

MEMORANDUM 10-160

TO: MAYOR AND CITY COUNCIL MEMBERS

FROM: THOMAS F. KLINKNER

RE: RENEWAL OF BRAD FAULKNER LEASE

CLIENT: CITY OF HOMER

FILE NO.: 506,742.1300

DATE: DECEMBER 7, 2010

You have asked whether the Council may accept the recommendation of the Lease Committee that the City enter into a new lease with Brad Faulkner on Lot 88-4 without a competitive process. I conclude that the Council may not proceed in the manner recommended by the Lease Committee unless it finds by resolution that it is in the public interest to grant an exception to competition under Lease Policy Section 4.1(A).

1. Introduction.

The City leased Lot 88-4, Homer Spit No. 2 Subdivision to Katch Canning Co., Inc. under a Lease Agreement dated August 10, 1990 ("Lease"). Mr. Faulkner acquired the leasehold by assignment dated July 1, 1994.

Section Two of the Lease describes the term of the Lease as follows:

The period of this Lease shall be from August 15, 1990, for a period of ten years, through 12:00 midnight August 15, 2000, with an option to renew for additional two-five year periods...No further right or option to renew this lease shall exist.

Assuming that Mr. Faulkner exercised both renewal options under the Lease, and that there has been no other modification of the Lease term, the Lease expired at 12:00 midnight August 15, 2010.

In a letter to City Manager Walt Wrede dated August 22, 2010, Mr. Faulkner claims that he gave notice of his intent to renew the Lease by email messages to Harbor Director Bryan Hawkins on July 29 and 31, 2009. It appears that Mr. Faulkner's next communication regarding the renewal of his lease occurred when he appeared at

the April 29, 2010 meeting of the Lease Committee. Under the Public Comment item on the agenda at that meeting, Mr. Faulkner stated that he would apply to renew his lease upon the Council's adoption of changes to the City's lease policy.

By a letter to City Manager Walt Wrede dated July 13, 2010, Mr. Faulkner requested a one-year extension to his lease, "giving the council time to finish there [sic] work on lease policy." Mr. Faulkner also stated that he had not completed a lease application because he had been called out of town on short notice to assist with the response to the oil spill in the Gulf of Mexico, and requested that the application materials be emailed to him if an extension could not be granted. Mr. Wrede declined to grant Mr. Faulkner a one-year lease extension, but agreed that Mr. Faulkner could continue to occupy the leasehold on a month-to-month basis.

In his August 22, 2010 letter to Mr. Wrede, Mr. Faulkner accepted the offer of month-to-month occupancy, and undertook to submit a lease proposal in time for the October 14, 2010 meeting of the Lease Committee. Mr. Faulkner actually submitted a lease application on October 26, 2010, that Mr. Wrede found to be incomplete.

2. The Applicable Code and Lease Policy Provisions.

HCC 18.08.160 requires the Council to adopt a Property Management Policy and Procedures Manual (commonly referred to as the "Lease Policy"), and conform to the terms of the Lease Policy in the leasing of City property:

a. The City Council shall adopt by resolution a Property Management Policy and Procedures Manual. Leasing and use permits of City land and facilities shall conform to the manual except to the extent it shall be in conflict with this code or any relevant ordinance later adopted, in which case the provisions of this code and later ordinances shall prevail over the provisions of the manual.

Sections 11.2(E) and (F) of the Manual prescribe the procedure upon the expiration of a lease of City property:

- E. It is the policy of the City that equal opportunities should be provided to compete for leasing available public property. A lessee whose initial lease and all options have expired shall have no automatic right of further renewal or extension. In general, it is the policy of the City that the Lease Committee shall offer such properties to the public through the RFP/competitive bidding process described herein.
- F. Lease renewals: The City Council, after reviewing a recommendation from the Lease Committee, may elect to not require a competitive bidding process for a property whose lease has expired (including all options) if it finds that it is in the best interest of the City to enter into a new lease agreement with the current lessee. If the current lessee is interested in entering into a new lease agreement, he/she must indicate so in writing to the City Manager at least 12 months prior to

the expiration of the lease and submit a formal lease application/proposal for evaluation by the Lease Committee. The City will review the application but is under no obligation to enter into a new lease. If the Council chooses to approve such a new lease without a competitive process, it must approve such new lease by resolution within six months that includes a finding that it is in the public interest to do so, after consideration of relevant facts including, but not limited to, the following:

1. The lessee's past capital investment and binding commitment to future capital investment
2. The lessee's financial condition and prior lease history
3. The number of persons employed and the prospects for future employment
4. Tax revenues and other financial benefits to the City of Homer anticipated in the future if the lease is renewed
5. Consistency of the past use and intended future use with all applicable land use codes and regulations, the Comprehensive Plan, and Overall Economic Development Plan
6. Other opportunities for use of the property that may provide greater benefits to the City of Homer
7. Other social, policy, and economic considerations as determined by the Council.

In addition to Section 11.2(E) and (F) regarding procedure upon the expiration of a lease of City property, Section 4.1(A) of the Lease Policy addresses the subject of competition to lease City property generally:

It is the policy of the City of Homer that a request for proposals, or a competitive bidding process be used for the leasing of City owned property. Exceptions to this policy may be made by the City Council as per section 10.2.E of these policies and/or under special or exceptional circumstances. The Council shall review recommendations of the Lease Committee and, if an exception is granted, adopt a resolution finding that it is in the public interest and approving the exception.

3. Compliance with the Requirements to Renew under the Lease Policy.

Section 11.2(E) of the Lease Policy states that when an existing lease of City property expires and is subject to no additional renewal options, it is the general policy of the City that the Lease Committee shall offer such properties to the public through the RFP/competitive bidding process. However, Section 11.2(F) of the Lease Policy authorizes the Council, after reviewing a recommendation from the Lease Committee, "to not require a competitive bidding process for a property whose lease has expired (including all options) if it finds that it is in the best interest of the City to enter into a new lease agreement with the current lessee."

Section 11.2(F) does not grant the Council unlimited discretion to extend an existing lease without competition. It subjects the Council's discretion to several limitations. First, the lessee must have notified the City Manager of the lessee's intent to renew the lease "at least 12 months prior to the expiration of the lease and submit a formal lease application/proposal for evaluation by the Lease Committee." Second, the Council must find by resolution that it is in the public interest to renew the lease without competition, after consideration of factors listed in Section 11.2(F).

Mr. Faulkner claims in his July 13 and August 22, 2010 letters that he gave timely notice (i.e., at least one year before the lease expired on August 15, 2010) of his intent to renew his lease to Harbor Director Bryan Hawkins. However, Mr. Faulkner acknowledges that he did not submit a timely lease application as required by Lease Policy Section 11.2(F). Thus, he has not satisfied the prerequisites for the Council to consider his renewal application without competition under Section 11.2(F) of the Lease Policy.

HCC 18.08.160(a) requires leases of City property to conform to the provisions of the Lease Policy unless the provisions conflict with the City Code or are superseded by a later ordinance. Section 11.2(F) of the Lease Policy does not provide any authority for the Council to waive its requirements. However, Section 4.1(A) of the Lease Policy does authorize the Council to make exceptions to the requirement for competition to lease City property. Thus, if the Council found the "special or exceptional circumstances" referred to in Section 4.1(A) of the Lease Policy, it could grant an exception to the requirement for a competitive process to renew the Lease by resolution finding that it was in the public interest to do so. Although Lease Policy Section 4.1(A) does not identify factors that the Council should consider in determining whether to grant an exception, I recommend that the Council consider the factors listed in Lease Policy Section 11.2(F), and any other factors that it considers relevant for this purpose.

In conclusion, unless the Council finds by resolution that it is in the public interest to grant an exception to competition under Lease Policy Section 4.1(A), the Council should return the matter of the renewal of the Lease to the Lease Committee with instructions that the Lease Committee solicit bids or proposals to lease the affected property under HCC 18.08.140.