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MEMORANDUM OF LAW

DATE: February 11, 2008

TO: Tammy Rimes, Acting Director, Purchasing and Contracting

FROM: City Attorney

SUBJECT: Requirements for Legally Executed Contracts

INTRODUCTION

On October 19, 2007 you asked this Office's opinion on a series of questions related to the execution of City contracts. This memorandum addresses the basic requirements for legally executing City contracts, including the necessary signatures, the legal effect if one or more of those signatures is missing, and special rules for "major emergency" contracts. We have also addressed the City Attorney's role with respect to City contracts and sole source justifications, as well as special issues that arise when the City Attorney's Office is the procuring department. Specific questions presented and brief answers are as follows:

QUESTIONS PRESENTED

1. Whose signatures are required to legally execute a City contract?

2. What is the City Attorney's role in signing contracts?

3. What is the City Attorney's role with respect to sole source determinations?

SHORT ANSWERS

1. The signatures of the City (i.e. Mayor or designee), the contractor, and the City Attorney are each required to legally execute most City contracts.

2. The City Attorney's review and approval of all contracts is required by the City Charter. In the case of major emergency contracts, the City Attorney is required

to approve contracts *prior* to execution by the City. The City Attorney's Office may execute its own contracts because it is an independent department.

3. While the authority to certify grounds for a sole source procurement rests with the Purchasing and Contracting Department in this first instance, the City Attorney's role is to provide a legal review of that certification so that it may withstand court challenge.

DISCUSSION

Below is an overview of current law regarding the administration and execution of contracts by municipalities, followed by an analysis of the specific questions presented.

I. Overview.

The City of San Diego is a charter city, and therefore bound by the provisions of its Charter governing administration and execution of contracts. "[A] charter city may not act in conflict with its charter… 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). In the case of charter cities, courts have held that failure to follow procedures set forth by the charter will render a contract void, or at least, unenforceable.[1] *Katsura v. City of Beunaventura*, 155 Cal. App. 4th 104, 109-10 (2007) (it is well-settled that a municipal contract "made in disregard of the prescribed mode is unenforceable"), *citing Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 353 (1930).

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[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 1087, 1094 (1st Dist. 2000) (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 (2nd Dist. 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 (2d Dist. 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 (4th Dist. 2007).

II. Whose Signatures are Required to Legally Execute a Contract?

The City Charter currently provides that the Mayor (or his/her designee)[2] has authority to execute most City contracts. 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 City Charter [SDCC] section 260(b). Article V conferred on the City Manager the power to "execute all contracts for the Departments *under his control*." SDCC § 28 (emphasis added). In addition, 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 . . ." This language was copied verbatim from section 24, which sets forth the powers of the former "Weak Mayor" and is inoperative while the "Strong Mayor" system remains in effect.

The plain meaning of the term "execute" in the context of section 28 is to formally enter into a contract, for example by signing it. *See* Black's Law Dictionary 589 (7th ed. 1999)(defining "execute" to mean, among other things, "to make [a legal document] valid by signing…"). The majority of City contracts state that they become effective upon execution of *all parties* to the contract. 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). Therefore, if either the City (i.e., the Mayor or his/her designee) *or* the contractor fails to execute, *there is no contract*.[3]

The Charter also provides that the City Attorney must approve City contracts. Charter section 40 expressly 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 . . ."

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[2] While the Charter instills the power to execute in the Mayor, he can and has delegated this authority. *See* SDCC § 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"). In a series of memos dated June 9, 2006 to March 16, 2007, the Mayor delegated authority to execute contracts to a limited number of City officials, including the Director and Deputy Director of Purchasing and Contracting.

[3] 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." While most City contracts require all parties to execute before a contract becomes effective, it is possible that some City contracts do not expressly require this. In this case, the contract may be enforceable against the City if all mandatory City execution requirements have been met, even if the other party to the contract has not signed. *See, e.g. Angell v. Rowlands*, 85 Cal.App.3d 536, 578 (1978)(in absence of a showing that a contract was not intended to become operative until signed by all parties, the parties who did sign will be bound).

As discussed above, 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. Courts have generally held this to mean that where a charter contains *mandatory* language regarding approval by the city attorney, that approval is necessary to formation of a contract. *See, e.g. G.L. Mezzetta, Inc., supra,* 78 Cal.App.4th at 1092-94; *First Street Plaza Partners v. City of Los Angeles*, 65 Cal.App.4th 650, 662-65.

In *Mezzetta,* for example, the court declined to enforce an alleged oral contract against the City of American Canyon because the contract failed to comply with municipal code provisions requiring approval by the city council, the city attorney, and the mayor. American Canyon's municipal code was similar to the City of San Diego's Charter in the description of the functions of the city attorney's office:

> The functions of the office of the city attorney shall be to… Prepare and/or approve all ordinances, resolutions, agreements, contracts, and other legal instruments as shall be required for the proper conduct of the city and *approve the form* of all contracts and agreement and bonds given to the city… *Id.* at 193, *citing* American Canyon Municipal Code § 2.20.030 (emphasis added).

The court held that failure to comply with all requirements of the municipal code regarding the formation of contracts, including obtaining the signature of the city manager and the city attorney, rendered the alleged oral contract invalid. *Id.* at 1093-94. In support of its holding, the court reasoned that by requiring multiple signatures, the city clearly had intended to avoid hasty decision-making and to spread the ability to enter into contracts over a "broad base of authority." *Id.* at 1094. The same reasoning applies in this case.

In *First Street*, the court similarly held that failure to obtain the requisite signatures in violation of charter would render a 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. 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. *First Street, supra,* 65 Cal.App.4th at 663.

The court went on to find that interpreting any one of the aforementioned signatures as optional would "write out" the relevant charter sections. As the court stated:

> 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… *Id.* at 665 (emphasis in original).

As in *First Street*, interpreting Charter section 40 not to *require* the City Attorney's signature in order to legally execute a contract would essentially render the provision regarding the City Attorney's approval of contracts meaningless. The Charter requires, in mandatory language, that the City Attorney approve City contracts. The cases above make clear that the failure to comply with a mandatory requirement of contract formation, stated in the Charter, will prevent formation of a valid contract.

It is important to note that most City contracts state in the signature block for the City Attorney, "approved as to form *and legality*," though the Charter language is "form or correctness." The former phrase indicates that the City Attorney has approved both the form (wording) of the contract and confirmed that it is a legally valid contract – i.e. that the contract is approved as to both form and correctness. If a contract suffers from an underlying legal problem, City Attorney approval "as to form only" will satisfy the Charter's requirement for an endorsement as to "form *or* correctness." It will not, however, remedy the underlying legal problem.

For the reasons stated above, the City Attorney's signature, in addition to the City's and the contractor's, is required to legally execute a City contract. In some cases, the City Attorney will approve a contract as to "form" only, which will not prevent formation under Charter section 40, but will signal another legal problem with the contract.

III. What is the City Attorney's Role in Signing Contracts?

A. General Contracts.

As noted above, the City Attorney's role is generally to approve the contract. If the City Attorney endorses approval of the contract as to "form and legality," the City Attorney has indicated that he or she has determined that the contract is proper, valid, and enforceable. If the City Attorney endorses the contract as to "form" only, the City Attorney is indicating that, upon review, he or she has determined the contract to be improper or illegal for one reason or another.

If the City Attorney declines to endorse approval of a contract *either* as to form or correctness, the City's chief legal officer has determined that the contract has not been formed in accordance with the Charter or other applicable laws. The contract is therefore unenforceable against the City, and may be entirely void. The City Attorney's approval is a necessary element of contract formation. A contract cannot be formed without it.[4]

B. Major Emergency Contracts.

Charter section 94 contains special rules for City Attorney approval in the case of contracts executed in a major emergency. 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, section 94 provides, "[a]ll contracts *before execution* shall be approved as to form and legality by the City Attorney."

Therefore, the Charter requires that the City Attorney approve major emergency contracts *prior* to execution by the City and the contractor. This differs from the process for general contracts, where the timing of the City Attorney's signature is not critical. In addition, section 94 expressly indicates that failure to follow the processes set forth in that section will render a contract void: "All contracts entered into in violation of this Section shall be void and shall not be enforceable against said City…" 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. City Attorney Contracts.

The City Attorney's Office may initiate contracts as needed to "to perform all services incident to the legal department," as required by Charter section 40. Historically, the City Attorney also had the power to *execute* such contracts as an independent department. As will be discussed below, the implementation of the Strong Mayor provisions of the City Charter has not affected the power of independent City departments to execute their own contracts.

The power of the City Attorney to execute contracts for services rendered directly to the City Attorney's Office [City Attorney contracts], such as outside counsel and expert witness

[4] While the Charter provides that the City Attorney shall endorse his or her approval of contracts, it would likely present significant logistical issues for the City Attorney to sign *every* contract entered into by the City on a day-to-day basis. According to our previous discussions with Purchasing and Contracting, the City Attorney currently does not review and sign all City contracts due to the excessive volume of those contracts. We stand ready to work with City departments to address these issues.

services, clearly existed prior to the current Strong Mayor experiment. Under the City Manager form of government, as noted, the City Manager's execution authority extended only to "contracts for the Departments under his control."[5] SDCC § 28. Because the City Manager's control never extended to the City Attorney's Office, which is independent under Charter section 40, the City Manager under the Weak Mayor system did not have authority to execute City Attorney contracts. In practice, these contracts have historically been executed by designated persons within the City Attorney's Office, such as Assistant City Attorneys.

The question, then, is whether Article XV of the City Charter, initiating the Strong Mayor experiment, removed the City Attorney's Office's power to execute its own contracts and placed that power with the Mayor. Based on our analysis of the relevant Charter provisions, we conclude it did not.

The Mayor's current powers derive from three sources: the former City Managers' powers, the former Mayors' powers, and new powers explicitly conferred upon the Mayor by Article XV. If the Mayor were to have the exclusive power to execute City Attorney contracts, it would have to be derived from one of these sources. None of these sources give the Mayor such power.

First, the Mayor, pursuant to Charter section 260(b), has all powers formerly residing in the City Manager. The City Manager's power to execute contracts is derived from Charter section 28. As noted, this section does not extend that power to City Attorney contracts, but only to contracts "for the Departments under [the Manager's] control."

Second, the limited powers of the previous Weak Mayors were carried forward to the current Strong Mayor. Specifically, the third sentence of the now suspended Charter section 24 has been copied, verbatim, as the currently effective Charter section 265(a). It reads in full:

> The Mayor shall be recognized as the official head of the City for all ceremonial purposes, by the courts for the purpose of serving civil process, for the signing of all legal instruments and documents, and by the Governor for military purposes.

While the language of Charter section 265(a) might be read more broadly than that of section 28, extending the Mayor's execution authority to "*all* legal instruments and documents," the legislative history of this provision makes clear that it was not intended to expand the Mayor's execution authority. First, as noted, the language was copied verbatim from the

[5] This limitation on the City Manager's historical authority extended beyond the City Attorney's Office to other departments not controlled by the City Manager, such as the City Council Districts. Like the City Attorney's Office, they have the authority to execute their own contracts independent of the Mayor's Office.

suspended section 24, which did not create an exclusive execution power for the Mayor.[6] Thus, it is unlikely that the voters' intent, in carrying forward exactly the same language, was to effect a change. Second, a review of the proceedings of the City Council, in considering the language of Charter section 260(a) that was eventually placed before the voters reveals that the Council was specifically told by a representative of the City Attorney's Office that the intent of that section was to carry forward, unchanged, the powers of the previous Weak Mayors.

Indeed, where the purpose of Article XV was the creation of new mayoral powers, beyond what had previously existed for the City Manager and the Weak Mayor, that intention is clear. The third source of current mayoral power is Charter section 265(b), which creates fifteen enumerated "additional rights, powers, and duties." Only in this subsection does the Charter confer powers upon the Strong Mayor that exceed the combined powers of the former City Manager and Weak Mayor.[7] None of these fifteen subparagraphs includes any suggestion that the power to execute contracts, explicitly addressed elsewhere, is to be modified in any way.

Because the City Attorney's Office and other independent City departments have the power to execute their contracts, the Mayor's (or designee's) signature is not required to legally execute such contracts. The City Attorney, however, is still required to approve all such contracts pursuant to Charter section 40.

IV. What is the City Attorney's Role With Respect to Sole Source Determinations?

The San Diego Municipal Code [SDMC] gives the Mayor (or designee) the authority to certify sole source determinations. The Municipal Code provides that:

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[6] The language of both suspended Charter section 24 and current Charter section 265(a) must not, however, be rendered a nullity. The Mayor's power to sign "all legal instruments and documents," as distinct from the City Manager's power to execute "contracts for the Departments under his control," must mean something. We conclude that it refers, at a minimum, to documents that are not contractual in nature, such as resolutions and ordinances.

[7] This intent is further confirmed by the remainder of Charter section 265. After copying, at subsection (a), the third sentence of suspended section 24, section 265 detours into subsection (b) to create "additional" powers. Having done so, section 265 then returns at subsection (c) to tracking section 24, requiring that the Strong Mayor give annual addresses to the City Council (copying unaltered the fourth sentence of section 24) and giving him the power to command the police in times of emergency (slightly altering the fifth sentence of section 24). Taken as a whole, subsections (a) through (c) of section 265 evidence a series of considered, intentional decisions on whether mayoral powers should be carried forward unchanged, altered, or expanded. Thus, the decision not to change the way the Charter addresses contract execution authority must be viewed as intentional.

> The [Mayor] may certify that a sole source contract is justified because 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(a).

The Municipal Code further provides that the Mayor may delegate sole source certification authority to any Department Director, such as the Director of Purchasing and Contracting. Therefore, the power to certify grounds for sole source rests with Purchasing and Contracting 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. As discussed above, the City Attorney's approval is a mandatory element of City contract formation. The requirement that the Mayor's designee approve any sole source procurement is an additional mandatory requirement for sole source contracts; but it does not obviate the need for City Attorney approval.

CONCLUSION

In order to legally execute most City contracts, the Mayor (or designee), the contractor, and the City Attorney are each required to sign the contract. In the case of major emergency contracts, failure to obtain the City Attorney's approval *prior* to execution by the Mayor (or designee) will render the contract void and unenforceable per the express terms of the City Charter. City Attorney contracts and contracts for other independent departments may be executed by those departments. With respect to sole source determinations, the Mayor (or designee) has authority to certify that use of a sole source is justified. That certification is mandatory but does not eliminate the need for City Attorney approval.

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