

MEMORANDUM OF LAW

DATE: November 2, 1992

TO: Karen L. Henry, Senior Civil Engineer, Engineering
Division, Water Utilities Department

FROM: City Attorney

SUBJECT: Traffic Control Plans Prepared by O'Rourke
Engineering

By memorandum dated September 4, 1992, you asked for the opinion of this office regarding the claims put forth by O'Rourke Engineering for additional compensation under its contract with the City. An analysis of the issues raised in your letter follows.

ANALYSIS

I. Contract Provisions

Pursuant to Resolution No. R-279397, the City Manager executed an agreement for As-Needed Traffic Engineering Consultant Services ("Agreement") with O'Rourke Engineering ("Consultant"). The scope of work for the contract is set forth in Section 1.2.1 of the Agreement. Section 1.2.2 of the Agreement requires that Consultant advise the City, in writing, if there is any pending need for a change in the scope of services. Moreover, any agreed upon changes in the general scope of services required under the Agreement also must be made in writing and signed by both parties. (See, Sections 4.6.2, and 4.8.5.)

The provisions of the Agreement fully comply with the dictates of San Diego Municipal Code ("SDMC") section 22.0209. Section 22.0209 provides in relevant part:

The City Manager shall make alterations in contracts only when

....

....

(b) The cost of the alterations does not exceed the total amount authorized for the project by ordinance or resolution; and

(c) It is the opinion of the City Manager that the alterations are

necessary to fulfill the purpose of the contract; and

(d) The alterations are made by agreement in writing between the contractor and the City Manager. (Emphasis added.)

From the foregoing it is evident that in order for there to be any valid changes in the scope of services Consultant is to provide under the Agreement, those changes must be made in writing. Only when a written change is agreed upon by both parties is an equitable adjustment to be made pursuant to Section 4.6.2 of the Agreement.

Consultant was assigned specific "tasks" on an as-needed basis. Agreement Section 1.2.1. When a task was assigned the scope of work was to include all activities reasonably anticipated and necessary to accomplish the end result or component of the task. Id. A letter from the City authorizing Consultant to proceed with the work on a task would be forwarded to Consultant. Agreement Section 1-3. This letter would set forth the maximum amount Consultant would be compensated for the task.

Consultant claims that with respect to several assigned tasks it increased the scope of its services at the "tacit" direction of City personnel. Consultant, however, provides no documentation or information to verify its claims. Moreover, you have informed this office that all City personnel who acted as task managers and administered Consultant's work deny Consultant's claims.

Consultant also attempts to equate approval of its work by City personnel with approval for an increase in its scope of services on a task. Accordingly, Consultant concludes it is entitled to additional compensation for the increase in its scope of services.

Consultant's claims are contrary to the clear language of Section 4.6.2 of the Agreement which permits equitable adjustments only for changes reduced to a writing and agreed upon by both parties. Consultant never submitted a written notification advising the City that it was aware of facts, events, or circumstances which necessitated a change in the scope of its services on given tasks. Additionally, the Agreement requires a written change in the scope of services be agreed upon prior to the work being commenced. Approval of the plans submitted by Consultant after the work has been completed does not equate to a written agreement for a change in the scope of services and simply does not comply with the mandates of the Agreement.

II. Quantum Meruit

As noted above, Consultant argues that it increased its scope of services due to verbal requests made by City personnel. Consultant concludes, therefore, that based upon a theory of quantum meruit, it is entitled to additional compensation.

Even assuming Consultant's claims can be substantiated that it acted at the direction of City personnel and therefore expanded the scope of its services, Consultant is not necessarily entitled to recovery under equitable principles of relief. Under the terms of the Agreement, any change in the scope of services must be made in writing in order for any equitable adjustments to be made. A written agreement therefore is a condition precedent to a change in compensation.

A condition precedent "is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." Rest. 2d Contracts Section Section 224, 225; 1 B. Witkin Summary of Cal. Law (9th Ed. 1987), Contracts Section 7247 at 656. If a condition precedent is not fulfilled, there is no right to enforce the terms of the contract. *Kadner v. Shields*, 20 Cal. App. 3d 251, 258 (1971). Thus, because Consultant failed to fulfill the condition precedent of obtaining a written agreement, it has no right to enforce the terms of the contract which allow for equitable adjustments.

Consultant attempts to argue, however, that under a quantum meruit theory, it is entitled to additional compensation. A recovery on quantum meruit is based on the benefit accepted or derived for which the law implies a contract to pay. However, the courts have recognized that

there cannot be a valid, express contract and an implied contract, each embracing the same subject matter, existing at the same time The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability and to withdraw from one party benefits for which he has bargained and to which he is entitled.

Wal-Noon Corp. v. Hill, 45 Cal. App. 3d 605, 613 (1975).

Here, there is a valid express contract which directly embraces the same subject matter -- equitable adjustments for

changes in the scope of services. Arguably, the resolution of the instant controversy by the extension of equitable relief to Consultant would effectively deprive the City of part of the bargained-for consideration in the Agreement, i.e., the right for a written agreement before a change in the scope of services results in an increase in the financial obligations of the City. "While a court of equity may exercise broad powers in applying equitable remedies, it may not create new substantive rights under the guise of doing equity." *Id.* (Quoting, *Laude v. Jarisich*, 59 Cal. App. 2d 613, 618.)

III. Equitable Estoppel

Consultant may attempt to argue that the City should be equitably estopped from denying liability for the services it has received. Generally, five elements must be present in order to invoke a claim of equitable estoppel. These elements are as follows:

1. A representation or concealment of material facts;
2. Made with the knowledge, actual or virtual, of the facts;
3. To a party ignorant, actually and permissibly, of the truth;
4. With the intention, actual or virtual, that the latter will act upon it; and
5. The party was induced to act upon it. *Hill v. Kaiser*, 130 Cal. App. 3d 188, 195 (1982).

There can be no estoppel where any one of these elements is missing. *Johnson v. Johnson*, 179 Cal. App. 2d 326, 330 (1960).

With respect to an estoppel claim against a public agency, however, an additional element is required. In order to prevail, the asserting party must prove that "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." *City of Long Beach v. Mansell*, 3 Cal. 2d 462, 500 (1970). There can be no estoppel where it would defeat or effectively nullify operation of a legitimate policy protecting the public. *Id.* at 493; See, *Smith v. County of Santa Barbara*, 7 Cal. App. 4th 77, 775-776 (1992).

In the present case, it is clear from the facts as presented by Consultant that it cannot establish the five elements noted above. Consultant was fully aware of Section 1.2.2 which requires a Consultant to notify the City, in writing, of any pending need to change the scope of services. Consultant also was not ignorant of sections 4.6.2 and 4.8.5 of the Agreement which require that any change in the scope of services be agreed upon in writing by both parties to the Agreement.

Additionally, to require an equitable adjustment without a prior written agreement would defeat the legitimate public policy set forth in Section 22.0209 of the SDMC, which requires that alterations to City contracts be made by agreement in writing between Consultant and the City Manager. Ignoring the contract provisions and the mandates of the SDMC would establish a broad precedent and result in the City operating in violation of its own laws. See, Smith, 7 Cal. App. 4th at 775.

CONCLUSION

From the foregoing, it is evident Consultant failed to comply with the contractual obligations of the Agreement. Consultant therefore cannot now attempt to invoke the equitable adjustments provision of Section 4.6.2. Moreover, it would appear Consultant is not entitled to any adjustments to its compensation pursuant to equitable theories of quantum meruit or estoppel. I hope this information answers your questions. Should you require any additional information, please do not hesitate to contact us.

JOHN W. WITT, City Attorney

By

Kelly J. Salt

Deputy City Attorney

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