

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

THOMAS C. ZELENY
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 533-5800
FAX (619) 533-5856

September 26, 2011

REPORT TO THE COMMITTEE ON RULES, OPEN GOVERNMENT
AND INTERGOVERNMENTAL RELATIONS

CONTRACTS FOR REPAIR AND MAINTENANCE OF PUBLIC FACILITIES

INTRODUCTION

The City's award criteria for repair contracts and maintenance contracts are different, which has complicated the proposed managed competition of certain functions performed by the Street Division. This report explains why maintenance of public facilities is eligible for managed competition while repair of public facilities is not.

DISCUSSION

I. REPAIR OF PUBLIC FACILITIES

The San Diego Charter requires that contracts for repair of public facilities be awarded to the lowest responsible and reliable bidder.

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 this 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

Charter § 94 (emphasis added).

The City cannot consider the relative qualifications of bidders when awarding a contract based on low bid. *City of Inglewood – Los Angeles County Civic Center Authority v. Superior Court*, 7 Cal. 3d 861, 867 (1972). The City can only consider the amount of the bid and whether the bidder can satisfactorily complete the work. 2003 City Att'y Report 398 (2003-12; April 28, 2003).

The exceptions in the Charter to this low bid requirement are job order contracts, design-build contracts, and construction manager at risk contracts, found in Charter sections 94.1, 94.2, and 94.4, respectively. Section 94 also permits City forces to perform public works projects costing less than an amount set by ordinance without City Council approval:

The Council may, however, establish by ordinance an amount below which the Manager may order the performance of any construction, reconstruction or *repair* work by appropriate City forces without approval by Council. When such Council approval is required, the Manager's recommendation shall indicate justification for the use of City forces and shall indicate whether the work can be done by City forces more economically than if let by contract.

Charter § 94 (emphasis added).

The Mayor may use City forces to perform public works projects costing \$100,000 or less without City Council approval. SDMC § 22.3105(b). The Mayor may use City forces to perform public works projects costing over \$100,000 if City forces can complete the work more economically than by written contract and if such use of City forces is approved by the City Council. SDMC § 22.3105(a).

II. MAINTENANCE OF PUBLIC FACILITIES

The City Charter allows the City to hire private firms to provide City services under certain circumstances, a process known as managed competition:

The City may employ any independent contractor when the City Manager determines, subject to City Council approval, City *services* can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service while maintaining service quality and protecting the public interest.

Charter § 117(c) (emphasis added).

Services include maintenance work, and exclude public works projects. SDMC § 22.3003. Service contracts are awarded to the firm offering the best value to the City, where price is only one of several considerations. SDMC § 22.3213. The managed competition process is similar to the award of service contracts in that it involves factors other than price, including efficiency, service quality, and the public interest. Charter § 117(c). Unlike a low bid contract, the award of a contract for City services involves the exercise of discretion by the City in selecting the winning firm. *Mike Moore's 24-Hour Towing v. City of San Diego*, 45 Cal. App. 4th 1294, 1303 (1996).

Maintenance is distinguished from repair by the ordinary, recurring nature of maintenance work. The Municipal Code defines maintenance as “the furnishing of property-related services and materials for the ordinary and usual maintenance, operation, and servicing of any improvement” and references a similar definition in the California Streets and Highways Code. SDMC §§ 22.3003, 65.0202. The State defines maintenance as including routine, recurring and usual work to preserve and protect public facilities:

Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

Cal. Code Regs. title 8, § 16000.

Whether a particular task is maintenance or repair is very fact specific, and admittedly it can be difficult sometimes to distinguish between the two. We are guided primarily by these definitions and past City practice. Generally, though, the smaller and more frequent the task, the more likely the task is maintenance work. The larger and less frequent the task, the more likely the task is repair or construction work.

III. THE WORK PERFORMED BY STREET DIVISION

Street Division performs both repair work and maintenance work. Frequent small tasks such as filling potholes, grinding and temporarily patching sidewalk defects, and the upkeep of existing traffic signs, roadway striping, and markings is maintenance work. Larger, less frequent work such as asphalt overlay, sidewalk panel replacement, and installation of new traffic signs, roadway striping, and markings is repair (or construction) work. Most of the larger projects are already performed by private contractors under contracts awarded by low bid, but the City still performs some of this work in-house.

The different award criteria for repair work and maintenance work in the City Charter and Municipal Code precludes the City from bundling all the work performed by Street Division into one contract. If repair work is awarded through managed competition to a contractor that did not bid the lowest price, the award would violate Charter section 94. If maintenance work currently performed by City employees is awarded to a contractor based solely on price, the award would violate Charter section 117(c) because the City did not consider efficiency, service quality, and the public interest.

Private contractors may perform the work currently done by Street Division, but repair and maintenance must be awarded through separate contracts. Maintenance work is eligible for managed competition as a City service. Repair work done by Street Division may be advertised and awarded to the low bidder as public works, but only after the City has met and conferred with the affected labor organizations pursuant to the Meyers-Milias-Brown Act. *See* City Att’y

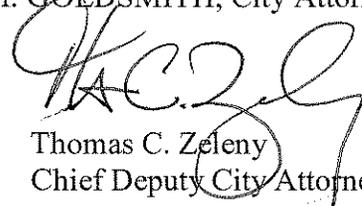
MOL No. 2011-10 (July 22, 2011) (transfer of bargaining unit work to volunteers requires meet and confer).

CONCLUSION

Street Division repairs and maintains City facilities. Different rules apply to the award of repair contracts and maintenance contracts. The maintenance work performed by Street Division is eligible for managed competition under Charter section 117(c). The repair work performed by Street Division is public works which must be awarded to the lowest bidder under Charter section 94. Both functions may be performed by private contractors, but repair and maintenance must be advertised and awarded separately.

JAN I. GOLDSMITH, City Attorney

By



Thomas C. Zeleny
Chief Deputy City Attorney

TCZ:mb
RC-2011-35