

July 25, 2002

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

ITEM 150 - PROPOSED CHARTER AMENDMENT

INTRODUCTION

This report addresses certain issues surrounding a proposed amendment to San Diego Charter section 94. The proposed amendment is designed to broaden contracting opportunities while maximizing quality in the selection of contractors.

BACKGROUND

Historically the City has adopted a number of programs designed to help spread the tax dollars spent on City contracts to a broad base of the community. This focus has resulted in, among other things, the subcontractor outreach program, the mentor/protégé program, disadvantaged business programs, and design-build programs. The goal of each of these programs has been to open City contracting opportunities to a wide segment of the business community. The Citizens' Equal Opportunity Commission [CEOC], which advises the Mayor and Council on such issues, has consistently sought more effective ways to open up contracting opportunities to a wide segment of the City population.

On November 7, 2001, the CEOC began a discussion regarding San Diego Charter article VII, section 94, Contracts "Section 94" as part of its on-going effort to assist staff of the Office of Equal Opportunity Contracting [EOC] in fulfilling its mission of providing equal opportunity in construction contracting within the current requirements of California and federal law. On January 16, 2002, a task force of CEOC Commissioners was formed to review the Charter language after a presentation to the CEOC by representatives of the African-American community during which concerns were raised regarding the City of San Diego's perceived lack of diversity in construction contracting.

Two proposals were drafted by the taskforce for the CEOC. One, the "Best Value" proposal, was drafted by the chairperson of the CEOC. The second, the "CEOC Amendment" (Exhibit "A") was drafted by the City Attorney's Office. Both proposals were reviewed and discussed by the CEOC. After extensive review and debate, the CEOC did not pursue the option of sending either proposal to the Mayor and Council for placement on the November ballot.

On May 8, 2002, the Public Safety and Neighborhood Services Committee requested that the CEOC Amendment be forwarded to the Committee on Rules, Finance and Intergovernmental Relations for discussion. That committee was unable to fully consider the issue because of a lack of time, but unanimously approved forwarding the issue to Council without recommendation for

consideration of placing the proposal on the November ballot.

ANALYSIS

A. THE AWARD OF PUBLIC WORKS CONTRACTS IS GENERALLY A MUNICIPAL AFFAIR WITHIN THE PURVIEW OF A CITY'S CHARTER

The City of San Diego is a charter city. Under the California Constitution, a chartered city enjoys autonomy over its “municipal affairs.” Cal. Const. art. XI, § 5. Section 5 states:

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

The principle of “home rule” is that a charter city has the power to control all municipal affairs without interference from general state laws and subject only to limitations contained in the state constitution and charter itself. *City Council v. South*, 146 Cal. App. 3d 320, 326-27 (1983). The purpose of home rule is to curtail the state legislature’s authority to intrude into matters of local concern, because cities are familiar with their own local problems and can often act more promptly to address problems than the state legislature. *Isaac v. City of Los Angeles*, 66 Cal. App. 4th 586, 599 (1998). Consequently, charter provisions and ordinances which deal with purely municipal affairs are valid even if they conflict with general laws. *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981). On the other hand, general laws on subjects of statewide concern supersede any conflicting enactments of chartered cities. *Id.*

Generally, the award of public works contracts is a municipal affair. Except as otherwise determined by the courts, the City has always viewed its ability to enter contracts as a municipal affair. *See also*, 1993 City Att’y MOL 217. Thus, any charter changes regarding the award of City-funded contracts generally need not comply with the dictates of either the California Public Contract Code or case law defining the state requirements of public contracting. It would be permissible, therefore, for the City to adopt a contract bidding scheme different from state rules so long as that scheme is applied only to contracts in which no state or federal funds are included, and which otherwise qualify as a municipal affair.

Issues have been raised concerning the City's ability to adopt a definition of “responsible bidder” which varies from that set forth in the California Public Contract Code. To the extent the City is receiving state or federal funds for a contract, the California Public Contract Code would be applicable, but, as previously discussed, it does not apply to purely municipal affairs. With respect to municipal affairs the courts have granted considerable latitude to cities in determining the selection of the lowest responsible bidder. “A responsible bid thus is one that responds to all proper bid specifications, and, in setting such, the public agency must be accorded considerable latitude. By necessary implication, therefore, the direct cost of the project need not be the agency’s sole consideration in setting bid specifications. Rather, any requirements reasonably relating to the ‘quality, fitness, and capacity of a bidder to satisfactorily perform the proposed work’ generally are permissible.” *Associated Builders and Contractors, Inc. Golden Gate Chapter v. San Francisco Airports*

Commission, 21 Cal. 4th 352, 366 (1999).

B. THE PROPOSED AMENDMENT DOES NOT VIOLATE PROPOSITION 209

Questions have also been raised regarding potential violations of Proposition 209 in the proposed amendment to the charter because of the language requiring bidders to comply with the City's equal opportunity policies. Proposition 209 was adopted by the voters in November 1996, and is now article 1, section 31 of the California Constitution. The language of the proposition is straightforward. It prohibits state and local governments from discriminating against or affording preferences to any person or group of people based on race, sex, color, ethnicity, or national origin in their employment, education, or contracting programs.

By banning preferential treatment, Proposition 209 bans affirmative action programs implemented by government agencies that use percentages, quotas, or set-asides to meet a goal of including or benefitting minorities and women. After the passage of Proposition 209, the City reviewed its existing programs and amended all programs to comply with the dictates of Proposition 209 as outlined by the California Supreme Court in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000). That case holds that all programs which give a preference of any kind based on one of the named categories are prohibited by Proposition 209. City equal opportunity programs are now structured to give preferences based on economic data only, because Proposition 209 does not prohibit preferences based on economic factors. Thus, the proposed amendment to the charter has no Proposition 209 implications because the City no longer has equal opportunity programs based on race or gender.

C. THE ORIGINALLY PROPOSED CHARTER AMENDMENT MAY PRESENT VAGUENESS AND UNCERTAINTY ISSUES

Potential bidders have further taken issue with the uncertainty of how language in the originally proposed amendment to section 94 would be interpreted, especially in light of the subjective nature of the proposed definitions of "responsible" and "responsive."

A charter provision, like a statute or ordinance, must be definite and certain. An individual must be able to determine whether his or her proposed activity is prohibited. If such a judgment cannot be made, the charter provision or phrase is void for vagueness. 3 McQuillin, *Municipal Corporations*, Vol. 9, 26.73, p. 235-236, supp. p. 16 (2001), citing *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161 (1994). Furthermore, when municipal officials are charged with carrying out a charter provision, the provision must provide a uniform standard or rule of conduct. *Stacy & Witbeck, Inc. v. City and County of San Francisco*, 36 Cal. App. 4th 1074, 1084 (1995).

1. Existing State Law Definitions

The terms at issue, "responsible" and "reliable," have long stood in Section 94 but were never specifically defined there. In the absence of express definitions, the cases which define the terms in state law have provided clarification.

Under state law, the term "responsible" refers to attributes of trustworthiness, quality, fitness, and capacity of a bidder to perform the proposed agreement satisfactorily. *City of Inglewood - L.A. County Civic*

Center Authority v. Superior Court, 7 Cal. 3d 861, 867 (1972). California Public Contract Code section 1103 provides a similar definition: “the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.” Although public bodies have discretion under state law to determine which bidders are responsible, they may not, if they determine more than one bidder is responsible, make the award on the basis of relative superiority. *City of Inglewood - L.A. County Civic Center Authority v. Superior Court*, 7 Cal. 3d at 867. The term “reliable” has been held to be effectively synonymous with the term “responsible” under state law. *Associated Builders and Contractors, Inc., Golden Gate Chapter v. San Francisco Airports Commission*, 21 Cal. 4th 352, 365 (1999).

2. CEOC Amendment

The CEOC Amendment of Charter section 94 would substantially change the definitions of the terms “responsible” and “reliable” and in doing so consider the relative superiority of the bidders. The CEOC Amendment's definition of “responsible” refers to “the bidder whose offer *best* responds in quality, fitness and capacity to perform the particular requirements of the proposed work.” (Emphasis added). Under this definition, only one bidder would be “responsible.” It is not clear from the face of the revisions, however, which factors would be considered in deciding which one bidder *best* meets the City’s needs on a particular project.

The CEOC Amendment also defines the term “reliable” in a manner involving relative superiority: “the bidder has the necessary skill, experience and business judgment to complete the project in the *most* efficient and economical manner and has performed work in accordance with the plans and specifications.” (Emphasis added). Again, it is unclear which factors would be considered in determining which bidder can perform in the *most* economical and efficient manner.

Furthermore, because “responsible” and “reliable” are each defined uniquely under the proposed amendment, a situation may arise where the most responsible bidder is not the most reliable or the lowest bidder. In such a case it is unclear which qualification would take precedence in determining the award of the contract. Overall, the CEOC Amendment may not set forth the required “uniform standard” of consideration, and as such may be challenged on vagueness grounds. These issues could be addressed and mitigated by proceeding with the revised amendment to section 94, set forth as alternative 2 below.

D. ALTERNATIVES

1. Use CEOC Amendment at this Time

One course of action is to go forward with the original proposed amendment to Charter section 94 attached as Exhibit “A.” This would incorporate the amendment presented at the July 10, 2002, meeting of the Committee on Rules, Finance and Intergovernmental Relations.

This option would make two substantive changes to the existing language of Charter section 94. First, the definitions of “responsible” and “reliable” would be added. The definitions would be materially different than the existing state law definitions which presently govern the City’s bid process in that they would consider the relative superiority of the bidders. Because the definitions create a more subjective and imprecise process than currently exists, litigation would be expected to follow the adoption of such modifications. The litigation would likely be targeted at either clarifying the definitions and the overall process, or at overturning the charter

amendment in its entirety. Additionally, the number of bid protest hearings administered by the City would likely rise significantly. A bidder who is deemed to be not responsible must be allowed to review and rebut an agency's basis for such a finding. *City of Inglewood - L.A. Civic County Center Authority v. Superior Court*, 7 Cal. 3d at 871 (1972). As such, bid protest hearings could potentially be required on every project involving more than one bidder.

Second, this option would add "responsiveness" as a required element of a successful low bid, as well as defining that term as follows: "Responsive bidder means the bidder has fully complied with all the requirements of the invitation to bid, the equal opportunity policies and procedures of the City and any other ordinances or written policies adopted by the City Council or City Manager to ensure equal opportunity in the award of public contracts." While not expressly set forth in the current version of section 94, state law recognizes that a bid which is not responsive to the bid instructions may be rejected, or may be accepted if the deviation is inconsequential and does not result in an unfair competitive advantage in the bidding process. *MCM Construction, Inc. v. City and County of San Francisco*, 66 Cal. App. 4th 359, 374-75 (1998). If a bidder fails to comply with requirements called out in the bid instructions, that bid may be rejected, regardless of the nature or degree of the failing. *Id.* The City may also, however, accept a bid if the deviation is inconsequential, as explained above. Thus, by expressly requiring a successful bidder to be responsive, the City would likely forfeit its current ability to waive inconsequential deviations from the bid instructions.

Because this option does vary significantly from state law, the proposed bidding scheme could only be used on projects which are "municipal affairs," while those projects involving state or federal funds or otherwise not considered municipal affairs would be required to follow the existing state law bidding process.

2. Go Forward With a Revised Amendment to Charter Section 94

Another potential course of action would be to go forward with the modifications to Charter section 94 attached as Exhibit "B." These modifications have been revised from the CEOC Amendment to address the concerns addressed above in three primary areas.

First, the definitions of "responsible" and "reliable" have been modified to provide a more objective basis for selection, including deletion of the terms "best" and "most" in the respective definitions. Second, while the requirement of responsiveness is retained, the right to waive immaterial deviations from the bid instructions is expressly retained. This will not require the City to waive such deviations, but will merely allow it.

Finally, this revision will require the Council to adopt rules and regulations to implement the intent and purposes of the section. This proposed revision will broaden the definition of "responsible" and "reliable" to include consideration of numerous subjective factors, including "quality," "fitness," "capacity," "necessary skill," "experience" and "business judgment." Rules and regulations clearly defining such terms with clarity and specificity, as well as the manner in which they are to be considered in awarding a bid, will help to provide the required "uniform standard or rule of conduct" by which bidders will be considered, and thus limit the ability of contractors to sue the City regarding the meaning of the section. If this option is pursued, it is recommended that the Council immediately direct the preparation of such rules and regulations so that they can be adopted and effective upon the vote of the Charter section, thus avoiding any delay in the implementation of the revised Charter section.

3. Do Not Go Forward with any Amendment to Charter Section 94

A final option is to not go forward with any amendment to Charter section 94. Under this option, public works contracts above the threshold amount would continue to be awarded to the lowest responsible and reliable bidder, as those terms are defined by state law. The City would also retain the ability to reject any non-responsive bid, but could waive such irregularity if the deviation was immaterial. However, the City is currently working on revisions to its prequalification requirements.¹ Such prequalification requirements may be sufficient to address the purposes of the proposed amendment to section 94.

CONCLUSION

The City may legally amend its Charter to address concerns regarding contracting for public works with City funds. Several alternatives exist for amendments that comply with current legal requirements of state and federal law.

Respectfully submitted,

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