

May 2, 1991

REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

MBE/WBE GOALS - AWARD OF CONTRACTS TO NEXT LOW BIDDER

BACKGROUND

In December 1990 the Committee on Public Services and Safety asked the City Attorney for a report to explain why The City of San Diego ("City") cannot award contracts to the next low responsible and reliable bidder where minority and woman business enterprise (MBE/WBE) goals are not met, or where good faith efforts to meet the goals have not been made by the actual low and responsible bidder. This office provided the requested report to the Committee on January 10, 1991. After reviewing the report, the Committee sought further explanation of the conclusions, particularly because some other California public entities are believed to be following the practice of awarding contracts to the next low bidder where MBE/WBE goals are not attained. The Committee expressed concern that the alternative of rejecting all bids and again advertising for new bids is often time consuming and costly. Such a procedure is further deemed to be unfair to those bidders who met the goals on the first bid, with the result being not only the rejection of compliant bids, but also a sometimes expensive imposition on those bidders to submit new ones. For these reasons the Committee has asked this office to expand upon the analysis given in its initial report.

DISCUSSION

A. Construction Contracts

We begin with a reiteration of the conclusion reached in the January 10, 1991, report. In sum, that conclusion is that San Diego City Charter ("Charter") section 94 mandates award of City construction contracts to the lowest responsible and reliable bidder, and that the definitional meaning of the term "responsible and reliable" does not encompass a contractor's efforts to meet MBE/WBE goals. The California Supreme Court decision in *City of Inglewood-Los Angeles County Civic Center Auth. v. Superior Court*, 7 Cal. 3d 861, 867 (1972) is cited as the controlling authority for the rule that "responsible" pertains only to the contractor's trustworthiness, qualifications, fitness and capacity to perform the work involved. *Inglewood* holds that a "contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under consideration." *Id.* at 867. (Emphasis added.) We have thus advised that inquiry must be confined to the contractor's qualifications to do the work and the price charged. A conclusion that a second low bidder is

more qualified to perform the contract because it has secured more adequate MBE/WBE participation than the lower bidder cannot alone mean that the lower bidder is unqualified to do the work. The rationale for the rule that contracts must be awarded to the lowest qualified bidder is quoted from the plaintiff's brief in the Inglewood case:

To permit a local public works contracting agency to expressly or impliedly reject the bid of a qualified and responsible lowest monetary bidder in favor of a higher bidder deemed to be more qualified frustrates the very purpose of competitive bidding laws and violates the interest of the public in having public works projects awarded without favoritism, without excessive cost, and constructed at the lowest price consistent with the reasonable quality and expectation of completion.

Id.

Although the Inglewood case involved an interpretation of Government Code section 25454 (now Public Contract Code section 20128), a general law, its holding likewise extends to Charter section 94. Both provisions embody the term "responsible," the definition of which is at the heart of the Inglewood decision. Since the same rationale plainly lies beneath both the general law and the Charter section, there is no doubt that Inglewood applies to the award of construction contracts by the City.

The holding in Inglewood has apparently been fully considered by the California legislature, particularly as it affects implementation of MBE/WBE goals. In evident response to the very question at issue here, the legislature enacted Public Contract Code section 2000, which provides in pertinent part:

(a) Notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following:

(1) Meets goals and requirements

estab

by the local agency relating to

participation

the contract by minority business

enterprises

women business enterprises. If the bidder

do

not meet the goals and requirements

. . . the

local agency shall evaluate the good faith

ef

of the bidder to comply with those goals and requirements

(2) Makes a good faith effort

. . . to

comply with the goals and requirements . . .

In considering the application of Public Contracts Code section 2000 to the award of City contracts, we recall attention to two very important limitations: First, the provisions of the California Constitution relating to the municipal affairs of a chartered city; second, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Both of these limitations have previously been discussed by this office in City Attorney Opinion No. 84-4 (copy attached), as well as in other memoranda. In revisiting these subjects here, we turn first to the municipal affairs question, then to the concern for equal protection.

CHARTER LIMITATIONS

In furtherance of MBE/WBE contract participation objectives, Public Contract Code section 2000 permits local agencies to depart from a strict application of laws which require award of contracts to the lowest responsible bidder. The term "local agency" is defined by Public Contract Code section 2000(d) to mean "a county or city, whether general law or chartered" Nevertheless, this legislative provision may not be invoked in contravention of a city charter. Under the California Constitution, a chartered city enjoys autonomy over its "municipal affairs." California Constitution article XI, section 5. Consequently, a chartered city's laws which deal with municipal affairs control even if they conflict with general laws. *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981).

The law is clear that a city charter is an instrument of limitation and restriction on the exercise of power over all municipal affairs. *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 599 (1949). In respect to municipal affairs the City is not subject to general law except as the charter may provide. *Id.* at 599. Thus, in respect to the City's letting of contracts which are municipal affairs, Charter section 94 is the governing limitation on the procedure to be followed. The contracts must be let to the lowest responsible bidder as defined and directed by the Inglewood case, for the City Charter permits no further consideration.

The Public Contract Code, enacted in initial form by the California legislature in 1981, is a body of general law which supersedes and incorporates provisions of other California codes relating to contracts. As its title implies, the Public Contract Code addresses the statewide concern for the method of letting and administering public contracts. Charter section 94 addresses this same topic on the municipal level, and is therefore controlling over the Public Contract Code where the

municipal affairs of the City are concerned. Public Contract Code section 2000 may be lawfully applied only if it does not conflict with charter limitations. It is, therefore, not applicable to San Diego's municipal affairs contracts, as the provision conflicts with the limitations of Charter section 94.

If no charter conflicts exist, Public Contract Code section 2000 may be utilized. This rule explains how and why some other public entities, many of which are governed by general law, can lawfully resort to awarding contracts to the low responsible bidder who also meets MBE/WBE objectives. In enacting Public Contract Code section 2000, the legislature essentially created a statutory addendum to all general laws which require award to the low responsible bidder in order to enable consideration of the MBE/WBE issue. Where general laws are concerned, no problem is posed in the application of this legislation. Application of the statute to the laws of a charter city is another matter entirely.

The state legislature is not necessarily precluded from legislating on matters which are municipal affairs of a charter city, but if a conflict exists between the legislation and the charter, the question becomes one of predominant interest. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62 (1969). Where resolution of this question requires a determination as to whether the matter regulated is a state or municipal affair, then it becomes necessary for the courts to "decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern." *Id.* at 62. Courts have not adopted an exact definition for the term "municipal affairs," and instead will review the facts of each case to give the term meaning. It is certain, however, that municipal affairs are dictated solely by the provisions of the City Charter.

It is necessary to inquire into the state's interest in each particular contract to determine if the work to be performed is a municipal affair. Generally, this inquiry will focus on the funding sources for the project and the scope of the work to be performed. If the funding for a particular contract comes entirely from the City's own revenues, and if the nature of the work is such that the project does not transcend the exclusive interests of the City, then in all probability a court will find the contract to be a municipal affair. The Public Contract Code would not be applicable to such contracts, and Charter section 94 would in these cases strictly apply per the Inglewood decision.

On the other hand, contracts which have elements of state or regional funding, or those projects which are metropolitan and not purely municipal in scope will likely be held to be matters of statewide concern.

As we have maintained since Opinion No. 84-4, by Deputy City Attorney (now Chief Deputy City Attorney) John M. Kaheny, an amendment to Charter section 94 will be required before the City may lawfully award municipal

construction contracts to any party other than the lowest monetary bidder who possesses the qualifications to perform the work. The procedures for amending the Charter are set forth in California Constitution article XI, section 3. Under that constitutional provision, the City Council or Charter Commission may propose charter amendments, or amendments may be proposed by initiative. All procedural options to amend the charter entail an election and voter approval.

EQUAL PROTECTION: *Richmond v. Croson*

To this point we have concluded that a charter city may invoke Public Contract Code section 2000 in contracts of statewide interest, but there is a further important condition to the legality of such an application. That condition is the constitutional requirement of equal protection, as provided by the Fourteenth Amendment to the U.S. Constitution.

No reported case has challenged the validity of Public Contracts Code section 2000. However, a statute which is valid on its face may not be applied in an unlawful manner. Public Contracts Code section 2000 may therefore be applied only to lawful affirmative action programs.

This reasoning, which was employed in Opinion No. 84-4, is even more critical following the decision in *City of Richmond v. J.A. Croson Co.*, 102 L. Ed. 2d 854 (1989). That case firmly establishes a significant limitation on the application of non-federal affirmative action programs. To summarize the message of *Richmond*, an affirmative action plan which is race conscious will draw strict scrutiny from the courts, such that the city or state must prove a compelling interest in the plan. Further, if a compelling interest is shown, the city or state must also demonstrate that its plan is narrowly tailored to remedy identifiable past discrimination.

The remedy of past discrimination was recognized by *Richmond* to be a compelling interest, but only to the extent that the city can prove that specific discrimination existed in its own past practices. "To show that a plan is justified by a compelling governmental interest, a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination." *Id.* at 876, quoting the Court of Appeals in the *Richmond* case, 822 F.2d 1355, 1357. "Findings of societal discrimination will not suffice; the findings must concern 'prior discrimination by the government unit involved.'" *Id.*, quoting *Wygant v. Jackson*, 90 L. Ed. 2d 260, 269 (1986) emphasis in original.

The *Richmond* case explains the reason for such strict scrutiny of race conscious programs:

Absent searching judicial inquiry into the justification for such race-based measures, there is no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of

strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

Id. at 881-882.

Accordingly, the United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment demands that a city specifically identify past discrimination in its own practice before any of its race-conscious remedial programs may be found lawful. Specific identification of past discrimination must have "strong basis in evidence." Id. at 866.

This does not mean that a city must admit liability for past discrimination or make formal findings in that regard before its MBE/WBE program may be upheld. Rather, the question is whether a city has "sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant*, 90 L. Ed. 2d at 271; see also, concurring opinion at 279-280.

In applying the foregoing analysis to The City of San Diego's MBE/WBE program,, we have strong reservations and doubts that the City could employ Public Contract Code section 2000 and still survive an equal protection challenge. The City's current MBE/WBE program is carefully drafted to avoid using racial or gender based criteria in the awarding of a bid by merely rejecting all bids when the lowest responsible bidder fails to at least make a good faith effort to reach the goals of the program. If the City adopts the procedure set forth in Public Contract Code section 2000, which gives cities the authority to use race or gender criteria in the awarding of bids, then the City would have to carry the burden of proving it had concrete evidence of specifically identifiable past discrimination, perpetrated on its own part, before the remedial program was implemented. We do not presently believe that the City could sustain that burden, because we have not been made aware of sufficient evidence. We therefore advise that the City not proceed under Public Contract Code section 2000 in contracts which are matters of statewide concern.

As a comparative note, we point out that the City of San Francisco, in reaction to the Richmond case, has conducted hearings and commissioned studies to ascertain whether it has sufficient evidence of past discrimination to warrant validity of its MBE/WBE program. Concluding that it did have sufficient evidence of discrimination in the letting of public contracts, San Francisco adopted an MBE/WBE program which it believed was narrowly tailored to remedy that past discrimination. The program was challenged by a contractor's association, which sought a preliminary injunction. *Associated General Contractors v. San Francisco*, 748 F. Supp. 1443 (N.D. Cal. 1990). The court denied the request to preliminarily enjoin the program, finding that the city had "done far more than declare a benevolent purpose and point to generalized

discrimination in the construction industry and statistics with little probative value. Rather, it has 'identified discrimination' against MBE's in San Francisco by both the city and private contractors." *Id.* at 1450. The court went on to describe an especially significant study by economic analysts commissioned by the city. The court found the study had enough probative value to support an inference of discriminatory exclusion. Also, the court detailed hearings held by the city in which many MBE's gave testimony of discriminatory practices which prevented them from winning contracts. The court concluded that "these findings, supported by the statistical and other evidence, satisfy us that the city will likely demonstrate that it has a "strong basis in evidence for taking corrective action" The preliminary injunction was therefore denied. The lesson in this case is that San Francisco developed the evidence necessary to support a finding that its MBE/WBE program was legally legitimate, and did so before the program was in fact established. Still, the case only involved an application for preliminary injunction - it remains to be determined whether San Francisco's program will be upheld in the trial and appellate courts.

B. Procurement Contracts

Contracts for the procurement of materials and supplies are also required to be competitively bid in most instances. Procurement contracts usually do not involve subcontracts, and thus MBE/WBE issues are not frequently raised in this context. Also, most purchases are truly municipal affairs, so Public Contracts Code section 2000 is rarely applicable in the first instance. Still, for those cases where the issue may arise, it is helpful to examine the law as it relates to award of contracts to a party other than the low bidder. Again, we find that there are concerns with both charter limitations and the constitutional standards of equal protection. As for equal protection, the foregoing analysis is equally applicable in the procurement setting. Thus, we discuss only Charter concerns here.

The award of City procurement contracts is a subject governed by Charter section 35 and San Diego Municipal Code (SDMC) section 22.0512. Although neither of these provisions contains express language requiring award to the lowest responsible bidder, the procurement law is founded upon the same competitive rationale as Charter section 94.

Charter section 35 provides several procedures for purchasing materials and supplies, depending on the cost of any given contract. Section 35 directs the City Council to establish by ordinance the evaluative parameters for implementation of these procedures. In almost all purchases, however, some sort of competition must be arranged, either by price quotation or by advertisement for sealed bids. The plain intent of section 35 is to establish a process by which the City will receive competitive offers for the sale of articles which suit its needs. The following excerpt from section 35 demonstrates the emphasis on receiving offers of goods which conform to specification:

It shall be the duty of the Purchasing Agent to inspect or cause to be inspected all purchases, and reject any of those which are not up to standard specifications provided therefor, and he shall not approve any bid or voucher for articles which are not in conformity with specifications, or which are at variance with any contract.

Thus, the Purchasing Agent is required to only accept bids which offer materials and supplies that meet the City's specified needs. Where more than one bid offers products which conform to specifications, SDMC section 22.0512 sets forth the factors to be considered in making award:

Section 22.0512 Award

Contracts for procurement under an Invitation to Bid will be awarded on the basis of the low acceptable bid meeting specifications. Contracts for procurement under a Request for Proposal will be awarded on the basis of the proposal best meeting City requirements. Determinations shall be based on one or more or any combination of factors which will serve to provide City requirements at the best economic advantage to the City including but not limited to: unit cost, life cycle cost, economic cost analysis, operating efficiency, warranty and quality, compatibility with existing equipment, maintenance costs (to include consideration for the costs associated with proprietary invention), experience and responsibility of bidder. The Purchasing Agent and the City Manager may waive defects and technicalities when such is in the best interests of the City. The Purchasing Agent shall notify all bidders of the proposed selection for award upon determination thereof.

Here, rather than "lowest responsible and reliable bid," the requirement for award of a procurement contract is "low acceptable bid meeting specifications." While the term "responsible" was defined in the Inglewood case, no decision has passed on the question of the meaning of "acceptable" under SDMC section 22.0512. However, the factors enumerated in that section for determining acceptability of a bid mostly concern the product itself: cost, efficiency, warranty, compatibility with existing equipment, etc. Only the last factor concerns the supplier of the product: experience and responsibility of the bidder. Again, consideration returns to the notion of responsibility, which under the Inglewood rationale would concern a vendor's ability to make timely

delivery, honor its warranties, furnish functional goods, and perform other obligations incumbent upon a reliable seller. Under this definition, a supplier's efforts to attain the City's MBE/WBE goals cannot be considered, because these efforts have no bearing on the supplier's ability to perform as a reliable provider of goods and services.

In short, the sole focus is on the supplier's ability to responsibly provide the City with the goods and services it requires at the best price. In this light, we conclude that the provisions of Charter section 35, as implemented through SDMC section 22.0512, present a limitation which is similar to the one found in Charter section 94. That is, we believe that the term "low acceptable bid" means the lowest bid given by a responsible seller that meets specifications. The question of what defines a "responsible" seller should be answered by reference to the rationale of the Inglewood case, which means that a responsible seller is one who is able to provide the goods and services as specified, and who will honor any warranties for those goods and services.

CONCLUSION

In contracts involving purely municipal affairs, the Charter mandates award to the lowest responsible bidder. Case law holds that this means the contract must be given to the bidder with the lowest price who is trusted and qualified to do the work. The Charter does not allow for consideration of the bidder's efforts to meet MBE/WBE goals, and the City may not lawfully proceed to award a municipal affairs contract to a second low bidder if the lowest bidder does not attain, or does not attempt in good faith to attain, the City's MBE/WBE goals.

In regard to contracts which are matters of statewide concern (e.g., generally those that have elements of state or regional funding, or those projects which have a metropolitan and not merely municipal impact), Public Contracts Code section 2000 may be applied to lawful MBE/WBE programs. The City is advised not to invoke this legislation because its program likely can not withstand a legal challenge claiming it violates the Equal Protection Clause of the Fourteenth Amendment. The program could survive such a challenge only if the City had established it in light of strong evidence of specifically identifiable past discrimination and narrowly tailored it to redress only that discrimination. Development of sufficient evidence would require extensive studies and hearings bearing findings of specific past discrimination.

Respectfully submitted,
JOHN W. WITT
City Attorney

FMO:mrh:skc:jrl:911(043.1)
RC-91-23