

## **Appendix D**

**Office of the City Attorney:  
*Legal Issues Raised by “Seconding”*  
May 5, 2003**



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**MEMORANDUM  
PRIVILEGED & CONFIDENTIAL**

TO: HONORABLE AARON PESKIN  
FROM: BUCK E. DELVENTHAL *BEJ*  
Deputy City Attorney  
DATE: May 5, 2003  
RE: LEGAL ISSUES RAISED BY "SECONDING"

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Question

What are the legal requirements governing the practice of seconding, including seconding arrangements in which the City selects the employees or subcontractors to be seconded and, specifically, is the practice prohibited under current law?

Short Answer

The law does not prohibit the practice by the City of seconding personnel or subcontractors of a prime contractor that provides professional services so long as (i) the services rendered by seconded personnel are within the scope of work authorized under the prime contract and (ii) any work done complies with restrictions that derive from the source of funding for the contract. But a seconding arrangement may make the City vulnerable to claims by third parties that the City is liable for the negligent actions of seconded personnel and to claims by such personnel that they are entitled to employee benefits from the City. The City may also be unable to hold the prime contractor accountable for cost overruns or other problems that arise because of the work done by the seconded personnel. Because of these potential liabilities, the agreement governing seconded personnel should -- at a minimum -- require insurance and confirm the status of the personnel as either independent contractors responsible directly to the City for their activities under the contract or employees of the prime contractor.

When the City, and not the prime contractor, selects the seconded personnel or subcontractors, seconding is lawful only if the requirements described above are met and, in addition, the employees or subcontractors are procured under any applicable City procurement requirements. In making the selection, the City department must generally either conduct a competitive process for services in excess of certain threshold amounts or make the selection under an authorized alternative, such as qualification as a sole source. These requirements help ensure that the selection is not for the purpose of circumventing otherwise applicable City laws for selecting City employees and contractors. The selection would also have to meet the applicable Minority/Women/Local Business Enterprise ("M/W/LBE") or, for federal funded contracts, Disadvantaged Business Enterprise ["DBE"] participation requirements, as set forth in the prime contract.

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Background

At your request, the Budget Analyst for the Board of Supervisors has been conducting a management audit of the Airfield Development Bureau of the San Francisco International Airport. The Budget Analyst has asked questions about the lawfulness of a contracting procedure known as "seconding."

Seconding is most often used in large, complex construction projects, such as airport developments and large transportation projects.<sup>1</sup> The term refers to a contracting arrangement in which the owner of the property on which the project will be developed, here the City and County of San Francisco, and the prime contractor for the project agree that the prime contractor will assign an employee or subcontractor to work on a discrete portion of the project directly under the supervision of a City official.<sup>2</sup> The agreement may require the "seconded" employee or subcontractor to take direction from and report directly to the City and may further provide that the City will take responsibility for the work product of these personnel. Where the seconded entity is a subcontractor, the contracts specify that the subcontractor will be directly responsible to the City for its work product. In some cases, the City itself may select the employee or subcontractor, who is then hired or retained by the prime. Public officials use seconding to achieve more efficient and direct communication among those working on the project and better control over particular aspects of the project.

The contracts that the Budget Analyst is reviewing are professional services contracts entered into by the Airport. This analysis is therefore limited to a review of seconding in the context of such professional services contracts (not construction contracts or contracts for the purchase of goods).

Analysis

The legal requirements that apply when a City department uses seconding turn on whether the prime contractor or the City selects the seconded personnel.

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<sup>1</sup>Airport staff has advised this office that seconding has been used routinely by large airports engaged in complex airport development projects. In addition, information and documents provided by an Airport employee formerly employed by BART show that BART has used seconding for transit related contracts. MUNI has included seconding provisions in its RFPs and RFQs for many years, including the Third Street Light Rail Transit Project (for Phase I, Quality Assurance & Construction Management Services), although it has actually entered into seconding agreements only rarely. The Department of Public Works, although not referring to a seconding arrangement, included provisions in its RFQ for Construction Management Consulting Services for the Juvenile Hall Replacement Project giving the City the right to require the addition, replacement or removal of specific consultants to or from the project team.

<sup>2</sup>This opinion addresses seconding in the context of Airport contracts. Thus, for the purposes of this opinion, the owner is the City and County of San Francisco.

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Prime Contractor Selects the Seconded Personnel

We consider first a situation in which the prime contractor selects the individual or firm assigned to work under the City's direct supervision. Here, so long as the services rendered by the seconded employee or subcontractor are within the scope of work properly authorized under the prime contract, the seconding arrangement is not unlawful in and of itself. Further, the seconded work must be consistent with any restrictions dictated by the funding source, such as revenue bond proceeds or sales tax revenues designated for a particular purpose.

Although the use of seconded personnel in the situation just described is lawful, the arrangement may raise liability issues for the City. Where the City exercises direct control over seconded personnel, even if the City does not select the seconded personnel, the City may be vulnerable to a claim that the City, and not the prime contractor, is liable for the any damage to third parties caused by the negligent acts of the seconded personnel. Moreover, the seconded personnel may claim entitlement to workers' compensation, retirement, and other employee benefits. The City may also be unable to hold the prime contractor accountable for cost overruns or other problems that arise because of the work done by the seconded personnel. Because of these potential liabilities, the agreement governing seconded personnel should -- at a minimum -- require insurance or other provisions to reduce the potential exposure of the City. In addition, where the seconded personnel have a subcontract with the prime contractor, the contract between the City and the prime should contain provisions that confirm the status of the personnel as independent contractors.

City Selects the Seconded Personnel

Additional issues arise where the City, rather than the prime contractor, selects the individual or subcontractor. In these instances, the City selects an individual or firm that does not become a City employee or City contractor. Rather, the individual or firm becomes an employee or subcontractor of the City's prime contractor.

No City ordinance specifically addresses the selection by City officials of subcontractors or employees of City prime contractors. Seconding provides an opportunity for the City to evade civil service rules and circumvent City contracting requirements. As noted in *Hall v. Hall* (1950) 98 Cal.App.2d 209, "It is a general rule of law that one should not be permitted to do indirectly that which he is forbidden to do directly. *Hunter v. Superior Court*, 36 Cal.App.2d 100." A court would therefore likely review the lawfulness of the City's selection of an individual or firm as if the City itself were appointing the employee or awarding the contract.

If the City department that selects the seconded personnel complies with the standard City processes applicable to selecting a City employee or prime City contractor and then assigns the employee or contract to the prime, seconding is permissible. If it does not, then closer examination of the specific factual context of the selection process is required to determine if the arrangement is lawful.

To determine compliance with the standard City processes applicable to selecting a City employee or prime City contractor, we must first consider the Charter requirements governing

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the civil service system. Generally, before the City may employ a professional services contractor, the contract awarding authority must obtain either a determination by the Civil Service Commission that the work falls within one of the exceptions to civil service requirements set forth in Charter section 10.104 or certification by the Controller and approval by the Board of Supervisors under Charter section 10.104, subsection 15, that the work can be done at a lesser cost by a contractor than by City employees (commonly referred to as "Proposition J approval"). Where the services to be performed by the seconded personnel are included in the scope of services of the original contract, compliance with this requirement would have been accomplished with the review and approval by the Civil Service Commission of the original contract. If the services represent a significant modification or addition to the original scope, a contract modification and, under some circumstances, subsequent Civil Service Commission approval would be required.

The second set of requirements that we must consider are those governing competitive solicitation. As a general rule, competitive solicitation is not required for municipal contracts unless the Charter or other law imposes that requirement. *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669, 676. Current City law generally requires that contracts for professional services be competitively solicited. S.F. Admin. Code §6.40 and §21.1 (see, also, S.F. Admin. Code §§12D.A(9)(A), 12D.A.12(B), 12D.A.13(b) [imposing competitive solicitation requirements by imposing ratings discounts on qualified M/W/LBEs]. Various factors determine whether a competitive process is required and, if so, how formal it must be, including the amount of the contract, restrictions imposed by a funding source, and whether an alternative to competitive solicitation applies, such as services available only from a sole source. With respect to the amount of the contract:

- San Francisco Administrative Code Sec. 6.40 currently requires a competitive solicitation process for professional services contracts for public works projects exceeding \$25,000.
- San Francisco Administrative Code Sec. 21.1 requires a competitive solicitation for professional services contracts unless, under Sec. 21.5 and the Purchaser's Rules and Regulations, the purchase falls within certain exceptions such as the purchase of services totaling \$10,000 or less, services required to respond to an emergency or services available only from a sole source.

If a contract is federally funded and a City department selects seconded personnel, the department must follow applicable City contracting laws, except that federal DBE requirements apply and not the requirements of the M/W/LBE ordinance set forth in San Francisco Administrative Code Chapter 12D.A. Absent specific prohibitions that apply by virtue of federal requirements, a City department must comply with the City's contracting laws even if the project is federally funded. But federal funding restrictions require the City to use federal procurement procedures and contract requirements with respect to DBE participation requirements. Therefore, although San Francisco's M/W/LBE ordinance imposes competitive solicitation requirements by requiring ratings discounts, the City may not apply these requirements where prohibited by federal funding restrictions and, in those instances, the Human Rights Commission

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has no role in procurement decisions, including sole source determinations under Chapter 12D.A.

As we have discussed, where a City department selects the seconded personnel, seconding is lawful if the department complies with the standard City processes for selecting City employees and City contractors. But even where the department has done so, the potential risk and liabilities described above in the section addressing contractor-selected seconded personnel still apply. In fact, such problems are more likely to arise because the City both selects the seconded personnel and directs their work.

Concluding Remarks

If you have any questions about the validity of seconding with respect to any particular contracts, please let us know and we can provide an analysis. Moreover, if you believe that it is appropriate to propose legislation to address issues raised by the practice of seconding, we would be happy to work with you on this matter.

B.E.D.