

WCCUSD Subcommittee on Clay Investigation

Alvarado Adult Education Campus

September 10, 2015

Minutes

A. OPENING PROCEDURES

A.1 Call to Order

The meeting was called to order at 3:05 PM by Chairperson Liz Block.

A.2 Roll Call

Committee Members Present: Liz Block, Valerie Cuevas, Ivette Ricco

Staff Attendees: Lisa LeBlanc, Associate Superintendent for Operations; Phyllis Rosen, Clerical Staff; James K. Kawahara, Special Counsel; Jackie Kim, CPA, Internal Auditor.

Ms. LeBlanc introduced Ms. Kim as the district's internal auditor who was hired December 2014. Ms. Kim will be reporting directly to Ms. LeBlanc in this investigation and will be handling the day-to-day interactions with the auditor and Ms. LeBlanc, and she will be arranging for access to documents with the appropriate district staff.

Ms. Block clarified that while Ms. Kim reported to Ms. Gamba in her routine duties, for the purpose of this investigation she will report only to Ms. LeBlanc.

A.3 Approval of Agenda

MOTION: Ms. Ricco moved to approve the Agenda renumbering the first four items as Item B.1 through Item B.4, consecutively. Ms. Cuevas seconded. Ms. Block, Ms. Cuevas and Ms. Ricco voted yes, with no abstentions and no absences. Motion carried 3-0-0-0.

A.4 Approval of Minutes: August 10, 2015

Ms. Ricco corrected a typo in section A.4.

MOTION: Ms. Cuevas moved to approve the minutes of the August 10, 2015 meeting, as amended. Ms. Block seconded. Ms. Block, Ms. Cuevas and Ms. Ricco voted yes, with no abstentions and no absences. Motion carried 3-0-0-0.

B. DISCUSSION / APPROVAL ITEMS

Public Comment:

Linda Lozito commented on discussion that occurred at a prior meeting regarding a rumor whether SGI was trying to influence employees not to cooperate with the audit. Ms. Lozito located a 2013 SGI contract on the district site and referred to language on Page 29, which provided clarification regarding SGI employees' cooperation in such matters.

Ms. Lozito also expressed concerns regarding selecting Nigro and Nigro PC as the forensic auditor due to a possible conflict. She added that the district can use bond proceeds to pay for the audit, an issue that was raised at a prior meeting.

Mr. Gregg Visineau asked how information from the public is processed by the subcommittee members at the meetings. Ms. Block provided clarification. Ms. LeBlanc referred Mr. Visineau to Item B.2 on this agenda for further discussion.

B.1 Discuss / Approve subcommittee's selection of forensic accountants to be selected as "finalists" to be interviewed the week of September 14, 2015.

Committee Comment:

Ms. Block provided guidance regarding the process of selecting the forensic accounting firm.

Ms. LeBlanc distributed a list of the names of the firms that submitted proposals.

Mr. Kawahara recommended to the subcommittee that since there will be negotiation with these firms, it would probably not be in the best interest of the district if the firms knew what the other firms were bidding. He added that the information could be released to the public once they are selected. Under the public records act, since this is a contracting situation, the subcommittee is not obligated to disclose this information at this point.

Ms. LeBlanc suggested that for the purpose of this meeting, subcommittee members refer to costs as being higher cost or lower cost, and all subcommittee members concurred.

Ms. Block asked the subcommittee members to reveal their top choices of firms to be interviewed and asked Mr. Panas to note the names on the white board.

Ms. Ricco provided her top five selections listed from highest to lowest preference: 1. Eisner/Amper, 2. BCA Watson Rice, 3. Vicenti, Lloyd & Stutzman (VLS), 4. Baker Tilly, and 5. McHard Accounting Consulting.

Ms. Block indicated her top five in order of preference: 1. Weaver and Tidwell, 2. BCA, 3. Eisner, 4. McHard, and 5. Baker Tilly.

Ms. Cuevas indicated her top candidate as VLS, with the following four of no particular preference: BCA, Baker Tilly, and Weaver.

Ms. Block said her choice settled on whether the firm had the relevant experience.

Ms. Ricco said she looked at the firm's response to the RFP and if they had taken a hard look at the Clay allegations and how well they responded to what they thought needed to be done.

Ms. Cuevas said some were clearer about what their methodology would be and how they articulated that. She also looked at their experience with construction, data forensics and data recovery technology and also experience in California around Prop 39.

Ms. Block then identified two firms that were present in all three lists as BCA and Baker Tilly. The firms that were present in two lists were VLS, Eisner, Weaver and McHard.

Ms. Cuevas suggested they decide how many firms they will select and recommended that the two firms in all three lists fill two slots. The subcommittee concurred that two of the slots were filled by BCA and Baker Tilly, and they would select as many as five firms to be interviewed.

Ms. Block directed the subcommittee to review the remaining firms still up for discussion. She asked for information about VLS. Ms. Ricco responded they have a strong California presence. Ms. LeBlanc added they have done financial statements and performance audits

for school districts, fraud investigations, and forensic accounting for K-12 schools, charters, colleges and governmental agencies, and added they were a higher cost than some others. Ms. Cuevas added VLS had past investigative experience with investigative agencies. Ms. Block said she agrees with VLS's strong experience, and agrees this firm should be in the top five.

Ms. Ricco spoke about Eisner having staff in Sacramento, and that she thought they made the strongest presentation seeming to really understand the depth and scope of the allegations and they had a very good work plan.

Ms. Block noted Eisner has extensive experience performing forensic accounting and fraud investigation involving school districts on programs involving construction projects and that they specialize in forensic technology investigations and forensic data recovery. She liked the way they spoke about false claims and change orders.

Discussion followed regarding the practice of change orders being approved by the board after they have been put into effect and the risk of this standard practice.

The subcommittee agreed to include VLS and Eisner in the list of firms to be interviewed.

Ms. Ricco and Ms. Bloc discussed Weaver, indicating their only concern was that they lacked a California presence. The subcommittee members discussed the pros and cons of using an out-of-state firm.

Mr. Kawahara noted that the obligations for a performance audit is a function of California law, and was not the same as Texas or New Mexico, but that the actual process of issuing bonds is similar nationwide.

Discussion continued regarding McHard's use of a predicate or hypothesis in the RFP.

Discussion continued among the subcommittee members, Ms. LeBlanc and Mr. Kawahara whether to add either Weaver or McHard to the list as both were out of state, or to interview only the four firms identified. Ms. Ricco reiterated the additional costs that would be involved with travel and working long distance.

The subcommittee members agreed they had identified the strongest four firms, and to change the number of firms to be interviewed from five to four.

MOTION: Ms. Cuevas moved approval of four forensic accountants as finalists to be interviewed: BCA Watson Rice LLP, Baker Tilly, Vincenti, Lloyd & Stutzman LLP, and EisnerAmper LLP. Ms. Ricco seconded. Ms. Block, Ms. Cuevas and Ms. Ricco voted yes, with no abstentions and no absences. Motion carried 3-0-0-0.

B.2 Discuss / Approve recommendation to Board of Education regarding cooperation with forensic investigation

Mr. Kawahara provided follow up information to issues raised at a prior meeting. He determined that there is a right to audit clause in the current contract with the Seville Group (SGI), and so by contract they must comply with the audit request by the district. Also he was informed by Ms. LeBlanc that SGI is willing to provide a letter to the district that they will cooperate.

Ms. LeBlanc said she had a conversation with SGI personnel, and as a follow up to the conversation they had already sent out a directive to their staff requiring full cooperation on the investigation.

Ms. Block inquired if that would include responding to interview questions, and Ms. LeBlanc said yes.

Mr. Kawahara also said he received a copy of the separation agreement of Mr. Fay, and in his opinion the nondisparagement provision would not apply to an interview request from the district to discuss what he knows about district operations, adding that Mr. Fay would be speaking directly to the district at the district's request. He added that participating in an interview would be at his choice, as there are no means to compel his participation.

Regarding current district employees, Mr. Kawahara said Ms. LeBlanc indicated that at this point there is no indication that employees would not cooperate with the auditor, and so there is no need at this point for the Board to direct employees to cooperate. He added that there was concern such a directive would send a wrong signal that there were some employees who would not cooperate.

Ms. Cuevas said she appreciated Mr. Kawahara for his follow up and said she concurs, that there is no need to cross that bridge until it becomes necessary.

Anton Jungherr asked whether the information regarding the SGI contract also included subcontractors. Mr. Kawahara responded that if a subcontractor did not cooperate, that would put SGI at breach of the general contract.

Mr. Jungherr said this was very critical as the Primavera system was operated by a subcontractor of SGI.

Ms. Cuevas asked whether there is expectation that SGI will fully cooperate to include subcontractors. Ms. LeBlanc responded yes, there is that expectation.

B.3 Discuss Citizen Bond Oversight Committee's questions for review by the forensic auditor.

Ms. Ricco distributed copies of the CBOC's Questions RE: The Dennis Clay Allegations. She said that at the disclosure of the Clay allegations to the CBOC, a Data Review Subcommittee was established to review the allegations and focus on areas relevant to their work with bond finance. The group of six drafted this list of questions, after reviewing the allegations, to be included as part of the audit process.

Ms. Cuevas asked for clarification regarding the nature of the questions. Ms. Ricco said they were all specific to issues within their purview, that is bond program management and bond finance.

Ms. LeBlanc asked if the questions were pulled out of the allegations, and are specifically related to the allegations themselves, adding that the list could potentially be given to the auditors as a reference in review of the allegations as they do their risk assessment, rather than being outside of the investigation.

Ms. Ricco said they would like the auditors to take a look at these questions, and confirmed that all questions came from the allegations themselves.

Ms. Cuevas asked for clarification. Ms. Ricco said the intent was not for a specific report back to the CBOC, but for the questions to become part of the scope of the entire investigation process.

Mr. Kawahara added that the risk assessment in Phase I is to look at risk or the possibility of conditions that would create fraud or waste or abuse, and it would be possible to ask the auditor to look at the questions in terms of risk assessment, but not to investigate each one of these questions.

Ms. Block said that the CBOC is very important in monitoring the bond program and so these items are of interest.

Mr. Kawahara said that in terms of change orders as discussed earlier, those questions would be a huge issue in terms of risk to district.

Ms. Block said she agrees the questions would be important, but she would want them to be part of the scope, and not cause the auditors to go into a completely different direction.

Ms. Cuevas said this is a contribution that helps the auditors do their work and she is very comfortable with the list. She asked whether the risk assessment will answer each specific question.

Ms Ricco said that these questions are being asked because of the allegations, and they are not made up on their own.

Ms. Block raised a question about whether there actually was a valid SGI contract indicating a handwritten change was made regarding termination from “terminate for convenience” to “only at breach.”

Mr. Jungherr said it is clear the clause was amended on the floor and approved by the board unanimously and is clearly stated in minutes.

Ms. Cuevas asked to clarify what was the expectation of the CBOC regarding outcome.

Ms. Ricco said they are not asking for a particular outcome, just that the questions be included as part of the investigation.

MOTION: Ms. Cuevas moved to include the CBOC Questions RE: The Dennis Clay Allegations as an artifact that gets turned over to the selected audit firm. Ms. Block seconded. Ms. Block, Ms. Cuevas and Ms. Ricco voted yes, with no abstentions and no absences. Motion carried 3-0-0-0.

B.4 Discuss application of attorney-client privilege and attorney work product

Mr. Kawahara said that the attorney-client privilege exists when the attorney is hired to assist the subcommittee and any advice is ordinarily privilege, but since this is public forum there is no privilege so going forward we need to understand what that means. If asked to give advice on a particular issue, a response by memorandum would be privileged, but if he responded during an open meeting the privilege would have been waived.

Regarding the attorney work product privilege, after the auditing firm is hired, he recommends they be retained through his firm and therefore whatever evidence and information is being collected is attorney work product.

Committee Comment:

Ms. Block asked for clarification, and Mr. Kawahara responded that this application would be part of the actual contract.

Ms. Block asked about communication to keep the subcommittee updated. Mr. Kawahara said that written updates would be privileged.

Ms. Cuevas said that evoking the privilege makes sense when it is for the benefit of the district but there is a Catch 22 regarding disclosing information for the benefit of the public.

Mr. Kawahara clarified that without the privilege it would put the district at a disadvantage if you were to find a legal claim against a firm, and you would have to disclose that before completing deliberation.

Ms. Block said the purpose of the subcommittee is to get this matter investigated and get information uncovered. She feels that having information privileged to Mr. Kawahara's firm will get them closer to that goal, as the information will be coming out but it just will not be coming out piecemeal.

Ms. Cuevas asked if we could still expect that once the investigation was completed, every piece of information would be made public. Ms. Ricco said the final report which detailed findings would be made public.

Ms. Cuevas said she struggles with being transparent and being good stewards of the district, which can be at odds.

Ms. Ricco said we have to work within the framework of legality.

Public Comment:

Tom Panas said we need to tread carefully here and suggested perhaps at the next meeting we could have a full report on the subject. He said it makes people nervous talking about holding back, and he asked the subcommittee to be as transparent as they can.

Anton Jungherr said that the board in setting up this subcommittee promised transparency and commented that they are investigating key people in the district. He asked whether closed session could be a way to deal with some of these concerns.

Peggy Wilcox asked if in the RFP is there anything on how they will report findings to the public. Ms. Block commented that it was never her intention there would only be a phase one.

Ms. Cuevas said her challenge is to get to that ultimate truth and asked if this was a question of transparency or timing. She thought it was a given that everything be transparent. She spoke about the difficult questions that they are faced with. She said we should do more deliberation as to what this means in the context of this committee and the work we are trying to do.

Ms. Cuevas asked Mr. Kawahara how similar investigations and audits were handled. He responded that most were treated as deliberative process in which you are a subcommittee of the board and deliberating with whether to proceed with legal action. He said the Brown Act has very limited exceptions to closed meetings, and he could not advise to have a close session on pending litigation because it is not clear if there is a claim yet.

Ms. Ricco said that in terms of risk assessment as things are discovered and how those things are going to be revealed to the public, we need to think about it and figure out what is the best course of action for this subcommittee.

Ms. Block said she would like to take some time and review the methods of reporting that the different firms proposed, and having this conversation again at the next meeting.

Ms. Cuevas said she would like this issue to be part of the interview, asking the firms how they have dealt with this issue in their prior experience and asking their advice.

Ms. Block suggested to include asking what has been their method of communication with the subcommittee along the way.

Mr. Kawahara said he will prepare a memo for the subcommittee members of the pros and cons and also speak with the other district officials as to how they interact with attorney-client privilege and attorney work product privilege.

B.5 Discussion / Approval of next steps

Ms. LeBlanc commented on the interview method as outlined in the RFP, indicating there would be one hour designated for each firm selected to take place during the week of September 14 through 18, and that committee members previously indicated availability on September 16 and 17.

The committee members discussed whether to hold the interviews on one day or two. There was consensus to hold the interviews on one day, September 16.

The committee members agreed that at least one of the firm's representatives should be one of the principals who will be working on the audit.

Ms. Block commented that the firms will first make a 30-minute presentation followed by questions and answers. Discussion followed regarding the submission of questions from members of the public. All committee members agreed that the public should submit questions to any of the subcommittee members and/or Ms. LeBlanc. The subcommittee would bring their own questions to the interview along with any questions they selected from the public submissions. Ms. Cuevas added that the questions could be specific to any firm, and all agreed.

Mr. Kawahara recommended keeping the interviewees separate, and having only the firm being interviewed present in the room, adding that this will be an open meeting and they can only make the request to the other firms to remain outside. Ms. LeBlanc said she would locate a room where the other firms could stay.

Mr. Jungherr asked when the proposals of the four selected firms would be available. Ms. LeBlanc said they would be placed online Friday, September 11th.

Ms. LeBlanc commented on the proposed timeline to bring a recommendation to the Board of Education at the September 30th meeting, which will be a joint meeting with the CBOC. There was discussion among subcommittee members as to the best timing to bring the item for approval and whether to hold a special meeting before or after the joint meeting. It was agreed that a special meeting before the regular joint meeting would be best, and Ms. LeBlanc said she will relay that information to the Board of Education members and Dr. Harter. Ms. Ricco said she will not be present at the September 30 board meeting.

The agenda for the September 16th meeting was discussed. There are two items for consideration, the Board's approval of the audit firm selection and the recommendation to the board regarding the reporting relationship of the audit firm. Mr. Kawahara clarified that the Board would take action on September 30th regarding the selection of the auditing firm, and then after that he recommended that there will be a separate decision regarding the reporting relationship going forward. He added that details regarding the reporting relationship would be in the contract. Ms. Block commented that she would be okay if that meant a two week delay in finalizing the contract with the audit firm.

Mr. Panas asked whether they have considered time on the schedule for deliberation on who to pick, and discussion followed.

Mr. Visineau inquired about the interview process and allowing for the possibility to go back and ask questions to the firms after their interviews are completed, and discussion followed.

It was agreed that the September 16th meeting will begin at 8:30 am, with interviews beginning at 8:45 am to allow one hour for each interview, with a 15 minute break and 30 minute lunch break between interviews, followed by deliberation at 2:00 pm.

C. FUTURE MEETINGS

C.1 Next Meeting Date

The next meeting of the Subcommittee on Clay Investigation is Wednesday, September 16, 2015 at 8:30 AM.

D. ADJOURNMENT

Chairperson Block adjourned the meeting at 5:10 PM.