

PRIVILEGED AND CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

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**REPORT OF THE INVESTIGATION OF THE PROCUREMENT OF AN  
ENERGY MANAGEMENT PROGRAM AND RECOMMENDATIONS**

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March 10, 2021

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## I. Introduction and Background.

On January 26, 2021, Pima County Community College District (“College”) General Counsel Jeffrey Silvyn asked me, as outside counsel, to conduct an investigation of a Comprehensive, Integrated Energy Management Program (“EMP”) procurement (“EMP Procurement”).<sup>1</sup> The EMP Procurement ultimately resulted in the award of a contract (“EMP Contract”)<sup>2</sup> to Trane U.S. Inc. (“Trane”) by the College Governing Board (Board”) on June 3, 2020.

My assignment arose from a letter written by Board members Maria Garcia and Luis L. Gonzales to Arizona Auditor General Lindsay Perry, dated January 14, 2021 (the “Letter”).<sup>3</sup> Tab 1. In the Letter, Ms. Garcia and Mr. Gonzales requested that the Arizona Auditor General conduct an audit of the EMP Procurement. The Letter specifically referred to emails containing communications between Trane Director of Integrated Solutions Jim Knutson and employees of the District.

Subsequently, the Arizona Auditor General declined to conduct the requested audit. In an email to Ms. Garcia and Mr. Gonzales from Gretchen Augustine, Arizona Auditor General Division of Financial Investigations Lead Manager, dated February 11, 2021, Ms. Augustine stated the following:

We have reviewed the documents you provided and have concluded on the following. Specifically, the college district does not follow the State Procurement Statutes, but instead has its own procurement rules and therefore this Office has no authority to conduct an internal review of potential rule violations. **Further, the emails you provided do not establish any obvious violations of the State Conflict of Interest Statutes.** It appears that the concerns brought forth are internal and the college district should

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<sup>1</sup> My qualifications in the area of Arizona public procurement law can be found at [https://gustlaw.com/attorneys3.tpl?GustLaw=Susan\\_Plimpton\\_Segal](https://gustlaw.com/attorneys3.tpl?GustLaw=Susan_Plimpton_Segal). In addition to that information, I am providing my specific background relevant to this investigation. In 1983, I was one of four persons who drafted the Arizona Procurement Code that applies to state agencies. Since then, I advised on changes to that code and the School Procurement Code. I have presented to numerous groups representing public agencies on the topic of public procurement. I have authored Attorney General legal opinions on the topic while employed by the Arizona Attorney General and I am author of a chapter on construction procurement in a book entitled *From the Ground Up*. I have been consulted as an expert witness on the topic of public procurement and I have investigated procurement practices of a variety of public entities. While I served as the Chief Counsel of Public Advocacy in the administration of Attorney General Terry Goddard, among other things, I supervised the attorneys in the School Fraud Unit.

<sup>2</sup> The full title of the EMP Contract is Comprehensive, Integrated Energy Management Program Agreement.

<sup>3</sup> Although Ms. Garcia and Mr. Gonzales identify themselves in the Letter as members of the College Board of Governors, by statute, they are Governing Board members and by law and policy, the Board is called the Governing Board. Arizona Revised Statute (“A.R.S.”) §15-1441., Board Policy 1.06, <https://www.pima.edu/about-pima/leadership-policies/policies/board-policies/docs-bp-01/BP-1-06.pdf>. I only point this out for the benefit of third parties who may not understand that they are one and the same.

conduct an internal review to determine if the district's policies were violated. As a result, we will not be conducting a further review of these issues at this time.

[Emphasis added.] Tab 2.

Although the College is not subject to State procurement statutes or the State Procurement Code,<sup>4</sup> its employees are subject to the Arizona conflict of interest ("Conflict of Interest") laws, which the Auditor General routinely addresses with respect to the conduct of officials of a variety of public entities. It is particularly noteworthy that the Auditor General concluded that "the emails . . . provided do not establish any obvious violations of the State Conflict of Interest Statutes." *Id.* See discussion below in Section XIII.

Prior to writing the Letter, Ms. Garcia and Mr. Gonzales raised concerns that Chancellor Lee Lambert's position as a nonsalaried officer of the Board of Directors of the nonprofit National Coalition of Certification Centers ("NC3") created a conflict of interest under Arizona's Conflict of Interest laws or College policies with respect to the award of the EMP Contract to Trane. Tab 3. I concluded, in a letter dated September 30, 2020, that there was no conflict of interest and no violation of College policy or the Arizona Conflict of Interest laws.

My legal analysis in my September 30, 2020, opinion was related solely to the question of whether Chancellor Lambert's service on the NC3 Board created a conflict of interest in connection with the EMP award and EMP Contract with Trane. Based on application of the law to the facts, I determined that the Chancellor did not violate any Arizona law or College policy by virtue of service on the nonprofit NC3 Board and his limited involvement with and participation in the EMP award and EMP Contract with Trane. Service as a nonsalaried officer on a nonprofit board is deemed only a remote interest under Arizona Conflict of Interest law, which do not constitute a prohibited conflict. A.R.S. §38-502(10)(a), see also Arizona Attorney General Agency Handbook (Revised 2018) ("Handbook") §8.3. If the public official or employee has only a remote interest, there is no need for further analysis. Further, Chancellor Lambert had no financial interest in the award of the EMP Contract. *Id.* My analysis and written findings were presented to the Board at a meeting held on October 6, 2020 and are set out in my letter attached to this report at Tab 3.

## **II. Purpose of Investigation and Scope of Review.**

The purpose of this investigation was to investigate the facts relating to the EMP Procurement and analyze that procurement in terms of requirements of law and policy. This task is to be distinguished from making a business judgment about the EMP

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<sup>4</sup> State procurement rules are codified at Arizona Administrative Code (A.A.C.)R7-2-701 *et. seq.*,

transaction. In essence, my investigation constitutes the review suggested by the Arizona Auditor General. Tab 2.

With respect to my legal analysis for this report, I examined the EMP Procurement in light of Arizona Conflict of Interest laws and procurement laws and College policies. My findings and legal conclusions are set forth below.

### **III. Persons Interviewed.**

In connection with this investigation, I interviewed the following persons:

Dr. David Bea, Executive Vice Chancellor for Finance and Administration

David Davis, Energy Resource Manager

Jim Knutson, Trane Director of Integrated Solutions

Lee Lambert, Chancellor

Jan Posz, formerly a Senior Procurement Analyst

Terry Robinson, Director of Procurement & Payment Services, Chief Procurement Officer

Jeffrey Silvyn, General Counsel

William Ward, Vice Chancellor for Facilities.

Greg Wilson, Dean of Applied Technology

With the exception of Mr. Knutson, all of the above witnesses are current or former employees of the College.

### **IV. Documents Reviewed.**

In addition to the relevant College and Board policies and Arizona statutes, I examined and reviewed the following:

- Agenda of Governing Board Meeting of June 3, 2020. Tab 6.
- Arizona statutes referred to in this report.
- College policies and procedures referred to in this report.
- Conflict of Interest policies and Conflict of Interest Statements signed by all members of the Purchasing and Evaluation Committee for the Comprehensive, Integrated Energy Management Program. Tab 4.
- Decision regarding Ameresco Protest. Tab 8.
- Email from David Bea to members of the Committee dated September 10, 2019. Tab 9.
- Email from Gretchen Augustine dated February 11, 2021. Tab 2.
- Email from Jan Posz to Committee members dated September 20, 2019. Tab 13.

- Email from Jim Knutson to Chancellor Lambert dated May 6, 2019. Tab 10.
- Emails between David Davis and Jan Posz.
- Emails to and from Jim Knutson referenced herein.
- Emails to and from William Ward referred to herein.
- Emails referenced in the Letter (total of 518).
- EMP Contract.  
(<https://go.boarddocs.com/az/pima/Board.nsf/goto?open&id=BJPMBT595F4C>)
- Evaluation scoring sheets. Tab 5.
- Letter from Jan Posz to Dean Oakley, dated May 12, 2020.
- Minutes of Governing Board Meeting of June 3, 2020. Tab 6.
- Request for Proposal P20/10015 (the “RFP”) requesting proposals from qualified firms for consulting services to develop and implement a comprehensive, integrated energy management program.  
(<https://web19.pima.edu/administration/contracts-purchasing/docs/comprehensive-integrated-energy-managment-program.pdf>)
- Procurement protest from Ameresco. Tab 7.
- Second Round Questions. Tab 12.
- The Letter, including all attachments. Tab 1.
- Video of Board meeting of June 3, 2020.  
(<https://www.youtube.com/watch?v=ihooXUOgwhM>)

## V. Summary of Conclusions.

1. Arizona community college districts, such as the College, are exempt from the Arizona Procurement Code because they are not state governmental units. A.R.S. §41-2501; 1986 Ariz. Op. Att’y Gen. 9.
2. Contact with potential vendors before the Bid/RFP process commences is not prohibited.
3. Mr. Knutson’s pre-RFP emails are very aggressive and overreaching at times in terms of making suggestions about how the EMP Procurement should be conducted. They also are voluminous. However, these emails had no impact on how the procurement was conducted.
4. The email from Mr. Knutson to Ms. Posz about the logistics of the second round interview on February 11, 2019, and the email forwarding copies of the slides Trane used at the second round interview to Ms. Posz are not unusual or inappropriate.

5. Trane and its representatives were not involved in the initial preparation of the RFP. Had Trane been involved, most likely these specifications would have been more tailored to give Trane an advantage. The specifications do not do this.
6. No competitor claimed that the specifications were proprietary, too narrow, anticompetitive, or tailored to a particular vendor.
7. The specifications and the Scope of Work were not influenced by Trane.
8. The specifications and the Scope of Work were not proprietary, too narrow, anticompetitive, or tailored to a particular vendor.
9. I find nothing inappropriate in the membership of the Committee. The members selected for the Committee were logical resources and uniquely situated to assess proposals for the EMP project. Dr. Bea picked a variety of knowledgeable administrators and staff from diverse but relevant areas of the College, including representatives from the Facilities Department.
10. The emails sent by Mr. Knutson had no influence on the selection of Committee members. Mr. Knutson's suggestion as to the composition of the Committee set in his email of May 20, 2019, was not adopted.
11. The evaluation process was fair and appropriate. It adhered to College policy and fundamental principles of competitive procurement.
12. The situation with Mr. Davis could have been handled differently. Mr. Davis should have been instructed he was required to rank the vendors in good faith. If Mr. Davis continued to refuse to participate in good faith, a determination should have been made as to whether he needed to be replaced on the Committee. However, this incident did not invalidate the EMP procurement by any means.
13. The EMP Contract negotiations on behalf of the College with Trane were at arm's length and the drafts exchanged by the parties required multiple revisions and extensive interaction. The end result was a contract that protected the College's interests. The terms of the EMP Contract are fair to the College.
14. In an email to Ms. Garcia and Mr. Gonzales from Gretchen Augustine, Arizona Auditor General Division of Financial Investigations Lead Manager, dated February 11, 2021, Ms. Augustine stated that the emails provided to her by them "do not establish any obvious violations of the State Conflict of Interest" statutes. I concur with this conclusion.

15. I do not find that Chancellor Lambert did anything inappropriate, much less violated Arizona Conflict of Interest laws, with respect to his residential Trane unit. There was no offer of anything of value and Chancellor Lambert did not take anything of value. He did not follow up on Mr. Knutson's offer to have someone look at Chancellor Lambert's residential unit. Nor did Mr. Knutson offer to do anything for free. Chancellor Lambert did not take Mr. Knutson up on the offer to take a look at his residential unit, much less accept it.
16. Months later Chancellor Lambert asked Mr. Ward for a recommendation for a new residential unit after his residential air conditioner failed. As recommended by Mr. Ward, Chancellor Lambert purchased a Lennox or Rheem unit through a local dealer. Chancellor Lambert did not contact Mr. Knutson. This is further evidence that the previous conversation with Mr. Knutson had no effect on Chancellor Lambert.
17. There was no violation of Arizona law or College policy arising from Mr. Knutson's email dated May 6, 2019.
18. There is no evidence of anything of value in excess of \$25.00 given by Trane to any College employee, with the exception of the purchase of a foursome of golf in 2019 at a golf tournament sponsored by the College Foundation, which is not a violation of law or policy.

## **VI. Applicable Procurement Rules and Laws.**

### **A. Procurement Rules.**

Arizona community college districts, such as the College, are exempt from the Arizona Procurement Code because they are not state governmental units. A.R.S. §41-2501. 1986 Ariz. Op. Att'y Gen. 9 (1986). However, "even in the absence of a statutory bidding requirement, the board has a fiduciary obligation to obtain maximum return for each dollar spent which may, under some circumstances, require competitive bidding." 1986 Ariz. Op. Att'y Gen. 9.

Political subdivisions, such as the College, typically adopt their own procurement rules. In the case of the College, its administrative purchasing procedure is found at AP 4.01.05. <https://go.boarddocs.com/az/pima/Board.nsf/goto?open&id=BJPMBT595F4C>. In addition, the College has adopted procurement procedures that are contained in its *Purchasing Procedures Manual* ("Manual").

While they are similar in many ways to rules contained in the State procurement code, the rules and policies in the College Code and manual are separate and distinct from those in the State procurement code. This is true with respect to procurement rules adopted by all Arizona community colleges.



Some of the relevant sections of AP 4.01.05 are the following:

“Full and Open Competition” - when used with respect to a contract action, means all responsible vendors are permitted to compete for the College purchase.. Section 1 Definitions.

All College procurement transactions shall be conducted in a manner providing full and open competition consistent with the standards and subject to prohibited practices identified in the Uniform Guidance. Section 4, 4.2 Full and Open Competition.

The Specifications may not contain features or characteristics that are unduly restrictive to competition and may not require “brand name” product instead of allowing for “an equal or equivalent” product. Any vendor who has developed or assisted in development of the Solicitation Materials or any of its components shall be excluded from competing for such procurements. Section 5, 5.2 Solicitation Materials; Specifications.

College contracts may be awarded only to responsive, responsible vendor possessing the ability to perform successfully under the terms and conditions of a proposed procurement, considering all factors required by the Uniform Guidance. Section 6, 6.1 Vendor Selection Criteria.

The College shall, in all procurements of architect and engineering services and for purchases where it would assist the College in selecting qualified vendors, use a committee consisting of members of the public, students, and/or current College employees, qualified through experience or education. Section 6, 6.2 Selection Committees.

The *Purchasing Procedures Manual* (the “Manual”) is consistent with AP 4.01.05. For purposes of this report, this provision is particularly relevant:

#### 5.6 Contact with Vendors

Vendors play an important role in keeping College personnel informed of products and services available. Personnel are encouraged to take advantage of these contacts. However, specific rules must be followed when dealing with vendors to avoid financial liability, conflicts of interest and other misunderstandings. Avoid the following:

...

2. Do not contact a vendor after a Bid/RFP process has started;

...

7. Questions or clarifications should be addressed to the Procurement Services Department.

This section of the Manual makes it clear that contact with potential vendors before the Bid/RFP process commences is not prohibited. However, once the Bid/RFP process commences, communications with vendors should cease.

Ms. Posz and Mr. Robinson confirmed this is the rule. Further, in the case of the EMP Procurement, communications with Trane were limited after the RFP was issued. *See* Section VII.

### **B. Energy Savings Agreements.**

The content and terms of energy management agreements (also known as energy savings contracts) are governed by A.R.S. §34-105. The College retained qualified outside legal counsel to assist with negotiation and drafting of the EMP contract terms.

### **C. Conflict of Interest Laws and Policies.**

The applicable Conflict of Interest laws are set out in my letter of September 30, 2020, which is attached to this report at Tab 3. For purposes of this report, the focus is upon a) when an employee is required to disclose a conflict of interest and b) whether there were any improper gratuities or gifts that may have violated A.R.S. §§38-504 or 505.

The College Employee Handbook entitled “Ethical Standards and Conflict of Interest,” adopted September 11, 2020. That section also reiterates A.R.S. §38-501 through 511, which are the relevant statutory conflict of interest provisions for public employees.

## **VII. Timeline of the EMP Procurement and the EMP Contract.**

On November 13, 2019, the College issued Request for Proposal P20/10015 (the “RFP”) requesting proposals from qualified firms for consulting services to develop and implement a comprehensive, integrated energy management program.<sup>5</sup> The proposals were submitted on December 18, 2019. Five proposals were submitted, including one from Trane.<sup>6</sup>

The RFP Review and Evaluation Committee (the “Committee”) consisted of the following individuals: Greg Wilson, Committee Team Leader and College Dean of Applied Technology; James Russell, a College faculty member who had previously worked in the private sector for over 20 years in HVAC; Agnes Maina, College Director of Financial Services who previously worked for the Arizona Auditor General; Jessica Normoyle, a College Advanced Program Manager; David Clark, College Superintendent of Operations and Raj Murthy, College Chief Information Officer.<sup>7</sup> College Senior Procurement Analyst,

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<sup>5</sup> The RFP can be found at <https://web19.pima.edu/administration/contracts-purchasing/docs/comprehensive-integrated-energy-managment-program.pdf>.

<sup>6</sup> The other proposers/offerors were Ameresco, Bath, Bernhard, and Wendel.

<sup>7</sup> The process for the selection of Committee members is described in Section X.

Jan Posz, convened and facilitated the Committee. Each Committee member completed and signed a conflict of interest and confidentiality statement (the “Statement”). Tab 4. Dr. Bea, a non-voting member of the Committee, also signed the Statement.

In the Statement, each member of the Committee said:

. . . I acknowledge that I have been informed . . . that service [on the Committee] requires that I:

Understand that it is a conflict of interest and a violation of State statutes for a member of this committee or a relative of a member to have a substantial interest in supplying any equipment, material, supplies or services involved through this solicitation, and that it is my responsibility to avoid situations in which a conflict of interest may arise;

Understand that it is my legal and ethical responsibility to maintain the confidentiality of the process and agree that I will have no communication related in any way to the particular procurement, except during formal Committee meetings, with any Offeror or potential subcontractor to that Offeror prior to award, and that I will promptly disclose any attempted contacts to the Purchasing Department;

Agree it is not appropriate to reveal the content of any evaluation discussions to persons within or outside the College not directly involved in the process;

Agree to protect the materials submitted as confidential information; and

Agree to discuss confidential information only as part of the evaluation process, and to refrain from discussing, either during or after the evaluation process, any information outside of the Committee or within the hearing of other people not involved in the evaluation process.

*Id.*

After initial scoring, the Committee met and ranked Ameresco, Trane and Wendel as the top offerors. The Committee conducted interviews with representatives of each on February 11, 2019. The same Second Round Questions were asked of each vendor offeror. Tab 12.

The Committee’s review of the RFP responses and the scoring process were finalized on February 18, 2020, and the highest scored/ranked Offeror was Trane.<sup>8</sup> Tab 5. Trane was notified of this decision on May 12, 2020, by Ms. Posz in a letter, which included a formal contract.

Upon the College’s completion of extensive arm’s length contract negotiations with Trane, the EMP Contract was awarded to Trane by the Governing Board at its meeting of June 3, 2020.<sup>9</sup> Tab. 6.

Chancellor Lambert was not involved in the procurement evaluation process or the negotiation of the Contract terms. He signed the EMP Contract on June 29, 2020.

On July 17, 2020, Ameresco, which scored the second highest number of points, filed a protest of the award. Tab 7. The protest was deemed timely but, it was denied on the merits by Mr. Robinson on July 23, 2020. Tab 8. The protest informed Ameresco of its right to appeal, but Ameresco did not do so. *Id.*

### **VIII. Pre-Award Communications from Mr. Knutson.**

Because the concerns raised in the Letter are primarily related to Trane’s influence on the EMP Procurement process before the EMP Contract was awarded to Trane, my investigation focused on communications a) before the RFP was issued and b) between the date the RFP was issued and the date Trane was notified of the Committee’s decision on the successful offerer.

#### **A. Pre-RFP Communications.**

Jim Knutson sent a number of emails, primarily to Dean Wilson, before the RFP was issued on November 13, 2019. The Letter lists some of the emails that Ms. Garcia and Mr. Gonzales say are “troubling. Tab 1. I have reviewed all of the emails (over five hundred) that Mr. Luis A. Gonzales previously requested from the College.<sup>10</sup> *See* Letter.

Mr. Knutson’s pre-RFP emails are very aggressive and overreaching at times in terms of making suggestions about how the EMP Procurement should be conducted. They also are voluminous. However, as noted below, these emails had no impact on how the EMP Procurement was conducted.

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<sup>8</sup> The Evaluation process is addressed in Section XI.

<sup>9</sup> The actual motion was that the “Governing Board authorize the Chancellor or designee to execute an agreement with Trane, Inc. to develop a comprehensive energy management program that includes evaluation of Heating, Ventilation, and Air Conditioning and controls systems, recommendations for efficiency improvements, and integration of equipment and training into state-of-the-art living lab academic programming.” Tab 6.

<sup>10</sup> Mr. Luis A. Gonzales is a former Board member and not the current Board member Luis L. Gonzales. However, because the attachments to the Letter are some of those obtained by Luis A. Gonzales, it is logical to assume that these documents were part of those provided to Luis A. Gonzales in response to his public records request. Ms. Garcia and Mr. Luis L. Gonzales refer to a number of these emails in the Letter.

Dean Wilson told me that he ignored these emails. In his words, the “College is going to do what’s in its best interests” and he took the emails “with a grain of salt.” He added that the Knutson emails “did not have an influence in making the best decision for the College.” Regardless of what was said, Mr. Wilson added, “we are going to go forward with what is in the best interest of the College” as “we [the College] determine it to be”—not based on comments from or discussions with outside vendors.

Some of Mr. Knutson’s emails are harshly accusatory toward Mr. Ward. There were two emails in particular that had negative comments about Mr. Ward and what Mr. Knutson perceived was Mr. Ward’s bias against the EMP project: May 20, 2019 and June 4, 2019. I questioned Dean Wilson about the emails and, in particular, the June 4, 2020, email from Mr. Knutson to him. He recalled the email and said, “As you can see, I clearly did not respond.”

Mr. Ward said in his interview that he was offended by Mr. Knutson’s accusations against him in some of the emails. He referred to the June 4, 2020, email, which he had partially read when I interviewed him. Tab 1. Mr. Ward said, “I am offended this happened” and “I’m upset this [the email] is a public record.”

Mr. Ward distinguished Mr. Knutson’s conduct from Trane’s ability to perform. He said he likes Trane generally, is a “massive supporter of Trane companies,” and has worked successfully with Trane companies on other projects. However, Mr. Ward deems the “antics” of Mr. Knutson and Mr. Knutson’s emails to be “very concerning.” He also expressed that he could not imagine that Trane would condone Mr. Knutson’s conduct. He later added, referring to the concerns that have arisen, “This is all on Knutson.”

Mr. Knutson, who was interviewed with a Trane attorney present, stated that he felt some antagonism from Mr. Ward and that Mr. Ward was shutting his team of engineers out while they were doing feasibility studies. Mr. Ward explained that this was not true and presented logical reasons why his team was not available. One reason is that the College was closed for a period due to the Covid-19 pandemic. The other reason, he said, is that the Trane engineers “just showed up.”

#### **B. Pre-Award Notification Communications.**

There were no emails between the date the RFP was issued and the date Trane was notified of the Committee’s decision on the successful offerer that raise issues as to the EMP Procurement. There is one email from Mr. Knutson to Ms. Posz that was sent before the second round interview on February 11, 2019, concerning the logistics of the meeting, and an email sent after the second round interview on February 11, 2019, sending copies of the slides Trane used at the second round interview to Ms. Posz. This type of communication is not unusual or inappropriate.

#### **IX. Drafting of the RFP and Specifications for the EMP Procurement.**

Jan Posz explained the process for drafting the RFP and specifications. The College has template language for all requests for proposals, which typically includes all

but technical specifications that are uniquely aligned with the deliverable. The technical specifications are contained in the “Scope of Work” section of the RFP.

Dr. Bea drafted the scope of work and specifications. To do this, he conducted research on the internet on “living labs.” Among the many sources he consulted was the SEED (Sustainability Education and Economic Development) Center.<sup>11</sup> The College is a member of SEED, which consists of 480 community colleges throughout the nation. <https://theseedcenter.org/about/who-we-are/>. Chancellor Lambert and David Dore, College President of Campuses and Executive Vice Chancellor, serve on the advisory committee of the SEED Center, along with twenty-three other community college leaders from around the nation.<sup>12</sup>

Ms. Posz and Dr. Bea both emphatically stated that Trane and its representatives played no role in developing the RFP or the specifications. Mr. Knutson also said that Trane and its representatives had no role in the drafting of the specifications.

In fact, my examination of the Scope of Work shows that the specifications are very general, competitive, and non-proprietary or tailored to a particular brand or vendor, which allows for competition. Here is the language:

Pima Community College is seeking a qualified firm to develop and implement a comprehensive energy management program, to include system controls and equipment and training services for integration into the Center of Excellence of Applied Technology, including (but not limited to) the following expectations:

- Assessing current systems and equipment to develop lifecycle replacement plans for systems, controls, and equipment in a large multi-location organization
- Establishing and tracking sustainability and energy and cost reduction goals
- Identifying and/or providing funding sources and financing options suited to the College’s needs
- Implementing smart technology and data analytic platforms to monitor efficiency and optimize system performance

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<sup>11</sup> The SEED Center was originally a program of the American Association of Community Colleges, a nonprofit organization. The Center is now run by the nonprofit National Council for Workforce Education and Bellevue College. The American Association of Community Colleges (AACC) is a member organization that advocates on behalf of 1,200 community colleges and the nearly 12 million students they serve.

<sup>12</sup> For the same reasons set out in my September 30, 2020, letter, there is no “substantial interest” by virtue of their service on the advisory committee and thus no conflict of interest by virtue of their service on the advisory board of this non-profit entity.

- Designing and implementing living labs, including integrating industry-standard technology and training into academic curricula and facilitating hands-on, experiential learning opportunities for faculty and students
- Promoting program awareness and accomplishments via interactive web-based dashboards, publications, etc.

RFP, page 4.

Mr. Robinson and Ms. Posz confirmed that the specifications for this RFP were very general. In my interview, Ms. Posz did not express any concerns about the language in the Scope of Work.

It is my conclusion that Trane and its representatives were not involved in the initial preparation of the RFP. Had Trane been involved, most likely these specifications would have been more tailored to give Trane an advantage. The specifications do not do this.

It is also noteworthy that no competitor claimed that the specifications were proprietary, too narrow, anticompetitive, or tailored to a particular vendor. After the solicitation was issued, all interested vendors had the opportunity to submit questions on November 13, 2019. *See* RFP. Only one question pertaining to the current College systems was submitted.

There also is a process for a potential bidder/offerer to complain about specifications. *See* Manual, Section 5.7.<sup>13</sup> Once a Request For Proposal or Call for Bid is issued by a public procurement unit, it is not uncommon for potential vendors/offerors to challenge specifications in the pre-submission stage. *Id.* There was no such challenge to the RFP.

It is true that Mr. Knutson sent an email to Mr. Wilson with suggestions about language for the Investment Grade Audit and the Facility Condition Assessment, as well as public information from the Colorado State Architect. Tab 11. However, Dr. Bea did not rely on this information to prepare the Scope of Work or the specifications. Mr. Ward agrees that there is no evidence that the information Mr. Knutson sent to Mr. Wilson influenced the drafting of the Scope of Work or the specifications.

## **X. Selection of Evaluation Committee Members.**

Dr. Bea selected the Committee members, with the exception of the representatives of the Facilities Department. With respect to the Facilities Department, Dr. Bea communicated with Mr. Ward to ask him who should represent the Facilities Department on the Committee. Mr. Ward named David Clark, the Superintendent of Operations, and

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<sup>13</sup> The language of this section is substantially similar to A.A.C. R2-7-A901, which applies to state agencies and R7-2-1142, which applies to K-12 school districts.

David Davis, the Energy Resource Manager.<sup>14</sup> Dr. Bea then invited these individuals to join the committee. Both were initially on the Committee. Tab 9. However, Mr. Davis gave a “0” on each of the evaluation criteria for each vendor/offeror proposal. He ultimately left the Committee.<sup>15</sup>

The other members selected for the Committee were logical resources and uniquely situated to assess proposals for the EMP project. The living lab that is part of the project is to be situated on the Downtown campus and under the jurisdiction of Dean Wilson, the lead on the Committee. James Russell is a College faculty member who had previously worked in the private sector for over 20 years in HVAC. Agnes Maina, College Director of Financial Services, previously worked for the Arizona Auditor General and understands financial and operational compliance. In addition, the RFP called for the vendor/offeror to identify and/or provide funding sources and financing options suited to the College’s needs. Raj Murthy is the College Chief Information Officer. Part of the RFP called for integrating industry-standard technology and Implementing smart technology and data analytic platforms. Jessica Normoyle was a College Advanced Program Manager and was assigned to the College Workforce Development Division, which is logically connected to the EMP project. She was also selected to serve on the Committee because of her familiarity with the Center of Excellence for Applied Technology and her compliance role with Grants and Contracts.

At one point during a Board meeting, Ms. Garcia asked Mr. Ward whether he was involved in the selection process. Mr. Ward responded, “No.” Mr. Ward told me that he took the question to mean him personally. He stated that he was involved to the extent that he selected two members of his department to serve on the Committee.

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<sup>14</sup> Mr. Ward had high praise for David Clark. He said, “David Clark just wanted the best deal for the College.”

<sup>15</sup> Mr. Davis was notified on September 10, 2019, in an email from Dr. Bea that he had been selected to serve on the Committee. Tab 9. According to Mr. Robinson and Ms. Posz, Mr. Davis attended the first Committee meeting on January 16, 2020, that took place starting at 9am at the District Office. The procedure was for Ms. Posz to call out an evaluation criteria and then go around the room and each member would indicate their respective score for that criteria. Ms. Posz would record these scores and then calculate the average. Mr. Davis responded with the number 0 on each criteria for each vendor/offeror. When it appeared to Ms. Posz that Mr. Davis intended to give each vendor/offeror a 0 on each evaluation criteria, Ms. Posz met with him separately outside of the meeting room. Mr. Davis told me he gave each vendor/offeror a 0 on each criteria because he was not consulted on the specifications. This is confirmed by an email he sent to Ms. Posz after he left the January 16, 2020, meeting. Ms. Posz and Mr. Davis agreed he should not continue on the Committee.

The first time Mr. Davis indicated he would give each vendor a 0 score was on January 16, 2016. If Mr. Davis had problems with serving on the Committee or evaluating the proposals, he should have raised them to Ms. Posz. If he felt his concerns were not being addressed, he should have contacted Mr. Robinson. *See* discussion in section XI..



It would be unusual for the head of a major College business unit to participate in an RFP selection committee. In this case, Mr. Ward designated two representatives who were both subject matter experts.

I find nothing inappropriate in the membership of the Committee. When Mr. Davis dropped out of the process, Mr. Clark remained. Mr. Russell, who has expertise in HVAC continued on the Committee as well.

I also find that the emails sent by Mr. Knutson had no influence on the selection of Committee members. Mr. Knutson's suggestion as to the composition of the Committee sent in his email of May 20, 2019, was not adopted. *See* Tab 1. Dr. Bea was not influenced by the email, which was addressed to Dean Wilson. Dr. Bea picked a variety of knowledgeable administrators and staff from diverse but relevant areas of the College, including representatives from the Facilities Department.

**XI. The Evaluation Process.**

**A. The Process in General.**

After Dr. Bea selected the Committee members, Ms. Posz wrote an email on September 20, 2019, to each of them explaining the process. Tab 13. Among other things, Ms. Posz said:

You are committing to participate to the fullest in all meetings (2-3,). We will attempt to schedule them early enough to let you know so that you can schedule (or adjust) your schedule to make the meetings. At any point in the process you are not able to participate you will be removed as a voting member, however, you will be held to the confidentiality until after the award.

*Id.*

Once the proposals of offerors were submitted, the members of the Committee were asked to evaluate them and score them on the criteria listed in the RFP.<sup>16</sup> After initial scoring by Committee members, and at the meeting of January 16, 2020, the Committee ranked Ameresco, Trane and Wendel as the top offerors. The Committee conducted interviews with representatives of each of the top offerors on February 11, 2019.

Committee members were asked to bring their work to a February 18, 2019 meeting of the Committee. Ms. Posz facilitated the meeting. Each member was asked their score on each of the evaluation factors listed in the RFP. Tab 5. Ms. Posz added up the scores.

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<sup>16</sup> It is a fundamental principle of public procurement that the evaluation of proposals be based on the evaluation factors set out in the RFP. Compare, for example, A.A.C. R2-7-C301 and C317, which apply to state agencies and R7-2-1042 and 1046 in the School Procurement Code.

In the case of the EMP Procurement, the evaluation factors and their relative weights are set out on page 9 of 27 and R7-2-1042 and 1046 in the School Procurement Code.

The Committee's review of the RFP responses and the scoring process were finalized on February 18, 2020, and the highest scored/ranked offeror was Trane.

Ms. Posz also summarized the comments of the Committee on each of the offers. She distributed this to each Committee member and asked for feedback. Mr. Robinson reviewed the comments on February 19, 2019.

The evaluation process was fair and appropriate. It adhered to College policy and fundamental principles of competitive procurement.

#### **B. The Participation of Mr. Davis on the Committee.**

In my opinion, the situation with Mr. Davis could have been handled differently. *See* discussion in footnote 14 for background. When Mr. Davis came to the Committee meeting on January 16, 2019 and indicated, for the first time, that he was giving each vendor/offer a 0 score on each evaluation criteria, the matter should have been referred to his supervisor, Dr. Bea, and possibly Mr. Silvyn. Mr. Davis should have been instructed he was required to grade the proposals of each vendor/offeror in good faith. As Mr. Ward told me, "You should have to score whether you like it or not."<sup>17</sup>

If Mr. Davis continued to refuse to participate in good faith, a determination should have been made as to whether he needed to be replaced on the Committee. Mr. Ward told me, "I could have given them another name," which he said would have been Mike Baker, who is the Facilities Operations Manager.

Nonetheless, this incident does not invalidate the EMP Procurement by any means.

#### **XII. The Contract.**

Scott Holcomb of the Dickinson Wright law firm represented the College in negotiations with Trane. Mr. Holcomb has a high level of experience in procurement of energy management and energy management contracts.

Mr. Holcomb's negotiations with Trane on behalf of the College were at arm's length and the drafts exchanged by the parties required multiple revisions and extensive interaction. The end result was a contract that protected the College's interests. The terms are fair to the College.

#### **XIII. Allegations of Improper Gifts or Financial Benefits.**

##### **A. The May 6, 2019 Email.**

In the Letter, Ms. Garcia and Mr. Gonzales raise concern about an offer from Mr. Knutson to "send technicians and or an engineer" to look at Chancellor Lambert's Trane unit at his home.

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<sup>17</sup> Mr. Davis told Ms. Posz in a January 16, 2019, email that he felt that if he scored the EMP responses on the criteria established, it would imply his acceptance of them. Herein is an example of another missed opportunity, which was for someone to explain to him that participation in the evaluation did not imply his acceptance of the criteria.

In particular, the email of May 6, 2019, states:

[Y]ou mentioned you have a Trane unit on your home that is or has gotten loud. I'd like to see if one of our technicians and/or an engineer could stop by and take a look at it to see if we might help.

Let me know if that is of interest and we will have our team in Tucson get a site visit scheduled.

As the Arizona Auditor General concluded, the emails, including this email, that Ms. Garcia and Mr. Gonzales provided in the Letter “do not establish any obvious violations of the State Conflict of Interest Statutes.”

I do not find that Chancellor Lambert did anything inappropriate, much less violated Arizona Conflict of Interest laws, with respect to his residential Trane unit for the following reasons:

1. My investigation shows that the Trane commercial section is separate and apart from Trane residential operations. This was confirmed by Mr. Ward. Trane residential operations are far different from the Trane commercial operations.

Trane residential units and services are sold by separately and independently owned Trane dealers.

<https://www.trane.com/index.html>

Mr. Knutson had no ability to influence what was offered or sold by independent dealers of Trane residential units.

2. This email was sent six months before the RFP was issued.
3. Chancellor Lambert did not ask Trane to repair or replace his residential unit and the email does not state that. He merely complained that his home unit was loud.
4. Chancellor Lambert did not follow up on the offer to take a look at his residential unit, much less accept it.
5. Mr. Knutson did not offer to give the Chancellor anything of value. The Chancellor did not accept anything of value.
6. Months later Chancellor Lambert asked Mr. Ward for a recommendation for a new residential unit after his residential unit failed. Mr. Ward told me that he recommended Chancellor Lambert purchase a Lennox or Rheem unit through a local dealer. This is in fact what Chancellor Lambert did. He bought a Lennox unit through Costco. He did not

contact Mr. Knutson. This is further evidence that the previous conversation with Mr. Knutson had no effect on Chancellor Lambert.

7. Finally, Chancellor Lambert did not participate in the selection of Trane and I can find no evidence he made any attempt to influence the ultimate selection.

A.R.S. §38-502 *et. seq.* and College policy require a College employee to disclose when he or she has a substantial financial interest in a decision or transaction. In this case, no such interest existed. Even if Trane had offered to supply a Trane unit to Chancellor Lambert, which it did not do, Chancellor Lambert could not accept the offer. There is no disclosure requirement under such circumstances.

A.R.S. §38-504(C) and 505 prohibit a public employee from accepting a “valuable thing” that is “of such character as to manifest a substantial and improper influence.” This determination is a subjective test and depends on the nature of the “valuable thing” and whether it “is of such character as to manifest a substantial and improper influence.” *See State v. Ross*, 214 Ariz. 280, 284, 151 P.3d 1261, 1265 (App. 2007), as amended (March, 2007)(Overturning the conviction of the Maricopa County Assessor for using voter information for his personal business.)

However, in this matter, there was no offer of anything of value and Chancellor Lambert did not take anything of value. He did not follow up on this May 6, 2019 offer to have an engineer or technician “stop by” Chancellor Lambert’s home and “and take a look at it to see if we might help.”

For these reasons, I conclude that there was no violation of Arizona law or College policy arising from this email.

#### **B. Items of Value.**

I asked each witness if they knew of anything of value in excess of \$25.00 given by Trane to any College employee. The answer was “no,” with the exception of the purchase of a foursome of golf in 2019 at a golf tournament sponsored by the College Foundation, which is discussed below.

Please note that meals and sponsorships are generally excluded from State prohibitions against gifts. See e.g. A.R.S. §15-213(Q). Travel expense reimbursements are likewise excluded. A.R.S. §38-502(f). I used the \$25.00 benchmark, which has been used in applying A.R.S. §38-504(C) and 505.

#### **C. The Foundation Golf Tournament.**

Further consideration should be given to the Facilities Department soliciting vendors for participation in a 2019 golf tournament hosted by the College Foundation (the

“Foundation”), which is reflected in Mr. Knutson’s emails.<sup>18</sup> The Foundation is a separate non-profit that raises funds to support the College’s mission.  
<https://pimafoundation.org/about/finances/>.

While the solicitation of vendors to participate in the golf tournament is not illegal, or specifically contrary to College policy, the best practice would be for such solicitation to be made by the Foundation, rather than the Facilities Department. This way there can be no doubt that vendors participating in this event do not have any competitive advantage in future solicitations.

#### **XIV. Best Practices and Recommendations.**

I have also been asked to make recommendations for policy changes to ensure the College is engaging in best practices over and above the minimum required by the law and to avoid future concerns. In that regard, I recommend the following:

1. The College Procurement and Payment Services Department should amend Section 5.6 of the Manual by adding the following:

If a vendor contacts College personnel outside of the Contracts and Purchasing Department after a Bid/RFP process has started, the vendor should be referred to the Procurement and Payment Services Department.

If College personnel have a good faith belief that a vendor is attempting to exert undue influence on a procurement or is making inappropriate comments about the College or personnel, he or she should immediately report it to the Procurement Director.

2. The College Procurement and Payment Services Department should add the following to the Manual:

If any person serving on a committee to evaluate bids or proposals has a good faith belief he or she cannot fairly evaluate bids or proposals, he or she should contact the Procurement Director immediately.

3. In the Manual, there should be an added requirement that evaluation committee members for any procurement shall not solicit a potential vendor for that procurement for a contribution to a College related charitable event.

This requirement should be reiterated in the Employee Handbook section of "Ethical Standards."

4. Any person who is appointed to evaluate bids or proposals who refuses to assign scores should be instructed that it is his or her duty to participate in the evaluation in good faith.

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<sup>18</sup> Trane, among other vendors, purchased a foursome for this event held in 2019.

5. With the benefit of hindsight a group representing relevant perspectives and expertise (i.e., Procurement, Legal, Human Resources, etc.) should debrief what happened with David Davis and his expressions of concerns and determine what guidance should be developed to deal with future, similar situations.

Dated March 10, 2021.

A handwritten signature in blue ink, reading "Susan Segal", is written over a horizontal line.

Susan Plimpton Segal