

ORDINANCE NUMBER O- 19353 (New Series)

ADOPTED ON JAN 24 2005

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING DIVISION 8, SECTION 22.0807, RELATING TO DEBARMENT; BY AMENDING DIVISION 30, SECTIONS 22.3003, 22.3006, 22.3026, 22.3029, 22.3036, AND 22.3037, DIVISION 31, SECTION 22.3102 AND DIVISION 32, SECTIONS 22.3212, AND 22.3223, ALL RELATING TO ADMINISTRATION OF CONTRACTS.

§22.0807 Grounds for Debarment

(a) A final conviction, including a plea of nolo contendere, or final unappealable civil judgment of any one or more of the grounds lists in Section 22.0807(a)(1)-(5) constitutes grounds for permanent *debarment* of the *person* who is subject to, or is the *affiliate* of the *person* who is subject to, the criminal conviction, plea, or civil judgment:

- (1) under any state or federal statute or municipal ordinance for embezzlement, theft, fraudulent schemes and artifices, fraudulent schemes and practices, bid rigging, perjury, forgery, bribery, falsification or destruction of records, receiving stolen property or any offense indicating a lack of business integrity or business honesty which affects the *person's* or its *affiliate's* responsibility; or,

- (2) for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract; or,
 - (3) for violations of California Government Code sections 84300(c) and 84301 (sections of the California Political Reform Act requiring disclosure of true campaign donor), as they exist on May 15, 1996, or as amended thereafter, which violations occurred on or after May 15, 1996, and which violations occur with respect to a City election; or,
 - (4) for a conviction under federal or state antitrust statutes involving public contracts or the submission of offers or bid proposals,
- (b) A Fair Political Practices Commission enforcement order against a *person*, either following a hearing or by stipulation, that makes a finding of a violation of California Government Code sections 84300(c) and 84301, as those sections exist on May 15, 1996, or as amended thereafter, which violations occurred on or after May 15, 1996, and which violations occurred with respect to a City election, constitutes grounds for permanent *debarment* of the *person* who is subject to, or is the *affiliate* of the *person* who is subject to, the enforcement order.

(c) Any one of the following acts or omissions by a *person* also constitute grounds for permanent *debarment*:

- (1) the *person* committed any offense, took any action, or failed to take an action, which indicates a lack of business integrity and which could directly affect the reliability and credibility of performance of the *person* on future *contracts* with the *City*; or,
- (2) the *person* committed a violation of San Diego Charter section 97; or,
- (3) the *person* has committed any corrupt practice in bidding for or in any way seeking award of a *contract*, or has committed any corrupt practice in any way relating to a *City contract*; or,
- (4) the *person* was established to, or operates in a manner designed to evade the application of this Division or to defeat the purpose of this Division;

(d) Any two or more of the following acts or omissions by a person constitute grounds for debarment of that person for no less than three years and up to and including permanently:

- (1) the *person* unjustifiably refused to properly perform or complete *contract* work or warranty performance; or,
- (2) the *person* unjustifiably failed to honor or observe contractual obligations or legal requirements pertaining to the *contract*; or,
- (3) the *person* used substandard materials, or has failed to furnish or

install materials in accordance with *contract* requirements, even if the discovery of the defect is subsequent to acceptance of the project and

expiration of the warranty thereof, if such defect amounts to intentionally deficient or grossly negligent performance of the *contract* under which the defect occurred; or,

- (4) the *person* committed a violation of the Drug-Free workplace Act of 1988 (41 USC sections 701-707); or,
- (5) the *person* willfully failed to cooperate in the investigation or hearing of the proposed *debarment*; or,
- (6) the *person* performs, or fails to perform, a *contract* in such a way that environmental damage results or a violation of environmental laws or permits is committed; or,
- (7) the *person* has not implemented its Equal Employment Opportunity Plan required by Municipal Code section 22.2705, or practices unlawful discrimination in employment, and the *person* has not taken corrective action after sufficient notice by the *City*;
- (8) the *person* has falsified a statement of gross income submitted under the City's Minor Public Works Construction Project program; or,
- (9) the *person* has committed an act or omission of so serious or compelling a nature that:

- (a) it affects the present responsibility of the *person* to be awarded a *contract* or to participate as a *subcontractor* in a *contract*; or,
 - (b) it affects the integrity of the procurement process.
- (10) Any one of the following acts or omissions by a person listed in Section 22.0807(e).
- (e) The following acts or omissions by a *person* constitute grounds for *debarment* of that *person* for no less than one year.
- (1) the City issued the *person* two or more *performance evaluations* from the *City* with a rating of unsatisfactory within a two-year period; or,
 - (2) the City has issued the *person* a *final performance evaluation* with a rating of unsatisfactory.
 - (3) the *person* has failed to timely submit bond, *contract* documents, insurance documents or any other item required by the City, acceptable to the *City* which conform to bid, request for proposal and/or *contract* requirements.
 - (4) the *person* who is notified that they are the apparent low bidder on a *contract* has failed to timely submit on two or more occasions complete Equal Opportunity Outreach documentation that is required by Municipal Code section 22.2705 or by policies adopted pursuant to that Division and that is acceptable to the City.

- (5) the *person* submitted two or more claims of computational or other error in a bid to the *City* within a two-year period.

§22.3003 Definitions

Terms defined in Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36 are indicated by italics. For purposes of Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36:

Agency includes the State of California, counties, districts, public authorities, joint power agencies, public non-profit corporations, and any other public or quasi-public entity that the Council may designate by resolution.

Announcement means the declaration of the intent to *award a contract* or a *public works contract*, by any means of transmission; including U.S. mailing, automated phone message or Internet posting. The effective date of an *announcement* by mail is the date that the *announcement* is deposited in the U.S. mail.

Award means the acceptance of a bid or proposal by the City's authorized representative.

Award date or *date of award* means the date that the City Manager or his designee signs the documents constituting a *public works contract*, *contract*, or *consultant agreement*, and all conditions precedent to *award* have been satisfied.

Bidder means a *person* who submitted a bid, proposal or other document seeking *award* of a *contract*, *public works contract* or *consultant agreement*.

Brand Name refers to a specific product in specifications for *goods*, *services*, or *public works*.

City's Public Contracts Code includes the City's Charter, Municipal Code, Council policies, administrative regulations, past practices, current practices, or any portion of those laws, policies, regulations, or practices, pertaining to *contracts* or agreements between the City and other party.

Consultant includes providers of expert or professional *services* and excludes providers of *services*.

Contract includes a *contract for goods*, a *contract for services*, or a *cooperative procurement contract* unless otherwise stated.

Contract for Goods means an agreement between the City and another party in which the City is the purchaser of articles, commodities, materials, supplies, equipment, or insurance.

Contract for Inmate Services means an agreement between the City and an *Agency* for the use of inmates confined in state prisons, or probationers, or parolees to perform *services*.

Contract for Services means an agreement between the City and another party in which the City is the purchaser of *services*, excluding *consultant services*. It includes *maintenance contracts*.

Cooperative Procurement Contract means a *contract* entered into by the Purchasing Agent and another *agency* to obtain *goods* or *services* or an *agency contract* utilizing a bidding process that complies with City requirements.

Emergency means an event of great public calamity, such as extraordinary fire, flood, storm, epidemic or other disaster.

Evaluation Team means the City team (consisting of one or more members) assembled to review and evaluate bids and proposals.

General Requirements Contract means a *public works contract* which contains a unit price book of detailed specifications and unit prices for typical tasks. Specific construction projects are not contemplated or authorized at the time of *award*. Work is authorized as required by a separate *task order*.

Goods means any articles, commodities, materials, supplies, equipment, or insurance.

Maintenance Contracts has the meaning contained in section 65.0201 of this Code.

Major public works contract means a *public works contract* valued at more than \$250,000.

Minor public works contract means a *public works contract* valued at \$250,000 or less.

Person has the same meaning as that in San Diego Municipal Code section 11.0210.

Protest Body means a panel appointed by the City Manager as needed to review evidence presented by all interested parties to determine whether the *evaluation team's* contract selection is in accordance with all applicable laws and guidelines.

Public Meeting means an assemblage of interested persons gathered in response to a notice specifying the time and place where bids will be opened.

Public Works means the construction, reconstruction, or repair of public buildings, streets, utilities and other public works.

Public Works Contract means a *contract* for the construction, reconstruction or repair of public buildings, streets, utilities and other public works.

Responsible means a *bidder's* quality, fitness, and capacity to perform the particular requirements of the proposed work.

Responsiveness means a *bidder's* compliance with the bidding instructions.

Services means all work provided by *persons* other than *consultants*. It includes *maintenance contracts*. It excludes *public works and goods*.

Sole Source means the recipient of the *award* of a *public works contract, consultant agreement, or contract* without competitive selection or bidding.

Sole Source Contract means a *public works contract, consultant agreement, or contract* awarded without competitive selection or bidding.

Task Order means an authorization for construction, reconstruction, repair and maintenance work under a *general requirements contract*.

Valued at means the amount authorized to be expended for performance of a *public works contract* at the same time of bid opening.

§22.3006 Bid Initiation; When Advertising in Official Newspaper Required for Public Works Contract

- (a) *Major public works contracts* that provide for an expenditure of more than \$250,000 shall be advertised for a minimum of one day in the City Official Newspaper; provided, however, that no advertising shall be required for a *sole source contract* certified by the City Manager in accordance with section 22. 3037.

- (b) The City Manager may *award minor public works contracts* without advertising. In lieu of advertising, the City Manager shall follow procedures set forth in Municipal Code Chapter 2, Article 2, Division 36, and in regulations adopted by the City Manager consistent with this Section and Division 36. The Manager's regulations shall ensure that the City seeks competitive prices either orally or in writing and shall ensure that the City Manager has taken those prices under consideration before a *minor public works contract* is awarded.

§22.3026 Award of Contracts and Public Works Contracts

- (a) Except as provided in section 22.3026(b), for *contracts and public works contracts* that are required to be advertised, the City may make the *award* not less than ten calendar days after advertising in accordance with the following:
- (1) Except for *Sole Source Contracts* authorized under section 22.3037, *Public works contracts* under sections 22.3102 and 22.3103 shall be awarded to the lowest *responsible* and reliable *bidder* that meets the specifications.
 - (2) *Contracts*, excluding *public works contracts* and *consultant agreements*, shall be awarded on the basis of the low acceptable bid that best meets City requirements under section 22.3211.
 - (3) *Cooperative procurement contracts* under a request for proposal or bid will be awarded on the basis of the proposal best meeting City requirements.

- (b) The City is authorized to *award contracts* and *public works contracts* to the next *bidder* that meets all requirements when the apparent successful *bidder* under section 22.3026(a)(1) or (2) does not meet deadlines for submitting the required bond and insurance documents.

§22.3029 Protests of Contract Award

- (a) A non-selected *bidder* may protest *award* of a *contract*, *public works contract*, or *consultant* agreement to the selected *bidder* by submitting a written "Notice of Intent to Protest," which shall be received by the City Department administering the contract *award*, no later than ten calendar days after the City's *announcement* of the selected *bidder* or no later than ten calendar days from the date that the City issues notice of designation of a *bidder* as *non-responsible*. If the tenth calendar day falls on a weekend or City holiday, the protesting *bidder* may submit the Notice of Intent to Protest on the first work day following such weekend or holiday. The City shall disclose the method of *announcement* to all *bidders* in the bid documents. Failure to submit a timely Notice of Intent to Protest shall bar consideration of a protest.
- (b) The Notice of Intent to Protest shall state all grounds claimed for the protest and include supporting documentation. Failure to clearly state the grounds for the protest and provide supporting documentation shall be deemed a waiver of all protest rights.

- (c) The City Department administering the contract *award* shall review the Notice of Intent to Protest to determine whether it complies with section 22.3029(b) and whether a Protest Hearing is required under section 22.3029(d).
- (d) A protesting *bidder* may present evidence at a Protest Hearing only when the alleged grounds for the protest are as follows: (1) The City failed to follow procedures or requirements specified in the Request for Bids or Request for Proposals or equivalent, including any amendments; (2) City employees or *evaluation team* members engaged in misconduct or impropriety; (3) the City's designation of the protesting *bidder* as non-*responsible* was incorrect. A protesting *bidder* shall not be entitled to a hearing to protest its own or another *bidder's responsiveness*; however, the City Manager may exercise discretion and allow a *bidder* designated as non-*responsive* by the City Department to file a Formal Protest, pursuant to the Formal Procedures set forth under this section 22.3029, if the City Manager determines that a hearing is necessary to resolve a relevant factual issue that cannot be determined from the face of a bid document or proposal.
- (e) After review of a *bidder's* Notice of Intent to File a Protest, the City Department will provide written notice to the *bidder* of its determination, detailing the factual basis for the City's determination. Service of the City Department's determination shall be made in accordance with one of the methods listed in Municipal Code section 11.0301.

- (f) If the *bidder* desires to continue its protest notwithstanding the City Department's determination, the *bidder* must submit a written Formal Protest, which shall be received by the City Department administering the contract *award* within ten calendar days of service of the City Department's determination. If the tenth calendar day falls on a weekend or City holiday, the protesting *bidder* may submit the Formal Protest on the first work day following such weekend or holiday. Failure to file a timely written Formal Protest shall bar consideration of the Formal Protest.
- (g) The written Formal Protest shall include a detailed factual response to the City Department's determination, including all supporting documentation. The *bidder* shall also include a bid protest bond in any of the following forms: a surety bond from a California licensed surety, an irrevocable standby letter of credit, certified check, cashier's check or money order, made payable to the City of San Diego. The bid protest bond shall be in the following amounts:

Contract Value (\$)	Bond Amount
Less than 250,000	\$5,000
250,000 – 1,000,000	\$10,000
Greater than 1,000,000	\$25,000

- (h) The City Manager shall appoint a *Protest Body* and determine whether the grounds stated in the written Formal Protest meet the requirements for a Protest Hearing, as set forth in this section 22.3029. The *Protest Body* shall conduct the Protest Hearing in accordance with the Policy approved by City Council. The *bidder's* failure to comply with Formal Protest procedures set forth in the Policy approved by City Council shall bar further consideration of the *bidder's* Formal Protest.
- (i) If the *Protest Body's* decision upholds the determination of the City Department regarding the *award*, the *Protest Body*, at its discretion, may assess the City's costs of the Protest Hearing. The *bidder* shall then pay the assessed costs within thirty calendar days of service of the decision; otherwise the City may deduct the assessed costs from the bid protest bond provided by the *bidder*.
- (j) The decision of the *Protest Body* shall be issued in accordance with the Policy approved by City Council and shall become final on the date of service of the decision, in accordance with one of the methods listed in Municipal Code section 11.0301.
- (k) The *bidder's* filing of a Notice of Intent to File a Protest or written Formal Protest shall not preclude the City Manager from rejecting all bids and rebidding a *contract*.

§22.3036 Alterations in Contracts, and Public Works Contracts

- (a) Except as provided in section 22.3036(b), whenever it becomes necessary to make alterations in *contracts*, and *public works contracts*, the City

Manager shall make alterations only when authorized by the Council, unless such alterations meet all of the following criteria:

- (1) The cost of each alteration does not increase the *contract or public works contract* amount by more than \$200,000; and
 - (2) The cost of alteration does not exceed the total amount authorized for the project by ordinance or resolution; and
 - (3) The City Manager certifies that the alterations are necessary to fulfill the purpose of the *contract*; and
 - (4) The alterations are made by agreement in writing between the contractor and the City Manager.
- (b) Notwithstanding the limitation provided by section 22.3036(a), in any *contract* for the construction of the South Bay Ocean Outfall let pursuant to cooperative agreement with Environmental Protection Agency and the International Boundary and Water Commission, the City Manager may approve alterations without authorization of the Council, provided that the cost of each alteration does not exceed five percent of the original prime *contract* value and provided that all other criteria in section 22.3036(a) are met.

§22.3037 City Manager's Certification of Sole Source Contract

- (a) The City Manager may certify that a *sole source contract* is justified because strict compliance with competitive selection or bidding requirements would be unavailing, or would not produce an advantage, or would be undesirable, impractical, or impossible.

- (b) The City Manager may delegate the *sole source* certification authority provided by section 22.3037(a) to the Assistant City Manager, Deputy City Manager, or any Department Director.

§ 22.3102 When Major Public Works Contracts May be Awarded by City Manager

- (a) The City Manager may *award a major public works contract* that provides for an expenditure of an amount equal to or less than \$1,000,000 provided that the following requirements are met:
 - (1) the *major public works project* was previously approved and appropriated through the Annual Capital Improvements Program (CIP) budget; and
 - (2) the *major public works contract* has been advertised as described in Section 22.3006 or has been certified by the City Manager as a *sole source contract* in accordance with section 22.3037; and
 - (3) the *major public works contract* is in writing.
- (b) All other *major public works contracts* that do not meet the requirements of Section 22.3102 (a) are required to be authorized by the City Council before being awarded by the City Manager. The City Council may authorize the City Manager to *award a public works contract* if it has met the following requirements:
 - (1) the *public works contract* has been advertised as described in Section 22.3006; and

- (2) the *public works contract* is in writing; and
- (3) the City Council has authorized the necessary expenditure of funds for the *public works contract*.

§22.3212 Contracts Not Required to be Competitively Bid

The *contracts* listed in section 22.3212(a)-(g) are not required to be competitively bid:

- (a) A *contract* that provides for an expenditure of less than \$5,000;
- (b) A *cooperative procurement contract* in an amount less than \$10,000;
- (c) A *contract* to remedy an *emergency* that affects public health or safety,

provided that:

- (1) The Purchasing Agent immediately reports the *emergency award* and its justifications to the City Council; and
- (2) The Council by resolution acknowledges and ratifies the procurement;

- (d) A *cooperative procurement contract* administrated by an *agency* provided that:

- (1) The City Manager certifies in writing that the *cooperative procurement contract* is in the best interests of the City; and
- (2) The cooperative procurement is to the City's economic advantage; and
- (3) The *agency's* bidding process substantially complies with the City's competitive bidding requirements.

- (e) A *contract* that is available from a *Sole Source* only, if, in advance of the *contract*, the City Manager certifies in writing in accordance with Section 22.3037 the *Sole Source* status of the provider;
- (f) Annual blanket purchase orders for an expenditure greater than \$5,000 for commercially available materials and supplies, provided that they are:
 - (1) required by City forces for immediate completion of work in progress;
 - (2) not normally kept in City stores; and
 - (3) less than \$50,000.
- (g) *Contracts* for Inmate Services which comply with Section 22.3221.
- (h) *Contracts* for Services with Agencies or Non-Profit Organizations which comply with Section 22.3222.

§22.3223 Consultant Contracts

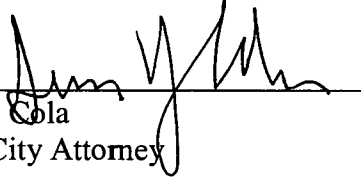
Except as otherwise provided by Charter or ordinance, the City Manager may enter a *contract* with a *Consultant* to perform work or give advice without first seeking Council approval provided that both of the following conditions exist:

- (a) the *contract* and any subsequent amendments do not exceed \$250,000 in any given fiscal year; and

(b) the total amount of *contract* awards to the *Consultant*, including the current *award*, in any given fiscal year does not exceed \$250,000.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By



Susan Y. Cola
Deputy City Attorney

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