

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

THOMAS C. ZELENY
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

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

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

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