

April 1, 1998

REPORT TO THE COMMITTEE ON RULES,
FINANCE AND INTERGOVERNMENTAL RELATIONS

ORDINANCE AMENDING CONTRACTING PROVISIONS
OF THE MUNICIPAL CODE

INTRODUCTION

At the Natural Resources and Culture [NR&C] Committee meeting of November 5, 1997, the Committee considered a proposal to amend the Municipal Code to provide standardized procedures for the award of a “job order ” contract, otherwise known as a “general requirements” contract. The proposal was necessary because of concerns this Office expressed over the utilization of a job order contract authorized for the Metropolitan Wastewater District [MWWD] in June of 1996. That contract, authorized to perform emergency work and small CIP projects, is due to expire soon, and MWWD wishes to award another contract. The City Attorney provided a Report to the Committee which discussed the legality of a job order contract under the provisions of the San Diego City Charter and California law. A copy of that Report is enclosed as Attachment 1. After making some comments on the proposal, the Committee decided that the matter was a proper one for this Committee to consider, and the matter was referred accordingly.

At about the same time, the City Attorney was preparing other amendments to the Municipal Code regarding contracting for personal (but not professional or consultant) services, and reorganizing the various contracting provisions of the Code to group them more logically. Specifically, the proposed changes regarding services contracts concern the award of contracts for inmate services, to non-profit and other governmental agencies, and for Landscape Maintenance Districts [LMDs]. Additionally, this Office proposes that the various classes of contracting authority be given their own divisions in the Municipal Code, rather than being grouped under various other matters.

All these proposals have been consolidated into one proposed ordinance for review by this Committee, along with some cleanup of existing provisions. The current, comprehensive draft ordinance is enclosed as Attachment 2. This Report describes recent changes to the job order contract sections of the draft ordinance, and describes the need for the other proposed changes to the Municipal Code regarding contracting.

I

GENERAL REORGANIZATION

Currently, the various provisions setting forth contracting authority in the Municipal Code are scattered about under different subject matters. For example, certain contracting authority is set forth in Division 2 of Chapter II, Article 2 concerning the City Manager. Other authority is set forth in Division 5 of the same Chapter and Article concerning the Purchasing Agent. We believe that these provisions are better and more logically grouped in their own divisions, based upon the general category of contracting authority.

The enclosed draft ordinance creates three new divisions in Chapter II, Article 2; Divisions 30, 31 and 32, setting forth, respectively: 1) contracting definitions, competitive bidding requirements, and contract alteration authority; 2) procedures for public works contracts, including job order contracts; and, 3) procedures for personal services, goods, and consultant contracts. We believe that this grouping will make the Municipal Code's contracting provisions easier to find and understand by the interested public as well as City staff.

II

JOB ORDER CONTRACTING

As the testimony at the hearing before this Committee will undoubtedly show, a job order contract does have certain advantages and has the potential to provide certain benefits to the City. These include overall efficiency for the awarding department, time savings in the accomplishment of task orders or jobs, and potential cost savings. However, as the enclosed Report discusses, a job order contract also carries with it the potential for abuse and favoritism, and the possibility that the lowest cost for the work performed will not be achieved.

The enclosed Report expresses the City Attorney's opinion that City Charter section 94 will allow only a limited use of a job order contract. The opinion of the City Attorney set forth in that Report is unchanged. However, in order to accommodate MWWD, and other City departments that have expressed an interest in job order contracts, this Office prepared the draft ordinance previously brought to the NR&C Committee in order to implement job order contracting on a uniform basis throughout the City.

Based on comments expressed by members of the NR&C Committee, and comments by MWWD on the draft ordinance, this Office has made some changes to the draft ordinance, although many of the provisions in the draft ordinance remain at the discretion of this Committee and the City Council. The recent changes are as follows:

1. The certification for the use of the job order contract may be made by any Department Director, in addition to the City Manager, Assistant City Manager and any Deputy City Manager. (Section 22.3104 (b), page 16 of 23).
2. The authorized level for an individual task order has been reduced to \$500,000 from \$750,000. (Section 22.3104 (c), page 16 of 23).
3. The reporting requirement on the issuance of task orders has been modified so that the use of a task order in excess of \$250,000 is now only reportable to the

City Auditor & Comptroller, rather than the Mayor and City Council. (Section 22.3104 (d), page 16 of 23).

In all other respects the provisions regarding job order contracting remain the same. Any of these thresholds or limits are at your discretion, however.

III

CONTRACTS FOR PERSONAL SERVICES

A. Background

The Municipal Code requires that all contracts for personal services greater than \$5,000 be awarded only after obtaining competitive prices or sealed bids, depending on the dollar amount of the contract.¹ Historically, however, a few City departments have contracted with non-profit or governmental entities to provide services without receiving competitive bids or prices as required by the Municipal Code. Several City departments have requested extensions or renewals of agreements, which were not competitively bid or priced, with various agencies and non-profit organizations to provide the City with general maintenance services. Consequently, awarding these service contracts could be problematic and potentially subject to legal challenge.

It has also become apparent that current procedures for entering into LMD contracts is not consistent with the current Municipal Code requirements contained in Section 22.0211. That section requires that every LMD contract be approved and awarded by the City Council. As a result, these contracts also could present legal difficulties.

Specifically, since 1984, the Environmental Services Department [ESD] has utilized County probationers to perform janitorial and landscaping services, and trash and weed cleanup along roadways, and, since 1986, has hired Donovan prison crews as general laborers at the Miramar Landfill Greenery Recycling Area. ESD wants to continue to use prison and probation labor for these purposes. ESD seeks to renew an agreement with the County to have probationers perform general maintenance services. The estimated total cost for this contract is approximately \$180,000. A previous agreement with Donovan for inmate labor was in the amount of \$76,300. ESD also wants to contract with the Alpha Project, an organization which trains and employs homeless people, to provide services similar to those services currently provided by probation crews.

In addition, MWWD wants to enter into a new contract with the Urban Corps of San Diego to provide maintenance and grounds-keeping services at the San Pasqual Water Reclamation Plant. Expenditures under this contract would be approximately \$77,376.

Historically, the justification for not competitively pricing or bidding these service contracts was that the organization was the sole source for such services. However, given the general nature of services provided, coupled with the increasing number of entities providing these types of services, the City Attorney questioned whether the sole source exception to

competitive bidding was applicable. To eliminate any legal uncertainty in this regard, this Office has drafted amendments to the Municipal Code which explicitly authorize agreements with non-profit and governmental entities under specific and limited circumstances.

B. Analysis

1. City Charter and Municipal Code Requirements

City Charter section 35 requires that all purchases for supplies, materials, equipment and insurance be procured only after advertising for sealed proposals or securing competitive prices depending upon the dollar amount established by ordinance. Section 35 is silent regarding similar restrictions on service contracts.

The ordinance establishing the dollar values for purchases of supplies, materials, equipment and insurance mentioned in City Charter section 35 is Municipal Code section 22.0504. That section also governs acquisition of services. Pursuant to Section 22.0504, only service contracts in an amount less than \$5,000 can be awarded outright without some form of a competitive process. Contracts exceeding \$50,000 must be advertised, and awarded to the lowest responsible bidder through a formal competitive bidding procedure. The literal interpretation of the Municipal Code requires that the service contracts requested by ESD and MWWD be let only after a competitive process. Because the City Charter does not set requirements for the award of service contracts, an amendment to the Municipal Code to exempt certain service contracts from competitive bidding is possible, and recommended amendments are included in the draft ordinance and described below.

LMD contracts are specifically described in Municipal Code section 22.0211. That section requires that every LMD contract in an amount equal to or less than \$250,000 be advertised and awarded by the City Council after the Council has considered the bid prices and other factors. This section is silent regarding how LMD contracts in excess of \$250,000 are to be awarded. Despite these provisions, established practice in awarding LMD contracts has been to handle their award under the requirements of Municipal Code section 22.0504, governing all other non-professional service contracts, which would not require a formal bidding process nor Council approval for many LMD contracts of small value. This Office recommends that modifications to the existing Municipal Code provision for LMD contracts be made in order to conform the law to current practice. The recommended changes are included in the draft ordinance and described below. Alternatively, if the Council chooses not to modify the law, it is recommended that policies and procedures be prepared to ensure that the procedure for awarding LMD contracts comport with existing law.

2. The Draft Ordinance Expressly Authorizes Exemptions to the Competitive Bidding Requirements for Certain Service Contracts

Proposed Municipal Code section 22.3221, at page 21 of 23 of the attached draft, allows the City Manager to contract for inmate (probationer and/or prisoner) services where the contract is in the public interest, does not exceed \$250,000 per year, and the Manager has considered whether the agency will supervise the workers, provide workers compensation and indemnify the

City from any loss.

Proposed section 22.3222, at page 22 of 23 of the attached draft, authorizes the City Manager to contract for services with any agency or non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code. Each contract must further a specific public policy and be in the public interest, as certified by the Manager. The contract may not exceed \$250,000. Finally, the Manager, prior to awarding the contract, must consider worker supervision, workers compensation, and indemnification.

The requirements for entering into these service contracts, including the dollar threshold for Council approval, are subject to your discretion. The dollar threshold for Council approval set forth in the draft ordinance (\$250,000) is consistent with the upper limit of the City Manager's contracting authority in other areas. An alternative limit for you to consider is the Purchasing Agent's limit for awarding service contracts, which authority is up to \$1 million.

3. The Draft Ordinance Modifies the Procedures for Awarding LMD Contracts

The draft ordinance alters LMD contract award requirements by including LMD contracts within the definition of a service contract, which must be advertised and competitively bid above established dollar amounts. This modification renders the law consistent with established practice. However, the appropriate remedy for the disparity between current practice and the Municipal Code on LMD contracts is within your discretion.

CONCLUSION

This Office has recommended a general reorganization of the contracting provisions of the Municipal Code into a more logical grouping than currently exists. In addition, the enclosed draft ordinance provides for the uniform award and utilization of job order contracts. Finally, in order to clarify City practice and procedure for certain service contracts, the draft ordinance provides for the award of agreements for those types of services that promote a public purpose, or are in the public interest, without competitively bidding the contract.

Respectfully submitted,

CASEY GWINN
City Attorney

LJG:JM:js:pev:820:(043.1)

cc: City Manager

City Auditor & Comptroller

Personnel Director

RC-98-8

L:\GIRARD\REPORTS\RC-98-8.WPD