for the habitat restoration of the entire 4,388 acres of Skaggs Island.*

The Budget Analyst properly summarized the Airport's work with agencies, Wildlands' qualifications and how Wildlands approached the City and the Airport's reasons for entering into the Airport/Wildlands Agreement. The Budget Analyst does a good job summarizing the terms of the Airport/Wildlands Agreement. Tables 6.1 and 6.2 are a good representation of the budget for the Airport/Wildlands Agreement. The Budget Analyst includes a discussion about the extra third party review the Airport conducted. The Audit Report reads:

*In November of 2001, Wetlands Research Associates, Inc. reviewed the habitat restoration proposals prepared by Wildlands, Inc. The reviewers concluded that (a) "the technical design and cost estimate met generally acceptable standards at this stage of the project planning;" (b) the planning and design scope of work, and the proposed budget for those tasks, were "in conformance with the approach taken in other major restoration projects in California;" and (c) the scope of maintenance and monitoring work after project completion was "acceptable in terms of industry standards." The working estimate of \$70,000 per acre (including land acquisition) was "well within the range for large scale restoration projects of this nature." The reviewers noted that the cost per acre would drop significantly if the project is*



*combined with the restoration of the rest of Skaggs Island because there would be no need to build a new, large levee between the two projects.*

### **Issues of Concern Identified by Budget Analyst**

With these citations noted in the Audit Report, the Budget Analyst has outlined the following issues and findings regarding ADB's entering into the Airport/Wildlands Agreement:

- 1) **Uncertain Need for Haire Ranch Site** - The Budget Analyst states the Airport is spending \$9.4 million on an option agreement without a guarantee a runway construction alternative will be selected. The Audit Report states:

*The Airport cannot know whether or not the Runway Reconfiguration Project will go forward until after regulatory agency review of the draft EIR/EIS and after San Francisco voters have considered the matter. If none of the Airport's runway build alternatives proceed, the Airport could have expended up to \$9,455,100 on Phases A through C of the Wildlands, Inc. option agreement to put a hold on a property that it does not require.*

- 2) **Uncertain Ability to Use the Haire Ranch Site** - The Budget Analyst states the Airport can not guarantee the Haire Ranch will be selected by regulatory agencies as mitigation, if a runway construction alternative is selected. The Audit Report states:

*... the Airport may spend up to \$9,455,100 on Phases A through C of the Wildlands, Inc. option agreement to put a hold on a property that it cannot use if approvals from the above-named regulatory agencies are not obtained.*

- 3) **The Value of Haire Ranch** - The Budget Analyst states the value of Haire Ranch is between \$1,308,000 and \$1,635,000 and the option payments that may total \$2,038,000 exceed the value of Haire Ranch. The Budget Analyst states Wildlands is paying approximately 11 times too much for the Haire Ranch.
- 4) **Restoration Costs** - The Budget Analyst states the estimated restoration costs are outside the restoration ranges published in the Habitat Goals Report and the Airport never informed the Airport Commission of the total restored project value.
- 5) **Other Mitigation Site Alternatives** - The Budget Analyst states the regulatory agencies will select the mitigation sites, could easily select other mitigation sites, and Haire Ranch is a small component of the potential sites. The Audit Report reads:

*If a runway build alternative proceeds, mitigation sites will be selected by the regulatory agencies menu-style. The regulatory agencies could chose one or more*

of the sites. The 1,090 acres of Haire Ranch represent just 2.99 percent of the total Bay land identified by the Airport as potentially available and suitable for mitigation credits.

- 6) **Other Agencies Could Share the Haire Ranch Site Habitat Restoration Costs -** The Budget Analyst correctly identifies Haire Ranch as a key site with intense agency interest, states that both the federal government and the Airport are attempting to restore Haire Ranch and states the Airport's involvement relieves the USFWS of obligations. The Audit Report reads:

*Therefore, the Airport is effectively paying the high price of up to \$69,167,082 to be able to earn habitat mitigation credits on a site that the federal government has strong incentives of its own to restore with the funding involvement of other agencies seeking opportunities to earn habitat mitigation credits.*

- 7) **Airfield Development Bureau Management of the Wildlands, Inc. Option Agreement -** The Budget Analyst praises the Airport with the following text:

*Airfield Development Bureau maintains comprehensive and orderly files on the Wildlands, Inc. option agreement to which the Budget Analyst Audit Team had full access*

and, continues to assert the Airport is withholding information:

*The Budget Analyst Audit Team questions why Airfield Development Bureau staff regarded it as necessary to withhold information about the Wildlands, Inc. option agreement if, as Airfield Development Bureau staff argue, the option agreement represents a future benefit to the City.*

- 8) **The Business Case -** The Budget Analyst states economic deterioration and delays in the DEIR/DEIS will increase the cost of the Airport/Wildlands Agreement. The Audit Report reads:

*Therefore, given the time needed to obtain regulatory agency feedback on the draft EIR/EIS, and to permit voter consideration of any proposals to fill a portion of the Bay, construction of a runway build alternative, if selected, could not now occur until 2007 at the very earliest. Therefore, the Airfield Development Bureau is making option payments for longer than it originally anticipated. Each year's delay costs \$407,760 in monthly option payments (12 months, at \$33,980 per month).*

### **Budget Analyst's Recommendations**

The Budget Analyst has made the following recommendations:

*The Airport Commission should:*

- 6.1 *Terminate the Wildlands, Inc. option agreement.*
- 6.2 *Apply the balance of the Wildlands, Inc. budget of \$8,713,463 to the purchase of habitat mitigation credits once the regulatory agencies and San Francisco voters have determined whether a runway build alternative will go forward, and what habitat restoration needs to occur to mitigate the environmental impacts of Bay fill.*

## **AIRPORT RESPONSE**

The Budget Analyst acknowledges, and the Airport concurs, that the management of the agreement is orderly and comprehensive. The Audit Report recognizes the Airport employed a third party contractor to review the agreement who concluded the contract “met generally acceptable standards”, was “in conformance” and “well within range for large-scale restoration projects”. While the Audit Report suggests that the decision to enter into the agreement was somehow misguided, the Airport’s view is that the decision to enter into the agreement was a prudent business decision at the time.

### **Airport Response to Budget Analyst's Issues:**

The following eight subsections respond to the eight issues identified by the Audit Report.

#### **1) Uncertain Need for Haire Ranch Site**

If a runway construction alternatives is selected, the Airport would be required to mitigate for project impacts. Having an option agreement on potential mitigation credits for Waters of the United States and tidal marsh habitat helps demonstrates the potential project impacts could be mitigated. Demonstrating feasibility and certainty in mitigation reduces uncertainty that might obstruct selection of a runway construction alternative. Option agreement is a low cost way to demonstrate feasibility and certainty.

#### **2) Uncertain Ability to Use the Haire Ranch Site**

If a runway construction alternative is selected, Haire Ranch could be used to offset losses of Water of the United States and to create habitat. The habitat value of the mitigation credits developed at Haire Ranch is not known at this time, but some credits would be created at Haire Ranch. The site is identified in the Habitat Goals Report, it is unlikely the agencies would not permit restoration at Haire Ranch.

#### **3) The Value of Haire Ranch**

The Audit Report should rely upon the comparable conservation projects cited. The price Wildlands is paying Haire (\$16,000/acre) is within the range of prices cited (\$9,900 to \$21,000).

**4) Restoration Costs**

The Budget Analyst implies the restoration costs are not in line with similar projects. However, the Budget Analyst cited the Wetlands Research Associates report that stated:

*" The working estimate of \$70,000 per acre (including land acquisition) was well within the range for large scale restoration projects of this nature".*

**5) Other Mitigation Site Alternatives**

If a runway construction alternative is selected, the Airport could exercise its option and purchase mitigation credits at Haire Ranch. The regulatory agencies would provide guidance on the habitat mitigation value of different potential mitigation sites. The Airport would be tasked to restore sufficient acres to offset the potential project impacts. At this time, the Airport does not know how the regulatory agencies would value different potential mitigation sites. As previously stated, Haire Ranch could mitigate for losses of Waters of the United States. Land that can replace Waters of the United States is very limited. Haire Ranch represents approximately 15% of the potential available area.

**6) Other Agencies Could Share the Haire Ranch Site Habitat Restoration Costs**

The federal government has no plans to restore Haire Ranch. The Airport/Wildlands Agreement contemplates all of the restoration activities at Haire Ranch being conducted by Wildlands on the Airport's behalf. The Airport expects to receive the benefit of all habitat mitigation credits developed at the Haire Ranch. In addition to the credits developed at Haire Ranch, the Airport does expect to receive habitat mitigation credit on the USFWS site if Haire Ranch is restored for the reasons specified in the Audit Report. USFWS is responsible for restoration on their portion of Skaggs Island.

If the Airport does participate in the restoration of the 3,298 acres owned by USFWS, as suggested in the USFWS letter, the aggregate cost per acre would drop quickly as the proposed restoration on the USFWS site is not complex and therefore not as expensive. The Airport could conceivably contribute an additional \$25 million and be accredited restoration of approximately half the acreage (\$25 million would represent about half the total cost including \$8 million from Caltrans and \$20 million from USFWS for land, management and maintenance). For approximately \$95 million in cost (\$70 million at Haire Ranch and \$25 million at USFWS site), the Airport could receive approximately 2,640 acres (1,090 acres at Haire site and 1,550 at USFWS site) of tidal marsh habitat at an average cost of \$36,000 per acre.

**7) Airfield Development Bureau Management of the Wildlands, Inc. Option Agreement**

Airfield Development Bureau staff did not withhold information from the Budget Analyst. The Audit Report states:

*Airfield Development Bureau maintains comprehensive and orderly files on the Wildlands, Inc. option agreement to which the Budget Analyst Audit Team had full access.*

and

*While Airfield Development Bureau staff remained reluctant to provide informative answers to most of those business-related questions, they eventually did provide the requested information.*

## **8) The Business Case**

The Airport entered into the Agreement before the current economic situation was evident. In 2000 the Airport accommodated almost 39 million passengers and estimated a passenger demand of 50 million passengers in 2008. The number of passengers declined in 2001 to almost 35 million passengers and to 31.5 million passengers in 2002. In March of 2003, the FAA estimated the passenger demand in 2008 at SFO will be approximately 36 million. Until March 2003, the ADB anticipated completing the environmental process within the option period.

Because of ongoing economic pressure and uncertainty in the airline industry, the Airport is evaluating continuation of the Airport/Wildlands Agreement.

### **Airport Response to Budget Analyst's Recommendations**

The following two subsections address the Budget Analyst's Recommendations:

**Terminate Immediately** -The Airport Director believes that due to changes in traffic and economic conditions, it would be prudent to reevaluate the Airport/Wildlands Agreement. When the Airport negotiated and executed the Agreement, the plans to develop mitigation on the schedule to support program goals, if a runway construction alternative was selected, were appropriate. The option payments of \$2 million for a \$67 million project represents only a 3% increase in cost to secure a site that could mitigate for Water of the United States and provide up to 1,090 acres of habitat mitigation. Because there are only six property owners in the North Bay with this type of acreage available, securing one of those sites in a voluntary agreement was a prudent business decision at that time.

It is in the best interest of the Airport and the City to work at restructuring or terminating this agreement in a manner that has the best business and economic consequences for all parties involved. In April 2003, the Airport Director began researching transfer of the Airport/Wildlands Agreement to an appropriate recipient. Because the transferee has not been identified and time for a transfer is unknown, the Airport Director requested the entire FY 03/04 budget for Wildlands in order to secure enough funding to allow transfer to occur without a lapse in the Agreement. The Airport continues to believe this is the most prudent course of action.

**Apply Savings to Future Acquisitions** - The Budget Analyst recommends applying the savings of \$8.7 million to purchase mitigation land agencies identify once the project is certain. The actual saving would only be \$1.3 million (\$2 million less \$0.7 million) as the design and permitting activities included in the Airport/Wildlands Agreement would still be needed for future mitigation sites and could not be applied to purchasing mitigation credits.

This recommendation assumes that similar land would still be available in the future, voluntary sellers would offer the similar land at Fair Market Value or the City would prevail in condemnation proceedings, the agencies would require the same quantity of land to mitigate potential project impacts without the certainty provided by an option agreement, and the actual saving of only \$1.3 million will cover any increases in land costs (either increases in value over the same quantity of land or increase in cost caused by larger quantity of land).

## **Section 7: Integrating the Runway Reconfiguration Project into the Bureau of Design and Construction**

---

The Airport agrees with the Budget Analyst's presentation of the organizational structure and history of the Airfield Development Bureau. Further, the Airport agrees with the Budget Analyst's conclusions regarding staff reductions. The reduced staffing levels will be proposed to the Board of Supervisors as part of the budget request for FY 03-04.

The Airport has consolidated the Airfield Development Bureau, the Bureau of Planning and the Bureau of Design and Construction into a newly formed division called Airport Development. The former Administrator of the Bureau of Design and Construction is assigned as the interim manager of Airport Development. The proposed staffing has been reviewed with the Budget Analyst's Office and will be finalized through the City budget review process.

The consolidation of bureaus is part of a larger consolidation and streamlining of the Airport organizational structure in response to economic conditions and the substantial reduction in passenger loads. The reorganization will be complete by the end of July 2003.

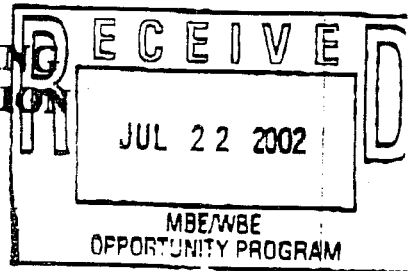
---

## **ATTACHMENTS**

---



**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE AIRPORT COMMISSION  
AND  
HUMAN RIGHTS COMMISSION**



This memorandum of understanding ("MOU") is entered into as of July 1, 2002 by John L. Martin, Airport Director, for the City and County, of San Francisco Airport Commission ("Airport"); and Virginia Harmon, Director, Human Rights Commission ("HRC"), to memorialize the agreement between the Airport and HRC upon which they will cooperate to provide the services listed below in this agreement during Fiscal Year 2002/03. This MOU will expire on June 30, 2003.

This MOU is further made in recognition of the requirements of the Federal Aviation Administration (FAA) final Policy and Procedures Concerning the Use of Airport Revenue ("Diversion Policy"), and the Airport /Airline Settlement Agreement. The Airport will budget a maximum of \$335,371 for FY 2002/03.

Consistent with the above-mentioned goals, legal and contractual requirements, the Departments agree as follows:

**I. SERVICES TO BE PROVIDED:**

On a full-time basis, HRC staff will perform the following tasks for Airport contracts in accordance with Chapters 12D.A. and 12B:

**A. Contract Compliance with Chapters 12D.A. and 12B**

1. Ensure that Airport contracts include the appropriate HRC information on M/W/LBE Ordinance requirements, reporting procedures, MBE/WBE participation goals, and reporting forms on contracts \$100,000 and over.
2. Approve MBE/WBE participation goals for construction and professional services contracts. For HRC approval, Airport staff will recommend MBE/WBE participation goals, and provide HRC with scope of work and subcontracting opportunities with cost estimates, using the HRC goal methodology form.
3. Evaluate HRC documents/forms submitted by the apparent successful bidders for compliance with Chapters 12D.A. and 12B requirements within ten (10) business days after the bid opening dates to facilitate the timely award of contracts and proposals.
4. Review and approve, when needed, the Equal Benefits forms for contractors.

## **B. Progress and Activity Reports**

In accordance with the Administrative Code, Chapter 12B, HRC staff shall submit annual progress reports by July 31st of each fiscal year to the Airport Director on the status of contractors' workforce and employment efforts in hiring minorities and women on Airport contracts.

## **C. Timelines for Completion of Contract Compliance Reviews After Contract Awards**

1. When contractors are found to be non-compliant with the City's requirements, HRC staff shall notify the Airport Director of the contractors' alleged non-compliance within two (2) business days after the complaint is filed or reported to HRC. In addition, the HRC Director shall submit a written report to the Airport Director on any findings or determinations of non-compliance within ten (10) business days after HRC's final determination.
2. HRC Director shall act upon the Airport's recommended MBE/WBE participation goals within 10 business days of the Airport's submittal of such goals.

## **II. STAFF ASSIGNMENTS**

The HRC Director shall assign three (3) full-time and one (1) part-time staff to the Airport to perform services specified in this MOU for the period of July 1, 2002 to June 30, 2003. These staff positions shall include: one (1) Contract Compliance Officer II, one (1) Contract Compliance Officer I, one (1) part-time Contract Compliance Officer I and one (1) Executive Secretary (1452). On an annual basis or upon request, the Airport Director may provide in writing to the HRC Director an assessment of the performance of HRC staff assigned to the Airport to determine the continued volume of work and number of HRC staff assigned to the Airport. On-site HRC staff shall agree to a regular work schedule and report time away from the Airport office (i.e. field site visits, HRC meetings, etc.). HRC Director agrees to notify the Airport Director of any extended absences (vacation and illness) of on-site staff.

The Airport Deputy Director of Public Affairs will oversee the coordination efforts of the on-site HRC staff to ensure compliance with the terms of this MOU. The manager of the Airport MBE/WBE/DBE Opportunity Office will serve as the liaison between HRC and Airport regarding the requirements of the San Francisco Administrative Code, Chapters 12 D.A. and 12B.

## **III. BILLING PROCEDURES**

1. It is agreed that no funds shall be transferred from the Airport to the department without written approval from the Airport.
2. Billings must be submitted on a monthly basis.
3. All requests for payment must include documentation for the charges (i.e., payroll



CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DENNIS J. HERRERA  
City Attorney

BUCK DELVENTHAL  
Deputy City Attorney  
DIRECT DIAL: (415) 554-4650  
E-MAIL: BUCK\_DELVENTHAL@CITY.CA.GOV

**MEMORANDUM  
PRIVILEGED & CONFIDENTIAL**

TO: HONORABLE AARON PESKIN  
FROM: BUCK E. DELVENTHAL *BEJ*  
Deputy City Attorney  
DATE: May 5, 2003  
RE: LEGAL ISSUES RAISED BY "SECONDING"

Question

What are the legal requirements governing the practice of seconding, including seconding arrangements in which the City selects the employees or subcontractors to be seconded and, specifically, is the practice prohibited under current law?

Short Answer

The law does not prohibit the practice by the City of seconding personnel or subcontractors of a prime contractor that provides professional services so long as (i) the services rendered by seconded personnel are within the scope of work authorized under the prime contract and (ii) any work done complies with restrictions that derive from the source of funding for the contract. But a seconding arrangement may make the City vulnerable to claims by third parties that the City is liable for the negligent actions of seconded personnel and to claims by such personnel that they are entitled to employee benefits from the City. The City may also be unable to hold the prime contractor accountable for cost overruns or other problems that arise because of the work done by the seconded personnel. Because of these potential liabilities, the agreement governing seconded personnel should -- at a minimum -- require insurance and confirm the status of the personnel as either independent contractors responsible directly to the City for their activities under the contract or employees of the prime contractor.

When the City, and not the prime contractor, selects the seconded personnel or subcontractors, seconding is lawful only if the requirements described above are met and, in addition, the employees or subcontractors are procured under any applicable City procurement requirements. In making the selection, the City department must generally either conduct a competitive process for services in excess of certain threshold amounts or make the selection under an authorized alternative, such as qualification as a sole source. These requirements help ensure that the selection is not for the purpose of circumventing otherwise applicable City laws for selecting City employees and contractors. The selection would also have to meet the applicable Minority/Women/Local Business Enterprise ("M/W/LBE") or, for federal funded contracts, Disadvantaged Business Enterprise ["DBE"] participation requirements, as set forth in the prime contract.

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

**Memorandum  
Privileged & Confidential**

TO: HONORABLE AARON PESKIN  
DATE: May 5, 2003  
PAGE: 2  
RE: LEGAL ISSUES RAISED BY "SECONDING"

Background

At your request, the Budget Analyst for the Board of Supervisors has been conducting a management audit of the Airfield Development Bureau of the San Francisco International Airport. The Budget Analyst has asked questions about the lawfulness of a contracting procedure known as "seconding."

Seconding is most often used in large, complex construction projects, such as airport developments and large transportation projects.<sup>1</sup> The term refers to a contracting arrangement in which the owner of the property on which the project will be developed, here the City and County of San Francisco, and the prime contractor for the project agree that the prime contractor will assign an employee or subcontractor to work on a discrete portion of the project directly under the supervision of a City official.<sup>2</sup> The agreement may require the "seconded" employee or subcontractor to take direction from and report directly to the City and may further provide that the City will take responsibility for the work product of these personnel. Where the seconded entity is a subcontractor, the contracts specify that the subcontractor will be directly responsible to the City for its work product. In some cases, the City itself may select the employee or subcontractor, who is then hired or retained by the prime. Public officials use seconding to achieve more efficient and direct communication among those working on the project and better control over particular aspects of the project.

The contracts that the Budget Analyst is reviewing are professional services contracts entered into by the Airport. This analysis is therefore limited to a review of seconding in the context of such professional services contracts (not construction contracts or contracts for the purchase of goods).

Analysis

The legal requirements that apply when a City department uses seconding turn on whether the prime contractor or the City selects the seconded personnel.

<sup>1</sup> Airport staff has advised this office that seconding has been used routinely by large airports engaged in complex airport development projects. In addition, information and documents provided by an Airport employee formerly employed by BART show that BART has used seconding for transit related contracts. MUNI has included seconding provisions in its RFPs and RFQs for many years, including the Third Street Light Rail Transit Project (for Phase I, Quality Assurance & Construction Management Services), although it has actually entered into seconding agreements only rarely. The Department of Public Works, although not referring to a seconding arrangement, included provisions in its RFQ for Construction Management Consulting Services for the Juvenile Hall Replacement Project giving the City the right to require the addition, replacement or removal of specific consultants to or from the project team.

<sup>2</sup> This opinion addresses seconding in the context of Airport contracts. Thus, for the purposes of this opinion, the owner is the City and County of San Francisco.

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

**Memorandum  
Privileged & Confidential**

TO: HONORABLE AARON PESKIN  
 DATE: May 5, 2003  
 PAGE: 3  
 RE: LEGAL ISSUES RAISED BY "SECONDING"

---

Prime Contractor Selects the Seconded Personnel

We consider first a situation in which the prime contractor selects the individual or firm assigned to work under the City's direct supervision. Here, so long as the services rendered by the seconded employee or subcontractor are within the scope of work properly authorized under the prime contract, the seconding arrangement is not unlawful in and of itself. Further, the seconded work must be consistent with any restrictions dictated by the funding source, such as revenue bond proceeds or sales tax revenues designated for a particular purpose.

Although the use of seconded personnel in the situation just described is lawful, the arrangement may raise liability issues for the City. Where the City exercises direct control over seconded personnel, even if the City does not select the seconded personnel, the City may be vulnerable to a claim that the City, and not the prime contractor, is liable for the any damage to third parties caused by the negligent acts of the seconded personnel. Moreover, the seconded personnel may claim entitlement to workers' compensation, retirement, and other employee benefits. The City may also be unable to hold the prime contractor accountable for cost overruns or other problems that arise because of the work done by the seconded personnel. Because of these potential liabilities, the agreement governing seconded personnel should -- at a minimum -- require insurance or other provisions to reduce the potential exposure of the City. In addition, where the seconded personnel have a subcontract with the prime contractor, the contract between the City and the prime should contain provisions that confirm the status of the personnel as independent contractors.

City Selects the Seconded Personnel

Additional issues arise where the City, rather than the prime contractor, selects the individual or subcontractor. In these instances, the City selects an individual or firm that does not become a City employee or City contractor. Rather, the individual or firm becomes an employee or subcontractor of the City's prime contractor.

No City ordinance specifically addresses the selection by City officials of subcontractors or employees of City prime contractors. Seconding provides an opportunity for the City to evade civil service rules and circumvent City contracting requirements. As noted in *Hall v. Hall* (1950) 98 Cal.App.2d 209, "It is a general rule of law that one should not be permitted to do indirectly that which he is forbidden to do directly. *Hunter v. Superior Court*, 36 Cal.App.2d 100." A court would therefore likely review the lawfulness of the City's selection of an individual or firm as if the City itself were appointing the employee or awarding the contract.

If the City department that selects the seconded personnel complies with the standard City processes applicable to selecting a City employee or prime City contractor and then assigns the employee or contract to the prime, seconding is permissible. If it does not, then closer examination of the specific factual context of the selection process is required to determine if the arrangement is lawful.

To determine compliance with the standard City processes applicable to selecting a City employee or prime City contractor, we must first consider the Charter requirements governing

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

Memorandum  
Privileged & Confidential

TO: HONORABLE AARON PESKIN  
DATE: May 5, 2003  
PAGE: 4  
RE: LEGAL ISSUES RAISED BY "SECONDING"

the civil service system. Generally, before the City may employ a professional services contractor, the contract awarding authority must obtain either a determination by the Civil Service Commission that the work falls within one of the exceptions to civil service requirements set forth in Charter section 10.104 or certification by the Controller and approval by the Board of Supervisors under Charter section 10.104, subsection 15, that the work can be done at a lesser cost by a contractor than by City employees (commonly referred to as "Proposition J approval"). Where the services to be performed by the seconded personnel are included in the scope of services of the original contract, compliance with this requirement would have been accomplished with the review and approval by the Civil Service Commission of the original contract. If the services represent a significant modification or addition to the original scope, a contract modification and, under some circumstances, subsequent Civil Service Commission approval would be required.

The second set of requirements that we must consider are those governing competitive solicitation. As a general rule, competitive solicitation is not required for municipal contracts unless the Charter or other law imposes that requirement. *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669, 676. Current City law generally requires that contracts for professional services be competitively solicited. S.F. Admin. Code §6.40 and §21.1 (see, also, S.F. Admin. Code §§12D.A.(9)(A), 12D.A.12(B), 12D.A.13(b) [imposing competitive solicitation requirements by imposing ratings discounts on qualified M/W/LBEs]). Various factors determine whether a competitive process is required and, if so, how formal it must be, including the amount of the contract, restrictions imposed by a funding source, and whether an alternative to competitive solicitation applies, such as services available only from a sole source. With respect to the amount of the contract:

- San Francisco Administrative Code Sec. 6.40 currently requires a competitive solicitation process for professional services contracts for public works projects exceeding \$25,000.
- San Francisco Administrative Code Sec. 21.1 requires a competitive solicitation for professional services contracts unless, under Sec. 21.5 and the Purchaser's Rules and Regulations, the purchase falls within certain exceptions such as the purchase of services totaling \$10,000 or less, services required to respond to an emergency or services available only from a sole source.

If a contract is federally funded and a City department selects seconded personnel, the department must follow applicable City contracting laws, except that federal DBE requirements apply and not the requirements of the M/W/LBE ordinance set forth in San Francisco Administrative Code Chapter 12D.A. Absent specific prohibitions that apply by virtue of federal requirements, a City department must comply with the City's contracting laws even if the project is federally funded. But federal funding restrictions require the City to use federal procurement procedures and contract requirements with respect to DBE participation requirements. Therefore, although San Francisco's M/W/LBE ordinance imposes competitive solicitation requirements by requiring ratings discounts, the City may not apply these requirements where prohibited by federal funding restrictions and, in those instances, the Human Rights Commission

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

Memorandum  
Privileged & Confidential

TO: HONORABLE AARON PESKIN  
DATE: May 5, 2003  
PAGE: 5  
RE: LEGAL ISSUES RAISED BY "SECONDING"

---

has no role in procurement decisions, including sole source determinations under Chapter 12D.A.

As we have discussed, where a City department selects the seconded personnel, seconding is lawful if the department complies with the standard City processes for selecting City employees and City contractors. But even where the department has done so, the potential risk and liabilities described above in the section addressing contractor-selected seconded personnel still apply. In fact, such problems are more likely to arise because the City both selects the seconded personnel and directs their work.

Concluding Remarks

If you have any questions about the validity of seconding with respect to any particular contracts, please let us know and we can provide an analysis. Moreover, if you believe that it is appropriate to propose legislation to address issues raised by the practice of seconding, we would be happy to work with you on this matter.

B.E.D.



RECEIVED  
AIRFIELD DEVELOPMENT  
CITY AND COUNTY OF SAN FRANCISCO  
SAN FRANCISCO INTERNATIONAL AIRPORT  
2001 **INTER-OFFICE MEMORANDUM**

**TO:** Senior Staff

**DATE:** March 21, 2001

**FROM:** John L. Martin

**SUBJECT:** Professional Services Contracts and Subcontracts

Effective immediately, all Airport Commission packets concerning the award of professional services contracts shall list all professional service subcontractors with an indication of the scope of services to be provided and the related subcontract amounts. Any addition of professional service subcontractor(s) to existing contracts or increases to existing subcontractors' budgeted expenditures shall be subject to my approval. The requests for approval shall identify the subcontractor, the services to be provided and the negotiated, or budgeted expenditures associated with the services.

**TOM KARDOS**  
Airfield Development

  
**John L. Martin**  
**AIRPORT DIRECTOR**

