

## INTER-OFFICE MEMORANDUM

<b>TO:</b> Bradford R. Jerbic City Attorney	<b>FROM:</b> Robert S. Sylvain <i>RSS</i> Deputy City Attorney
<b>SUBJECT:</b> Contract Modification--Western Summit/TIC Inc.	<b>COPIES TO:</b> GNS 98-001

At the meeting on January 12, 1998, the City Council approved a contract modification (Contract Modification #1) in the amount of \$2,193,470 to the agreement between the City of Las Vegas and Western Summit/TIC, Inc. ("Western Summit"), a joint venture, for the expansion of the nitrification facilities ("Nitrification Facility Expansion") at the City's Water Pollution Control Facility ("WPCF") located on Vegas Drive. The original contract (the "Nitrification Expansion Agreement") awarded on June 23, 1997 to Western Summit was in the amount of \$5,100,607. Contract Modification #1, representing a 43% increase in the cost of the original contract, was not subject to any competitive bidding.<sup>1</sup> Because of the magnitude of this increase, you have expressed the concern whether this proposed modification violates the public bid requirements set forth in Chapter 338 of the NRS, and requested that I provide an opinion as to legality of this contract amendment.

Briefly, in the way of a factual background to the issue you have raised, approximately three weeks after the award of the Nitrification Expansion Agreement, the City entered into a lease and management agreement dated July 14, 1997, with Golf Club of Illinois, Inc., an Illinois corporation. The lease agreement gave to this corporation the use of three parcels of land, approximately 163 acres, for the construction of an 18-hole golf course commonly known as the "Links."<sup>2</sup> In order to provide water for this golf course, as well as the three 18 hole golf courses commonly known as "Stallion Mountain" located to the south of the WPCF, the City entered into two separate but identical water provision agreements to provide reuse water for these courses. Under each agreement, the City agreed to design, construct, operate and maintain a "subterranean water conveyance system" which transports reuse water to these golf courses by July 1, 1998, although Golf Club of Illinois would like an earlier delivery date (approximately April 1, 1998). The approximate construction time for the reuse water facilities and the 84" effluent sewer is three months and four months, respectively, exclusive of any public bidding requirements.

The reuse water is to be used for turf irrigation on all four golf courses. Because golfers will be playing golf in the area which is to be irrigated with the reuse water, there exists a "zero

<sup>1</sup>A copy of Contract Modification #1 is attached hereto as Attachment "A."

<sup>2</sup>The location of these parcels is shown on Attachment "B."

buffer zone" which means that there exists the potential for human contact with the reuse water. Under state regulations, reuse water must be treated to a higher standard if there exists a "zero buffer zone" in the reuse water area.<sup>3</sup> In order to meet this stricter standard, the City is required to make certain improvements to the WPCF which is the primary reason for Contract Modification #1.

A. Law of Contract Modifications

The original contract entered into with Western Summit is subject to the provisions of the Uniform Standard Specifications for Public Works Construction Off-Site Improvements, Clark County Area.<sup>4</sup> Section 104.02 permits the City to make a substantial change in the nature of the project design or in the type or extent of construction provided the parties enter into a supplemental agreement.<sup>5</sup> Section 104.03 pertaining to extra work requires the contractor to perform unforeseen work for which no price is included in the contract whenever necessary or desirable to complete the work as originally contemplated.<sup>6</sup> I understand that Contract

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<sup>3</sup>NAC 445A.275 and 445A.276 are the regulations applicable to the reuse water which the City proposed to provide for use on the Links and Stallion Mountain Golf Courses. Such reuse water is classified as "Category C" under NAC 445A.276, which means the fecal coliform must meet a 30-day average of 2.2 mpn/100ml with a maximum daily number of 23 mpn/100 ml (i.e., the reuse water can exceed 23 mpn/100 ml only once in a thirty (30) day period).

<sup>4</sup>Uniform Standard Specifications for Public Works Construction Off-Site Improvements, Clark County Area was adopted by the City Council on June 16, 1993, pursuant to R32-93.

<sup>5</sup>Section 104 of the Uniform Standard Specifications provides in pertinent part the following:

The Contracting Agency reserves the right to make by written order and without notice to surety, such alterations in the plans or character or quantity of the work which may be considered necessary or desirable from time to time during the progress of the work to complete satisfactorily the proposed construction. Such alterations shall not be considered as a waiver of any conditions of the contract or invalidate any of the provisions thereof.

Whenever an alteration in character of work on the project involves a substantial change in the nature of the design or in the type or extent of construction which materially increases or decreases the cost of the performance, the work shall be performed in accordance with the specifications and as directed provided, however, that before such work is started, a supplemental agreement acceptable to both parties to the contract shall be executed.

<sup>6</sup>Section 104.03 of the Uniform Standard Specifications provides in pertinent part the following:

Modification #1 has been rationalized under either or both of these provisions. These provisions, however, must be interpreted in the context of the requirements of both state and case law on the subject of contract modifications.

Nevada was one of the first, if not the first, jurisdiction to consider the question of whether a modification could be made to a public works contract without complying with the public bid requirements. In a very old case, *Sadler v. Eureka County*, 15 Nev. 39 (1880), the Supreme Court of Nevada expressed the view that contracts for extra work are valid, and do not require competitive bidding if the extra work in the aggregate does not exceed the statutory minimum which triggers the public bid requirement. In that case, the county commissioners of Eureka County let a contract to the lowest responsible bidder for the construction of a new courthouse. Subsequently, the county entered into two additional contracts requiring the contractor to dig to a depth of 11 feet (or until white sand was reached) and to build a stone wall in addition to the walls already contracted for under the initial contract. A short time thereafter, the parties executed another contract increasing the width of the walls of certain rooms in the courthouse. The court held the county commissioners had authority to make changes or alterations in the original plans and specifications provided the same in the aggregate did not exceed the statutory limit of \$500.00 which triggered the competitive bidding requirements at that time. If a Nevada court were to follow the *Sadler* case today, then under the current dollar limits found under NRS 338.143, we would have to publicly rebid any contract modification of \$100,000 or more.

Since the *Sadler* decision (more than 100 years ago), other jurisdictions have not followed this rather strict view. A number of courts in other jurisdictions have expressed the view that competitive bidding does not apply to contracts for extra work made after the letting of the principal contract where the changes involved are merely incidental to the original contract. For example, in *Michigan City v. Witter*, 34 N.E.2d 132 (Ind. 1941), the court held that a statutory requirement that public contracts for construction work costing over a stated amount shall be let by competitive bidding does not preclude a city from agreeing with a contractor to pay for extras occasioned by changes required by conditions developing in the progress of the work which were not known at the time the plans and specifications were adopted and could not have been ascertained at the time with any reasonable degree of diligence. For additional cases, see 135 ALR 1265, 1274.

This more liberal approach has been aptly summarized in the following manner:

It is somewhat difficult to say to what extent and under what circumstances and conditions statutes or ordinances requiring competitive bidding for public contracts apply to agreements made subsequently to the award of the contract, to allow the contractor

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The Contractor shall perform unforeseen work, for which there is no price included in the contract, whenever it is deemed necessary or desirable in order to complete fully the work as contemplated.

additional compensation on account of additional work and materials furnished or expenditures incurred by reason of subsequent changes in specification, extensions of the contract, or extras not included in the formal contract let pursuant to competitive bidding. In many instances, statutes requiring the letting of public contracts to the lowest bidder are regarded as rendering invalid and unenforceable subsequent supplemental agreements for additional compensation for extras or additional labor and materials not included in the original contract, at least where the additional compensation exceeds the amount for which public contracts may be made without competitive bidding.

On the other hand, there is much authority for the view that statutes requiring that public contracts be let to the lowest bidder do not apply to agreements made after the letting of the principal contract for additional compensation for extras, etc., where the changes involved are merely incidental and of minor importance, and this seems a very sensible view. Requirements of competitive bidding on public improvement contracts should be zealously guarded, but this does not mean that they should be construed so as to divest the public authorities of all discretion in the matter of alterations or changes in the plans and specifications. Public officers must, however, act honestly, reasonably, and intelligently, and may not authorize a new departure which so varies from the original plan or is of such importance as to constitute a new undertaking where fairness could be reached only through competitive bidding.

65 Am. Jur.2d. Public Works and Contracts § 198.

The rationale for requiring public bidding of modifications which are beyond the scope of the original contract is that the unsuccessful bidders on the original competition for the job may--quite fairly--claim that the job ultimately being done is not the job for which they competed. In effect, the significantly modified job on a public works project would not have been competitively bid which is, of course, unlawful. Such contracts have been regarded as void. Even if the record of this particular job indicates that Western Summit was the only competitor, it is very dangerous to permit another contractor to claim that, while he was not originally interested in bidding on a \$5,000,000 job, he certainly would have bid on a \$7,000,000 job if he had only known the true scope of the project.

Whether the more modern view would be followed in Nevada is an open issue. The *Sadler* court never stated in its decision whether the additional work at issue in that case was merely incidental to the original contract (although the nature of such work would seem to be incidental to the original contract). Consequently, the *Sadler* decision does not answer the question whether extra work, incidental to the original contract but in excess of the statutory limit triggering

competitive bidding, would be allowed by the court. Because of the age of the *Sadler* opinion, I am of the opinion that the Supreme Court, if presented with this issue today, would probably follow the more modern view, i.e., allowing a modification to the contract without competitive bidding if the change is basically within the scope of the original contract. Sections 104.02 and 104.03 of the Uniform Standard Specifications, although permitting substantial changes in the character of the work, would not, under the modern view, permit a separate project to be piggybacked onto another separate project by way of a contract modification thereby avoiding the requirements of public bidding. Assuming for the sake of this memo that Contract Modification #1 would be examined under the modern test, you need to understand the nature of the original project and the projects envisioned by Contract Modification #1.

B. WPC Nitrification Facility Expansion and Contract Modification #1

Wastewater which is received at the City's WPCF undergoes a three-phase treatment process before the effluent is permitted to be discharged into the Las Vegas Wash. The tertiary phase of this treatment process involves nitrification, i.e., the removal of ammonia from the wastewater. The contract awarded to Western Summit expanded this nitrification process by providing for the construction of a new aeration basin, an additional final clarifier, pumping station, AB tunnel extension and other improvements related to the expansion of the nitrification process.<sup>7</sup>

Contract Modification #1 consists of Change Order Proposals 15 through 20 ("CPR"), all of which pertain to providing reuse water to the Links and Stallion Mountain Golf Courses except for CPR #19 and #20.<sup>8</sup> These CPR's can be summarized as follows:<sup>9</sup>

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<sup>7</sup>The location of these improvements are shown on an aerial map of the WPCF attached hereto as Attachment "C."

<sup>8</sup>An aerial map showing the approximate location of the work to be performed under each CPR is shown on Attachment "C."

<sup>9</sup>Copies of the above-referenced CPR's and accompanying diagrams are attached hereto as Attachment "D."

CPR	Total Amount
<p><b>CPR #15</b> provides for the installation of three 36" sluice gates at Plant 3-4 Chlorine Contact Basin. (Currently, the City intends to replace the more expensive sluice gates with the less expensive sliding gates.) A 10" concrete deck is to be constructed above the contact basin which will be the foundation for the packaged pumps. The installation of the electrical conduit from the Plant 3-04 Electrical Building to the pumping station panels is part of the CPR.</p>	\$ 227,291.00
<p><b>CPR #16</b> is the cost of the two Flowtronex manufactured skid mounted package pumping stations. One station is a high pressure pump and the other is a low pressure pump.</p>	\$336,586.00
<p><b>CPR #17</b> is basically the installation cost of the two Flowtronex pumping stations along with the connection piping for the 20" high pressure line (HPL), 14" low pressure line (LPL) and the 4" backwash waste line (BWW).</p>	\$ 79,066.00
<p><b>CPR #18</b> is the cost of material and installation of the 20" HPL, 14" LPL and an irrigation line. The HPL line will service the Links Golf Course and will run from the chlorine detention basin, along Desert Inn Road and then north along what was previously Stephanie Street. The LPL line will run west along Desert Inn Road. The irrigation line located along the current perimeter fence and used to water landscaping at the WPCF will have to be moved to a location along the new perimeter wall.</p>	\$852,899.00
<p><b>CPR #19</b> is the cost to provide and install an 84" influent sewer line along Vegas Drive to accommodate future expansion of the WPCF. The line is being installed at this time to avoid having to disturb the golf course improvements at some future date.</p>	\$640,818.00
<p><b>CPR #20</b> involves the construction of a new 8' perimeter security fence along the western boundary of the WPCF. The old perimeter fence will be torn down to make way for the golf course.</p>	\$ 56,810.00

A review of some of the cases in this area indicates a rational nexus between the original project and the proposed modification. In *Pyle v. Kernan*, 36 P.2d 580 (Ore. 1934), the court viewed the substitution of one kind of rock for that of another, found by the contractor to be uncrushable, to be merely incidental to the original contract. Similarly, in *Jonathan Clark & Sons Co., v. Pittsburgh*, 66 A. 154 (1907), the court held that the director of Public Works of a city had authority to direct minor and incidental changes which became necessary in the construction of a reservoir which included the insertion of ribs to strengthen a concrete layer, increasing the

thickness of a cement finish, and providing for drainage to protect an embankment and slope. In *Hibbs v. Arenbers*, 119 A. 727 ( ) the court allowed a school director to substitute a more expensive brick for that which was required under the plans and specifications that were found to be defective. The court in *Michigan City v. Witter, supra*, allowed the contractor to recover the cost to construct extra manholes and in certain locations to change the standard manhole to an interceptor manhole or a combination of an interceptor and standard manhole. In all of these cases, the change in the contract was clearly related to the project envisioned in the original contract.

An example of a contract modification outside the scope of the original contract is found in *Albert Elia Bldg. v. N. Y. State Urban Development*, 388 N.Y.S.2d 462 (1976). In that case, an appellate court in New York had to consider whether the proposed change order providing for the construction of an underground tunnel was incidental to the original contract. The underground tunnel linked an open plaza with the new convention center under construction across the street. The tunnel emerged by way of an escalator shaft in the new convention center. The court held that the tunnel so varied from the original plan that it constituted a total new undertaking on the part of the City of Niagra Falls and, therefore, should have been publicly bid.

Contract Modification #1 involves an amalgamation of projects which were not envisioned as part of the original Nitrification Facility Expansion. The Nitrification Facility Expansion occurs in an area of the WPCF which is separate from the area where the improvements are to be made under Contract Modification #1. CPR's #15,#16,#17 and #18 are the result of the City's decision that in order to meet the regulations of the Nevada Department of Environmental Protection concerning reuse water, certain improvements would have to be made to the WPCF. CPR #19 involves the 84" sewer effluent line pertaining to future plant expansion. CPR #20 involves the installation of a new perimeter fence which was required because of the City's decision to lease a portion of the land comprising the WPCF to Golf Club of Illinois. None of these projects arise out of any unforeseen changes in the Nitrification Expansion Agreement. Consequently, the improvements as set forth in all of the CPR's are both legally, as well as physically, separate and distinct from the Nitrification Facility Expansion.

#### CONCLUSION

Contract Modification #1 should be subject to competitive bidding pursuant to Chapter 338 of the NRS.

RSS:vb  
Attachments