

Office of  
The City Attorney  
City of San Diego

MEMORANDUM  
MS 59

(619) 236-6220

**DATE:** April 8, 2008  
**TO:** Mark Patzman, Program Manager, Managed Competition  
**FROM:** City Attorney  
**SUBJECT:** 1472 Approval Request: Agreement with Grant Thornton LLP for Managed Competition Consulting Services

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### INTRODUCTION

On April 4, you requested that our Office expedite review and approval of a 1472 to “ratify”<sup>1</sup> an agreement between the City and Grant Thornton LLP [Grant Thornton] for consulting services in connection with the City’s Managed Competition program. Unfortunately, we cannot approve the 1472 because the underlying agreement is invalid for several reasons, which we outline below.

### DISCUSSION

First, the City Attorney’s office never approved the original agreement with Grant Thornton as to form or correctness, as required by Charter section 40. 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. . . .” (emphasis added).<sup>2</sup> 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 by the contractor. *Katsura v. City of*

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<sup>1</sup> Both the 1472 form and Executive Summary request that City Council “[a]uthorize the Mayor to ratify contract 8020-07-Z with grant Thornton LLP for managed competition program support. . . .”

<sup>2</sup> This office’s Memorandum of Law 2008-1 extensively discussed the effect of the failure to obtain City Attorney endorsement of a City contract, concluding that it is a fatal flaw.

*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).

At present, the City's standard practice for competitively procured consultants is to incorporate the terms and conditions of the Request for Proposal [RFP], the winning proposal, and any addendums and letters of clarification into a resulting "contract." After award and the necessary contract approvals, the City and contractor will execute a Memorandum of Agreement [MOA] which ties together the various contract documents and clarifies the order of priority in the case of conflicting provisions. Once executed by the parties, the City Attorney will endorse his or her approval on the MOA as to form and legality.

In this case, the City issued an RFP for "Preliminary Planning and Statement of Work (SOW) for the Managed Competition Initiative" in November 2006. On April 12, 2007, the City's Purchasing & Contracting Department sent a letter to Grant Thornton stating that its proposal "ha[d] been accepted by the City of San Diego." The parties never entered into an MOA memorializing the contract terms and conditions; therefore, there was no "contract" for the City Attorney to review and approve. Even if the April 12, 2007 letter arguably gave rise to a contractual relationship,<sup>3</sup> the City Attorney did not endorse his approval on the letter. Under *Katsura*, the original agreement with Grant Thornton was not executed in accordance with the Charter and was therefore invalid.

Second, the original agreement was invalid because it was not approved by City Council prior to the agreement's purported execution. San Diego Municipal section 22.3223 requires that the City Council approve execution of consulting agreements in amounts exceeding \$250,000 in a fiscal year. According to the 1472 and Executive Summary, Grant Thornton performed \$650,000 worth of services during the first one-year term of the agreement, which was from March 12, 2007 to March 11, 2008. Neither the 1472 nor the Executive Summary reference a prior resolution authorizing this agreement, and we could not locate one in our online searches. Unless such a resolution exists, the original agreement was invalid for the independent reason of failure to obtain City Council approval.

Third, even if the original agreement had been valid, it expired prior to any attempted exercise of an option to renew. As mentioned above, the first one-year term of the agreement expired on March 11, 2008. Although the RFP and April 12, 2007 letter provide for four one-year optional renewal periods, the parties did not timely exercise the option to renew. Pursuant to the RFP, renewal of the agreement was "contingent on a mutual agreement between the City

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<sup>3</sup> Even absent the other defects of not having been approved by the City Attorney, it is unclear whether the parties ever executed a document or documents in a manner that would have been sufficient to complete a contract. The April 12, 2007 letter was signed by Lance Wade, who was then Director of Purchasing & Contracting and did have execution authority for City contracts pursuant to the Mayor's various delegation of authority memoranda. A contractual relationship existed only if the letter, combined with other documents, objectively manifested an intent of each of the parties to be contractually bound. 2 Williston on Contracts (4th ed. 2007) § 6:3, p. 23. It is not clear that the documents sufficiently manifested this intent to complete a contract. Because the Grant Thornton agreement was invalid for other reasons, we need not resolve this close question here.

and the Contractor with such agreement to be confirmed in writing within sixty (60) days prior to the expiration of the contract period.” See RFP, Section V.B, page. 37. Neither the 1472 nor the Executive Summary make reference to any purported exercise of the option to renew prior to March 11, 2008.

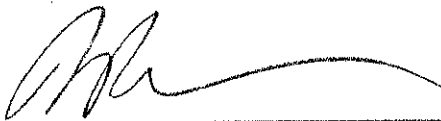
Our understanding of the current situation is that Grant Thornton has ceased work on the subject agreement pending further payment.<sup>4</sup> When an agreement has expired on its own terms, and the parties have ceased performing their respective obligations thereunder, they cannot “resurrect” the agreement by retroactively invoking an option to renew. 15 Williston on Contracts (4th ed. 2007) § 46.12, pp. 448-52 (an option may only be exercised in strict accordance with its terms). As such, even if the original agreement had been valid –which it was not for the several reasons described above- the agreement expired prior to renewal, and therefore no agreement exists for the City Council to approve.

For each of these reasons, we cannot approve the 1472 to “ratify” the Grant Thornton agreement.

#### CONCLUSION

Our Office cannot approve the 1472 to “ratify” the agreement with Grant Thornton because the underlying agreement is invalid for several reasons. First, the agreement was never approved by the City Attorney as to form or correctness in violation of Charter section 40. Second, the agreement was never approved by City Council prior to purported execution in violation of Municipal Code section 22.2322. Finally, even if the original agreement had been valid, the parties failed to timely exercise the option to renew and have ceased performance under the agreement. As such, no agreement exists for the City Council to approve, extend, or ratify.

MICHAEL J. AGUIRRE, City Attorney

By   
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Michael P. Calabrese,  
Chief Deputy City Attorney

<sup>4</sup> It is unclear to our Office whether and to what extent Grant Thornton has already been paid. The City’s April 12, 2007 letter makes reference to payment via purchase orders “not to exceed \$55,000.” The letter goes on to erroneously state that “expenditures cannot exceed \$1,000,000 without City Council approval,” (in fact, the limit was \$250,000) and that it was the “City’s intent to obtain approval from the City Council before the \$1,000,000 threshold is met.” From this language, it appears that the parties initially believed this to be goods or services contract, which does not require Council approval in amounts equal to or under \$1,000,000. San Diego Municipal Code section 22.3211(d). However, it is plain from the 1472, Executive Summary, and supporting materials, that this actually constitutes a consultant agreement.