

MEMORANDUM OF LAW

DATE: February 21, 1992

TO: Dave Schlesinger, Director, Clean Water Program

FROM: City Attorney

SUBJECT: Novation Clause in Construction Contracts

You have asked whether a novation clause is legally required in Clean Water Program construction contracts in light of the creation of the proposed San Diego Area Wastewater Management District which would effectively stand in the shoes of the City regarding Clean Water Program projects. The short answer is that a novation clause is not legally required in such construction contracts.

Novation is the substitution by agreement of a new obligation for an existing one, with intent to extinguish the latter. Cal. Civ. Code Sections 1530, 1531 (West 1982). The substitution may be either a new obligation between the same parties or new parties to the agreement. Cal. Civ. Code Section 1531 (West 1982). A novation completely extinguishes the original obligation, and a failure to perform the new obligation does not revive the original; it means that it was canceled and obliterated as completely as though it had never had existence. *Beckwith v. Sheldon*, 165 Cal. 319, 323 (1913).

A novation would enable the renegotiation of terms between the new parties. In contradistinction, an assignment of a right is "a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." Restatement of the Law of Contracts, 2d, Section 317(1).

In a December 11, 1990 memorandum of law, attached as Enclosure 1, former Deputy City Attorney Richard Pinckard discussed in detail the assignment and delegation of sewage disposal agreements. Since construction contracts, like sewage disposal agreements are bilateral contracts, Mr. Pinckard's analysis of assignment, delegation, and novation is applicable to your current concern. Mr. Pinckard concluded that "the City may by assignment and delegation transfer the existing agreements between it and the participating agencies to the special act district with no adverse consequences to the participating agencies. Such a substitution could be also accomplished by novation, but it is not legally required."

We find Mr. Pinckard's conclusion applicable to construction contracts between the City and construction firms.

Should you have further questions after reviewing Mr. Pinckard's memorandum of law, please feel free to contact us.

JOHN W. WITT, City Attorney

By

Marguerite S. Strand

Deputy City Attorney

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Enclosure

ML-92-16