March 13, 1992

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

RECOMMENDATION TO REJECT ALL BIDS FOR LOW BIDDER'S FAILURE TO MAKE GOOD
FAITH MBE/WBE EFFORTS; BID NO. K2542/92

Item 106 on the City Council Docket of February 24, 1992 was presented with the City Manager's recommendation that all bids for a sewer group replacement project (Bid No. K2542/92) be rejected because the low bidder, Universal Liner, Inc., achieved zero percent Minority Business Enterprise ("MBE") and Women Business Enterprise ("WBE") participation and did not demonstrate a good faith effort to meet the City's equal opportunity goals. The Council did not act on the recommendation, however, and moved instead to direct the Manager to further investigate reasons why there was no minority participation in the bid. Apart from this investigation, there has arisen a significant legal concern with regard to the recommendation to reject all bids. This report is intended to assess the legal implications of the proposed action. We conclude that the rejection of all bids may have legal consequences upon which liability for damages could result.

The present City policy of rejecting all construction bids where the low bidder fails to make a good faith effort to meet MBE/WBE goals is based on the advice of this office that San Diego City Charter ("Charter") section 94 mandates award to the low responsible and reliable bidder, and that the California Supreme Court has interpreted the term "responsible and reliable" so as to preclude consideration of MBE compliance efforts. Additionally, we have advised that taking the affirmative action of awarding the contract to the next lowest bidder who has made a good faith MBE effort would violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because the City lacks specific evidence of past discrimination in its jurisdiction which would establish a compelling interest in taking such action. (For a full discussion of this advice, see, City Attorney Opinion No. 84-4.) Accordingly, we have taken the view that in order for the City to pursue its equal opportunity goals in construction contracts where low bidders fail to make good faith MBE efforts, it must rely on that authority contained in Charter section 94 which permits it to "reject any and all bids and readvertise for bids."

This approach may now itself be subject to challenge in light of

the recent decision in Pataula Electric Membership Corp. v. Whitworth, 951 F.2d 1238 (11th Cir. 1992). That case, which involved the bidding laws of the state of Georgia, held that the discretion invested in public officials to determine the lowest responsible bidder was not so great as to preclude the low bidder from forming an expectation of award; and thus formation of a property interest protected by the constitutional right to due process. "A disappointed bidder may have a constitutionally protected property interest in the award of a contract under 42 U.S.C.A. Section 1983 (1981) if that interest is acknowledged by 'existing rules or understandings that stem from an independent source such as state law.'" Id. at 1242 (U.S. Supreme Court citation omitted). 42 U.S.C.A. Section 1983 provides a cause of action for damages for the deprivation of federal constitutional rights under color of state law.

We consider this case significant because Charter section 94 is an "independent source such as state law" which appears to convey the message to contract bidders that the lowest responsible and reliable bidder will be awarded, thus forming protected property interest in the low bid. The express discretionary authority to "reject any and all bids" contained in Charter section 94 may be found, as it was in the Pataula Electric case, to be confined so as to prohibit the City from acting in an arbitrary manner. By invoking the right to reject all bids where the low bidder does not attempt in good faith to meet MBE/WBE goals, the City has purposely circumvented equal protection claims against its use of racial classifications that are not supported by sufficient evidence. But the practice of invoking the rejection right for this purpose may come under attack as an arbitrary reason violative of due process. As a result of Pataula Electric, we are now concerned that this circumvention of equal protection claims may result in claims of due process violation where all bids are rejected for race-based reasons. Further, it could well be argued that both the right of equal protection and the right of due process are abridged where a low bid submitted under definitive competitive bidding laws is rejected because it does not comply with race-conscious criteria that are not supported by sufficient evidence of past discrimination. A violation of either constitutional right could result in damages under 42 U.S.C.A. Section 1983.

It must be noted that Pataula Electric was decided in the Eleventh Circuit Court of Appeals and is therefore not binding authority on the City. The case is persuasive authority, however, that could be accepted by the Ninth Circuit Court of Appeals, which has jurisdiction of federal cases involving the City. Potential plaintiffs could argue that the reasoning employed by the Eleventh Circuit should be adopted in this jurisdiction, and we believe such an argument would have good force of reason.

With respect to the present situation of Universal Liner, Inc., the fact that its bid of $478,302.40 is 34.4 percent below the engineer's

estimate of $728,608.00, and is even further below the second low bid of $748,558.00, could strengthen the argument that rejection of all bids for lack of MBE participation would be an arbitrary action abusive of the Council's discretion and violative of due process. Therefore, we must simply advise that the proposed action of rejecting all bids in this instance could be argued to be an unconstitutional act, thus exposing the City to a claim of damages under 42 U.S.C.A. Section 1983.

Respectfully submitted,
JOHN W. WITT
City Attorney

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