

MEMORANDUM OF LAW

DATE: March 6, 1992

TO: Ed Ryan, City Auditor and Comptroller

FROM: City Attorney

SUBJECT: Emergency Repair of Point Loma Outfall

By memorandum of March 4, 1992 attached hereto, you posed four (4) questions regarding the method of contracting, authority to pay, and breadth of authority under Resolution No. R-279384 declaring the existence of a state of emergency within the City relating to the Point Loma Outfall. We answer each question seriatim:

1. Notice to Proceed

We note with approval that immediately following the declaration of the emergency the City Manager initiated the acquisition of equipment and services by means of a letter (notice) to proceed. This method of initiating action defines an agreement long recognized in the law as quantum meruit, i.e., the consent for services to be charged at a reasonable price. Corbin, Contracts, section 20 (1952). Indeed this precise method is expressly provided in San Diego Municipal Code section 51.0106 a.6.b: "To obtain vital supplies, equipment, and . . . to bind the City for the fair value thereof." (Emphasis added.)

Given the immediate threat to public health and safety, an auditor's certification is not a pre-requisite to this activity. Obviously both Charter section 94, Resolution R-279384 and sound judgment require sufficient funds to pay for same. However, subsequent certification as well as subsequent appropriation can be utilized to accomplish this.

Both Charter section 94 and the emergency resolution do not require prior certification of a notice to proceed. We understand that a City Manager's Action requesting just such subsequent certification is being processed through your office.

2. May Point Loma contractors be paid based on a Notice to Proceed?

From the above discussion, the City's notice to proceed

establishes a binding agreement based on quantum meruit to pay the reasonable value of the services rendered. As long as the City Manager affirms that this charge reasonably reflects the amount and value of the effort expended, you are obligated to pay same.

We understand that a formal express contract is being negotiated which, when done, should confirm the reasonableness of these charges. However, the instant bill is a valid charge against the City assuming the Manager's attestation to effort expended and reasonableness of fee.

3. This question is moot since question number one (1) above is answered in the affirmative
4. What is the extent of the Manager's authority under Resolution No. R-279384?

The emergency resolution authorizes the City Manager to execute "all necessary contracts for the emergency repair of the Point Loma Outfall" Given the nature of emergencies in general and this one in particular, no legislative body knows the extent of services, supplies or equipment necessary to remedy an emergency which by definition threatens "public peace, health or safety" (San Diego Municipal Code section 51.0102). Hence the legislative body delegates the broadest possible authority to its Manager when such an event occurs.

Obviously "necessary" is an adjective that expresses degrees and must be interpreted within the context of the concern. Here the concern is efficiently and expeditiously remedying the threat to public health and safety. Hence in defining "all necessary contracts" in this context we are faced with the ranges recognized by the courts:

"Necessary" is defined as: "1. Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; ... (Webster's New International Dictionary (2d ed.), unabridged.)

Empha

"'necessary' has not a fixed meaning, but is flexible and relative." (Westphal v. Westphal, 122 Cal.App. 379, 382 10 P.2d 119; see also, City of Dayton v. Borchers (1967) Ohio Misc. 373 232 N.E.2d 437,441; "A necessary thing may supply a wide range of wants, from mere convenience to logical completeness.") Emphasis added.

People v. Belous, 71 Cal.2d 954, 961 (1969)

We think that "logical completeness" presents a tangible test for what contracts to include. Adopting this test, we find that at a minimum all contracts for repair services, equipment, design, supplies and supervision would clearly be included. Moreover stabilizing armour rock would also be an integral part of logical completeness.

While unmentioned, this office and the Manager have or will utilize the services of forensic engineers and other professionals to investigate the cause of the rupture. This retention is presently limited to data acquisition and analysis. To the extent that such activity bears on the design and stability of the remedial repair, such charges are properly within the "logical completeness" test utilized above. Obviously future efforts done for regulatory or litigation initiatives would be beyond the logical completeness of the repair, and we will so distinguish in contractual documents.

CONCLUSION

I trust this answers the questions posed and provides additional guidelines for collateral contracts that will be forthcoming. As we learned from the Pump Station 64 emergency, each emergency is unique and, hence, must be addressed and redressed in its own unique way. Within the context of the outfall rupture, Resolution No. R-279384 gives expansive power to the Manager limited only by those actions necessary to "logically complete" the repair and there being "sufficient sums" on deposit in the City Treasury.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:mb:452.1.1(x043.2)

Attachment:1

cc H.R. Frauenfelder

F.D. Schlesinger

William Hanley, III

ML-92-19