

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

KEVIN REISCH
CHIEF DEPUTY CITY ATTORNEY

JOAN F. DAWSON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Jan I. Goldsmith

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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REPORT TO HONORABLE MAYOR AND CITY COUNCIL

PROPOSED EMPLOYMENT OF CIVIC SAN DIEGO TO PROVIDE CERTAIN SERVICES
RELATED TO FORMER REDEVELOPMENT AGENCY PROPERTIES PROPOSED TO BE
TRANSFERRED TO THE CITY OF SAN DIEGO

INTRODUCTION

This Report is presented at the request of Council President Pro Tem Sherri Lightner, who asked at the March 12, 2014, meeting of the Smart Growth and Land Use Committee whether there are procedural requirements that the City of San Diego (City) must follow before it employs Civic San Diego (CivicSD or Corporation) to manage certain aspects of the future implementation of the proposed Long-Range Property Management Plan (PMP). The San Diego City Council (Council) will consider approval of certain actions related to the PMP on behalf of both the City, a municipal corporation, and the City, solely in its capacity as the designated successor agency to the former Redevelopment Agency (Successor Agency).

CivicSD, in its capacity as a consultant to the Successor Agency, is recommending transfer of a number of non-housing properties currently held by the Successor Agency to the City through the PMP. Among these properties are nineteen parcels designated for "Future Development" within the meaning of California Health and Safety Code section 34191.5(c)(2). These Future Development properties fall into one of two categories: six are "Public Facilities" sites on which a future public improvement project will be constructed, and thirteen are "Economic Development" or "Opportunity Sites" on which a private developer will construct the identified project after acquiring ownership of the site from the City.¹ CivicSD is proposing to provide project management services, including development or disposition services, related to the Future Development properties on the City's behalf, if the proposed transfer of the properties from the Successor Agency to the City occurs.

CivicSD is presently providing specific consulting services to the City through written agreements, including an agreement for Successor Agency and Housing Successor Agency Services approved by the Council in June 2012 and subsequently amended. *See* San Diego Resolution R-307537 (June 28, 2012); San Diego Resolution R-307849 (Nov. 28, 2012). This

¹ A Future Development property is defined as one that will be used for a project identified in an approved redevelopment plan, or a project listed in a community plan or a five-year implementation plan. Cal. Health & Safety Code § 34191.5(c)(2)(A)(ii). If the proposed transfer of the properties from the Successor Agency to the City occurs, the City will be responsible for the completion of the applicable project. Cal. Health & Safety Code § 34191.5(c)(2)(A)(i).

agreement does not cover management, development, or disposition of non-housing properties owned by the City. It only covers services related to non-housing properties held by the Successor Agency and related to housing properties held by the City as housing successor to the Former RDA.

As part of the proposed action on the Council agenda, CivicSD is asking the Council to request that the Mayor or his designee explore alternatives for the provision of staffing related to future implementation of the PMP, including the potential opportunity for CivicSD to provide expert consultant services for the City's benefit related to project management, development, and disposition of certain Future Development properties (Proposed Services). The proposed action does not include a request for a final decision on project staffing; rather, the request is for the Mayor or his designee to explore alternatives and report back to the Council or Council Committee, as appropriate. Council President Pro Tem Lightner has asked this Office whether competitive bidding and meet and confer are required before the City decides to engage CivicSD to perform the Proposed Services.

The Successor Agency, like the former Redevelopment Agency that dissolved effective February 1, 2012 (Former RDA), is a legal entity, established under state law. The Successor Agency is separate and distinct from the City, as a municipal corporation established by the San Diego Charter (Charter). Cal. Health & Safety Code § 34173(g). The Successor Agency is in the process of winding down the Former RDA's operations, subject to supervision by the seven-member Oversight Board and the California Department of Finance (DOF). Among other duties, the Successor Agency must dispose of the Former RDA's real property assets.²

The Successor Agency has no employees, and much of its work is presently being carried out by CivicSD under a consultant agreement. If the Council, acting as the governing board of the Successor Agency, transfers certain properties to the City, then the City's future disposition and use of such properties will be governed by the PMP. Cal. Health & Safety Code § 34191.3. The City's procedural rules related to management, development, and disposition of the properties, as established by the Charter, ordinances of the Council, and other applicable rules and policies, will apply to the extent that those procedures are not in direct conflict with the PMP or the Dissolution Laws.

The Oversight Board must approve the PMP before a statutory deadline of June 2, 2014, and the DOF must approve the PMP before a statutory deadline of January 1, 2015. Cal. Health & Safety Code §§ 34191.1, 34191.3, 34191.5(b). The DOF has the authority to reclassify

² The California Legislature has ended state redevelopment and has clarified the process for dissolution of redevelopment agencies through a series of bills, known as the Dissolution Laws. Of relevance to the PMP, these bills include Assembly Bill x 1 26, enacted on June 28, 2011; Assembly Bill 1484, enacted on June 27, 2012; and Assembly Bill 471, enacted on February 18, 2014. Under the Dissolution Laws, the City may accept the transfer of certain assets of the Former RDA in order to use them for future redevelopment activities pursuant to the PMP as approved by the DOF. Cal. Health & Safety Code § 34191.3. If the DOF has not approved the PMP by the statutory deadline of January 1, 2015, the City may still accept the transfer of certain assets of the Former RDA for use for future redevelopment activities, as long as the City funds those activities and enters into a compensation agreement with the other local taxing entities to make payments to them in proportion to their relative shares of the base property tax for the value of the assets retained by the City. Cal. Health & Safety Code § 34180(f)(1).

properties as part of its review process. Therefore, the proposed transfer of the properties from the Successor Agency to the City will not occur until the DOF approves the transfer. This Office anticipates that the DOF's review process may take until the end of this year; therefore, the Successor Agency may not be in a position to transfer any of its properties to the City until next year. Any final decisions related to development or disposition of the properties must await the DOF's approval; until then, the properties will continue to be held by the Successor Agency.

This Office understands that CivicSD has other proposals to provide services to the City beyond the scope of its existing agreements with the City and the Proposed Services here. Therefore, this Report is intended to not only respond to Council President Pro Tem Lightner's question related to the Proposed Services, but also to provide the general legal principles that must be applied to any employment of CivicSD by the City. It is this Office's understanding that no final decisions have been made regarding employment of CivicSD to perform any of the Proposed Services; rather, there is general, preliminary discussion focused on the parameters of what authority may be delegated to CivicSD. Therefore, this Office is providing the general legal principles that must be considered in that discussion.

QUESTION PRESENTED

If the City wants CivicSD to perform the Proposed Services related to certain Future Development properties recommended to be transferred from the Successor Agency to the City, must the City satisfy certain procedural requirements before a final decision is made?

SHORT ANSWER

Yes. The City must comply with applicable procedural requirements under the Meyers-Milias-Brown Act (MMBA), the Charter, including Charter section 117(c), and City contracting rules before it decides to contract with CivicSD to perform the Proposed Services.

DISCUSSION

I. CIVICSD IS A LEGAL ENTITY SEPARATE FROM ITS SOLE MEMBER -- THE CITY -- AND THE SERVICES IT MAY PROVIDE TO THE CITY ARE LIMITED BY THE CHARTER AND OTHER APPLICABLE STATE AND LOCAL LAWS.

CivicSD is a legal entity separate from the City, a municipal corporation. *See* San Diego Charter § 1. CivicSD is a nonprofit public benefit corporation, formed under the California nonprofit public benefit corporation law, and organized and operated exclusively for charitable purposes within the meaning of Internal Revenue Code section 501(c)(3).³ CivicSD was formerly known as Centre City Development Corporation, Inc. (CCDC), and it was renamed in 2012. *See* Amended and Restated Bylaws of Civic San Diego (Bylaws). *See also* Restated

³ "Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues." *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983).

Articles of Incorporation of Centre City Development Corporation, Inc. (filed with California Secretary of State, June 28, 2012) (Articles of Incorporation). The separate personality of a corporation is a statutory privilege. *Greenspan v. LADT, LLC*, 191 Cal. App. 4th 486, 510 (2010).

As a nonprofit corporation, CivicSD does not have shareholders or owners. However, the Corporation has a single member – the City – which has voting rights. Articles of Incorporation, art. V. *See also* Bylaws, art. 2. The City has the right to vote on the election of members of the Corporation board of directors, the disposition of the Corporation’s assets, any merger of the Corporation, any election to dissolve the Corporation, amendments to the Articles of Incorporation or the Bylaws, and other matters established by the Bylaws and by law. *Id.*

Although the City is the sole member of the Corporation, CivicSD is not a City department. *See* San Diego Charter § 26 (stating that the Council must by ordinance adopt an administrative code providing for the detailed powers and duties of the administrative offices and departments of the City government, based upon provisions of the Charter); San Diego Municipal Code § 22.1801 (codified Council ordinance setting forth list of City departments).

The Corporation’s authority to act is set forth in its Articles of Incorporation, which state that the specific purposes of the Corporation are to:

- (i) engage in economic development, land use permitting and project management services which under California law, can be done by contract with or delegated by the City of San Diego (“City”), or the City solely in its capacity as the designated successor agency to the Redevelopment Agency of the City of San Diego (“Successor Agency”);
- (ii) enter into agreements, contracts or memoranda of understanding with any public or corporate entity, including the City, in furtherance of the purposes for which the Corporation is formed;
- (iii) engage in any other activities in furtherance of the purposes for which the Corporation is formed; and
- (iv) receive, invest and utilize for the purposes for which the Corporation is formed (a) gross receipts from activities related to the Corporation’s exempt functions, and (b) funds and property acquired through solicitation of contributions, donations, grants, gifts, bequests and the like.

Articles of Incorporation, art. II, para. C (June 28, 2012).

Under the Articles of Incorporation, CivicSD can perform specified work for the City – economic development, land use permitting, and project management services – by contract with the City or by delegation, within the parameters of California law and the Charter.⁴

The California Constitution confers on all cities, whether chartered or general law, and all counties the power to make and enforce, within their respective limits, all local, police, sanitary, and other ordinances and regulations not in conflict with general state laws. Cal. Const. art. XI, § 7. This constitutional police power gives local governments the authority to regulate land through planning, zoning, and building ordinances to protect public health, safety, and welfare. *Fonseca v. City of Gilroy*, 148 Cal. App. 4th 1174, 1181 (2007), *rev. denied*. Generally, as a charter city, this City has broad control over local land use matters. *See Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1151 (2006) (“Land use regulation in California historically has been a function of local government under the grant of police power . . .”).

California also has a well-established doctrine prohibiting delegation of legislative power. As a general rule, the City cannot delegate discretionary, legislative powers, including land use authority, to another entity in such a way that results in a total abdication of those powers. *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, 72 Cal. App. 4th 366, 376 (1999) (citing *Kugler v. Yocum*, 69 Cal. 2d 371, 384 (1968)). Land use regulation, as an exercise of a city’s inherent police power, must always be reposed somewhere. *City of Burbank*, 72 Cal. App. 4th at 376 (citing *DeVita v. County of Napa*, 9 Cal. 4th 763, 782 (1995); *Delucchi v. County of Santa Cruz*, 179 Cal. App. 3d 814, 823 (1986) (police powers cannot be barred or suspended by contract or law)).

Further, Charter section 11.1 sets forth nondelegable legislative powers, including the prohibition against Council delegation of all decisions and actions related to raising and spending public funds or establishing public policy. This section states, in pertinent part, that the Council “shall not delegate legislative power or responsibility which [the Councilmembers] were elected to exercise in the adoption of any ordinance or resolution which raises or spends public monies, including but not limited to the City’s annual budget ordinance or any part thereof, and the annual ordinance setting compensation for City employees, or any ordinance or resolution setting public policy.” San Diego Charter § 11.1. *See also* 1994 City Att’y MOL 412 (94-44; May 19, 1994). (As discussed more fully below, Charter section 117(c) also sets forth limitations in hiring an independent contractor to provide City services as an alternative to classified employees.)

⁴ The City is limited by express provisions in the Charter. *See City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-599 (1949) (stating “that by accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter. The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation . . .”).

A local legislative body may delegate certain administrative powers and functions.⁵ If administrative or regulatory functions are delegated, the legislative body – that is, the Council – must provide sufficiently definite policy direction on behalf of the City to allow for completion of the delegated work. *City of Burbank*, 72 Cal. App. 4th at 376. “Grants of power to an administrative agency must include adequate safeguards to protect against misuse of that power.” *Id.*

As the California Supreme Court has explained:

Nor does the fact that a third party, whether private or governmental, performs some role in the application and implementation of an established legislative scheme render the legislation invalid as an unlawful delegation.

Kugler, 69 Cal. 2d at 379-380.

Thus, the doctrine prohibiting delegation of legislative power is not violated if the legislative body makes the fundamental policy decisions and then leaves to another body – public or private – the task of achieving the goals envisioned in the legislation. *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 507 (1971); *Kugler*, 69 Cal. 2d at 375-377. To overcome a challenge, a reasonable grant of power to an administrative agency must be accompanied by adequate safeguards to guide the use of power and protect against its misuse. *CEED v. California Coastal Zone Conservation Commission*, 43 Cal. App. 3d 306, 325 (1974).

If the Council decides to delegate duties to CivicSD, it is critical that the Council provide specific parameters limiting CivicSD’s exercise of authority; doing so will reduce the risk of successful challenge to the act of delegation.⁶ Also, if the Council delegates authority to CivicSD or enters into a contract with CivicSD to provide any of the Proposed Services, there must be compliance with other controlling legal provisions, including those in the Charter and in City

⁵ The Charter incorporates provisions of state law related to establishment of the Planning Commission (Commission). San Diego Charter § 41(c). Under state law, each city and county must establish a “planning agency with the powers necessary to carry out the purposes” of the state’s planning and zoning laws. Cal. Gov’t Code § 65100. The legislative body of a local agency “shall by ordinance assign the functions of the planning agency to a planning department, one or more planning commissions, administrative bodies or hearing officers, the legislative body itself, or any combination thereof.” *Id.* The Charter sets forth the duties of the Commission: “The City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws. The duties of the Commission shall also include advising upon public buildings, bridges, retaining walls, approaches, park and harbor structures, the improvement of Pueblo lands and such other improvements as the Council may by ordinance determine.” San Diego Charter § 41(c).

⁶ CivicSD currently carries out certain land use permitting functions downtown pursuant to the downtown planned district ordinances, which have been adopted by the Council. CivicSD is mandated to administer and enforce the ordinances, in accordance with the Council’s established standards and policies as memorialized in the San Diego Municipal Code (Municipal Code or SDMC). *See, e.g.*, SDMC ch. 15, art. 6, div. 3 (Centre City Planned District); SDMC ch. 15, art. 7 (Gaslamp Quarter Planned District); SDMC ch. 15, art. 11 (Marina Planned District).

contracting rules.⁷ This Office cannot say with certainty whether a proposed delegation is lawful without review of the proposal. The discussion in this Report is intended to set forth the legal parameters that will apply if the Council desires to delegate certain administrative authority to CivicSD in the future.

II. THE CITY MUST COMPLY WITH THE CHARTER AND THE MMBA IN EMPLOYING CIVICSD TO PROVIDE CONSULTANT SERVICES.

The City has a civil service system, and generally City services are provided by civil service employees, known as classified employees. *See* San Diego Charter § 117 (unclassified and classified services). Charter section 117(c) provides that the City may employ an independent contractor to provide City services as an alternative to classified employees when the Mayor determines, subject to Council approval, that the services can be provided “more economically and efficiently by an independent contractor . . . while maintaining service quality and protecting the public interest.” San Diego Charter § 117(c). *See* 2009 Op. City Att’y 710 (2009-2; Oct. 8, 2009) (2009 Legal Opinion).

As explained earlier, CivicSD employees are not City employees. They are not protected by the City’s civil service system nor are they members of the City’s retirement system or retirement plan. The City does not exercise appointing authority over CivicSD employees nor does the City determine the compensation or benefits of CivicSD employees, or cover them for work-related injury or disability. CivicSD employees do not fall within the parameters of Charter section 117, which defines City employees; therefore, CivicSD is an “independent contractor” within the meaning of Charter section 117(c).⁸

⁷ If CivicSD provides any services on behalf of the City, it is this Office’s opinion that the City must enter into a contract with CivicSD that provides express conditions related to the work that CivicSD will perform. The conditions should include oversight; indemnification, hold harmless, and other provisions to protect the City from liability caused by CivicSD’s conduct; termination for non-performance and convenience; and other provisions. Contract considerations are discussed more fully in sections III and IV of this Report.

⁸ Note, in this Office’s April 20, 2009 Report to the Committee on Rules, Open Government and Intergovernmental Relations, this Office explained that the City has delegated certain functions to the Corporation by ordinance. 2009 City Att’y Report 414 (2009-6; April 20, 2009). Further, the City considers members of the Corporation’s board and others as City officials for conflict of interest purposes and requires them to file Statements of Economic Interest forms (Form 700s) and to comply with City laws related to ethics (SDMC §§ 27.3501- 27.3595) and lobbying (SDMC §§ 27.4001-27.4055). *Id. See also* SDMC § 26.0413(a)(7) (City’s Ethics Commission has jurisdiction over officers, directors, employees, and consultants of corporations wholly owned by the City). In compliance with California Government Code section 87306.5, the City serves as the reviewing body for conflict of interest codes for all City departments, agencies, boards, and commissions, which include the nonprofit corporations solely owned by the City. *See* San Diego Resolution R-307443 (May 15, 2012). The Corporation drafted its conflict of interest code, and the Council approved it. San Diego Resolution R-307816 (Nov. 13, 2012). Although the Corporation is subject to the City’s Ethics Ordinance (*see* SDMC §§ 26.0402, 26.0413(a)(7)) and its employees file Form 700s, the Corporation remains a separate legal entity. Many of the City’s consultants, who are independent contractors, must file Form 700s, and are subject to the jurisdiction of the City’s Ethics Commission. SDMC § 26.0413(a)(5).

If CivicSD is providing the Proposed Services as an alternative to the City's classified employees,⁹ then the provisions of Charter section 117(c) must be met.¹⁰

Charter section 28 authorizes the Mayor to "employ experts, or consultants to perform work or give advice connected with the Departments of the City when such work or advice is necessary in connection therewith." San Diego Charter § 28. As this Office explained in its 2009 Legal Opinion, the term "consultant" has been defined by the Council. A "consultant contract" means "a contract to provide expert or professional services including, but not limited to, accounting, architectural, engineering, marketing, public relations, management, financial, and legal services." SDMC § 22.3003.

These two Charter provisions must be read together and harmonized to give meaning to both. *See Arntz v. Superior Court*, 187 Cal. App. 4th 1082, 1091 (2010). Courts "do not interpret statutes (or charter provisions) in isolation. Rather, we must construe every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." *Mason v. Retirement Bd. of City and County of San Francisco*, 111 Cal. App. 4th 1221, 1229 (2003) (internal quotations omitted) (citing and quoting *Ford & Vlahos v. ITT Commercial Finance Corp.*, 8 Cal. 4th 1220, 1234 (1994), quoting *Clean Air Constituency v. California State Air Resources Bd.*, 11 Cal. 3d 801, 814 (1974)). Charter section 28 cannot subsume Charter section 117(c); effect must be given to both provisions.¹¹

⁹ The City's classified employees include Civil, Electrical, Mechanical, and Structural Engineers, who perform wide-ranging duties related to public works and utilities projects; Community Development Specialists, who direct and coordinate preparation and implementation of major community development programs, among other duties; Planners, who prepare revisions to land use plans and conduct environmental impact reports, among other duties; Plan Review Specialists, who issue building and engineering permits and conduct plan checks and other permit issuance functions, among other duties; Procurement Specialists, who prepare bids and specifications for contracts and conduct public contracting processes, among other duties; and Project Officers, who plan and coordinate design, construction, and operation of major public works projects, among other duties. Most of these classified employees are represented by the San Diego Municipal Employees' Association.

¹⁰ Courts have historically defined an "independent contractor" as "one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished." *Moody v. Industrial Accident Commission*, 204 Cal. 668, 670 (1928). "It is well settled that where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled." *Id.* (citations and internal quotations omitted). The test to determine whether there is an employer-employee relationship or a relationship involving an independent contractor is: Who has the right to direct what shall be done, and when and how it shall be done? Who has the right to general control? The test of what constitutes independent service lies in the control exercised. The test of control means complete control, and a reviewing court must carefully distinguish between authoritative control and mere suggestion as to detail. *Id.* (citations omitted).

¹¹ "[S]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1386 (1987) (citing *California MFs. Assn. v. Public Utilities Com.*, 24 Cal. 3d 836, 844 (1979)). Furthermore, "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citations omitted); *see also Williams v. Superior Court of San Bernardino County*, 5 Cal. 4th 337, 357 (1993) ("An interpretation that renders statutory language a nullity is obviously to be avoided.").

To the extent that the Proposed Services are expert or professional consultant services, then the City may be able to rely on Charter section 28 to support employing CivicSD under a consultant contract. As this Office explained in its 2009 Legal Opinion, Charter section 28 provides the conditions upon which experts or consultants may be hired.

The [Mayor] shall have the power to employ experts, or consultants to perform work or give advice connected with the Departments of the City when such work or advice is necessary in connection therewith.

San Diego Charter § 28.

“Consultation” generally means “the act of asking the advice or opinion of someone (such as a lawyer).” Black’s Law Dictionary (7th ed. 1999). An “expert” is generally defined as “[a] person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.” Black’s Law Dictionary (9th ed. 2009).

By ordinance, the Council has defined a “consultant contract” as “a contract to provide expert or professional services including, but not limited to, accounting, architectural, engineering, marketing, public relations, management, financial, and legal services.” SDMC § 22.3003. A “consultant contract” is distinct from a “contract for services,” which is “a contract to provide assistance, labor or maintenance.” *Id.* The Municipal Code states: “A *contract for services* does not include *consultant contracts*, *contracts for goods*, or *public works contracts*.” *Id.*

The Council has adopted a Council Policy regarding use of consultant services that sets forth how consultants are to be used to assist the City. It provides, in relevant part:

The City requires services of a recurring nature or for a specific one-time project which cannot be routinely provided by City staff, either because of the expertise required or the ongoing work load. Consultants may be employed where City staff is unable to accommodate this requirement. . . .The type and scope of the required service or product must be clearly defined by the [Mayor] to determine whether it can be most efficiently provided by City staff or by a consultant, and where a consultant is chosen, whether licensed or non-licensed services are necessary.

Council Policy 300-07, at p. 1.

By ordinance and by Council Policy, the Council requires that consultants be selected through a formal, competitive process, with limited exceptions. *See* SDMC § 22.3207 (Award of Consultant Contracts); Council Policy 300-07. *See also* San Diego Admin. Reg. 25.60 (Selection of Consultants for Work Requiring Licensed Architect and Engineering Skills); San Diego Admin. Reg. 25.70 (Hiring of Consultants Other than Architects and Engineers). One exception

is a sole source contract, but, as discussed more fully below, it must be justified and certified as to why strict compliance with a competitive process would be unavailing or would not produce an advantage. *See* SDMC § 22.3016.

Compliance with Charter section 117(c) requires the Mayor to make a determination that CivicSD can provide the services more economically and efficiently while maintaining service quality and protecting the public interest. Any contract with the CivicSD under the authority of Charter section 117(c) must be approved by the Council. San Diego Charter § 117(c). Further, the City has a process set forth in the City's Managed Competition Guide, which was adopted by ordinance after being negotiated with its recognized employee organizations in compliance with the procedures set forth in Charter section 117(c). San Diego Ordinance O-19995 (Oct. 18, 2010). Policies regarding possible future contracting out of bargaining unit work are mandatory subjects of bargaining. *State of California (Department of Personnel Administration)*, PERB Dec. No. 574-S (1986); *Healdsburg Union High School District*, PERB Dec. No. 132 (1980). Therefore, if the City wants to use another process to comply with Charter section 117(c), it must first negotiate that process with its impacted employee organizations.

To determine whether the City can rely on Charter section 28 or whether the Proposed Services fall under Charter section 117(c) requires an analysis of the specific tasks or functions that the City wants CivicSD to perform. If a proposed contract between the City and CivicSD meets the criteria for a "consultant contract," then the City may rely on Charter section 28 as authority to contract with CivicSD (assuming other applicable contracting requirements are met). However, if the services to be provided are those that are also provided by the City's classified employees and CivicSD is merely serving as an alternative to classified employees, then Charter section 117(c) is triggered. The City must also comply with the MMBA prior to a decision to transfer the work of represented City employees to CivicSD.

As a general rule, if there is a transfer of work from the City's represented employees to another bargaining unit within the City, to unrepresented employees, or to an outside contractor, then the City must meet and confer with the represented employees impacted by the proposal prior to a final decision on the proposal. *Rialto Police Benefit Ass'n v. City of Rialto*, 155 Cal. App. 4th 1295, 1309 (2007) (holding that city's decision to enter into a contract with the county sheriff for law enforcement services, rather than continue to provide such services through the city's own police department, was subject to the meet-and-confer requirements of the MMBA). In the *City of Rialto* case, the Court of Appeal explained that the transfer of work away from a bargaining unit had a significant effect on wages, hours, and working conditions of bargaining unit employees, and was subject to collective bargaining. *Id.* *See also* *Oakland Unified School District*, PERB Dec. No. 1770 (2005) ("the removal of work either from one bargaining unit to another or subcontracting it outside to non-employees is negotiable"); *Lucia Mar Unified School District*, PERB Dec. No. 1440 (2001) (concluding that there is a statutory duty to bargain where the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances); *Fibreboard Paper Products Corp. v. National Labor*

Relations Bd., 379 U.S. 203, 211 (1964) (stating that “the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under [the National Labor Relations Act]”).

At least two of the City’s recognized employee organizations may be impacted by a proposed transfer of City work to CivicSD. The San Diego Municipal Employees’ Association (MEA) represents multiple bargaining units, including the Professional Unit, Supervisory Unit, and Technical Unit, that could be impacted by a proposed contract with CivicSD. The City employs planners, engineers, property agents, community development specialists, park designers, property inspectors, and many other classifications who could perform the Proposed Services. The American Federation of State, County and Municipal Employees, Local 127, represents maintenance workers, technicians, workers in the skilled trades, and equipment operators who also maintain City-owned properties.¹²

III. THE CITY GENERALLY MUST USE A COMPETITIVE PROCESS TO HIRE A CONSULTANT, UNLESS AN EXCEPTION TO THE COMPETITIVE PROCESS APPLIES.

Depending on what services CivicSD provides to the City, the services may fall under the definition of a “consultant contract” or they may fall under the definition of a contract for services. The rules related to consultant contracts are set forth in the Municipal Code, Chapter 2, Article 2, Division 32. As explained above, a consultant contract is defined as “a contract to provide expert or professional services including, but not limited to, accounting, architectural, engineering, marketing, public relations, management, financial, and legal services.” SDMC § 22.3003. A consultant contract is distinct from a contract for services, which is defined as a contract to provide assistance, labor, or maintenance. SDMC § 22.3003. The services CivicSD presently provides to the City are under a consultant contract.¹³ Maintenance of City properties would likely fall under the rules related to a contract for services. The rules related to authority to award contracts differ in some respects based on whether a contract for services

¹² Depending on future decisions related to whether and how CivicSD will carry out any of the Proposed Services, this Office may need to evaluate whether the City would also have a meet and confer obligation with the Deputy City Attorneys Association. This Office routinely works on various agreements on behalf of the City and the Successor Agency, such as financial assistance agreements with third party developers, when CivicSD is performing consultant work on projects on behalf of the City or the Successor Agency. This Office serves as the City’s chief legal advisor under Charter section 40. However, although this Office advises on economic development and land use matters for the City, this Office is not the legal advisor for CivicSD. The Corporation has retained its own corporate counsel to address certain matters affecting CivicSD’s interests. Therefore, if CivicSD is acting on behalf of the City, exercising decision-making authority and must rely on advice of its corporate counsel, this may result in a transfer of work that would be typically be performed by represented employees in the Deputy City Attorneys Association because City staff has been providing the services directly.

¹³ CivicSD provides consultant services to the City required to implement the requirements of the Downtown Community Plan, the Centre City Planned District Ordinance, the Gaslamp Planned District Ordinance, the Marina Planned District Ordinance, the Downtown Community Parking District, and specified economic development activities. *See* San Diego Resolution R-307538 (June 28, 2012).

or a consultant contract is involved. *See* SDMC §§ 22.3203 (Competitive Process for Contracts for Goods and Services); 22.3206 (Award of Contracts for Goods and Services); 22.3207 (Award of Consultant Contracts); Council Policy 300-07 (Consultant Services Selection).

Generally, all contracts, regardless of whether they are consultant contracts or contracts for services, must be awarded through a competitive process, unless there is an express statutory exception. SDMC § 22.3202. A sole source contract is one awarded without a competitive process. SDMC § 22.3003. A sole source contract must be supported by written certification by the City Manager or Purchasing Agent, stating why strict compliance with a competitive process would be unavailing or would not produce an advantage, and why soliciting bids or proposals would therefore be undesirable, impractical, or impossible. SDMC § 22.3016(a). The City may be able to employ CivicSD to perform the Proposed Services, under a sole source contract, with the proper justification and certification.¹⁴

The Purchasing Agent may approve certain consultant agreements on behalf of the City, without the need for Council approval. SDMC § 22.3207. “The Purchasing Agent may award a consultant contract without Council approval if: (1) the consultant contract does not exceed \$250,000; and (2) the total cumulative amount of contract awards to the consultant, including the current award, does not exceed \$250,000 in any given fiscal year.” SDMC § 22.3207(a). The monetary threshold for Purchasing Agent authority to award a consultant contract for a public works project without Council approval is \$1,000,000, as long as the public works project was previously identified and appropriated through the Annual Capital Improvements Program budget, the Annual Capital Improvements Program budget is the source of funding for the contract, and the total cumulative amount of contract awards to the consultant, including the current award, does not exceed \$1,000,000 in any given fiscal year. SDMC § 22.3207(b). All other consultant contracts must be approved by the Council. SDMC § 22.3207(c).

The Purchasing Agent may award contracts for services that do not exceed \$1,000,000; however, the Purchasing Agent must follow specific rules related to competitive bidding and specific evaluation criteria for proposals. *See* SDMC §§ 22.3203 (Competitive Process for Contracts for Goods and Services); 22.3206 (Award of Contracts for Goods and Services).

If CivicSD will provide the Proposed Services to the City as an alternative to the City’s classified employees providing those services, then the contract between the City and CivicSD

¹⁴ There is another exception related to contracts for services with agencies and nonprofit organizations that may be applicable, depending on what work CivicSD is authorized to perform. The Purchasing Agent may award contracts for services to certain agencies, including nonprofit corporations wholly owned by a public agency, provided that: (a) the Purchasing Agent has certified in writing that the contract furthers a specific public policy; (b) the Purchasing Agent has certified in writing that the contract is in the public interest; (c) the contract does not exceed \$500,000 per year; and (d) the Purchasing Agent considers three factors related to supervision of workers, provision of workers’ compensation insurance, and indemnification and defense of the City against all claims caused by the agency employees. SDMC § 22.3210. If CivicSD is performing maintenance work related to City-owned properties, this exception may be applicable.

must be approved by the Council, under the provisions of Charter section 117(c), regardless of provisions in the Municipal Code authorizing the Purchasing Agent to award a contract.

To determine with certainty whether an exception to the competitive process applies and whether a contract requires Council approval, a policy decision must be made as to what services the City desires CivicSD to perform. Questions to consider include: Will CivicSD provide expert consultant services that are not provided by the City's classified workforce? If CivicSD is providing services as an alternative to the City's classified workforce, then how will the determination that employment of CivicSD is more economical and efficient, while maintaining service quality and protecting the public interest, be made? Are represented employees currently providing any of the Proposed Services? If the City is not going to use a competitive process, then why is soliciting bids or proposals undesirable, impractical, or impossible?

IV. ANY CONTRACT BETWEEN THE CITY AND CIVICSD MUST SEEK TO PROTECT THE CITY FROM ANY ALTER-EGO LIABILITY, TO THE EXTENT THAT THE CITY CAN BE PROTECTED.

Despite being the sole member of CivicSD, under the Corporation's Bylaws, the City is not liable for the debts, liabilities, or obligations of the Corporation. Bylaws, art. 2, subsection 2.6. The business and affairs of the Corporation are managed, and all corporate powers are exercised by and under the direction of the Board of Directors. Bylaws, art. 3, subsection 3.1.

This provision in the Bylaws is consistent with the general rule that a member of a corporation, including a nonprofit corporation, is not liable for the debts, liabilities, or obligations of the corporation, unless the member owes money to the corporation or the alter ego doctrine applies. *ECC Construction, Inc. v. Ganson*, 82 Cal. App. 4th 572, 575-576 (2000). See also *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 538 (2000) ("Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations.").

In limited circumstances, courts will disregard the corporate entity, allowing for individual members, directors, or officers – the "alter egos" – to be held liable. This is also known as "piercing the corporate veil." "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests. . . . In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation." *Greenspan*, 191 Cal. App. 4th at 510 (citing and quoting *Andersen v. Abbott*, 321 U.S. 349, 361-363 (1944)).

In California, two conditions must be met before a court will apply the alter ego doctrine.

First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone.

Sonora Diamond Corp., 83 Cal. App. 4th at 538. A court will apply the alter ego doctrine when it is necessary to reach an equitable result. *Mesler v. Bragg Management Co.*, 39 Cal. 3d 290, 301 (1985). “A corporate identity may be disregarded – the ‘corporate veil’ pierced – where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation.” *Sonora Diamond Corp.*, 83 Cal. App. 4th at 538.

Among factors a court will consider in applying the alter ego doctrine is the disregard of corporate formalities. *Id.* at 539. A court may also consider the failure to maintain arm’s length relationships among related entities, and the use of a corporate entity to procure labor, services, or merchandise for another person or entity. *Associated Vendors, Inc. v. Oakland Meat Co., Inc.*, 210 Cal. App. 2d 825, 837 (1962).

As this Office explained in a 1991 Memorandum of Law, the Corporation, which was formerly known as CCDC, was created at the request of the Council “to allow for certain public benefit services to be performed by a legal entity separate from the City.” 1991 City Att’y MOL 894 (91-89; Oct. 29, 1991). The officers and employees of CivicSD, like those of the now-dissolved San Diego Data Processing Corporation and the Southeastern Economic Development Corporation, as well as the existing San Diego Convention Center Corporation, “are not protected under the City’s Civil Service rules and are not members of the City’s retirement system.” *Id.* This Office explained “it is important that the City maintain its independence from the corporations and allow each corporation to maintain its separate legal entity status.” *Id.*¹⁵

This Office recently reiterated the importance of maintaining separation between the City and the Corporation to limit risk to the City. City Att’y MS 743 (2009-3; Mar. 3, 2009) (MS-2009-3). As this Office explained, “[i]f the corporate veil is pierced, each defendant as to whom it is pierced is jointly and severally liable for the full amount of the corporation’s obligation. Alter ego liability is not apportioned according to the ownership of interests of each defendant.” *Id.* (citing *Minnesota Mining & Manufacturing Co. v. Superior Court*, 206 Cal. App. 3d 1025, 1028-1029 (1988)).

¹⁵ In 1991, this Office opined that nothing prohibited the City from auditing one of its wholly owned nonprofit, public benefit corporations, as long as any audit was conducted in a manner maintaining the distinction between the two legal entities. This Office wrote:

The only significant potential legal problem to conducting management audits, therefore, would be a requirement that the City conduct such audits in a manner consistent with the proposition that each corporation is separate and distinct from the City; that the officers and employees of each corporation are not City employees; and that the corporations are not merely “agents” of the City but are separate, legal entities responsible for their own acts and capable of entering into contracts on their own behalf, without City approval and without creating a City obligation. While the legal concept of “piercing the corporate veil” is generally involved in for-profit corporation situations, the concept has also been applied to a nonprofit corporation. *Macaluso v. Jenkins*, 420 N.E. 2d 251, Ill. (1981). Substantial financial issues would be involved in the event the various nonprofit corporations were held to be mere conduits and agents of the City. Any such possibility should therefore be avoided.

1991 City Att’y MOL 894 (91-89; Oct. 29, 1991).

As explained above, a public body may delegate the performance of administrative functions to a private entity if it retains ultimate control over administration so as to protect the public interest. *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.*, 69 Cal. App. 4th 287, 297-298 (1999). *See also Epstein v. Hollywood Entertainment District II Business Improvement District*, 87 Cal. App. 4th 862, 873 (2001) (stating that a public body may only delegate the performance of its administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest and a nonprofit corporation to which such administrative functions are delegated must comply with the same laws and regulations as the public entity that is delegating its authority). Therefore, any agreement between the City and CivicSD must contain provisions that clearly and specifically define the parameters of CivicSD's Proposed Services. Any agreement must also provide proper City oversight of the Corporation's work and protection for the City from any liability attributed to the Corporation or its officers or employees.

The Corporation may, under its Articles of Incorporation, "enter into agreements, contracts or memoranda of understanding with any public or corporate entity, including the City, in furtherance of the purposes for which the Corporation is formed." Articles of Incorporation, art. II. *See also* Bylaws, art. 1, subsection 1.2. However, a corporation to which administrative functions are delegated by a public entity must comply with the same laws and regulations as the public entity that is delegating its authority. *Epstein*, 87 Cal. App. 4th at 873. *See also* 81 Ops. Cal. Atty. Gen. 281 (1998) (stating when a community redevelopment agency used a nonprofit corporation to administer its housing activities, the nonprofit corporation was required to comply with the same laws applicable to the redevelopment agency itself, such as open meeting laws and public bidding and prevailing wage statutes).

Therefore, if the Corporation is negotiating contracts on behalf of the City that involve the City as a party to the contract, then the City must direct the Corporation, through express language in any consultant contract, to mandate that all contractors doing business with the City must comply with all applicable City contracting rules, including compliance with requirements related to prevailing wage, living wage, equal benefits, and others. There must also be a policy decision as to whether CivicSD will be authorized to enter into contracts on the City's behalf, without approval of the City. A broad delegation of this authority is highly risky, and legislative decisions, including decisions to spend public money, cannot be wholly delegated, as explained above.¹⁶

¹⁶ The Council has previously approved certain Purchasing and Contracting Policies governing CivicSD's contracting process on behalf of the Former RDA. *See* Corporation Policies 4.01 through 4.04, at <http://www.civicsd.com/about-us/corporation-policies.html>. However, these policies do not clearly apply to any contracts that CivicSD may enter into on behalf of the City as a municipal corporation. Article 6, subsection 6.2.2 of the Corporation's Bylaws states: "Any proposed changes to the Fiscal & Financial Policies, Purchasing & Contracting Policies and the Conflict of Interest Policy shall first be submitted to the Board for review and approval, then to the CFO of the City for review and comment (except the Conflicts of Interest Policy) and finally submitted to the Council for review and approval." Before the Council considers any future delegation of authority to CivicSD to contract on behalf of the City, as a municipal corporation, the Corporation's Purchasing and Contracting Policies must be appropriately updated to conform to the proposed delegation.

CONCLUSION

The City must comply with its obligations under the MMBA prior to a transfer of bargaining unit work to CivicSD or any other entity. Further, the City must ensure that it is complying with its contracting requirements and the Charter, including Charter section 117(c), in entering into a consultant contract with CivicSD to perform services on behalf of and at the request of the City. If the Successor Agency transfers non-housing properties to the City, and the City wants CivicSD to perform the Proposed Services related to such properties, then the City and CivicSD must enter into a new agreement to formally establish the terms under which CivicSD will perform the work. This must be a negotiated, arm's length transaction, and officers and employees for both the City and CivicSD must maintain the separate "personalities" of the Corporation and the City, its member, to minimize the risk to the City of alter ego liability due to conduct of the Corporation.

We note that the request of CivicSD before the Council is to ask the Mayor or his designee to explore alternatives and report back to the Council or a Council Committee, as appropriate. The requested action does not include a final decision on the staffing of any projects related to Future Development properties at this time. The compliance issues described in this Report and any other legal issues identified at a future date should be addressed prior to any final decision.

This Office recommends that, before the City makes any decisions related to employment of CivicSD or negotiates any agreement with CivicSD, the City's policymakers determine what staffing needs or objectives the City intends to accomplish by employment of CivicSD or any other consultant. Once that information is gathered, an appropriate analysis related to applicable procedural requirements can occur.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Kevin Reisch
Kevin Reisch
Chief Deputy City Attorney

By /s/ Joan F. Dawson
Joan F. Dawson
Deputy City Attorney