



CITY OF LAGUNA NIGUEL

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MEMORANDUM

September 1, 2017

TO: City Council,
City of Laguna Niguel

FROM: Terry E. Dixon, City Attorney

RE: Tree Maintenance Services Agreement Between City of Laguna Niguel and West Coast Arborists, Inc.; Allegations that Payments for Tree Maintenance Services Above the Not-to-Exceed Amount are Illegal and May be Recovered from Contractor by City; City Attorney Opinions

1. Introduction

The proposed First Amendment to the Agreement for Tree Maintenance Services with West Coast Arborists, Inc. ("WCA") was on the agenda for the August 1, 2017, regular meeting of the City Council. The proposed First Amendment if approved by the City Council would increase the not-to-exceed amount that is applicable to the second year of the Agreement from \$140,000 to \$450,000. Council Member Jerry Slusiewicz opposed the amendment and claimed that for contract years 2015/2016 and 2016/2017 the City had paid approximately \$410,000 to WCA, in excess of the maximum amount specified in the Agreement and that these payments could be recovered from WCA.

The City Attorney was directed to review and report on these allegations, including the City's liability for failure to pay WCA's outstanding invoice of \$40,524.50 and the issue of whether the City Council could enter into the proposed First Amendment to the Agreement for Tree Maintenance Services to increase the \$140,000 cap set forth in the existing Agreement to \$450,000.

2. Summary of City Attorney Opinions

This situation presents three legal issues.

- a. Can the City recover the \$410,000 from WCA?
- b. If the City fails to pay the \$40,524.50, what would be the likely result if WCA sued the City to obtain that amount?

- c. Does the City have the legal authority to approve the First Amendment to increase the cap for the second year of the Agreement?

The following are the City Attorney opinions as to the above issues.

- a. Under the legal Doctrine of Equitable Estoppel, if the City initiated litigation against WCA to recover the \$410,000, WCA would most likely prevail against the City. Under the existing facts, it would be very difficult for the City to convince a court that WCA should return the \$410,000. It is recommended that the City not initiate litigation to recover the \$410,000. Further, such a lawsuit would require the City to incur substantial attorneys' fees and the City would have to pay WCA's attorneys' fees if the City lost.
- b. Also, under the legal Doctrine of Equitable Estoppel, if the City failed to pay the \$40,524.50 and WCA initiates litigation against the City, the City will most likely lose that lawsuit and be obligated to pay attorneys' fees and interest on the amount past due.

Because of the City's actions in continuing to request WCA provide tree maintenance services after the \$140,000 cap had been reached and the City continuing to pay for those services with City officials being aware of this situation and approving the payments to WCA, the City is now most likely estopped and barred from recovering the \$410,000 in payments made for work done after the cap had been reached and also estopped and barred from refusing to pay the \$40,524.50.

- c. There is no legal impediment to the City Council approving the proposed First Amendment and its retroactive increase of the annual \$140,000 cap.

This issue is addressed in the memorandum from the law firm of Burke, Williams & Sorensen, LLP, dated August 31, 2017.

In addition to the equitable estoppel, there are other legal theories that support WCA's position. These are discussed below.

3. Legality of the Tree Maintenance Services Agreement

The Agreement was entered into in full compliance with the Laguna Niguel Municipal Code Section 3-6-9. Section 3-6-9 requires for maintenance agreements of \$25,000 or more the preparation and submittal to prospective bidders of a request for proposal, proposals being received from bidders and reviewed by Public Works, and a contract being awarded by the City Council based on the responsiveness of the proposals to the request for proposal, the

qualifications and experience of the bidders and the amount of the price or prices included in the proposals.

In addition to being in full compliance with the Laguna Niguel Municipal Code, including the City's Purchasing Ordinance (LNMC Section 3-6-1 through 3-6-10, inclusive), the Agreement is also in full compliance with the Laguna Niguel Purchasing Requirements.

The \$140,000 per year cap is a provision in the Agreement. It is not a requirement of either the Purchasing Ordinance or the Laguna Niguel Purchasing Requirements. The failure to follow the cap does not violate the Purchasing Ordinance. There is nothing in the Purchasing Ordinance that states anything to the effect that the failure of a City official or a contractor to follow a provision in an agreement, including a cap, constitutes a violation of the Purchasing Ordinance or the Laguna Niguel Purchasing Requirements or of any other City policy, procedure or rule.

The failure of City Public Works staff to comply with the cap is not a violation of the Laguna Niguel Municipal Code. It is not a breach of the Agreement. It does not make the Agreement illegal, invalid or void.

4. The City is Equitably Estopped from Attempting from Recovering the \$410,000 and from Failing to Pay the \$40,524.50

There are various legal theories that are applicable to this situation. If the City were to initiate litigation to attempt to recover the approximately \$410,000 or defend against a lawsuit filed by WCA to obtain payment of the \$40,524.50, the City would assert the position that since the payments were over the cap in the Tree Maintenance Services Agreement, they violate California Constitution Article VII, Section 10.¹

This provision has been effectively modified by Appellate Court case law creating numerous exceptions.

- a. Description of the Legal Doctrine of Equitable Estoppel

The legal Doctrine of Equitable Estoppel is applicable to this situation. That Doctrine arises in situations where a private contractor is contracting with a governmental agency and the agency takes some action that the contractor relies on and then subsequently changes its position

¹ That section reads as follows. "(a) A local government body may not grant extra compensation or extra allowance to a public officer, public employee or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law."

on that action to the detriment of the contractor. The public agency is estopped or barred from changing its position.

The following is from a leading case on equitable estoppel, *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462.

"The rule of law is clear, that, where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time." "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

"Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. Keeping in mind the admitted generality of this formulation and the flexibility which is necessary to its proper concrete application within the broad equitable framework we have expressed, it may be said that the elements here stated are basic to the general doctrine of equitable estoppel as it exists in this and other jurisdictions. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297 at p. 305.)"

b. Application of Doctrine of Equitable Estoppel to WCA

The Doctrine of Equitable Estoppel is applicable to the first contract year 2015/2016. Once the cap was reached in 2015/2016, Public Works continued to request tree maintenance services. WCA continued to provide those services and invoiced the City. Public Works continued to approve the invoices and City Council approved the warrants for payment of those services. The continued requests to provide tree maintenance services and the City paying for that work induced WCA to continue to provide the services. The City can't, more than a year later, unwind or ignore these actions and decide to now enforce the cap.

The Doctrine of Equitable Estoppel is applicable to the second contract year 2016/2017. In fact, the application of the Doctrine is even stronger. Once the cap is reached, Public Works continued to request tree maintenance services, including services to address the beetle infestation. WCA continued to provide those services. Public Works inspected the services, approved invoices, and sent the invoices to the Finance Department. Council Member Slusiewicz became aware in April 2017 from The Pun Group's work on the Agree-Upon Procedures Report that the cap for that year had been exceeded. Council Member Slusiewicz'

knowledge of this situation was apparent when the 5/16/17 agenda report and proposed First Amendment to the Tree Maintenance Services Agreement were taken off the agenda. Further, Council Member Slusiewicz approved between April, May and June about \$182,000 for tree maintenance services that were provided after the cap had been reached. The City after not following the cap and having WCA rely on that can't change its position and decide to enforce the cap retroactively.

The City's Agreement with WCA has an attorney's fee provision, therefore, the prevailing party would be entitled to attorney's fees. If a case like this actually went to trial, the amount of attorney's fees would be substantial. Further WCA would be entitled to interest on the outstanding invoice.

c. Other Legal Theories that Would Support WCA

- (1) Implied in fact or implied in law contract. The courts could find that a contract is implied as to each invoice for work done after the cap was reached. This would be based on Public Works requesting the services and WCA providing those services as requested. A court could determine that these actions formed a contract and that the contractor was entitled to the reasonable value of its services.
- (2) Breach of Contract. If litigation were initiated regarding this matter, the courts could find the following. The City breached the WCA Agreement by requesting that tree maintenance service in excess of the cap be provided at the contract price. That WCA had waived that breach by providing the services. The City's failure to pay for those services would then be considered to be a breach of the Agreement, and WCA would be entitled to receive the value of its services.
- (3) Approval of extension of the cap. If litigation were initiated over this matter, the courts could find as to each invoice for tree maintenance services that was provided after the cap was reached that the City Council by approving the warrant for the invoice had approved the extension of the cap.

5. Tree Maintenance Services at Former City Manager Rod Foster's Property in August 2016

Questions have been raised regarding the significance of former City Manager Foster having WCA provide tree services on his residential property. There are two issues.

First, a question has been raised as to whether or not he paid for those services. Both WCA and Mr. Foster state that payment was made for those services in the amount of approximately \$2,500. Mr. Foster has provided a copy of the check with the deposit information on the back. Even so, questions about the validity of these documents could always be raised.

Second, it has been alleged that Mr. Foster was responsible for the additional tree maintenance services being assigned to WCA. It has been suggested that this could have been for WCA providing free tree service or some other benefit to Mr. Foster. I have discussed this matter with the Public Works Director, Nasser Abbaszadeh, and the Landscape Maintenance Superintendent, Jerry Sollom. They state that there is no link between Mr. Foster and the decisions that were being made regarding the additional tree maintenance services. Decisions regarding what services were needed to address the beetle infestation and when they were needed were all made by Public Works without direction from or consultation with Mr. Foster.

6. Conclusion

a. Contract Year 2015/2016

Contract year 2015/2016 ended on September 30, 2016, all the services have been paid. There is nothing left for the City to do.

b. Contract Year 2016/2017

Current year 2016/2017 is still open until September 30, 2017. There is a valid Agreement in place. The cap has been exceeded. As of the August 1, 2017, City Council meeting, the City has stopped requesting tree maintenance services and stopped paying for services. There is an outstanding balance of \$40,524.50.

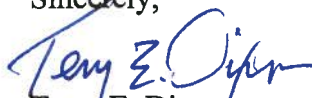
The City needs to make two decisions.

First, decide what to do about the \$40,524.50. If the City doesn't pay for those services, eventually WCA will sue the City. It will probably obtain the funds owed and recover attorney's fees and interest on the amounts due.

Second, if the City needs to have additional services because of the Polyphagous Shot Hole Borer infestation, it needs to enter into the First Amendment to at least cover the work that has not been done or wait until September 30, 2017, the end of the second contract year, and start the third contract year.

If any Council member has any questions regarding this matter, please advise.

Sincerely,


Terry E. Dixon

TED:dv

ATTACHMENT H



MEMORANDUM

TO: Terry Dixon, City Attorney
City of Laguna Niguel

FROM: Stephen A. McEwen

FILE NO.: 07223-0002

DATE: August 31, 2017

RE: West Coast Arborists Contract

You have asked me to look into whether the City has the authority to approve a retroactive amendment to its 2015 contract with West Coast Arborists. As set forth below, there is no legal barrier to a retroactive amendment to the West Coast Arborists contract.

Parties may enter into or modify contracts if there is mutual consent. (See 14A Cal. Jur. 3d Contracts, §§ 277-280; 3 Cal. Jur. 3rd Alteration of Instruments, §§ 31-34.) If the parties mutually consent to a term that retroactively applies an obligation, then that term is valid and enforceable. (See *Coon v. Nicola* (1993) 17 Cal. App. 4th 1225, 1230 (upholding retroactive application of an arbitration clause because it was undisputed that both parties expressly agreed to that provision); *Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, 967-968 (refusing to apply retroactive arbitration clause where parties did not mutually agree to be bound by it).)

These principles apply with equal force to municipal contracts. In *Mott v. Horstmann* (1950) 36 Cal.2d 388, the California Supreme Court held, "It is the general rule that a governmental body may effectively ratify what it could theretofore have lawfully authorized." "Ratification after the act is said to be as potent as authority before the act. Irregular and void acts may be ratified or confirmed at a subsequent meeting, provided it is a valid or legal meeting. [¶] The above rules have been applied to numerous situations, including ... the ratification of municipal contracts, [the borrowing] of money ... and ... bond issues...." (4 McQuillin, Mun. Corp. § 13.47 (3rd ed.1992), pp. 878-879 (fns.omitted).)

In *Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 359-360, the court recognized that any rule that void contracts cannot be ratified is limited to contracts which are beyond the powers of the public entity, or those in which some prescribed formality has irrevocably been disregarded. Ratification must be (1) based upon a previously existing power to make the particular contracts and (2) made in the manner prescribed for the making of such contract. In other words, where a public entity is

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without power to enter into a particular type of contract, it lacks the power to ratify it after performance. However, void municipal contracts that are fully within the powers of the public entity may be effectively ratified if done so in the manner prescribed for the making of the contract. (*Id.* at pp. 359–360.) “Upon such ratification the contracts [become] binding upon the city as fully as though they had been previously entered into in the prescribed manner.” (*Id.* at p. 360.)

In *Advance Medical Diagnostic Laboratories v. County of Los Angeles* (1976) 58 Cal.App.3d 263, the Court of Appeal observed that a local agency can retroactively approve work that has already been performed under a contract that was not properly approved. In that case, a county purchasing agent approved contracts for laboratory testing services in monetary amounts that legally required approval by the board of supervisors. The Court of Appeal concluded that the contracts were null and void but that the doctrine of equitable estoppel may require payment to the contractors. In reaching this conclusion, the Court of Appeal noted that the board of supervisors had the authority to approve the contracts in the first instance and therefore could ratify the contracts retroactively. (*Id.* at p. 275.)

Here, so long as the City and the contractor both mutually consent to a provision to retroactively change the “not to exceed” requirement, then the retroactive provision will be valid and enforceable. The City Council had discretion and authority to approve a contract with West Coast Arborists that contained a higher annual cap. There is nothing in the Municipal Code that would prevent the City Council from doing so now. The City Council, therefore, could exercise its lawful authority to approve the retroactive change in the West Coast Arborists contract.

SAM/jcv