

October 1, 2001

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PRE-QUALIFICATION OF PUBLIC WORKS
CONSTRUCTION CONTRACTORS

INTRODUCTION

On November 15, 2000, the Land Use & Housing Committee [LU&H] directed staff to develop a pilot program for the pre-qualification of public works contractors. On February 28, 2001, the City Manager's staff recommended a one year pilot pre-qualification program [Program] to LU&H. *See Exhibit A, City Manager's Report No. 01-039.* The purpose of the Program is to identify and pre-qualify prospective bidders who have demonstrated the attributes of "responsibility," that is, trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform public works projects.

San Diego Charter [Charter] section 94 provides that the City of San Diego [City] shall let public works contracts to the "lowest responsible and reliable bidder." The City's practice of letting public works contracts has generally been to deem a contractor as "responsible" if that contractor has a State contractor's license and an acceptable surety bond. However, the City's intermittent problems with contractor performance has prompted a renewed inquiry into the determination of "responsibility." The Program, as currently proposed, consists of a standardized questionnaire and a pass/fail point rating system based on the State Department of Industrial Relations [DIR] model. The Program is designed to reinforce the City's determination of "responsibility" by focusing on the following additional criteria: history of the business and organizational performance; compliance with safety, worker's compensation, prevailing wage and EEO and Apprenticeship Laws; and past performance. A contractor who is deemed "responsible" then becomes eligible to bid on City public works projects.

After hearing concerns from various segments of the contracting community, LU&H directed the City Manager to meet with contractor representatives, consider the contractors' concerns regarding implementation of the pilot program, and accommodate these contractors' concerns, if possible, without undermining the integrity of the Program. City staff subsequently conducted several workshops and slightly modified the DIR questionnaire by clarifying language and omitting questions that reference industry trends and factors beyond the contractors' control. The City Manager resubmitted the Program proposal for LU&H approval on August 1, 2001.

LU&H approved the Program and directed the City Manager to consider a mandatory pre-bid meeting as part of the Program.

The revised Program implements significant changes to the City's public works bidding procedures. The purpose of this report is to advise the Honorable Mayor and City Council of legal issues that may arise during implementation of the Program. It is our opinion that the City may lawfully implement the Program because it complies with recently enacted sections of the California Public Contract Code and the Charter specifically authorizes the City to utilize such provisions. However, if the City Council approves the Program, it should direct the City Manager to adopt administrative regulations to ensure the City's conformance with established California case law and statutory restrictions during the Program's implementation.

DISCUSSION

I

THE CITY MAY APPROVE THE PROGRAM AS LONG AS THE PROGRAM COMPLIES WITH CALIFORNIA CONTRACT CODE SECTION 20101.

San Diego Charter section 94 provides that the City shall let public works contracts to the "lowest responsible and reliable bidder."¹ The term "responsible" in the context of "responsible bidder" refers not only to the attribute of trustworthiness, but also to the quality, fitness, and capacity of the bidder to perform the proposed agreement satisfactorily. *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, 7 Cal. 3d at 867 (1972). A contract must, therefore, be awarded to the lowest bidder unless it is found that the bidder is not responsible, that is, not qualified to do the particular work under consideration. *Id.*

Contracting entities are vested with some discretion in determining whether a bidder is responsible. *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352, 366 (1999); *M & B Construction v. Yuba County Water Agency*, 68 Cal. App. 4th 1353, 1361, n.3 (1999) (citing *Stacey & Witbeck, Inc. v. City and County of San Francisco*, 36 Cal. App. 4th 1074, 1094 n.9 (1995)); and *Boydston v. Napa Sanitation Dist.*, 222 Cal. App. 3d 1362, 1369 (1990). Administrative decisions are subject to reversal only if they are "arbitrary, capricious or entirely lacking in evidentiary support, . . . contrary to established public policy or unlawful or procedurally unfair." *M & B Construction*, 68 Cal. App. 4th at 1361 (quoting *Mike Moore's 24-Hour Towing v. City of San Diego*, 45 Cal. App. 4th 1294, 1303 (1996)). Courts will also evaluate responsibility requirements in light of the purpose of competitive bidding, which has been stated by courts as a means "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public; and to stimulate advantageous market place competition." *Associated Builders & Contractors, Inc.*, 21 Cal. 4th 352, 365 (1999) (quoting *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 173 (1994)).

The City Attorney's Office has previously addressed the issue of whether the City may require that bidders have minimum level of experience as a criteria of "responsibility" and opined that, in the absence of very special circumstances, bid invitations may not be restrictive with regard to experience because of the likely anti-competitive impacts on new contractors. *See*

Exhibit B, 1992 City Att’y Report 341.

The City Manager’s proposed Program essentially adopts the State Department of Industrial Relations [DIR] model pre-qualification program in that it entails a standardized questionnaire and financial statement to evaluate a bidder’s “responsibility.” See Exhibit A, City Manager's Report No. 01-039. The State DIR model program was created as a result of the passage of Assembly Bill [AB] 574 on October 10, 1999. AB 574 codified the *City of Inglewood* definition of “responsible bidder”(Cal. Pub. Cont. Code 1103) and established the following categories of “responsibility” criteria: history of the business and organizational performance; compliance with safety, worker’s compensation, prevailing wage and EEO and Apprenticeship Laws; and past performance. Because the City Manager is proposing that the City Council adopt a program based upon the DIR model, an issue arises as to whether the Program conflicts with the City Charter.

San Diego is a charter city. *Mira Development Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1214 (1988). Charter cities enjoy autonomous rule over municipal affairs pursuant to article XI, section 5 of the California Constitution, “subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law.” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994); *Johnson v. Bradley*, 4 Cal. 4th 389, 397 (1992); *California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 12 (1991). In general, the mode in which a city chooses to contract is a municipal affair. *Associated Builders & Contractors, Inc. v. San Francisco Airports Comm.*, 21 Cal. 4th 352, 364 (1999). Thus the mode of determining “responsibility” is also a municipal affair.

The Charter is silent on how “responsibility” is to be determined. However, Charter section 1 provides that the City “shall have all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever now or hereafter authorized to be granted to municipal corporations by the Constitution and the laws of the State of California.” Charter section 2 provides that the City “is authorized to exercise any and all rights, powers and privileges heretofore or hereafter granted by General Laws of the State.” Thus, because AB 574 adopts a pre-qualification program designed to implement the term “responsible bidder” as interpreted by the California Supreme Court, the City may adopt the pre-qualification model authorized by AB 574, because it is specifically authorized by the Charter to do so and it does not specifically conflict with Charter section 94.

Although AB 574 authorizes public agencies to pre-qualify prospective bidders for “responsibility” by means of a standardized questionnaire and financial statement, it requires those agencies that adopt such a program to comply with the following three requirements:

- (1) The questionnaires and financial records shall not be public records and shall not be open to public inspection. Cal. Pub. Cont. Code 20101(a).
- (2) The agency must adopt and apply a uniform system of rating bidders on objective criteria, on the basis of the completed questionnaires and financial statements. Cal. Pub. Cont. Code 20101(b).

(3) The agency must establish an appeals procedure that will allow prospective bidders to dispute their proposed pre-qualification rating prior to the closing time for receipt of bids. The appeal process shall include notice of the basis for the prospective bidder's disqualification and any supporting evidence that has been received from others or adduced as a result of an investigation by a public agency, and an opportunity for the prospective bidder to rebut evidence of disqualification or present contradictory evidence. Cal. Pub. Cont. Code 20101(d).

Therefore, if the City adopts the DIR's model pre-qualification program, it must also comply with the aforementioned requirements.

II

THE CITY MAY IMPOSE A MANDATORY BID REQUIREMENT FOR PROJECTS THAT HAVE UNUSUAL OR UNIQUE PHYSICAL CHARACTERISTICS OR DESIGN SPECIFICATIONS AS LONG AS THE CITY COMPLIES WITH CALIFORNIA PUBLIC CONTRACT CODE SECTION 6610.

LU&H's directive to consider a mandatory pre-bid meeting as part of the Program focuses on the prospective bidder's knowledge and awareness of bid specifications after the bid documents have been published and before bids have been submitted.

As discussed in Part I of this Report, a public agency may impose "responsibility" requirements as long as those requirements are not arbitrary, capricious, contrary to established public policy, unlawful, or procedurally unfair. *M & B Construction*, 68 Cal. App. 4th at 1361 (quoting *Mike Moore's 24-Hour Towing v. City of San Diego*, 45 Cal. App. 4th 1294, 1303 (1996)). A pre-bid meeting may be warranted if the project site has unusual or unique physical characteristics or design specifications such that it would be difficult to provide an accurate cost estimate for the project without a pre-bid meeting between City project managers or engineers and prospective bidders. On the other hand, where a project is commonly viewed by the construction industry as routine and does not entail any special considerations, such as a simple water or sewer line, street repair or overlay, a pre-bid meeting may not facilitate accurate bidding. Furthermore, such a requirement may be viewed as arbitrary, wasteful of public resources, and anti-competitive because local bidders would have an economic advantage over non-local bidders in the cost of the bid. It is thus recommended that if the City Council adopts this portion of the Program, it also directs the City Manager to establish administrative regulations to restrict mandatory pre-bid meetings to projects that have unusual or unique physical conditions or design specifications. Such regulations should also incorporate alternatives to physical presence at the meeting, such as teleconference calls, where feasible.

California Public Contract Code section 6610 imposes an additional requirement that public agencies that mandate pre-bid meetings include the time, date, and location of the mandatory pre-bid meeting in the notice inviting formal bids. That section also provides that mandatory pre-bid meetings cannot occur within a minimum of five calendar days of publication

of the initial notice. Thus, if the City imposes a mandatory pre-bid requirement, it must also comply with section 6610.

CONCLUSION

Charter sections 1 and 2 authorize the City to take advantage of the general laws of the State that do not specifically conflict with the Charter. California Public Contract Code section 20101 authorizes the City to adopt a pre-qualification program based upon the DIR model. The City Manager's Program is based upon the DIR model, which is designed to implement state law regarding "responsible bidders." Therefore, the City Council may approve the Program as long as the Program complies with the restrictions of California Public Contract Code section 20101.

A mandatory pre-bid meeting requirement is an additional criteria of "responsibility." Therefore, the City may impose a mandatory pre-bid meeting requirement only where the meeting is likely to facilitate accurate bidding, such as in projects with unusual or unique physical conditions or design specifications; however, if the City imposes a mandatory pre-bid meeting requirement, it must also provide notice of the mandatory pre-bid meeting according to California Public Contract Code section 6610.

To ensure compliance with statutory requirements during implementation of the Program, it is thus recommended that the City Council direct the City Manager to adopt administrative regulations to: (1) properly handle completed questionnaires and financial statements as non-public records; (2) restrict mandatory pre-bid meetings to projects that have unusual or unique physical conditions or design specifications; (3) ensure that departments follow required appeal procedures; and (4) provide proper notice of pre-bid meetings pursuant to California Public Contract Code section 6610.

Respectfully submitted,

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CASEY GWINN
City Attorney

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Attachments:2
Exhibits A, B
RC-2001-26