

RESOLUTION NUMBER R- 307147

DATE OF FINAL PASSAGE NOV 30 2011

A RESOLUTION OF THE COUNCIL OF THE CITY OF
SAN DIEGO APPROVING AND RATIFYING AN
AGREEMENT BETWEEN THE CITY AND SAN DIEGO
MUNICIPAL EMPLOYEES' ASSOCIATION REGARDING
THE SPSP WAIVER ELECTION.

WHEREAS, in Fiscal Years 2010 and 2011, under agreement between the City of San Diego and the San Diego Municipal Employees' Association (MEA), MEA-represented employees who were eligible for the Supplemental Pension Savings Plan (SPSP) were given an "election" between a 3% salary reduction and waiving their 3% employer matching contribution to the SPSP, which was a match on the SPSP employee mandatory contribution; and

WHEREAS, in Fiscal Year 2012, under agreement between the City and MEA, MEA-represented employees who were eligible for SPSP were given an "election" between a waiving their 3% employer matching contribution to SPSP and a salary reduction in the form of 52 hours of unpaid furlough; and

WHEREAS, the election between the SPSP employer matching contribution and reduced pay, whether or not accompanied by furlough, is referred to throughout this Resolution as the "SPSP Waiver Election"; and

WHEREAS, the SPSP Waiver Election was first available to MEA-represented employees effective the pay period ending July 24, 2009; and

WHEREAS, in March 2011, tax counsel advised the City that the SPSP Waiver Election constitutes a "cash or deferred arrangement" (CODA) under federal tax laws; and

WHEREAS, the SPSP Plan did not have the required Internal Revenue Code (IRC) section 401(k) provisions and did not have provisions allowing employees to waive the employer matching contribution, the SPSP Waiver Election was a non-qualified CODA and also conflicted with the SPSP Plan document; and

WHEREAS, the affected MEA-represented employees are not responsible for the creation of the non-qualified CODA and had no notice that their non-waived SPSP employer contributions would become taxable; and

WHEREAS, to preserve the SPSP Plan's tax qualification, the San Diego City Council (City Council) adopted San Diego Resolution R-306805 (R-306805) on May 10, 2011, approving prospective and retroactive amendments to the SPSP Plan document allowing employees to waive the mandatory employee contribution and the matching employer contribution in compliance with IRC section 401(k); and

WHEREAS, R-306805 also approved the filing of a Voluntary Correction Program (VCP) application with the Internal Revenue Service (IRS) Employee Plans Compliance Resolution System (EPCRS) to seek IRS approval for the retroactive plan amendments; and

WHEREAS, as a result of the SPSP Plan amendments, the employer matching contribution (made on behalf of employees who chose not to waive the contribution) is treated as an "elective deferral" in the same manner as an employee contribution to the City's 401(k) Plan; and

WHEREAS, the employer matching contributions are therefore subject to the IRC section 402(g) annual dollar limit on elective deferrals; and

WHEREAS, in determining whether an employee exceeded the IRC section 402(g) limit in any year, the City must add the non-waived employer matching contributions to the elective deferrals the employee made to the City's 401(k) Plan in each year, and test the total against the annual limit; and

WHEREAS, the City must now issue corrected 2009 and 2010 W-2s to all of the MEA-represented employees who chose not to waive the employer matching contributions in those years, except for employees who: (1) are not covered by Medicare, and also (2) did not exceed the IRC section 402(g) limit in either year; and

WHEREAS, unlike employer contributions to a qualified retirement plan, elective deferrals under IRC section 401(k) are subject to Medicare taxes; and

WHEREAS, therefore, the corrected 2009 and 2010 W-2s issued to MEA-represented employees who chose not to waive the SPSP employer matching contribution will report additional wages subject to Medicare taxes; and

WHEREAS, the City wishes to compensate the affected MEA-represented employees for the adverse effects caused by these unforeseeable Medicare taxes; and

WHEREAS, all of the MEA-represented employees who exceeded the IRC section 402(g) limit in either 2009 or 2010 (Excess Deferral Employees) will receive corrected W-2s for the years in which they exceeded the limit, which will report additional wages subject to state and federal income taxes; and

WHEREAS, the Excess Deferral Employees will also receive distributions from their City 401(k) Plan accounts in the amount of their excess deferrals in 2009 and 2010, as adjusted by gains or losses in the year in which the excess deferral was made, and will receive Form 1099-Rs showing the excess deferral amounts as taxable distributions to them in the year of distribution; and

WHEREAS, absent action by the City Council, these employees would be penalized, through no fault of their own, by double taxation of their “excess deferrals” in 2009 and 2010; and

WHEREAS, the City Council wishes to compensate the Excess Deferral Employees for the adverse effects caused by the re-characterization of the SPSP employer matching contributions as elective deferrals by paying the federal and state income taxes on the excess deferral amounts in the year of deferral; and

WHEREAS, the City is taking steps to ensure that employees do not exceed the IRC section 402(g) limit in 2011 or 2012, thereby preventing double-taxation of employees in those years; and

WHEREAS, from October 10 through November 4, 2011, the City’s representatives met and conferred with MEA regarding the manner in which the City would compensate MEA-represented employees affected by the City’s correction of the tax failures arising out of the SPSP Waiver Election; and

WHEREAS, on November 4, 2011, the City’s representatives and representatives of MEA reached agreement regarding the manner in which the City would compensate MEA-represented employees regarding the manner in which the City would compensate MEA-represented employees affected by the City’s correction of the tax failures arising out of the SPSP Waiver Election (Agreement); and

WHEREAS, the Agreement incorporates by reference and is to be read with the Memorandum of Understanding between the City and MEA approved by the City Council by San Diego Resolution R-305370 on October 27, 2009, and the Addendum between the City and the MEA approved by the City Council by San Diego Resolution R-306776 on April 11, 2011; and


WHEREAS, the Agreement is not binding upon the City Council until it is approved by the City Council by resolution; and

WHEREAS, the Agreement is now being submitted to the City Council for determination; NOW, THEREFORE,

BE IT RESOLVED, that the Council of the City of San Diego approves the "Agreement between the City of San Diego and the San Diego Municipal Employees' Association Regarding the Supplemental Pension Savings Plan Waiver Election," which is on file in the Office of the City Clerk as Document No. R-307147

BE IT FURTHER RESOLVED, that the City Council authorizes the expenditure of necessary funds to implement the Agreement.


APPROVED: JAN I. GOLDSMITH, City Attorney

By  _____
Roxanne Story Parks
Deputy City Attorney

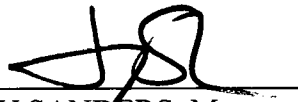
RSP:ccm
11/7/2011
Or.Dept:Human Resources
Doc. #273628

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of ~~NOV 15 2011~~

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 11.30.11
(date)


JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor