



## CONTRACT AUTHORITY MEMORANDUM

Date: August 23, 2011

To: Mike Cooper, Mayor

Copy: City Council  
Phil Williams, Public Works Director  
Carrie Hite, Parks & Recreation Director

From: Jeff Taraday and Sharon Cates, Office of the City Attorney

Re: Extent and nature of authority of City Administration to manage public works construction contracts

---

This memorandum comes in response to a request from the Mayor to clarify the extent and nature of the authority granted to the City of Edmonds' administration to enter into change orders for public works construction contracts. This question arises in the context of Haines Wharf Park and whether the ten change orders for that project should have been brought to the City Council for approval. In our opinion, the short answer is that, in the absence of a clear delegation of the City Council's contracting authority to approve such change orders, they should have been brought to the City Council for approval. If the City Council finds that it is in the City's best interest to allow the administration to process certain change orders in the future, this could be accomplished by amending the City's purchasing policies.

### I. Background on Haines Wharf Park Project

The City, with the approval of the City Council, awarded the Haines Wharf Park project construction contract, in the amount of \$1.634 Million, to general contractor Precision Earthworks, Inc. in May 2009. Thereafter, between December 2009 and September 2010, the administration approved ten change orders authorizing additional work and additional payments in the amount of \$725,000. Change orders one through five and change orders nine and ten were less than \$100,000 each. Change orders six, seven, and eight, approved in the Spring of 2010, amounted to \$131,548, \$245,297 and \$167,739, respectively. We understand that none of the project's change orders was presented to the City Council for review or approval prior to its implementation. In or around August 2010, the City administration advised the City Council of the status of the



Haines Wharf Park project, including the amount of the change orders and the plan to cover the increased costs of the project.

## II. Statutory Contract Authority Granted to City Council

The general question posed here is whether the City administration acted within its authority to approve change orders to a public works construction project without first obtaining the approval of the City Council. In order to answer that question, it is helpful to first review the statutory authority granted to code cities. As a code city's legislative body, the City Council has broad authority to act on behalf of the City, including the authority to "contract and be contracted with...." RCW 35A.11.010. City Councils often choose to delegate part of this authority to the City's administration within certain limits.

The primary authority granted to the Mayor of a code city by statute is to act as the chief executive and administrative officer of the city. The Mayor is granted the authority of general supervision of the administration of city government. RCW 35A.12.100; *see also* ECC Chapter 2.01. One of these supervisory responsibilities is the duty to see that all contracts and agreements made with the city or for its use and benefit are faithfully kept and performed. RCW 35A.12.100. In the absence of a delegation of the City Council's contracting authority to the Mayor (this has been done in the City's purchasing policies for contracts up to \$100,000), there would not be any mayoral contracting authority under state law.

## III. Amendments to Public Works Construction Contracts

As noted above, the City Council has adopted purchasing policies and procedures that limit the City administration's authority with regard to public works construction bids and awards. The Bidding Requirements section of this document provides, in relevant part, as follows:

1. Authorization for Bids Authorization to call for bids will be approved by the department director (or designee) for public works projects estimated at less than \$50,000; and by the department director and the Mayor (or their designees) for a public works project costing more than \$50,000 but less than \$100,000. The City Council must authorize the call for bids for a project estimated at \$100,000 or more.

...

6. Bid Award Unless all bids are rejected, a winning bid must be awarded to the lowest responsible bidder by the department director (or designee) for a public works project costing less than \$50,000; and by the department director

and Mayor (or their designees) for a public works project costing more than \$50,000 but less than \$100,000. The City Council must award bids which exceed \$100,000. The City may choose to reject all bids for any reason.

City of Edmonds Purchasing Policies and Procedures, January 2009, pp. 4-5.

Unlike some other Washington cities' purchasing policies and procedures, however, Edmonds' policies do not currently include guidelines with regard to the City administration's authority to approve and implement change orders. While the policies do not expressly address change orders, one should infer from them that the City Council intended to limit the City administration's change order authority in the public works construction context to change orders of \$100,000 or less. Less clear under the current purchasing policies is whether change orders of \$100,000 or less require City Council approval when the change order would cause the total contract amount to exceed \$100,000 or when the original contract amount already exceeds \$100,000 as would be the case with all change orders for Haines Wharf Park.

While one could make the argument that change orders under \$100,000 could be authorized by the administration under the existing contracting policies, we read the current purchasing policies to require all amendments and change orders on contracts over \$100,000 to come to the City Council for approval, no matter how small the amendment. Otherwise, the City Council's retained contracting authority could be avoided by piecemealing, which was not likely the City Council's intent. If the City Council would like to delegate to the administration the authority to make minor amendments even on large projects, it should revise its purchasing policies.

One should also note that in many cases a City Council will authorize, at the time of bid award, a particular dollar amount as a "management reserve" to be used for change orders. In such a case, change orders would probably not need to be brought to the City Council, as long as they would not exceed the pre-approved management reserve. When the Haines Wharf Park project was awarded by the City Council on May 5, 2009, the agenda bill did show a 10% contingency in the amount of \$163,460. Ideally, in the future, there would be a City Council action to expressly authorize the administration to approve change orders up to the contingency amount. In any case, the \$163,460 contingency that was arguably authorized on May 5, 2009 would not have been sufficient to cover the cost of all ten change orders.

In conclusion, while the City administration may have been misled by language in the purchasing policies authorizing the administration to approve contracts under \$100,000, we do not read this language as obviating the need to seek City Council approval of change orders when the contract already exceeds \$100,000. Going forward, we recommend that the City Council and the Administration craft an appropriate amendment to the purchasing policies that expressly addresses change orders and when they need not be approved by the City Council. In crafting such a policy, it will be important for the City Council to find the right balance between retaining an appropriate amount of contracting authority and ensuring that public works projects are not slowed down by the City Council's processing of change orders. Such a policy should help significantly to clarify this issue going forward.