

DENNIS J. HERRERA  
City Attorney

ay 31, 2002

### OPINION NO. 2002-03

SUBJECT: Application of Charter Section 9.118(b)  
REQUESTED BY: Hon. Aaron Peskin  
Member, Board of Supervisors  
PREPARED BY: Burk E. Delventhal  
David A. Greenburg  
Deputy City Attorneys

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#### **Question Presented**

You have asked whether: (1) contracts for professional services related to construction in excess of \$10 million are subject to approval by the Board of Supervisors under Charter section 9.118(b); (2) Board approval is required for modifications to contracts that were initially not subject to Board approval because they did not exceed \$10 million or 10 years, but with the modification would exceed \$10 million or 10 years; and (3) existing contracts that were entered into in reliance on prior advice from our office would be rendered invalid if we now conclude that those contracts should have been approved by the Board.

#### **Short Answer**

While the language of the relevant Charter provisions is ambiguous, we conclude that a court is likely to hold that (1) construction-related professional services contracts, such as contracts for architectural, engineering and construction management services do not fall within the exception for construction contracts from the requirement for Board approval of contracts for \$10 million or more in Charter section 9.118(b); (2) Board approval is required for contract modifications where a modification causes the cumulative amount of a contract initially not subject to Board approval to exceed \$10 million, or causes the term of a contract to exceed 10 years; and (3) contracts subject to Board approval under this opinion, but which were entered into without Board approval, remain binding upon the City, although any future modification to such contracts will require Board approval.

#### **Background/Facts**

Under Charter section 9.118(b), all contracts in excess of \$10 million or that have a term of 10 years or more, except for construction contracts, are subject to approval by the Board of Supervisors. The City Attorney's Office has received questions in the past concerning the application of Charter section 9.118(b) to construction-related professional services contracts.

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Although we have not previously issued formal advice on these questions and they have arisen infrequently, deputies have given varying advice to departments concerning this provision. This opinion is intended to enunciate the City Attorney's official interpretation of section 9.118(b) and to address the impact of that interpretation on contracts that have previously been entered into in reliance on our earlier advice

**Analysis****A. Application of Section 9.118(b) to Professional Services Contracts**

Section 9.118(b) states

Unless otherwise provided for in this Charter, and with the exception of construction contracts entered into by the City and County, any other contracts or agreements entered into by a department, board or commission having a term in excess of ten years, or requiring anticipated expenditures by the City and County of ten million dollars, or the modification or amendments [sic] to such contract or agreement having an impact of more than \$500,000 shall be subject to approval of the Board of Supervisors by resolution.

This provision excludes "construction contracts" from the class of contracts subject to Board approval. Neither the Charter nor the Administrative Code defines the term "construction contract." Our examination of state and local law found no clear definition of the term.<sup>1</sup> Accordingly, the meaning of the term "construction contract" as used in section 9.118 is ambiguous.

There are, however, various rules for interpreting a charter provision. "We look first to the language of the charter, giving effect to its plain meaning. Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history." (*Domar Electric, Inc. v. City of Los Angeles*

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<sup>1</sup> While state law contains definitions of "construction contract," these definitions address specific issues, and are not consistent. Compare Civil Code §2783 (construction contract for purposes of indemnity agreements includes contract for construction, design, surveying, specification, or an agreement to perform any services "reasonably related thereto") with Gov't. Code §14135 (governing the authority of the Department of Transportation to enter into professional and technical services contracts, and drawing distinction between contracts for engineering or architectural services and construction contracts) and 18 Cal. Admin. Code §1521 (defining construction contract for sales tax purposes as the erection, construction, alteration or repair of a building, structure or other improvement on real property). The San Francisco Administrative Code contains no definition of the term "construction contract." Administrative Code Chapter 6, governing public works contracting procedures, defines "contract" broadly, so as to include professional design and consultant services as well as construction. (Admin. Code §6.1(F)). The term "construction contract," however, is not defined. Moreover, at the time the voters passed Proposition G, in 1988, Chapter 6 did not contain a definition of "contract." Similarly, while Administrative Code Chapters 10.25-10 and 12D.A (as well as and its predecessor Chapter 12D) contain references to "construction contracts," the term is not defined.

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(1995) 9 Cal.4th 161, 171[internal citations omitted].) Where the meaning of statutory language is unclear on its face, courts refer to the statute's legislative history. (*Service Employees International Union Local 715 v. City of Redwood City* (1995) 32 Cal. App. 4th 53, 59.)

Applying these principles to interpret section 9.118(b), we find support for the position that the exception covers only "pure" construction contracts, and does not extend to construction-related professional services contracts. Although the plain wording of section 9.118(b) provides no guidance with respect to its intended scope, the legislative history supports this view.

In December 1987, Supervisors Nancy Walker and Richard Hongisto introduced before the Board of Supervisors the initial proposal for Proposition G (now section 9.118(b)). The proposal did not contain the exception for construction contracts. Rudolf Nothenberg, then the City's Chief Administrative Officer, requested in a February 2, 1988 letter to the Clerk of the Board (copy attached) that the Board add an exception for construction contracts. The letter pointed out that the ballot measure would substantially increase the time period for award of construction contracts. It also stated that this delay could cause difficulties that could translate into higher costs for the City because construction contracts have tight time constraints and require strict adherence to time schedules, and because fewer contractors may bid on City contracts due to the length of delay in awarding contracts. The Airport also submitted comments to the Clerk of the Board on February 8, 1988 (copy attached) expressing concern about the consequences of delays in the award of construction contracts that would occur under the proposed ballot measure.

In a July 5, 1988 letter to the Clerk of the Board (copy attached), Mr. Nothenberg reiterated his concerns about the proposed Charter amendment, and requested that an exception be added for construction contracts. Mr. Nothenberg reasoned that construction contracts were awarded following a formal, open and public bid process, and that the Board of Supervisors essentially approved such projects at the time it appropriated funding. Therefore, there should be no need to return to the Board of Supervisors for subsequent approval of the award of the construction contract. Shortly after Mr. Nothenberg's July 5 letter, the Board amended the draft proposition to include the exception for "construction contracts." The Board placed the amended version on the ballot for November 1988.<sup>2</sup> The official argument in support of Proposition G, contained in the voter pamphlet, stated that "[a]n exception is made for construction contracts because of the volume of these contracts and the need for fast turnaround to award bids."

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<sup>2</sup> Proposition G was added to the Charter as section 3.502 in 1988. The 1996 Charter renumbered the provision as section 9.118(b), and replaced the opening phrase "Notwithstanding any other provision of this Charter," with the present phrase "Unless otherwise provided for in this Charter." This revision was intended only to modernize the Charter language, and was not intended as a substantive revision. See November 1995 San Francisco Voters Pamphlet at 62 (saying the 1996 Charter specifically retains Board approval of such contracts); Paid Arguments in Support of Proposition E, November 1995 San Francisco Voters Pamphlet (addressing several times the modernization of the language in the new Charter).

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Unlike construction contracts, contracts for construction-related professional services are not now, and were not at the time the voters adopted the Charter amendment, subject to the same type of open and public competitive bidding procedures that apply to construction contracts.<sup>3</sup> Thus, the rationale for the exception for construction contracts contained in Mr. Nothenberg's letter does not apply to these professional services contracts. In addition, the justification for the exception for construction contracts set forth in the voter pamphlet is inapplicable to professional services contracts. Most professional services work on City projects, such as architectural, engineering and construction management services, is performed by City personnel. The City has rarely contracted for professional services work in excess of \$10 million. Where such work is contracted out, the contract is typically let well before the "pure" construction contract for the project. Moreover, had the Board intended to include construction-related professional services contracts within the exception in section 9.118(b), the Board could have chosen more specific language or used a defined term to make clear that contracts for construction-related services come within the scope of the exception.

While the issue is not free from doubt, and we recognize that a few deputies in the office have in the past given different advice, we conclude that a court is likely to decide that the exception from Board review in section 9.118(b) does not extend to contracts for construction-related professional services such as architectural, engineering and construction management services. Thus, future contracts for construction-related professional services in excess of \$10 million should be submitted to the Board for approval.

**B. Modifications Causing a Contract to Exceed the Threshold Amount**

Your second question concerns the application of section 9.118(b) to contracts that are initially awarded for an amount under \$10 million, or a term of less than 10 years, and thus not subject to Board review, but would exceed that amount as a result of one or more subsequent modifications. As with approval of the construction-related professional services contracts discussed above, prior interpretations from this office have varied, and as a result City departments have diverged with respect to the need for Board approval of these contract modifications.

Following the same principles of charter interpretation discussed above, the plain meaning of section 9.118(b) with respect to the scope of its application to contract modifications is not clear, and the legislative history is silent on this issue and provides no guidance. The language of section 9.118(b) suggests that as long as the initial contract does not exceed a ten-year term or \$10 million, subsequent modifications need not be approved by the Board even if the total of the modifications when added to the original contract exceeds \$10 million. This

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<sup>3</sup> At the time Prop. G was drafted, neither the Charter nor the Administrative Code required any competitive process for the award of contracts for construction-related professional service. Chapter 6, Article III of the Administrative Code now requires competitive procurement procedures for construction-related professional services but, in contrast to construction contracts, not an award based solely on price.

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reading is based on the language in section 9.118(b) referring to “amendments to such contracts.” If “such contracts” is construed as referring only to contracts that are initially subject to Board approval because the contracts are either greater than \$10 million, or for a term of greater than ten years, then amendments to any contract that is initially for a lesser amount or a shorter term would not be subject to Board approval regardless of the cumulative amount or term of subsequent modifications. A stronger case for this reading arises in circumstances where the Board has made an appropriation for the project, thus already indicating its support.

But this reading conflicts with the purpose behind section 9.118(b). Legislation is presumed to intend results that are consistent with its express purpose. (*Santa Clara Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235.) Here, the official argument in favor of Proposition G stated that

Good government requires that those responsible for the budget maintain authority over large expenditures. In the past, city departments have had the authority to make these expenditures without first obtaining Board approval. With this change, departments will first have to obtain Board approval.

(Nov. 1988 San Francisco Voter’s Pamphlet at p. 62; see also Admin. Code §6.20 [breaking contract up into smaller pieces to avoid competitive bidding requirements constitutes official misconduct].) Under the literal reading, section 9.118(b) would exclude from Board review contracts that exceed the ten year or \$10 million threshold only as a result of modifications subsequent to the initial award. A department could avoid Board review of very large contracts by simply entering into an initial contract for less than ten years or \$10 million, followed by any number of modifications, as long as no single modification was for more than ten years or \$10 million.<sup>4</sup> This result is at odds with the purpose behind the requirement for Board approval of large contracts. Moreover, the provision in question ““must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.”” (*Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal. App. 4th 287, 299, quoting *DeYoung v. City of San Diego* (1983) 147 Cal. App. 3d 11, 17-18, disapproved on other grounds, *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 15.) Adhering to the literal reading of section 9.118(b) in this case would severely undermine the purpose behind its enactment.

Comparing the language of sections 9.118(a) and (c) with the language of section 9.118(b) also supports construing this provision to require Board approval. Section 9.118(a) requires Board approval of contracts generating revenue of one million dollars or more. Section 9.118(c) requires Board approval of leases generating revenue of one million

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<sup>4</sup> Indeed under this literal reading, as long as the initial contract does not exceed the \$10 million threshold, subsequent modifications, no matter what the amount, even in excess of \$10 million, would not be subject to section 9.118.

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dollars or more, or with terms of ten years or more. Both sections 9.118(a) and (c) specify that they apply to modification of contracts that *when entered into* had anticipated revenue in excess of one million dollars, or in the case of section 9.118(c), a term of ten years or more. The use of this specific language makes clear that sections 9.118(a) and (c) apply only to modification of contracts if these sections were applicable at the time the contract was entered into. section 9.118(b), on the other hand, contains only the reference to modification of “such contracts.” Had the Board intended that section 9.118(b) be read consistently with sections 9.118(a) and (c), the Board could have chosen to use the same qualifying language that is used in sections 9.118(a) and (c). We note, however, that the significance of the Board’s choice of words is lessened because the voters passed the original text of what is now sections 9.118(a) and (c) in 1978, whereas the voters did not pass section 9.118(b) until 1988.<sup>5</sup>

We conclude that the legally safest course of action is for departments to obtain Board approval of modifications of contracts initially below the \$10 million threshold set forth in section 9.118(b) at the time that any modification brings the total amount of a contract over that threshold. Thereafter, consistent with the language of section 9.118(b) concerning modifications, any modification that exceeds \$500,000 would be subject to Board approval. In light of the ambiguity created by the possible literal reading of this Charter section, however, the Board of Supervisors could pass legislation interpreting the scope of the exception in section 9.118(b) to clarify whether contracts that did not initially require Board approval would need to be approved by the Board under these circumstances. While the Board may not make substantive amendments by legislation to the Charter, the Board may nonetheless interpret the Charter where the terms are ambiguous when read with existing law. (*Creighton v. City of Santa Monica* (1984) 160 Cal. App. 3d 1011, 1021.)

For the same reasons discussed above with respect to contracts in excess of \$10 million, we likewise conclude where a contract not otherwise subject to Board approval is modified to extend to the term to ten years or longer, the contract should be approved by the Board.

**C. Effect of this Opinion on Prior Contracts**

The conclusions that we have reached in this opinion may raise concerns about the validity of contracts and modifications to contracts subject to Charter section 9.118(b) that were entered into previously without seeking Board approval. We recognize that these contracts may have been entered into in reliance on advice from this office, based on the ambiguities in the Charter provisions.

The conclusions we have reached regarding the need for Board approval of contracts under Charter section 9.118 should be applied prospectively only. Generally, contracts with

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<sup>5</sup> Sections 9.118(a) and 9.118(c) were approved by the voters as Proposition I in November, 1978. Section 9.118(a) was originally codified as section 3.502, and section 9.118(c) as section 7.402-1 of the 1932 Charter.

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governmental agencies are not valid if legally mandated procedures are not followed. Here, however, where a contract or modification has been previously approved by the requisite City officials, and approved by this office as to form based on ambiguous language in the Charter, the contract or modification is binding on the City. Effective immediately, however, this office will not approve any contracts with a cost to the City in excess of \$10 million for construction-related professional services, nor will we approve any modifications to contracts subject to Charter section 9.118(b) where the amount of the modification increase the total of the contract to \$10 million or more, or extends the term of the contract to 10 years or more unless, in each instance, the contract or modification has first been approved by the Board

**Conclusion**

For the reasons set forth above, we conclude that (1) construction-related professional services contracts, such as contracts for architectural, engineering and construction management services for \$10 million or more, do not fall within the exception to Board of Supervisors approval for construction contracts in Charter section 9.118(b); (2) Board of Supervisors approval is required for contract modifications where a modification causes the cumulative amount of a contract initially not subject to Board approval to exceed \$10 million, or causes the term of a contract to exceed 10 years; and (3) previously approved contracts remain binding upon the City, although any modifications to such contracts will require Board approval.

Please do not hesitate to contact this office if you have any questions concerning these issues.

Attachments

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Very truly yours,

DENNIS J. HERRERA  
City Attorney

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APPROVED:

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