

Opinion No. 91-12

BEFORE THE NEVADA COMMISSION ON ETHICS

In The Matter of the Opinion Requests of RAYMOND LUCCHESI and STEVEN CARR, faculty members, University of Nevada, Las Vegas

This opinion is in response to separate opinion requests by a joint venture of Lucchesi & Associates, Inc. (Raymond Lucchesi) and JMA Architects and Engineers (Steven Carr), both of Las Vegas, Nevada, "JMA/Lucchesi," Nevada State Assemblyman James McGaughey, and a joint venture of Barton Myers Associates, Inc. of Los Angeles, California, and Swisher & Hall, AIA, Limited of Las Vegas, Nevada, "Barton Myers/Swisher Hall." JMA/Lucchesi is represented by Gene T. Porter and David T. Wall of Gentile, Porter & Kelesis of Las Vegas, Nevada. Barton Myers/Swisher Hall is represented by Kirk R. Harrison and Derek Ence of Jones, Jones, Close & Brown of Las Vegas. Raymond Lucchesi, the participating architect and a principal of Lucchesi & Associates, Inc. and Steven Carr, the participating architect and a principal of JMA Architects and Engineers were at all relevant times members of the faculty of the School of Architecture of the University of Nevada, Las Vegas (UNLV).

The subject matter of this opinion is (i) whether JMA/Lucchesi may contract with the University of Nevada System (the State of Nevada) to provide architectural services while Mr. Lucchesi and Mr. Carr are members of the faculty of UNLV, and (ii) whether either Mr. Lucchesi or Mr. Carr failed to comply with the requirements of the Nevada Ethics in Government Law, NRS 281 .411 to 281 .581 et. seq., if applicable.

Statutory confidentiality of all proceedings was waived by JMA/Lucchesi, Mr. Lucchesi and Mr. Carr, and all meetings of the Nevada Commission on Ethics (Commission), therefore, were open to the public.

The Commission met to hear testimony and receive other evidence in Las Vegas, Nevada, on April 14, 15, 16 and 30, 1992. The Commission thereafter deliberated at its meeting in Reno, Nevada, on May 14, 1992, by a telephone conference on June 3, 1992 and at its meeting in Las Vegas, Nevada, on July 15, 1992.

BACKGROUND INFORMATION

In March 1989 a design committee was formed consisting of Tony Marnell of the architectural firm of Marnell Carrao, Inc. and Dr. Hugh Burgess, Richard Beckman and Raymond Lucchesi to develop a design and plans for an Architectural School building to be constructed at UNLV. Messers Burgess, Beckman and Lucchesi were all faculty members of the UNLV/School of Architecture. Approximately 30 meetings were held over a two-year period (Exhibit 12) to define the needs of the user (client) of the building, the School of Architecture, and to determine what was necessary for the building, what the "dreams and aspirations" of the client were, what the requirements of an acceptable design, on behalf of the client, were, and what the building was to be for the client in relation to the UNLV campus. During the two-year period, Marnell Carrao, Inc. developed several designs for the building, which changed as the meetings progressed. As a result of these meetings, the architectural theme of the building and a "program" were developed for the UNLV School of Architecture building. The program defined the activities and functional areas within the building and their interrelationship and the required square feet of each. The program defined the theme and statement of the building, how the building was to function and how the various rooms, areas and spaces within the building were to interrelate. (Exhibit D.) By May 1991 the design committee still had not completed its work, and Tony Marnell and Marnell Carrao, Inc. withdrew.

There was testimony by Mr. Lucchesi that the program as developed by the design committee did not constitute the "contract plans and specifications" and that Mr. Lucchesi did not take part in their development as prohibited by a competing public officer or employee under NRS 281.481(3).

There was also testimony, however, by Dean Paul Blanton of the University of Idaho School of Architecture that such an architectural program is the "preamble" to the design, which is developed by the client and its consultants, and is as definitive as possible to provide the same amount of information equally to all competitors. Many times, those who develop the program are disqualified from competition because of the competitive advantage over others who did not participate in developing the program.

There was also testimony by Mr. Lucchesi that before he made the decision to withdraw from the design committee and enter the design competition with JMA, he specifically inquired of and was advised by Dr. Burgess of UNLV and by a member of the staff of the State Public Works Board (SPWB) that he was not disqualified from competition.

Thereafter, the design committee, the UNLV staff and the SPWB decided to sponsor a design competition for the Architectural School building. The design competition required selection of several architectural firms to submit designs and build a scale model of the Architectural School building in response to the program that had been developed. A design competition jury would judge the unidentified designs and models and submit its recommendation to the SPWB for ultimate determination. The SPWB by law makes the final selection of the architectural firm that will design the UNLV School of Architecture building.

In July 1991 the SPWB publicly announced the design competition. Between 13 and 20 architectural firms responded to the announcement and 4 submitted their qualifications to the SPWB. A SPWB committee of staff then selected four architectural firms to compete in the design competition by a process known as "short listing," that is, reducing the longer list of applicants to a list of three or four to compete. Those firms selected on the "short list" to compete were JMA/Lucchesi, Barton Myers/Swisher Hall, Fielden/Quigley and Tate Snyder/Kittrell Garlock.

The SPWB Secretary-Manager, Robert Ferrari, appointed staff member Chris Chimits chairman of the design competition. In September 1991 Mr. Chimits held a meeting with representatives of the four "short-listed" firms to distribute the design program, provide background information, explanations, a review of the competition rules, and answer any questions of the firms. (Exhibit D.)

Mr. Ferrari appointed the design competition jury consisting of the following members: Chris Chimits, Dr. Hugh Burgess, Paul Blanton, Roger Lujan, Dr. John Unrue, Richard Knapp, John Smits, John Amend, Eric Raecke, and Jim Mark. (Exhibit 8.) Design materials and models of the Architectural School building were judged by the jury on November 7 and 8, 1991. There were ten members of the jury with two jurors having one-half (1/2) vote each. Nancy Flagg substituted for Dr. Unrue. After examining each model, the jury members scored the models on a point scale according to a pre-set criteria. (Exhibit 8.) The jury voted three times. On November 7, 1991 after several hours of individually evaluating each model and proposal and before any discussions were held, the first vote was taken as a "straw vote" to determine if there were clear preferences among the four models and design proposals. In the straw vote Model A (Barton Myers/Swisher Hall) received 2-1/2 votes, Model B (JMA/Lucchesi) received 5-1/2 votes and another model received 1 vote. As a result two of the models (C and D) were eliminated.

Thereafter, the jury met and discussed Models A and B, each member expressing his or her analysis and preference. After extensive discussion, a second vote was taken. Model A (Barton Myers/Swisher Hall) received 4 votes, and Model B (JMA/Lucchesi) received 5 votes.

The jury thereafter decided to take one more vote the following day, November 8th. One jury member, Mr. Lujan, had to return home to New Mexico and was absent, although he had indicated that he would not change his vote. During the second vote on November 7th Mr. Lujan had voted for Model A (Barton Myers/Swisher Hall). On November 8, 1991 a third vote was taken. Model A (Barton Myers/Swisher Hall) received 4 votes, and Model B (JMA/Lucchesi) received 4 votes. The vote of Mr. Lujan on November 7th for Model A was not included. The last vote was taken prior to a presentation during a public program by each of the architectural firms of its design

proposal and models A, B, C, or D as submitted.

On November 12, 1991 Mr. Ferrari, based upon a memorandum from Mr. Chimits, the jury chairman, wrote a letter to Dr. Robert Max son President of UNLV, regarding the design competition for the UNLV School of Architecture building. (Exhibit 4.) Mr. Ferrari informed Dr. Max son, among other things, that he would recommend that the SPWB select JMA/Lucchesi to design the UNLV School of Architecture building. This letter was distributed to all members of the SPWB prior to the Board's November 18, 1991 meeting.^[1]

Mr. Chimits telephoned Thomas Schoeman of Lucchesi and Associates, Inc. on either November 13th or 14th and informed him that Mr. Ferrari would recommend to the SPWB that it select JMA/Lucchesi and invited JMA/Lucchesi to attend the SPWB meeting on November 18, 1991. Barton Myers/Swisher Hall was not telephoned or invited to the meeting.

The SPWB met on November 18, 1991 and awarded the architectural design contract to JMA/Lucchesi. The contract has not yet been submitted to the Board of Examiners for approval.

FINDINGS OF FACT

1. Raymond Lucchesi has been a full-time member of the faculty at UNLV since August 1987. He teaches classes in architecture and has been closely involved in the development of the School of Architecture at UNLV. Mr. Lucchesi is a licensed architect in the, state of Nevada. He is a principal in the architectural firm of Lucchesi & Associates, Inc., located in Las Vegas, Nevada.
2. Steven Carr was a part-time member of the faculty of UNLV from 1987 until January 1992, teaching classes in architecture. He is a licensed architect in the state of Nevada. He is a principal in the architectural firm of JMA Architects and Engineers, located in Las Vegas, Nevada.
3. Lucchesi & Associates, Inc. and JMA Architects and Engineers, Inc. formed a joint venture, JMA/Lucchesi, for the purpose of entering the design competition for the UNLV School of Architecture building. This joint venture was formed in June 1991.
4. Barton Myers Associates, Inc. and Swisher & Hall, AIA, Limited formed a joint venture, Barton Myers/Swisher Hall, for the purpose of entering the design competition for the UNLV School of Architectural building.
5. Neither Mr. Lucchesi nor Mr. Carr participated as an agent of government in the negotiation or execution of the contract between the State of Nevada through its agency the University of Nevada System and JMA/Lucchesi.
6. The process of selecting an architectural firm to design the UNLV School of Architecture building was as described herein above.
7. There is no shortage of architectural firms that are qualified to design the UNLV School of Architecture building. Between 13 and 20 architectural firms initially responded to the SPWB announcement inviting proposals. Further, there was no evidence of such a shortage.
8. Mr. Lucchesi, but not Mr. Carr, did participate in developing the program and, therefore, the contract plans and specifications.
9. Neither Mr. Lucchesi nor Mr. Carr were personally involved in opening, considering or accepting the offers, bids or proposals submitted by the architectural firms.

10. Robert Fielden of the joint venture, Fielden/Quigley (one of the four short listed firms) was a member of the faculty of UNLV during the 1991-92 school term.

11. Mr. Lucchesi did not use his position as a faculty member at UNLV to secure an unwarranted advantage for JMA/Lucchesi, a business entity in which he has a significant pecuniary interest, in violation of NRS 281.481(2).

OPINION

Based on the above stated Findings of Fact, the Commission concludes that Mr. Lucchesi was and is a public employee as defined by NRS 281 .436 because he is a member of the faculty at UNLV and that Mr. Carr was a public employee while he was a member of the faculty at UNLV.

The Legislative Declaration and Findings which express the public policy of the Nevada Ethics in Government Law appear at NRS 281.421:

1. It is hereby declared to be the public policy of this state that:
 - (a) A public office is a public trust and shall be held for the sole benefit of the people.
 - (b) A public officer or employee must commit himself to avoid conflicts between his private interest and those of the general public whom he serves.
2. The Legislature finds that:
 - (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interest.
 - (b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

Consistent with that policy and the specific provisions of the Code of Ethical Standards (NRS 281.481 -281.511, inclusive), the opinions of the Commission may include guidance to the public official pursuant to NRS 281.521(1):

1. The commission's opinions may include guidance to a public officer or employee on questions whether:
 - (a) A conflict exists between his personal interest and his official duty.
 - (b) His official duties involve the use of discretionary judgment whose exercise in the particular matter would have a significant effect upon the disposition of the matter.
 - (c) The conflict would materially affect the independence of the judgment of a reasonable person in his situation.
 - (d) He possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision.
 - (e) It would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter.

Reviewing the Code of Ethical Standards, general requirements found in NRS 281.481(2) and (3) are relevant to the Commission's present inquiry:

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person.

3. A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and any private business in which he has a significant pecuniary interest. Unless specifically prohibited by law, a public officer or employee, as such, is not precluded from making a bid on a government contract if the contracting process is controlled by rules of open competitive bidding, the sources of supply are limited, he has not taken part in developing the contract plans or specifications and he will not be personally involved in opening, considering or accepting offers.

The language in NRS 281.481 (2) addresses a public officer or employee's misuse of his position.

Mr. Lucchesi met with Dr. Burgess on November 12, 1991 in Dr. Burgess' office on the UNLV campus. Mr. Lucchesi requested the meeting and participated in the meeting as a member of the faculty. The purpose of the meeting was to inform Dr. Burgess of the negative reaction among the architectural community in Las Vegas to the possibility of an out-of-state firm being awarded the contract for the architectural building. This meeting took place after the models had been judged by the jury and before the SPWB met to award the contract. No final decision as to which firm would be awarded the contract had been made at this time by the SPWB, which would not meet until November 18, 1991. It was possible that Dr. Burgess could have lobbied staff and/or members of the SPWB to choose one firm instead of another. There was no evidence that Dr. Burgess did this. However, on November 12th Mr. Lucchesi did not know what Dr. Burgess would or would not do.

The results of the jury selection were not conclusive in that the second ballot was a 5 to 4 vote and the final ballot was a tie (4 to 4 votes) between JMA/Lucchesi and Barton Myers/Swisher Hall. By telling Dr. Burgess of the negative reaction of the Las Vegas architectural community to the possibility of an out-of-state (Barton Myers Associates, Inc. is located in California) firm being awarded the contract, Dr. Burgess may have been dissuaded from advocating for Model A, Barton Myers/Swisher Hall, thereby eliminating a possible obstacle to an award of the contract to JMA/Lucchesi.

Although troublesome, however, based upon the testimony of both Mr. Lucchesi and Dr. Burgess and resolving any doubt in favor of that testimony, that the purpose and intention of the conversation was innocent, the Commission ultimately resolved the evidence as expressed in Finding of Fact #11, namely that Mr. Lucchesi did not use his position as a faculty member to secure an unwarranted advantage.

NRS 281.481 (3) prohibits a public employee from entering into a government contract, unless certain criteria are satisfied. Neither Mr. Lucchesi nor Mr. Carr at any time participated as an agent of the State of Nevada in negotiating or executing the contract between the State of Nevada through its agency, the University of Nevada System, and JMA/Lucchesi, as reflected in Finding of Fact #5.

The Commission notes that exceptions to the prohibition against a public employee entering into government contracts found in NRS 281.481 are specifically restrictive. Each criterion must be satisfied on the facts if the public employee is allowed to participate in the contracting process.

Mr. Lucchesi and Mr. Carr through the joint venture, JMA/Lucchesi, can contract with the State of Nevada through its agency, the University of Nevada System, only if the following conditions are satisfied: 1) any contract between JMA/Lucchesi and the state is governed by open, competitive bidding; 2) Mr. Lucchesi and Mr. Carr can demonstrate that there is a limited supply of the service their business will be supplying; 3) Mr. Lucchesi and/or Mr. Carr do not participate in developing the contract plans or specifications; and 4) neither Mr. Lucchesi or Mr. Carr is personally involved in opening, considering or accepting offers.

Architects, by Nevada law, are prohibited from participating in a bid process based on competitive fees for their services. NRS 625.530(3). This relevant section of the statute states:

The selection of a registered professional engineer, professional land surveyor or registered architect to perform services under subsection 1 [for the State of Nevada or any of its political subdivisions] must be made on the basis of the competence and qualifications of the engineer, land surveyor or architect for the type of services to be performed, and not on the basis of competitive fees. If, after selection of the engineer, land surveyor or architect, an agreement upon a fair and reasonable fee cannot be reached with him, the public agency may terminate negotiations and select another engineer, land surveyor or architect.

Nevada Administrative Code (NAC) 623.800 contains similar language:

An architect or residential designer who holds a certificate of registration shall not submit any information to the state of Nevada or any of its political subdivisions as part of a proposal for a public works project which would enable the public agency to evaluate the proposal on any basis other than the competence and qualifications of the registrant to perform the type of services required.

These statutory and regulatory provisions enjoin architects in Nevada from being awarded a contract with the state based on a lowest price competitive bid. It does not prevent the state from selecting an architect based on other competitive criteria. Indeed, that criteria is also set forth in NRS 625.530(3): competence and qualifications.

The question is whether the language of NRS 281.481 (3), requiring that the "contracting process" between a public employee and the State "is controlled by rules of open competitive bidding..." can be reconciled with NRS 625.530(3), which specifically prohibits the selection of an architect or engineer "on the basis of competitive fees." NAC 623.800 also prohibits architects from contracting "on any basis other than the competence and qualifications of the registrant to perform the type of services required."

NRS 281.481 (3) and 625.530(3) are in apparent conflict, as noted by the concurring opinion. If the prohibition of NRS 281.481 (3) is intended to apply absolutely, then full or part-time faculty (who are defined as public employees) who are practicing professionals consistent with University policy, and may be desired as teaching faculty for that very reason, are disqualified from such State contracts. Likewise, the members of the State architects and engineers licensing boards (who are also defined as public employees) who practice professionally as required by law, are also disqualified. The resulting disqualification from contracts for the design of State-owned buildings is a serious disincentive to serve, either as teaching faculty or State licensing board members.

In view of the express language of the two provisions, legislative intent as reflected by their history, and the rules of statutory construction, the general requirement of the phrase "rules of open competitive bidding" would appear to allow its reconciliation with the narrower specific prohibition against employing architects "on the basis of competitive fees." We interpret NRS 281.481 (3) to allow such reconciliation where, as in these specific circumstances, the process of selection is entirely competitive in every respect except as to "fees," which remain subject to the subsequent determination by the SPWB that the fees to be paid to the selected architect are to be no more than standard and customary and, therefore, "competitive," and in any event not more than the SPWB is willing to pay.

In the facts and circumstances of this matter, rules of "competitive bidding," as applied to vendors bidding only on price to sell the same quantity of the same item, do not seem wholly applicable to a selection among competitive designs, where the fee to be charged is standard and customary and, in any event, subject to agreement by the SPWB.

In this matter, a number of firms made application to the SPWB, from which four firms were selected competitively or

"short listed," based upon their professional qualifications, strengths and abilities to design this particular building. The four firms then participated in a design competition utilizing design proposals and models, which were judged by a panel or jury for its selection and recommendation to the SPWB.

Accordingly, the Commission concludes that the contracting process was controlled by rules of open competitive bidding as required by NRS 281.481(3).

The Commission limits the construction of NRS 281.481 (3) and its reconciliation with NRS 625.530(3) to the specific circumstances of this opinion and does not attempt to construe and reconcile those provisions where the State contracts with the architect for services without any competitive process of selection, as distinct from that which occurred in this matter.

The Commission concludes that there is no shortage of architectural firms that are qualified to design the UNLV School of Architecture Building, as required for a public employee to contract with the State. Between 13 and 20 architectural firms initially responded to the SPWB advertisement, as required by NRS 281.481(3), and four firms were selected ("short listed") to compete.

The Commission concludes that Mr. Lucchesi, but not Mr. Carr, did participate in developing the contract plans and specifications. Mr. Lucchesi's participation in developing the contract plans and specifications began many months before the design competition was even announced when Mr. Lucchesi together with Dr. Burgess and Mr. Beckman, two other members of the UNLV faculty, met regularly over a two year period with the architectural firm, Marnell Carrao, Inc., to develop a design for the architectural building at UNLV, as prohibited by NRS 281.481(3) where a public employee contracts with the State.

Substantial work was done during this period of time defining the general nature of the architectural building. The program distributed to the short listed architectural firms (Exhibit D), although not specifically developed by this design committee, reflected their work product. The work product of this design committee was at all times available to the public, but Mr. Lucchesi in addition to that work product took with him into the design competition an understanding of the essence of the architectural building not available to anyone outside the design committee. Mr. Lucchesi's participation on the design committee was for the benefit of UNLV; however, he gained a benefit from this participation as well: a cognizance of the nature of what the architectural building was to be. This benefit carried over into his work with JMA/Lucchesi on the design model for the competition. Mr. Lucchesi's work as part of the design committee is implicitly a part of his work with JMA/Lucchesi. The two cannot be separated. The participation by Mr. Lucchesi was innocent, but, nevertheless, did result in an advantage to JMA/Lucchesi; however, NRS 281.481(3) does not require that a malicious intent be present or that an advantage be gained. It simply prohibits participation.

Neither Mr. Lucchesi nor Mr. Carr were personally involved in opening, considering or accepting the offers.

NRS 281.481 (3) precludes Mr. Lucchesi and Mr. Carr, as state employees, from contracting with the State of Nevada through its agency, the University of Nevada Systems, for architectural services.

Mr. Lucchesi inquired of the SPWB and the University of Nevada System as to the legality of his participation in the design competition before entering the competition. Both the SPWB and the University of Nevada System told him they were not aware of any problems. Therefore, the Commission finds that while Mr. Lucchesi violated NRS chapter 281, the violation was not willful and is not subject to civil penalties pursuant to NRS 281.551.

DATED: August 7, 1992.

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R.C. WILSON, II, Chairman

CONCURRING OPINION:

Commissioner Michael F. Mackedon concurs with the majority opinion in its conclusion and all of its findings except for that portion of the majority's opinion which offers a broad definition of that standard set forth in NRS 281.481 (3) which prohibits a public officer or employee from contracting with the State unless "the contracting process is controlled by open, competitive bidding." I agree with the majority opinion that each of the criteria set forth in NRS 281.481 (3) is specifically restrictive and that each must be satisfied if a public officer or employee is to be permitted to contract with the State. The language of the statute suggests a public policy which does not favor contracting between the State of Nevada and its officers and employees and warrants such contracts only when an element of necessity is present, to wit, sources of supply are limited and then only under circumstances which insure that the public interest is protected by standards that are objectively ascertainable.

A strict or narrow interpretation of NRS 281 .481 (3) is therefore required by the public policy which underwrites the statutes. Therefore, the phrase "if the contracting process is controlled by open, competitive bidding" should not include any procedure not expressly tied to an objective monetary standard. A strict definition of this standard would preclude the possibility of an architect who is also a public officer or employee from offering to contract with the State of Nevada for public works in a private capacity as an architect; however, this interpretation would have no effect on architects who are not public officers or employees. This interpretation of the statute renders unnecessary the discussion of or consideration of the various statutes considered by the majority in its opinion which attempts to compare and reconcile respectively architects' professional responsibilities and limitations, the requirements of NRS 281 .481 (3) as it applies to architects who are also public officers or employees of the State of Nevada and who wish to contract for a Nevada public works project and the manner in which architects are usually selected by the State of Nevada for public works projects. The legislature may wish to qualify the language of NRS 281.481 (3) as it effects architects in public works as it has done in the case of other professions whose services are important to the State, but until it does, the provisions of NRS 281.481(3) preclude the State from contracting with one of its officers or employees except upon an open, competitive bid process based exclusively on price.

The findings and conclusions of the majority would not be changed if the majority were to adopt this interpretation. Consequently because the other standards to which the majority opinion refers are quite clearly, correctly applied, I concur in that result.

DATED: August 11, 1992.

By: /s/ MICHAEL F. MACKEDON, Commission Member

[1] The letter expressed initial SPWB staff concern during the "short listing" process that Barton Myers "would not be fully involved...to completion," by inference suggesting that such doubt remains and was never resolved, even in light of the various ballots of the jury.

The letter stated that Dr. Burgess violated a rule that the "short listed firms" have "no contact with university officials" by "escorting Barton Myers around the campus by (sic) one of the competing firms." The evidence, however, was that Dr. Burgess did not do so. In fact, Mr. Chimits testified that the circumstances described were not a competition rule infraction, and the allegation of misconduct was in error.

The letter was largely critical of Dr. Burgess and alleged attempts by him to influence the selection of Model A, the

Barton Myers/Swisher Hall proposal. Generally, however, the allegations were not supported by the evidence. To the contrary, Dean Paul Blanton of the University of Idaho School of Architecture, a jury member, testified that Dr. Burgess' behavior as a juror was entirely proper. Mr. Roger Lujan the Director of Facilities Planning at the University of New Mexico, also a jury member, testified that all of the jurors had their favorite designs and advocated for them, that Dr. Burgess did so with zeal, and that Mr. Lujan had expected him to do so as Dean of the Architecture School.

The letter stated that "James Mark, who is a graduate student doing his Masters project under Dr. Burgess, changed his vote from 'B' to 'A'" clearly implying that Dr. Burgess influenced his change of vote. Neither the testimony of witnesses nor other evidence, however, raised any suggestion that Mr. Mark changed his vote from Model B to Model A on the third ballot under pressure or influence from Dr. Burgess. Dr. Burgess testified that he had no such discussion and made no attempt to influence Mr. Mark's vote.

The letter stated that "the competition was to be completely anonymous..." Model A was designed by Barton Myers/Swisher Hall, which "produced a 'signature' design which was readily recognizable...", and that "Dr. Burgess continually pushed for the Barton Myer (sic) entry." Contrary to the letter, Dr. Burgess testified that he did not know which competing firm created which model and that he, in fact, had been mistaken in his assumption as to which of the models was that of Barton Myers/Swisher Hall.

The letter concluded "Considering all the above and recognizing the procedure...established...I intend to recommend...that [JMA/Lucchesi] be selected...."

The letter was inaccurate, unfair, apparently was released to the news media without a copy to Dr. Burgess and was given to the SPWB for its consideration in its deliberations and decision at its November 18, 1991 meeting.

The testimony reflected that Mr. Chimits telephoned Mr. Lucchesi, informed him that JMA/Lucchesi would be recommended to the SPWB and invited JMA/Lucchesi to attend the November 18, 1991 meeting of the SPWB in Carson City. Notwithstanding the tie vote on the third ballot, Barton Myers/Swisher Hall was not so notified or invited to the meeting.

The foregoing, unfortunately, created considerable controversy in this matter, which certainly reflects on the entire process and its fairness and warrants review by the SPWB for its own consideration and internal procedures and policies. It is emphasized, however, that there was no evidence, and no inference should be drawn, that the letter and the other actions described in this footnote were the fault of Mr. Lucchesi, Mr. Carr or JMA/Lucchesi or in any way have bearing on the specific and narrow issues of this opinion.