

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

THOMAS C. ZELENY
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 533-5800
FAX (619) 533-5856

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REPORT TO THE AUDIT COMMITTEE

**LEGAL INTERPRETATION OF CITY CHARTER AND MUNICIPAL CODE PROVISIONS
REGARDING SERVICE CONTRACTS AWARDED TO AGENCIES AND NON-PROFITS**

INTRODUCTION

In March of this year, the City Auditor released an audit report entitled “The City Needs to Clarify Purchasing Laws to Ensure City Council Oversight and Encourage Competition,” as part of a performance audit of the Purchasing and Contracting Department. The audit report recommends the Office of the City Attorney provide a legal interpretation of certain provisions of the City Charter and Municipal Code regarding the award of contracts to agencies and non-profit corporations. This report provides the requested legal analysis.¹

DISCUSSION

**I. MUNICIPAL CODE REQUIREMENTS FOR AGENCY AND NON-PROFIT
SERVICE CONTRACTS**

The City Auditor identified approximately \$7.4 million in brush management, graffiti removal, and weed abatement contracts awarded to agencies and non-profits without City Council approval or competitive bids. While the individual contract awards appear to be \$500,000 or less, cumulatively the contract awards to each of these firms² exceed \$500,000 per year. The City Auditor is concerned about the level of oversight of the award of these contracts, and has asked whether this practice is consistent with the San Diego Municipal Code (SDMC).

¹ Legal review of the individual contracts identified in the City Auditor’s report will be done by separate memorandum.

² The agencies and non-profits are Alpha Project, Urban Corps, California Conservation Corps, and the County of San Diego Probation Department.

A. Cumulative Contract Awards.

Chapter 2, Article 2, Division 32 of the SDMC establishes competitive bidding requirements for goods and services contracts.³ Division 32 also identifies exceptions to the competitive bidding requirements, including “Contracts for Services with Agencies and Non-Profit Organizations which comply with Section 22.3222.” SDMC § 22.3212(h). Section 22.3222 provides:

§22.3222 City Manager’s Authority to Enter Contracts for Services with
Agencies or Non-Profit Organizations

The City Manager may enter *contracts* for Services with any Agency or with any non-profit organization qualified under Section 501(c)(3) of the Internal Revenue Code without Council action, provided that all of the following conditions are met:

- (a) The City Manager has certified in writing that the *contract* furthers a specific public policy; and
- (b) The City Manager has certified in writing that the contract is in the public interest; and
- (c) The *contract* does not exceed \$500,000 per year; and
- (d) The City Manager has considered all of the following:
 - (1) whether the Agency or non-profit organization agrees to direct supervision of the workers; and
 - (2) whether the Agency or non-profit organization agrees to provide workers’ compensation insurance for the workers; and
 - (3) whether the Agency or non-profit organization agrees to indemnify, protect, defend, and hold the City harmless against any and all claims alleged to be caused or caused by any act or omission of the worker or Agency employee.

SDMC § 22.3222

To determine whether the City’s practice of awarding agency and non-profit contracts is consistent with the SDMC, we first turn to the rules of statutory interpretation. The rules of

³ This Division of the Municipal Code was recently amended by Ordinance No. O-20148 (Apr. 23, 2012). This ordinance renumbers and clarifies some of the provisions referenced in this report, but the substance of the provisions regarding agency and non-profit service contracts is still the same.

statutory construction and interpretation apply to local ordinances. *County of Madera v. Superior Court*, 39 Cal. App. 3d 665, 668 (1974). “When statutory language is clear and unambiguous, we need not construe its meaning.” *Howard Jarvis Taxpayers Ass’n v. County of Orange*, 110 Cal. App. 4th 1375, 1381 (2003). Otherwise the rules of statutory interpretation should be used to ascertain the intent of the legislature. *Palos Verdes Faculty Ass’n v. Palos Verdes Peninsula Unified School District*, 21 Cal. 3d 650, 658 (1978). Words used in a statute are given their usual meaning. *Hamilton v. State Board of Education*, 117 Cal. App. 3d 132, 141 (1981). If a statute is ambiguous, the public agency’s interpretation is accorded great weight. *Gay Law Students Ass’n v. Pacific Telephone & Telegraph*, 24 Cal. 3d 458, 491 (1979); *Mason v. Retirement Board of the City and County of San Francisco*, 111 Cal. App. 4th 1221, 1228 (2003).

Section 22.3222 does not preclude the award of contracts to an agency or non-profit cumulatively exceeding \$500,000 per year, provided each contract is less than \$500,000 per year. The restriction in SDMC 22.3222(c) that “[t]he contract” not exceed \$500,000 per year is singular, thereby expressing that the \$500,000 annual limit applies individually to each contract. If the intent of the ordinance was a cumulative limit, we would expect the ordinance to restrict the plural of “the contracts” to \$500,000 per year. The other restrictions in SDMC 22.3222(a) and (b) also reference “the contract,” further supporting a contract-by-contract review applies to agency and non-profit service contracts.

Even assuming Section 22.3222 is ambiguous, applying the rules of statutory interpretation lead to the same conclusion. In determining the intent of the legislature, we can look to other provisions of the statutory scheme for guidance. *See People v. Drake*, 19 Cal. 3d 749, 755 (1977). “Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.” *Allis-Chalmers Corp. v. City of Oxnard*, 126 Cal. App. 3d 814, 821 (1981) (citations omitted). The City Council has established a cumulative annual limit for contract awards for consultant contracts in the same Division of the SDMC that addresses contracts with agencies and non-profits:

§22.3223 Consultant Contracts

Except as otherwise provided by Charter or ordinance, the City Manager may enter a *contract* with a *Consultant* to perform work or give advice without first seeking Council approval provided that both of the following conditions exist:

- (a) the *contract* and any subsequent amendments do not exceed \$250,000 in any given fiscal year; and
- (b) the total amount of *contract* awards to the *Consultant*, including the current *award*, in any given fiscal year does not exceed \$250,000.

Section 22.3223 clearly establishes both an individual contract limit and a cumulative annual limit for “the total amount of contract awards” to consultants, after which City Council approval is required. It is evident that the City Council can establish a cumulative annual limit when it intends to do so. The absence of such language in Section 22.3222 for agency and non-profit contracts demonstrates the City Council’s intent not to impose a cumulative limit on contract awards. The City’s practice has been to apply the \$500,000 annual restriction on a contract-by-contract basis, which is consistent with this interpretation.

B. Subdividing Contracts.

Some of the contracts awarded to agencies and non-profits, particularly for brush management and weed abatement, involve similar work. The City Auditor asks whether this work can be awarded as separate contracts, or whether the work should have been awarded as a single contract for each agency or non-profit which in some cases would have triggered competitive bidding and City Council approval by exceeding the \$500,000 limit. As the City Auditor indicates, the City is prohibited from subdividing purchases for the purpose of avoiding competitive bidding requirements:

§22.3204 Subdividing Purchase Prohibited

The Purchasing Agent is prohibited from subdividing into two or more purchases any purchase of Goods or Services for an expenditure of \$50,000 or more that logically should be made as a single transaction *if the purpose of the subdividing is to avoid the bidding requirements* of the San Diego Municipal Code and the City Charter.

SDMC § 22.3204 (emphasis added).

There are many reasons why similar work may be awarded to the same firm through separate contracts. The need for the work may arise at different times, in different City departments, with different funding sources and managed by different City employees. These appear to be logical reasons for awarding separate contracts to the same agency or non-profit, which are not for the purpose of avoiding competitive bidding. However, the City Auditor raises a good point. It is difficult to determine whether separate contracts are being awarded for one of these reasons, or whether avoiding competitive bidding is also a reason behind awarding separate contracts.

If the City Council is concerned about the amount or the manner in which contracts are being awarded to agencies and non-profits, we recommend amending the SDMC to better define the limits of the City’s authority to award these contracts. The City Council could impose a cumulative annual limit, like it has for consultant contracts, for competitive bidding, City Council approval, or both. Alternatively, the City Council could impose limits for specific departments, or for particular types of work. There may be other alternatives too. This Office can draft the appropriate amendments to the SDMC once we receive guidance from the City Council.

II. CITY CHARTER REQUIREMENTS FOR CONTRACTS OVER FIVE YEARS

The City Auditor has raised concerns that some of the contracts with agencies and non-profits may have been extended beyond a five year term without City Council approval. The City Charter provides:

No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds' majority vote of the members elected to the Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.

San Diego Charter § 99.

This Office has indicated that month-to-month extensions of contracts resulting in a total contract term of more than five years must be approved by ordinance of the City Council. City Att'y MOL No. 2009-20 (Dec. 18, 2009). Such extensions that have not been approved by the City Council are void or at least unenforceable against the City, leaving the firms at risk that they may not be paid for their services. *Id.*

Charter Section 99, however, does not apply to separate contracts that cumulatively exceed five years if each contract is less than five years. City Att'y MOL No. 2010-11 (June 8, 2010). But intentionally breaking up what would logically be a single contract into smaller transactions to avoid City Council review will render the transactions void. *Id.* Whether the City has extended an existing contract or awarded a new contract is a factual question that should be analyzed on a case-by-case basis. If the City followed the SDMC process for the award of new contracts, it is strong evidence the contracts are separate. For example, if the City advertised for bids and the incumbent firm won the competition, they are separate contracts. In the case of agency and non-profit service contracts, if the City made the sole source certifications required by Section 22.3222 between consecutive awards, they are probably separate contracts absent any evidence of intent to avoid City Council review. If a later contract amends or incorporates a prior contract, it is likely an extension of an existing contract requiring City Council approval if cumulatively longer than five years. But we emphasize that each situation must be individually reviewed to determine whether City Council approval is required under Charter Section 99.

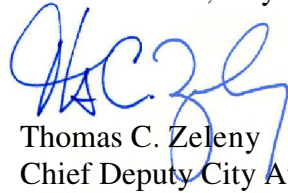
CONCLUSION

The SDMC does not prohibit the award of contracts to agencies or non-profits that cumulatively exceed \$500,000 per year, as long as each individual contract is less than \$500,000 per year. The City Charter does not prohibit the award of contracts to one firm that cumulatively exceeds five years, but whether a contract has been extended or a new contract awarded is a review that should be done on a case-by-case basis. The SDMC prohibits dividing transactions into contracts of less than \$500,000 per year for the purpose of avoiding competitive

bidding, but it may be difficult to ascertain why work was awarded to one firm through multiple contracts instead of a single contract. If the City Council is concerned about the amount or manner in which contracts are being awarded to agencies or non-profits, this Office can draft appropriate amendments to the SDMC with guidance from the City Council.

JAN I. GOLDSMITH, City Attorney

By



Thomas C. Zeleny
Chief Deputy City Attorney

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