

Santa Clara Stadium Authority

Informational Report Notice of Default of Management Agreement

April 30, 2019



Management Agreement

STADIUM MANAGEMENT AGREEMENT

by and among

SANTA CLARA STADIUM AUTHORITY,
a joint exercise of powers entity, created through Government Code section 6500 et seq.
(the "Stadium Authority")

and

FORTY NINERS STADIUM MANAGEMENT COMPANY LLC,
a Delaware limited liability company (the "Stadium Manager")

and

FORTY NINERS SC STADIUM COMPANY, LLC,
a Delaware limited liability company ("Standco")

Dated as of March 28, 2012

11.3 Notice of Breach. Each party shall promptly notify the other party of any act or omission believed to be a breach of this Agreement. In order to be effective for purposes of Section 11.1, a notice of a breach must state that it is a notice of breach and must specify in detail the act or omission alleged to constitute a breach of this Agreement.



Management Agreement

11.1 Events of Default. Each of the following shall constitute an “Event of Default” under this Agreement:

11.1.1 Failure to pay when due any amount required to be paid under this Agreement, if the failure continues for thirty (30) days after notice has been given to the breaching party; and

11.1.2 Failure to perform any other obligation under this Agreement, if the failure to perform is not cured within thirty (30) days after the earlier of the breaching party having actual knowledge of such failure to perform and written notice having been given to the breaching party; *provided, however*, that if the breach is of a type that cannot reasonably be cured within such thirty (30) day period, an Event of Default shall not be deemed to have occurred if the breach is such that it can reasonably be expected to be cured within one hundred twenty (120) days after notice, the breaching party begins to cure the breach within the thirty (30) day period and diligently and in good faith continues to pursue the cure of the breach and such breach is in fact cured within such one hundred twenty (120) day period.



First Amendment to Management Agreement

2. Delegation of Contracting Authority.

2.1 Stadium Procurement Contracts. In addition to contracting authority that may be granted to the Stadium Manager from time to time pursuant to Section 6.4 of the Existing Management Agreement, the Stadium Authority hereby agrees that the Stadium Manager shall have full authority and discretion to select the providers, and to negotiate, approve, enter into and administer contracts with such providers on behalf of the Stadium Authority, for the purchase of supplies, materials and equipment, and for services, relating to the Stadium and its operations (“Stadium Procurement Contracts”), as and to the extent the Executive Director has authority to enter into such Stadium Procurement Contracts pursuant to Sections 17.30.010 through 17.30.180 of the Santa Clara City Code (“SCCC”), as approved on first reading by the Santa Clara City Council on November 13, 2012. Manager shall provide the Stadium Authority with information, including the contracting party and the contract amount, regarding all Stadium Procurement Contracts entered into with contract amounts greater than \$100,000 within thirty (30) days of entering into any such contract. The foregoing constitutes the Executive Director’s delegation to the Stadium Manager, pursuant to Section 17.30.010(c) of the SCCC, of the authority granted to the Executive Director to enter into such Stadium Procurement Contracts. If the ordinance adopting Sections 17.30.010 through 17.30.180 of the SCCC approved on November 13, 2012 does not become effective by January 31, 2013, this Section 2 shall be of no further force or effect.



Background

On March 21, 2019, the Stadium Authority issued a Notice of Breach of the Stadium Management Agreement due to the Stadium Manager's failure to comply with the California Labor Code and Department of Industrial Relations regulations for prevailing wage requirements for contracts paid for in whole or in part by public funds. The Notice also identified Stadium Manager's failure to comply with the Stadium Authority Procurement Policy set forth in Santa Clara City Code Chapter 17.30.

Background

- Although the March 21 Notice triggered discussions regarding the Stadium Manager's intention to attempt to cure the breaches, the Stadium Manager failed to cure within the 30 days provided for in Section 11.1 of the Management Agreement.
- This failure to cure is evidenced by ManCo's counsel's April 24, 2019 letter.

ManCo's April 24 2018 Letter

The April 24 Letter concedes that Stadium Manager did not meet "strict and total compliance" with the prevailing wage laws. Indeed, Stadium Manager has failed to provide any evidence that the NEX Systems contract met state prevailing wage requirements at all. Stadium Manager also concedes that compliance going forward remains uncertain.



Stadium Authority Notice of Default

April 26, 2019

Al Guido, President
San Francisco Forty Niners Management Company
4900 Marie P. De Bartolo Way
Santa Clara, CA 95054

**SUBJECT: Notice of Default of Management Agreement
Failure to Cure Breach – NEX Systems Surfaces Contract**



Notice of Default

- Stadium Manager's plan to have new counsel work with the DIR is not a cure at all.
- Stadium Manager should have obtained adequate legal advice regarding the exercise of public agency contracting authority from the first day that it took on the role of procuring Stadium Authority contracts five years ago.

Notice of Default

- Stadium Authority questions the legal and contractual right to reclassify the prior work provided under NEX contract to StadCo.
- This proposed approach is also contradictory, given that the DIR would not approve a contract that is not subject to prevailing wage laws.

Notice of Default

- With regard to the procurement policies and requirements, Stadium Manager's April 24 letter takes the untenable position that the procurement of the NEX Systems contract is not at issue because no written contract was never executed.
- Stadium Manager own actions pertaining to this contract and the services provided prove a contract existed.
- Stadium Manager's current attempt to hide or re-write those facts demonstrates Stadium Manager's apparent disregard for the seriousness of contract procurement requirements.

Notice of Default

- Finally, Stadium Manager's April 24 letter provided no legal or contractual authority to support a cure of the breach by having Stadium Manager sign the NEX System contract on behalf of StadCo, and not the Stadium Authority.
- The fact remains that Stadium Manager engaged a contractor in a work of public improvement in violation of the law.

Notice of Default

- For all these reasons, the Stadium Authority declared a Default pursuant to Section 11.1.2 of the Management Agreement.
- The Stadium Authority intends to undertake any and all of the remedies provided for in Section 11.4 of the Management Agreement, including but not limited to termination of the delegated procurement authority granted to Stadium Manager in Section 2.1 of the First Amendment to the Management Agreement. All damages and costs, including attorneys' fees, shall be borne by Stadium Manager.

Management Agreement

11.4 Rights of Non-Breaching Party. If an Event of Default occurs and is not waived in writing by the non-breaching party, then the non-breaching party shall have the following remedies, which are not exclusive but cumulative, in addition to any other remedies now or later allowed by law or in equity:

11.4.1 The right to cure, at the breaching party's cost and expense, any Event of Default and recover such costs, together with interest thereon as provided in Section 11.2 and reasonable attorneys' fees and costs of court;

11.4.2 The right to sue to collect any sums not paid when due, together with interest accrued thereon as provided in Section 11.2 and reasonable attorneys' fees and costs of court incurred in collecting the same;

11.4.3 The right to sue to collect damages suffered by the non-breaching party by reason of the occurrence of an Event of Default other than breach in the payment of money, together with reasonable attorneys' fees and costs of court incurred in such proceedings;

11.4.4 To the extent provided in Article 8, the right to terminate this Agreement;
or

11.4.5 The right to injunctive relief including seeking specific performance of the breached obligation, together with reasonable attorneys' fees and costs of court incurred in such proceedings.

Recommendation

- Note and file this Report
- Direct the Stadium Authority Counsel and Executive Director to bring back to the Stadium Authority Board appropriate actions that result in the revocation of the Stadium Manager's delegated procurement authority per Santa Clara Code Chapter 17.30 (Stadium Authority Procurement Policy) and any other actions relative to staff's review underway on this topic



SCSA

Santa Clara Stadium Authority

4-30-19

Item 5 # 19-439

Deanna Santana

From: Deanna Santana
Sent: Tuesday, April 30, 2019 10:43 AM
To: Jim Mercurio (jim.mercurio@49ers-smc.com); Compliance Manager
Cc: Brian Doyle; Walter Rossmann; Catlin Ivanetich
Subject: Media Coverage re Levi's Stadium

Good Morning Jim,

The purpose of this email is to inquire about the attached media article. The article shows your filed Form 700 and your disclosure of an interest in VenueNext Company. Please clarify your relationship with them and your connection to the contract. A copy of the contract did not appear in submitted documents, please provide a copy today.

<https://santaclaranews.org/2019/04/30/49ers-stadium-manager-jim-mercurio-owns-stock-in-stadium-vendor-in-possible-financial-conflict-of-interests/comment-page-1/>

Thank you,

DEANNA J. SANTANA | City Manager
1500 Warburton Avenue | Santa Clara, CA 95050
D: 408.615.2210 | www.santaclaraca.gov



**City of
Santa Clara**
The Center of What's Possible

POST MEETING MATERIAL

4-30-19

Item #5

Cris Evans

From: Mercurio, Jim <jim.mercurio@49ers-smc.com>
Sent: Tuesday, April 30, 2019 4:55 PM
To: Deanna Santana; Compliance Manager
Cc: Brian Doyle; Walter Rossmann; Catlin Ivanetich
Subject: RE: Media Coverage re Levi's Stadium

Dear Deanna,

There are no contracts between Venue Next and Forty Niners Stadium Management Company LLC, so none were produced. While I was not involved, I am informed that Venue Next has provided technology services to Forty Niners SC Stadium Company LLC and Forty Niners Football Company LLC pursuant to a contract between those entities.

JIM

From: Deanna Santana [mailto:DSantana@SantaClaraCA.gov]
Sent: Tuesday, April 30, 2019 10:43 AM
To: Mercurio, Jim <jim.mercurio@49ers-smc.com>; Compliance Manager <compliancemanager@49ers-smc.com>
Cc: Brian Doyle <BDoyle@SantaClaraCA.gov>; Walter Rossmann <WRossmann@SantaClaraCA.gov>; Catlin Ivanetich <CIvanetich@SantaClaraCA.gov>
Subject: Media Coverage re Levi's Stadium

Good Morning Jim,

The purpose of this email is to inquire about the attached media article. The article shows your filed Form 700 and your disclosure of an interest in VenueNext Company. Please clarify your relationship with them and your connection to the contract. A copy of the contract did not appear in submitted documents, please provide a copy today.

<https://santaclaranews.org/2019/04/30/49ers-stadium-manager-jim-mercurio-owns-stock-in-stadium-vendor-in-possible-financial-conflict-of-interests/comment-page-1/>

Thank you,

DEANNA J. SANTANA | City Manager
1500 Warburton Avenue | Santa Clara, CA 95050
D: 408.615.2210 | www.santaclaraca.gov



**City of
Santa Clara**
The Center of What's Possible

4-30-19

Item 5 #19-439

Coblentz
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Jonathan R. Bass
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jbass@coblenzlaw.com

April 29, 2019

Brian Doyle
Interim Stadium Counsel
Santa Clara Stadium Authority
1500 Warburton Avenue
Santa Clara, CA 95050

Re: Notice of Default of Management Agreement
Failure to Cure Breach – NEX Systems Surfaces Contract

Dear Brian:

I am responding to your letter of April 26, 2019 to Al Guido.

If the Stadium Authority is truly interested in ensuring that the procurement function at the Stadium is handled in accordance with its policies, practices and procedures, there is a simple way to accomplish that. We could work together to reconcile our practices with yours. That would be a much more efficient and productive approach than sending out serial notices, asserting spurious claims of breach, and declaring non-existent Events of Default.

As you know, when this issue first arose, my client sought to engage counsel with the appropriate expertise. Two of the firms we contacted had performed legal work for the City, and so felt that they needed to get the City's consent for the engagement. We regarded their prior work for the City as a positive thing, and looked forward to engaging a firm in which the City reposed confidence, or, even better, to engage a firm jointly with the Stadium Authority. Since our interests are aligned, we would therefore be able ensure that our practices would be aligned as well. But you refused to consent to our engagement of those firms. Apparently, the City and the Stadium Authority wish to avoid even the appearance of cooperation.

Sending a Notice of Default, when we have kept you apprised of our diligent and good faith efforts to address your concerns, is wholly counterproductive. The issue identified in your March 21 letter – the Notice of Breach – was not of a nature that could be "cured" within 30 days, as you surely knew when you sent that letter. This is apart from the question of whether the circumstances outlined in that letter would constitute a breach of the Management Agreement in any event. We do not see how they could, but we nonetheless began immediately to take steps to address them, and we are continuing to work toward a solution.

Brian Doyle
April 29, 2019
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You have mentioned how seriously you take the prevailing wage issue. I can assure you that we take it seriously as well, and we appreciate your raising the issue now, although we wish that the Stadium Authority had raised it five years ago. Our aim now is to see to it that similar misunderstandings and miscommunications are not repeated in the future, and that all applicable contracting rules are followed. We hope that is your aim as well, and that we can work together to solve whatever problems exist. We are concerned, of course, that your strategy has been to generate or exacerbate conflicts, not resolve them, as reflected in the fact you have dismissed each of our proposals for dealing with the Stadium Authority's concerns, while taking care never to offer any yourself.

The Stadium Authority has been aware, for years, of the manner in which the Management Company has been procuring services for the Stadium. The Stadium Authority provided the original contract form that was used as a template, and then reviewed and approved the forms that have been used ever since. Yet it raised no issues until you decided to do so. We would be happy to align our procurement practices with your view of how the Stadium Authority should be operating. What we find objectionable, and destructive, is your zeal in seizing on this issue as part of the Stadium Authority's strategy of attacking the Forty Niners at every turn. That open and obvious hostility does nothing to serve the interests of the Stadium Authority or the City; it casts the Stadium itself in a bad light, thus rendering it a less desirable venue for the major events that generate revenue for the Stadium Authority; and it carries with it the risk of generating pointless, but expensive, legal disputes.

We will continue to pursue solutions with respect to the subject of your March 21 letter. If you wish to limit your contribution to sniping about the adequacy of our solutions, without offering any of your own, so be it.

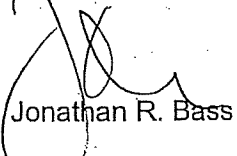
Your April 26 letter states that the Stadium Authority intends to undertake any and all of the remedies provided for in Section 11.4 of the Management Agreement. If there had in fact been an Event of Default, then the only remedy set forth in that section with any possible application would be the one in Section 11.4.1, which gives your client the right to cure an Event of Default. Are you now saying that the Stadium Authority wishes – contrary to its position up to now – to "cure" the alleged default? If that is the case, then we should, of course, be working together, since we are in the process of addressing the matter. If the Stadium Authority intends to step in and involve itself in some sort of "cure," we should be aware of that, so that we do not find ourselves working at cross-purposes.

Coblentz
Patch Duffy
& Bass LLP

Brian Doyle
April 29, 2019
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I do not have the impression you have any desire to cooperate in achieving a resolution,
but please tell me if I have misunderstood your intentions.

Very truly yours,



Jonathan R. Bass

JRB

cc: Jihad F. Beauchman
Robert Fried
Hannah Gordon
Mohammad Walizadeh



*Sent Via Certified Mail, Return Receipt Requested
and Email al.guido@49ers.com*

April 26, 2019

Al Guido, President
San Francisco Forty Niners Management Company
4900 Marie P. De Bartolo Way
Santa Clara, CA 95054

**SUBJECT: Notice of Default of Management Agreement
Failure to Cure Breach – NEX Systems Surfaces Contract**

Dear Mr. Guido:

On March 21, 2019, the Stadium Authority issued a Notice of Breach of the Stadium Management Agreement due to the Stadium Manager's failure to comply with the California Labor Code and Department of Industrial Relations regulations for prevailing wage requirements for contracts paid for in whole or in part by public funds. The Notice also identified Stadium Manager's failure to comply with the Stadium Authority Procurement Policy set forth in Santa Clara City Code Chapter 17.30.

Although the March 21 Notice triggered discussions regarding the Stadium Manager's intention to attempt to cure the breaches, the Stadium Manager has failed to cure within the 30 days provided for in Section 11.1 of the Management Agreement. This failure to cure is evidenced by your counsel's April 24, 2019 letter. Accordingly, the Stadium Authority must declare a Default pursuant to Section 11.1.2 of the Management Agreement.

With regard to the prevailing wage requirements, the April 24 Letter concedes that Stadium Manager did not meet "strict and total compliance" with the prevailing wage laws. Indeed, Stadium Manager has failed to provide any evidence that the NEX Systems contract met state prevailing wage requirements at all. Stadium Manager also concedes that compliance going forward remains uncertain. Accordingly, Stadium Manager has failed to cure its breach, and is now in default.

As for the proposed cures, Stadium Manager's plan to have their new counsel work with the DIR is not a cure at all. Stadium Manager should have obtained adequate legal advice regarding the exercise of public agency contracting authority from the first day that it took on the role of procuring Stadium Authority contracts five years ago. Second, as explained below, we question the legal and contractual right to reclassify the prior work provided under NEX contract to StadCo. This proposed approach is also contradictory, given that the DIR would not approve a contract that is not subject to prevailing wage laws. In sum, Stadium Authority can discuss

AL GUIDO, PRESIDENT
SAN FRANCISCO FORTY NINERS MANAGEMENT COMPANY
Re: Notice of Default of Management Agreement
Failure to Cure Breach – NEX Systems Surfaces Contract
April 26, 2019
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whether Stadium Manager provided adequate cure only after we are provided an official response from the DIR that the work is in compliance.

With regard to the procurement policies and requirements, Stadium Manager's April 24 letter takes the untenable position that the procurement of the NEX Systems contract is not at issue because no written contract was never executed. Stadium Manager own actions pertaining to this contract and the services provided prove a contract existed, and Stadium Manager's current attempt to hide or re-write those facts demonstrates Stadium Manager's apparent disregard for the seriousness of contract procurement requirements. Mr. Mercurio represented to the Stadium Authority that the NEX systems contract was a contract in excess of \$250,000 that needed to be ratified by the Stadium Authority Board. In addition, Stadium Manager submitted to the Stadium Authority four invoices from NEX Systems, dated July through August 2018, which were paid by the Stadium Authority. Clearly, public services were provided here under this contract.

Moreover, even assuming that no contract had been entered into (despite Stadium Manager's statements, comments and submission of paid invoices), then what was the Stadium Manager doing here? Mr. Mercurio has no authority to dangle public contract work in front of potential contractors, only to tell them later that he was acting outside of his authority and would have another party pay them directly in order to avoid application of public contracting laws. This shows that Stadium Manager does not understand and cannot meet its management obligations.

This failure is further demonstrated by the legal argument made in the April 24 letter. Stadium Manager's attorney cites to a case claiming that a contract (such as the NEX Systems contract) is void if it was created in excess of the agency's power. This argument, however, does not explain or excuse Mr. Mercurio's prior statements regarding the NEX Systems contract or the fact the NEX Systems provided services that were paid for by the Stadium Authority. Instead, this argument only proves the point that the Stadium Manager was improperly acting outside of its delegated authority and in breach of the Management Agreement.

Finally, Stadium Manager's April 24 letter provided no legal or contractual authority to support a cure of the breach by having Stadium Manager sign the NEX System contract on behalf of StadCo, and not the Stadium Authority. The fact remains that Stadium Manager engaged a contractor in a work of public improvement in violation of the law. Although we remain highly skeptical that legal authority exists for your proffered solution of unilaterally shifting the funding for capital expenditure for Stadium work, you are free to submit such authority.

AL GUIDO, PRESIDENT
SAN FRANCISCO FORTY NINERS MANAGEMENT COMPANY
Re: Notice of Default of Management Agreement
Failure to Cure Breach – NEX Systems Surfaces Contract
April 26, 2019
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For all these reasons, the Stadium Authority hereby declares a Default pursuant to Section 11.1.2 of the Management Agreement.

As you are aware, failure to comply with state prevailing wage law is a serious matter, which must be cured without further delay. Accordingly, the Stadium Authority intends to undertake any and all of the remedies provided for in Section 11.4 of the Management Agreement, including but not limited to termination of the delegated procurement authority granted to Stadium Manager in Section 2.1 of the First Amendment to the Management Agreement. All damages and costs, including attorneys' fees, shall be borne by Stadium Manager.

Sincerely,



Brian Doyle
Stadium Authority Counsel

cc: Deanna Santana, Stadium Authority Executive Director
Jihad Beauchman, Stadium Manager Counsel
Jonathan Bass, Esq.
Hannah Gordon, Esq.
Mohammad Walizadeh, Esq.