



Policy Type: Board

Category: Procurement

Policy Name: Real Property, Franchise and Concession Contracts - Board Policy 5.9

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5.9 REAL PROPERTY, FRANCHISE AND CONCESSION CONTRACTS (Adopted 2-28-12; Amended 3-16-12; Amended 9-10-13; Amended 6-24-14; Amended 8-5-14)

5.9.1 Overview

This section describes the different types of real property, franchise and concession contracts entered into by the County and applicable legal requirements relating to these contracts.

5.9.2 Policy

It is the policy of the Board that all real property, franchise and concession contracts entered into on behalf of the County comply with applicable laws, while recognizing the unique nature of such contracts. Sections 5.4 and 5.6 of this Chapter do not apply to these contracts. The policies governing those contracts are described in this section.

5.9.3 Background

The County enters into different types of real property, franchise and concession contracts including lease, rental, franchise, and concession



agreements. The County may act as the landlord, tenant, lessor, lessee, or franchisor.

5.9.4 Purpose

The purpose of Section 5.9 is to establish a policy of the Board relating to the soliciting and contracting processes for real property, franchise and concession contracts.

5.9.5 Application of the Policy

5.9.5.1 Leases or Rentals

Prior to any request for the lease or purchase of property for use by a County Department or Office, the requesting Department or Office shall develop and present to the Office of County Executive, the Director of Facilities and Fleet, the Director of Parks and Recreation or the Director of Roads and Airports, as applicable, (each a "Property Managing Department") a written plan demonstrating the fiscal, operational and management objectives associated with the need for the property and its intended use (short term or long term, as applicable), and shall work with the Property Managing Department to develop Project Specifications and Performance Standards ("Specifications") for the lease or purchase of the property, identifying at a minimum:

- (1) All key and material deliverables;
- (2) The performance, industry and other standards to be achieved or applied to measure and determine successful project completion (including achievement of Department fiscal, operational and management goals) for the period of intended property use; and,



- (3) A financing mechanism to be used to cover or recapture the costs of the Property Managing Department to administer, manage and oversee the project improvements.

Using the requesting Department's written plan and other relevant information, the Property Managing Department will develop an analysis to determine the cost/benefit of leasing versus purchasing the property.

(A) County as the Lessee/Tenant

From time to time, the County enters into rental or lease contracts with public or private entities for County use of real property. No other Office or Department other than a Property Managing Department is authorized on behalf of the County to negotiate or enter into a rental or lease contract with public or private entities for County use of real property. The Budgetary Contingency mandatory provision that allows the County to terminate the agreement if it does not have sufficient funds to sustain the agreement shall not apply to real property rental or lease agreements. Where a lease, rental contract or agreement for County use of a facility, parking structure, building, space or other property involves or may potentially involve any construction, alteration, renovation or improvement to the facility, structure, building, space or property, then said lease, rental contract or agreement shall include, at a minimum, terms and conditions that address the following:

- (1) Payment of prevailing wage.
- (2) A requirement that the landlord (where needed/negotiated) obtain a minimum of three (3) competitive bids from prospective contractors for performance of work under the



lease, and/or provide cost schedules for instances of landlord self-performance.

- (3) A provision identifying by title the County's representative from the applicable Property Managing Department authorized to agree to any property improvements or new construction, and to negotiate, approve, enter into and sign any and all amendments, change orders, fee or cost increases, other modifications to the scope of work or terms of the lease or rental contract on behalf of the County.
- (4) Where applicable, as determined by the Property Managing Department, implement and incorporate by reference the County's Project Specifications and Performance Standards ("Specifications"), including the development, and incorporation by reference, of a mutually acceptable implementation work plan that meets the Specifications and which contains at a minimum:
 - (a) All tasks to be completed.
 - (b) Critical Path Milestones (including Milestone State and finish dates).
 - (c) Detailed description of Landlord action items.
 - (d) Detailed description of County action items.
 - (e) Detailed description of third party action items.
 - (f) Dates and frequency of status meetings and reports.



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- (g) Method and process for content, submission, review, approval and authorization of Change Orders.
- (h) Definition of material change in project scope.
- (i) The fee and cost structure, including any fees and costs associated with changes in project scope.
- (j) Definition of "Project Acceptance" or "Completion of Work" to include method and means for validating and reviewing completion of performance, and identification of the County representative from the applicable Property Managing Department authorized to make this determination.
- (k) Process for correction of defects or other modifications needed to achieve or demonstrate "Project Acceptance."
- (l) Process for post-project acceptance corrections of defects and alterations.
- (m) Warranty period and coverage after completion of work.
- (n) Identification of authorized and unauthorized pass-through charges.
- (o) Invoicing and payment process.
- (p) Method and process for dispute resolution concerning completion of work plan.

(B) County as the Lessor/Landlord



The County may rent or lease a County facility to a private firm or another public entity, in which case the County acts as the landlord under a rental or lease agreement with a tenant. The County may also allow Community Based Organizations or other County contractors holding valid County contracts to utilize County owned property on a loan basis in lieu of purchasing or leasing similar property with contract funds to perform the services, or for the benefit of the program under the valid contract provided the agreement meets the requirements of Section 5.9.5.6.

(C) County as the Lessor/Landlord and Lessee/Tenant

Agencies/Departments cannot contract with each other. When one Agency/Department desires to "rent" real property from another Agency/Department, however, and one of the two Agencies/Departments operates through use of general funds and the other operates with restricted funds, the Facilities and Fleet Department (FAF) is responsible for coordinating the arrangement, obtaining approval for this arrangement, including Board approval, if applicable, and preparing the "rental agreement." FAF will coordinate with County Counsel to ensure that the rental costs satisfy the requirements of United States Office of Management and Budget Circular A-87, to the extent it is applicable. Nothing in this policy is to be construed to supersede the duties or authority of the Board-appointed County Road Commissioner with respect to the Road Fund's real property assets.

5.9.5.2 Franchise or Concessions

The County enters into franchise and concession agreements when the Board approves a concession and/or a lease of County-owned property to an individual or firm. Under this type of agreement, the individual or firm is authorized to manage a business for specifically-described purposes and



under limited conditions on the County property in question. This also applies when the Board grants a license to do business in the County. For example, the Board may license one or more firms for the limited purpose of providing paramedic and ambulance services within the County.

By law, the County serves as a franchising authority that grants access and easements on public property within the County's geographical boundaries to public utilities and cable television operators. The utilities and cable operators may be granted exclusive or non-exclusive franchises by the Board. These types of franchises are awarded by the Board by ordinance, which sets forth the terms and conditions under which the franchise may operate within the County. The term of any lease or concession agreement, including any extensions, shall be limited to a total of 30 years, after which a competitive bid must be undertaken for a new lease or concession agreement. All lease or concession agreements shall require a security deposit or performance bond in accordance with the County's financial risk at stake in the agreement.

Other commonly recognized forms of franchises and concession agreements include leases of County-owned property for various purposes and the granting of concessions or operating permits for enterprises on County-owned property.

All franchise and concession contracts must incorporate the following conditions:

- (A) Performance requirements that are imposed on the franchise and the conditions under which the license to operate may be cancelled for failure to perform;
- (B) The length of the franchise and the conditions under which the license to operate may be extended or re-bid; and



- (C) The franchisee's financial capacity to carry out the terms and conditions in the agreement with the County and the franchisee's demonstrated experience and past performance in providing the service in question.

The Board shall seek compensation for a lessee's or concessionaire's use of County-owned property consistent with fair market values that prevail at the time of soliciting and contracting. Using the process and criteria provided for in Section 5.9.5.6 below, the Board may waive fair market considerations if it determines that such action is needed to support a County-sponsored program and/or subsidize the cost of the lessee's enterprise for the purpose of serving (1) economically or (2) physically disadvantaged persons or for other reasons as determined by the Board. Under such circumstances, the Board will strive to maintain a balance between the County's interest in generating revenue and the need to ensure reasonable public access to the service in question.

Conditions calling for a subsidy of an enterprise that is granted a franchise or permit to operate on County-owned land shall be set forth in an agreement between the County and the contractor.

5.9.5.3 Authority

Subject to certain restrictions and exceptions, (1) the Director of the Facilities and Fleet Department (FAF), (2) the Director of the Roads and Airports Department (Roads), and (3) the Director of the Parks and Recreation Department (Parks) have authority to enter into rental or lease agreements on behalf of the County. This includes a facility rental by a Department. Agencies/Departments should consult with the appropriate department (FAF, Roads, or Parks) or County Counsel to determine which exceptions and restrictions apply.



5.9.5.4 Method(s) of Solicitation

All leases of County-owned real property to private firms or individuals, including all concessionaires that are allowed to operate privately held businesses on County-owned real property, must occur pursuant to a formal competitive bidding or sole source criteria that are set forth in this policy and Ordinance Code Division A21.

The bid process for real property leases and any contract emanating from that bidding process must minimally account for the following:

- (A) The expected uses and use limitations on the property;
- (B) Rental rates, escalators in the rates, and revenue sharing requirements (if any);
- (C) Lessee and lessor requirements with respect to capital improvements and the maintenance of improvements on the property;
- (D) The length of the agreement and the conditions under which the lease and/or concession will be extended and/or re-bid; and
- (E) Performance requirements that are imposed on the lessee and the conditions under which the lease and/or concession may be cancelled for failure to perform.

5.9.5.5 Use of Commercially Licensed Real Estate Brokers and Agents

The use of or payment by the County or any Department of the County of a licensed real estate broker for any real property transaction is not required.



5.9.5.5.1 Payment of Commission by County to Buyer's Agent

If the County is selling or leasing County-owned property, and it wants to pay any part of the commission of a licensed real estate broker serving as the procuring agent of the buyer or lessee ("Buyer's Agent"), then the County will comply with the requirements of Section 25527 et seq. of the Government Code.

5.9.5.5.2 Payment of Commission by County to County's Agent

When the County is acquiring or disposing of real property by sale or lease, a licensed real estate broker may be used by the County as County's agent ("County's Agent") provided the terms of the real estate broker agreement have been approved by the Board of Supervisors prior to entering into the agreement.

For the sale or lease of County-owned real property, the County may, at its discretion, require in the real estate broker agreement that County's Agent share a percentage of its commission with the Buyer's Agent in which case the requirements of Section 25527 et seq. of the Government Code shall be followed.

5.9.5.5.3 Payment of Commission by Third Party

If the County has engaged the services of a licensed real estate broker (as the procuring cause) for the disposition by sale or lease of County-owned real property, and the commission will be in excess of \$100,000 and paid by a third party, then the commission must be approved by the Board of Supervisors in advance of the payment unless due to the nature of the transaction prior approval is not possible.



If the County engages the services of a licensed real estate broker (as the procuring cause) for the acquisition by purchase or lease of real property for County use, and the commission will be in excess of \$200,000 and paid by a third party, then the commission must be approved by the Board of Supervisors in advance of the payment unless due to the nature of the transaction prior approval is not possible.

5.9.5.5.4 Real Estate Broker Selection

In addition to all other requirements of this Section 5.9.5.5, if any County Department intends to enter into an agreement with a licensed real estate broker to serve as County's exclusive agent for the purchase or lease of real property for County use or for the sale or lease of County-owned real property, then the Department shall select a broker from the list(s) of brokers available through the Facilities and Fleet Department's Office of Property Management ("OPM"), or OPM designee, which list(s) shall be valid for five (5) years and generated through a request for qualifications process administered, updated, modified and managed by the OPM, or OPM designee.

5.9.5.6 Below Fair Market Value

(A) Intent

Non-profit or volunteer groups or organizations and public agency uses of County property at below fair market value ("BFMV") rent or fee can sometimes be justified due to the important public benefit or services provided through such use. Such uses can be justified through demonstrated need and accountability in compliance with the spirit and intent of County ordinances and other applicable law, including but not limited to Government Code Section 26227. These public purpose uses can



provide benefit to County residents by increasing the scope and diversity of services and benefits available Countywide.

(B) Managing the Relationship

The County manages these relationships through a variety of County departments and agencies. Generally, the responsibility for managing the day-to-day use of County Property resides primarily within the County Executive's Office of Asset and Economic Development, the Facilities and Fleet Department, the Parks and Recreation Department and the Roads and Airports Department.

(C) Below Fair Market Value Agreements

Except as allowed herein or in Section 5.9.5.6 (D) and (E) or where otherwise expressly allowed by applicable law or County ordinance, the County shall not enter into any below fair market value agreements ("BFMV Agreement") for the use of County real property or space ("County Property"). In addition, except as expressly allowed by applicable law, the County shall not enter into BFMV Agreements with any for-profit business, person, entity, partnership or other group or organization.

- (1) Without first having to comply with any other provision of Board of Supervisors approval, each of the Directors of the Roads and Airport Department, Facilities and Fleet Department, Parks and Recreation Department and Office of Asset & Economic Development are hereby delegated the authority to negotiate, amend, enter into and execute leases, licenses and other space use agreements or contracts for the use of County facilities, space or real property at or below fair market value with any third party if (1) the term of the agreement is less than 12 months, (2) the rent or fee for the use is less than \$10,000



per month, (3) the agreement is non-renewable, (4) the agreement has been reviewed as to form and legality by County Counsel and has been approved by the Office of County Executive, (5) the use serves a public purpose and (6) the department with the delegation has complied with all other applicable provisions of the Ordinance Code or law pertaining to such use (by way of example and not limitation, County Ordinance Code A21-20.b).

(D) Below Fair Market Value Justification

For purposes of this section, a below fair market value justification will require the following:

- (1) An appraisal or an economic opportunity evaluation. If an economic opportunity evaluation is performed it should include, if needed, consideration of the following: lease vs. sale economics, net present value comparisons, marketing options, market trends, proposed timing for use, minimum bid recommendations, development pro-forma, title encumbrances (restrictive easements or bond financing encumbrances) or a discussion of the non-applicability of any of these elements if that is the County staff's determination. If the property is a park, then the analysis in this section (D)(1) is not required;
- (2) A determination that the proposed use is consistent with the County's goal of serving the public purpose;
- (3) A preliminary assessment of whether CEQA is applicable and has been satisfied;



- (4) A determination that the proposed use would be in the public interest and would not substantially conflict or interfere with the County's use of the space or the use of other County properties;
- (5) The proposed user has demonstrated that the fee or rent at fair market value is not economically feasible and the proposed below fair market fee or rent is otherwise justified for the intended use. An effort should be made to quantify the public benefit associated with the grant of a below fair market fee, rent or payment, including any savings to the County; and,
- (6) The proposed user has demonstrated that it has the financial and operational ability or expertise to perform the public service or provide the benefit contemplated.

(E) Approving the Below Fair Market Value Agreement

Prior to entering into any BFMV Agreement, the BFMV Agreement shall:

- (1) Be in writing, and subject to review and approval by County Executive (or designee) and review and approval by County Counsel as to form and legality; and,
- (2) Be subject to the Board of Supervisors approval.

(F) Effective Date

This Section 5.9.5.6 shall apply from the date of adoption and shall not be retroactive.

5.9.5.7 Uses of Property Not Belonging to County (Adopted 12-8-15)

- (A) Without first having to comply with any other provision of Board Policy Chapter 5.9, the Board of Supervisors delegates to the County



Executive or designees the authority to negotiate, amend, enter into and execute leases, licenses and other space use agreements or contracts for the use of facilities, space or property belonging to another if (1) the term of the agreement is ten (10) days or less, (2) the rent or fee for the use is less than \$7,500, (3) the agreement is non-renewable, (4) the use serves a public purpose, (5) the department with the delegation has complied with all other applicable provisions of the Ordinance Code or law pertaining to such use, (6) an executed copy of the agreement is provided to the Director of the Facilities and Fleet Department, and (7) an off-agenda memo is sent to the Board of Supervisors with a summary and a copy of that agreement.

(B) Effective Date

This Section 5.9.5.7 shall apply from the date of adoption and shall not be retroactive

5.9.6 Guidelines/Procedures

Additional information can be found in the County Executive's Administrative Guidelines, the County's Contracting Manual and any other applicable procedures developed for this subject area.

5.9.7 Applicable Legal Authority

The applicable legal authority for this Section includes, but is not limited to the following:

County of Santa Clara Ordinance Code Division A21

California Government Code Section 25525, et seq.



Board Resolution Authorizing the Directors of the Facilities and Fleet Department, Parks and Recreation Department, and Roads and Airports Department to execute and amend leases and license of Real Property for use by the County, dated May 22, 2007.

Related Policies

None.

Related Forms and Information

None.

History

| Date | Changes Made |
|------------|--|
| 12/8/2015 | Policy Amended. View legislative file. |
| 11/17/2015 | Policy Amended. View legislative file. |
| 8/5/2014 | Policy Amended. View legislative file. |
| 6/24/2014 | Policy Amended. |
| 3/19/2014 | Policy Uploaded. (Kyle Larson) |
| 9/10/2013 | Policy Amended. View legislative file. |
| 3/16/2012 | Policy Amended. |
| 2/28/2012 | Policy Adopted. View legislative file. |