

Review of City of Phoenix West Fillmore Redevelopment Request for Proposal RFP-CED15WF



Garrick L. Gallagher
Shanks Leonhardt
P 602.532.5720
F 602.230.5053

Garrick.Gallagher@sandersparks.com
Shanks.Leonhardt@sandersparks.com

I. Introduction

The City of Phoenix retained Sanders and Parks to conduct a review of the West Fillmore Redevelopment Request for Proposal RFP-CED15W (“RFP”), regarding development of property located between 4th Avenue and 6th Avenue south of Fillmore Street (the “West Fillmore Project” or “Project”). Multiple bidders responded to the RFP. One bidder was Phoenix Fillmore, which was comprised of the Trammell Crow Company (“Trammell”) and the Cesar Chavez Foundation (“CCF”). Another bidder was Fifth & Fillmore Development Partners, LLC (“Fifth & Fillmore”), which included as a member DECO Multifamily Holdings, LLC (“DECO”). After the City’s Evaluation Panel recommended that the Phoenix Fillmore proposal be selected, the Arizona Republic published comments from DECO alleging that it discussed its bid proposal ideas with Phoenix City Councilman Michael Nowakowski without knowing that the Councilman’s employer, CCF, also intended to bid on the RFP.

The City asked us to review two issues: (1) whether the City’s process for recommending the award of the RFP met all applicable legal standards and requirements; and (2) whether Councilman Nowakowski violated the City and Arizona’s conflict of interest laws related to the RFP. It is our conclusion based on the information available to us at this time that, although Councilman Nowakowski (sometimes referred to herein as the “Councilman”) could have been more forthcoming in his discussion with DECO to avoid the appearance of impropriety, the RFP process was uncompromised and there were no violations of conflict of interest laws.

II. Basis for, and Limitations of, Our Review

The City asked us to conduct a review of the RFP and the conflict of interest issues involving Councilman Nowakowski. We do not have subpoena power, and therefore our review and conclusions are necessarily based upon the information that witnesses were willing to voluntarily provide to us as part of this review.

Documents Reviewed

We were able to obtain and review the following documents:

1. A copy of the procurement file for the RFP with the Phoenix Fillmore proposal and the Fifth & Fillmore proposal and related documentation.
2. Copies of the City’s email distribution lists used to notify developers of upcoming RFPs and/or projects.

3. A copy of the attendance sheet for the May 18, 2015 Pre-Proposal Meeting for the RFP listing Trammell, CCF, and DECO as attendees.
4. Arizona Republic or AZcentral.com articles related to the RFP dated February 26, 2015, October 3, 2015, October 6, 2015, October 7, 2015, and October 20, 2015.
5. Copies of the materials publicly disclosed by Councilman Nowakowski on or about October 6, 2015.
6. DECO materials shown to Councilman Michael Nowakowski during April 6, 2015 meeting with DECO.
7. Arizona Corporation Commission Records for Phoenix Fillmore and Fifth & Fillmore.
8. Records of campaign contributions to Councilman Nowakowski from January 1, 2015 through June 30, 2015.

We asked representatives of the Phoenix Fillmore group for their complete RFP project files, but they would not produce them due to concerns regarding disclosure of confidential and proprietary information unrelated to the scope of our review. In an effort to address those concerns, we asked for a focused email search regarding Nowakowski and/or DECO, but they still declined to provide their communications. Accordingly, we were not able to review the Phoenix Fillmore group's e-mail correspondence related to the Project.

However, the Phoenix Fillmore group representatives have stated they would be willing to sign affidavits confirming that:

- (1) They did not receive information from any source during the RFP process about any other bidder's proposal;
- (2) They never had any contact or communications with Councilman Nowakowski (or anyone from his office) conveying information about DECO or any other potential bidder;
- (3) They based their proposal on their own substantial experience with, and knowledge about, such projects, including a similar project they were awarded in Los Angeles.

Additional items that we requested, but that were not made available to us for review as of this date are: (i) Councilman Nowakowski's entire calendar from January 2015

through August 2015; (ii) CCF's Board meeting minutes for 2015; (iii) DECO's project-related correspondence.

Interviews

We were able to interview the following witnesses:

Jim Anderson	Trammell Crow (Los Angeles)
Murray Boess	Phoenix IDA Evaluation Panel Member
Paul Blue	City of Phoenix, Deputy City Manager
Paul Chavez	CCF
Cindy Dach	Downtown Phoenix, Inc./Roosevelt Row Board Member Evaluation Panel Member
Alfredo Izmajtovich	CCF
Christopher Kowalsky	City of Phoenix, Planning and Development Evaluation Panel Member
Eric Johnson	City of Phoenix, CED
Caroline Lobo	suoLL Evaluation Panel Member
Robert Lyles	DECO
Chris Mackay	City of Phoenix, CED
Cullen Mahoney	Trammell Crow (AZ)
Jim Mahoney	Trammell Crow (AZ)

Keon Montgomery	City of Phoenix, Housing Department Evaluation Panel Member
Michael Nowakowski	City of Phoenix, Councilman CCF
Robyn Sahid	City of Phoenix, CED Evaluation Panel Member
Mark Singerman	Rockefeller Group Development Evaluation Panel Member
Mark Stratz	DTZ Evaluation Panel Member
Paul Tuchin	Trammell Crow (AZ)
Patricia Watts	DECO
Gretchen Wolfe	City of Phoenix, CED

The only key witness we were unable to interview was Billy Shields, a lobbyist working with DECO. We attempted to reach him using various contact information but we did not receive a response to our request for an interview.

III. Executive Summary

A. The Process of the RFP

We reviewed the process the City used to issue, evaluate, and make a recommendation to award the RFP to determine whether the process complied with the required standards. We did not find any evidence to suggest that the RFP process was improper or compromised. The Evaluation Panel (the “panel”) that reviewed the bids and recommended the award to Phoenix Fillmore did not have any conflicts of interest. The panel was not influenced or persuaded by anyone outside the panel to select one proposal over another. The Councilman’s affiliation with CCF was never considered or discussed.

In fact, only one of the eight panel members even knew the Councilman had an affiliation with CCF. The others did not learn of this fact until the story appeared in the media.

The panel's recommendation of Phoenix Fillmore's proposal was a consensus decision and the recommendation was based solely on a review of the merits of the competing proposals and the interview process in comparison with the RFP's criteria. The panel reported that it recommended the Phoenix Fillmore proposal because it provided the least risk to the City, it had the best chance of actually being built and it offered the best financial return to the City.

The panel graded the Fifth & Fillmore proposal slightly lower than Phoenix Fillmore (i.e., 820 points versus 855 points). One of the primary factors that led the panel to recommend Phoenix Fillmore's proposal over Fifth & Fillmore's proposal was the terms for paying the City. Phoenix Fillmore's proposal offers \$9,000,000 to be paid in two parts—one payment at the beginning of each phase of construction. Fifth & Fillmore offered \$8,500,000 (the appraised value as of 2014). Roughly half of this amount would be paid upon execution of the sale of the property, but the other half would be paid in incremental payments (of approximately \$12,000 each) upon the sale of each condominium in the proposed Fifth & Fillmore development. The panel felt the prospect of tying the City's payments to the future sales of condominiums was risky, weighing against the selection of the Fifth & Fillmore bid.

B. Conflict of Interest

We also reviewed whether Councilman Nowakowski engaged in actions with respect to the RFP that are prohibited by the conflict of interest statutes. It is common practice and legally permissible for members of the City Council and Community and Economic Development Department ("CED") to have contact with or meet with developers prior to the issuance of an RFP to build interest and encourage developers to bid on projects. It is in the City's best interest to encourage the most proposals to provide the best competition and options for the City. Our review indicates that all of the contacts brought to our attention between City officials and developers regarding the RFP were permissible both in content and timing.

There are two primary contacts at issue here. The first is a telephone call between Councilman Nowakowski and Paul Chavez, president and chairman of the CCF, which took place during the first week of March 2015. During this call, the Councilman and Mr. Chavez discussed a development opportunity at Grand Canyon University and the Councilman mentioned that there was also an upcoming project downtown near the Arizona State University Downtown Campus. Mr. Chavez and the Councilman both confirmed this was a 10 second or so exchange where the Councilman mentioned the

Project, Mr. Chavez asked if it was for affordable housing, the Councilman said he did not know and Mr. Chavez said he would look into it.

At the time of the Councilman's contact with Paul Chavez in March 2015, the general details of the forthcoming RFP and the Project had already been published in the Arizona Republic a week earlier. The discussion appears to have been informational only, and intended to spur interest in the project. There is no evidence any information was exchanged during this call that was not publicly available to all interested developers. It does not appear this contact with Paul Chavez gave the Councilman a "substantial interest" in the RFP that would have created a conflict of interest that prevented the Councilman from voting to issue the RFP.

The second contact was a meeting on April 6, 2015, at the CCF offices, between the Councilman and members of DECO where DECO's interest in the Project was discussed. The content of this April 6th discussion is the subject of some dispute between the Councilman and DECO. The Councilman recalls this as a 15-20 minute general meeting about development in Phoenix and not specific to the West Fillmore Project, although the Project was discussed. DECO describes this meeting as a 45 minute meeting that was specifically to discuss the upcoming RFP for the West Fillmore Project.

However, regardless of which scenario actually occurred, none of the information that would have been discussed during this April 6, 2015 meeting impacted the RFP process. The information DECO contends it shared with the Councilman was general in nature (i.e., regarding DECO's prior work and qualifications) and it did not include any information specific to the upcoming RFP (e.g., the price that DECO intended to bid in its proposal or DECO's specific designs for its proposal). DECO stated that it would not have had any specific information yet since the RFP had not even been issued. Our review revealed no evidence that Phoenix Fillmore received information from anyone about DECO's proposal or ideas for the RFP. Further, DECO is not even alleging that it believes the Phoenix Fillmore proposal used ideas or designs from DECO.

Both of the contacts at issue occurred prior to the issuance of the RFP on April 30, 2015. As such, there is no evidence of a violation of the transparency period relating to the RFP, and no evidence of a conflict of interest. While we did not receive information showing the Councilman violated the terms of the RFP or any conflict of interest rules, we believe that the better practice would have been for the Councilman to disclose to DECO on April 6, 2015 that CCF was "looking into" the RFP for the sake of complete transparency and to avoid the possible appearance of impropriety.

IV. Facts Learned In Review

A. Development of the RFP

Since 2006, the City has been acquiring land for development of the West Fillmore Project. The City, the Industrial Development Authority, and community leaders conducted various community outreach efforts and raised funding for a conceptual study by the architecture firm of Ayers Saint Gross (“ASG”) to determine the best use of the property. At the same time, the City began developing the criteria for what would be included in an RFP to develop the West Fillmore land.

The CED worked with the City Council’s Downtown Aviation and Redevelopment (“DAR”) subcommittee to reach acceptable criteria for the RFP, which would then be presented to the full City Council for a vote. DAR determined that the RFP should generally seek proposals for an appropriately dense, mixed use redevelopment with residential options attracting a variety of income levels and commercial features that facilitate urban living and walkability in downtown Phoenix (e.g., restaurants, office, retail). Councilman Michael Nowakowski did not sit on the DAR subcommittee and was not involved in the creation of the criteria for the RFP. The criteria approved by DAR was the same criteria used in the RFP.

The City completed this first phase of community outreach, conceptual study, land acquisition and recommended RFP criteria in early February 2015.

B. The Vote to Issue the RFP

Issuance of the RFP was originally set for a City Council vote on February 18, 2015. Councilman Nowakowski requested that the vote be postponed by four weeks. The Councilman, CED, and the City Manager’s office all confirmed that this postponement was for the purpose of engaging in discussions with the owner of an adjoining parcel to the Project regarding the development of a grocery store on the corner of 7th Avenue and Fillmore Street. The information we reviewed contained no evidence suggesting that the Councilman’s request for postponement was improper or related to any interest in the Project from the CCF.

Witnesses confirm that a grocery store in Downtown Phoenix has been a longstanding goal of CED, the Councilman, and community groups. During that four week postponement, the Councilman and CED engaged in negotiations with the adjoining landowner in an attempt to convince the landowner to develop a grocery store that could work in tandem with or complement the Project. The City and the landowner

ultimately could not reach an agreement. Accordingly, the RFP went back on the agenda for a vote on March 25, 2015 and was approved by the City Council without any changes from the criteria recommended by DAR.

C. Public Dissemination of the Forthcoming RFP

On February 26, 2015, the Arizona Republic ran a story about the Project and the forthcoming RFP that included a general description of the land and the City's desire for the Project, stating:

Most of that land — 7.4 acres — will be developed as part of an agreement with the city. The city owns the land south of Fillmore Street between Fourth and Sixth avenues after collaborating with the Phoenix Industrial Development Authority on parts of the purchase.

The City Council is set to vote next month to approve a request for proposals for the area's biggest project since the Arizona Center, said Scott Sumners, deputy economic-development director. Developers will then come to the city with their ideas for a landmark project.

* * *

The goal for the area is a pedestrian-friendly project with an urban feel, said Dan Klocke, director of the Downtown Phoenix Community Development Corporation. The organization coordinated market-feasibility studies and community outreach to test concepts for the site.

Part of the parcel could be saved for a school, for example. The site could also support up to 1,000 residents through a mix of rental, ownership, affordable and market-rate housing options. Other possibilities include retail and restaurant space along Fillmore Street, Klocke said, joining area establishments like The Vig and Cibo.

* * *

The concepts were presented this month to the council's Downtown, Aviation and Redevelopment Subcommittee. Council members recommended authorizing the proposal, saying a project with a sustainable, urban and walkable feel will showcase what the city is pushing for the area.

(See <http://www.azcentral.com/story/news/local/phoenix/2015/02/26/vacant-lots-slated-development-fillmore-street/24066615/>.)

Trammell first learned of the Project and the RFP when it read this Arizona Republic article. Trammell heard about the Project again in a meeting with CED's Chris

Mackay on April 20, 2015 to discuss various projects and development opportunities in the City, including a parking garage structure. Ms. Mackay and Trammell advised that their conversation regarding the Project was relatively brief and general in nature (e.g., when is the RFP coming out). Ms. Mackay told Trammell the RFP was coming out on April 30, 2015.

D. Chavez Learns of Forthcoming RFP from the Councilman

In approximately the first week of March, 2015, a week or so after publication of the February 26, 2015 Arizona Republic article, Councilman Nowakowski had a telephone call with Paul Chavez. The Councilman primarily discussed housing initiatives near the Grand Canyon University campus and inquired whether CCF had interest. During this call, the Councilman also mentioned the upcoming West Fillmore Project. Paul Chavez asked if it was for affordable housing. The Councilman stated that he did not know. Mr. Chavez responded that he would have Alfredo Izmajtovich, the Executive Vice President of the Housing and Economic Development Fund of the CCF, review it to see if it was something the CCF would be interested in. That same day, Mr. Chavez asked Mr. Izmajtovich to look into the Project.

On March 10, 2015, Mr. Izmajtovich called Paul Blue, the Deputy City Manager, to ask some general questions about the RFP (i.e., when it was coming out and how the process generally worked). This call was around 5-10 minutes and Mr. Blue reports there was nothing abnormal about the call. It was consistent with the kind of information he did and would give out to any developers potentially interested in an RFP.

Mr. Blue stated that he did not know how Mr. Izmajtovich got his name but that his calendar entry states that the call was at the request of District 7, which is Councilman Nowakowski's district. Mr. Blue confirmed that he had no conversations with the Councilman about Mr. Izmajtovich calling for information. Mr. Blue believes this notation on his calendar simply refers to the fact that District 7 referred the call to him since it related to the RFP. The Councilman confirmed that the standard procedure at his office would be for his staff to refer an inquiry about an RFP to the individuals at the City involved in that RFP. In this case, that was Paul Blue.

On March 18, 2015, Mr. Izmajtovich mentioned the West Fillmore Project to Trammell's representative in Los Angeles, Jim Anderson, during a meeting to discuss a Trammell/CCF project in Los Angeles called La Plaza Village. The West Fillmore Project sounded similar to the La Plaza Village project that Trammell and CCF had bid for and recently been awarded. Trammell and CCF conducted a few teleconferences during this time period and continued to explore the potential for the West Fillmore

Project. Trammell and CCF stated that their interest in the Project ultimately depended on what the RFP actually sought when it came out.

Both the Councilman and Mr. Chavez stated they had no further communications about the Project until the first week in August 2015, when Mr. Chavez told the Councilman that he was coming to Phoenix to participate in an interview for the RFP. The Councilman advised that this was the first time he learned CCF was interested in the Project and that it had actually submitted a bid. Alfredo Izmajtovich and the key members of Trammell stated they had no communications with the Councilman regarding the Project or CCF's interest in the Project.

E. The April 6, 2015 DECO Meeting

The length and content of the April 6, 2015 meeting between the Councilman and DECO is somewhat disputed. The Councilman recalls that he received a call from Billy Shields, a lobbyist working with DECO,¹ requesting a "meet and greet" with DECO as DECO was interested in downtown development. The Councilman stated that such meetings are a typical part of his work as a Councilman as he always tries to foster interest in development in his District. The Councilman stated it was not a meeting to specifically discuss the Project. The meeting took place at the Councilman's office at the Cesar Chavez Foundation.

The Councilman recalls the meeting lasted around 15-20 minutes. Mr. Shields was present along with DECO principals, Robert Lyles and Patricia Watts. The Councilman could not recall if he had ever met Mr. Lyles or Ms. Watts prior to this meeting. During the meeting, DECO generally talked about its work and experience in developing mixed use properties in downtown areas. It provided the Councilman with a 20+ page booklet that contained pictures of some of DECO's prior work and residential housing brands. The West Fillmore Project was one of several topics discussed during the meeting. DECO did not tell the Councilman that it specifically intended to bid on the as-yet unissued RFP, and DECO took back its booklet when it left the meeting.

Robert Lyles and Patricia Watts recall that the meeting on April 6, 2015, was specifically to discuss the upcoming RFP. They agree that the meeting was in the Councilman's CCF offices and they knew prior to the meeting that the Councilman was affiliated with CCF. They recall the meeting lasting approximately 45 minutes. They stated that they showed the Councilman pictures of some of their different development

¹ Billy Shields was also a donor to the Councilman's campaign fund. According to the records we reviewed, Mr. Shields made a \$1,000 donation to the Councilman on May 8, 2015. We have made attempts to interview Mr. Shields but we have so far been unable to reach him.

brands and some rough hand-drawn sketches regarding the Project. DECO no longer has these hand-drawn sketches. Mr. Lyles discussed DECO's broad vision of the Project, including a mix of for-rent and for-sale units and retail space. Mr. Lyles also asked about the preferred direction of the "urban paseo" that was mentioned in the ASG conceptual study (i.e., whether the Councilman thought it was better to direct the paseo from north to south or east to west). DECO did not discuss numbers or bid price. It had no idea about this information since the RFP had not yet been issued. When Mr. Lyles and Ms. Watts left the meeting, they did not leave any materials with the Councilman other than maybe a CV/resume. The Councilman did not tell Mr. Lyles or Ms. Watts that CCF was looking into the RFP.

F. The Issuance of the RFP and Selection of the Panel

The City issued the RFP on April 30, 2015. CED followed the terms of the RFP during the procurement process. Generally, state statutes control an RFP for a development agreement. Nevertheless, CED typically follows all the same steps as those used for other procurements, including prohibiting contacts during open procurement (i.e., the transparency policy), advertising the RFP, conducting a pre-proposal meeting, conducting public question and answer sessions before the bids are due, etc. CED follows this process because it is the most effective method to ensure a transparent and consistent process. CED followed this process here.

Regarding the selection of Evaluation Panel members, there are no internal published rules at the City or CED for qualifications for panel members on a selection committee for a development agreement. There are also no internal published rules for searching for conflicts of interest regarding panel members—outside of the standard conflict of interest rules under state law. Here, CED representatives working on this RFP sought individuals with expertise in various areas relevant to the RFP who would be able to address questions that arose during the panel's evaluation process instead of having to put those to the City (e.g., a question about a proposal's compliance with City ordinances can be addressed by a panel member with knowledge in those areas).

CED usually includes at least one member of the community on the panel. Here, CED also wanted someone from the City planning office, someone from the City housing department, and a developer that was not going to bid. CED also seeks diversity on the panel that reflects the diversity of the City. For each category CED identifies, CED tries to select two panelists, so that there is an alternate in case someone cannot perform. This process was followed for this RFP. At the conclusion of the panel selection process, the City had eight panel members and seven alternates.

Once the proposed panel members were selected, procurement officer Gretchen Wolfe performed Google searches on each proposed member to look for any obvious conflicts. The panel members then attended a training session where they were educated on Arizona's conflict of interest laws and the RFP process. At the conclusion of that training, they each signed an "Evaluation Panel Member Agreement" that included an avowal that they understand the conflict of interest laws and that they had no conflicts of interest.

Once the RFP submittal period closed and Ms. Wolfe obtained a list of the groups affiliated with each bidder, she sent this list to the entire evaluation panel and asked them to confirm they had no conflicts of interest. Each of the panel members confirmed in writing they had no conflicts. The process employed by Ms. Wolfe only determined whether there were conflicts between the bidders and the panel members; it did not check for possible conflicts between bidders and City employees or Council members. The CED staff directly involved in procurement and Ms. Wolfe did not know Councilman Nowakowski was involved with an entity that had been part of a bid until after the panel recommended the Phoenix Fillmore proposal.

Nevertheless, we did not find evidence that any of the panel members had any conflict of interest or any relationship with any bidders or the Councilman. Panelist Cindy Dach was the only panelist who knew the Councilman was affiliated somehow with CCF, but she was not sure how he was affiliated with CCF. She stated this was something she had simply heard from others in the community in the past. This knowledge had no impact on her decision and the Councilman's name never came up in panel deliberations. None of the other panelists knew that Councilman Nowakowski was employed by one of the bidders. None of the panelists were contacted by Councilman Nowakowski or by any interested parties in violation of the RFP's rules.

The following people were on the evaluation panel:

1. Murray Boess, Financial Operations Administrator of Phoenix IDA. Mr. Boess was selected as a representative of IDA, a co-owner of the property which is the subject of the RFP.
2. Cindy Dach, Downtown Phoenix Inc. Board Member and Roosevelt Row CDC Board Member. Ms. Dach was selected as a community representative and because she was involved as a community representative during the conceptual planning for the site in 2014.
3. Christopher Kowalsky, Office of Customer Advocacy Program Manager, City of Phoenix Planning and Development Department. Mr. Kowalsky

was selected as a representative from the City qualified to address zoning, construction, and building requirements that comply with City ordinances.

4. Mark Singerman, Vice President and Regional Director for Rockefeller Group Development. Mr. Singerman was selected as a real estate developer representative.
5. Caroline Lobo, Architect at suoLL. Ms. Lobo was selected as an architect representative and regarding sustainability issues.
6. Keon Montgomery, Housing Development Manager, City of Phoenix Housing Development Department. Mr. Montgomery was selected as a representative regarding affordable housing.
7. Robyn Sahid, Program Manager, Community and Economic Development Department, City of Phoenix. Ms. Sahid was selected as a CED representative because she had no involvement with the process of preparing and issuing the RFP.
8. Mark Stratz, Vice President, DTZ. Mr. Stratz was selected as a real estate broker representative.

Each panel member confirmed that this group represented a good cross-section of knowledge for the evaluation process. No panel member believed there was a gap in knowledge on the panel or that the panel needed additional expertise to evaluate the proposals or the RFP.

G. Submittals from Proposers and the Interview Process

The City held a Pre-Proposal Meeting on May 18, 2015. There were approximately 80 attendees. Representatives from Trammell and DECO attended the meeting in person; a CCF representative attended via the internet. Following this meeting, the City circulated an attendance sheet to all attendees. This list showed Trammell, CCF and DECO all having attended the meeting. Trammell and CCF stated this was the first time they learned DECO was interested in the Project. DECO claims that while it received the list, it did not notice that there was an attendee from CCF.

The deadline to submit bids was June 30, 2015. There were five bids. The procurement officer disqualified a bid from Helix because it facially did not comply with the terms of the RFP. The four remaining bidders were contacted in mid-July 2015 to coordinate interviews with the evaluation panel. At this time, the four remaining bidders

received a letter with the list of the bidders who would participate in the interview process. This was the first time Phoenix Fillmore learned that DECO had submitted a bid for the Project since DECO was listed as a “member” of Fifth & Fillmore. DECO claims that it still did not know CCF was involved because the City’s letter only listed “Phoenix Fillmore Partners, LLC.” DECO stated that the Arizona Corporation Commission (“ACC”) records for this entity did not list CCF as a member. Indeed, the ACC records indicate that the only member of Phoenix Fillmore Partners, LLC is an entity called “High Street Arizona, Inc.” based in Dallas.

The evaluation panel interviews took place on August 7, 2015. CCF did not know anyone on the evaluation panel. Trammell confirmed that it only recognized two people on the panel: (1) Mark Singerman, a developer who they considered a competitor; and (2) Mark Stratz, a commercial real estate broker who they knew of generally from the industry. Trammell confirmed that it had no conflicts with either of these panelists.

The Councilman and CCF agree that Paul Chavez contacted the Councilman to advise him that he would be in Phoenix to attend the August 7, 2015 interview. This was the first time the Councilman learned CCF was interested in and had actually put in a bid on the RFP. No details of the Project or the RFP were discussed during this call and the Councilman stated that he advised Mr. Chavez that he would be conflicted out of any involvement in the RFP due to his connection with CCF.

In mid-August 2015, CCF held its biannual board meeting. The Councilman and CCF confirmed that CCF’s biannual board meetings were the only times when the different “funds” of CCF would gather to update the rest of CCF.² The Councilman attended this meeting to update CCF on the Communications Fund. The meeting agenda included an update from Alfredo Izmajtovich on the Housing and Economic Development Fund, which included the status of the bid on the West Fillmore Project. The Councilman did not participate in the portion of the meeting that discussed the RFP.

H. Selection of the Trammell/Chavez Bid

After evaluation of the four competing bids and deliberation, the Evaluation Panel scored Phoenix Fillmore as highest rated bid. Scores of the four proposals show:

² CCF stated that it is organized in separate funds. The Councilman heads the “Communications Fund” which operates CCF’s radio stations. The “Housing and Economic Development Fund” is run by Alfredo Izmajtovich and handles CCF’s affordable housing development.

West Fillmore Redevelopment RFP
Evaluation Panel Deliberations Summary and Scoring

	Prop. Qual. & Fin. Capacity (0-225)	Scope/Scale of Prop. Development (0-225)	Financial Return/Public Benefits (0-200)	Consistency w/App. Plans & Ordinances (0-150)	Proposed Business Plan (0-100)	Proposed Timeline (0-100)	Total (0-1000)
Concord Eastridge	190	180	140	140	50	60	760
Fifth & Fillmore Dev. Partners	200	190	160	130	70	70	820
Kenilworth Neighborhood	150	150	100	100	25	40	565
Phoenix Fillmore Partners	220	170	180	115	80	90	855

The panel stated that the primary factors weighing against Fifth & Fillmore and in favor of Phoenix Fillmore were the financial return, business plan, and timeline categories. Fifth & Fillmore proposed an \$8.5 million purchase price; half the purchase price would be paid up front but the remaining \$4M+ would be paid in approximately \$12,000 increments upon the close of escrow of each for-sale condo unit in the development. Panelist Mark Stratz recalled that one of the questions asked of each interviewee was when they expected to close on the purchase of the land from the City. Mr. Stratz stated that Fifth & Fillmore’s answer was “when the last condo sells.” Thus, the panelists believed there was more financial risk and uncertainty to the City in the Fifth & Fillmore proposal.

Mr. Lyles referred to Fifth & Fillmore’s payment plan as a “takedown” agreement and he stated that he believed the City had accepted such financing arrangements in the past. Panelist Robyn Sahid, the CED panel representative, stated that she knew of a different agreement the City had accepted with that type of financing arrangement but she stated that it was not preferable to the Phoenix Fillmore payment proposal. Specifically, the Phoenix Fillmore proposal did not tie payment to any sale of condo units (which are dependent on market conditions) and it provided a fixed timeframe for payment to the City. The panel was not against condo sales but strongly believed fixed payment was less risk for the City than contingent payments. Phoenix Fillmore’s proposal promised payment in two set installments: the first payment came at the beginning of Phase 1 of the Project and the second payment came at the beginning of Phase 2 of the Project.³ The panel favored the Phoenix Fillmore plan because having a fixed timeframe for payment

³ Phoenix Fillmore’s bid also requested tax assistance under the Government Property Lease Excise Tax (“GPLET”) statutes and built this tax relief into the budget. All of the bidders, including Fifth & Fillmore, indicated they may use this same GPLET tax abatement. The City confirmed that developers almost always request this relief and it only applies by statute to rental units that are located in the central business area and that are part of a redevelopment project. A.R.S. § 42-6208 (2015). The GPLET tax abatement must be approved by the City Council. Mr. Lyles agrees that Fifth & Fillmore would have requested a GPLET if it was available but he states the Fifth & Fillmore proposal and budget was not conditioned on receiving a GPLET.

was more predictable for the City and allowed the City to pay back the IDA for the purchase of a portion of the West Fillmore land from the County.

The panelists all confirmed that they reached a consensus on the award and that their decision was based solely on a review of the competing proposals and interviews in combination with the RFP criteria. For example, Murray Boess, the panelist representative from Phoenix IDA, stated that the Phoenix Fillmore proposal provided the “least risk to the City and the highest return.” Panelists Caroline Lobo and Chris Kowalsky, who had both been members of other evaluation panels in the past, stated that there was “nothing abnormal” about the RFP process and that the decision to select Phoenix Fillmore was objective and based solely on the merits of the proposal.

Panelists Mark Singerman, the developer representative on the panel, and Mark Stratz, the real estate broker representative, both stated that the panel selected the Phoenix Fillmore proposal because it best protected the City’s interests and it had the best chance of actually being built given Trammell’s reputation in the industry. Other panelists also noted that they favored the Phoenix Fillmore proposal due to Trammell’s reputation and similar project in Los Angeles. The panel did not believe Fifth & Fillmore’s proposal was bad—they just felt that the Phoenix Fillmore plan was the better option.

On August 26, 2015, Gretchen Wolfe and Chris Mackay called Phoenix Fillmore to notify them of their selection by the evaluation panel, and the selection was made public.

H. Complaints by DECO

A few days after the City announced the selection of the Phoenix Fillmore bid, Patricia Watts from DECO called Chris Mackay to express her displeasure and to complain about the meeting between DECO and the Councilman. Ms. Watts told Ms. Mackay that DECO “showed the Councilman our plans” and that DECO would have never done so had it known the Councilman was involved with a potential competing bidder. Ms. Mackay advised Ms. Watts that the RFP was still in open procurement and that she could not discuss it -- directing Ms. Watts to the terms of the RFP regarding the process for filing a protest. Gretchen Wolfe confirmed this to Ms. Watts in an email. The deadline to file a protest was September 2, 2015. No one filed a protest.

About one month after the protest deadline expired, the Arizona Republic published a lengthy article on the RFP. The article contained quotes from DECO stating it would not have attended the April 6, 2015 meeting had it known the Councilman was

affiliated with a potentially competing bidder and complaining that this should have been disclosed to DECO:

“We were shocked that the group he worked for was one of the successful bidders,” Lyles said. “We felt it should have been disclosed to us. At that level, transparency is really important. We’re just disappointed in the process.”

([http://www.azcentral.com/story/news/local/phoenix/2015/10/02/nowakowski-scrutinized-downtown-phoenix-land-deal/32542429/.](http://www.azcentral.com/story/news/local/phoenix/2015/10/02/nowakowski-scrutinized-downtown-phoenix-land-deal/32542429/)) The article also reports that DECO could not understand why it was “marked down” for including condominiums since those were specified and allowed as part of the RFP.

During our interview with Mr. Lyles, he explained that he was upset over the panel’s recommendation because he believed the Fifth & Fillmore proposal was clearly the stronger and more responsive proposal to the RFP and the conceptual study done by ASG in 2014. Specifically, Mr. Lyles believes that Fifth & Fillmore’s proposal was superior on the following criteria:

- Evidence of Financial Capacity. Mr. Lyles stated that he was backed by the Weiss family, whose representative personally attended the interviews and committed to funding the project. Fifth & Fillmore provided letters from two banks confirming the Weiss family’s ability to fund the Project. In comparison, the Phoenix Fillmore proposal included only a letter from Wells Fargo for the debt component and no letter from the Principal Financial Group confirming its commitment to its portion of the equity component.
- Financial Return/Public Benefit. Mr. Lyles stated that Fifth & Fillmore commissioned a report from Elliot D. Pollack & Company showing a financial return to the City of \$13.7 million. Phoenix Fillmore provided no similar report but merely listed bullet points with general discussions regarding financial return.
- Proposed Business Plan. Mr. Lyles stated that Fifth & Fillmore provided a detailed market feasibility study from Belifore Real Estate Consulting supporting Fifth & Fillmore’s proposed plan. Phoenix Fillmore provided comps to other downtown buildings.
- Scope of Proposed Development and Consistency with Plans. Mr. Lyles stated that the RFP called for a mixed-use proposal with both sale and rental properties, which was what Fifth & Fillmore provided. The Phoenix Fillmore proposal included rental properties only. Additionally, Mr. Lyles

stated that Fifth & Fillmore provided almost 1,500 parking spaces for 665 units plus retail while Phoenix Fillmore only provided 780 parking spaces for 607 units plus retail. Mr. Lyles did acknowledge that Fifth & Fillmore scored higher in these categories than Phoenix Fillmore.

Mr. Lyles clarified that DECO does not claim Phoenix Fillmore co-opted designs or ideas from the Fifth & Fillmore proposal, or that Phoenix Fillmore received inside information from the Councilman about DECO's plans. He stated he had no evidence of either. Rather, DECO believes that either the evaluation panel was unqualified⁴ or that there was some "influence" on the panel to award the RFP to Phoenix Fillmore. Regarding the latter scenario, DECO admits that it has no direct evidence that the panel was improperly influenced to favor Phoenix Fillmore.

Mr. Lyles stated DECO did not file a protest because DECO believed it would be decided by the same people who, in his opinion, got it wrong in the first place. But that belief is incorrect; the Evaluation Panel that made the bid recommendation would have had nothing to do with a protest. Mr. Lyles also explained he had not sought out coverage in the Arizona Republic, but that he was contacted by the Arizona Republic about the RFP. Mr. Lyles stated that he now "regretted" speaking with the media and that, while DECO was disappointed in the outcome, DECO's intention was to move on to other projects and opportunities.

V. The Process of the RFP

A. The Terms of the RFP

CED conducted this procurement in accordance with specific RFP terms and conditions. The RFP is a development agreement for jointly owned City-IDA property. Although Phoenix City Code Chapter 43 governs procurements by the City, including RFPs, development agreements⁵ are **not** subject to Chapter 43. Specifically, Code

⁴ Mr. Lyles took issue with the fact that there were no residential real estate developers or brokers on the panel. Mark Singerman is primarily a developer of office and industrial buildings but he had been involved in at least one mixed use project. Mark Stratz handles primarily commercial real estate but was selected because of his activity in the ongoing development of the downtown Phoenix area and the growth cycles of the market.

⁵ Development agreements are defined in Code Section 29-3, which adopts the definition in A.R.S. § 9-500.051: "Development agreement" means an agreement between a municipality and a community facilities district pursuant to section 48-709, a landowner or any other person having an interest in real property that may specify or otherwise relate to any of the following:

- (a) The duration of the development agreement.
- (b) The permitted uses of property subject to the development agreement.
- (c) The density and intensity of uses and the maximum height and size of proposed buildings within such property.

Section 43-2(B) states: “[t]he following activities are excluded from the scope of this chapter . . . [d]evelopment agreements as defined under Arizona law.” Thus, the terms of the RFP are the only terms that govern the procedure for the bidding process.

The RFP prohibited all persons or entities that respond to the RFP from “any direct or indirect contact with any person (other than the designated procurement officer) who may play a part in the selection process, including members of the evaluation panel, the City Manager, Assistant City Manager, Deputy City Managers, Department heads, the Mayor and other members of the Phoenix City Council.” (RFP ¶ V.) This rule is generally referred to as the transparency policy. The “General Information” category of the RFP also required all proposers to sign an affidavit stating, in relevant part: “Proposer has not in any manner, directly or indirectly, conspired with any person or party to unfairly compete or compromise the competitive nature of the RFP process.” (RFP, Attachment A ¶ 9.)

This transparency policy of the RFP is consistent with the City’s procurement rules and relevant case law. See, e.g., Gamewell v. City of Phoenix, 216 F.2d 928, 935-936 (9th Cir. 1951) (holding trial court properly invalidated procurement contract, in part, because winning bidder had access to information relevant to the bid that was not provided in the bid specifications and that other bidders did not receive).

The RFP required seven categories (or “tabs”) of information from each proposer: (1) General Information; (2) Proposer’s Qualifications and Financing Capacity; (3) Scope/Scale of the Proposed Development; (4) Financial Return and Public Benefits; (5) Consistency with Approved Plans and Ordinances; (6) Proposer’s Business Plan; and (7) Proposed Timeline. (RFP ¶ III(B).)

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- (d) Provisions for reservation or dedication of land for public purposes and provisions to protect environmentally sensitive lands.
 - (e) Provisions for preservation and restoration of historic structures.
 - (f) The phasing or time of construction or development on property subject to the development agreement.
 - (g) Conditions, terms, restrictions and requirements for public infrastructure and the financing of public infrastructure and subsequent reimbursements over time.
 - (h) Conditions, terms, restrictions and requirements for annexation of property by the municipality and the phasing or timing of annexation of property by the municipality.
 - (i) Conditions, terms, restrictions and requirements of deannexation of property from one municipality to another municipality and the phasing or timing of deannexation of property from one municipality to another municipality.
 - (j) Conditions, terms, restrictions and requirements relating to the governing body's intent to form a special taxing district pursuant to title 48.
 - (k) Any other matters relating to the development of the property.

The panel evaluated the materials submitted in each of the categories using a “best-value-to-the-City” procurement, which means they looked at all factors, not just financial return, in selecting the recommended proposer. The RFP requires the panel to use the following ratings scale:

1. Proposed Qualifications and Financing Capacity (0-225 points)
2. Scope/Scale of the Proposed Development (0-225 points)
3. Financial Return and Public Benefits (0-200 points)
4. Consistency with Approved Plans and Ordinances (0-150 points)
5. Proposed Business Plan (0-100 points)
6. Proposed Timeline (0-100 points)

(RFP ¶ IV(B).)

The RFP also provided a right of review, stating:

A proposer that submits a proposal that is disqualified may challenge the disqualification by filing a protest within seven calendar days of the date of the City’s notice of disqualification.

An unsuccessful proposer may challenge an award recommendation by filing a protest within seven calendar days after the award recommendation has been posted at phoenix.gov/finance/business-opportunities/bid-awards-andrecommendations. Proposers that have had their proposals disqualified may not protest an award recommendation.

All protests must be in writing, filed with the Procurement Officer listed on page 1, and include all of the following:

1. Name and number of the RFP challenged;
2. Name, address and telephone number of the protester;
3. Detailed statement of the legal and factual grounds of the protest including copies of relevant documents;
4. Form of relief requested; and
5. The signature of the protester or its legal representative.

(RFP ¶ M.)

Courts strictly enforce bid protest time limits to avoid delay in government procurement. City & Cnty. of San Francisco v. United States, 130 F.3d 873, 877 (9th Cir. 1997) (holding cases uniformly recognize “the importance of strict time limitations for bid protests in order to avoid delay in the government procurement process”). Here,

the deadline to file a protest in accordance with the terms of the RFP was September 2, 2015. Fifth & Fillmore did not file a protest.

B. Judicial Standard of Review

A city's procurement decisions are tested by whether they are "illegal, unfair or arbitrary," or the city has "act[ed] in bad faith." See Brown v. City of Phoenix, 77 Ariz. 368, 377, 272 P.2d 358, 364 (1954) (holding public officials have broad discretion in public-procurement matters, and "the courts generally will not disturb an honest exercise of discretion"); Sulphur Springs Valley Elec. Coop., Inc. v. City of Tombstone, 99 Ariz. 110, 113, 407 P.2d 76, 78 (1965) ("[T]here is an area of discretion lodged in city officials in carrying out transactions for the benefit of the City and its inhabitants. In the absence of fraud or bad faith, the validity of their actions will not be entertained by courts").

The party "attacking the validity of a contract made by [the] municipality" bears the burden of proving fraud, illegality or bad faith. Specifically, "[i]t is not enough to show that the contract was disadvantageous to the city or that it might possibly prove to be such. . . . [T]he showing must be that the contract was either tainted with fraud or so inequitable and unreasonable that it amounts to an abuse of discretion." City of Phoenix v. Landrum & Mills Realty Co., 71 Ariz. 382, 388, 227 P.2d 1011, 1014 (1951).

There is a presumption that the government acted in good faith when it procures or contracts for services or products. Bean Stuyvesant, L.L.C. v. United States, 48 Fed. Cl. 303, 320 (2000) (holding there is a "strong presumption that government officials act correctly, honestly, and in good faith when considering bids"); HomeSource Real Estate Asset Servs., Inc. v. United States, 94 Fed. Cl. 466, 480 (2010). The rule against second-guessing municipal agency decisions applies with greatest force to "factual questions or matters involving agency expertise." Thomas & King, Inc. v. City of Phoenix, 208 Ariz. 203, 209, ¶ 24, 92 P.3d 429, 435 (App. 2004) (internal quotations omitted).

The party protesting procurement carries a heavy burden to show through almost irrefutable proof that the government had a specific intent to injure or harm the protesting party. Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578, 1581 (Fed. Cir. 1995). Thus, "[m]ere suspicion will not suffice." Bryan O. Ramos, Never Say Die: The Continued Existence of the Government Officials' Good Faith Presumption in Federal Contracting Law and the Well-Nigh Irrefragable Proof Standard After Tecom, 63 A.F. L. Rev. 163, 167-69 (2009) (stating "[t]he actions of government officials that have been found to meet this specific intent include those 'motivated alone by malice' or 'actuated by animus toward the plaintiff'").

C. Analysis

No bidder filed a protest in accordance with the RFP's terms. Fifth & Fillmore presented no argument or evidence to the procurement officer or the City in accordance with the RFP's protest process—let alone any evidence that would satisfy the heavy burden necessary to set aside the evaluation panel's recommendation of the Phoenix Fillmore proposal. Based on the information we were able to gather, we found: (1) no evidence that there was a violation of the RFP's transparency policy; (2) no evidence that Phoenix Fillmore received confidential information (or other favorable information) unavailable to other bidders; (3) no evidence that the Councilman provided information about Fifth & Fillmore's plans for the RFP to Phoenix Fillmore; and (4) no evidence that the Councilman, or his affiliation with CCF, influenced the RFP criteria or the evaluation panel's recommendation.

DECO's complaints about the RFP reflect its disagreement with the panel's decision on the merits of the competing proposals. Basically, DECO contends that it had the stronger proposal, such that either the panel got the decision wrong or it was improperly influenced. Even had DECO filed a protest (which it did not), we do not believe these complaints satisfy the heavy burden required to set aside the procurement recommendation, nor is there evidence that we have discovered to support such a claim.

DECO's complaints about the panel getting the decision wrong on specific issues (e.g., parking spaces, financing capability) do not take into account the overall assessment by the panel, and are not sufficient to set aside the recommendation. We believe these complaints are nothing more than disputing the panel's "honest exercise of its discretion" on "factual questions or matters involving agency expertise." See Brown, 77 Ariz. at 377, 272 P.2d at 364; Thomas & King, 208 Ariz. at 209, ¶ 24, 92 P.3d at 435. It is not grounds to overturn the panel's recommendation even if DECO believes the panel selected a proposal that "was disadvantageous to the city or that it might possibly prove to be such." See Landrum & Mills Realty Co., 71 Ariz. at 388, 227 P.2d at 1014. We have not seen any evidence that the panel's decision was "tainted with fraud or so inequitable and unreasonable that it amounts to an abuse of discretion." Id.

Here, CED possesses expertise overseeing the procurement of development agreements like the RFP. CED chose evaluation panelists with appropriate expertise, and these panelists drew on their education and experience to fairly evaluate the proposals submitted. We believe an Arizona court will defer to that expertise in reviewing the panel's recommendation to award the RFP to Phoenix Fillmore.

Similarly, the information we reviewed revealed no evidence to support DECO's allegations about the panel being improperly influenced. While DECO believes the

Councilman should have told DECO of CCF's potential interest in the RFP during the April 6, 2015 meeting, DECO concedes that it does not have evidence that the Councilman passed information about DECO's bid or designs to Phoenix Fillmore. Thus, we believe an Arizona court would find that these allegations, at most, constitute "mere suspicion," which cannot rebut the presumption of good faith in favor of the City's process. See Ramos, supra, 63 A.F. L. Rev. at 167-69; Brown v., 77 Ariz. at 377, 272 P.2d at 364; Landrum & Mills Realty Co., 71 Ariz. at 388, 227 P.2d at 1014.

Further, it appears some of DECO's complaints arose from ambiguous language in the evaluation panel's score sheet. Specifically, DECO believed that the Fifth & Fillmore proposal was scored negatively for its inclusion of condominiums. This belief derives from the score sheet entry under the category of "Proposed Business Plan" that states: "The panel had more concern with Concord Eastridge's and Fifth & Fillmore's reliance on for sale properties." The score sheet also says, under the "Proposed Timeline" category, that Fifth & Fillmore "is more reliant on for sale properties which could result in a longer timeline."

The panelists confirmed that DECO's interpretation is incorrect. Every panelist concurred that they did not score Fifth & Fillmore's proposal negatively because it proposed condominiums; they scored the proposal lower because it tied payments to the City to the sale of each condominium, creating a longer timeline for payment and a more risky/speculative option for the City. The key factors that led to the panel's recommendation were Phoenix Fillmore's business plan, timeline, and reputation. This led the panel to conclude this group was the most likely to build what they proposed with the least risk and best (and most timely) return to the City.

VI. Conflict of Interest

A. Standard of Review

The City of Phoenix Charter Article XI formally adopts state laws on conflicts of interest. The state conflict of interest laws are set forth in A.R.S. §§ 38-501 *et seq.* and A.R.S. §§ 36-1406, 1477. Specifically, A.R.S. § 38-503 (2015) states:

- A. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

- B. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

See also A.R.S. § 38-504 (“A public officer or employee shall not disclose or use, without appropriate authorization, any information that is acquired by the officer or employee in the course of the officer’s or employee’s official duties and that is declared confidential by law”).

The purpose of the conflict of interest statute is to protect the public from self-dealing by public employees. Maucher v. City of Eloy, 145 Ariz. 335, 337, 701 P.2d 593, 595 (App. 1985). The most critical factor in analyzing a conflict of interest is whether the individual had a “substantial interest” in the decision by the public agency. See Arizona Farmworkers Union v. Agric. Employment Relations Bd., 158 Ariz. 411, 413, 762 P.2d 1365, 1367 (App. 1988) (holding state agricultural board member, who worked for a company that belonged to a lobbying group arguably affected by a board decision, did not violate the conflict of interest statute by participating in board decisions); Yetman v. Naumann, 16 Ariz. 314, 317, 492 P.2d 1252, 1255 (App. 1972) (holding the legislature did not intend “interest” for purposes of disqualification to include a mere abstract interest in the general subject or a mere possible contingent interest; it must be a pecuniary or proprietary interest and something more than general sympathy, feeling or bias); see also Emmett McLoughlin Realty, Inc. v. Pima County, 212 Ariz. 351, 357, 132 P.3d 290, 296 (App. 2006).

The City has also internally adopted and published these Arizona conflict of interest rules through its City of Phoenix Ethics Handbook, which states:

Arizona law prohibits any employee, City Council Member, or member of a board, commission or committee who has “a substantial interest in any contract, sale, purchase or service to such public agency” from participating in any way with the transaction. See A.R.S. § 38-503(A) (reprinted in Appendix B). Also, Arizona law has a flat prohibition against any City employee or anyone officially representing the City from providing certain goods and services to the City without competitive bidding. See A.R.S. § 38-503(C). Two other statutes prohibit municipal and public officers from

being personally involved in housing or redevelopment projects. See A.R.S. § § 36-1406 and 36-1477.⁶

City of Phoenix Ethics Handbook ¶ C.⁷ Examples of conflicts of interest are found at Appendix A in the Handbook, including the following at paragraphs 8 and 9:

8. The close relative of a City employee or a member of a City board, commission, committee or the City Council is in business with a person whose application or contract is being considered by the public agency.
9. The City employee or member of a City board, commission, committee or the City Council receives more than five percent of his total annual income from a corporation that has an application or a contract pending before the public body.

(Id., App. A.)

B. Analysis

The conflict of interest rules basically require two actions: disclosure and recusal/abstention from participating in an action affecting a conflicted interest. According to City records, the Councilman complied with the first requirement when he disclosed to the City in 2012 that he had a conflict of interest with matters affecting the Cesar Chavez Foundation. The Councilman stated that he has recused himself from votes affecting CCF on at least 25 prior occasions.

The award of the RFP falls within the conflict of interest examples listed above in the City Ethics Handbook with respect to Councilman Nowakowski, given his employment with CCF. Arizona law and the City's rules prohibit Councilman Nowakowski from having any role in the decision to award the RFP to Phoenix Fillmore since this would provide a direct benefit to his employer. He would have to abstain from any vote to adopt the evaluation panel's recommendation of the Phoenix Fillmore proposal. However, this vote has not occurred and the Councilman has already stated that he will abstain from voting on the RFP.

Thus, the key analysis here is: (1) whether the Councilman had a duty to abstain from the February and March 2015 votes related to *issuance* of the RFP; (2) whether he

⁶ A.R.S. §§ 36-1406 and 36-1477 specifically state municipal and public officers cannot own an interest in housing or redevelopment projects.

⁷ The Ethics Handbook also confirms the prohibition on disclosure of confidential information related to a bidding process. (City of Phoenix Ethics Handbook ¶ D citing A.R.S. § 38-504(B).)

had a duty not to speak with Paul Chavez about the RFP in early March 2015 before it was issued; and (3) whether he had a duty not meet with DECO on April 6, 2015 before the RFP was issued. Based on our review and the existing statutes and case law, we believe an Arizona court would find that the Councilman did not violate any conflict of interest or confidentiality laws.

1. The February and March 2015 Votes

We believe an Arizona court would likely find that the Councilman did not have to recuse himself from his votes regarding the RFP in February and March 2015 because he did not have a “substantial interest” in the outcome of the RFP at those times. Regarding the February 2015 vote, the information we reviewed revealed no evidence that the Councilman had any knowledge or information that would lead him to believe CCF was interested in the RFP. The witnesses we interviewed confirmed that the four-week postponement in issuing the RFP was to pursue the potential for a grocery store adjacent to the Project. Further, the information we gathered revealed no evidence CCF even knew about the Project until March 2015. Thus, on February 18, 2015, the Councilman had no substantial interest in the RFP or any substantial interest in the timing of when it would be issued.

Regarding the March 25, 2015 vote, the only evidence we located regarding the Councilman’s knowledge of CCF’s interest in the bid was his brief conversation with Paul Chavez during the first week of March 2015. The Councilman mentioned that Mr. Chavez should take a look at the RFP and Mr. Chavez replied that he would have Mr. Izmajtovich “check it out” to see if it was something that interested the CCF. Also, the CCF has issued a letter confirming that the Councilman’s compensation would not be affected in any way by the award of the RFP.

Based on this limited conversation and the representation from CCF, we believe an Arizona court would find that, at most, the Councilman only had a remote interest in the bid as of March 25, 2015, and he did not stand to gain or lose financially from the issuance of the RFP. See Arizona Farmworkers Union, 158 Ariz. at 413, 762 P.2d at 1367. There may be speculation that CCF’s decision to look into the bid, alone, constitutes a substantial interest since with a winning bid, CCF’s revenues would likely increase, and in turn, so too would salaries for employees, such as the Councilman. However, courts have defined this speculation as “contingent or remote,” falling well short of “substantial.” Id.; see also Yetman, 16 Ariz. at 317, 492 P.2d at 1255. As of March 25, 2015, any loyalty the Councilman may have toward the CCF as his employer is not likely to be deemed a “substantial interest” in violation of the conflict of interest laws since we found no evidence that CCF intended to pursue the RFP as of that date. See Emmett McLoughlin, 212 Ariz. at 357, 132 P.3d at 296.

Further, even if the Councilman had a substantial interest, an Arizona court would likely rule that a recusal from the February 18 and March 25, 2015 votes was unnecessary because those votes were immaterial to the final outcome of the proposals, and thus, harmless. See id. at 357-58, 132 P.3d at 296-97 (holding a commission member’s participation was immaterial to the final outcome because the votes cast were 1) to delay a recommendation to a final Board, and 2) substantive votes recommending the Board vote against a proposal but the Board ultimately voted for it); see also Arizona Farmworkers Union, 158 Ariz. at 413, 762 P.2d at 1367 (holding a board member’s participation was harmless because he only made “a single factual obligation that was immaterial to the issues to be decided”).

We found no evidence suggesting that the Councilman’s February 18 and March 25, 2015 votes materially impacted the RFP process. The RFP’s criteria remained the same from the time it was originally proposed by DAR to its ultimate issuance.

2. The early March 2015 call with Paul Chavez

We believe an Arizona court would not find the Councilman was prohibited from speaking with Paul Chavez in early March 2015. For the same reasons discussed above, the Councilman did not have any “substantial interest” in the RFP at the time of this call; he did not even know if CCF would be interested in the RFP. Further, the RFP had not been issued and communications between developers and City representatives are not only permitted during this period but actually quite common. Lastly, the content of discussion was general and not a violation of the City’s confidentiality requirements. The Arizona Republic had already published details about the forthcoming RFP a week or so prior to the telephone call, and the Republic article contained far more information about the RFP than was discussed during the early March telephone call.

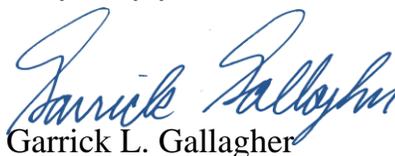
3. The April 6, 2015 meeting with DECO

Similarly, we believe an Arizona court would likely not find that the Councilman violated conflict of interest rules when he met with DECO on April 6, 2015. The RFP had not been issued so there was no prohibition on these communications under the RFP’s transparency policy. We found no evidence that the Councilman knew on April 6, 2015 that CCF going to actually pursue the RFP or that it intended to submit a proposal. Mr. Chavez had stated only that he would have Alfredo Izmajtovich “look into it.” The Councilman did not learn about CCF’s interest and bid until early August 2015. We believe a court would determine the Councilman’s interest was only “remote” at the time of this meeting.

Finally, while the content of information the Councilman received from DECO during this April 6, 2015 meeting is the subject of dispute, the information we reviewed revealed no evidence that DECO provided specific or material details to the Councilman regarding Fifth & Fillmore's ultimate proposal, or that the panel was aware of any information allegedly provided by DECO to the Councilman. DECO does not allege any information was actually transmitted about DECO's plans to Phoenix Fillmore, and it has no direct evidence to support such an allegation. As discussed above, this accusation does not rise beyond the level of mere suspicion.

While the Councilman's meeting with DECO did not rise to the level of a conflict of interest under Arizona law, we believe the better practice would have been for the Councilman to notify DECO that CCF was "looking into" the Project when the issue of the Project came up in the April 6th meeting. The Councilman should have disclosed this fact to DECO for the sake of complete transparency and to prevent the appearance of impropriety. However, nothing we were able to obtain and review indicates that the process was tainted, or that the recommendation by the panel was in any way influenced by the Councilman's connection to CCF.

Very truly yours,



Garrick L. Gallagher
Shanks Leonhardt
For the Firm

GLG/SL