Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: August 4, 2017

TO: Honorable Councilmember David Alvarez

FROM: City Attorney

SUBJECT: San Diego Charter Section 99 and the San Diego River Park and Soccer City Initiative

---

If approved by the voters, the San Diego River Park and Soccer City Initiative (Initiative) would authorize the Mayor to execute a lease for the subject real property to a "Qualified Lessee" for a term of 99 years without further Council action under certain circumstances. Initiative § 7, 61.2803(b), 61.2805(b), 62.2805(e), pp. 13, 30. On June 19, 2017, you asked whether the Initiative's 99-year term violates San Diego Charter (Charter) section 99, which requires that contracts, agreements, or obligations exceeding five years be authorized through an ordinance adopted by two-thirds of the San Diego City Council.

This Office has issued several memoranda, attached hereto, regarding the proper interpretation of this two-thirds approval requirement of Charter section 99. *See* 1998 City Att'y MOL 298 (98-14; June 4, 1998), 2004 City Att'y MOL 170 (2004-12; July 15, 2004); 2012 City Att'y MOL 144 (2012-8; July 16, 2012); and City Att'y MOL No. 2015-12 (July 14, 2015). Generally, the requirement that the Council authorize contracts, agreements, or obligations exceeding five years by an ordinance adopted by two-thirds of the Council applies only to contracts, agreements, or obligations requiring an expenditure of City funds. *Id.* The two-thirds approval requirement of Charter section 99 does not apply if the lease resulting from the Initiative does not require an expenditure of City funds.

The Initiative includes mandatory terms that must be included in a lease, and also anticipates that additional terms will be added to create a final lease. The contents of the final lease are not known at this time. Initiative § 7, 61.2805(a), p. 30. If a lease resulting from the Initiative is ultimately determined to be subject to Charter section 99 because it requires an expenditure of

City funds, the Mayor would be required to obtain Council approval prior to executing the lease. San Diego Charter § 99. The Initiative does not authorize the Mayor to execute the lease without further Council action if the Charter requires Council approval. Initiative § 7, 61.2805(e), p. 30. If the Initiative is approved by the voters, this Office can assist with the determination of whether Charter section 99 applies to any resulting lease that is negotiated.

MARA W. ELLIOTT, CITY ATTORNEY

By/s/ *Melissa D. Ables*
Melissa D. Ables
Deputy City Attorney

MDA:mcm
MS-2017-18
Doc. No.: 1535093_4
Attachments
cc: Hon. Mayor
Hon. City Councilmembers
Andrea Tevlin, Independent Budget Analyst

ATTACHMENTS

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: June 4, 1998

NAME: Mike Uberuaga, City Manager

FROM: City Attorney

SUBJECT: Charter Section 99 - Agreements for a Term in Excess of Five Years

QUESTION PRESENTED

Does the requirement in San Diego City Charter section 99 [Section 99], that any "contract, agreement or obligation extending for a period of more than five years" be authorized by ordinance approved by a two-thirds vote of the members of the City Council after two public hearings, apply to *any* contract or agreement, or only to contracts or agreements for the expenditure of funds by the City?

SHORT ANSWER

Notwithstanding previous advice by the City Attorney's Office, it is our opinion that the cited provision of Section 99 applies only to contracts or agreements for the expenditure of funds by the City with a term in excess of five years.

BACKGROUND

Approximately three years ago, in response to a question presented concerning a proposed ten-year agreement between the City and a joint venture for the construction of a landfill, the City Attorney's Office reached a tentative conclusion that any agreement or contract with a term in excess of five years must be approved by ordinance as specified in the last sentence of Section 99. *See* Attachment 1. That sentence reads as follows: "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."

A memorandum prepared at that time reviewed the question of whether the referenced ten-year agreement was subject to the ordinance procedure contained in Section 99. *Id.* The memorandum correctly concluded that the ten-year agreement, which involved a City obligation for the expenditure of funds, was subject to the Section 99 ordinance requirements. The memorandum, however, contained some broader language concluding that *all* contracts and agreements of more than five years must be authorized by ordinance after a duly noticed public hearing.

This Office has been asked on a number of occasions to reassess the conclusion expressed in 1993 because of the constraints placed on City operations as a result of complying with the broad interpretation of the ordinance procedure. For example, if the City proposes to lease a parcel of property for a period in excess of five years, that lease must be approved by ordinance after hearing, a process that takes at least 45 days. The prospective lessee may have time constraints that require a lease to be executed more quickly. Such constraints may result in lost revenue opportunities for the City. *See, e.g.,* Attachment 2. This memorandum undertakes the requested reassessment.

ANALYSIS

We believe that Section 99 is ambiguous on the question of whether the last sentence applies to *any* contract or agreement, or applies only to contracts or agreements for the expenditure of funds. Because of this ambiguity, resort to the legislative history of Section 99 may be had to answer the question. We believe that the legislative history of Section 99 shows that it was intended to apply only to contracts or agreements that involve a financial obligation on the part of the City for more than a five-year period.

More recent research on the question concludes that Section 99, for a variety of reasons, but most importantly its legislative history, applies solely and exclusively to long-term contracts involving financial obligations of the City. *See* Attachment 3. The most compelling analysis behind that conclusion may be summarized as follows.

Article VII of the Charter, Sections 68 through 114, deal with "finance" issues. Section 99, a part of Article VII, was amended in 1941 to read as follows:

> Section 99. Continuing Contracts. (As amended April 22, 1941. Effective May 8, 1941.) No contract or obligation *involving the payment of money* out of the appropriations of more than one year, except bonded indebtedness provided for in Section 90 of this Article, shall be entered into unless there shall first have been notice published in the official newspaper of the City at least two weeks before final action of the Council thereon. *Such a contract* shall require the approval of not less than five members of the Council. *If the contract* is to be for a

> period of more than five years it must also first be submitted to the electors of the City at a regular or special election and be approved by a two-thirds majority of those voting thereon. Any contract entered into in violation of the requirements of this section shall be invalid, and no rights, indebtedness, liabilities or obligations shall arise thereunder or be created thereby [emphasis added].

You will note that the 1941 version of Section 99 dealt exclusively with contracts or obligations "involving the payment of money."

An opinion of the City Attorney's Office, dated March 18, 1968, described how an amendment to Section 99 was necessary because the 1941 version was inconsistent with the State Constitution and case law dealing with continuing contracts involving the expenditure of City funds. *See* Attachment 4. Changes were therefore proposed to Section 99 to "simply paraphrase the provisions of Section 18, Article 2 of the Constitution of the State of California." The amendment was adopted and as a result, Section 99 now reads:

> Section 99. Continuing Contracts. The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at any election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. 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.

The 1968 ballot question for the proposed amendment read as follows:

PROPOSITION A. CITY OF SAN DIEGO CHARTER AMENDMENT. AMEND SECTION 80 AND SECTION 99 OF THE CHARTER OF THE CITY OF SAN DIEGO.

Shall the Charter be amended to include a debt limitation provision consistent with the Constitution of the State of California, and to remove certain inconsistent provisions now contained in Section 80 and Section 99?

The above language clearly indicates that the purpose of the amendment was to bring Section 99 into consistency with the constitutional debt limitation provision. The argument in favor of the proposition described the inconsistency in the context of allowing taxpayers to protect "long-term projects not otherwise subject to a vote of the people." Such long-term projects are identified in that argument as "proposals for financing municipal improvements." The argument further identifies the proposition as dealing with "public financing limitations under the Constitution." *See* Attachment 5.

We believe that the intended result of the 1968 amendment to Section 99 was to require the City to adopt a referable ordinance any time the City proposed to enter into an agreement extending for more than five years and involving an obligation to expend City funds. That result would be consistent with the constitutional debt limitations discussed as a justification for the amendment. A position that Charter Section 99 applies not only to those types of agreements but to any agreement or contract is, we believe, beyond the scope and intent of Section 99, and would lead to needless handicaps on City business not applicable to other charter or general law cities.

CONCLUSION

In summary, a review of the changes to Section 99 over time indicates that the section is intended to deal solely and exclusively with financial obligations of the City. The section, as amended in 1968, requires the City to adopt an ordinance any time it proposes to enter into an

agreement which calls for City expenditures for a period in excess of five years. Other long-term agreements and contracts, where the City receives funds, or, where the City is not required to pay out funds, were not intended to be subject to the provisions of Section 99.

CASEY GWINN, City Attorney

By
Leslie J. Girard
Assistant City Attorney

LJG:ljg:js:820:003(x043.2)
Attachments 1-5
cc: Mayor & City Council
City Auditor & Comptroller
City Clerk
ML-98-14

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

THOMAS C. ZELENY
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: July 15, 2004

TO: Nathan Bruner, Underground Program Manager

FROM: Thomas Zeleny, Deputy City Attorney

SUBJECT: City Manager's Authority to Execute Joint Use Agreements

INTRODUCTION

We have been asked by the Underground Utility Conversion Program to review a proposed Joint Use Agreement [JUA] provided by SDG&E for a portion of Scripps Lake Drive. JUAs provide that if the work of either party affects the facilities of the other, the party doing the work will indemnify the other party against any costs associated with relocating or restoring the other's facilities. Consulting with SDG&E and various City departments, this appears to be the first time a JUA has been requested where SDG&E does not have an existing easement overlapping the public right-of-way. This Memorandum addresses the legality of the City Manager executing JUAs only in the context of relocating utilities from a utility easement in adjacent property into the public right-of-way.

QUESTION PRESENTED

May the City Manager execute a JUA in conjunction with the relocation of SDG&E facilities from a private easement into the public right-of-way without prior City Council approval?

SHORT ANSWER

No, San Diego Charter [Charter] section 11 precludes the City Manager from executing JUAs without prior approval of the City Council, in instances where SDG&E does not have an existing easement that overlaps the public right-of-way. City Council approval may be expressed by resolution, as the ordinance requirement of Charter section 99 does not apply to JUAs.

DISCUSSION

I. Background

Historically, the City and SDG&E have executed JUAs where new streets overlap SDG&E easements,[1] in most cases without seeking prior City Council approval. SDG&E and the City want to extend the use of JUAs to situations where SDG&E is abandoning an existing private easement and relocating its facilities into the pubic right-of-way at the City's request. The JUA proposed by SDG&E is attached. Paragraph 8 of the JUA states the terms of the JUA prevail over conflicting provisions of the SDG&E Franchise Agreement and the Municipal Code. This raises the question whether the City Manager may execute such JUAs without City Council approval.

II. The SDG&E Franchise Agreement and Municipal Code Section 62.1112

Pursuant to authority granted under state law,[2] Section 8 of the SDG&E Franchise Agreement provides:

> Section 8. CITY RESERVED POWERS
>
> (a) City reserves the right for itself to lay, construct, erect, install, use, operate, repair, replace, remove, relocate, regrade or maintain below surface or above surface improvements of any type or description in, upon, along, across, under or over the streets of the City. City further reserves the right to relocate, remove, vacate or replace the streets themselves. If the necessary exercise of the aforementioned reserve rights conflicts with any poles, wires, conduits, and appurtenances of Grantee constructed, maintained and used pursuant to the provisions of the franchise granted hereby, whether previously constructed, maintained and used or not, Grantee shall, without cost or expense to City within ninety (90) days after written notice from the City Manager, or his designated representative, and request to do so, begin the physical field construction of changing the location of all facilities or equipment so conflicting. Grantee shall proceed promptly to complete such required work.

---

[1] We have previously opined that where the utility has an easement, the City must pay relocation costs. *See* 1999 City Att'y MOL 130. In some instances, though, if a "paper street" existed prior to the utility easement, the utility may be required to relocate at its own expense. *City of Anaheim v. Metropolitan Water District of Southern California*, 82 Cal. App. 3d 763 (1978).

[2] The grantee shall remove or relocate without expense to the municipality any facilities installed, used, and maintained under the franchise if and when made necessary by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the construction of any subway or viaduct, by the municipality. Cal. Pub. Util. Code § 6297.

> (b) Irrespective of any other provision of this ordinance, Grantee's right to construct, maintain and use, or remove poles, wires, conduits, and appurtenances thereto shall be subject at all times to the right of the City, in the exercise of its police power, to require the removal or relocation, to either overhead or underground locations, of said poles, wires, conduits and appurtenances thereto at the sole cost and expense of Grantee.
>
> (emphasis added)

Similarly, San Diego Municipal Code [SDMC] section 62.1112 addresses utilities located in the public right-of-way:

> (a) All persons maintaining installations in the public right-of-way shall relocate or remove their installations whenever such relocation is necessary for a proper governmental purpose, whether or not that purpose is to be accomplished by a public entity or by a private entity on behalf of a public entity. In such cases, the cost of the relocation shall be borne by the person.
>
> (emphasis added)

Neither the Franchise Agreement nor SDMC section 62.1112 contemplates an exception to the rule that SDG&E must relocate its facilities in the public right-of-way at its own expense. It is current practice for the City Manager to execute JUAs without City Council approval, but it does not appear this Office has ever issued a written opinion on JUAs or who has authority to approve them.

III. Charter Section 11

Whether the City Manager has authority to create exceptions to this rule that utilities must relocate their facilities at their own expense may depend on whether granting JUAs is considered a legislative or administrative function. Charter section 11 reserves legislative functions to the City Council:

> All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State.

Charter section 28 vests administrative power with the City Manager:

> It shall be the duty of the Manager to supervise the administration of the affairs of the City except as otherwise specifically provided in this Charter . . . to see that the ordinances of the City and the laws of the State are enforced. . . . [A]ll other administrative powers conferred by the laws of the State upon any municipal official shall be exercised by the Manager[.]

The City Council cannot delegate legislative functions to the City Manager:[3]

> Powers conferred on the legislative body of a city involving the exercise of judgment or discretion are in the nature of public trusts, and, as a general rule, cannot be delegated.
>
> 45 Cal. Jur. 3d (Rev.) Part 1 *Municipalities* § 294 (2000).

If it is later determined the City Manager had no authority to execute JUAs because it was an improper delegation of a legislative function, the contracts are void and unenforceable. *See* 10A McQuillin Mun. Corp. § 29.104.30 (3rd ed. 1999); *County of San Diego v. California Water and Telephone Company*, 30 Cal. 2d 817 (1947).

A review of state law and the City Charter indicates approval of JUAs is a non-delegable legislative function. Franchises can only be granted by City Council. Cal. Pub. Util. Code § 6202; Charter § 103. The terms and conditions of Franchise Agreements must also be approved by the City Council. Cal. Pub. Util. Code § 6203; Charter § 103.1. Paragraph 8 of the JUA proposed by SDG&E, a copy of which is attached, states that the terms of the JUA prevail over conflicting provisions in the SDG&E Franchise Agreement and the Municipal Code. If the City Manager alters the terms of the Franchise Agreement by executing JUAs, the City Manager is performing a legislative function. The wisdom of granting SDG&E such an interest is something the City Council should decide on a case-by-case basis, because JUAs could increase the cost of future City projects.

This conclusion is supported by the manner in which the City handles similar interests in real property. Street and easement vacations must be approved by the City Council. Cal. Sts. & High. Code § 8312. Eminent domain actions must be authorized by the City Council. *City of Sierra Madre v. Superior Court of Los Angeles County*, 191 Cal. App. 2d 587 (1961). Encroachment of underground facilities into the public right-of-way must be approved by the City Council. SDMC § 62.0303. JUAs give SDG&E an interest in real property exceeding what is granted by the City Council in the SDG&E Franchise Agreement insofar as the City would have to pay SDG&E to relocate its facilities. The interest granted by the JUA is akin to an easement, and SDG&E records JUAs with the County Recorder as an interest in real property.

IV. Charter Section 99

A JUA typically has no fixed duration, and could require the City to pay SDG&E to relocate its facilities more than five years after the date the JUA is executed. Charter section 99 provides that contracts in excess of five years duration must be authorized by ordinance approved by two-thirds of the City Council:

---

[3] *See* 1982 Ops. City Att'y 149 (advising against delegating street dedications and easement abandonments to the City Manager as an improper delegation of legislative functions.) State law was later amended to allow administrative acceptance of street dedications.

> The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California. . . . 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[.]

This rule is limited to contracts that call for an expenditure of funds by the City.[4] JUAs do not require an immediate expenditure of funds. The City only has to pay if the City requires SDG&E to relocate its facilities. We have issued several memoranda interpreting Charter section 99, but none address its applicability to agreements that call for an expenditure of funds contingent on some future event.

Charter section 99 was modeled after the debt limitation provision of article XI, section 18 of the California Constitution,[5] which has since been moved to article XVI, section 18.

> No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity[.]
>
> Cal. Const. art. XVI, § 18(a)

An exception to this rule is where the debt is contingent on a future event. 67 Op. Att'y Gen. 349, 352 (1984). "A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens." *Id.*, quoting *Doland v. Clark*, 143 Cal. 176, 181 (1904). The debt limitation provision of Charter section 99 is interpreted no more restrictively than article XVI, section 18. *Rider v. City of San Diego*, 18 Cal. 4th 1035, 1050 (1998).

Under this exception, Charter section 99 does not mandate City Council approval of JUAs by ordinance. The obligation to pay SDG&E is contingent on the City performing work in the public right-of-way that affects SDG&E facilities. The contingency is entirely within the City's control. Therefore, agreements with expenditures contingent on a future event are not agreements calling for expenditure of funds limited by Charter section 99.

---

[4] *See* 1998 City Att'y MOL 298.

[5] *See* 1968 Op. City Att'y 85.

CONCLUSION

In instances where SDG&E does not have an easement overlapping the public right-of-way, JUAs should be approved by the City Council. While such approval is not required under Charter section 99, City Council approval is mandated by Charter section 11. Approval of such JUAs is a legislative function: an action requiring the exercise of judgment or discretion by the City Council. This conclusion is consistent with the City Council's exclusive authority over other matters affecting interests in real property, such as eminent domain, street and easement vacations, and encroachments into the public right-of-way. Such legislative functions may not be delegated to the City Manager.

CASEY GWINN, City Attorney

By

Thomas C. Zeleny
Deputy City Attorney

TCZ:sc
ML-2004-12

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

CHRISTINA L. RAE
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: July 16, 2012

TO: Darren Greenhalgh, Deputy Director, Public Works Department

FROM: City Attorney

SUBJECT: Charter Section 99 and the proposed Chilled Water Service Agreement

INTRODUCTION

The City Attorney's office has been asked by the Public Works Department to review the Chilled Water Service Agreement (Agreement) between JMIR-Chilled Water LLC (JMIR) and the City of San Diego, which will provide chilled water to cool the New Main Library (Library). The Agreement will be for a term of twenty years, with four options to extend, each option for an additional five years. It was anticipated in 2006 when the City granted JMIR a chilled water franchise agreement that they would provide chilled water to the Library once it was built. The Library is currently under construction and was designed to be cooled by chilled water. The infrastructure has been designed and constructed to connect to JMIR's system which is the only provider of chilled water in that area.

QUESTIONS PRESENTED

1. Is the proposed Agreement consistent with the debt limitation provisions of the California Constitution and San Diego Charter section 99?

2. Can the City Council approve the Agreement by resolution, rather than by ordinance under San Diego Charter section 99?

SHORT ANSWERS

1. Yes. This Agreement to provide chilled water services does not violate the debt limitation provisions of either the California Constitution or San Diego Charter section 99.

2. Yes. The City Council can approve the Agreement by resolution.

ANALYSIS

I. CALIFORNIA CONSTITUTION DEBT LIMITATION PROVISION

Article XVI, section 18 of the California Constitution, Debt Limitation, provides:

> (a) No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of the two-thirds of the voters of the public entity voting at an election to be held for that purpose.

The purpose of the debt limitation provision of the California Constitution is to prevent the imprudent creation of inordinate debt that might be charged against taxpayers, and to ensure that taxpayers have the opportunity to express their approval or disapproval of long term indebtedness. 48 Op. Cal. Att'y Gen. 110 (1966). This provision is intended to hold cities accountable for the debt that they incur; the purpose is to prevent current city leaders from burdening future city leaders and tax payers for the agreements they entered into a long time ago. *McBean v. City of Fresno*, 112 Cal. 159, 164 (1896). All the money required to meet a present liability must be within the year's income, unless an exception to the debt limitation law exists. *City of Los Angeles v. Offner*, 19 Cal. 2d 483, 487 (1942).

A. Contingent Obligation Exception

Since the 1890's the Courts have recognized certain exceptions to the debt limitation provision to allow cities to function. One exception is known as the "contingent obligation" exception. Courts have determined that a contingent obligation is not a debt for purposes of the debt limitation provision. 67 Op. Cal. Att'y Gen. 349, 352-353 (1984). "A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens." *Id.* at 352, (citing *McBean v. City of Fresno*, 112 Cal. 159, 168 (1896)). This exception includes what is also commonly referred to as the lease exception. Courts have found long term leases are not debts, but rather contingent obligations, in which rental/lease payments are to be exchanged for contemporaneously received consideration. 67 Op. Cal. Att'y Gen. at 352-353; *See also Rider v. City of San Diego*, 18 Cal. 4th 1035, 1047 (1998).

> It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered

> into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision.

City of Los Angeles v. Offner, 19 Cal. 2d at 485-486.

The contingent obligation exception has been applied by the Courts to uphold multi-year contracts in which the local government agrees to pay in each successive year for land, goods, or services provided during that year. *Rider*, 18 Cal. 4th at 1047. This allows cities to negotiate lower prices, better terms and to avoid price volatility. *Id.* The key as the court stated in the sentinel lease exception case of *City of Los Angeles v. Offner,* is that the contract "creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year." *Offner,* 19 Cal. 2d at 486; *See also Rider,* 18 Cal 4th at 1048. The liability is confined to the specific performance of each party every month. The nature of the contract is such that neither party can fully perform nor is expected to fully perform upon execution of the contract, but rather their performance is tied to a specific time period. In the lease example the use and enjoyment of the space each month will trigger the payment obligation for that month.

B. San Diego Charter Section 99

Charter section 99 was amended in 1968 to bring it into consistency with the debt limitation provision of the Constitution of the State of California. Prior to the 1968 amendment to the Charter, the City was having difficulty interpreting section 99 and its requirements.[1] The 1968 amendment was done to allow the City of San Diego to use the protections flowing from the long standing case law interpreting the debt limitation provision and all the court recognized exceptions to the debt limitation provision of the California Constitution. City Att'y MOL No. 98-14 (June 4, 1998). The debt limitation provision of Charter section 99 is interpreted no more restrictively than article XVI, section 18 of the California Constitution. *Rider,* 18 Cal. 4th at 1050. Charter section 99 says:

> The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California . . . .

[1] See letter to Purchasing Agent from the City Attorney's Office in 1968 – detailing why Charter section 99 needs to be amended attached as A to this memorandum.

Charter section 99 is modeled on the debt limitation provision of article XVI, section 18 of the California Constitution. *See Ballot Measure for Proposition A, 1968.*[2] The amended section 99 allows the City to avail itself of the long standing case law exceptions to the debt limitation provisions, such as the contingent obligation exception. City Att'y MOL No. 98-14; (June 4, 1998).

The analysis under the Constitutional debt limitation provision and the San Diego Charter debt limitation provision is practically the same. The Service Agreement with JMIR is for a term of twenty years. The amounts due under this Agreement are specifically for the chilled water service provided by JMIR. This is similar to any other utility agreement or lease agreement. The City will owe JMIR each month for actual services provided by them in that month. There will be a constant and continuous exchange of consideration between JMIR and the City. Upon signing the Agreement the City will not owe a present and demandable debt to JMIR for the entire agreement amount. On the contrary, the City will owe JMIR a specific amount each month as long as JMIR provides chilled water services.

An acceleration clause or other provision making the aggregate immediately payable upon default could cause such a contract to violate the Constitutional debt limitation. 48 Op. Cal. Att'y Gen. 110 (1966). The Agreement does not contain any such acceleration clause. Either party can terminate the Agreement if the other party is not performing their duties under the Agreement. If the Agreement were to be terminated for default, the only amount potentially due would be for services already rendered prior to termination. Liability is restricted to monthly payments, therefore this Agreement would be considered a contingent obligation. Similarly Courts have held that lease agreements with a continued exchange of consideration are not debts and therefore not subject to the debt limitation provisions. *Id.* at 113.

The contingent obligation exception has been repeatedly used to uphold multiyear contracts for land, good and services, so long as liability is confined to actual present and contemporaneous exchange of consideration. *See Rider*, 18 Cal. 4th at 1047. The Agreement with JMIR would only create a contingent liability, contingent on each party performing each month. Therefore, the Agreement creates no immediate debt that would fall under the purview of the California Constitution or Charter section 99. *See Id.* at 1048.

II. ORDINANCES UNDER CHARTER SECTION 99

Charter section 99 it its entirety provides:

> The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have

[2] The ballot language is attached to this memo as attachment B. The legislative history of the current Section 99 will be addressed in more detail in the next section of this memo as well.

> indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. *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.*" (emphasis added).

The current version of section 99 was added to the San Diego Charter by voter approval of Proposition A in 1968.

The primary goal in construing a voter-approved amendment to a city charter is to effectuate the voters' intent in approving the amendment. *People v Jones*, 5 Cal. 4th 1142, 1146 (1993). When interpreting laws we begin with the "plain meaning doctrine" in which they will infer the plain and ordinary meaning of words and terms. However, "the plain meaning rule does not compel rote application of the common meaning of words, without regard to the context in which they are used." *County of Sacramento v. Pacific Gas & Electric Co.*, 193 Cal. App. 3d 300, 309 (1987).

With that in mind, the final sentence of section 99 says "[n]o contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance." If given their plain meaning in isolation, the words would appear to apply the ordinance requirement to <u>any</u> contract, agreement or obligation with no other limiting language. Since we do not apply a "rote" application of this doctrine, but rather look at the context in which these words are used, we must look at the entire section.

Charter section 99 consists of one paragraph with only three sentences. The first two sentences of this paragraph deal with incurring any indebtedness or liability. Because the subject of the final sentence seem so broad and the subject of the first two sentences seems more narrow, it is necessary to look at some grammatical rules in getting to the plain meaning in context of the entire section.

In interpreting a section of the California Vehicle Code, the court in *Addison v Department of Motor Vehicles*, 69 Cal. App. 3d 486, applied a common rule of grammatical construction to effectuate plain meaning in context, stating that "the second sentence of a paragraph ordinarily pertains to the same subject matter as the first." *Addison*, 69 Cal. App. 3d at 496. In normal rules of written communication we group like things in a single paragraph. When we wish to discuss a different idea, topic or conclusion we begin a separate paragraph. The court in *Addison* went on to find that the second sentence of the paragraph applied to the limited subject as outlined by the first sentence of the paragraph, if the legislature had intended a broader reading then "[i]t would have placed the last sentence in a separate paragraph, or included it as part of the proceeding paragraphs, or noted it in some other section of the Vehicle Code." *Id. See also Terry York Imports, Inc. v Department of Motor Vehicles*, 197 Cal. App. 3d 307 (1987).[3]

In this situation it is reasonable to see that the third sentence of this paragraph when read in context of the limited subject matter of the first two sentences, would relate to incurring indebtedness or liability. Under the *Addison* analysis, if the legislature intended a broader reading of the final sentence they should have put it in a separate paragraph or place it somewhere else in the Charter. *Id.*

Another factor in looking at the plain meaning of a statute in context is to look at the words used throughout the paragraph to harmonize the section with itself. Similar to the *Addison* approach of looking at the entire paragraph, we need to also look at any limiting words and where they are placed. The first sentence deals with "[t]he City shall not incur indebtedness or liability" and the second sentence deals with " . . . when two or more propositions for incurring indebtedness or liability". These two sentences that begin the paragraph have limiting words of indebtedness and liability. Under the *Ejusdem Generis* doctrine "where general words follow specific words in a statutory enumeration, general words are construed to comprise only objects similar in nature . . ." *Carriere v Cominco Alaska, Inc.*, 823 F. Supp. 680, 689 (1993). While normally this rule of construct is useful in interpreting lists of things, it is not confined to lists, it is also used to restrict general phrases used to objects that are similar to specific phrases already used in the statute. *Id.* at 690. With this in mind the first two sentences limit the provision to the context of indebtedness or liability. Thus, it would logically flow that the final sentence in the paragraph, while using the general terms "no contract, agreement or obligation" would be restricted to the objects within the limiting phrases already used, dealing with indebtedness or liability. The second sentence then would be restricted to contracts, agreements or obligations creating indebtedness or liability, consistent with this Office's 1998 opinion.

It is arguable that the plain meaning, even in context of section 99, is open to different interpretations. In this situation the context helps clarify this disputed phrase, but does not entirely eliminate any ambiguity. Therefore, the next step in the analysis is to look at the legislative intent of the Charter amendment. *The People v. Terry Eugene Birkett,* 21 Cal 4th 226, 231-232 (1999).

---

[3] *Terry York Imports, Inc. v Department of Motor Vehicles*, 197 Cal. App. 3d 307 (1987). In this case the Terry court was looking at the same vehicle code section that was at issue in the *Addison v. Department of Motor Vehicles* case. The Terry court agreed with the statutory interpretation done by the Addison Court and agreed with their reading of the statute. *Id.* at 316.

Legislative history is especially persuasive in determining the meaning of a given word or phrase. "In ascertaining the Legislature's intent, we turn first to the language of the statute." *Id.* at 231. In this situation there are several indicia of legislative intent in the actual language of Section 99 itself. The first sentence states that this is "required by the Constitution of the State of California." This shows the intent to mirror the California Constitutional debt limitation provision. There is also the use of specific words in Section 99 that reinforce the desire to create a debt limitation provision. The terms "indebtedness" and "liability" are used six different times in the first two sentences (the entire section is only three sentences long) of the section. In 1968 the City asked voters to amend Charter sections 80 and 99 in Proposition A. The ballot language of Proposition A provided: "Shall the Charter be amended to include *a debt limitation provision* consistent with the Constitution of the State of California, and to remove certain inconsistent provisions now contained in Section 80 and Section 99." (*See* Ballot measure for Proposition A 1968 (emphasis added).

The ballot goes on to show the changes being made to Section 80 Money Required to be in Treasury and Section 99 Continuing Contracts. Section 80 begins with "No contract, agreement or other obligation, involving the expenditure of money out of appropriations made by the Council, *in any one fiscal year* . . . " (the new language to be added to Section 80 was *in any one fiscal year*). This section was amended at the same time as Section 99. The beginning of the third sentence of Section 99 mirrors the beginning of the first sentence of Section 80 with "[n]o contract, agreement or obligation . . . " In looking at the argument for Proposition A we can clearly see the intent of the legislature "[a]s changed this section [80] will then be in line with Section 99 and both sections, if the amendments are adopted, will bring our Charter into conformity with the protections afforded by the State Constitution." Section 80 deals exclusively with the requirement that the Comptroller shall certify that funds are available prior to the execution of any contract, agreement or obligation. The two sections are closely linked by the desire to deal with the expenditure of funds in the City. The overall goal of amending both sections was to afford the City all the legal certainty from the court cases interpreting the debt limitation provision of the California Constitution. The previous language of Section 99 did not mirror the debt limitation provision of the California Constitution and thus "as presently written their ambiguities complicate City proposals for financing municipal improvements and they differ from similar provisions of the State Constitution." (Argument for Proposition A, 1968). The City was seeking to benefit from the numerous court interpretations of the debt limitation provision of the State Constitution, and needed to bring Section 99 into conformity with the State Constitution Debt limitation provision.

The argument in favor of Proposition A goes on to say "[t]he amendments to section 99, if adopted, will require that any contract or agreement of more than five years can only be authorized, after a public hearing, by a two-thirds' vote of the Council, whose action then will be subject to the referendum. This addition will enable the taxpayer to protest long-term projects not otherwise subject to a vote of the people."

Section 99 prior to the 1968 amendment provided:

> No contract or obligation involving the payment of money out of the appropriations of more than one year, except bonded indebtedness provided for in Section 90 of this Article, shall be entered into unless there shall first have been notice published in the official newspaper of the City at least two weeks before final action of the Council thereon. Such a contract shall require the approval of not less than five members of the Council. If the contract is to be for a period of more than five years it must also first be submitted to the electors of the City at a regular or special election and be approved by a two-thirds majority of those voting thereon. Any contract entered into violation of the requirements of this section shall be invalid, and no rights, indebtedness, liability or obligations shall arise thereunder or be created thereby."

The version of Section 99 prior to the 1968 amendment required that if the contract is for longer than five years it would have to go to a vote of the people in a general or special election. The amended Section 99 was to bring the section into conformity with the debt limitation provision of the State Constitution which only allows for the electorate to vote if the expenditure exceeds the City's revenue for the year. (*See* Ballot measure for Proposition A 1968). The electorate would not have the chance to otherwise contest long term projects or expenditures that do not rise to the level mentioned above. By adding the final sentence in Section 99, the City was trying to allow the citizens of the City of San Diego the opportunity to protest expenditures on long term projects that, but for that final sentence, they would not be allowed to protest. (*See* Argument for Proposition A, 1968). By adding that sentence, the City would approve those contracts, agreements or obligations incurring indebtedness in excess of five years by Ordinance allowing the electorate the ability to protest through the referendum process[4] rather than through a formal election.

The final sentence of the argument in favor of Proposition A reads: "These amendments are most essential to the orderly and economic functioning of your City government." The third sentence of the pre-1968 amended Section 99, "the contract" requiring a vote of the people at a special election was intended to refer back to the first sentence of the section "contract or obligation involving the payment of money." Nothing in the 1968 amendment indicates an attempt to expand the number of contracts coming within the scope of Section 99. (*See* Argument for Proposition A, 1968). The ballot language in fact describes an effort to create a more efficient process when looking to finance municipal improvements. If we read the final sentence of Section 99 to apply to ALL contracts, agreements or obligations and not just those that create fiscal indebtedness, we would be adding to the workload and expense of the City process. (*See* Argument for Proposition A, 1969). This would require contracts that were not previously required to go to City Council, to now go to Council, with two readings, a publication

[4] Under Charter section 23 "referendum may be exercised on any ordinance passed by the Council except an ordinance which by the provisions of this Charter take effect immediately upon its passage."

in the official newspaper of the City and a thirty day referendum period. This would be additional expense and processing time, inconsistent with the ballot argument of creating a more orderly and economic functioning government.

Our office in 2004 also issued a Memorandum of Law, City Att'y MOL No. 2004-12 (July 15, 2004), discussing Section 99 in relation to a Joint Use Agreement and whether it could be approved by Council by resolution rather than ordinance. In that memorandum our office concluded that Joint Use Agreements fell under the "contingent obligation" exception to the debt limitation provision of both the California Constitution and Charter section 99. Because the Joint Use Agreements fit as an exception to the debt limitation provision, then they were not considered a debt and could be approved by Council by resolution. *Id.* at 5. That is, because the agreement did not create a debt, the ordinance requirement of Section 99 did not apply. As discussed above, agreements with expenditures contingent on a future event are not debt and do not come under the purview of a debt limitation provision. *McBean v. City of Fresno*, 112 Cal. 159, 168 (1896).

The proposed agreement with JMIR is a contingent obligation akin to the lease exception; it is contingent upon services being rendered each and every month and a mutual exchange of consideration each month. JMIR cannot fully perform its obligations under the contract upon signing the agreement. It is a physical impossibility. JMIR can only perform on a monthly basis. The City is only required to pay JMIR if services are rendered and then for the value of the services rendered each month. Under the contingent obligation exception the agreement with JMIR is not a debt and therefore, Charter section 99 does not apply.

CONCLUSION

After considering the plain meaning of the statue, in context of Section 99, there was some guidance as to its full extent and meaning. With some room remaining for ambiguity, the rules of statutory interpretation required a closer look at the legislative intent and legislative history of Section 99 to ascertain more indications of its meaning and intent. With all these pieces of information and indicia of intent, this Office concludes that all three sentences of Section 99 were intended to apply only to fiscal indebtedness, not to all contracts regardless of fiscal impacts.

The proposed Agreement with JMIR falls within the contingent obligation exception to the debt limitation provision of the California Constitution and Charter section 99. This Agreement is for the mutual exchange of consideration tied to the services rendered in each year, or more particularly each month. Charter section 99 was amended in 1968 to mirror the Constitutional debt limitation provision so the legal analysis under both restrictions is the same.

Because the ordinance requirement of Charter section 99 only applies to debts, as defined in the California Constitution, this Agreement can be approved by City Council by resolution.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Christina L. Rae
Christina L. Rae
Deputy City Attorney

CLR:cla:cw
Attachment A: City Charter Section 99—Continuing Contracts
Attachment B: Proposition A
ML-2012-8
Doc. No. 400970_2

Attachment A

(City Charter Section 99—Continuing Contracts)

THE CITY OF SAN DIEGO
OFFICE OF CITY ATTORNEY-CITY ADMINISTRATION BUILDING • SAN DIEGO, CALIFORNIA
Telephone 23

EDWARD T. BUTLER
CITY ATTORNEY

March 18, 1968

Mr. John A. Mattis
Purchasing Agent
The City of San Diego
San Diego, California

Dear Mr. Mattis:

City Charter Section 99--
Continuing Contracts

We have received your memorandum dated March 8, 1968, relating to a proposed Charter amendment to Section 99 which now relates to continuing contracts. You ask our advice concerning the effect the proposed amendment, if adopted, will have on your purchase of five-year insurance policies when 1) the premium is fully paid in advance, and 2) when the premium is paid in annual installments. You also seek our advice concerning requirements contracts extending for a period longer than one year when money is appropriated only for the first year's requirements.

We are of the opinion that the proposed amendment to Section 99 will not preclude your purchase of five-year insurance policies whether or not the premium is paid in full in advance. We are also of the opinion that the City may validly enter into requirements contracts extending for a period longer than one year when an appropriation is made only for the first year's annual requirements.

The proposed amendment to Section 99 simply paraphrases the provisions of Section 18, Article 11, of the Constitution of the State of California. Our recommendation for the amendment to Section 99 was prompted by a continuing difficulty with the interpretation of Section 99 as it presently stands. To the extent that it authorizes obligations involving the payment of money out of the appropriations of more than one year but less than five years without the approval of a two-thirds' majority of the electorate,

we believe it to be unconstitutional. The underlying philosophy of Section 99 in its current form is to prevent City officials from mortgaging future revenues for present benefits. That objective is also reached by Section 18 of Article 11 of the Constitution. The advantage we see in the proposed amendment is its similarity to the constitutional provision which has been subjected to considerable litigation. As a result, lawyers are able to give a more consistent interpretation to the constitutional language.

While insurance contracts for a period of five years may require the expenditure of moneys not presently available, we are of the opinion that the purchase of such policies is not forbidden by the constitutional provision and therefore would be permitted under the proposed amendment to Section 99 of our Charter. Our theory is that the consideration furnished by the insurance company in providing protection to the City is a benefit accorded on an annual basis and is contingent upon payment by the City of annual premiums. Thus, it is not unlike a lease for a period of years where the consideration is (assuming a month-to-month tenancy) furnished by the lessor each month and the obligation of the lessee to pay rent arises on a monthly basis, so long as the lessor continues to permit quiet enjoyment of the premises. In considering the validity of a long-term lease by the City of Los Angeles with a private contractor who was to furnish a rubbish incinerator for a period of ten years, the court in City of Los Angeles v. Offner (1942) 19 Cal.2d 483 [122 P.2d 14], said at pages 485 and 486:

> "It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision."

If, of course, there are sufficient funds available to prepay the premiums in full, there will be no indebtedness

incurred exceeding the income and revenue for that year and therefore no violation of either Section 18 of Article 11 of the Constitution or the proposed amendment to Section 99 of the Charter.

In the case of a requirements contract extending for a period longer than one year, we are of the opinion that no obligation is incurred under Section 18 of Article 11 of the Constitution until the requirement for the product or services in question arises. We believe that under the proposed amendment to Section 99 of the Charter a sum payable upon a contingency is not a "debt" until the contingency has occurred. See City of Oakland v. Williams (1940) 15 Cal.2d 542 [103 P.2d 168]. Such a contract is similar to contracts which require, in effect, payments to be made from time to time as work progresses. (We do not here refer to contracts such as those for the construction of a building under which the City's obligation to pay arises at the time a contract is let and where the payment schedule is related to a percentage of completion of the construction.) In Wyckoff v. Force (1923) 61 Cal.App.246 [214 P. 489], the court reviewed a contract with an architect who was to design and supervise construction of a school building. He was to be paid over a period of years as work under the contract was accomplished. The court there said at page 250 that the architect's contract

> "called for his services until the building was completed, payments to be made from time to time as the work progressed. It does not appear that any installment coming due in any year during the life of the contract was in excess of the income and revenue [of the public agency] of that year. The contract is not, therefore, within the inhibitions of Section 18 of Article 11 of the constitution."

In summation, we believe that the proposed amendment will not necessarily alter your present practice with respect to the two types of contracts you mention.

Very truly yours,

EDWARD T. BUTLER, City Attorney

By Brian J. Newman-Crawford
Brian J. Newman-Crawford, Deputy

BJN-C:K

APPROVED:

City Attorney

Attachment B

(Proposition A)

JUN - 4 1968

PROPOSITION A

(THIS PROPOSITION WILL APPEAR ON THE BALLOT IN THE FOLLOWING FORM)

PROPOSITION A. CITY OF SAN DIEGO CHARTER AMENDMENT: AMEND SECTION 80 AND SECTION 99 OF THE CHARTER OF THE CITY OF SAN DIEGO. Shall the Charter be amended to include a debt limitation provision consistent with the Constitution of the State of California, and to remove certain inconsistent provisions now contained in Section 80 and Section 99?	YES	
	NO	/

This proposition amends Section 80 and Section 99 of the Charter of The City of San Diego by deleting certain provisions and by adding new provisions. The portions to be deleted are printed in STRIKE-OUT TYPE and the portions to be added are underlined.

This proposition requires a majority vote.

Section 80. MONEY REQUIRED TO BE IN TREASURY.

No contract, agreement, or other obligation, involving the expenditure of money out of appropriations made by the Council, in any one fiscal year shall be entered into, nor shall any order for such expenditure be valid unless the Auditor and Comptroller shall first certify to the Council that the money required for such contract, agreement or obligation for such year is in the treasury to the credit of the appropriation from which it is to be drawn and that it is otherwise unencumbered. The certificate of the Auditor and Comptroller shall be filed and made a matter of record in his office and the sum so certified as being in the treasury shall not thereafter be considered unencumbered until the City is discharged from the contract, agreement or obligation. All unencumbered moneys actually in the treasury to the credit of the appropriation from which ~~an~~ a contract, agreement or obligation is to be paid, and all moneys applicable to its payment which before the maturity thereof are anticipated to come into the treasury to the credit of such appropriation shall, for the purpose of such certificate, be deemed in the treasury to the credit of the appropriation from which the contract, agreement or obligation is to be paid. ~~The Council may approve a contract subject to a vote of two thirds of the electors, extending over a period of years for additions to the real estate, water plant, harbor, or other revenue producing utilities, in excess of the estimated revenue of the year, if in the opinion of the Auditor and Comptroller and the Council there will be money available to meet the payments on the contract as they come due. Provided, however, that nothing herein contained shall be construed as authorizing the incurring of indebtedness in excess of that limited by Section 76 of this Article.~~

Section 99. CONTINUING CONTRACTS.

~~No contract or obligation involving the payment of money out of the appropriations of more than one year, except bonded indebtedness provided for in Section 90 of this Article, shall be~~

JUN - 4 1968

~~entered into unless there shall first have been notice published in the official newspaper of the City at least two weeks before final action of the Council thereon. Such a contract shall require the approval of not less than five members of the Council. If the contract is to be for a period of more than five years it must also first be submitted to the electors of the City at a regular or special election and be approved by a two-thirds majority of those voting thereon. Any contract entered into in violation of the requirements of this section shall be invalid, and no rights, indebtedness, liabilities or obligations shall arise thereunder or be created thereby.~~

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. 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.

ARGUMENT FOR PROPOSITION A

Sections 80 and 99 are the "dry as dust" provisions of our City Charter. As presently written, their ambiguities complicate City proposals for financing municipal improvements and they differ from similar provisions in the State Constitution. While our courts in a long series of decisions have set forth public financing limitations under the Constitution, the City does not have the benefit of these decisions in interpreting Sections 80 and 99 of our Charter. Needless expense, delays and prolonged litigation are the results. The amendments to Section 99, if adopted, will require that any contract or agreement of more than five years can only be authorized, after a public hearing, by a two-thirds' vote of the Council, whose action then will be subject to the referendum. This addition will enable the taxpayer to protest long-term projects not otherwise subject to a vote of the people. Section 80 is proposed to be amended by removing certain provisions inconsistent with other Charter sections. As changed, this section will then be in line with Section 99 and both sections, if the amendments are adopted, will bring our Charter

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

CHRISTINA L. RAE
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: July 16, 2012

TO: Darren Greenhalgh, Deputy Director, Public Works Department

FROM: City Attorney

SUBJECT: Charter Section 99 and the proposed Chilled Water Service Agreement

INTRODUCTION

The City Attorney's office has been asked by the Public Works Department to review the Chilled Water Service Agreement (Agreement) between JMIR-Chilled Water LLC (JMIR) and the City of San Diego, which will provide chilled water to cool the New Main Library (Library). The Agreement will be for a term of twenty years, with four options to extend, each option for an additional five years. It was anticipated in 2006 when the City granted JMIR a chilled water franchise agreement that they would provide chilled water to the Library once it was built. The Library is currently under construction and was designed to be cooled by chilled water. The infrastructure has been designed and constructed to connect to JMIR's system which is the only provider of chilled water in that area.

QUESTIONS PRESENTED

1. Is the proposed Agreement consistent with the debt limitation provisions of the California Constitution and San Diego Charter section 99?

2. Can the City Council approve the Agreement by resolution, rather than by ordinance under San Diego Charter section 99?

Legislative history is especially persuasive in determining the meaning of a given word or phrase. "In ascertaining the Legislature's intent, we turn first to the language of the statute." *Id.* at 231. In this situation there are several indicia of legislative intent in the actual language of Section 99 itself. The first sentence states that this is "required by the Constitution of the State of California." This shows the intent to mirror the California Constitutional debt limitation provision. There is also the use of specific words in Section 99 that reinforce the desire to create a debt limitation provision. The terms "indebtedness" and "liability" are used six different times in the first two sentences (the entire section is only three sentences long) of the section. In 1968 the City asked voters to amend Charter sections 80 and 99 in Proposition A. The ballot language of Proposition A provided: "Shall the Charter be amended to include *a debt limitation provision* consistent with the Constitution of the State of California, and to remove certain inconsistent provisions now contained in Section 80 and Section 99." (*See* Ballot measure for Proposition A 1968 (emphasis added).

The ballot goes on to show the changes being made to Section 80 Money Required to be in Treasury and Section 99 Continuing Contracts. Section 80 begins with "No contract, agreement or other obligation, involving the expenditure of money out of appropriations made by the Council, *in any one fiscal year* . . . " (the new language to be added to Section 80 was *in any one fiscal year*). This section was amended at the same time as Section 99. The beginning of the third sentence of Section 99 mirrors the beginning of the first sentence of Section 80 with "[n]o contract, agreement or obligation . . . " In looking at the argument for Proposition A we can clearly see the intent of the legislature "[a]s changed this section [80] will then be in line with Section 99 and both sections, if the amendments are adopted, will bring our Charter into conformity with the protections afforded by the State Constitution." Section 80 deals exclusively with the requirement that the Comptroller shall certify that funds are available prior to the execution of any contract, agreement or obligation. The two sections are closely linked by the desire to deal with the expenditure of funds in the City. The overall goal of amending both sections was to afford the City all the legal certainty from the court cases interpreting the debt limitation provision of the California Constitution. The previous language of Section 99 did not mirror the debt limitation provision of the California Constitution and thus "as presently written their ambiguities complicate City proposals for financing municipal improvements and they differ from similar provisions of the State Constitution." (Argument for Proposition A, 1968). The City was seeking to benefit from the numerous court interpretations of the debt limitation provision of the State Constitution, and needed to bring Section 99 into conformity with the State Constitution Debt limitation provision.

The argument in favor of Proposition A goes on to say "[t]he amendments to section 99, if adopted, will require that any contract or agreement of more than five years can only be authorized, after a public hearing, by a two-thirds' vote of the Council, whose action then will be subject to the referendum. This addition will enable the taxpayer to protest long-term projects not otherwise subject to a vote of the people."

in the official newspaper of the City and a thirty day referendum period. This would be additional expense and processing time, inconsistent with the ballot argument of creating a more orderly and economic functioning government.

Our office in 2004 also issued a Memorandum of Law, City Att'y MOL No. 2004-12 (July 15, 2004), discussing Section 99 in relation to a Joint Use Agreement and whether it could be approved by Council by resolution rather than ordinance. In that memorandum our office concluded that Joint Use Agreements fell under the "contingent obligation" exception to the debt limitation provision of both the California Constitution and Charter section 99. Because the Joint Use Agreements fit as an exception to the debt limitation provision, then they were not considered a debt and could be approved by Council by resolution. *Id.* at 5. That is, because the agreement did not create a debt, the ordinance requirement of Section 99 did not apply. As discussed above, agreements with expenditures contingent on a future event are not debt and do not come under the purview of a debt limitation provision. *McBean v. City of Fresno*, 112 Cal. 159, 168 (1896).

The proposed agreement with JMIR is a contingent obligation akin to the lease exception; it is contingent upon services being rendered each and every month and a mutual exchange of consideration each month. JMIR cannot fully perform its obligations under the contract upon signing the agreement. It is a physical impossibility. JMIR can only perform on a monthly basis. The City is only required to pay JMIR if services are rendered and then for the value of the services rendered each month. Under the contingent obligation exception the agreement with JMIR is not a debt and therefore, Charter section 99 does not apply.

CONCLUSION

After considering the plain meaning of the statue, in context of Section 99, there was some guidance as to its full extent and meaning. With some room remaining for ambiguity, the rules of statutory interpretation required a closer look at the legislative intent and legislative history of Section 99 to ascertain more indications of its meaning and intent. With all these pieces of information and indicia of intent, this Office concludes that all three sentences of Section 99 were intended to apply only to fiscal indebtedness, not to all contracts regardless of fiscal impacts.

The proposed Agreement with JMIR falls within the contingent obligation exception to the debt limitation provision of the California Constitution and Charter section 99. This Agreement is for the mutual exchange of consideration tied to the services rendered in each year, or more particularly each month. Charter section 99 was amended in 1968 to mirror the Constitutional debt limitation provision so the legal analysis under both restrictions is the same.

Attachment A

(City Charter Section 99—Continuing Contracts)

we believe it to be unconstitutional. The underlying philosophy of Section 99 in its current form is to prevent City officials from mortgaging future revenues for present benefits. That objective is also reached by Section 18 of Article 11 of the Constitution. The advantage we see in the proposed amendment is its similarity to the constitutional provision which has been subjected to considerable litigation. As a result, lawyers are able to give a more consistent interpretation to the constitutional language.

While insurance contracts for a period of five years may require the expenditure of moneys not presently available, we are of the opinion that the purchase of such policies is not forbidden by the constitutional provision and therefore would be permitted under the proposed amendment to Section 99 of our Charter. Our theory is that the consideration furnished by the insurance company in providing protection to the City is a benefit accorded on an annual basis and is contingent upon payment by the City of annual premiums. Thus, it is not unlike a lease for a period of years where the consideration is (assuming a month-to-month tenancy) furnished by the lessor each month and the obligation of the lessee to pay rent arises on a monthly basis, so long as the lessor continues to permit quiet enjoyment of the premises. In considering the validity of a long-term lease by the City of Los Angeles with a private contractor who was to furnish a rubbish incinerator for a period of ten years, the court in City of Los Angeles v. Offner (1942) 19 Cal.2d 483 [122 P.2d 14], said at pages 485 and 486:

> "It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision."

If, of course, there are sufficient funds available to prepay the premiums in full, there will be no indebtedness

Attachment B

(Proposition A)

JUN - 4 1968

~~entered into unless there shall first have been notice published in the official newspaper of the City at least two weeks before final action of the Council thereon. Such a contract shall require the approval of not less than five members of the Council. If the contract is to be for a period of more than five years it must also first be submitted to the electors of the City at a regular or special election and be approved by a two-thirds majority of those voting thereon. Any contract entered into in violation of the requirements of this section shall be invalid, and no rights, indebtedness, liabilities or obligations shall arise thereunder or be created thereby.~~

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. 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.

ARGUMENT FOR PROPOSITION A

Sections 80 and 99 are the "dry as dust" provisions of our City Charter. As presently written, their ambiguities complicate City proposals for financing municipal improvements and they differ from similar provisions in the State Constitution. While our courts in a long series of decisions have set forth public financing limitations under the Constitution, the City does not have the benefit of these decisions in interpreting Sections 80 and 99 of our Charter. Needless expense, delays and prolonged litigation are the results. The amendments to Section 99, if adopted, will require that any contract or agreement of more than five years can only be authorized, after a public hearing, by a two-thirds' vote of the Council, whose action then will be subject to the referendum. This addition will enable the taxpayer to protest long-term projects not otherwise subject to a vote of the people. Section 80 is proposed to be amended by removing certain provisions inconsistent with other Charter sections. As changed, this section will then be in line with Section 99 and both sections, if the amendments are adopted, will bring our Charter

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

LARA E. EASTON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL ADVISORY DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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 Officer[1] 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 unenforceable[2] 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 Buenaventura*, 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.

---

[1] Although 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 newspaper[4] 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 execute[7] 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 unenforceable[10] 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

---

[8] All 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

LEE:mt:cfq:cw:cfq
ML-2015-12
Doc. No.:944991_2

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