

January 10, 1991

REPORT TO THE COMMITTEE ON PUBLIC SERVICES AND SAFETY
MBE/WBE GOALS

BACKGROUND

On December 6, 1990, the Public Services and Safety Committee requested the City Attorney to provide a report on why the next lowest and reliable bidder is not selected when MBE/WBE goals are not met. At the same committee meeting, Councilmember McCarty requested that we explain the debarment procedure for public works contracts.

ANALYSIS

1. MBE/WBE

We will first respond to the MBE/WBE issue. We have attached an opinion from this office dated April 17, 1984 which addresses precisely this issue, and continues to reflect the current law. That opinion is summarized as follows.

San Diego Charter section 35 requires sealed bids and competitive pricing in purchases of supplies, materials, equipment, and insurance. Charter section 94 requires that the City Council let contracts for the construction, reconstruction or repair of public buildings, streets, utilities and other public works to the lowest responsible and reliable bidder. In addition, section 94 authorizes Council to reject any and all bids and readvertise for bids.

If the City Manager and the City Council determine that an original low bidder is not responsible or reliable, Council may select the second low bidder. The California Supreme Court has held that the term ". . . 'responsible' includes the attribute of trustworthiness . . . and also has reference to the quality,

fitness, and capacity of the low bidder to satisfactorily perform the proposed work." City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court, 7 Cal.3d 861, 867 (1972). The term "lowest responsible bidder" as defined in that case and applied to the wording of section 94 of the Charter of The City of San Diego, requires the City, when awarding construction contracts, to only consider the qualifications of the bidder to do the construction work and the price.

The United States Supreme Court has heard cases regarding affirmative action programs and has clearly stated that the mere existence of societal discrimination, without more, is an insufficient basis for imposing a racial or sexually

discriminatory remedy. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). In other words, unless certain findings are made of past specific discrimination by a particular government agency, that agency cannot provide for "set asides" of contract funds for minority or women businesses, nor instigate a "quota" system to be utilized in the awarding of contracts.

Since there has been no history of discrimination on the part of The City of San Diego, the City cannot therefore adopt an Affirmative Action Program incorporating quotas as part of the consideration for lowest responsible bidder. The City is free, however, to adopt an Equal Opportunity Program that utilizes goals that bidders should attempt to meet, or to show at least a "good faith effort" to meet them.

According to the City's Equal Opportunity Program, if a bidder either fails to meet the predetermined goals or make an adequate showing of a "good faith effort" to comply with them, his or bid may be rejected by Council. But such a rejection may not be treated the same as the situation where a low bidder is nonresponsive or not reliable. Council may only award a contract to the second-low bidder where the low bidder does not meet the criteria of a "responsible, reliable bidder." Lack of good faith effort to meet an agency's Equal Opportunity Program goals cannot be considered either nonresponsive or nonreliable. Where a low bidder has not met the goals of the program, nor made a good faith effort to do so, then all bids must be rejected and the project must be readvertised.

2. Debarment

The second question is that presented by Councilmember McCarty, who requested information regarding the debarment process wherein certain bidders or contractors are not considered by the City for future contracts. San Diego Municipal Code section 22.0514, subsection a., authorizes the City Council, upon 30advice of the City Manager and the City Attorney, to declare a bidder or contractor ineligible to bid on City procurement and public works contracts for a period not to exceed three years.

The grounds on which to base the debarment are enumerated:

- Two or more claims of computational error in bid submission within a two-year period;

- Unjustified refusal to provide or execute contract documents;

- Unsatisfactory performance of contract;

- Unjustified refusal to perform or complete contract work or warranty performance;

- Unjustified failure to honor or observe

contractual obligations or legal requirements pertaining to the contract;

Conviction under state or federal statutes for fraud, bribery, theft, falsification or destruction of records, receiving stolen property or of any other similar crime or offense indicating a lack of business integrity and which would directly affect the reliability and credibility of performance of such a vendor or contractor with future contracts with the City; or,

Based on the limited debarment by another governmental agency.

Subsection b. of that section mandates permanent debarment of any bidder or contractor for a violation of Charter section 97, COLLUSION IN BIDDING, and authorizes permanent debarment for a "conviction under federal or state antitrust statutes involving public contracts or the submission of bid proposals, for any corrupt practices involving the administration or award of a contract with the City, or permanent debarment of the bidder or contractor by another governmental agency."

Subsection c. provides due process protection for a bidder or contractor being considered for debarment.

CONCLUSION

The City Charter, San Diego Municipal Code and case law provide direction for the readvertising of bids where MBE/WBE good faith efforts are at issue, and the Municipal Code is clear on debarment procedures for procurement and public works contracts.

Respectfully submitted,
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Attachment
RC-91-6