MEMORANDUM OF LAW

DATE: November 20, 1986

TO: Jack Thorpe, Purchasing Agent via Jack McGrory, Deputy City Manager

FROM: City Attorney

SUBJECT: Contracting for Goods and Services with Companies that do Business in or have ties with South Africa

Your memorandum of October 17, 1986 requested our advice concerning restrictions on the purchase of goods and equipment from companies doing business in South Africa. You specifically asked:

1. Could the Purchasing Agent be precluded from buying from a low bidder because they were involved in South Africa? Also, could the Purchasing Agent be precluded from buying from a low bidder because the goods offered were manufactured, produced, assembled, grown or mined in South Africa?
2. Could the Purchasing Agent be precluded from entering into a construction contract with a contractor if some of the material, supplies or equipment to be used on that City contract came from South Africa?

We answer both your questions in the negative, subject, however, to those restrictions imposed by Public Law 99-440, 100 Stat. 1086, prohibiting the importation of certain materials from South Africa. We do so based on those provisions of the City Charter which would prohibit such factors from being used as a basis for the award of a public contract for goods, services or construction.

Section 35 of the City Charter requires the Purchasing Agent to advertise for sealed bids for supplies, material, equipment and insurance that exceed costs established by ordinance. It

further provides that the Purchasing Agent may not make such purchases without having secured "competitive prices," unless below an amount fixed by ordinance. The competitive bidding process contemplates comparisons by which the public entity and the taxpayer receive the most for their money based on purely economic considerations.

The award of construction contracts under Section 94 of the City Charter is subject to the restriction that the Council "shall let the same to the lowest responsible and reliable

bidder." The courts have consistently held that this limitation requires the award to the low bidder who is responsible, unless it can be shown the bidder is not "responsible." Inglewood - Los Angeles County Civic Center Authority v Superior Court, 7 Cal.3d 861, 103 Cal.Rptr. 689, 500 P.2d 602 (1972).

Competitive bidding under either of these Charter sections does not permit distinctions other than the ability to perform to be used in awarding such contracts. We attach a copy of City Attorney Opinion 84-4 of this office which clearly sets forth this principle. We would observe that social policy concerning a foreign nation is not a proper determinant for the expenditure of municipal tax dollars, and that apartheid considerations -- irrespective of any sense of repugnance that may be shared by this office -- are not a proper subject upon which to base or deny a public contract under the City Charter. We also opined in City Attorney Opinion 84-4 that any requirements based on other than "lowest responsible bidder" criteria are invalid, absent a change to the City Charter. In the absence of Charter revision the City Council may only reject all bids and readvertise -- a process which may serve, on occasion, to frustrate or delay necessary public improvements or increase their costs.

Sections 35 and 94 of the San Diego City Charter are comparable to the provisions of the City Charter of the City of Los Angeles. We therefore attach a copy of Opinion 85-32/85-35 issued by the City Attorney of Los Angeles dated February 13, 1986, to whom a similar question was posed. That office also concluded that it was legally impermissible to adopt such restrictions. The reasoning and conclusions therein are adopted by this office. The City of Los Angeles thereafter adopted an ordinance prohibiting purchases from South Africa, except, in part, as to purchases that were required to be competitively bid. We further observe that City Manager Report No. 86-425 proposed certain exceptions to a non South-African purchase policy which are consistent with the exceptions adopted by the City of Los Angeles. See Los Angeles Administrative Code section 10.31.4.

Because we must consider any purchasing restrictions based on South Africa policy issues to be legally questionable, the exceptions set forth in City Manager Report No. 86-425 would permit this office to certify the legality of any contract entered into; absent such exceptions for competitive bidding, we could not do so, with the result that the City would be potentially at risk for monetary damages to unsuccessful bidders.

Irrespective of Charter issues, the federal government has adopted restrictions on certain business dealings with South Africa. We refer to the provisions of the Comprehensive

Anti-Apartheid Act of 1986, Public Law 99-440, 100 Stat. 1086, 132 Cong. Rec. H 6768-76 (daily ed. Sept. 12, 1986) which was enacted into law on October 2, 1986 over the veto of President Reagan. The Act prohibits, among other matters, the importation of steel, iron, uranium, coal and textile and agricultural products from South Africa effective on or after Jan. 1, 1987. The exact list of prohibited imports is to be promulgated by Executive Order. The Act does not specifically limit or otherwise pre-empt local or State legislation respecting South Africa trade. The observation was made during the Congressional debates on the Act that it did not appear to be the intent of Congress to pre-empt local legislation. See 44 Congressional Quarterly 2120 (September 13, 1986). It would not supersede the Charter requirements which are binding on City of San Diego contracting practices. The Act will, however, limit what may be legally sold from South Africa, and thus indirectly affect what is available for City competitive procurement.

The Act provides in sections 309 and 320 that no uranium ore or oxides, coal, iron or steel or textiles produced or manufactured in South Africa may be imported into the United States. Exceptions were made for certain contracts entered into prior to August 15, 1986 by H.J. Res. 756, 99th Cong., 2d Sess., 132 Cong. Rec. H 11587-88 (daily ed. Oct. 17, 1986). "South Africa," as used in Section 3(6) of the Act, refers to the Republic of South Africa, any territory under its administration, and the "bantustans" or homelands to which South African blacks are assigned by governmental decree.

Section 603 of the Act provides for criminal and civil penalties for intentionally evading or entering into contracts which would violate specific provisions of the Act. Section 606, however, provides that no state or local government shall be denied federal funds for which they are eligible by reason of the application of any state or local law concerning apartheid to any contract entered into for 90 days after the effective date of the Act. (We interpret that date to be on or after January 1,

1987). Unfortunately, it is not clear whether this is intended to penalize local governments by the loss of funding for enacting or applying local anti-apartheid legislation or regulations, or whether it means that there will be no penalties regardless of whether there is such legislation or application of a local sanction.

The Act is further complicated by a provision in Section 314 which provides that no department or agency of the United States Government may enter into a contract for the procurement of "goods or services" from "parastatal" organizations except for

necessary diplomatic or consular purposes. Since the Act specifically prohibits certain imports into the United States, and specifically prohibits the United States government and its agencies from the procurement of "goods or services" from South Africa, it must mean that the Act does not prohibit a local government from procuring any goods or services that are not otherwise specifically prohibited by the Act.

The effect of this legislation remains to be seen. Executive orders implementing its provisions will be forthcoming. It suffices for now to observe that companies with whom the City of San Diego does business may be required to certify that their supplying of goods is not in violation of the Act. The failure to so certify as part of the procurement process could then give rise to a finding that the bid is non-responsive and thus may be rejected; conversely, if the offered goods violate the Act, they cannot lawfully be purchased.

We therefore conclude that the City may lawfully qualify its procurement from South Africa to goods or services that are lawful pursuant to Public Law 99-440 without violating the City Charter and without invalidating the competitive bid process.

JOHN W. WITT, City Attorney
By
Rudolf Hradecky
Deputy City Attorney

RH:mrh:820(x043.2)
Attachment
ML-86-132