

RESOLUTION NUMBER R-308282

DATE OF FINAL PASSAGE JUL 02 2013

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN DIEGO AUTHORIZING ~~AND DIRECTING~~ ^{BF} THE MAYOR and direct TO EXECUTE A FIRST AMENDMENT TO THE CITY'S AGREEMENT WITH MALLORY SAFETY AND SUPPLY, LLC AND AUTHORIZING THE CHIEF FINANCIAL OFFICER TO EXPEND AN AMOUNT NOT TO EXCEED \$1,000,000 FOR PURPOSES OF EXECUTING THIS FIRST AMENDMENT.

WHEREAS, in February 2012, the City's Office of Homeland Security entered into a participation agreement with Mallory Safety and Supply, LLC for the use of U.S. Communities Contract No. 4600001128; and

WHEREAS, the purpose of entering into such an agreement was to have the ability to procure specialized equipment in an expedited manner that would comply with all legal requirements and provide efficient delivery of products while obtaining the best value through competition; and

WHEREAS, since the issuance of the City's participation agreement with the Mallory Safety and Supply, LLC's (Mallory) cooperative procurement contract, the City's Office of Homeland Security (OHS) has procured grant funded specialized equipment; and

WHEREAS, to date, the City has issued purchase orders via this participation agreement totaling \$733,559, of which \$566,694 is for equipment procured by OHS and the balance was used for automated external defibrillators purchased for several City departments; and

WHEREAS, OHS projects to spend additional grant funds to procure specialized safety equipment; and

WHEREAS, all equipment procured by OHS must be approved by the Federal Department of Homeland Security and support the goals and objectives identified in the Federal Homeland Security Grant Program Security Strategy; and

WHEREAS, the estimated costs of this first amendment is an additional not to exceed amount of \$1,000,000, bringing the total amended contract not to exceed amount to \$2,000,000; and

WHEREAS, the participation agreement and this first amendment with Mallory does not obligate the City to procure goods and services; and

WHEREAS, City purchase orders are issued under this participation agreement as needed; and

WHEREAS, purchases made pursuant to this first amendment will be for grant related expenditures; and

WHEREAS, these grants are reimbursable in nature, requiring the City to expend funds prior to requesting reimbursement; and

WHEREAS, expenditures will be initially sourced from the City's General Fund, and then reimbursed from the corresponding grant program; NOW THEREFORE,

BE IT RESOLVED, that the City Council of the City of San Diego hereby authorizes ~~and~~ ~~and~~

~~BF~~ ~~directs~~ the Mayor or his designee to execute, for and on behalf of the City, a first amendment to ~~directs~~ the participation agreement with Mallory Safety and Supply, LLC for the use of U.S.

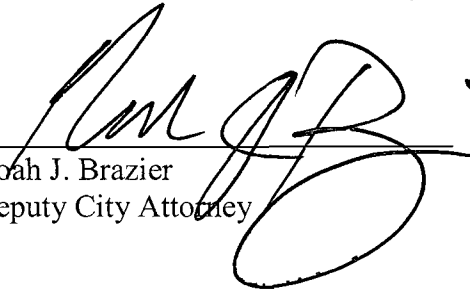
Communities Contract No. 4600001128 for an additional one year period.

BE IT FURTHER RESOLVED, that the City Council of the City of San Diego also

~~BF~~ authorizes ~~and~~ ~~directs~~ its Chief Financial Officer to expend an amount not to exceed \$1,000,000 and ~~directs~~

during the one year period covered by the first amendment to the participation agreement with
Mallory Safety and Supply, LLC.

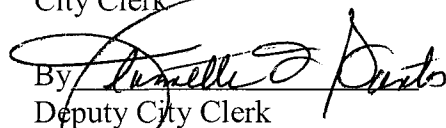
APPROVED: JAN I. GOLDSMITH, City Attorney

By 
Noah J. Brazier
Deputy City Attorney

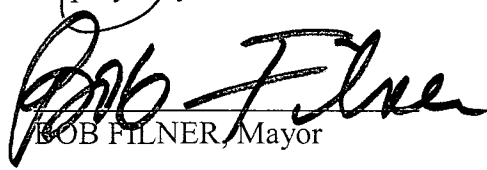
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05/09/13
06/13/13 Cor. Copy
Or.Dept:PSE
Doc. No. 559656_3

I hereby certify that the foregoing Resolution was passed by the Council of the City of San
Diego, at this meeting of JUN 18 2013.

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 7/2/13
(date)
(with amendments)


BOB FILNER, Mayor

Vetoed: _____
(date)

BOB FILNER, Mayor

*Pursuant to the attached City Attorney Memorandum of Law dated July 15, 2013,
the strike-out amendments to this resolution have been deemed ineffectual.
The Resolution, as passed by the Council on June 18, 2013, is effective on the
day the Resolution was returned to the Office of the City Clerk with the
Mayor's approval, that date being July 2, 2013.

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY
CATHERINE M. BRADLEY
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
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MEMORANDUM OF LAW

DATE: July 15, 2013
TO: City Clerk
FROM: City Attorney
SUBJECT: Effect of Mayor's Approval of Resolution with Amendments

INTRODUCTION

On June 18, 2013, the Council passed a resolution that: (1) "authorizes and directs the Mayor or his designee" to execute an amendment to the agreement with Mallory Safety and Supply, LLC.; and (2) "authorizes and directs its Chief Financial Officer" to expend an amount not to exceed \$1,000,000 for the agreement. *See*, Resolution No. R-308282. On June 20, 2013, the resolution was transmitted by the Clerk to the Mayor for approval or veto within ten business days. *See*, Charter § 280(c).

On July 2, 2013, the Mayor timely returned the resolution to the Clerk. However, he struck out the words "and directs" in the two action items described above, and in the title of the resolution. The Mayor signed the resolution indicating his approval of the resolution "with amendments." A copy of the resolution is attached for your reference.

QUESTION PRESENTED

What is the effect of the Mayor's approval of a resolution "with amendments"?

SHORT ANSWER

The Mayor's attempt to amend the resolution is not permitted by the City Charter. Such amendments are ineffective and the approval of the resolution is deemed absolute. The final date of passage is the day the resolution was returned to the City Clerk with the Mayor's approval.

ANALYSIS

I. THE MAYOR MAY APPROVE OR VETO A RESOLUTION OR ORDINANCE ONLY AS PERMITTED BY THE CHARTER.

The Mayor has the power to approve or veto all resolutions and ordinances passed by the Council, with certain exceptions. Charter § 280. The Mayor can act only in the Charter-specified mode and can exercise only the granted powers. If the Mayor attempts to exercise them in a different mode, or to exercise powers not given, his or her act will be wholly ineffectual and void for any and every purpose. *See, Lukens v. Nye*, 156 Cal. 498 (1909). When the Mayor goes beyond the limits of these powers in the attempt to exercise them, the acts, so far as they transcend the powers, are of no force. *Id.*

The process for the Mayor to approve or veto a resolution or ordinance passed by the Council is set forth in Charter section 280(c):

The following shall apply to each resolution and ordinance that has been passed by the Council and is subject to the Mayor's veto:

(1) Each such resolution or ordinance shall, within forty-eight hours of passage, be transmitted to the Mayor by the City Clerk with appropriate notations of the action taken by the Council.

(2) The Mayor shall act upon each resolution or ordinance within ten business days of receiving the City Clerk's transmittal.

(3) *The Mayor shall either approve the resolution or ordinance by signing and returning it to the City Clerk within the specified time limit, or shall veto any resolution or ordinance and return it to the City Clerk with his or her written objections within the specified time limit.* (Emphasis added).

(4) Failure to return the resolution or ordinance within the specified time limit shall constitute approval and such resolution or ordinance shall take effect without the Mayor's signed approval. The City Clerk shall note this fact on the official copy of such resolution or ordinance.

There is no provision in the Charter for the Mayor to approve a resolution or ordinance "with amendments." The Charter authorizes a modification or line-item veto by the Mayor in only two instances: the salary ordinance and the budget. With respect to the salary ordinance, the Mayor must "either approve the ordinance as introduced or veto all or any specific provision within the ordinance." Charter § 290(a)(1). With the budget, the Mayor must "either approve, veto, or modify any line item approved by the Council." Charter § 290(b)(2)(A). In both instances, the Council has an opportunity to consider the Mayor's modifications before the final actions are approved. Charter §§ 290(a)(2) and (b)(2)(B).

For all other resolutions and ordinances subject to the Mayor's veto, the Mayor has three choices: (1) approve the resolution or ordinance in the form passed by the Council; (2) veto the resolution or ordinance; or (3) let the Council action take effect by failing to return the resolution or ordinance within the specified time limit. Charter § 280(c).

II. THE AMENDMENTS TO THE RESOLUTION ARE INEFFECTIVE.

In this case, the Mayor approved the resolution "with amendments." The amendments were done by crossing out the words "and directs." Unless the Charter permits modification, the resolution must be approved as a whole. *Lukens v. Nye*, 156 Cal. 498 (1909). In *Lukens*, the court explained that the governor must approve a bill, without qualification:

The same principles apply when the power of the governor as a legislative instrumentality is involved. He may act only in the prescribed mode, and may exercise only the powers enumerated, or necessarily implied. In the case of a bill containing several items of appropriation of money, he may approve one or more of them, and object to the others. (citation omitted). In no other case is he empowered to modify or change the effect of a proposed law, or to do anything concerning it except to approve or disapprove it as a whole. . . . If he approves a proposed bill, his duty requires him to sign it as evidence of such approval. This approval, except in the [appropriation of money], must be of the bill as a whole, and without qualification. *Any attempt on his part to attach to his approval any qualification, or to withhold his consent to a part of the law and give it to other parts, will either be entirely nugatory and ineffectual, and leave the approval absolute, or it will completely nullify the approval and operate as a veto of the whole bill.* (Emphasis added).

Id. at 503.

The court in *Lukens* suggests that the result is to leave the approval absolute or completely nullify the approval and operate as a veto. However, the Mayor's veto of a resolution without providing the reasons for the veto also is ineffectual. In *Casey v. Dadmen*, 191 Mass. 370 (1906), the court held that when a mayor vetoes a council's action but fails to state the reasons, his disapproval is "unavailing and of no effect."¹ The mayor must state his objections so the council can consider the objections, and determine whether it is right or wrong. *Id.* Accordingly, the attempt to amend the resolution by merely striking out some of the language, would not operate as an effective veto.

¹ Similarly, a mayor's letter to the common council suggesting amendments were ineffective where he was required to return the resolution with his objections to the city clerk. *Kittinger v. Buffalo Traction Co.*, 160 N.Y. 377, 383 (1899).

III. THE RESOLUTION IS EFFECTIVE ON THE DAY RETURNED TO THE CITY CLERK WITH THE MAYOR'S APPROVAL.

In *Pulskamp v. Martinez*, 2 Cal. App. 4th 854 (1992), the mayor mistakenly signed an ordinance that he had planned to veto. The time to approve or veto the ordinance had not passed so the mayor retrieved the ordinance from the clerk and returned it the same day with his veto. However, the court held the ordinance became effective once the mayor relinquished possession of the ordinance with his signature and transmitted it to the city clerk. The court explained the mayor's authority as follows:

The fact that the Los Angeles City Charter requires the mayor to approve an ordinance, either by his signature or through inaction, only demonstrates that the mayor is vested with discretionary power over the law-making authority of the council. Under such a governing scheme, the mayor, while considering an ordinance presented to him for his approval, is acting in his legislative capacity (citations omitted); and the requirement of his signature "is for the purpose of registering his approval of the measure." (citation omitted) . . . Moreover, under the Los Angeles City Charter, an ordinance is still in the process of being adopted while it is in the possession of the mayor. (citation omitted). During the time the legislation is under his custody and control, there is nothing to prevent the mayor from reconsidering any action as to his approval or disapproval of the ordinance. However, as demonstrated by decisions from this state and other jurisdictions, it must be concluded that *once a chief executive has relinquished possession of legislation with his signature and transmitted it to the appropriate depository agent (in our case the city clerk), the measure's character as a properly enacted law becomes immutable.* (Emphasis added).

Id. at 862-863.

The court gave three reasons why the mayor could not change his decision on an ordinance after transmitting it to the City Clerk:

Besides reassuring the city's population and its departments of government that they can rely on the action of the mayor, our decision today also serves other salutary purposes. First, it emphasizes the obvious: elected officials must give the governmental documents they sign meaningful review. Each stage of the legislative process should be afforded careful deliberation and thought by the persons whom the public has entrusted with the power to make law. Second, it avoids the difficult situation of having the judiciary pass judgment on the veracity of the testimony of a chief executive who serves as the head of a co-equal branch of government. Lastly, it discourages politicians from using the legislative process to launch trial balloons to gauge the direction of the political winds. For example, a mayor or governor facing a backlash for approving what results to be unpopular legislation, should not be permitted to undo his or her action by conveniently announcing it was all a mistake.

Id. at 865-866

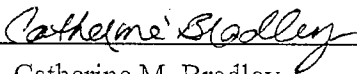
In this case, the Mayor approved the resolution and returned it to the City Clerk, but with some of the language crossed-out. The Charter does not allow the Mayor to approve a resolution with qualifications or amendments, except for the salary ordinance and budget. Accordingly, the amendments are ineffective. The approval, on the other hand, was effective once the resolution, signed by the Mayor, was returned to the City Clerk.

CONCLUSION

The Charter provides that the Mayor can approve or veto all resolutions and ordinances of the Council, with certain specified exceptions. Except for the salary ordinance and budget, the approval must be of the resolution or ordinance as a whole. That is, the resolution or ordinance must either be approved in its entirety, or vetoed with written objections. If the Mayor fails to act, the resolution or ordinance will be approved without the Mayor's approval.

The Mayor's attempt to qualify his approval of a resolution by striking out language is ineffectual because it is not authorized by the Charter. The resolution, as passed by the Council on June 18, 2013, is effective on the day the resolution was returned to the City Clerk with the Mayor's approval, July 2, 2013.

JAN I. GOLDSMITH, CITY ATTORNEY

By 
Catherine M. Bradley
Deputy City Attorney

CMB:sc
Attachment
cc: Honorable Mayor and Councilmembers
ML-2013-11
Doc. No. 597406

JUN 18 2013

Passed by the Council of The City of San Diego on _____, by the following vote:

Councilmembers	Yeas	Nays	Not Present	Recused
Sherri Lightner	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Kevin Faulconer	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Todd Gloria	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Myrtle Cole	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mark Kersey	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lorie Zapf	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Scott Sherman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
David Alvarez	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Marti Emerald	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Date of final passage JUL 02 2013

AUTHENTICATED BY:

BOB FILNER
Mayor of The City of San Diego, California.

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California.

(Seal)

By *Janette J. Sants*, Deputy

Office of the City Clerk, San Diego, California
Resolution Number R- <u>308282</u>