

R E P O R T (Draft)

of

Ken M. Kawaichi
Piedmont Hills Underground Utility Project
Audit Sub-Committee of the Piedmont City Council
January 28, 2011

Introduction

On February 24, 2010, I was appointed to the Piedmont Hills Undergrounding Utilities District Audit Sub-Committee, a sub-committee which I was informed was to perform an “audit” and report to the Piedmont City Council. I was later reminded that because of the restrictions on such committees by the Brown Act, the committee members could not discuss any conclusions or conduct any deliberations except in open public meetings. I was further informed that because the City of Piedmont is currently engaged in litigation regarding the project, it would not be appropriate to discuss various topics, such as legal theories and factual disputes, as that could jeopardize the attorney-client privilege between the City, the City Council and its attorneys or the work product doctrine.

Several residents and groups of residents of Piedmont have presented ideas, concerns and questions to the committee. Again, some of these questions were on topics which could not be discussed by committee members outside public hearings or were on topics covered by litigation or investigations and involved the attorney-client privilege or the work product doctrine.

Within these constraints, public meetings were held on March 31, 2010, May 13, 2010, July 8, 2010, July 21, 2010 and now scheduled for January 26, 2011. This report represents the views of only one subcommittee member. I understand that each member will generate a report and recommendations and these will be discussed at the next public meeting with the goal of producing one joint report.

Piedmont City Policy

Applicable statutes, including the City Charter, minutes of City Council meetings, and correspondence all will be found on the City of Piedmont website. There are many other materials, most of which have been presented in public hearings, which bear on the work of the subcommittee.

As a guiding principle, the City of Piedmont should have a set of policies and guidelines which are clear, understandable, up to date, and as easy to follow as possible. Forms for implementation should be developed to encourage uniformity and transparency of the process.

1. When the Council changes or modifies policy while projects are underway, those changes or modifications should state on their face whether they are intended to apply to the projects which are already underway or only to future projects.
2. Whether in electronic or hard-copy form, all policies relating to undergrounding of utilities should be available to any interested party. They should be kept together, updated regularly and indexed for easy access.
3. The City should adopt a policy which prohibits the same individual or entity from making a bid on a project, evaluating the bids submitted for that project, and recommending the acceptance of their own bid. The City Engineer should be independent and prohibited from making bids on projects.
4. As a policy, oversight and management of projects should be assigned to qualified personnel who will be accountable for keeping the Council informed on such matters as cost overruns, unanticipated performance problems and any matter which could involve substantial expenditures of City funds. City oversight should be continuous from initial proposal through completion and should, to the extent possible, follow guidelines promulgated by the City Council and Staff.
5. The City system of requests for proposals and bid solicitation should be examined regularly and adjusted to prevent abuses

and errors. The City policy should focus on the inception and pre-inception stages because once a project has begun, the potential economic consequences of delay or stoppage appear to rise steeply.

6. As a matter of policy, the Council should consider whether any sub-committee with the purpose of audit or reporting on projects can adequately perform the task if there is litigation pending or impending or if other formal investigative or administrative proceedings are pending. The report and recommendations presented by this subcommittee should be subject to revision after the litigation and investigation are complete.
7. The Council should consider a policy that requires a preliminary geophysical report on all future utilities undergrounding projects in the City of Piedmont.

Responses to Questions Presented

During the existence of the audit sub-committee, a number of questions were asked of the committee. These were reformatted, since several were compound and complex and are posted on the website.

Attached are four soils reports which were available on request from the City. This type of report is apparently required to be maintained and reported to the State as part of the seismic information system. The reports relate to the following properties and dates:

- 393 Hampton Road – January 31, 2007
- 430 Hampton Road – September 24, 2002
- 25 Glen Alpine Road – August 12, 2005
- 61 Glen Alpine Road – June 20, 2008

Separately filed with the City is a group of documents which represent the information given to the Steering Committee as the project progressed.

Because of restrictions on subcommittee actions because of attorney/client privilege and work product, these answers to questions

rely on materials and information which are public knowledge and as recommended below, do not constitute definitive answers to the questions asked.

1. Q: Does the City have a conflicts of interest policy regarding the City Engineer and the Outside Engineering Firm retained to perform design services?

A: No, not at any time relevant to this project. In one of the contracts, there is a provision that the Engineer nor any relative within the third degree hold any interest in any property which is the subject of the project.

2. Q: Does the City have a policy regarding the use of General fund monies for undergrounding districts which applies after formation?

A: No. The prohibition of use of general funds is for pre-formation expenses.

2a. Q How does the City define "direct" and "indirect" costs?

A: There are general accepted definitions which the City adopts. However, specific cases may raise questions which may be addressed on an ad hoc basis. Most of the "indirect costs" which were paid by the City involved, for example, time spent on the project by various individuals for legal and clerical matters.

2b. Q: Did the City pay direct or indirect costs associated with the Piedmont Hills district and not charge them to the district?

A: The amounts paid by the City were governed by the Preliminary Expense Agreement between the City and the Committee of Homeowners.

3. Q: What were the specific roles and responsibilities of City Staff?

A: In general, see the City Charter and the Personnel Manual definitions (on line).

3a: Q: City Clerk?

A. See on line

3b. Q. Public Works?

A. See on line.. There are two job descriptions, one for Public Works Director and one for Public Works Supervisor.

3c. Q. City Engineer?

A. There is no job description for this position. The position is established by the City Charter. The duties of the position are set forth in the contract.

- a. Q. Does a document summarize? A. Only the contract between the engineer and the City;
- b. Q. Did the roles and responsibilities change over time? A. In the specific case of the PHUUD project, the City Engineer was the same as the Engineer of Work at the outset. However, notice was subsequently given to the City by Harris indicating that the work could not be done as agreed. Therefore Robert Gray Associates took over as Engineer of Work prior to July 1, 2009. In addition, Coastline was retained to serve in a consulting capacity on July 1, 2009. Unfortunately, Robert Gray Associates was given and adopted the data from Harris & Associates in continuing the work.
- c. Q: Did the Council inquire about such roles and responsibilities? A: The Council was aware of the notice from Harris and the agreement with Robert Gray Associates. It is not clear whether the specific role of Robert Gray Associates was the subject of Council inquiries in any detail.
- d. Q: Who verified and audited the PHUDD overruns and when was it done? A: The Council and Staff relied on periodic reports from the City Engineer. The reports were filed with the construction committee and passed-along to the City. There was no outside audit. The reports were not independently verified until Acting Director of Public Works, Chester Nakahara, working with Coastline and RGA required regular, verified documentation.

4. Q: What were the factors used to determine the contingency for the project?

A: The first draft of the Engineers' Report used a higher figure for contingency hold-back (30%). However, the final report intended to use a lower figure (15%) because that was the figure used in the Wildwood-Crocker and Central Piedmont projects. It is not known how or why the figure was reduced below 15%.(14.25%). I found no document which records the change or any reason for it.

5. Q: What process was used to determine what should be included in the documents?
A: Without reference to specific documents, it is difficult to respond to this question. For the engineering documents, for example, Harris & Associates designated the appropriate document and provided them. For the bond documents, bond counsel followed various statutory and regulatory procedures and drafted or obtained the appropriate documents. .
6. Q: Who decided to put “zero” for the quantity of rock?
A: Harris & Associates initially and then RGA. Note that there are public seismic reports which are available.
7. Q: Who reviewed and approved the bid documents?
A. The City Engineer (Harris & Associates)
8. Q: What was the evaluation process for reviewing the bids?
A. The City Engineer reviewed the bids and made recommendations to the Council.
9. Q: Did anyone raise the issue that the hard rock bids were significantly unbalanced?
A: Nobody addressed the issue. Harris & Associates were responsible for reviewing the bids and making a recommendation as to which entity would be awarded the project.
- 10: Q: Was the City Engineer or any other department asked to review the bid results?
A. Only the City Engineer.
11. Q: Was there a policy or practice for the City Engineer or other staff member to notify the Council of potential bid irregularities?
A. Yes. The City Engineer had that responsibility.
12. Q: Should the Council consider adopting a policy that would require informing residents what percentage of favorable votes would be required to proceed with the project?
A. This is an issue for the Council. See Recommendations, below.
15. Q: If the bidders followed the State-approved bidding format, is it true that the Valley Utility bid, although the lowest in base bid, was not the overall best value or most advantageous?
A. There does not appear to be a “State-approved bidding format for this type of bid. However, depending on the circumstances, clearly the lowest base bid may not always be

the most advantageous.

16. Q: Did the Administrator, City Attorney and PHUUD steering committee violate the State Public bidding laws by using an unknown firm with an irregular low bid coupled with unbalanced unit numbers?

A. I could find no clear violation of any criminal statute in regard to the bid. However, there may be possible causes of action for failure to meet the applicable standard of practice in the profession.

17. Q: Why was the Valley bid chosen when it appears to be irregular, particularly in the Line 38 rock clause?

A. The selection was on the recommendation of the City Engineer (Harris & Associates). There are issues of fact regarding what was known and who knew it at the time.

18. Q: Was the PHUUD Steering Committee aware of substantial bedrock in their district?

A: The Committee chair denies that bedrock was ever mentioned by any resident during the course of discussions. On the other hand, from the soils reports set forth above, there had been work on at least four properties in the district which disclosed potential rock problems.

19. Q: Was the Valley bid an unbalanced bid?

A: In hindsight it appears unbalanced. The facts that were known or knowable, however, must be taken into account. The Valley bid was within the range of other bids at the time.

20. Q: Why was geotechnical work not required by staff, once substantial bedrock was found in the first week of work?

A: Past experience had been that the presence of bedrock was sporadic and irregular. In this case, there was normal progress after the first week. Then more rock.

21. Q: Why wasn't Tennyson Electric brought in to replace Valley early on, or another contractor, such as Ranger Pipeline who had extensive experience with blue granite?

A: The City was trying to perform under its contract with Valley at the time and avoid expensive disputes. The extent of the blue granite was unknown at the time.

22. Q: Why wasn't a competitive price in line with the other bids negotiated with Valley once substantial bedrock was found?

A: In spite of having a 10-day notice to terminate right, it

was thought to be not feasible in economic terms given the circumstances. See John Chiang's analysis.

23. Q: Why was the 30% contingency in the January 10, 2007 Harris Engineer Preliminary Draft report reduced to 14.25%?

A. The reduction was based on similar reductions for the Contingency in the Wildwood-Crocker and Central Piedmont projects. The reduction was intended to be to 15% only. There does not appear to be any apparent reason for the reduction below 15% to 14.25%.

24. Q: Why didn't the City staff inform the Council members immediately in July?

A. In July, there was still substantial uncertainty about the Geological situation. There does not appear to be a good Reason not to share the uncertainty with the Council. City staff indicate they were aware.

Recommendations

These recommendations focus primarily on prior to or early in the project, since the costs and risks appear to build up steeply once the project is underway. There may be overlap between this section and the section above, "Piedmont City Policy".

- In any project for which the budget is over an amount to be determined by the City Council, the City Council should, as a matter of policy, designate or retain a project manager to oversee progress of the project as well as ascertain and make regular reports on progress, cost and any matters which the council directs should be reported.
- The City Engineer should not be permitted to bid directly on city projects.
- For any future utilities undergrounding projects, part of the bidding process should include examination of existing reports, inclusion, where appropriate, of geological reports and reasonable provisions for unforeseen problems, such as bedrock, springs, and other matters. For example in the PHUUD case, the "Instructions to Bidders" on page one state

that, “(3) all other data and matters requisite to the fulfillment of the work and on its own knowledge of existing facilities on and in the vicinity of the site of the work to be constructed under the contract, (4) the conditions to be encountered...”. At various times before and during the project, at least four soils reports, referred to above, were available to the bidders. Items 138 and 144 of the Bid Proposal form specifically name two of the addresses, while item 133 appears to be adjacent to another.

- If a project manager is not appointed or assigned for a particular project, an independent monitor should be assigned to monitor a city project and report regularly to the council.
- A city website containing all relevant legal and policy documents for undergrounding of utilities should be established and updated at least annually or when any change in law or policy occurs which affects the project.
- Because it appears that once a utilities undergrounding project is undertaken, the adverse monetary consequences are so great that it is very difficult to stop or even pause a project once it is underway, policies should be implemented which will allow homeowners to vote knowledgeably as to whether to proceed with the project at all:
 - o The thresholds for the vote should be clear. State law mandates that if more than 50% of the voters vote against the project, the council must reject the project, however, there is uncertainty regarding the specific number of homeowners who must vote favorably in order to have the council support the project.
 - o It appears that the “bid, then vote” system allows for a more fully informed vote than the vote, then bid system. The council should consider whether it wishes, as a matter of policy, to inform the homeowners of the percentage of votes needed for support. If it is determined to be council policy that no specific percentage of supporting votes will be announced prior to the vote, that fact should be published to the committee and homeowners prior to the vote.
 - o The council should determine a policy regarding post-approval direct and indirect expenses and to what extent the city will pay those expenses or pass them through to the homeowners.

- The council should determine whether it will develop a policy to place any cap on city contributions to utilities undergrounding projects. For example, in the PHUUD case, the City could have stated before the vote that under no circumstances would the City be responsible for cost overruns exceeding a set percentage of the total budgeted cost of the project, including the contingency. That would have encouraged a complete examination of all aspects of the project before it began and not only would have limited the City contribution, but also would have encouraged all parties involved to exercise caution before the project began. The legal implications of any such cap would have to be considered.
- If any member of the Staff team assigned to assist or monitor any city project becomes ill or unable to perform that person's duties for any reason, another qualified staff member or a qualified person specifically engaged to fill the position vacated should be substituted immediately.
- A reasonable contingency should be set at the inception of every undergrounding project and reviewed periodically. That contingency should be maintained at the established level unless the Council, upon recommendation by Staff, finds that a different contingency is appropriate and necessary.
- For reasons set forth above, it is not possible to proceed with a public hearing for which witnesses can be subpoenaed and placed under oath. I recommend that the subcommittee hold such a hearing after resolution of the current legal actions and not issue a final report until that hearing is held.

Summary

The Piedmont Hills Utilities Undergrounding District project has placed in focus a number potential weaknesses in policies, procedures, management and oversight. Even this auditing process is flawed because it is much less effective due to constraints of pending investigations and litigation. In my view, this audit process has revealed no violations of criminal law. There is little credible evidence that any participant knowingly or intentionally violated a regulation or statute. A number of weaknesses came together with a

number of bad circumstances with the result that the residents of Piedmont have had to contribute approximately \$2,064,000.00 (again, it is too early to be specific) to the PHUUD project. The lack of apparent criminal conduct, however, does not mean that there was no negligent or performance below the applicable standard of care. .

The Sub-committee meeting scheduled January 26, 2011 will serve as the forum to present various proposals for recommendations primarily designed to avoid any reoccurrence of this situation in the future.

I thank the City Council for this interesting assignment.