



DENNIS J. HERRERA
City Attorney

JULIA A. MOLL
Deputy City Attorney

DIRECT DIAL: (415) 554-4705
E-MAIL: Julia_Moll@ci.sf.ca.us

MEMORANDUM

TO: MEMBERS
San Francisco Elections Commission
JOHN ARNTZ
Director of Elections

FROM: JULIA A. MOLL
CHAD A. JACOBS
Deputy City Attorneys

DATE: November 19, 2003

RE: Commission's Role in Awarding a Contract for a new Voting System

You requested advice regarding what role the Elections Commission ("Commission") may play in the process of awarding a contract for a new voting system.

SUMMARY OF ADVICE

Although the authority to award a new voting system contract rests with the Director of Elections, the Commission may hold hearings and pass resolutions to provide guidance to the Director on topics such as the process by which the Director selects a voting system or the type of voting system that would be best for the City to use. In addition, because the Board of Supervisors has not yet appropriated funds for a new voting system contract, the Commission may review any funding request for a contact for a new voting system that the Director wishes to award, and the Commission may, during the public hearing to consider any request for funding, review and discuss the proposed contract for a new voting system.

DISCUSSION

It is well settled that administrative bodies, such as the Commission, have only those powers that have been conferred upon them by the law either expressly or by implication. *See Ferdig v. State Personnel Board*, 71 Cal.2d 96, 103 (1969); *City and County of San Francisco v. Padilla*, 23 Cal.App.3d 388, 399 (1972).

A. Express Powers Related to Awarding Contracts

The duties and powers of the Commission are set forth in the Charter. *See, e.g.*, S.F. Charter §§ 4.102, 13.103.5 and 13.104.5. Except for limited circumstances related to hiring outside counsel, the Charter does not expressly provide the Commission with the power to award contracts. Instead, the Charter expressly grants to the Commission general oversight and policy-

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making powers. *See id.* Conversely, state and local law expressly provide that the Director of Elections ("Director") is responsible for the award of contracts for goods and services used by the Department of Elections ("Department"). The Charter states that the Department "shall be administered by the Director of Elections, who shall be vested with the day-to-day conduct and management of the Department." *See* S.F. Charter § 13.104. As part of these duties, local law requires the Director to "issue or authorize all requisitions for the purchase of materials, supplies and equipment required by [the] Department," and state law provides the Director, as the county elections official, with the authority to purchase supplies that are necessary for election-day activities without going through the City's purchasing processes. *See* S.F. Admin. Code § 2A.30; Cal. Elections Code § 14100.¹ Accordingly, the law has not expressly conferred upon the Commission the power to award a contract for a new voting system.

Nevertheless, the Charter expressly grants to the Commission the power to "conduct investigations into any aspect of governmental operations within its jurisdiction through the power of inquiry," and to "hold hearings and take testimony." *See* S.F. Charter §§ 4.102(7) & 4.102(10). With regard to the award of a contract for a new voting system, these express powers would permit the Commission to discuss and provide guidance to the Director of Elections on topics such as the process by which the Director selects a voting system or the type of voting system that would be best for the City to use. *See Diamond Int'l Corp. v. Boas*, 92 CalApp.3d 1015, 1037 (1979). In *Boas*, the court analyzed who in the City was responsible for choosing a voting system. The court concluded that the Chief Administrative Officer, who preceded the Commission in overseeing the Department, did not have the authority to choose a voting system or prohibit the Director from recommending and issuing a requisition for a particular kind of voting equipment. Instead, the court determined that the Chief Administrative Officer had the authority to investigate and recommend the type of equipment that would best serve the City. *See id.*² We conclude that the Commission likewise maintains such power in awarding a new voting system contract.

¹ Except in limited circumstances governed by California Elections Code section 14100, local law requires the Purchaser to enter into contracts on behalf of the Department for the acquisition of supplies and services. *See* S.F. Admin. Code §§ 21.03(a) (The Purchaser shall purchase all Commodities or Services required by City departments and offices of the City and 21.05(b)(2) (The Director of Purchasing shall be the Contracting Officer for Professional Service contracts unless a Contracting Officer other than the Purchaser is authorized to enter into the contract directly). But such contracts must be based on requisitions issued or contracts awarded by the Department. *See* S.F. Admin. Code §§ 21.03(b) (All purchases made by the Purchaser shall be made on the basis of requisitions of ordering departments) and 21.05(b) (Departments shall be responsible for defining the scope of a project for contracting purposes, establishing fair evaluation criteria and selection processes for solicitations, and for the negotiation and award of contracts for Professional Services).

² Based on powers expressly granted to the Chief Administrative Officer in the former Charter that were not provided to the Commission, the *Boas* court concluded that the Chief Administrative Officer could decide not to approve the contract that would be entered into under the requisition issued by the Director. *See id.* (relying on former Charter section 7.103, which required the Chief Administrative Officer to approve all contracts under his jurisdiction with a value in excess of \$50,000).

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Furthermore, the Charter expressly provides that the Commission must, after a public hearing, approve any request to the Board of Supervisors for an appropriation. See S.F. Charter § 4.102(3). The Board of Supervisors has not yet appropriated any funds for a contract for a new voting system. Under these circumstances, the Charter expressly provides the Commission with the power to review any funding request for a contract for a new voting system that the Director wishes to award, and the Commission may, during the public hearing to consider any request for funding, review and discuss the proposed contract for a new voting system.

B. Implied Powers Related to Awarding Contracts

A public agency possesses implied powers that are "necessary or reasonably appropriate to the accomplishment of their express powers." See *County of San Joaquin v. Stockton Swim Club*, 42 Cal.App.3d 968, 972 (1974). An agency's implied powers, however, are not without limitation. For an agency to possess an implied power, the power "must be essential to the declared objects and purposes of the enabling act-not simply convenient, but indispensable." *Addison v. Department of Motor Vehicles*, 69 Cal.App.3d 486, 498 (1977) (quoting, 2 Cal.Jur.3d, Administrative Law, § 39, pp. 257-258).

In addition to the powers discussed above, the Charter expressly provides that the Commission is responsible for the "proper administration of the general practices of the Department, subject to the budgetary and fiscal provisions of this Charter." See S.F. Charter § 13.103.5. Implied within this express power is the power to hold hearings, take testimony and pass resolutions to provide guidance to the Director on issues related to the award of a contract for a new voting system. But implied within this power is not the power to actually award a contract for a new voting system. It is not essential or indispensable for the Commission to be able to award contracts in order to perform its oversight duties. The Commission can ensure the proper administration of the general practices of the Department by holding hearings, approving resolutions and motions, using its power of inquiry, and otherwise asking the Director to report on matters of interest. As a result, the Charter does not by implication grant to the Commission the power to award contracts including a contract for a new voting system.

Please let us know if you have any questions related to this memorandum.

J.A.M.

C.A.J.