



THE CITY OF SAN DIEGO

M E M O R A N D U M

DATE: June 15, 2010

TO: Council President Ben Hueso and Members of the Committee on Rules, Open Government, and Intergovernmental Relations

FROM: David Jarrell, Deputy Chief Operating Officer, Public Works

SUBJECT: Supplemental Materials for New Central Library- Item #3, June 16, 2010

The attached items regarding Equal Opportunity Contracting and Charter Section 99 are being provided as supplemental information pertaining to the New Central Library Item scheduled to be heard by the Rules, Open Government, and Intergovernmental Relations Committee on June 16, 2010.

If you have any questions, please contact Darren Greenhalgh, Deputy Director, Engineering and Capital Projects, at 533-6600.

A handwritten signature in black ink, appearing to read "David Jarrell".

David Jarrell

Attachments: Equal Opportunity Contracting Summary
June 14, 2010 Letter from Turner Construction re: Subcontracting Outreach and Participation
Turner Construction- Outreach Components
June 8, 2010, Memorandum of Law from the City Attorney- Charter Section 99

Cc: Honorable Mayor Jerry Sanders
Honorable Jan Goldsmith, City Attorney
Thomas Zeleny, Deputy City Attorney
Debra Fischle-Faulk, Director of Administration
Deborah Barrow, Director, Library Department
Patti Boekamp, Director, Engineering and Capital Projects Department



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: June 15, 2010

Item #: 3

ATTENTION: Rules Committee

SUBJECT: San Diego New Central Library

EQUAL OPPORTUNITY CONTRACTING SUMMARY:

Turner Construction commits to awarding 20-30% of their subcontracting opportunities to Minority Woman and Disadvantaged Business Enterprises (M/W/DBE) and 1-3% to Disabled Veteran Business Enterprises (DVBE). At this point in Turner's process they are achieving 16.8% M/W/DBE and 2.5% DVBE (19.3% total) participation. Turner is currently committed to a minimum of 85% local subcontractors and labor.

Total M/W/DBE participation is expected to increase once their contract with the City is awarded. Prior to award, Turner is unable to disclose the Prime and 2nd tier subcontractors, as it will jeopardize the confidential nature of the competitive bidding process that has been approved by the City. Turner has an approved EO Plan on file dated October 2009. EO plans approvals are granted for two years.



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June 14, 2010

City of San Diego
202 "C" Street
San Diego, CA 92101

ATTN: Honorable Mayor Jerry Sanders
Honorable City Council

SUBJECT: Subcontracting Outreach and Participation on the New Central Library

Mayor Sanders & Members of the City Council:

As Turner Construction Company's local Vice-President of Operations, I would like to express our unwavering commitment to ensure the New Central Library Project, as a whole, will include a diverse group of prime and second tier subcontractors. The scope and size of this project provides significant contracting opportunities at all levels. We require our prime contractors to share our same commitment of inclusion.

In our Outreach Proposal, we committed to awarding 20-30% of our subcontracting opportunities to Minority, Woman and Disadvantaged Business Enterprises (M/W/DBE) and 1-3% to Disabled Veteran Business Enterprises (DVBE). At this point in our process we are achieving 16.8% M/W/DBE and 2.5% DVBE (19.3% total) participation. We are also currently committed to a minimum of 85% local subcontractors and labor.

Our reputation is based upon being a leader in the industry for creating opportunities for Underutilized Business Enterprises as well as making sure these firms are members of our local community. Therefore, I am giving you Turner Construction Company's and my personal commitment that we will achieve a minimum of 20% M/W/DBE participation on this project. To further demonstrate our commitment, we will hold one of our 14 week Turner School of Construction Management Programs exclusively for City of San Diego Small Local Business Enterprise Program participants.

Total M/W/DBE participation is expected to increase once our contract with the City is awarded. Prior to award, we are unable to disclose the Prime and 2nd tier subcontractors, as it will jeopardize the confidential nature of the competitive bidding process that has been approved by the City.

Sincerely,

TURNER CONSTRUCTION COMPANY

Ron Rudolph
Vice-President Operations

cc. Debra Fischle-Faulk – San Diego City Administration Dept. Director
Rick Bach – Senior Vice-President, Turner
S. Rosenberger – Vice President, Turner

Turner Construction New Central Library Outreach Components

Turner Construction fully understands the importance of aggressive outreach efforts as it relates to the New Central Library project. The New Central Library is a large public works project that should help stimulate the local economy and support the City's commitment to inclusion. To ensure we maintain our commitment to inclusion, Turner has developed the following strategies:

3rd Party Outreach Consultant

The 3rd Party Outreach Consultant is JLC Consultants, currently very active in both outreach to DBE, MBE, WBE, & DVBE certified companies as well as promoting the new City SLBE Program Certification process.

Alternative Delivery Methods – Best Value

Contracts will be awarded based on a combination of factors rather than price alone. This process allows for a comprehensive evaluation process that takes into consideration factors such as safety, experience, financial stability, commitment to equal opportunity in contracting, etc.

Local Preference

Potential bidders will receive points based on their zip code in relation to the construction address of the New Main Library. Firms located within a 50 mile radius of the project receive extra points. This automatically includes all zip codes in SD County.

Apprenticeship/Mentoring program that encourages opportunities throughout the contract

Apprenticeship requirements are included in our contract with the City. The utilization of apprentices is a requirement on City public works projects valued at least \$1,000,000. We will monitor our subcontractors' compliance with this requirement.

The mentoring program will be included in the project. Currently, the City of San Diego has mentor protégés who are looking forward to working on the project. One of the mentor protégé companies has recently graduated from the Turner School of Construction Management. During that 14 week program, the mentor protégé received intense training in the study of many construction management disciplines. We look forward continuing their education through a such program. This mentor protégé project participation will include training and on-the-job mentoring for the length of the project.

Contract Sizing

Contracts will be reviewed and evaluated to determine whether or not they can be broken into smaller packages to provide direct contracting opportunities for a diverse pool of small local contractors.

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
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MEMORANDUM OF LAW

DATE: June 8, 2010
TO: Afshin Oskoui, City Engineer
FROM: City Attorney
SUBJECT: Approval of the Eighth Amendment to the Architectural and Engineering Contract for the New Central Library under San Diego Charter Section 99.

INTRODUCTION

This month, the Mayor and City Council will be asked to decide whether to proceed with construction of the New Central Library (Project). Construction is estimated to cost \$185 million, paid for through a combination of Redevelopment Agency funds, a state grant, funding from the San Diego Unified School District, and anticipated private donations.

The architect and engineer for the project is a Joint Venture consisting of Rob Wellington Quigley Architects (Quigley), and Tucker Sadler Noble Castro Architects (Tucker Sadler). Quigley was hired on October 2, 2000. The Joint Venture assumed responsibility for the Project on July 30, 2001. The architectural and engineering (A&E) contract with the Joint Venture needs to be amended for the firm to support the Project during construction. If approved, this will be the eighth amendment to the A&E contract.

To proceed with the Project, the City Council will be asked to approve this eighth amendment and a new Construction Manager at Risk (CM@Risk) contract with Turner Construction for construction services. The eighth amendment will require approval by ordinance and a two-thirds vote pursuant to San Diego Charter Section 99 (Section 99). The CM@Risk contract only requires approval by resolution and five votes of the City Council. You have asked if the CM@Risk contract is approved by resolution but the eighth amendment fails to receive the six votes required to pass the ordinance, whether a new, separate A&E contract for same services described in the eighth amendment would require approval by ordinance or resolution.

QUESTION PRESENTED

Would a new contract for A&E services need to be approved by resolution or by ordinance with a two-thirds vote of the City Council?

SHORT ANSWER

A new A&E contract for the Project may be approved by resolution of the City Council.

ANALYSIS

This appears to be a question of first impression. We are not aware of any prior instance where the City Council rejected a contract amendment required to be approved by ordinance, only to revisit it later as a new contract for approval by resolution. A search of this Office's prior opinions failed to reveal anything on point. A search of published court opinions met with the same result. Although Section 99 is based on the debt limitation provisions in article XVI, section 18 of the California Constitution, the ordinance requirement of the last sentence of Section 99 is unique and not part of those constitutional provisions:

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. The 1968 ballot language accompanying the last revision to Section 99 explains that the purpose of this language is to require any contract "of more than five years" to be approved by two-thirds of the City Council and then subject to referendum. The eighth amendment falls within this language of Section 99 because the original agreement was executed in 2000, making this contract as amended longer than five years.¹

To determine whether Section 99 would apply to a new A&E contract, we turn to the rules of statutory interpretation:

Rules of statutory interpretation are to be applied to charters. If the language of the provision is free of ambiguity, it must be given its plain meaning; rules of statutory construction are applied only where there is ambiguity or conflict in the provisions of the charter or statute, or a literal interpretation would lead to absurd consequences.

Castaneda v. Holcomb, 114 Cal. App. 3d 939, 942 (1981) [citations omitted]. 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). Other rules of interpretation only apply if the statutory language does not provide a clear answer. *Mason v. Retirement Board of the City and County of San Francisco*, 111 Cal. App. 4th 1221, 1227 (2003).

¹We note a prior opinion of this Office concluded, without analysis, that an amendment which by itself does not exceed five years does not need an ordinance under Section 99 even if the cumulative term of the original agreement and any amendments exceeds five years. See City Att'y MOL No. 91-98 (Nov. 29, 1991). As this has not been the practice of this Office for the last several years, and insofar as that conclusion conflicts with this opinion, this Office's advice from nearly twenty years ago should be disregarded.

We find no ambiguity in Section 99 as it applies to a new contract.² The ordinance requirement of Section 99 applies to a “contract, agreement or obligation extending for a period of more than five years.” If a new contract is anticipated to last longer than five years, it must be approved by ordinance. Otherwise, the contract may be approved by resolution. Here, a new A&E contract would only incorporate the work described in the eighth amendment, which will be finished in less than five years. A new A&E contract may therefore be approved by resolution.

We acknowledge that if the City solicits proposals for a new A&E contract, the Joint Venture may respond and be selected. The Joint Venture is familiar with this Project. The City must select its A&E consultants based on their relative qualifications. Council Policy 300-07; Cal. Gov’t Code § 4526.

An ordinance is not required even if consecutive contracts cumulatively exceeding five years are awarded to the same firm. There is nothing in Section 99 to suggest that we should look beyond the term of each individual contract in determining whether it exceeds five years. The City’s practice has been to award new contracts of five years or less by resolution, even if the same firm provided the services previously and together the prior and new contracts exceed five years. *See* San Diego Resolutions R-301243 (Mar. 1, 2006) and R-293556 (Jul. 24, 2000) [separately authorizing two consecutive five-year agreements with Luth & Turley for as-needed remediation of water main breaks and sewer backups]; *see also* San Diego Resolutions R-301549 (Jun. 20, 2006) and R-296928 (Aug. 5, 2002) [separately authorizing two consecutive four-year contracts with Scripps Institution of Oceanography to study the impact of treated sewage on the Point Loma kelp forest]; *see also* San Diego Resolutions R-304952 (Jun. 2, 2009) and R-304215 (Oct. 24, 2008) [authorizing a new five year agreement with Macias Gini & O’Connell for outside audit services where the firm had been auditing the City’s financial statements since 2004 and the firm was the only bidder to respond to the City’s request for proposals]. An incumbent firm would be placed at a competitive disadvantage if a second contract with the incumbent has to be approved by ordinance and a two-thirds vote, while award of the same contract to a new firm could be approved by resolution.

This opinion should not be seen as an invitation to break up projects into separate contracts rather than amendments to avoid the ordinance requirement of Section 99. Intentionally breaking up what would logically be a single contract into smaller transactions to avoid City Council review will render the transactions void. *Gamewell Fire Alarm Telegraph Co. v. City of Los Angeles*, 45 Cal. App. 149 (1919) [separating the purchase of seventy police signal-boxes into individual transactions of less than \$500 with the intent to evade a two-thirds vote of the Los Angeles city council made the transactions void and unenforceable]. If the City Council votes to construct the New Central Library by approving the CM@Risk contract, but the eighth amendment to the A&E contract fails to receive the required two-thirds vote, only then should the City issue a request for proposals for a new A&E contract.

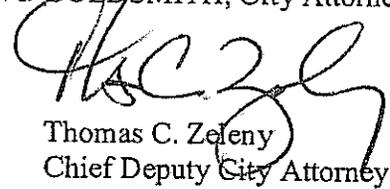
²We recognize this Office has found ambiguity in Section 99 as to whether it applies to contracts not involving the expenditure of City funds, a situation not involved here. *See* City Att’y MOL 98-14 (Jun. 4, 1998). That opinion is currently being revisited by this Office.

CONCLUSION

A new A&E contract to support the construction of the New Central Library may be approved by resolution. The plain language of Section 99 requires an ordinance and a two-thirds vote of the City Council only for contracts of over five years, without mention of any prior contractual relationship that may have existed with the City. If a contract is amended to exceed a total of five years, the amendment must be approved by ordinance. A new contract of five years or less may be awarded by resolution, even if the firm provided the same or similar services to the City immediately preceding the award of the new contract.

JAN I. GOLDSMITH, City Attorney

By



Thomas C. Zeleny
Chief Deputy City Attorney

TCZ:mb
ML-2010-11