

From: Commissioner Jerdonek

Date: November 10, 2022

SUBJECT: Board of Supervisors Approval and Dominion Contract Extension

At the October 19, 2022 Commission meeting, I was surprised to learn that the Department no longer needs approval from the Board of Supervisors to extend the City's 2019 contract with Dominion. The purpose of this memo is to share information on this topic.

I think it is important for there to be transparency around this change because for the nine months from January 2022 to October 2022, the Commission and the public were operating under a different understanding based on the information that was provided to the Commission. Director Arntz told the Commission in January and February 2022 in his budget documents that Board approval was required. This was also the basis for the Commission's "Resolution on Extending the City's Contract with Dominion Voting Systems" that it unanimously passed on June 15, 2022 after being on the agenda for three meetings and being discussed a fair amount of time. The need for Board approval was also my understanding before 2022, as well as the Director's from my conversations with him back then.

Finally, when I read the plain language of the various documents, it seems to say clearly that Board approval is required. So I imagine others may have some of the same questions. Here is a brief outline of my reasoning from the documents:

- 1) The contract says that exercising the extension requires amending the contract, and that exercising the extension would increase the City's obligations by \$2,100,000 each year.
- 2) SF's Charter says that amendments to a contract that required Board approval that have an "impact" of more than \$500,000 require Board approval by resolution.
- 3) The Board resolution in 2019 approved a contract that capped the City's obligations to \$8,460,000, and it didn't also approve amending the contract after it was signed or in a way that increased the City's financial obligation.

In Section 2 of this document, I give a more detailed version of the reasoning above. In the other sections, I provide some background history and excerpts from the various documents for convenience.

List of Attachments

1. January-February 2022 Department Budget Memo
2. San Francisco Charter Section 9.118
3. March 2019 Board of Supervisors Resolution #127-19
4. City's Signed Contract with Dominion
5. Budget and Legislative Analyst's Report on Resolution #127-19

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1. Background History

In March 2019, the Board of Supervisors adopted a resolution (Resolution #127-19) approving a contract between San Francisco and Dominion Voting Systems. The contract was to lease a new voting system from Dominion. The agreement was for four years for a contract term from January 1, 2019 through March 31, 2023, for an amount not to exceed \$8,460,000, and with two one-year options to extend at \$2,100,000 per year (for a total of \$12,660,000 if the City exercised both options).

The web page for the resolution is here (File No. 190192):

<https://sfgov.legistar.com/LegislationDetail.aspx?ID=3864492&GUID=330CD550-B782-4950-87BC-A8DD3C669051>

Attachments 3 and 5 can be found at the above link, as well as the draft version of Attachment 4 before it was signed.

1.1. January-February 2022 Budget Memo

In January and February 2022, Director Arntz provided the Commission with a Budget Memo (Attachment 1) as part of the Commission's review of the budget. The memo was attached to the agenda packets of the January 28, 2022 BOPEC meeting and February 14, 2022 Commission meeting, as well as of the August 10, 2022 BOPEC meeting when BOPEC discussed Department contracts. The Budget Memo said on page 5—

3. Voting System Contract. Under Article IX, §9.118 of the San Francisco Charter, any “contracts or agreements entered into by a department, board or commission having a term in excess of ten years, or requiring anticipated expenditures by the City and County of ten million dollars, or the modification or amendments to such contract or agreement having an impact of more than \$500,000 shall be subject to approval of the Board of Supervisors (Board) by resolution.” With the City's current voting system contract with Dominion Voting Systems (DVS) expiring at the end of March 2023, the Board must decide whether to approve one or both of the one-year options to extend the term of the contract. Depending on the Board's decision, the Department may need to issue a Request for Proposals for a new voting system in mid-2022.

In addition, page 6 of the memo included a chart saying that if the Board didn't approve the extension, the Department would need to issue an RFP by approximately July 2022.

1.2. June 15, 2022 Commission Resolution on Extending Contract

Following the Commission’s review of the budget, the Commission deliberated for three meetings on a resolution regarding the Dominion contract. The resolution was titled “Resolution on Extending the City’s Contract with Dominion Voting Systems.” Draft versions of the resolution were on the agenda of the April 6, May 18, and June 15 Commission meetings and passed 5-0 on June 15.

The resolution’s final RESOLVED clause said—

FINALLY RESOLVED, That the Commission requests that the Board extend the contract only one year this year and revisit the second-year extension next year, to ensure that the Department has a voting system in place with adequate time in advance of the November 5, 2024 Election.

The adopted resolution can be found on the “Resolutions” page of the Commission’s website: <https://sfgov.org/electionscommission/motions-and-resolutions>

1.3. October 19, 2022 Commission Meeting

At the October 19, 2022 Commission meeting (about 3:31 into the meeting), I asked Director Arntz when the resolution for the contract extension would go before the Board of Supervisors. I asked him because I had been checking the Board of Supervisors’ website weekly for several months and still hadn’t seen it. Director Arntz replied that “the way that the resolution is drafted, the extension does not go to the Board. So I essentially sign the contract, the City Attorney’s Office will sign the contract, OCA will sign the contract, and the vendor will sign the contract. But it doesn’t require Board action.”

Later in the meeting I asked for more detail—

Jerdonek: [3:47:43] Director Arntz, I just want to—back on the question about the contract extension, I’m still processing what you said, but we had a number of Commission meetings where we were, you know, debating this [Commission] resolution, and throughout those meetings we were sort of under the impression that the Board had to vote to approve the extension of the contract. So what changed to—so that you understood that you no longer needed to get Board approval?

Arntz: So the resolution that was drafted when the Board approved the original contract granted the Director of Elections authority to extend the contract.

2. Plain-language reading of documents

In the numbered bullets below I explain why my reading of the various documents leads me to think Board approval is required. This also agrees with what the Director wrote in his January-February 2022 Budget Memo.

The various documents are (1) the Board's March 2019 resolution approving the contract, (2) the draft contract the Board approved, (3) the final contract the City signed, (4) the Budget and Legislative Analyst's Report for the resolution, and (5) Section 9.118 of San Francisco's Charter.

Here is my reasoning from the plain language:

- 1) The contract the Board approved in March 2019 capped the obligation to the City at \$8,460,000 (see for example the first sentence of the "Fiscal Impact" section of the Budget and Legislative Analyst's Report, as well as page 4, Sec. 3.3.1 of the contract). The contract also gave the City the option to extend the contract for two more years at a guaranteed rate, in which case the cost could rise as high as \$12,660,000.
- 2) The contract says that to exercise the option the City would need to modify the agreement (see for example page 3, Sec. 2.2 of the contract).
- 3) San Francisco's Charter says that modifying a contract or agreement that required Board approval in a way that has an "impact" of more than \$500,000 requires Board approval (see Charter Sec. 9.118).
- 4) The Board's March 2019 resolution approving the contract did authorize the Department of Elections to make amendments to the contract, but only (1) before its "final execution by all parties" (so before it was signed), and (2) if the changes do not "materially increase the obligations or liabilities of the City."
- 5) The contract was executed (signed) sometime before April 26, 2019 (see page 24 of the signed contract).
- 6) Modifying the agreement to exercise the City's option to extend the contract would increase the City's obligations by \$2,100,000 for each year it was extended (see for example the second sentence of the "Fiscal Impact" section of the Budget and Legislative Analyst's Report, as well as page 4, Sec. 3.3.1 of the contract). So modifying it does have an impact of more than \$500,000.

3. San Francisco Charter Section 9.118

This section includes Section 9.118 of the City's charter (Attachment 2).

(b) Unless otherwise provided for in this Charter, and with the exception of construction contracts entered into by the City and County, any other contracts or agreements entered into by a department, board or commission having a term in excess of ten years, or requiring anticipated expenditures by the City and County of ten million dollars, or the modification or amendments to such contract or agreement having an impact of more than \$500,000 shall be subject to approval of the Board of Supervisors by resolution.

4. Excerpts of March 2019 Board of Supervisors Resolution #127-19

This section includes excerpts of Resolution #127-19 (Attachment 3). The summary on page 1 says—

Resolution retroactively approving a contract agreement between the City and County of San Francisco, by and through its Department of Elections, and Dominion Voting Systems, Inc., for the lease of a voting system, a license to use the voting system software, and related maintenance and support services, for four years for a contract term from January 1, 2019, through March 31, 2023, in an amount not to exceed \$8,460,000 and with two one-year options to extend, for a total contract amount not to exceed \$12,660,000.

Page 1 says--

WHEREAS, The Department of Elections completed negotiations and reached agreement with Dominion, on the terms of a proposed contract (the "Agreement"), with a term of four years from January 1, 2019, through March 31, 2023, with the option for the City to renew two times for one year each renewal; and

WHEREAS, The total amount of the Agreement for the initial four-year term shall not exceed \$8,460,000, and the total amount of the Agreement if the City exercises the two one-year options shall not exceed \$12,660,000; and

Page 4 says--

RESOLVED, That in accordance with Charter section 9.118(b), the Board of Supervisors hereby approves the Agreement with Dominion Voting Systems, Inc. on the terms and conditions of the Agreement on file with the Clerk of the Board of Supervisors in File No. 190192; and, be it

FURTHER RESOLVED, That the Board of Supervisors authorizes the Department of Elections to enter into any amendments or modifications to the contract, prior to its final execution by all parties, that the Department determines, in consultation with the City Attorney, are in the best interests of the City, do not otherwise materially increase the obligations or liabilities of the City, are necessary or advisable to effectuate the purposes of the contract, and are in compliance with all applicable laws; and, be it

FURTHER RESOLVED, That within 30 days of the contract being fully executed by all parties, the Director of Elections shall provide the final contract to the Clerk of the Board for inclusion in Board of Supervisors File No. 190192.

5. Excerpts of Signed Contract with Dominion

This section includes excerpts of the signed contract with Dominion (Attachment 4).

5.1. Payment [from page 4]

3.3.1 Payment. ... In no event shall the amount of this Agreement exceed \$8,460,000 (eight million, four hundred and sixty thousand dollars) for the initial term provided under Section 2.1, or \$12,660,000 (twelve million, six hundred and sixty thousand dollars) if the Department exercises the two one-year options provided under Section 2.2.

5.2. Term of the Agreement [from page 3]

Article 2 Term of the Agreement

2.1 The term of this Agreement shall commence on the later of: (i) January 1, 2019; or (ii) the Effective Date and expire on March 31, 2023, unless earlier terminated as otherwise provided herein.

2.2 The City has two (2) options to renew this Agreement for a period of one year each. The City may extend this Agreement beyond the expiration date by exercising an option at the City's sole and absolute discretion and by modifying this Agreement as provided in Section 11.5, "Modification of this Agreement."

5.3. Modification of the Agreement [from page 20]

11.5 **Modification of this Agreement.** This Agreement may not be modified, nor may compliance with any of its terms be waived, except as noted in Section 11.1, "Notices to Parties," regarding change in personnel or place, and except by written instrument executed and approved in the same manner as this Agreement. Contractor shall cooperate with Department to submit to the Director of CMD any amendment, modification, supplement or change order that would result in a cumulative increase of the original amount of this Agreement by more than 20% (CMD Contract Modification Form).

5.4. Execution [from page 24]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day first mentioned above.

6. Excerpts of Budget and Legislative Analyst's Report

This section includes excerpts of the Budget and Legislative Analyst's Report (Attachment 5) on the 2019 resolution.

6.1. Legislative Objectives [from page 1]

Legislative Objectives

The proposed resolution would retroactively approve a voting system contract between the Department of Elections and Dominion for a term of four years and three months, from January 2019 through March 2023, and an amount not to exceed \$8,460,000. The contract provides for two one-year options to extend through March 2025, for a total not to exceed \$12,660,000.

6.2. Fiscal Impact [from page 1]

Fiscal Impact

The contract authorized by the proposed resolution would cost the City an amount not to exceed \$8,460,000 over the initial term of four years and three months. If the two one-year options are exercised, the cost would increase by \$4,200,000, for a total not to exceed \$12,660,000.