
MEMORANDUM OF LAW

DATE: July 23, 2001

TO: George I. Loveland, Senior Deputy City Manager

FROM: City Attorney

SUBJECT: Restrictions on the Composition of a Bid Protest Hearing Board

QUESTION PRESENTED

May employees of a public works department sit as members of a Board that will review the rejection of a contract bid by a division within the same department?

SHORT ANSWER

Yes, with restrictions. Bid protest hearings should be conducted according to constitutional due process principles of fairness and impartiality, which means that, among other requirements, decision makers should be unbiased. Therefore, at a minimum, members of a bid protest Board should not be composed of personnel who have participated in the subject contract award decision or are subject to the authority, direction, or discretion of personnel who have participated in the subject contract award decision. As a practical matter, this standard may be accomplished by excluding division personnel as prospective Board members when that division has rejected the contract that is the subject of a bid protest hearing.

BACKGROUND

San Diego Municipal Code [SDMC] section 22.3029 provides that an unsuccessful bidder shall have a right to appear before the City Council to protest any award required to be confirmed by the Council.

Council Policy 000-29 states that it is the policy of the City Council that bid protests be heard by an "objective body." Protests must be heard by either the City Council, as in the case of a public works contract award that must be confirmed by the City Council pursuant to SDMC section 22.3029, or a Board comprising at least three to five members, as in the case of protests of a consulting contract for \$25,000 or more, a purchasing contract between \$50,000 and \$1,000,000 inclusive, or a public works contract not requiring Council confirmation. Council Policy 000-29 also provides that it is the duty of the City Manager to convene the Board to hear

the protest and designate one member as chairperson. The policy does not establish any other qualifications or limitations for Board members.

The Metropolitan Wastewater Department's [MWWD] current practice is fairly typical of how bid protests are handled within the City's public works departments. The MWWD's Services and Contracts Division [SCD] awards and administers contracts that are funded by the City's Sewer Revenue Fund. MWWD's current practice, upon receiving notice of a bid protest by a bidder that has been rejected by the SCD, is to issue the City Manager a memo, if the bid award does not require confirmation by City Council, requesting that the City Manager convene a Board consisting of two named senior management level members of MWWD (typically one from MWWD's SCD and the other person from MWWD's Engineering and Program Management Division) and a named senior manager of another City department. Historically, the City Manager has complied with MWWD's requests.

Given the recent increase in bid protest requests due to more stringent bidder requirements for subcontractor outreach during the bid process, the lack of express guidance within Council Policy 000-29 for qualifications of Board members, and the anticipated higher scrutiny of the City's bid protest procedures resulting from the increasing number of bid protests, the City's public works departments are now seeking guidance and review of their participation as Board members during bid protest hearings.

This memorandum of law will first discuss the legal requirements governing the City's bid protest hearings and then discuss the application of those requirements to the question of whether and under what circumstances bid protest Board members may include public works employees.

ANALYSIS

I. The City's Rules and Regulations Pertaining to Bid Protests are Subject to Federal and State Constitutional Principles of Due Process.

An adjudicative proceeding is defined as an evidentiary hearing for a determination of facts pursuant to which an agency formulates and issues a decision. Cal. Gov't Code 11405.20. A bid protest hearing qualifies as an adjudicative proceeding because it entails a determination of facts pursuant to which a City body formulates and issues a decision as to whether to overturn a department rejection of a contract bid.

All public entities in California are subject to constitutional due process requirements when conducting adjudicative proceedings. *See* U.S. Const. amend. XIV, 1; Cal. Const. art. I, 7(a). State of California agencies are subject to state statutory requirements, including the Administrative Procedure Act [APA]. Local agency adjudicative proceedings are not subject to state statutory requirements unless expressly provided for by state statute, but local agencies may adopt state hearing procedures or enact their own rules and regulations, subject to constitutional due process requirements. Cal. Gov't Code 11410.10 – 11410.40. As of the date of this writing, no California statutes expressly regulate local agency bid protest hearings. SDMC section 22.3029 provides that an "unsuccessful bidder shall have the right to appear before the City Council to protest any award required to be confirmed by the Council." Council Policy 000-29 states that bid protests are to be heard by an "objective body" and provides a procedure for bid

protests subject to Council or Board review. These rules and regulations are thus subject to the requirements and restrictions imposed by the federal and state constitutions and federal and state case law interpreting those requirements and restrictions.

II. Due Process Entitles an Unsuccessful Bidder to a Fair Hearing.

Both the United States and California constitutions provide that a person may not be deprived by the government of life, liberty, or property without due process of law. U.S. Const. amend. XIV, 1; Cal. Const. art. I, 7(a). Before a court considers the question of what due process is required for a particular governmental action, it must first determine whether there is a protected liberty or property interest at stake. *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972).

Property interests include more than tangible items and may include rights created by statutes, regulations, contracts, and practices. *Board of Regents* at 577. However, not all interests are constitutionally protected and California courts have found that the award of a municipal contract is not a property right unless a contractor can show an entitlement to that contract. *Golden Day Schools, Inc. v. State Dept. of Education*, 83 Cal. App. 4th 695, 704 (2000) (citing *Stacy & Witbeck, Inc. v. City and County of San Francisco*, 36 Cal. App. 4th 1074, fn. 6). Therefore, the denial of a single contract award does not necessarily constitute the taking of a property right.

Although a principal element of personal liberty is freedom from bodily restraint, courts have identified other aspects of this interest. In particular, courts have held that a liberty interest is infringed when a person's good name, reputation, honor, or integrity is at stake because of a governmental action. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

To invoke the liberty interest protection, the government action must seriously stigmatize the person, for example, by substantially injuring the person's standing in the community or effectively precluding them from exercising his or her profession. *Merritt v. Mackey*, 827 F. 2d 1368 (9th Cir. 1987). California courts have held that a liberty interest is invoked when a contractor is debarred from bidding on future contracts due to the severe economic consequences and stigma resulting from debarment. *See, e.g., Golden Day Schools, Inc v. State Dept. of Education*, 83 Cal. App. 4th 695 (2000) (where court held that a fair hearing to which a debarred appellant is entitled, whether before a single person or a panel, should be before an arbiter that has not participated in staff decisions concluding or leading to adverse decisions against appellant.). Thus, it is clear that the debarment of a contractor constitutes the taking of a liberty right.

Whether a contractor has the same liberty interest when bidding on a single contract as when being debarred is doubtful, however, because the contractor's good name, reputation, honor, or integrity are generally not at stake when bidding on a single contract and the economic consequences of bid rejection are much less severe than those resulting from debarment. This seems particularly true in light of the fact that a contractor who submits the lowest responsible bid can have no expectation of being awarded a contract because a state agency or local agency subject to state regulation of its non-municipal affairs contracts has the discretion to reject all bids if the agency determines that it would not be in its best interests to accept the lowest responsible bid.¹ Cal. Pub. Cont. Code 10185. California courts have thus focused not on the

contractor's liberty interest at stake when bidding on a contract but on the public's interest in being protected from a public agency's abuse of discretionary powers when awarding contracts. *See, e.g., City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County*, 7 Cal. 3d 861, 870-871 (1972) (citing *Housing Authority of the City of Opelousas v. Pittman Construction Company*, 264 F. 2d 695 (5th Cir. 1959)); *Golden Day Schools, Inc. v. State Dept. of Education*, 83 Cal. App. 4th 695 (2000).

In *City of Inglewood-Los Angeles County Civic Center Authority*, 7 Cal. 3d 861 (1972), the California Supreme Court held that where a statute requires a public agency to award a contract to the "lowest responsible bidder," the agency must notify the low monetary bidder of any evidence reflecting on his or her responsibility received from others or adduced as a result of independent investigation, afford him or her an opportunity to rebut such adverse evidence, and permit him or her to present evidence that he or she is qualified to perform the contract. *City of Inglewood-Los Angeles County Civic Center Authority*, at 870-71. The Court also noted that it did not believe that due process compelled a quasi-judicial proceeding — including pleadings, cross-examination of witnesses, and formal findings — prior to rejection of the low monetary bidder as the responsible bidder. *City of Inglewood-Los Angeles County Civic Center Authority*, at 871. Thus it is clear that while an unsuccessful contractor who submits the low monetary bid is entitled to a fair hearing, he or she is not entitled to a formal one.

III. At a Minimum, a Fair Hearing Requires an Unbiased Decision Maker.

The concept of fundamental fairness includes the right to an impartial decision maker. *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, the standard of impartiality is less exacting in an administrative proceeding than in a judicial one. *See, e.g., Gai v. City of Selma*, 68 Cal. App. 4th 213, 219 (1998). California courts have thus held that to disqualify an administrative decision maker, actual bias versus the appearance of bias must be found. *Andrews v. ALRB*, 28 Cal. 3d 781, 792 (1981); *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205 (2000); *Horning v. Superior Court*, 81 Cal. App. 4th 1095 (2000). Furthermore, it is a long established rule under both federal and state law that due process is not necessarily violated when an agency adjudicates an issue after its agents have instigated an adverse decision against the appellant prior to the proceeding. *Withrow v. Larkin*, 421 U.S. 35 (1975); *Kloepfer v. Commission on Judicial Performance*, 49 Cal. 3d 826 (1989); *Howitt v. Superior Court*, 3 Cal. App. 4th 1575 (1992); *Hohreiter v. Garrison*, 81 Cal. App. 2d 384 (1974).

In the context of a debarment hearing, however, courts have drawn a line when a decision maker is the head of a division that participated in a staff decision concluding, or leading to a conclusion, that is a basis for disbarment. *See, e.g., Golden Day Schools, Inc. v. State Dept. of Education*, 83 Cal. App. 4th 695 (2000). Moreover, the California legislature, via the APA, has undertaken to separate the adjudicative function from the investigative and advocacy functions within all state agencies. Cal. Gov't Code 11425.10(a)(4). Thus, a presiding hearing officer may not serve as an investigator or advocate in a state agency adjudicative proceeding. Cal. Gov't Code 11425.30.

While the City need not adopt the APA standard because it has no legal obligation to do so, it may adopt a similar standard by administrative regulation to ensure and facilitate fair and impartial practices during bid protest hearings. The application of this standard to the City's bid protest hearings would thus mean that the City Manager, upon receiving notice of a request for a

bid protest hearing from a public works department, should select Board members who are not employed by or under the direct influence of the division within the department that rejected the bid.

CONCLUSION

SDMC section 22.3029 and Council Policy 000-29, which govern the City's bid protest procedures, are subject to the federal and state constitutional principles of due process. Federal and state case law interpreting those principles provide that an unsuccessful bidder who requests a bid protest is, at a minimum, entitled to an informal hearing with an impartial decision maker. Established federal and state case law also provide that an administrative decision maker can only be disqualified for actual bias. Furthermore, due process is not necessarily violated when an agency adjudicates an issue after its agents have instigated an adverse decision. In the context of debarment, however, courts have drawn a line when a decision maker is the head of a division that participated in a staff decision concluding, or leading to a conclusion, that is a basis for debarment. The California Legislature has adopted this standard for all state agencies by providing that a presiding officer may not serve as an investigator or advocate in a state agency adjudicative proceeding.

While the City is not required to adopt this standard, this memorandum of law recommends that the City adopt a similar standard by administrative regulation in order to ensure and facilitate fair and impartial procedures during bid protest hearings. The application of this policy to a public works contract would thus mean that employees within the division that rejected the contract and those persons subject to that division's influence could not sit as members of a bid protest hearing Board.

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