



Office of the City Auditor

CONSENT CALENDAR
July 19, 2005

To: Honorable Mayor and
Members of the City Council

From: Ann-Marie Hogan, ^{AMH} City Auditor

Subject: "Right to Audit" Clause in City Contracts

RECOMMENDATION

Adopt a Resolution: 1) expanding current Council directives regarding audit of contracts to include language in City contracts specifying the City Auditor's right to audit; 2) instituting a requirement that the City Auditor be notified if a decision is made that any specific contracts or types of contracts should not include a right to audit clause; and 3) directing the City Manager to amend the City's contract instructions, administrative regulations, purchasing manual, and other guidelines to reflect this requirement.

FISCAL IMPACTS OF RECOMMENDATION

No significant cost in materials or staff time is anticipated. The Citywide contract instructions and purchasing manual are currently being reviewed and revised in order to make other administrative changes, so this change will not require a separate effort. Additionally, the City Attorney has already approved boilerplate personal services and community agency contracts which include a right to audit clause. Future audits of some contracts may result in the City receiving enhanced service, increased revenue, or other benefits.

CURRENT SITUATION AND ITS EFFECTS

Currently, all standard (attorney-approved boilerplate) forms for personal services contracts and for community agency contracts contain a right-to-audit clause, which is as follows:

Pursuant to Section 61 of the Berkeley City Charter, the City Auditor's Office may conduct an audit of Contractor's financial, performance and compliance records maintained in connection with the operations and services performed under this Contract. In the event of such audit, Contractor agrees to provide the City Auditor with reasonable access to Contractor's employees and make all such financial, performance and compliance records available to the Auditor's Office. City agrees to provide Contractor an opportunity to discuss and respond to any findings before a final audit report is filed.

Recently, it was noted that contracts which do not contain standard boilerplate verbiage may not include an audit clause, even though it would be prudent to do so in many cases. The establishment of the City Auditor's right to audit all contracts, and the requirement that contracts contain language authorizing the City Auditor or her designee to audit the contract, should be explicitly authorized by Council resolution. This will help ensure that staff preparing various types of contracts are aware of the necessity of adding a right to audit clause.

“Right to Audit” Clause in City Contracts

BACKGROUND

The City Auditor’s office has performed audits of City services, including audits of City contractors, vendors, and commercial taxpayers (such as business licensees and parking garage operators), for many years. However, until 1998, there was no specific authority in the Charter to perform these audits.

The City Charter was amended in 1998, at the City Auditor’s request, to require the Office to follow Government Audit Standards, and to give the Auditor’s Office the authority and responsibility to perform all types of audit work for the City. While some of the City Manager’s Administrative Regulations have been updated to reflect these changes to the Charter, a few of the City’s policies and procedures, including the Berkeley Municipal Code, have not been updated to reflect the evolving role of the Auditor.

In fiscal year 2000, at the request of the City Manager, the auditors performed a Public Works Construction Contracts Audit. As stated in the conclusion of that report:

We were not able to fully determine whether the City was being appropriately billed for construction contracts because the contracts reviewed did not contain an audit clause that would allow the auditors to conduct a detailed examination of the contractors’ records and expose areas of overpricing and over-billing.

The Council accepted, and the City Manager implemented, the audit recommendation that a construction contract audit clause be developed and included in all construction bid specifications. In addition, audit clauses were included in the City’s most recent revisions of the approved formats for personal services contracts and community agency contracts.

However, there are a number of other types of City agreements for which pre-approved contract formats are not available, and which sound business practices would suggest should contain a right to audit clause. One example would be a contract in which the City charges rent on a commercial property based on the amount of gross receipts reported by the business. It came to the Auditor’s attention that one such contract was drafted recently without an audit clause. Though this was quickly corrected, it seemed prudent to ask Council to take action to formalize the City Auditor’s authority to audit contracts and to direct that contracts contain a clause granting the City Auditor or her designee the right to audit that contract. The inclusion of the “designee” recognizes the possibility that an audit might be performed by an outside contractor or by staff outside of the Auditor’s office, in some cases.

ALTERNATIVE ACTIONS CONSIDERED

One action considered was to simply amend the City Manager’s Administrative Regulations and On-Line Contract Procedures without requesting Council direction. However, the Charter amendment regarding the right to audit was approved by Council and by the voters. The guidelines and model authorizing legislation published by the National Association of Local Government Auditors suggest that, in addition to some brief charter language establishing an audit function, ordinances and code language should spell out more of the specifics of how the audit function will work. Since Council resolutions carry more force than administrative practices, it seemed appropriate that Council should use this method to clarify and confirm administrative practice regarding audits of contracts.

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POSSIBLE FUTURE ACTION

The City Auditor may review provisions of the Berkeley Municipal Code in order to determine whether there may be other areas where clarification is needed regarding the responsibilities of the Office. If proposed changes are contemplated, they will be discussed with the City Manager, City Attorney, and Audit Committee of Council before presentation to Council for consideration.

CONTACT PERSON

Ann-Marie Hogan, City Auditor
Office of the City Auditor, (510) 981-6750

Approved:



Ann-Marie Hogan, City Auditor
Office of the City Auditor

Attachments:
Resolution- Exhibit A

“Right to Audit” Clause in City Contracts

RESOLUTION NO. ##,###-N.S.

EXPANDING CURRENT COUNCIL DIRECTIVES TO INCLUDE LANGUAGE
ESTABLISHING THE CITY AUDITOR’S AUTHORITY TO AUDIT IN ALL APPROPRIATE
CITY AGREEMENTS OR CONTRACTS

WHEREAS, the City Auditor, by Charter, has the authority and responsibility to conduct performance audits, financial audits, and special studies of all phases of Berkeley government in accordance with government auditing standards; and

WHEREAS, City Auditor staff have, for many years, performed audits of City systems, programs, taxes, and contracts; and

WHEREAS, management and employees in the public sector are responsible for taxpayer use of public resources and should be held accountable for carrying out this responsibility efficiently and effectively; and

WHEREAS, existing contract language and administrative practice grants the City Auditor authority to audit personal services, construction, and community agency contracts,

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley directs the City Manager to ensure that a right to audit clause giving authority to audit to the City Auditor or the City Auditor’s designee should be included in all contracts where such right to audit may reduce the risk of noncompliance with contract terms.

BE IT FURTHER RESOLVED, that, if the City Manager determines that certain individual contracts, or types of contracts, should not be subject to audit because of the low level of risk involved, or for some other reason, the City Manager shall so notify the City Auditor, in writing, before the contract is executed.

Exhibit A