

CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY

Legal Opinion

To: Dan Lindheim, City Administrator
From: John Russo, City Attorney
Date: January 27, 2009
Re: City Administrator's Emergency Contracting Authority

QUESTION

Does the City Administrator have the power to execute emergency contracts for the purchase of goods or services without City Council approval?

BRIEF ANSWER

Yes. The City's Purchasing Ordinance grants the City Administrator the power to execute "emergency" contracts in any amount to purchase supplies and services and procure professional and consulting services. (Sections 2.04.020(G) and (H) of Chapter 2.04 of the Oakland Municipal Code.) The City Administrator has the power to execute an "emergency" contract only for the immediate preservation of the public peace, health or safety in a situation that the City Administrator deems to be an emergency." The City's bidding and request for proposal requirements do not apply to emergency contracts. The City Administrator must provide an informational report to the City Council within a reasonable time after he/she executes an emergency contract.

BACKGROUND

City officials have asked whether the Mayor or City Administrator has the authority to execute an emergency professional services contract for a private company to provide security services in the downtown area. The Mayor and other officials have stated that they are concerned that additional damage and destruction of property will occur during rallies, marches, demonstrations and other gatherings that are

planned in downtown business districts to protest the January 1st Bart Police shooting of Oscar Grant.

ANALYSIS

I. The City Charter Mandates that the City Council Establish by Ordinance the City's Procedures and Conditions for the Purchase of Goods and Services

Section 808(a) of the City Charter requires that the City Council adopt by ordinance contracting *procedures* and *conditions* for the purchase of goods and services, including professional services:

The Council shall establish by ordinance the conditions and procedures for any purchase or contract, including advertising and bidding requirements, and may provide that all **bids** may be rejected. The ordinance may provide that under specified conditions, which the Council must find and determine exist in each applicable instance, advertising and bidding may be dispensed with. (Emphasis added.)

In accord with Charter section 808, the Council has adopted Chapter 2.04 of the Oakland Municipal Code ("OMC"), commonly referred to as the Purchasing Ordinance. The ordinance establishes general procedures and conditions under which the City may purchase goods, equipment, services (including professional services and construction services). (OMC, Chapter 2.04, sections 2.04.020.A and B).

The Purchasing Ordinance authorizes the City Administrator to execute the following non-emergency contracts without Council approval:

1. professional services contracts up to \$150,000; and
2. goods and services contracts up to \$250,000, and
3. professional services contracts up to \$15,000 or goods and services contracts up to \$50,000 that are
 - a. for a program, project or activity that is identified in the current Capital Improvement or operating budget, or
 - b. not directly or indirectly paid for with Oakland Redevelopment Agency or voter-approved measure funds, or
 - c. for affordable housing-related services, or
 - d. for computer-related purchases.

The City Administrator may execute the foregoing contracts only if (1) the City conducts a competitive selection process¹ for goods and services contracts exceeding \$50,000

¹ The competitive selection process is as follows:

1. solicitation of firm, fixed bids for goods and services contracts, advertised if over \$50,000, or
2. a request for proposals for professional services contracts over \$25,000. The ordinance expressly exempts professional services contracts from the "advertising" and "bid" procedures for goods

and professional services contracts over \$25,000 and (2) the contractor complies with the City's ordinances and policies (e.g. Living Wage, Equal Benefits, and Prompt Payment)².

II. City Administrator's Authority to Purchase Goods and Services without Council Approval in an Emergency

In addition to the City Administrator's powers to execute certain non emergency contracts without Council approval, the Purchasing Ordinance grants the City Administrator emergency contracting authority. In a situation that the City Administrator deems to be an emergency, he/she has the power to purchase goods and services in any dollar amount "for the immediate preservation of the public peace, health or safety" without Council approval. The City Administrator must provide an informational report to the City Council within a reasonable time after he/she executes an emergency contract. OMC section 2.04.020 provides in pertinent part:

2.04.020(G) Emergency Supply and Services Procurement. In a situation deemed by the City Administrator to be an emergency for the immediate preservation of the public peace, health or safety, the City Administrator may authorize a contract or purchase order exceeding two hundred fifty thousand dollars (\$250,000.00) in any one transaction, without advertising or previous specific action by the City Council, for the purchase supplies or payment for services, or a combination thereof, to be furnished to the city. All emergency contracts awarded by the City Administrator shall be presented for informational purposes to the City Council within a reasonable time of contract execution.

2.04.020(H) Emergency Professional Services and Consultant Agreements. In a situation deemed by the City Administrator to be an emergency for the immediate preservation of the public peace, health or safety, the City Administrator may authorize a contract exceeding one hundred fifty thousand dollars (\$150,000.00) in any one transaction, without previous specific action by the City Council, for the payment for services, or a combination thereof, to be furnished to the city. All emergency contracts awarded by the City Administrator shall be presented for informational purposes to the City Council within a reasonable time of contract execution.

and non-professional services. Instead, the City is required to conduct a competitive request for proposal process for professional services contracts over \$25,000. (OMC Section 2.04.051) The City Administrator is authorized to establish request for proposal procedures and may use a variety of procedures tailored to the City's needs, timing, type of the service and relevant market factors, which should be taken into account determining whether it is in the City's interest to advertise solicitations.

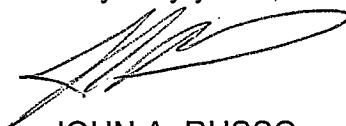
² The City Council has the authority to waive certain the requirements of some policies and programs and it has delegated to the City Administrator the power to waive others.

The City Administrator determines when threats to the public warrant use of his emergency contracting authority. The City Administrator may make this determination in any reasonable manner such as relying on facts and information reported by police, fire, traffic, health or other personnel who are charged with handling serious threats to the public peace, health and welfare. Continued threats of vandalism or rioting, particularly in the context of recent similar events, could justify use of the emergency purchase powers depending on the extent, timing and source of the threat(s).

CONCLUSION

The City Council has delegated to the City Administrator the authority to execute emergency contracts in any amount without Council approval for the purchase of goods and services, including professional services. Before the City Administrator executes an emergency contract, he/she must determine that the contract is necessary to preserve the public peace, welfare or safety in a situation that the City Administrator deems to be an emergency. If the City Administrator makes these determinations, he/she may execute a contract in any amount without Council approval and without completing bidding or RFP procedures.

Very truly yours,



JOHN A. RUSSO
City Attorney

Attorneys Assigned:
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cc: Mayor
City Council
City Auditor