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MEMORANDUM OF LAW

DATE: July 14, 2015

TO: Dennis Gakunga, Director, Purchasing and Contracting Department

FROM: City Attorney

SUBJECT: Overview of City Charter and Municipal Code Requirements for City Contracts

INTRODUCTION

This MOL focuses on the procurement of goods, services, and consultants, and supplements the Memorandum of Law (MOL) issued by this Office on December 18, 2009 (2009 MOL). 2009 City Att’y MOL 332 (2009-20; Dec. 18, 2009). The 2009 MOL summarized important contracting requirements described in the San Diego Charter (Charter), the San Diego Municipal Code (Municipal Code), Council Policies, Administrative Regulations, and other applicable legal authorities. This MOL provides an overview of City contract requirements, discusses Municipal Code revisions that took effect after the 2009 MOL was issued, and provides supplemental information concerning sole source procurements, cooperative procurements, and contracts with agencies and non-profit organizations.

QUESTIONS PRESENTED

1. When is competitive bidding required and are there any exceptions?
2. When is City Council approval required?
3. Who has authority to execute City contracts, and whose signatures are required to legally execute a City contract?
4. What are the requirements related to funding City contracts?
5. Which provisions and certifications must the City include in its contracts?

SHORT ANSWERS

1. The Municipal Code, Council Policies, and Administrative Regulations discuss requirements for the competitive bidding, advertisement, and award of goods, services, and consultant contracts. Exceptions to competitive bidding for certain contracts, such as emergency,

sole source, cooperative procurement, and contracts with agencies and non-profit organizations, are described in the Charter and Municipal Code.

2. Charter section 99 requires City Council approval by ordinance, by a two-thirds' vote, for contracts exceeding five years that involve the expenditure of funds. In addition, City Council approval is required for certain contracts that meet or exceed the contract dollar amount set forth in the Municipal Code.

3. The Mayor or his or her designee has authority to execute City contracts for those departments under the Mayor's control. To be valid, contracts must be signed by the Mayor or designee, the contractor, and the City Attorney.

4. Charter section 80 requires the Chief Financial Officer¹ to certify that funds are available, or will be available, and are not otherwise encumbered before the City enters into a contract involving fiscal obligations.

5. The City must include certain provisions and certifications as identified in the Municipal Code and Council Policies.

ANALYSIS

San Diego is a charter city, which means that it has the power to govern its own "municipal affairs." Cal. Const. art. XI, § 5. The City's power to govern its municipal affairs is subject only to the explicit limitations and restrictions contained in its charter and the state and federal constitutions. Generally, a charter city has discretion to develop its own contracting rules and procedures for municipal contracts as long as they do not conflict with the city's charter. *First Street Plaza Partners v. City of Los Angeles*, 65 Cal. App. 4th 650, 661 (1998). The Charter, Municipal Code, Council Policies, Administrative Regulations and other pertinent authorities describe the City's general contracting requirements in further detail. Failure to follow these requirements may result in a finding that a contract is void or unenforceable² against the City. See *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994); *G.L. Mezzetta, Inc. v. City of American Canyon*, 78 Cal. App. 4th 1087, 1094 (2000); *Katsura v. City of Buena Ventura*, 155 Cal. App. 4th 104, 109-10 (2007).

I. COMPETITIVE BIDDING REQUIREMENTS FOR GOODS, SERVICES, AND CONSULTANT CONTRACTS

The Charter, Municipal Code, Council Policies, and Administrative Regulations, set forth requirements for the competitive bidding, advertisement, and award of City contracts. These requirements vary depending on the nature of the contract.

¹Although Charter section 80 refers to the Auditor-Comptroller, the authority, power, and responsibilities of the Auditor-Comptroller were transferred to the Chief Financial Officer effective July 8, 2008.

² The legal distinction between a contract that is "void" and a contract that is "unenforceable" is an important one. The former term implies that the contract has no legal effect and cannot be enforced by or against *any party*. The latter term means that while a contract is technically legal, a certain party is without power to enforce the contract against the other.

A. Goods and Services Contracts

1. Informal Solicitations

The Municipal Code includes provisions regarding competitive bidding requirements for goods and services contracts based on the estimated contract amount. The level of formality required increases with the contract dollar amount. SDMC § 22.3203. The Purchasing Agent may award contracts greater than \$25,000, but equal to or less than \$50,000, after competitive bids are sought either verbally or in writing. SDMC § 22.3203(a). Contracts greater than \$50,000, but equal to or less than \$150,000, may only be awarded after written quotes have been solicited from five potential sources. SDMC § 22.3203(b).³

2. Formal Solicitations

The Purchasing Agent may award a contract greater than \$150,000 only after advertising for sealed bids or proposals for at least one day in the City official newspaper⁴ at least ten days before bids or proposals are due. SDMC § 22.3203(c).

The City uses two types of formal solicitations: an Invitation to Bid (ITB) and a Request for Proposal (RFP). An ITB is used when contracts are awarded on the basis of lowest bid. SDMC § 22.3008(a). ITB specifications must describe the materials, supplies, equipment, services, and insurance requirements, among other things, to allow for competitive bidding and evaluation. *Id.* The bidder must sufficiently respond to all required criteria for the bid to be responsive. SDMC § 22.3006(b). While an ITB is awarded on the basis of low bid, the City may also consider other factors prior to award, as described in the specifications, such as: (1) unit cost; (2) life cycle cost; (3) economic cost analysis; (4) operating efficiency; (5) warranty and quality; (6) compatibility with existing components; (7) maintenance costs (including the costs associated with proprietary invention); (8) experience and responsibility of the bidder; and (9) any additional factors the City deems relevant. SDMC § 22.3206.

In contrast, a RFP is used for contracts that are awarded on a basis other than low bid. SDMC § 22.3008(b). In addition to the factors described in section 22.3006(b), RFP specifications must also include a description of the evaluation criteria and the process the City will use to determine the winning proposal. *Id.* A contract for goods and services is awarded to the bidder offering the best value to the City, considering price and other factors, after the bids or proposals are submitted. SDMC § 22.3206(a).

B. Consultants

Competitive bidding requirements for consultant contracts are discussed in Council Policy 300-7 (Consultant Services Selection) and accompanying Administrative Regulations 25.60 (Selection of Consultants for Work Requiring Licensed Architect and Engineering Skills) and 25.70 (Hiring of Consultants Other Than Architects and Engineers). Selection of consultants must “be made from as broad a base of applicants as possible” and the choice must “be based on demonstrated capabilities or specific expertise.” Council Policy 300-7. A minimum of three

³ Similar to ITBs, as described in section I.A.2, informal solicitations are awarded on the basis of low bid, taking into account the various factors described in the specifications.

⁴ The City’s current official newspaper is the San Diego Daily Transcript.

consultants should be considered when possible, and the procurement should be advertised in the City's official newspaper. *Id.* The department hiring the consultant must submit a completed Consultant Award Tracking Form as specified in the Administrative Regulations. This important requirement helps the City track consultant expenditures.

C. Exceptions to Competitive Bidding

The Charter and Municipal Code provide exceptions to competitive bidding requirements. The City can award a contract without strictly following competitive bidding in the case of: (1) goods and services contracts for less than \$25,000 (SDMC § 22.3208(a)); (2) emergency contracts (San Diego Charter § 94 and SDMC § 22.3208(b)); (3) sole source contracts (SDMC §§ 22.3208(d)); (4) cooperative procurement contracts (SDMC § 22.3208(c)); and (5) service contracts with agencies or non-profit organizations that do not exceed \$1,000,000 (SDMC §§ 22.3208(g) and 22.3210). Each exception is discussed in more detail below.

1. Goods and Services Contracts for \$25,000 or Less

Goods and services contracts for \$25,000 or less are not required to be competitively bid. SDMC § 22.3208(a). The Purchasing Agent, department head, or designee may approve requisitions and purchase orders for goods and services required by a City department in an amount not to exceed \$25,000. SDMC § 22.0505(a).

2. Emergency Contracts

Municipal Code section 22.3208(c) exempts contracts necessary to safeguard life, health, or property due to extraordinary fire, flood, storm, epidemic, or other disaster from competitive bidding if the Purchasing Agent immediately reports the emergency award and justifications for the award to the City Council in writing and the City Council ratifies the award by resolution by a two-thirds' vote. SDMC § 22.3208(b).

3. Sole Source Contracts

A sole source contract is a contract awarded without a competitive process. SDMC § 22.3003. Before a sole source contract is let, the Purchasing Agent must certify in writing that "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). *See also Graydon v. Pasadena Redevelopment Agency*, 104 Cal. App. 3d 631, 635-37 (1980).

The sole source determination is made on a contract-by-contract basis by the City Manager, the Purchasing Agent, or designee.⁵ The justification must be based on market conditions at the time the contract is let. While competitive bidding may be "undesirable, impractical, or impossible" at the time the City awards the initial sole source contract, circumstances may change over time. For example, competitors may enter a market where none existed before, or new products may be available that are superior to existing products in quality,

⁵ Municipal Code section 22.3016(b) authorizes the City Manager or the Purchasing Agent to delegate sole source certification authority to "the Assistant City Manager, Deputy City Manager, or any Department Director."

value, or suitability. The Municipal Code does not place time restrictions on sole source contracts. Therefore, City staff must confirm that the sole source is still justified before the initial contract is extended or a new contract is awarded.

The City Attorney is responsible for reviewing the legal sufficiency of the sole source certification. If the certification does not meet the standard required in Municipal Code section 22.3016(a), the assigned deputy city attorney may decline to approve the contract.

4. Cooperative Procurement Contracts

Cooperative procurement contracts are another exception to competitive bidding requirements. A cooperative procurement contract is defined as either: (1) a contract resulting from the joint and cooperative purchase of goods or services by the City and one or more agencies;⁶ or (2) a contract between a contractor and one or more agencies, or agencies thereof, that allows other agencies to use the terms, conditions, and pricing of the original contract for goods or contract for services. SDMC § 22.3003. The Purchasing Agent may award a cooperative procurement contract without advertisement or competitive bidding provided that he or she first certifies in writing that the contract: (1) is in the best interests of the City; (2) is to the City's economic advantage; and (3) was competitively awarded using a process that complies with the policies, rules, and regulations developed and implemented by the City Manager. SDMC § 22.3208(c). Procedures for cooperative procurement contracts are described in Administrative Regulation 35.11.

As with sole source contract certifications, the City Attorney's Office reviews the Purchasing Agent's certification for legal sufficiency before the City uses the contract. The City Attorney's Office drafts a contract that incorporates mandatory City provisions and addresses inconsistencies between the City's and the lead agency's needs and legal authorities. Thus, Purchasing and Contracting and the requesting department must provide the City Attorney's Office with fundamental preliminary information including the original solicitation document, the winning proposal, proof of advertisement, and pricing sheets, before the City Attorney can draft the contract.

5. Contracts with Agencies and Non-Profit Organizations

The Purchasing Agent may also award contracts for services to any agency or qualified non-profit organization without a competitive process. SDMC § 22.3210. City Council approval is not required if the Purchasing Agent certifies: (1) the contract furthers a specific public policy; (2) the contract is in the public interest; and (3) the contract does not exceed \$1,000,000 per fiscal year. *Id.* The Purchasing Agent must further certify that he or she has considered all of the following: (1) whether the agency or non-profit agrees to direct supervision of workers; (2) whether the agency or non-profit organization agrees to provide workers' compensation insurance for the workers; and (3) whether the agency or non-profit agrees to indemnify, protect, defend, and hold the City harmless against any and all claims alleged to be caused or caused by

⁶ An agency is defined as any federal and state agencies, counties, cities, districts, local agencies, joint power authorities, non-profit corporations wholly owned by a public agency, and any quasi-public entity that the Council may designate by resolution. SDMC § 22.3003.

any act or omission of the worker or agency employee. *Id.* Again, the City Attorney's Office reviews the Purchasing Agent's certification for legal sufficiency before the contract is let.

II. CITY COUNCIL APPROVAL

Under the Charter and Municipal Code, City Council approval is required to enter into certain contracts based on contract length or dollar value.

A. Contract Term

Charter section 99 requires that contracts exceeding five years be approved by the City Council, by ordinance, by a two-thirds' vote after a public hearing that has been noticed in the official City newspaper. Contracts that are extended beyond five years without Council's two-thirds' vote are void or unenforceable against the City. *G.L. Mezzetta, Inc.* 78 Cal. App. 4th at 1094; *Katsura*, 155 Cal. App. 4th at 109-10. Contractors performing an extension not properly approved by Council are doing so at the risk that they will not be paid for their services. *Katsura*, 155 Cal. App. 4th at 111.

This Office has previously interpreted Charter section 99 to apply to City contracts requiring an expenditure of funds. *See* 1998 City Att'y MOL 298 (98-14; June 4, 1998). Non-expenditure contracts or revenue-generating contracts, such as leases, are not subject to Charter section 99 requirements nor are contracts involving contingent fiscal obligations (i.e., obligations dependent on the occurrence of some future event). *Id.*; 2009 City Att'y MOL 170 (2004-12; July 15, 2004) and City Att'y MOL No. 2012-8 (July 16, 2012).

The City department requesting the procurement should assess the likelihood of the contract extending beyond five years and should obtain City Council approval before the contract is executed if the initial term of the contract may or will extend beyond five years. If the contract's initial term is less than five years, the City department may: (1) obtain City Council approval of the initial term and any anticipated extensions before the initial term begins; or (2) obtain City Council approval before the extension would bring the contract term beyond five years.

If the term of a contract has already extended beyond five years without City Council approval, the procuring City department should immediately seek retroactive approval or "ratification" of the contract. Courts typically permit local agencies to cure defects in the formation of a contract by subsequent ratification provided that the local agency has the power to enter into the contract in the first instance. *See, e.g., Los Angeles Dredging Company v. City of Long Beach*, 210 Cal. 348, 359-61 (1930). We recognize a contract will, on occasion, extend beyond the five year term without the requisite Council approval. Nevertheless, retroactive approval should be an exception that is used as little as possible. As previously mentioned, failure to follow the procedures set forth in the Charter and Municipal Code will render a contract void or unenforceable against the City. *Domar Electric, Inc.* 9 Cal. 4th at 171.

Finally, if a City department requires continued goods or services, but does not wish to extend a contract beyond five years, it should coordinate with the Purchasing and Contracting Department to ensure that a competitive process for a new contract is underway well in advance of contract expiration. This Office defers to the Purchase and Contracting Department to provide

an appropriate procurement schedule that includes sufficient time for advertisement, evaluation, submission and resolution of any protests, award, and approvals.

B. Contract Value

City Council approval is required for contracts exceeding certain dollar thresholds as set forth in the Municipal Code. City Council must approve: (1) goods and services contracts that exceed \$3,000,000 when not previously approved and funded through the Annual Appropriation Ordinance (SDMC §§ 22.3206(c) and (d)); (2) agency and non-profit service contracts over \$1,000,000 (SDMC § 22.3210); (3) contract alterations exceeding \$200,000 (SDMC § 22.3018(b)(1)); and (4) consultant contracts that exceed \$250,000 or that result in more than \$250,000 in awards to a single consultant in a given fiscal year (SDMC § 22.3207(a)). The City Council can approve these types of contracts by resolution.

The Council must also approve contracts that are amended to exceed the City Manager's or Purchasing Agent's spending authority. Thus, for example, if the Purchasing Agent awards a contract for services for \$2.5 million, and a cost overrun requires the expenditure of an additional \$600,000, Council approval is required because the total expenditure exceeds the \$3,000,000 threshold. SDMC § 22.3206(c) and (d).

III. CONTRACT EXECUTION

A. The City Charter and Delegation of Authority

Charter section 260 states that “[a]ll executive authority, power, and responsibilities conferred upon the City Manager in Article V, Article VII, and Article IX shall be transferred to, assumed, and carried out by the Mayor.” Specifically, “[t]he Manager shall execute⁷ all contracts for the Departments under his control” and “shall approve all requisitions and vouchers for said Departments in person or through such assistants as he may designate for the purpose.” San Diego Charter § 28. In addition, Charter section 265(a) provides that the Mayor “shall be recognized as the official head of the City . . . for the signing of all legal instruments and documents”

The Charter instills the power to execute legal instruments and documents in the Mayor, who may delegate this authority to City officials including the Chief Operating Officer, the Assistant Chief Operating Officer, the Chief Financial Officer (for settlement agreements only), the Purchasing Agent (i.e., the Director of the Purchasing and Contracting Department), and various positions within the Purchasing and Contracting Department. *See* San Diego Charter § 28; Delegation of Authority to Sign Contracts memo dated October 8, 2014. The delegation of authority rests in the position, not the person holding the position. Only the positions listed in the delegation memo are authorized to sign City contracts for departments under the Mayor's control.

Charter section 35 states that the Purchasing Agent “shall perform such other duties as may be prescribed by general law or ordinance or by the City Manager.” The Municipal Code

⁷ The plain meaning of the term “execute” in the context of Charter section 28 is to formally enter into a contract by, for example, signing it. *See* Black's Law Dictionary 609 (10th ed. 2014).

authorizes the Purchasing Agent to enter into contracts on behalf of City departments. SDMC § 22.3202. The Municipal Code does not make a distinction in the solicitation, award, or execution of City contracts for Mayoral or non-Mayoral departments. The City's Public Contracts Code establishes general requirements that apply to the award of and alteration of City contracts. SDMC § 22.3001. As such, non-Mayoral departments must follow the City's Public Contracts Code to solicit, award, and execute contracts.

B. Signatures Required to Properly Execute a City Contract

City contracts become effective once they have been signed by the parties and approved by the City Attorney. The City Attorney signs last, approving as to "form and correctness." Charter § 40.

1. The Parties

In most cases, the "parties" will be the City and the contractor. When a contract expressly requires all parties to execute the contract before it becomes effective, failure of any party to sign prevents the formation of a valid and enforceable contract. *See, e.g., Banner Entertainment, Inc. v. Superior Court*, 62 Cal. App. 4th 348, 358 (1998). Consistent with the City requirements, there is no valid contract if either the City (i.e., the Mayor or designee) or the contractor fail to execute the contract.⁸

2. The City Attorney

Charter section 40 requires the City Attorney to "prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof. . . ." Therefore, the City Attorney's signature is necessary to form a valid contract. Accordingly, all goods, services, and consultant templates have been updated to reflect the City Attorney's approval "as to form."⁹

C. Effect of Improper Execution

When a charter provides for a certain method of approving a contract, failure to follow that method will render the contract void or unenforceable¹⁰ against the charter city. *See G.L. Mezzetta, Inc.* 78 Cal. App. 4th at 1092-94; *First Street Plaza Partners*, 65 Cal. App. 4th at 662-65; *Katsura*, 155 Cal. App. 4th at 109-10. In *Mezzetta*, for example, the court rendered an oral contract void and unenforceable because there was no written, signed contract as required by statutes and ordinances. *G.L. Mezzetta, Inc.*, 78 Cal. App. 4th at 1093-94.

Similarly, in *First Street*, the court held that failure to obtain signatures required by the Los Angeles charter rendered an alleged city contract unenforceable. Despite lengthy negotiations, the contract was never presented to the city council for approval, approved as to form by the city attorney, or signed by the mayor as required by the city charter. *First Street*, 65

⁸All City contract templates for goods, services, and consultants include signature blocks for the City designee, contractor, and City Attorney.

⁹ Purchase orders are considered contracts. This Office will issue a separate Memorandum describing the approval and signature process of purchase orders.

¹⁰ See Footnote 2.

Cal. App. 4th at 664 n.10. Since the contract was not approved according to charter rules, it could not be enforced against the city and the contractor was without remedy. *Id.* at 663-66.

Additionally, contractors are presumed to have notice of municipal contracting procedures and cannot recover for work performed under an invalidly-formed contract. *Katsura*, 155 Cal. App. 4th at 109. In *Katsura*, the court denied an engineering firm's claim for work performed, even though it had been requested verbally by a City employee, because the extra work had not been reflected in a properly approved modification to the original contract as required by the City's procedures. *Id.* The court found that the oral contract created by the City employee was insufficient to bind the City. *Id.*

As described above, a contract that does not follow City rules and regulations, including the Charter, is void or unenforceable. Contracts must be in writing and signed by the Mayor or designee and approved by the City Attorney.

IV. CERTIFICATION OF FUNDING

Charter section 80 requires the Chief Financial Officer to certify that there are sufficient funds available in the treasury to pay the costs of a particular contract, in any fiscal year, before that contract is entered into, and that appropriation has been made. City Att'y MS 2014-15 (July 29, 2014). The Charter requirements may be met through a "Comptroller's Certificate" certifying that funds have been appropriated and are not otherwise encumbered. The City is not authorized to enter into a contract nor are any expenditures related to such a contract valid unless the Chief Financial Officer certifies that funds are available for the contract and that an appropriation has been made to pay the obligation. *Id.* However, this Office has previously opined that the funds required for a contract need not actually be in the treasury to the credit of a particular obligation before that obligation matures. *Id.* citing 1990 City Att'y MOL 294 (90-32; Mar. 2, 1990). Rather, the certification of funds required by Charter section 80 is a judgment at the discretion of the Chief Financial Officer. City Att'y MS 2014-15 (July 29, 2014).

V. MANDATORY CONTRACT PROVISIONS AND CERTIFICATIONS

Before a contract is awarded, the City must determine that a bidder or proposer is capable of fully performing the contract requirements and has the business integrity to justify the award of public funds. SDMC § 22.3004(a). Contractor standards are described in the Municipal Code and assessed by City staff using the Contractor Standards Pledge of Compliance Form which all bidders and proposers must complete before contract award. SDMC § 22.3004(b). The Contractor Standards Pledge of Compliance Form must be submitted regardless of whether the contract was awarded by informal or formal solicitation. A bidder or proposer who is determined by the City to not be responsible may challenge this determination. SDMC § 22.3017(b); Council Policy 000-29.

The Municipal Code and Council Policies also require City contracts to include certain mandatory provisions or certifications that reflect Council priorities. These include, but are not limited to, certification of compliance with the Americans with Disabilities Act (Council Policy 100-04) and the City's Drug Free Workplace Policy (Council Policy 100-17). In addition, contractors agree to not discriminate, to provide equal employment opportunities, to offer equal benefits, and to pay livable wages. SDMC §§ 22.2704, 22.3512, 22.3514, 22.4304, and

22.4225(a). In addition, prevailing wages are applicable to public works, maintenance contracts and task orders awarded, entered into, or extended on or after January 1, 2014.

CONCLUSION

The Charter, Municipal Code, Council Policies, and Administrative Regulations set forth legal requirements for City contracts, including: (1) competitive bidding procedures and exceptions; (2) City Council approval for contracts based on term or dollar value; (3) proper execution of City contracts; and (4) certification of funding. Any contract that violates the requirements set forth in these authorities may be void or unenforceable against the City. Adherence to the legal requirements discussed above ensures the validity of City contracts and minimizes the risk of litigation. To eliminate inconsistency in City contracting practices related to the purchase of goods, services, and consultants, this Office has created contract templates for use by City staff which incorporates the mandatory provisions and certifications. Please contact this Office if your Department requires legal assistance to comply with these requirements.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/Lara E. Easton
Lara E. Easton
Deputy City Attorney

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cc: Scott Chadwick, Chief Operating Officer
Stacy LoMedico, Assistant Chief Operating Officer