
SAN DIEGO CONVENTION CENTER CORPORATION
LEGAL DEPARTMENT
MEMORANDUM

TO: Board of Directors
FROM: Theresa McAteer, General Counsel
SUBJECT: Agenda for Special Board Meeting of March 19, 2012; Legal Issues
Presented by Proposed Action items
DATE: 3/16/2012

The Special Board Meeting of March 19, 2012, has been called to have the Board consider two matters: (1) a proposed Addendum to the current SDCCC-City agreement concerning the management, operation and promotion of the Convention Center; and (2) a concept for a contract between SDCCC and the San Diego Convention and Visitors Bureau concerning sales, marketing and promotion services for the Center.

I have been asked to provide an analysis of the legal issues presented by these two proposed actions. I have also been asked to define the nature of the fiduciary duty applicable to the directors' consideration of these actions.

Corporations Code section 5231 requires directors of a nonprofit public benefit corporation to

"perform the duties of a director, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."

In this situation, the directors must individually satisfy themselves that they have enough information to determine whether each action proposed is in the best interests of the Corporation and in furtherance of its corporate mission, and act accordingly. In a 2002 opinion to the Board, outside counsel explained the fiduciary duty as follows:

"As with all corporations, the directors as fiduciaries must act in the best interests of the Corporation. Additionally, as a public benefit corporation carrying out a public purpose, the business decisions also must encompass

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the greater public good – which in this instance is directly related to the preservation of the public facility and continuity of the flow of revenue generated by the facility.”¹

The proposed actions would make changes to the Corporation’s (and Board’s) powers with respect to certain aspects of the Corporation’s operations. The City, as the other party to the Addendum, may decide to direct these changes be made; but as directors, the Board members have an independent obligation to determine whether these actions operate in the Corporation’s best interests.

Proposed Addendum to SDCCC-City Management Agreement

This document makes several substantive changes to the relationship between the City and SDCCC. I have not been involved in any discussions or negotiations regarding this agreement, but I am assuming that the idea is to have the Board consider it at Monday’s meeting, then have the Council consider it at a future meeting. My specific observations on each provision follow:

Section 1 – This provision should be mutual.

Section 2 – This provision defines the “City,” for purposes of exercising “the City’s” powers under the Management Agreement, as the Mayor, who may act “in his (or her) sole and absolute discretion.”² This provision is at odds with the Corporation’s bylaws which expressly state that “the City” as the Corporation’s member shall act through the City Council. This creates some confusion; further, while it is something for the Board to consider, regardless of the Board’s position on this question it will be unilaterally up to the City Council whether they desire to do this – in which case, they could simply amend the bylaws and thereby confer this authority on the Mayor’s office, even without making this change to the SDCCC-City Agreement.

Section 3 – This Section makes a number of material changes to the scope of the Corporation’s rights and authority.

¹ Memorandum to the Board of Directors, from Seltzer Caplan McMahon Vitek, dated May 8, 2002.

² While the focus of this Addendum is on the sales, marketing and promotion authority and functions, this Section 2 provides that the Mayor is “the City” for all purposes under the SDCCC-City Management Agreement.

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First, this section requires the Corporation to obtain the City's approval of any contract whereby the Corporation engages a third party to provide sales, marketing and promotion services. Normally, the City does not exercise authority over the Corporation's procurement contracts – the business-operations autonomy of the Corporation is a primary reason for its creation. This Section also dictates certain terms of any such contract, making them non-negotiable at the time of actually "negotiating" the contract. If it is the City's intent to remove the authority for policy and implementation of the sales, marketing and promotion function from the scope of the Corporation's authority, it would be more natural and efficient, and consistent with past practice, to do so by amending the existing SDCCC-City Agreement³, and returning to the direct-contract model they had with ConVis prior to 2004, rather than requiring the Corporation to "subcontract" the work on terms the Corporation will not be empowered to evaluate before making the commitment.

The setting of such material terms is also consequential, in light of the Section's express provision that "Corporation shall not be released from any obligations assigned pursuant to this Addendum Section 3." This means that, while the Corporation will relinquish all control over the assigned sales, marketing and promotion functions, it will retain its ultimate accountability to the City for the fiscal and other performance measures in all areas, including sales, marketing and promotions.

At the least, the Section would have to be clarified to determine whether the City intends this result, so the board can consider it.

Section 4 – This Section pre-allocates a significant portion of the Corporation's budget. The impact of this pre-allocation on the Corporation's ability to make fiscal policy decisions should be analyzed. As noted by prior counsel:

The Corporation is legally obligated and authorized to adopt a budget that, in the business discretion of its directors, will permit it to carry out its primary purpose to "manage, operate, maintain and promote" the Center "effectively in such a manner as to enhance the occupancy of hotels through the attraction of major conventions and trade shows." The Agreement between the Corporation and the City contemplates the

³ Following the model used in 2005 when the Corporation was given exclusive control over the sales, marketing and promotion functions.

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Corporation, acting through its directors, will independently make the determination of what level of City funding is required to carry out its legal obligations . . . The Corporation has sole responsibility and authority to make those budgetary decisions necessary to ensure continued compliance with its contractual and legal obligations. To the extent the City elects to provide less funding than that requested, the Corporation has the discretion to set priorities for funding that is made available.”

Pre-allocating the funds removes the Board’s ability to exercise that discretion.

By way of background information, according to the documentation the original City-ConVis agreement in 1983 merely provided for payment “as appropriated by Council” and was largely comprised of reimbursables. The 1985 Agreement tied payment to the TOT allocated by ordinance. And in the 1998 MOU between the Corporation and ConVis, the parties’ joint operation was tasked with agreeing on a budget, with each party paying many of their own expenses.

Section 5 – This Section appears to give permission to the Corporation to continue its Centerplate contract. No such permission is necessary (the contract with Centerplate was processed pursuant to established Corporation procurement procedures and does not require the City’s authorization). The reason for including this Section is not apparent.

Sections 6 and 8 – These appear to be new “boilerplate” included as a matter of course. I would anticipate discussing the point of these Sections with the Deputy City Attorney.

Concept for Contract with The San Diego Convention and Visitors Bureau

Since there is currently no document to review, an analysis of the legal issues is not possible. I will note that since the award would not appear to follow normal Corporation procedures, its terms should be carefully considered and discussed. In that regard, I note that 30 years is not a usual term for Corporation procurement contracts; that length of term is generally seen in some leases and financing arrangements, where longer terms are justified by the relevant market’s need for certainty of terms and parties.

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Please advise if you need further information or analysis.

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General Counsel