

# Memo

**To:** Jeff Rosen  
**From:** John Chase  
**Date:** July 20, 2020  
**Re:** Alum Rock/DelTerra decline [news release]

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The Santa Clara County District Attorney's Office has closed its three-year investigation into the Alum Rock Union Elementary School District's multimillion-dollar contracts with the DelTerra Group, Inc. construction management company, and will not file charges.

Although the investigation revealed breaches of contractual and other duties by DelTerra and negligence by district staff and board trustees, prosecutors determined that, except for one crime outside the statute of limitations, no crimes could be proved. Rather, these were civil law violations to be addressed in the district's lawsuit against DelTerra.

Eventually the investigation focused on three issues:

1. Whether DelTerra, under contract and in a fiduciary relationship with the district, committed conflict of interest crimes by securing additional contracts with the district resulting in more than \$2 million in additional revenue to DelTerra;
2. Whether DelTerra defrauded the district to get a contract amendment that resulted in \$600,000 in payments to DelTerra over the original contract fee; and
3. Whether DelTerra defrauded the district out of more than \$200,000 in supposed pre-construction management fees on projects where construction had not yet begun.

Prosecutors concluded that only the first of these issues found support in the evidence, but that crime was too old to prosecute. Additionally, despite favoritism toward DelTerra displayed by district staff and board trustees, the investigation turned up no evidence sufficient to support a criminal charge against any of them.

"Although no charges were filed, this Office's deep diligence in investigating this case speaks to its great import," District Attorney Jeff Rosen said. "Our school districts deserve rigorous, competent, and ethical oversight over their finances. These are not just dollars and cents or obscure line items in a

contract, they are our hard-earned tax dollars and they are meant to bolster the minds and well-being of our children.”

This investigation arose after complaints by district staff in the fall of 2016 prompted the County Superintendent of Schools to refer the matter to California’s Fiscal Crisis and Management Assistance Team (FCMAT) for an audit.

On June 9, 2017, FCMAT released its final report, which identified deficiencies in the awarding, administration, and language of the contracts. However, the report also suggested that DelTerra’s CEO, Luis Rojas, took advantage of inexperienced board members and overworked or incompetent district staff to cause these problems.

Upon receipt of the FCMAT report, the District Attorney’s Office opened an investigation to determine whether crimes were committed in connection with DelTerra’s contracts with the district. Search warrants procured much evidence that FCMAT could not obtain due to DelTerra’s lack of cooperation with the audit.

Regarding the 2015 contract amendment for an additional \$600,000, prosecutors determined that DelTerra’s questionable justifications when seeking that amendment were really matters of opinion that could not be proved false or that they were made with fraudulent intent.

Regarding the invoices on projects where construction had not started, DelTerra obtained \$213,992 in payments as the construction manager of two multi-purpose buildings, one at Fischer Middle School and one at George Middle School, neither of which has been built to this day. However, DelTerra claimed it had reached an agreement with district staff to submit monthly invoices for equal fee payments over the life of each project, rather than invoices for hours of work performed. Among the evidence seized with search warrants were emails and payment schedules supporting this claim. Based on this billing arrangement, the invoices did not itemize any work performed; they simply listed an amount due. Thus, the invoices could not be proved false or that they were made with fraudulent intent.

Investigators also searched for evidence that Rojas and DelTerra committed conflict of interest crimes when the company, already under contract and in a fiduciary relationship with the district, secured additional contracts with the district. Government Code section 1090 prohibits government officials and employees, as well as some government contractors, from being “financially interested” in contracts that they participate in making. Regarding the contracts hastily renewed in November 2016 just prior to the FCMAT referral, there was no evidence that DelTerra and Rojas, as fiduciaries to the district, leveraged their insider influence to obtain the renewals. At that time, the school board trustees were the ones pushing to renew the contracts without putting them out to bid.

In May 2014, the circumstances were different. Section 1090 violations may have occurred when Rojas, as fiduciary to the district under the program management contract, actively persuaded the school board and district staff to award DelTerra the construction management contract and two smaller contracts. However, investigators found insufficient evidence to toll the four-year statute of limitations to permit prosecution. Additionally, Rojas and DelTerra likely have a due process defense because the case

law at that time was that government contractors who did not hold named government positions could face only civil, not criminal, liability for violations of section 1090.

The district staff and most of the board trustees who were involved in these matters with DelTerra are no longer working for the district. All payments to DelTerra were stopped by the County Office of Education in December 2017. The district formally terminated all business with DelTerra in December 2018, and sued DelTerra in August 2019.