

**From:** Monica Houston  
**Sent:** Thursday, July 19, 2018 12:11 AM  
**To:** Ted Brandvold; Mani Grewal; Douglas Ridenour  
**Subject:** SR 132 Risk Concern

**Importance:** High

Good evening. I have spent much of today attempting to grasp an understanding of the issues and hence the organizational risks associated with the SR 132 email that prompted a request for documents by Mayor Brandvold. One of my duties as the City Auditor is to ensure that any significant risks to the organization are identified and appropriately mitigated; I also have a duty to inform the Council via the Audit Committee of such. In reviewing the documents provided, it appears that the organization may have exposure to risk in the areas of Fraud, Waste, and Abuse. To be clear that we are on the same page please consider the following:

**Fraud:** An intentional act of deception, misrepresentation or concealment in order to gain something of value. Fraud is described as: A false representation of a material fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives another so that he acts, or fails to act to his detriment. Generally Accepted Government Auditing Standards describes fraud as: A type of illegal act involving the obtaining of something of value through willful misrepresentation. Whether an act is, in fact, fraud is a determination to be made through the judicial or other adjudicative system and is beyond the auditor's professional responsibility.

**Waste:** Over-utilization of services (not caused by criminally negligent actions) and the misuse of resources. Government Accountability Office states waste involves the taxpayers not receiving reasonable value for money in connection with any government funded activities due to an inappropriate act or omission by players with control over or access to government resources (e.g. executive, judicial or legislative branch employees, grantees or other recipients). Most waste does not involve a violation of law. Rather, waste relates primarily to mismanagement, inappropriate actions and inadequate oversight. Waste is defined as failure to control costs or regulate payments associated with federal program monies

**Abuse:** An excessive or improper use of services or actions that are inconsistent with acceptable business or industry practice. This refers to incidents that, although not fraudulent, may directly or indirectly cause financial loss. Government Accountability Office states abuse involves behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary business practice given the facts and circumstances. Abuse also includes misuse of authority or position for personal financial interests or those of an immediate or close family member or business associate. Abuse does not necessarily involve fraud, violation of laws, regulations or provisions of a contract or grant agreement.

Per my review, the issue of most concern and exposure is the City's utilization of eminent domain legal services furnished by Meyers Nave (MN). It is clear from the documentation that CalTrans is steadfast in its decision that such use is subject to and not in compliance with state and federal competitive bid process requirements. This issue appears to have the following risks:

**Fraud:**

- Misrepresentation of fact. Classification of MN as employees instead of consultants under 23CFR to gain a favorable outcome could be deemed to be fraudulent, particularly as the City's agreement with MN specifically states that there is no employee relationship. It also appears that a separate agreement was executed between the City and MN specifically for this project, such act could further support the classification of consultant rather than employee.
- Supplier favoritism. Awarding of a contract on a non-competitive basis without substantiated and documented justification could be construed as avoidance of the bid process. The argument that these

services were previously awarded may be impeded by the execution of a separate agreement specifically for [REDACTED] project. Additionally it appeared that a recent email was sent by MN encouraging city management to provide the requisite justification, however such should have been provided at or before the contract was awarded to be most effective.

**Waste:**

- Failure to efficiently procure services. Awarding of a contract for services without use of the bid process when there are many providers of the requisite services could be construed as mismanagement of funds. In absence of a duly executed bid process, the City cannot conclusively determine if the services obtained were the most economical use of its resources. This is further compounded when the result of not doing such requires the use of monies that would otherwise have been provided for through external sources.

**Abuse:**

- Conflict of Interest. Awarding of a contract on a non-competitive basis by the City Attorney to a firm wherein he holds an interest and could benefit personally from the revenue generated by such could be deemed a conflict of interest.
- Financial Loss. The legal interpretations/opinions provided by Meyers Nave relative to the concern appeared to contain cites and case law that favored CalTrans and at best could be deemed inconclusive in supporting reimbursement of MN costs to the City from federal or state funds. The use of funds to pay expenditures that would otherwise be paid by a source external to the City if prudent business practices were adhered to appears to result in a financial loss to the City. The fact that funds could be expended from non-general funds does not preclude such financial loss, it simply shifts it.

Based on the above, it would be the recommendation of the City Auditor's Office that the Council consider submitting these services to a competitive bid process. It appears that this is the only option that would ensure that all risks noted above are properly mitigated.



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