

November 5, 1997

REPORT TO THE COMMITTEE ON NATURAL
RESOURCES AND CULTURE

JOB ORDER CONTRACTING

INTRODUCTION

Recently, the Metropolitan Wastewater Department (“MWWD”) expressed an interest in extending the use of an approved “job order contract” for public works construction to a level not previously contemplated in the original authorization. Other City departments have also expressed an interest in utilizing job order contracts for public works construction. City Charter requirements for public works construction contracts present some difficulties in using job order contracts for public works construction. This Report addresses the City’s ability to utilize job order contracts and makes a recommendation for the appropriate City Council authorization.

BACKGROUND

A job order contract is essentially a general requirements or purchasing type contract typically used for minor construction, repair and maintenance.¹ *See generally* 76 Ops. Cal. Att’y Gen. 126 (1993), enclosed as Attachment 1. Prospective contractors bid for specific types of construction tasks, contained in a unit price book which details specifications and unit prices for typical tasks. A bid is based upon a markup to the unit price the contractor is willing to offer. The requirements contract is awarded for a term of years but specific construction projects are not contemplated or authorized at the time the job order contract is awarded. Work pursuant to the contract is authorized by a separate “task order.” *Id.*

In June of 1996, the City Council adopted Resolution No. R-287546 which authorized the City Manager to enter into a one year requirements contract (the “Contract”) with an annual task order authorization not to exceed \$5,000,000. There was no limit on the amount of any given task order except the total annual limitation². A copy of that resolution is enclosed as Attachment 2. The Contract has a one year extension option, which was exercised by the City on April 28, 1997, by the adoption of Resolution No. R-288590. The option was for an additional \$5,000,000 in annual task authorizations. A copy of that resolution is enclosed as Attachment 3. The justification for the Contract was that MWWD had a “continuing need for an as-needed construction contract to respond to emergency work for repairs and for small CIP construction projects.” *See* Attachment 3, Form 1472, “Docket Supporting Information.”

At about the same time as the Contract option was exercised, MWWD expressed a desire to utilize the Contract for a relatively large project, the Metropolitan Operations Center (“MOC”) remodel. The task order authorization for that project would have been between \$750,000 and \$1.5 million. The City Attorney expressed some reservation about the utilization of the Contract for a project that large and, after consulting with MWWD and the City Manager, drafted an

ordinance amending and renumbering the Municipal Code provisions relating to public works contracting authority (current Municipal Code sections 22.0209 - 22.0212) to provide for the award of requirements contracts for public works.

As more fully explained below, the City Attorney's reservations about the use of the Contract were based upon the low bid requirements for public works contracts contained in City Charter section 94. In addition, other City departments had expressed an interest in requirements contracts and the City Attorney believed a standardized procedure for awarding and utilizing was appropriate for the City Council to consider and approve.

ANALYSIS

I

GENERAL PUBLIC WORKS CONTRACT REQUIREMENTS

Charters are the supreme law of charter cities. They are documents of limitation, not grants of power, and a charter city may exercise power over all matter deemed “municipal affairs” subject only to the limitations and restrictions of the charter. A City may not act in conflict with its charter but charter provisions are construed in favor of the exercise of power, and no limitation on the exercise of power is implied if not expressly stated. Domar Electric, Inc. v. City of Los Angeles, 9 Cal. 4th 161, 170-71 (1994).

“As a general rule, competitive bidding for public entities is a mandatory requirement as provided by statute, charter or ordinance” Graydon v. Pasadena Redevelopment Agency, 104 Cal. App. 3d 631, 635 (1980). The purposes of competitive bidding requirements are to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; to obtain the best economic result for the public; and to stimulate advantageous market place competition. Domar, 9 Cal. 4th at 173, *citing* 10 McQuillen, Municipal Corporations, 29.29 (3d ed.). *See also* Graydon, 104 Cal. App. 3d at 636; Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 354 (1930); Konica Business Machines U.S.A., Inc. v. Regents of the University of California, 206 Cal. App. 3d 449, 456 (1988). “The manifest policy of the law is to require competitive bidding when [a public agency] engages in the construction or repair of improvements costing more than the named amount.” Miller v. McKinnon, 20 Cal. 2d 83, 94 (1942).

Thus, despite the broad authority of charter cities to act in areas of municipal affairs, “the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, *and the deviations would save the entity money.*” Konica Business Machines, 206 Cal. App. 3d at 456-57 (emphasis added). *See also* Domar, 9 Cal. 4th at 173. “The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.” Konica Business Machines, 206 Cal. App. 3d at 456-457. *See also* Domar, 9 Cal. 4th at 175-76; Chase v. Scheerer, 136 Cal. 248, 249 (1902).

Competitive bidding requires that all bidders be allowed to bid upon the same plans and

specifications, and that those plans and specifications be sufficiently detailed to satisfy the purposes of competitive bidding:

A contract cannot be said to have been let to the lowest and best bidder unless all bidders have been invited to bid upon the same specifications. . . . Specifications inviting bids for public contracts must be sufficiently detailed, definite, and precise upon all the essential elements that enter into the contract, so as to afford for full and fair competitive bidding upon a common standard, and they should be free from any restrictions the effect of which would be to stifle competition;

Platt Electric Supply, Inc. v. City of Seattle, 16 Wash. App. 265, 276, 555 P. 2d 421, 430 (1977), *citing* 64 Am. Jur. 2d Public Works and Contracts 51 (1972) and 10 McQuillen, Municipal Corporations 29.54 (3d ed. rev. 1966). *See also* James Petrozello Company, Inc v. Township of Chatham, 75 N.J. Super. 173, 178-179, 182 A.2d 572, 575-576 (1962). Deviations from precise specifications in a call for bids “leaves bidders in the unfair position of having to guess what will satisfy the [public entity’s] needs.” Konica Business Machines, 206 Cal. App. 3d at 457. Where there are not sufficiently detailed plans and specifications “it is evident that no one could intelligently bid for the contract, as he could not tell in advance what would be the exact character or extent of the work to be done, or the necessary expense of doing it. Any bidder would, therefore, hesitate to take such a contract to do the work, *unless his bid was placed at a high figure, or he felt sure he would be favored by the [awarding authority]*” Chase v. Scheerer, 136 Cal. at 251 (emphasis added).

The Scheerer case highlights one of the potential problems with a requirements contract. Since the winning bidder must guarantee the unit price for typical work during the term of the contract, anticipated escalations in cost over the term of the contract must be averaged into the bid price, resulting in a higher price in the near term, but not ensuring a lower price at the far term. In addition, the profit for the contractor will depend on the authorizations for task orders, which opens the door to favoritism on the part of those charged with making those determinations. *Id.* at 251; California Imperial Co. v. Reynolds, 123 Cal. 88, 92 (1898). It is possible that those determinations will not be made based upon the public interest but, rather, based upon considerations the contractor might give to officials of the awarding authority.

Competitive bidding requirements need not be strictly followed, however, under certain limited circumstances, “where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage . . . or it is practically impossible to obtain what is required and observe such forms” or for emergency work. Los Angeles Dredging Co., 210 Cal. 354-56, *quoting* 2 Dillon, Municipal Corporations 1199, 802. *See also* Kennedy v. Ross, 28 Cal. 2d 569, 581 (1946); Graydon, 104 Cal. App. 3d at 635; Hodgeman v. City of San Diego, 53 Cal. App. 2d 610, 618 (1942). Thus, for example, neither contracts for professional services (Kennedy v. Ross), nor contracts for sole source products or services (Graydon and Hodgeman) need to be competitively bid.

In our opinion, there are other circumstances under which competitive bidding requirements need not be strictly followed, so long as the standards set forth above are followed. These circumstances include where no true emergency might exist but the City is under a deadline from a superior state or federal agency to complete a public works project by a time certain which does not allow for competitive bidding. *See also* Graydon, 104 Cal. App. 3d at

636-37.

Because the ability to utilize a requirements contract depends upon the limitations in a city's charter, the San Diego City Charter must be examined to determine if any such limitation exists. Charter section 94 provides such a limitation.

II

THE CITY CHARTER RESTRICTS THE CITY'S ABILITY TO UTILIZE A GENERAL REQUIREMENTS CONTRACT

San Diego City Charter section 94 provides in relevant part:

In the construction, reconstruction or repair of public buildings, streets, utilities and other public works, when the expenditure therefor shall exceed the sum established by ordinance of the City Council, the same shall be done by written contract, except as otherwise provided in the Charter, and the Council, on the recommendation of the Manager or the head of the Department in charge if not under the Manager's jurisdiction, shall let the same to the lowest responsible and reliable bidder, not less than ten days after advertising for one day in the official newspaper of the City sealed proposals for the work contemplated.³

This Charter language is a fairly typical recitation of a "low bid" requirement for public works construction. *See, e.g., City of Inglewood v. Superior Court*, 7 Cal. 3d 861, 866 n. 4 (1972); *Los Angeles Dredging Co.*, 210 Cal. at 354. Accordingly, the City's ability to utilize a requirements contract for public works is limited by the general restrictions outlined in the previous section.

The Charter section contains an additional element which reinforces the limitation on the letting of contracts. That element is the phrase: "for the work contemplated." "Contemplate" is defined in Webster's New Universal Unabridged Dictionary (Dorset & Baber, 2d ed. 1979) in relevant part as: "3. to look forward to; to consider or have in view in reference to a future act or event; to intend or expect." This definition connotes a present intention to undertake a specific project, act or event. Thus, Charter section 94 requires that a specific or intended project be in mind when the advertisement for bids is published. By contrast, requirements contracts are bid based upon "typical" work. Cal. Pub. Cont. Code 20128.5; 76 Ops. Cal. Att'y Gen. at 129. As discussed above, requirements contracts do not contemplate specific projects at the time the contract is awarded; specific projects or tasks arise later and are authorized separately.

Because a specific or intended project is necessary under Charter section 94, the principles regarding the preparation of detailed plans and specifications, and the advertising for bids based upon those specific plans and specifications, are applicable to the award of a contract pursuant to that section. Because a requirements contract is not awarded based upon detailed plans and specifications, Charter section 94 prohibits the use of such a contract unless certain criteria establishing an exception to the competitive bidding requirements of the section are present⁴. The City Attorney's Office has prepared an amendment to the Municipal Code that allows the City Manager to make a determination that those criteria are present, thus allowing the use of a requirements contract.

III

THE DRAFT ORDINANCE PROVIDES THE MECHANISM TO APPROPRIATELY UTILIZE A JOB ORDER CONTRACT

Enclosed as Attachment 4 is a draft ordinance prepared by the City Attorney's Office that amends the Municipal Code to allow for the award of general requirements contracts consistent with the legal principles outlined above.⁵ In particular, beginning at Section 5 (page 4

of 7) the ordinance provides:

1. A general requirements contract is to be competitively bid based upon unit-cost terms for all labor, material and equipment contemplated to be used for individual task orders;
2. It must be awarded to the lowest bidder upon authorization of the Council but may not exceed a total authorization of \$10 million.
3. The contract must not exceed two years, to allow for a re-evaluation of its benefits after a reasonable time, and may provide only that the contractor is entitled to cumulative task order authorizations not exceeding \$50,000;
4. The City Manager may authorize task orders if one of three criteria are met:
 - a. Strict compliance with bidding requirements will work an incongruity or be unavailing as to the final result;
 - b. Strict compliance will not produce an advantage; or,
 - c. Advertising for bids is undesirable because it will be practically impossible to obtain what is needed or required;
5. Individual task orders may not exceed \$750,000, except in cases of bona fide emergency, and individual task orders may not be subdivided into smaller tasks to circumvent the bidding requirements; and
6. The City Manager must immediately inform the City Auditor of any task order issued in excess of \$50,000, and must inform the City Council of any task order that exceeds \$250,000. These notification procedures are designed to minimize the possibility that the general requirements contract procedures are abused.

Many of the provisions drafted into the ordinance are subject to Council's discretion, for example the threshold amount for reports to Council on task order authorizations may logically be greater or smaller than the \$250,000 indicated. That figure is suggested only to be consistent with other authority granted to the City Manager on contracts. Also, the maximum value of any requirements contract may be greater or smaller than the \$10 million indicated. The primary goal of the ordinance is establishing criteria for utilizing the requirements contracts, and issuing task order authorizations. The criteria come directly from case law interpreting low bid requirements, and are the minimum standards upon which general requirements contracts may be utilized such that their use is neither abused nor leads to fraud and favoritism.

CONCLUSION

The City may utilize general requirements or job order contracts but under limited circumstances. The draft ordinance sets forth a standard procedure for utilizing such contracts that ensures, to the greatest extent possible, that the benefits of the low bid requirements of the Charter are realized.

Respectfully submitted,

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City Attorney

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Attachments 1-4
cc: Mayor & City Council
City Manager
City Auditor
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