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MEMORANDUM OF LAW

DATE: December 18, 2009

TO: Hildred Pepper, Jr., Director, Purchasing and Contracting Department

FROM: City Attorney

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

INTRODUCTION

You requested that our Office provide an overview of legal requirements for City contracts. We have summarized below the basic contracting requirements set forth in the San Diego City Charter [City Charter or San Diego Charter] and San Diego Municipal Code [Municipal Code or SDMC], including provisions regarding: (1) proper execution of City contracts; (2) City Council approval for contracts based on term length or dollar value; (3) competitive bidding requirements and exceptions; and (4) certification of funding. We also have addressed the potential legal consequences of failure to comply with these requirements and included recommendations for best practices on a going-forward basis.

QUESTIONS PRESENTED

1. Who has authority to execute City contracts, and whose signatures are required to legally execute a City contract?
2. When is City Council approval required?
3. When is competitive bidding required?
4. What are the requirements related to funding?

SHORT ANSWERS

1. The Mayor or his designee has authority to execute City contracts for those departments under the Mayor's control. The contracts must be signed by: (1) the Mayor or his designee; (2) the contractor; and (3) the City Attorney.
2. City 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, the Municipal Code requires City Council approval for certain contracts depending on dollar amount.
3. City Charter section 94 requires that public works contracts over a dollar amount set by ordinance be awarded to the lowest responsible and reliable bidder. The Municipal Code, Council Policies, and Administrative Regulations set forth additional requirements for the competitive bidding, advertisement, and award of public works, goods and services, and consultant contracts. The City Charter and Municipal Code permit exceptions to competitive bidding for certain contracts, for example, emergency contracts and sole source contracts.
4. City Charter sections 80 and 39 require that the City Comptroller and Chief Financial Officer certify, prior to the City entering into a contract involving fiscal obligations, that funds have been appropriated for the contract and are not otherwise encumbered.

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. However, "a charter city may not act in conflict with its charter," and "any act that is violative of or not in compliance with the charter is void." *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994). Generally, courts have considered the manner of municipal contracting to be a municipal affair. *First Street Partners v. City of Los Angeles*, 65 Cal. App. 4th 650, 661 (1998) ("[T]he manner in which a city is empowered to form a contract is generally a 'municipal affair' which can be controlled by the terms of the charter"). Therefore, 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.

In order to form a valid contract, the City must comply with its Charter and Municipal Code requirements governing contract formation. Failure to follow procedures set forth by the

Charter will render a contract void, or at least, unenforceable.¹ *See, e.g., G.L. Mezzetta, Inc. v. City of American Canyon*, 78 Cal. App. 4th 1087, 1094 (2000); *Katsura v. City of Beunaventura*, 155 Cal. App. 4th 104, 109-10 (2007).

The City Charter and Municipal Code set forth certain contracting requirements, including requirements regarding: the proper execution of City Contracts (San Diego Charter §§ 28, 260(b), and 265); Council approval of contracts based on term length (San Diego Charter § 99) and dollar value (SDMC §§ 22.3102, 22.3211(d), and 22.3223); competitive bidding and exceptions to competitive bidding (San Diego Charter § 94 and SDMC § 22.3212); and the verification of funding (San Diego Charter §§ 80 and 39). Failure to adhere to any of these requirements may result in a finding that a contract is void or unenforceable against the City. We discuss each of these contracting requirements in further detail, below.

I. Signature Authority for City Contracts

A. General Contracts.

1. Execution Authority

The City Charter currently provides that only the Mayor, or his or her designee, has authority to execute City contracts for departments under the Mayor's control. The Charter provides that, while the Strong Mayor form of government is in place, the Mayor has the powers and responsibilities previously conferred on the City Manager in Articles V, VII, and IX. San Diego Charter § 260(b). Article V conferred on the City Manager the power to "execute all contracts for the Departments *under his control*" (emphasis added). San Diego Charter § 28. In addition, Section 265(a) provides that the Mayor "shall be

¹ 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. There is some inconsistency among the California appellate districts regarding whether failure to follow municipal laws governing contract formation would render a contract completely void, or merely enforceable against the *city*. Some courts have suggested the former. *See, e.g., G.L. Mezzetta, Inc. v. City of American Canyon*, 78 Cal. App. 4th at 1094 (holding that "a contract that does not conform to the prescribed method for [entering municipal contracts] is void..."), citing *South Bay Senior Housing Corp. V. City of Hawthorne*, 56 Cal.App.4th 1231, 1235 (1997) (emphasis added). At least one court has permitted a *city* to enforce a contract not formed in accordance with the municipal code. *City of Orange v. San Diego County Employees Retirement Association*, 103 Cal.App.4th 45, 55-57 (2002) (private organization estopped to deny existence of oral settlement agreement with the City of Orange; *when the city is seeking to enforce*, failure to conform with contract formation requirements will not void the contract). Our own appellate district recently declined to enforce an alleged oral contract against the City of Poway, finding that the holding in *City of Orange* was limited to its facts. *Poway Royal Mobilehome Owners Association v. City of Poway*, 140 Cal. App. 4th 1460, 1474 (2007).

recognized as the official head of the City . . . for the signing of all legal instruments and documents”

While the Charter instills the power to execute in the Mayor, he can and has delegated this authority. *See* San Diego Charter § 28 (except as otherwise provided by the Charter, administrative duties may be performed by the City Manager – now the Mayor – or “persons designated by him”). The Mayor has currently delegated execution authority to a small number of 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 & Contracting Department, and various positions within the Purchasing & Contracting Department. *See* Mayor’s Memo dated February 23, 2009, entitled “Designation of Authority”; and Mayor’s Memo dated July 18, 2006, entitled “Designation of Authority to Sign Settlement Agreements.”² Aside from the individuals listed in the Mayor’s delegation memos, no other City officials are authorized to sign City contracts for departments under the Mayor’s control.³

2. Signatures Required to Properly Execute a City Contract

The plain meaning of the term “execute” in the context of Charter section 28 is to formally enter into a contract, for example, by signing it. *See* Black’s Law Dictionary 609 (8th ed. 2004) (defining “execute” to mean, among other things, “to make [a legal document] valid by signing . . .”). City contracts typically become effective once they have been executed by the parties and approved by the City Attorney.⁴

a. 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

² In addition, the Mayor has delegated limited execution authority to the Director of Real Estate Assets and Development for leases and property sale transactions. *See* Mayor’s Memo dated May 20, 2009, entitled “Signature Authority- Sale of Approved City Real Estate Assets”; and Mayor’s Memo dated May 20, 2009, entitled “Signature Authority- Authorization to Sign Leases.” The Mayor has also delegated execution authority to the Deputy Director of Field Engineering for change orders and public works amendments under \$200,000, as well as escrow agreements requested by prime contractors. *See* Mayor’s Memo dated August 29, 2009, entitled “Designation of Authority to Sign Change Orders and Escrow Agreements for all Construction Public Works Contracts.”

³ With respect to signature authority for City Attorney contracts, *see* City Att’y MOL No. 2008-1, entitled “Requirements for Legally Executed Contracts,” pp. 6-8.

⁴ The City’s template for consultant agreements states that the agreement becomes effective, “on the date it is executed by the last Party to sign the agreement, and approved by the City Attorney in accordance with Charter section 40.” However, some contracts may specify an alternative effective date.

formation of a valid and enforceable contract. *See, e.g., Banner Entertainment, Inc. v. Superior Court*, 62 Cal. App. 4th, 348, 358 (1998). Therefore, if either the City (i.e., the Mayor or his or her designee) or the contractor fails to execute, there is no valid contract.

b. The City Attorney

In addition, the Charter requires the City Attorney's signature in order to properly execute a City contract. Charter section 40 provides that it is the City Attorney's duty 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 also necessary to the formation of a valid contract.⁵

B. Emergency Contracts

The Charter contains special rules for contracts executed in response to a major emergency. Charter section 94 provides that "[i]n the case of a great public calamity, such as an extraordinary fire, flood, storm, epidemic or other disaster," the Council may authorize, by a two-thirds vote, immediate expenditures without the need for a competitive process. In such cases, "[a]ll contracts *before execution* shall be approved as to form and legality by the City Attorney" (emphasis added). Charter section 94 goes on to expressly state that: "All contracts entered into in violation of this Section shall be void and shall not be enforceable against said City" Unlike other, non-emergency contracts, the Charter requires that the City Attorney approve major emergency contracts *prior* to execution by the City and the contractor. For this particular category of contracts, the City Attorney's and the parties' signatures, in that order, are required to legally execute a contract.

C. Effect of Improper Execution

1. Contract is Invalid or Unenforceable Against the City.

When a charter provides for a certain method of approving a contract, failure to follow that method will render the contract void, or at least, unenforceable against the charter city. *G.L. Mezzetta, Inc.*, 78 Cal. App. 4th at 1092-94; *First Street Plaza Partners*, 65 Cal. App. 4th at 662-65; *Katsura v. City of Beunaventura*, 155 Cal. App. 4th at 109-10. In *Mezzetta*, for example, the court declined to enforce an alleged oral contract for access to a wastewater

⁵ We are aware that, due to the large volume of City contracts, not all contracts currently route through the City Attorney's Office for approval. Our Office is currently working with the Purchasing and Contracting Department to develop procedures for low expenditure contracts, such as small purchase orders or "pre-approved form" contracts, to ensure both compliance with Charter section 40 and efficient contracts processing.

discharge system against the City of American Canyon. *See Mezzetta*, 78 Cal. App. 4th at 1092-93. The court held that the failure to comply with the proscribed contracting method set forth in the statutes, including the failure to obtain the requisite signatures, rendered the alleged oral contract invalid: "Thus, because the statutes in question specifically set forth the ways in which the City may enter into contracts, any other methods of contract formation – even though not explicitly prohibited by the statutes - are invalid." *Id.* 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. *First Street* involved an action by private contractors against the City of Los Angeles to enforce a development contract. Although the parties engaged in protracted 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 Cal. App. 4th at 664, FN 10. The court found each of these requirements to be necessary to contract formation based on the presence of "the classic mandatory verb 'shall'" in the charter:

Plaintiff also argues that, despite the mandatory language ("shall"), the requirements of [the relevant charter section] need not be satisfied because the City's charter does not expressly *forbid* contract formation in a manner other than as specified in the charter. This proposition is suspect on its face since to accept it would render the contract formation requirements of [the relevant charter section] a complete nullity. . . . (emphasis in original).

Id. at 664, FN10. Since the contract in question was not approved in accordance with the charter, it could not be enforced against the city and the contractor was without remedy. *Id.* at 663-66.

Moreover, courts have held that contractors are deemed to have notice of municipal contracting procedures and cannot recover for work performed under an invalidly-formed contract. In *Katsura*, for example, the court denied an engineering firm's claim for work performed, even though it had been requested by a City employee. The court declined to hold the City liable because the extra work had not been reflected in a properly approved modification to the original contract:

Persons dealing with a public agency are presumed to know the law with respect to any agency's authority to contract There is no provision in

the City Charter for execution of oral contracts by employees of the City who do not have requisite authority. The alleged oral statements by [employees of the City who do not have such authority] are insufficient to bind the City.

Kastura, 155 Cal. App. 4th at 109. The court acknowledged the apparent harshness of the result, but maintained that a city is without power to contract in violation of its charter. Therefore, a contractor performing work under an unauthorized contract is but a "mere volunteer" and cannot enforce the contract against the City. *Id.* at 111, citing *Amelco Electric v. City of Thousand Oaks*, 27 Cal. 4th 228, 235 (2002).

Under the cases discussed above, any contract that is not signed by the Mayor or one of his designees, and approved by the City Attorney, is void or at least unenforceable against the City. In addition, any contractor who performs work under an improperly-formed City contract performs at the risk that he or she will not be paid.

2. Personal Liability of City Employee

Finally, a City employee may be subject to personal liability and forfeiture of office under Charter section 108, entitled "Forfeiture of Office for Fraud," which provides:

Every officer who shall willfully approve, allow, or pay any demand on the treasury not authorized by law, shall be liable to the City individually and on his official bond, for the amount of the demand so approved, allowed or paid, and shall forfeit such office and be forever debarred and disqualified from holding any position in the service of the City.

Moreover, the City is not required to indemnify City employees for liability from acts beyond the scope of their authority. See California Government Code 995.2 (public agencies may refuse to defend an employee acting beyond the scope of employment or with fraud, corruption or malice).

II. City Council Approval

Under the City Charter and Municipal Code, City Council approval is required to enter into certain contracts based on either: (1) the term length of the contract; or (2) the dollar value of the contract. The threshold for City Council approval varies depending on the contract type.

A. Contract Term

The City Charter requires that contracts exceeding five years be approved by the City Council by ordinance by a two-thirds' vote. Charter section 99 provides, in relevant part, that:

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.

We have previously interpreted Charter section 99 to apply to City contracts requiring an expenditure of funds. *See* City Att'y MOL No. 98-14, entitled "Charter Section 99 - Agreements for a Term in Excess of Five Years" (finding that the legislative history of Charter section 99 indicates an intent to apply to fiscal obligations only). Therefore, non-expenditure contracts or revenue-generating contracts, such as leases, would not be subject to the requirements of Charter section 99. Any other contract requiring an expenditure by the City, regardless of dollar amount, may not exceed a term of five years unless approved by the City Council, by ordinance, by a two-thirds' vote.⁶

We understand that in the past some City contracts have been extended on "month-to-month" basis. To the extent these extensions have resulted in a total contract term of more than five years, and have not been approved by the City Council by ordinance by a two-thirds' vote, the extensions are void or at least unenforceable against the City. *G.L. Mezzetta, Inc.*, 78 Cal. App. 4th at 1094; *Katsura*, 155 Cal. App. 4th at 109-10.⁷ As such, the contractors performing under these purported extensions are doing so at the risk that they will not be paid for their services. *Katsura*, 155 Cal. App. 4th at 111. To avoid this result on a going-forward basis, we recommend the following remedial measures:

The City department responsible for the procurement should assess the likelihood of the contract extending beyond five years. If the initial term of the contract will extend beyond five years, the City department should obtain City Council approval by ordinance by two-thirds' vote prior to execution of the contract and commencement of services. If the initial term of the contract is less than five years but the exercise of an option to extend will bring the total contract term beyond five years, the City department has the option of either: (1) obtaining City Council approval of the initial term and any anticipated extensions prior to commencement of the initial term, or (2) obtaining City

⁶ However, this Office has opined that the requirements of Charter section 99 do not extend to contracts involving contingent fiscal obligations, i.e., obligations dependent on the occurrence of some future event. *See* City Att'y MOL No. 2004-12, entitled "City Manager's Authority to Execute Joint Use Agreements."

⁷ *See* Footnote 1.

Council approval prior to exercising the extension that will bring the contract term beyond five years.⁸

If the term of a contract has already extended beyond five years without City Council approval by ordinance by two-thirds' vote, the procuring City department should immediately seek retroactive approval or "ratification" of the contract by City Council. 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) (City Council could retroactively approve emergency contract signed by the city manager because competitive bidding was not strictly required); *compare Reams v. Cooley*, 171 Cal. 150, 154-55 (1915) (when there is no exception to competitive bidding and none was performed, contract cannot be subsequently cured by ratification).

Finally, if a City department requires continued work, 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. We defer to the Purchasing & Contracting Department to set forth appropriate procurement schedules, which include sufficient time for advertisement, evaluation and award, submission and resolution of any protests, and City Council approval when required.

B. Contract Value

City Council approval is also required for contracts exceeding a certain dollar threshold. For example, the Municipal Code requires that the City Council approve: (1) public works contracts that exceed \$1,000,000 and public works contracts not previously funded through the Annual Capital Improvements Program (SDMC § 22.3102); (2) goods and services contracts that exceed \$1,000,000 (SDMC § 22.3211(d)); (3) non-profit services contracts over \$500,000 (SDMC § 22.3222); 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 § 22.3223). Since neither the City Charter nor the Municipal Code specify that such authorization be made by ordinance, the City Council can approve these types of contracts by resolution.

As with Charter section 99, failure to comply with any of the Municipal Code requirements for City Council approval will render a contract void or enforceable against

⁸ If the City department chooses to wait obtain Council approval until exercising an option to renew, it should seek City Council approval sufficiently in advance of expiration of the initial term to allow for timely exercise of the option. For example, some City contracts require that options to renew be exercised in writing 30, 60 or even 90 days in advance of expiration of the current term.

the City. *G.L. Mezzetta, Inc.*, 78 Cal. App. 4th at 1094.⁹ Therefore, we recommend that the City department responsible for the procurement determine the dollar value of a contract prior to advertisement and award. The procuring City department should then seek City Council approval either: (1) prior to the initial term if the contract value exceeds the applicable dollar threshold, or (2) prior to any extension that would bring the total contract value over the applicable dollar threshold.

III. Competitive Bidding, Advertisement and Award

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

A. Public Works

City Charter section 94 sets forth requirements for bidding, advertising, and awarding public works contracts over a certain dollar amount set by ordinance. Charter section 94 provides:

In the construction, reconstruction or repair of public buildings, streets, utilities and other public works, when the expenditure therefore *shall exceed the sum established by ordinance of the City Council*, the same shall be done by written contract, except as otherwise provided in this Charter, and the Council, on the recommendation of the Manager or the head of the Department in charge if not under the Manager's jurisdiction, shall let the same to *the lowest responsible and reliable bidder*, not less than ten days after advertising for one day in the official newspaper of the City for sealed proposals for the work contemplated (emphasis added).

Courts generally have interpreted a requirement to award to the "lowest responsible and reliable bidder" – or similar terms – to mean that a local agency must award to the lowest responsible bidder meeting advertised specifications. The agency has no discretion to consider subjective factors, such as relative quality, in making an award. *See, e.g., Associated Builders and Contractors, Inc. v. San Francisco Airports Commission*, 21 Cal. 4th 352, 366 (1999); *City of Inglewood- L.A. County Civic Center Authority v. Superior Court*, 7 Cal. 3d 861, 867-68 (1972).¹⁰

⁹ See Footnote 1.

¹⁰ For an in-depth discussion of the "lowest responsible and reliable" requirement, *see* City Att'y RC-2009-9 (May 20, 2009), entitled "Legal Options for Small or Local Business Preference Programs," pp. 3-5.

In addition to the basic requirements set forth in Charter section 94, the Municipal Code includes provisions regarding the bidding, advertisement, and award of public works contracts, in Chapter 2, Article 2, Division 30 ("Contract Definitions, Competitive Bidding Procedures, and Contract Alterations"), Division 31 ("Public Works Contracts"), and Division 36 ("Bidding and Award Requirements for Minor Public Works").

Charter section 94 also addresses bonding requirements and makes special provisions for emergency contracts. *See* Section I.B. of this Memorandum. Charter section 94 further prohibits City officers from being "directly or indirectly interested in" contracts awarded by the City, and expressly provides that any contracts made in violation of its provisions "shall be void and shall not be enforceable against the City"

B. Goods and Services

The Municipal Code also includes provisions regarding competitive bidding requirements for goods and services contracts. Municipal Code section 22.3026(a)(2) provides that goods and services contracts "shall be awarded on the basis of the low acceptable bid that best meets City requirements . . . , " also known as the "best value" standard, which permits the City to consider quality in addition to price. In addition, the Municipal Code sets forth advertising requirements for goods and services contracts. The level of formality required, from the solicitation of oral or written quotes to advertisement in the City's official newspaper, increases with the contract dollar amount. SDMC § 22.3211.

C. Consultants

Finally, competitive bidding requirements for consultant contracts are set forth 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). Council Policy 300-7 requires that selection of consultants, "be made from as broad a base of applicants as possible and the choice be based on demonstrated capabilities or specific expertise." Council Policy 300-7, p.1. The Council Policy also specifies that a minimum of three consultants should be considered when possible, and that procurements should be advertised in the City's official newspaper for non-Architectural and Engineering consultant agreements over \$3,000 and Architectural and Engineering consultant agreements over \$25,000.

D. Deviations from Competitive Bidding Requirements

Deviations from competitive bidding requirements set forth in the City Charter and Municipal Code will render a contract invalid and not subject to ratification. *See Reams v. Cooley*, 171 Cal. at 154 (contract entered into without competitive bidding process was invalid, and contractor was not entitled to damages for work performed);

Zottman v. City and County of San Francisco, 20 Cal. 96, 103 (1862) (holding that “where the charter authorizes a contract for work to be given only to the lowest bidder . . . a contract made in any other way . . . cannot be subsequently affirmed”).

Any deviations from advertised bid requirements may result in the City being forced to set aside an award. See *Konica Business Machines U.S.A., Inc. v. Regents of the Univ. of California*, 206 Cal. App. 3d 449, 457 (1988). In *Konica*, the U.C. Regents attempted to award a photocopying contract to a contractor who provided the lowest price but did not technically comply with the bid requirements. *Id.* at 452-53. The court found that deviations from the specifications as advertised were impermissible if they gave any bidder a “competitive advantage” over bidders who complied with the specifications. *Id.* at 455.

In support of its finding, the *Konica* court noted that the purpose of competitive bidding requirements was to “eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition.” *Id.* at 456. As such, specifications had to be sufficiently detailed and clear so as to provide a basis for a fair competitive process. The award to the lowest bidder did not strictly adhere to the bid specifications. Therefore, the court ordered the U.C. Regents to set aside the award and re-bid the contract. *Id.* at 458. See also *Valley Crest Landscape, Inc. v. City Council*, 41 Cal. App. 4th 1432, 1435 (1996) (public contracts cannot materially be amended in favor of winning bidder after bidding has closed).

In order to avoid the result in *Konica*, we recommend that City staff strictly adhere to the competitive bidding procedures set forth in the City Charter, Municipal Code, and Council Policies, and ensure that contract awards do not materially deviate from advertised bid requirements.

E. Exceptions to Competitive Bidding

The City Charter and Municipal Code set forth some exceptions to competitive bidding requirements. For example, the City can award a contract without strict adherence to competitive bidding in the case of: (1) goods and services contracts for less than \$5,000 (SDMC § 22.3212(a)); (2) cooperative procurement contracts (SDMC § 22.3212(b),(d)); (3) service contracts with nonprofits or other public agencies for \$500,000 or less (SDMC §§ 22.3212(h) and 22.3222); (4) emergency contracts (San Diego Charter § 94 and SDMC § 22.3212(c)); and (5) sole source contracts (SDMC §§ 22.3212(e) and 22.3037). We discuss the last two categories in more detail below.

1. Emergency Contracts

As discussed above, Charter section 94 provides that “[i]n the case of a great public calamity, such as an extraordinary fire, flood, storm, epidemic or other disaster,” the Council may authorize by resolution, by a two-thirds’ vote,

immediate expenditures to safeguard life, health, or property without the need for a competitive process. Tracking the Charter language, the Municipal Code defines “emergency” as: “an event of great public calamity, such as an extraordinary fire, flood, storm, epidemic or other disaster.” SDMC § 22.3003. The Municipal Code also sets forth a process for the Purchasing Agent to approve certain emergency contracts. It provides that a contract to remedy an emergency that affects public health or safety is exempt from competitive bidding if: (1) the Purchasing Agent immediately reports the emergency award and its justifications to the City Council, and (2) the City Council ratifies the emergency award by resolution. SDMC § 22.3212(c).

2. Sole Source Contracts

a. The Sole Source Standard

The Municipal Code also provides that a contract is exempt from competitive bidding when it “is available from a *Sole Source* only, if, in advance of the *contract*, the City Manager certifies in writing in accordance with Section 22.3037 the *Sole Source* status of the provider.” SDMC § 22.3212(e) (emphasis in original to indicate defined terms). Sole source contracts are justified where “strict compliance with competitive selection or bidding requirements would be unavailing, or would not produce an advantage, or would be undesirable, impractical, or impossible.” SDMC § 22.3037. The Municipal Code’s definition of sole source contracts is derived from the California Court of Appeal’s holding in *Graydon v. Pasadena Redevelopment Agency*, 104 Cal. App. 3d 631, 636-37 (1980).

In *Graydon*, the City of Pasadena Redevelopment Agency issued a bond to finance a private retail shopping center intended to revitalize the downtown area. In connection with the project, the Agency awarded a public contract for the construction of a subterranean garage without a competitive process. A plaintiff taxpayer filed suit, alleging among other things, that the award was improper because the contract was not competitively bid. *Id.* at 634-35. The *Graydon* court disagreed, finding that the garage was integrated with the shopping center project and that a competitive process would have caused a substantial delay and jeopardized the public financing. *Id.* at 638-39, 645. The court held that there was an exception to competitive bidding procedures when:

the nature of the subject of the contract is such that competitive proposals would be unavailing or would not produce an advantage, and that the advertisement for

competitive bid would thus be undesirable, impractical, or impossible

This principle has been held applicable in California decisions in a variety of situations involving both the purchase of services and products and the construction of public improvements and buildings where it has appeared that competitive bidding would be incongruous or would not result in any advantage to the public entity in efforts to contract for the greatest public benefit.

Id. at 635-36.

The *Graydon* court went on to cite examples of other situations where sole source may be justified: contracts for personal services requiring a special skill or ability; contracts for patented products; contracts for construction of public improvements by a government-regulated monopoly; contracts for experimental or unique products; or contracts for the acquisition or disposition of property for a particular use and with a special value to one person. *Id.* at 636-37. *See also Taylor Bus Service, Inc. v. San Diego Board of Education*, 195 Cal. App. 3d 1331, 1345 (1987) (upholding sole source award to various bus companies after low bidder failed to provide necessary insurance; competitive process was excused due to proximity to start of the school year); *San Diego Service Authority for Freeway Emergencies v. Superior Court*, 198 Cal. App. 3d 1466, 1473-74 (1988), *concurring opinion* (finding that award of emergency call box contract was not subject to competitive bidding because it was a “unique, one-of-a-kind,” contract); *San Juan Helicopters v. Department of Forestry*, 110 Cal. App. 4th 1549, 1554-55, 1565 (2003) (upholding interim sole source contract to helicopter maintenance company while protest from rival company was being resolved).

Under the Municipal Code, sole source justification must be determined on a contract-by-contract basis. Section 22.3212(e) exempts from competitive bidding a “*contract*” that is available from a sole source only when, “in advance of the *contract*, the City Manager certifies in writing in accordance with Section 22.3037 the *Sole Source* status of the provider” (emphasis in original to indicate defined terms). The City may not apply a blanket sole source certification to a specific vender, service provider, contractor, or consultant for all contracts awarded to it; nor may it certify as a sole source a specific product for an indefinite period of

time. Rather, the City Manager, or his or her designee,¹¹ must determine whether a sole source award to a particular contractor is justified for a particular contract based on the market conditions at the time the contract is let.

As such, sole source certifications should be coterminous with the length of a contract. While competitive bidding may be “undesirable, impractical, or impossible” at the time the City awards the initial 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, value, or suitability. Therefore, the City must certify the applicability of the sole source exemption prior to the award of each new contract and prior to each extension of an existing contract that was not contemplated in the initial contract term. In no event should sole source certification exceed the duration of the initial contract term plus extensions approved with the initial contract term, or have an indefinite or arbitrary expiration date.

b. The City Attorney’s Role

The power to certify grounds for sole source rests with the Mayor or his or her designee in the first instance. The City Attorney’s role is to provide a legal review of that certification in order to ensure that it will withstand legal challenge. If the City Attorney determines that a sole source certification does not meet the standard set forth in Municipal Code section 22.3212(e), he or she will advise City staff accordingly and could decline to approve the contract in question.

IV. Funding

Finally, the City Charter provides the City Comptroller and Chief Financial Officer must, prior to entering into any contract involving the expenditure of funds, certify: (1) that an appropriation of funds has been made for the expenditure, and (2) that the funds are not otherwise encumbered. Charter section 80 provides, in relevant part:

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

¹¹ Municipal Code section 22.3037(b) permits the City Manager to delegate sole source certification authority to “the Assistant City Manager, Deputy City Manager, or any Department Director.” The Mayor has delegated sole source certification authority to the Purchasing Agent, i.e., the Director of the Purchasing & Contracting Department.

the credit of the appropriation from which it is to be drawn and that it is otherwise unencumbered.

In addition, Charter section 39 provides, in relevant part:

No contract, agreement, or other obligation for the expenditure of public funds shall be entered into by any officer of the City and no such contract shall be valid unless the Chief Financial Officer shall certify in writing that there has been made an appropriation to cover the expenditure and that there remains a sufficient balance to meet the demand thereof.

Read together, these provisions set forth a mechanism for ensuring that the City does not enter into financial obligations unless there are sufficient funds available to meet those obligations. In the case of contracts routed by a Request for Council Action (Form 1472), a Request for Mayoral Action (Form 1544), and other contract routing forms, the Charter requirements may be met through a "Comptroller's Certificate" certifying that funds have been appropriated and not otherwise unencumbered. For other contracts, this certification may be made by purchase requisition or other instrument, provided that the requirements of Charter section 80 and 39 are satisfied.

CONCLUSION

The City Charter and Municipal Code set forth various legal requirements for City contracting, including requirements involving: (1) proper execution of City contracts; (2) City Council approval for contracts based on term length or dollar value; (3) competitive bidding requirements and exceptions; and (4) certification of funding. Any contract made in violation of the Charter and Municipal Code requirements may be void or at least unenforceable against the City. We recommend strict adherence to the legal requirements discussed above to ensure the validity of City contracts and to minimize the risk of litigation over unauthorized contracts. We stand ready to provide any legal assistance your Department may need in order to comply with these requirements.

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By

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Deputy City Attorney

SRS:amt

cc: Jay Goldstone, Chief Operating Officer
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