November 20, 1991

REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

PREFERENCE TO LOCAL FIRMS ON CITY CONTRACTS

My office has been asked several times in the past to research the question of the legality of the City's limiting bidding on certain construction projects to local contractors. Three relevant opinions and reports which remain accurate, dated November 17, 1981, April 18, 1983, and December 7, 1989, are attached for your review.

The cases cited in those opinions have not been overruled, so the principles enunciated therein are still valid. Two additional cases may be helpful. In Associated General Contractors of California, Inc., v. City and County of San Francisco, 813 F. 2d 922 (9th Cir. 1987), the Ninth Circuit Court of Appeals held that an ordinance providing a five-percent bidding preference to minority-owned, women-owned, and locally-owned business enterprises, violated the charter where contracts over $50,000 were to be awarded to the lowest reliable and responsible bidder. However, regarding local preference, the court also found that where the burdens of doing business in a particular location were so onerous that local businesses operate at "a competitive disadvantage with businesses from other areas . . . any business willing to share some of the burden of a particular location -higher rents, wages, insurance premiums, etc. - can enjoy the benefits of the LBE preference." Associated General Contractors of California v. San Francisco, 813 F.2d at 943-944.

That 1984, five year ordinance expired in 1989, and a new one was enacted that provided, among other things, a five-percent bid preference for local businesses, with no "set asides." The MBE portion of that ordinance has been challenged, but the local preference section has not. Incidentally, after most of the original ordinance was found invalid, San Francisco funded a statistical study which "`identified discrimination' against MBEs in San Francisco by both the city and private contractors." See Associated General Contractors of California v. City and County of San Francisco, 748 F. Supp 1443, 1450 (N.D.Cal. 1990).

APPLICATION

In order for a San Diego "local preference" ordinance to withstand legal challenge at least three hurdles would have to be overcome:

1) Section 94 of the City Charter would have to be amended to alleviate the lowest responsible and reliable bidder requirement.

2) To overcome a privileges and immunities clause challenge (U.S. Constitution, article IV, section 2, clause 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in

the several States."), it would be necessary to show that nonresidents "constitute a peculiar source of the evil at which the statute is aimed." United Building and Construction Trades Council of Camden County v. Mayor and Council of the City of Camden, 465 US 208, 222 (1984). In other words, specific findings would have to be made where local business people were damaged by outsiders.

3) Compliance with the California Constitution's equal protection clause and public employment discrimination provision would be necessary lest courts find that "any unreasonable limitation that deprives qualified persons of the equal opportunity to qualify for work is unconstitutional." Terry v. Civil Service Commission, 108 Cal.App.2d 861, 870 (1952).

CONCLUSION

With San Diego Charter section 94 as it is currently worded, any deviation from the acceptance of only the lowest responsible, reliable bidder on construction contracts would not, based on current law, withstand legal challenge. The restrictions of the U.S. and California Constitutions and making the necessary findings enumerated by the courts would create additional difficulties in drafting an allowable ordinance.

Respectfully submitted,
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Attachments:3
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